Nos. 19-1257 & 19-1258

IN THE

Supreme Court of the United States

MARK BRNOVICH,
ATTORNEY GENERAL OF ARIZONA, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Named for the late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at NYU School of Law is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. Through its Voting Rights & Elections Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote of every eligible citizen, to ensure that voting is free, fair, and accessible for all eligible Americans, and to prevent racial discrimination in election policy and procedures. The Brennan Center has focused extensively on protecting minority voting rights, including by authoring reports relating to voting rights and participating as counsel or amicus in a number of federal and state cases involving voting and election issues. The Brennan Center has submitted *amicus curiae* briefs in a number of Supreme Court cases involving the Voting Rights Act, including *Shelby County v. Holder*, 570 U.S. 529 (2013), *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), and *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2005).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* certify that *Amicus* and their counsel authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amicus* or their counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided blanket consent to the filing of this brief. This brief does not purport to represent the position of NYU School of Law.

SUMMARY OF ARGUMENT

When the Voting Rights Act of 1965 ("VRA") was first enacted, the principal harm it sought to prevent was the denial of the right to vote on account of race. As some voting barriers were knocked down and new ones emerged, Congress amended the VRA to broaden it, and federal courts have developed a rich jurisprudence regarding the VRA. Ignoring 40 years of jurisprudence, Petitioners and their supporting *Amici* make the extreme and unfounded argument that these subsequent amendments and interpretations of the VRA are inapplicable to the original harm the VRA was intended to address. This Court should reject these attempts and continue to interpret the VRA robustly. As new ways of discriminating on account of race have arisen, it is critical that the VRA be up to the task of addressing them.

The Brennan Center submits this Brief to respond to Petitioners and their *Amici*, who alternatively argue that there is no current framework for deciding vote-denial cases under Section 2 or concede that there is a framework but ask this Court to limit its application so as to make it more difficult to establish discriminatory vote denial. Both arguments are incorrect, and this Court should reject approaches that would restrict an important and time-proven tool for protecting against discrimination in voting.

The existing Section 2 vote-denial standard (the "impact-plus framework") is well-established and workable. Though courts may disagree on the particulars, they consistently hold that Section 2 vote-

denial cases require a showing of impact plus causation, assessed in the context of the totality of the circumstances. The totality of the circumstances analysis, which applies in all Section 2 cases, including vote-dilution cases, involves consideration of objective social and political factors, known as the Senate factors (the "Senate factors inquiry"). Congress derived these factors from this Court's jurisprudence to aid courts in their assessment of whether a given racial disparity resulted from discrimination, and this Court endorsed their use in *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986). The impact-plus framework, including the Senate factors inquiry, has long proved to be manageable for both courts and litigants.

The impact-plus framework, guided by the Senate factors inquiry, guards against unconstitutional overreach by demanding a fact-specific, on-the-ground examination of both impact and causation before a law can be struck down. By assuring that the protections afforded by Section 2 remain closely tied to underlying constitutional harms, the Senate factors inquiry ensures that the statute is well within Congress's authority under the Fourteenth and Fifteenth Amendments.

At the same time, the impact-plus framework is at least in part designed to smoke out discriminatory intent without requiring proof of intent, and it has many similarities with the test adopted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), for inferring intentional discrimination. The Senate factors inquiry bears such resemblance to the *Arlington Heights* test for establishing constitutional

harm, that if the impact-plus framework were deemed by this Court to be an impermissible way to implement the Fourteenth and Fifteenth Amendments, it is hard to imagine any other test that *would* be permissible.

Departure from the established impact-plus framework would be a radical disruption of a framework that courts have consistently and effectively applied to address the harm at the heart of the VRA. It would also open the door to a new wave of racial discrimination in voting procedures—potentially including some that have long been outlawed. This Court should reject Petitioners' and their *Amici*'s requests to invent a new standard or dramatically narrow Section 2's application.

Instead, this Court need only decide whether the district court's factual findings concerning the Arizona voting practices at issue are sufficient to establish liability under the traditional impact-plus framework, guided by the Senate factors.

THE ORIGIN OF THE SENATE FACTORS

In 1965, Congress passed the Voting Rights Act ("VRA"). Pub. L. No. 89-110, 79 Stat. 437 (1965). The VRA was an exercise of Congress's powers under both § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28, 341-42, 348 (1966). Tracking the language of the Fifteenth Amendment, Section 2 of the VRA prohibits any state from implementing any "standard, practice or procedure" that denies or abridges the right of any citizen to vote

on the basis of race. *Compare* VRA § 2, 79 Stat. at 437, *with* U.S. Const. amend. XV, § 1.

