Nos. 19-1257 & 19-1258

IN THE

Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, 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 *AMICUS CURIAE* PROFESSOR NICHOLAS STEPHANOPOULOS IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Professor Nicholas Stephanopoulos is a Professor of Law at Harvard Law School, where he specializes in election law. He is the author of a recent article on how courts should address claims of racial vote denial under Section 2 of the Voting Rights Act ("VRA"). *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 Yale L.J. 1566 (2019). He has also published extensively on other VRA issues. *See, e.g.*, Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. (forthcoming 2021); Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 Stan. L. Rev. 1323 (2016); Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329 (2016); Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 Sup. Ct. Rev. 55. He is a coeditor, as well, of a leading election law casebook. *See Election Law: Cases and Materials* (6th ed. 2017).

SUMMARY OF THE ARGUMENT

Over the nearly four decades that have passed since Congress enacted Section 2 in its current form in 1982, this Court has never decided a racial-vote-denial case under the provision. (In contrast, the Court has decided many racial-vote-dilution cases under Section 2.) To rule in this matter, then, the Court will have to determine the standard for liability

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[1] No party or its counsel had any role in authoring or made any monetary contribution to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37. All parties have consented to the filing of this brief and blanket letters of consent have been filed with the Clerk. *Id.*

that applies to Section 2 vote-denial cases. The Court should consider alternatives to the two-part test, recently embraced by several lower courts, that asks (1) whether an electoral regulation causes a disparate racial impact, and (2) whether this disparity is attributable to the regulation's interaction with historical and ongoing discrimination. In particular, the Court should consider adopting the disparate-impact framework used for decades under Title VII of the Civil Rights Act ("CRA"), the Fair Housing Act ("FHA"), and many more laws. The first step of this framework is the same: whether a particular practice causes a significant racial disparity. But the defendant then has the opportunity to show that the practice is necessary to achieve a substantial interest. And if that showing is made, the plaintiff may still prevail by demonstrating that this interest could be attained in a different, less discriminatory way.[2]

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[2] Scholars recommending an approach along these lines include Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 Ind. L.J. 299, 316 (2016); Stephanopoulos, *Disparate Impact, Unified Law*, *supra*; and Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 441 (2015).

This brief takes no position on what the result would be if the usual disparate-impact framework were applied to the facts of this case. However, the court below did thoroughly analyze "whether the polic[ies] underlying" Arizona's rules on out-of-precinct ballots and third-party ballot collection are "tenuous." S. Rep. No. 97-417, at 29 (1982); *see Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc) ("Of the various factors, we regard . . . the tenuousness of the justification for the challenged voting practices[] as particularly important."). As discussed below, the most obvious way to adopt the usual disparate-impact framework in the Section 2 vote-denial context

This approach (the "usual disparate-impact framework," or "usual framework" for short) applies to voting as naturally as to employment, housing, or other activities that are subject to antidiscrimination laws. Consider the most familiar theoretical account of disparate-impact law: that it smokes out racially discriminatory motives that cannot be proven directly. This theory works perfectly well in the voting context. When an electoral regulation differentially affects minority and nonminority citizens—and this disparate impact is unnecessary or could have been mitigated—a discriminatory purpose may reasonably be inferred. Absent such a purpose, after all, why would the regulation have been enacted in the first place?

As a substantive matter, voting also resembles employment, housing, and other areas already subject to the usual framework. Like a job or a home, the franchise is a valued good to which access is determined by criteria that not everyone can satisfy. It is true that voting (unlike employment and housing) is exclusively regulated by the state. But this only means that it is public rather than private interests that are the potential justifications for disparate impacts. It is true as well that voting (again unlike employment and housing) is a nonmarket good. This too, though, simply takes off the table one common rationale for racial discrepancies: private actors' pursuit of profit.

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is precisely by highlighting this tenuousness factor. *See* Argument IV, *infra*.

Turning to doctrine, the usual framework has a major practical advantage. Because it has been employed for so long, many contentious issues have been resolved under it. For example, must litigants establish a *large* disparate impact, or will any discriminatory effect do? Lower courts have disagreed in Section 2 vote-denial cases. But under the usual framework, it has been clear for decades that, to make out a prima facie case, a plaintiff must show that a policy has "*significantly* different" effects on minorities and nonminorities. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (emphasis added).

Similarly, what *kind* of disparate impact must be proven in Section 2 litigation—a difference between minority and nonminority citizens' likelihoods of compliance with an electoral requirement, or a racial gap in voter turnout? Again, lower courts have arrived at divergent conclusions. But under the usual framework, this Court long ago rejected the "suggestion that disparate impact should be measured only at the bottom line." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982). The Court held, in other words, that the racial discrepancies caused directly by a policy are at least as probative as its ultimate downstream consequences.

Beyond settling doctrinal issues, the adoption of the usual framework would bolster Section 2's constitutionality. Section 2 enforces the Fourteenth and Fifteenth Amendments. Both of these provisions are generally violated only if a racially discriminatory purpose is established. Such a purpose can seldom be deduced from a racial disparity alone. But an invidious aim can be inferred more readily when a

disparate impact is unnecessary and could have been reduced by a different policy. In that case, "disparate-impact liability under the [usual framework] plays a role in uncovering discriminatory intent." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015). Accordingly, the usual framework would tighten the fit between Section 2 and the underlying constitutional violations it seeks to prevent or remedy.

The usual framework would also alleviate any tension between Section 2 and the equal protection principle of colorblindness. If electoral regulations breach Section 2 whenever they produce racial disparities, then jurisdictions might have to fixate on race to avoid such disparities. This racial focus could "cause race to be used and considered in a pervasive way" and "serious constitutional questions then could arise." *Id.* at 542. In contrast, the usual framework would not create the same incentive for jurisdictions to operate race-consciously. Jurisdictions would simply have to ensure that their electoral policies actually advance important interests and do so without creating unwarranted racial discrepancies. Jurisdictions would not have to try to eliminate all racial gaps in voting.

Lastly, the adoption of the usual framework would be consistent with Section 2's text and history. On its face, Section 2 forbids one type of racial disparity from leading automatically to liability. "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). The usual framework dovetails nicely with

this disclaimer since, under it, neither this nor any other disparate impact would suffice, alone, to invalidate an electoral regulation.

Moreover, the definitive Senate report that accompanied the 1982 amendments to Section 2 identified as a probative factor "whether the policy underlying [a jurisdiction's electoral policy] is tenuous." S. Rep. No. 97-417, at 29 (1982). This tenuousness factor has been highlighted by this Court's Section 2 decisions. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 37, 45 (1986). And the factor could easily be construed to incorporate the second and third steps of the usual framework. An electoral practice that does not serve a substantial interest, or is unnecessary to a substantial interest's attainment, has a tenuous justification. So does an electoral practice whose disparate racial effects could have been lessened without compromising a jurisdiction's legitimate goals.

ARGUMENT

I. THE USUAL DISPARATE-IMPACT FRAMEWORK IS APPLICABLE TO VOTING.

The usual disparate-impact framework is currently employed under a wide range of federal statutes. Most prominently, it applies to employment under Title VII of the CRA, *see* 42 U.S.C. § 2000e-2(k), and to housing under the FHA, *see* 24 C.F.R. § 100.500. The usual framework also applies to recipients of federal funds under Title VI of the CRA, *see* Civil Rights Div., U.S. Dep't of Justice, *Title VI*

Legal Manual, § 7, at 6 (2017), to age discrimination under the Age Discrimination in Employment Act ("ADEA"), *see Smith v. City of Jackson*, 544 U.S. 228, 233–40 (2005), to lending discrimination under the Equal Credit Opportunity Act, *see* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994), and to disability discrimination under the Americans with Disabilities Act, *see* 42 U.S.C. § 12112(b)(6). In fact, the only corner of disparate-impact law where the usual framework is *not* used, at present, is voting.

To reiterate, the usual framework has three sequential steps. First, the plaintiff must identify a particular practice that causes a significant racial disparity. Next, if this showing is made, the defendant has the burden of proving that the practice is necessary to achieve a substantial interest. Finally, if the defendant carries this burden, the plaintiff must demonstrate that this interest could be attained in a different, less discriminatory way. The best-known statement of this approach is found in the 1991 amendments to Title VII of the CRA. Under these amendments, liability ensues if,

1. "[A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race[.]" 42 U.S.C. § 2000e-2(k)(1)(A)(i).
2. "[T]he respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]" *Id.*

3. "[T]he complaining party makes the demonstration"—that the disparate impact could be mitigated without undermining the employer's business objectives—"with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." *Id.* § 2000e-2(k)(1)(A)(ii).