Today's standard for Section 2 liability arises out of subsequent back and forth between this Court and Congress about how Section 2 should be interpreted. In 1980, a plurality of this Court in *City of Mobile v. Bolden* interpreted the Fifteenth Amendment and Section 2 of the VRA to require evidence of discriminatory intent in order to invalidate facially neutral laws. 446 U.S. 55, 61-65 (1980) (opinion of Stewart, J.). Direct evidence of discriminatory intent was understandably difficult for voters to prove, and this new barrier effectively impeded many challenges to discriminatory election practices under Section 2 of the VRA. *See* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* Minority Vote Dilution 145, 149 (Chandler Davidson ed., 1989) ("Dilution cases came to a virtual standstill; existing cases were overturned and dismissed, while plans for new cases were abandoned."). The intent requirement also created its own set of problems. For example, "requiring courts to label 'individual officials or entire communities' as racist in order to grant judicial relief was tremendously 'divisive, threatening to destroy any existing racial progress in a community.'" Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 735 (1998) (quoting S. Rep. No. 97-417, at 36).

In response, Congress broadened Section 2 in 1982 to provide voters with a mechanism to challenge state laws that affect citizens' ability to vote on the basis of race, without requiring direct evidence of

discriminatory intent on the part of the state. As amended, the statute provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color . . . .

52 U.S.C. § 10301(a) (emphasis added). The 1982 amendment responded to the *City of Mobile* interpretation requiring intent by adding a "results test." S. Rep. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (the "Senate Report"). Consistent with its broad language and remedial purpose, Section 2 "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969)).

Following the 1982 amendment, a Section 2 violation is established if, "based on the totality of circumstances," "political processes leading to nomination or election . . . are not equally open to participation" by members of a protected class in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 encompasses not just outright denials of the right to vote, but also "abridgement," such as "cumbersome procedure[s]" and "material requirement[s]" that "erect[] a real obstacle to voting." *Harman v. Forssenius*, 380 U.S. 528, 541-42 (1965).

Accordingly, abridgement, as opposed to denial, "can occur even when a facially neutral practice not aimed at minority voters results in minority citizens having 'less' (and not 'no') opportunity to participate equally." Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 Ohio St. L.J. 763, 773 (2016). Congress instructed courts to conduct the "totality of circumstances" analysis "on the basis of a variety of objective factors concerning the impact of the challenged practice and the social and political context in which it occurs." S. Rep. No. 97-417, at 67.[2] Although these factors are "neither comprehensive nor exclusive," they "will often be pertinent to certain types of [Section] 2 violations." *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

This Court was first confronted with the amended VRA in *Thornburg v. Gingles*. There, the Court established the impact-plus framework for Section 2 cases. It held that the "essence" of a

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[2] These factors include (1) the history of voting-related discrimination in the state; (2) the extent to which voting in the elections of the state are racially polarized; (3) the extent to which the state has used voting practices that tend to enhance the opportunity for discrimination against minority group members; (4) the exclusion of members of the minority group from the candidate slating process; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment and health; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) the extent to which elected officials are unresponsive to the particularized needs of the members of the minority group; and (9) the extent to which the policy underlying the state's use of the contested practice is tenuous. *Gingles*, 478 U.S. at 44-45; *see also* S. Rep. No. 97-417, at 28-29.

Section 2 results claim "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The "'right' question" is "whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Id.* at 44 (quoting S. Rep. No. 97-417, at 28). In establishing this framework, the Court referred to the factors as enumerated in the Senate Judiciary Committee's majority report—the "Senate factors inquiry"—while observing that those factors were derived from the Court's own opinion in *White v. Regester* and were later refined in the lower courts, particularly by the Fifth Circuit in *Zimmer v. McKeithen*. *See Gingles*, 478 at 36 n.4 (citing *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)); *see also* S. Rep. No. 97-417, at 28 n.113.

ARGUMENT

As it relates to the legal standard applicable to Section 2 vote-denial claims, Petitioners and their supporting *Amici* generally fall into two camps: (1) arguing that there is no Section 2 vote-denial test and urging this Court to create a circumscribed one or (2) conceding that there is an established test but arguing that its traditional reach should be narrowed. This Court should reject both sets of arguments.