Another influential formulation of the usual framework, used for decades in FHA cases, is as follows: The "plaintiff first bears the burden of proving . . . that a practice results in . . . a discriminatory effect on the basis of a protected characteristic." Implementation of the Fair Housing Act's Discriminatory Effects Standard ("FHA Implementation"), 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013). Second, "[i]f the . . . plaintiff proves a prima facie case, the burden of proof shifts to the . . . defendant to prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests." *Id.* And third, "[i]f the . . . defendant satisfies this burden, then the . . . plaintiff may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect." *Id.*[3]

[3] The Department of Housing and Urban Development ("HUD") recently made certain amendments to this formulation, *see* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020), but these changes have not yet been recognized by any courts.

A. The Theoretical Justifications for the Usual Framework Apply to Voting.

To determine if the usual framework is applicable to voting, a logical place to start is with the theories that underpin disparate-impact law. These theories, it turns out, extend to voting as readily as to employment, housing, or any other activity covered by antidiscrimination laws. First, one prominent account of disparate-impact law sees it as a way to target racially discriminatory motives that are suspected but cannot directly be proven. On this view, few contemporary defendants are so foolish as to create records that reveal their invidious objectives. In the absence of smoking guns, discriminatory intent must be inferred from circumstantial evidence. And perhaps the most probative such evidence is a significant racial disparity, caused by a particular practice, that could have been avoided without compromising any legitimate interest.

Justice Scalia characterized disparate-impact law in these terms in a 2009 concurrence, "framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment." *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). The Court has shared this perspective, observing that "disparate-impact liability . . . plays a role in uncovering discriminatory intent." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015). Discriminatory intent, the Court added, may include "unconscious prejudices," "disguised animus," and "covert and illicit stereotyping." *Id.*; *see*

also, e.g., Richard Primus, *The Future of Disparate Impact*, 108 Mich. L. Rev. 1341, 1376–77 (2010) (presenting disparate-impact law as "an evidentiary dragnet intended to identify hidden intentional discrimination").

This model of disparate-impact law plainly applies to voting. The logic that allows an invidious aim to be inferred is identical whether the practice at issue pertains to employment, housing, elections, or some other activity. In each context, one may surmise that a defendant intends to handicap minority members when she adopts a policy that causes a substantial and unjustified racial disparity. This sort of disparity in the electoral process is as suspicious as in any other domain. Put differently, the theory of disparate-impact law as a proxy for deliberate discrimination is trans-substantive. There is nothing about it that is limited to a particular legal field.

The other leading account of disparate-impact law stresses the removal of obstacles that unjustifiably prevent racial minority members from enjoying the same opportunities as nonminority members. By lowering these hurdles, disparate-impact law is supposed to improve conditions for minorities, to prevent their existing disadvantages from spreading into new areas, and ultimately to undermine the racial hierarchies of American society. This Court invoked this anti-racial-stratification model in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the decision that first recognized a disparate-impact cause of action under Title VII. So construed, Title VII would facilitate "the removal of artificial, arbitrary, and unnecessary barriers to employment"

that "operate as 'built-in headwinds' for minority groups." 401 U.S. at 431, 432. In *Inclusive Communities*, likewise, the Court quoted this language from *Griggs* and criticized housing policies that "arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation." 576 U.S. at 540; *see also, e.g.*, Primus, *supra*, at 1376 (noting that disparate-impact law can be seen as "redress[ing] self-perpetuating racial hierarchies inherited from the past").

This theory, too, is as germane to voting as to employment, housing, or any other area where discrimination is prohibited. Elections, like workplaces or real estate, often exhibit racial discrepancies. (In the electoral context, these discrepancies are between minority and nonminority citizens' political participation.) Some of these discrepancies, in any domain, are justifiable or unavoidable. But some are not. These racial gaps could be eliminated, or at least reduced, without impeding defendants' legitimate objectives. Under the anti-racial-stratification model, disparate-impact law helps to induce the removal of these unnecessary gaps. It thus makes progress toward a society where unwarranted racial disparities no longer exist—not in voting and not anywhere else either.

B. Voting Is Sufficiently Similar to Other Activities Covered by the Usual Framework.

To be sure, voting differs from employment and housing (the areas at the core of the usual framework) in certain key respects. Voting is exclusively

regulated by the state; indeed, it cannot even occur unless the government first establishes and administers an electoral system. In contrast, private actors make most decisions about workplaces and real estate based on their own considerations, rather than those of any public authority. Voting is also not a market good; it has no price set by the forces of supply and demand. Conversely, market dynamics largely determine the wages of employees and the costs of residences. And voting is not a rival good either; when one citizen casts a ballot, she does not stop another from doing the same. But when a job is filled or a home is sold, the position or the property becomes unavailable to everybody else.