I. THE STANDARD FOR SECTION 2 VOTE-DENIAL CLAIMS IS WELL ESTABLISHED.

For decades courts have applied Section 2 to vote-denial claims, including claims that state practices make voting harder for minority voters. In *Harris v. Siegelman*, for example, the court found discriminatory results under Section 2 due to the lack of Black poll officials, restrictions on assistance to voters, and time limits on remaining inside the voting booth. 695 F. Supp. 517, 527-28 (M.D. Ala. 1988). Likewise, in *United States v. Berks County*, the court found discriminatory results under Section 2 based on, among other things, the lack of Latino poll workers and onerous requirements for translators. 277 F. Supp. 2d 570, 580-81 (E.D. Pa. 2003).

Although certain *Amici* suggest that there is no accepted framework for analyzing vote-denial claims, *e.g.*, Cato Inst. Br. at 5-8; Honest Elections Project Br. at 17, that mischaracterizes the case law. Courts analyzing Section 2 vote-denial claims employ the familiar impact-plus framework, which involves an analysis of both disparate impact and causation. *See, e.g.*, *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). This framework directs courts first to determine whether the "standard, practice or procedure" at issue imposes a discriminatory burden on members of a protected class. *Id.* Such burden exists where members of a protected class have less opportunity than other voters to participate in the political process and elect representatives of their choice. *Id.* While disparate effects of a state's policy are relevant, statistical disparities in and of themselves are

insufficient to establish a violation of Section 2. *Id.* Courts then ask whether the burden is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* (quoting *Gingles*, 478 U.S. at 47). Courts apply the impact-plus framework by considering the "totality of circumstances" using the Senate factors. *See, e.g.*, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014).

While the Senate factors inquiry was first developed in the vote-dilution context, courts properly and consistently have applied the impact-plus framework to other Section 2 claims, including vote-denial claims. This Court should reject any suggestion to the contrary.

A. Application of the Senate Factors Is Faithful to the Text and Purpose of Section 2 of the VRA.

Use of the impact-plus framework in both vote-dilution and vote-denial cases is supported by the text and history of Section 2, as well as this Court's precedent.

Under the impact-plus framework, the analysis of a challenged practice's disparate impact follows directly from the language of Section 2. Courts ask whether the challenged policy "results" in a disparate burden on minority voters—that is, whether because of the challenged practice, minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b);

see also Gingles, 478 U.S. at 47 (asking whether the policy "cause[s] an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives").

The causation analysis similarly implements Section 2's mandate that the disparate impact be "on account of race." 52 U.S.C. § 10301(a). Plaintiffs must prove that the challenged policy "interacts with social and historical conditions to cause an inequality" that would not exist but for race, and thus prevents courts from finding Section 2 violations based on disparate impact alone. *See Gingles*, 478 U.S. at 57; *see also Veasey v. Abbott*, 830 F.3d 216, 245 (5th Cir. 2016) (en banc). Indeed, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation" of how the challenged practice "interacts with social and historical conditions." *Gingles*, 478 U.S. at 45, 47 (quoting S. Rep. No. 97-417, at 30).

Under Section 2, both the impact and the causation analyses require consideration of the "totality of circumstances," 52 U.S.C. § 10301(b), informed by the Senate factors. The Senate factors help "determine whether there is a sufficient causal link between the disparate burden imposed and the social and historical conditions produced by discrimination." *See Veasey,* 830 F.3d at 245; *Ohio State Conference of NAACP*, 768 F.3d at 554. They play a vital role in assessing not just "whether social and historical conditions 'result in' a disparate impact, but whether the challenged voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions." *Ohio*

Democratic Party v. Husted, 834 F.3d 620, 638 (6th Cir. 2016) (emphasis omitted).

The use of the impact-plus framework in both the vote-denial and vote-dilution contexts is logically consistent, given that both claims ultimately seek to remedy the same constitutional harm—racial discrimination in voting practices. The framework is particularly useful for contemporary vote-denial practices, where discriminatory intent is often unlikely to be as explicit and overt as it was when the VRA was enacted in 1965. The "principles that make vote dilution objectionable under the Voting Rights Act logically extend to vote denial." *League of Women Voters*, 769 F.3d at 239 (explaining that vote denial is simply a "more extreme form of the same pernicious violation"). To be sure, vote-denial practices have historically excluded minority voters wholesale from the political process rather than diluted their voting strength. But contemporary voting restrictions and practices are not less harmful simply because they work to undermine minority groups' political power rather than to exclude their vote entirely. Thus, factors that are indicative of racial discrimination and even purposeful intent in vote-dilution claims, such as racially polarized voting, are similarly probative of discrimination in vote-denial claims.

B. Application of the Senate Factors Is Workable and Has Been Consistently Employed by the Courts in the Vote-Denial Context.

Courts of appeals have consistently adhered to the impact-plus framework in assessing vote-denial claims. Indeed, the Ninth Circuit below recognized

that it and "most courts" employ a similar impact-plus framework "[i]n evaluating a vote-denial challenge to a 'standard, practice, or procedure' under the 'results test' of Section 2." JA 612. *See, e.g.*, *League of Women Voters*, 769 F.3d at 240; *Ohio Democratic Party*, 834 F.3d at 637-38; *Veasey*, 830 F.3d at 244. Petitioners' and their supporting *Amici*'s critique of the Senate factors is mistaken.

1. The Senate Factors Are Helpful for Analyzing Section 2 Claims.

Courts have employed the Senate factors inquiry to drive their analysis into whether a legally cognizable causal relationship exists between the disparate burden on minority voters and the social and historical conditions impacting them. JA 613-17. *See, e.g.*, *League of Women Voters*, 769 F.3d at 245-46 (relying on Senate factors one, three and nine); *Ohio State Conference of NAACP*, 768 F.3d at 554 (relying on factors one, three, five and nine); *Veasey*, 830 F.3d at 257-65 (considering factors one, two, and five through nine).

The Senate factors most heavily relied upon by courts of appeals in Section 2 vote-denial cases are factors one, three, five and nine. Factor one—the extent of a history of discrimination in the state—is "important" as it "bears on the existence of discrimination generally." JA 624. While factor three's specific references (unusually large election districts, majority vote requirements, and anti-single shot provisions) may be particularly apt in the vote-dilution context, its broader ambit of "voting practices or procedures that may enhance the opportunity for discrimination against the minority group" easily

encompasses vote-denial practices. *See Ohio State Conference of NAACP*, 768 F.3d at 557. Factor five—measuring the extent to which minority group members bear the effects of past discrimination in areas such as education, employment and health—is instructive as it acknowledges the social context within which policymakers act. *See Veasey*, 830 F.3d at 259 (noting the district court's finding of socioeconomic disparities between minorities and white voters hindering minority voter turnout as significant because Section 2 asks whether "vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process"). Finally, factor nine's focus on the "tenuousness" of the challenged policy is pertinent to vote-denial claims because it suggests the government's justification for the policy may be pretext for discrimination. *See id.* at 238-39.

Other Senate factors, while less salient in vote-denial claims, "can still provide helpful background context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process." *Ohio State Conference of NAACP*, 768 F.3d at 555. Factor two's examination of racial polarization can be probative of discriminatory purpose in vote-denial claims. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 481 (2015) (describing how racial polarization is "germane to the vote denial inquiry, because it suggests a motivation for the state to limit a racially defined group's voting opportunities," especially in states where a minority overwhelmingly votes for one party); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (explaining how racially

polarized voting "bear[s] heavily on the issue of purposeful discrimination" as it allows those elected to ignore minority interests without fear of political consequences). Factor seven—the extent to which members of a minority group are elected to public office in the jurisdiction—"contextualizes the degree to which the vestiges of discrimination continue to reduce minority participation in the political process." *Veasey*, 830 F.3d at 261. Factors six and eight—the use of racial appeals in political campaigns and the extent to which elected officials are unresponsive to the needs of the minority group—similarly point to electoral discrimination within the jurisdiction. That some factors may apply with more force than others in a given case is of little consequence; Section 2 claims are fact specific, not every factor will be relevant in every vote-denial case, and "there is no requirement that any particular number of factors be proved." *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 29).

2. The Senate Factors Apply in Vote-Denial Cases.

State Petitioners and certain *Amici* take issue with the application of the Senate factors in the vote-denial context. *See* State Pet'rs' Br. at 32-33; American Const. Rts. Union Br. at 11. State Petitioners argue that the Senate factors are irrelevant in the vote-*denial* context simply because they were endorsed by this Court in *Gingles*, which was a vote-*dilution* case. *See* State Pet'rs' Br. at 32-33. In an attempt to bolster their argument, they note that two circuits—the Seventh and the Eleventh—have expressed reservations regarding application of the Senate factors to vote-denial claims. *See* State

Pet'rs' Br. at 32-33. But far from departing from the impact-plus framework that this Court embraced in *Gingles*, these courts actually conducted a totality of the circumstances analysis into the facts on the ground and held, based on the particular facts before them, that plaintiffs had not met their burden to show more than mere disparate impact standing alone. *See Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1235-38 (11th Cir. 2020) ("question[ing] the applicability" of the Senate factors in part because they "bear no resemblance to the facts of this case," which the court demonstrated by walking through the Senate factors and finding plaintiffs failed to demonstrate the existence of those factors); *Frank v. Walker*, 768 F.3d 744, 754-55 (7th Cir. 2014) (stating the court was "skeptical" about the traditional framework but nevertheless stating it "is essential to look at everything (the 'totality of circumstances')").

Tellingly, even the decisions from courts with reservations about the Senate factors make clear that the reservations did not change the courts' ultimate conclusion on the merits. The Senate factors encompass information fundamental to, and in most cases inseparable from, the statutorily required totality of circumstances analysis against which impact and causation are assessed. *See* 52 U.S.C. § 10301(b). Although certain Petitioners and *Amici* ask this Court to disregard the Senate factors, they offer nothing to take their place in assessing the totality of the circumstances.

3. The Senate Factors Appropriately Implement the Statutory Text.

State Petitioners next suggest that the Senate factors should not apply to vote-denial claims because the factors are a "relic of a 'bygone era of statutory construction.'" State Pet'rs' Br. at 33 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)). But the Senate factors are tethered to the text of Section 2, which requires courts to analyze "the totality of circumstances." 52 U.S.C. § 10301(b). Moreover, consulting legislative history, when appropriate, to interpret statutory language is hardly an "erroneous mode of statutory analysis." State Pet'rs' Br. at 33; *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (concluding that the "statutory history and precedent, as well as the legislative history" support the result reached). And, in any event, the Senate factors were not born solely from the legislative history of the 1982 amendment; rather, they derive from pre-1982 voting-rights case law, including this Court's jurisprudence. *See supra* The Origins of the Senate Factors.

4. The Senate Factors Are Not Unpredictable.

Certain *Amici* separately argue that the Senate factors are unpredictable and can lead to inconsistent results. Cato Inst. Br. at 6; Public Interest Legal Found. Br. at 15-16. This is a paradoxical argument, as removing consideration of the Senate factors would leave courts with *less* guidance on how to apply the statutory "totality of circumstances" analysis. *Amici* also express concern that a procedure might be lawful in one state where the Senate factors are not present,

but unlawful in another state where the Senate factors are present. *See, e.g.*, Cato Inst. Br. at 2-3. However, the value of Section 2's totality of circumstances analysis is precisely that it differentiates between those situations when a given practice is discriminatory and those when it is not.

The potential for different outcomes in different jurisdictions is a feature of the impact-plus framework (indeed, one that helps preserve its constitutionality), not a flaw. In *Gingles*, this Court held that "electoral devices . . . may not be considered *per se* violative of [Section 2]." *Gingles*, 478 U.S. at 46. Section 2 liability is a "determination [that] is peculiarly *dependent upon the facts* of each case, . . . and requires 'an *intensely local appraisal* of the design and impact' of the contested electoral mechanisms." *Id.* at 79 (emphases added) (quoting *Rogers v. Lodge*, 458 U.S. 613, 621-22 (1982)). In *League of Women Voters*, for example, the Fourth Circuit considered the specifics of North Carolina's voting practices and history, and admonished the district court below for "suggest[ing] that a practice must be discriminatory on a nationwide basis." 769 F.3d at 242-44, 245-47.

What is more, the "totality of circumstances" analysis is drawn directly from the text of Section 2, 52 U.S.C. § 10301(b), and is based on this Court's own prior voting-rights jurisprudence. That a test is fact-driven and based on the totality of the circumstances present in a particular jurisdiction "does not make it dangerously limitless in application." *Veasey*, 830 F.3d at 247. In *Veasey*, the Fifth Circuit explains that the factors must be highly fact dependent to address "different laws, different states with varying histories of official discrimination, and different populations of

minority voters." *Id.* at 247 n.37. Multi-factor, "totality of circumstances" analyses are not unique to voter discrimination cases; a number of areas of the law require analysis of the totality of the circumstances. *See, e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014) (noting that whether a case is "exceptional" under the Patent Act requires "case-by-case exercise of . . . discretion, considering the totality of the circumstances"); *Missouri v. McNeely*, 569 U.S. 141, 145 (2013) (requiring fact-based totality of the circumstances review in exigency exception to Fourth Amendment warrant requirement).

II. THE SENATE FACTORS SAFEGUARD SECTION 2'S CONSTITUTIONALITY.

The impact-plus framework, and the Senate factors inquiry in particular, is not only a faithful application of Section 2. It is also critical in analyzing Section 2 claims because it cabins the VRA's reach in a way that ensures that the statute is constitutional.

A. The Senate Factors Are a Constitutionally Valid Tool for Identifying Cognizable Discriminatory Harm.

Section 2 of the VRA was enacted to enforce both the Fourteenth Amendment, which provides all persons with equal protection of the laws, and the Fifteenth Amendment, which prohibits discrimination in voting on the basis of race. Both amendments provide Congress with the power to enforce the amendment "by appropriate legislation." U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2. In

reauthorizing the VRA in 1982, Congress recognized that proving intent in voting discrimination cases was inordinately difficult and in response enacted the results test. *See supra* The Origins of the Senate Factors. To this end, Section 2 does not require proof of intent but does require that plaintiffs prove much more than a bare statistical disparity.

The Senate factors work to address both the harm of discrimination in voting and the difficulty (or impossibility) of proving intent in many circumstances. Where voting restrictions do cause racial disparities, the Senate factors inquiry provides courts with a flexible and non-exhaustive means to determine whether those disparities are the result of racial discrimination. As this Court has long acknowledged, Section 2 results liability does not—and should not—require a direct showing of discriminatory intent. *See Gingles*, 478 U.S. at 35 (noting that Congress revised the VRA "to make clear that a violation could be proved by showing discriminatory effect alone"). When reauthorizing the VRA, Congress was concerned about requiring litigants or judges to ascribe outright racial bias or motivation in order to succeed on a Section 2 claim. *See* S. Rep. No. 97-417, at 36 (noting Congress's concern that Section 2's former intent-based standard was "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities"). By linking the disparate impact to discriminatory social and historical conditions, the Senate factors have the effect of "smoking out" discrimination without requiring direct proof of intent. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016)

("Racially polarized voting is not, in and of itself, evidence of racial discrimination. But it does provide an incentive for intentional discrimination in the regulation of elections."); *Rogers*, 458 U.S. at 624-25 (recognizing that "[e]vidence of historical discrimination is relevant to drawing an inference of purposeful discrimination" and affirming finding of discrimination based on district court's application of circumstantial factors, primarily from *Zimmer*). The Senate factors are a way to flush out "improper motives" (discriminatory intent) without attempting to examine motives directly. *Cf*. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443, 451 (1996) (describing similar analysis in the First Amendment context).

The Senate factors' utility in helping courts identify discriminatory behavior is supported by the substantial overlap between the evidence needed to establish a violation using the Senate factors and the evidence needed to establish whether a law was passed with discriminatory intent using the *Arlington Heights* factors. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, this Court recognized that "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. 252, 266 (1977). The Court then set out several factors that informed the question whether a government action was taken with discriminatory intent by looking to the setting in which the decision was made: (i) the "historical background of the decision . . . , particularly if it reveals a series of

official actions taken for invidious purposes," (ii) the "specific sequence of events leading up to the challenged decision," (iii) "departures from the normal procedural sequence," (iv) the legislative history, and (v) the extent of disparate impact. *Id.* at 266-68.

The Senate factors similarly structure the analysis into whether a voting restriction is discriminatory by looking, for example, to whether there is a "history of official discrimination" with respect to voting, "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health," and "whether the policy underlying" the use of a voting procedure "is tenuous." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 37).[3] The Senate factors get close to exposing intent without actually requiring a showing of intent, which additionally moors the Section 2 results test to the authorizing constitutional provisions.

B. Contrary to Petitioners' and *Amici*'s Claims, the Impact-Plus Framework Is Constitutional Even If Analyzed Under *City of Boerne*.

Petitioners and the Solicitor General as *Amicus* erroneously argue that the means adopted by

[3] Although the Senate factors do not include procedural anomalies, *see Arlington Heights*, 429 U.S. at 564-65, in the voting context lawmakers often are able to manufacture discriminatory outcomes without engaging in the irregularities in zoning procedures identified in *Arlington Heights*. But because the Senate factors are non-exclusive, courts are free to consider such procedural anomalies as part of the "totality of circumstances" analysis where relevant.

Section 2 must be congruent and proportional to the injury sought to be prevented or remedied, and that, accordingly, Section 2 must target only intentional or purposeful discrimination. They contend that the impact-plus framework used by the Ninth Circuit calls into question Section 2's constitutionality. *See* Private Pet'rs' Br. at 39-42; State Pet'rs' Br. at 26; Solicitor General's Br. at 16. State Petitioners specifically tie their concern about constitutionality to the lack of a statutory requirement for a "substantial disparate impact." *See* State Pet'rs' Br. at 15, 26.

As a threshold matter, this Court's precedents do not establish that the congruence and proportionality requirement from *City of Boerne v. Flores*, 521 U.S. 507 (1997), applies, as Petitioners appear to assume. In *Shelby County v. Holder*, this Court's most recent examination of the constitutionality of a (different) provision of the VRA, the Court asked simply whether the state statute was rational, rather than inquiring into congruence and proportionality. *See* 570 U.S. 529, 550 (2013) (explaining that in *Katzenbach* the Court determined the VRA's coverage formula was "rational in both practice and theory" (quoting *Katzenbach*, 383 U.S. at 330)); *id.* at 554 ("Viewing the preclearance requirements as targeting such efforts simply highlights the *irrationality* of continued reliance on the § 4 coverage formula . . . ." (emphasis added)).

But even if analyzed under *City of Boerne*, which requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," 521 U.S. at 520, the traditional impact-plus framework brings the VRA within the scope of Congress's authority.

The *City of Boerne* test does not require exact equivalence between the statute and the constitutional provision, as Petitioners seem to believe; it instead asks whether there is a "connection" to the constitutional harm, *id.* at 520, and whether legislation is "responsive to, or designed to prevent, unconstitutional behavior," *id.* at 532. Therefore, to be constitutional, the imposition of liability under Section 2 need not require direct proof of intentional discrimination. It requires a connection between the means adopted and the harm to be remedied. That is clearly the case with the impact-plus framework for Section 2 claims under the VRA. As explained above, the Senate factors provide evidence of racial discrimination in the absence of a rare overt statement of intent. In this way, the Senate factors facilitate the congruence and proportionality between the injury to be remedied or prevented—racial discrimination—and the means adopted under Section 2. *See Veasey*, 830 F.3d at 253 (explaining that the impact-plus framework, including the Senate factors inquiry, "show[s] that Section 2's protections remain closely tied to the power granted Congress by the Fifteenth Amendment").

Moreover, Petitioners' stated constitutional concerns would be resolved by properly applying the Senate factors. For example, State Petitioners argue that invalidating a voting law under Section 2 "without evidence that could serve as a proxy for intentional discrimination" raises serious constitutional questions, State Pet'rs' Br. at 15, and that the framework used by the Ninth Circuit "allows anything more than a de minimis disparity to invalidate state electoral laws," *id.* at 26. This

argument fails for the reasons discussed below in Part III.A. But, as relevant here, Petitioners ignore the fact that *the Senate factors* themselves operate to make the accepted impact-plus framework a "proxy for intentional discrimination" and to preclude liability based on "anything more than a de minimis disparity." *Id.* at 15, 26.

Nevertheless, State Petitioners and certain *Amici* paradoxically seek to *preclude* any use of the Senate factors in the vote-denial context. *See, e.g.*, State Pet'rs' Br. at 32-33 (claiming there is no "basis to extend" the Senate factors "into the vote-denial context"); Senator Cruz Br. at 27-28 (arguing that a Section 2 violation cannot be found based on a "statistical disparity, without more" while also claiming that the Senate factors are not useful and should not apply in vote-denial cases). In doing so, they create on the one hand the very problem in interpreting Section 2 of the VRA that they then on the other hand ask this Court to solve by applying constitutional-avoidance principles. This faulty logic cannot serve as the foundation for an unnecessary divergence from both the text of the statute and the accepted judicial framework for Section 2 claims.

Because Section 2's "results" standard assessed under the traditional impact-plus framework is a constitutional exercise of Congress's power, the Court should affirm its validity.

III. THE LIMITS ON SECTION 2 PROPOSED BY PETITIONERS AND *AMICI* ARE UNSUPPORTED AND INAPPROPRIATE.

Petitioners and *Amici* urge the Court to impose numerous limits on Section 2 in the vote-denial context. These requests lack precedent or support, and importantly, are unnecessary to achieve a workable and constitutional framework. Indeed, the Senate factors address Petitioners' purported concerns with the established framework for examining vote-denial cases.

A. The Size of the Disparate Impact Is Not Dispositive, But Informs the Relative Importance of the Senate Factors.

State Petitioners erroneously argue that for a practice to violate Section 2, it must cause a "*substantial* disparate impact on minority voters' opportunity to participate and to elect their desired candidates." State Pet'rs' Br. at 31. However, nothing in the plain text or purpose of the VRA requires a "substantial" disparate impact. Indeed, although State Petitioners argue that "by definition, an insubstantial impact is unlikely to affect minority groups' opportunity 'to elect representatives of their choice,'" *id.* at 22 (quoting 52 U.S.C. § 10301(b)), this Court has made clear that "*[a]ny* abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397 (emphasis added).

The degree of impact, to be sure, is not irrelevant. In those cases where there is a showing of only *some*

or a slight disparate impact, the impact-plus framework appropriately allows courts to consider the robustness of the evidence of discrimination under the Senate factors. As some *Amici* note, a large racial disparity is strong evidence of discrimination. *See, e.g.*, Senator Cruz Br. at 27 ("[P]ast invidious practices like literacy tests produced such large racial disparities in actual voter participation that they could only be explained as preventing minorities from voting rather than actually addressing voter fraud."). In those cases, the substantial disparate impact goes a long way toward proving liability and providing an inference of discrimination, and a court need not demand such an exacting review of the rest of the circumstances set forth in the Senate factors. But as racial disparities get smaller, analysis of the totality of the circumstances using the Senate factors grows in importance since courts must rely on other factors to determine whether discrimination is at play. The Senate factors inquiry helps in the determination of whether a racial disparity in voting is the result of racial discrimination, rather than a statistical anomaly. Thus, the Senate factors provide the critical tool for assessing discrimination in cases where there is no "smoking gun" evidence of racial bias and where the disparate impact—while still present—is by itself less clearly probative of discrimination.

B. The Senate Factors Sensibly Evaluate Whether a Challenged Practice Exploits Social and Historical Conditions.

Petitioners also seek to limit which social and historical conditions can be considered, arguing that Section 2 should be limited to conditions brought about *by recent state action* to avoid liability due to

"amorphous" conditions. Private Pet'rs' Br. at 34; *see also* State Pet'rs' Br. at 32. But to the extent that there is a valid concern regarding overextension of Section 2 liability, the Senate factors inquiry actually eliminates the concern.

First, the impact-plus framework with Senate factors inquiry, as explained above, is a flexible, pragmatic, and case-specific approach that significantly limits reach of the VRA. *See* Part I.B. Petitioners' concerns are belied by the actual outcomes in numerous cases that have *upheld* the challenged "commonplace" voting rules. *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 607-08 (4th Cir. 2016) (upholding voter ID requirement); *Ohio Democratic Party*, 834 F.3d at 640 (upholding reduction in time for early voting).

Second, the argument ignores the history of Section 2. The VRA was passed in part to respond to Jim Crow-era restrictions on voting, such as literacy tests and poll taxes, that exploited existing social conditions in a way that caused a disparate impact on Black and other minority voters' ability to participate in the political process. *See Katzenbach*, 383 U.S. at 328 (noting the "widespread and persistent discrimination in voting" and "a century of systemic resistance to the Fifteenth Amendment"). Petitioners' proposed limit would permit states to return to similar Jim Crow-era restrictions—on the argument that conditions of illiteracy and poverty, for example, are not the direct product of recent state action.

Third, the origin of social conditions does nothing to inform whether crafty policymakers are *exploiting* those conditions to deny or abridge the rights of

minority voters. Petitioners' proposal is completely divorced from the reality that lawmakers can (and do, especially in the context of contemporary voting procedures) capitalize on longstanding and obvious social or historical disparities to reach the same result—denial or abridgement of the right to vote—whether those conditions are state-created or not.

C. The Extreme Limit Proposed by Private Petitioners Lacks Support and Is Unfaithful to the VRA.

Private Petitioners go a major step further than State Petitioners, essentially arguing for a *per se* test, under which *any* restriction on the time, place, or manner of voting would survive Section 2 scrutiny, regardless of its discriminatory impact on minority voters. *See* Private Pet'rs' Br. at 25. In other words, under Private Petitioners' test, race-neutral voting restrictions, including the rules at issue in this case and many others, could virtually never deny or abridge the right to vote under Section 2.

This proposed rule fails as a practical matter. For example, a practice establishing only a single voting location within a state, located in a predominantly white county far from several predominantly Black counties, would plainly implicate Section 2 concerns; yet any claim challenging that practice would fail under Private Petitioners' test merely because it regulates the "place" of voting within a state.

This proposed rule also runs afoul of the text and broad remedial purpose of Section 2. The VRA has an expansive definition of voting, which applies to Section 2 claims and reaches "all action necessary to

make a vote effective," expressly including "action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included." 52 U.S.C. § 10310(c)(1). This broad definition clearly encompasses restrictions on the time, place, and manner of voting that have a discriminatory effect on minority voters. To use Justice Scalia's example:

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and [Section] 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able to *elect* their own candidate.

Chisom, 501 U.S. at 408 (Scalia, J., dissenting). Moreover, such a *per se* approach cannot be squared with the text of the VRA, which compels a totality of the circumstances analysis—an inherently fact-specific and flexible approach. Private Petitioners' contrary reading is untenable and should be rejected.

CONCLUSION

For the reasons stated, *Amicus* respectfully requests that the Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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