Significant as these distinctions are, they do not render the usual framework any less apt for voting. Instead, they either are legally irrelevant or suggest that courts should have fewer qualms about striking down electoral (as opposed to employment or housing) practices. Start with the fact that the defendant in Section 2 vote-denial cases is necessarily the government. This does not actually distinguish these cases from Title VII and FHA suits, which can be brought against public employers and housing providers as readily as against private ones. Additionally, the governmental status of Section 2 defendants simply means that public rather than private interests must be analyzed under the usual framework's second and third prongs. Public interests like preventing fraud, conserving resources, and efficiently administering elections are *different* from the private pursuit of profit. But they are no less amenable to being weighed for their importance, scrutinized for their fit with challenged policies, and

having this fit compared to that of alternative measures. *See, e.g.*, FHA Implementation, 78 Fed. Reg. at 11,470 (explaining, in the FHA context, that the usual framework "applies to individuals, businesses, nonprofit organizations, *and public entities*" (emphasis added)).

Similarly, the main implication of voting not being a market good is that there is no market-based reason to limit it. The burdening of the franchise, that is, cannot be justified by what *Griggs* called "business necessity," 401 U.S. at 431, or *Inclusive Communities* described as "the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system," 576 U.S. at 533. The most familiar rationale for countenancing racial disparities is thus off the table when it comes to disputed electoral practices. To defend such disparities, jurisdictions must cite non-market interests.

As for voting's lack of scarcity, it avoids a potential pitfall of judicial intervention. When a good (like employment or housing) is in short supply, courts may be concerned about the innocent victims of their decisions: the nonminority job applicants who would no longer get offers if a hiring criterion were dropped, the nonminority homebuyers who would no longer be sold units if a housing policy were revised, and so on. These worries may convince courts not to invalidate challenged practices, or at least to dilute the remedies they ultimately impose. But with a nonrivalrous good like voting, there is no risk of such collateral damage. A ruling that makes it easier for minority citizens to vote does not inhibit nonminority

citizens from casting ballots. In fact, it *helps* them to vote, thus yielding innocent *beneficiaries* rather than victims.

II. THE USUAL DISPARATE-IMPACT FRAMEWORK WOULD RESOLVE A SERIES OF ISSUES ABOUT RACIAL-VOTE-DENIAL CLAIMS.

Both disparate-impact theory and the nature of voting, then, indicate that the usual framework *could* be applied to Section 2 vote-denial claims. One compelling reason why it *should* be applied to them is that doing so would resolve a number of issues that have arisen under Section 2. To date, these issues have divided the lower courts. But they have been settled—and reasonably so—over the decades in which the usual framework has been employed in other fields. Accordingly, if the usual framework were extended to Section 2, these doctrinal solutions would come with it.

A. Must a Plaintiff Challenge a Specific Practice or the Whole Electoral System?

To begin with, what exactly is a Section 2 vote-denial plaintiff supposed to challenge—a particular electoral practice or a jurisdiction's integrated system of election administration? Some courts have individually examined a series of measures, making factual findings and reaching legal conclusions as to each discrete policy. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 658 (6th Cir. 2016) (Keith, J., concurring) (observing that the court

"engage[d] in a piecemeal freeze frame approach . . . finding that each new requirement in a vacuum does not meet the standard for disparate impact"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014). In contrast, other courts have evaluated the collective results of all relevant electoral rules. *See, e.g.*, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (analyzing an Ohio cutback to early voting as "one component of Ohio's progressive voting system"); *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

Under the usual framework, this question has a clear answer: A disparate-impact plaintiff must ordinarily attack a specific practice. In the Title VII context, Congress opted for particularity in most circumstances in its 1991 amendments to the CRA. As a general matter, Congress required "the complaining party [to] demonstrate that each *particular* challenged employment practice causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (emphasis added). The only exception arises "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis." *Id.* HUD took the same position when it clarified the operation of the usual framework in FHA cases. Typically, a plaintiff must "identif[y] the *specific* practice that caused the alleged discriminatory effect." FHA Implementation, 78 Fed. Reg. at 11,469 (emphasis added). On occasion, though, "it may be appropriate to challenge the decision-making process as a whole." *Id.*

B. Does the Magnitude of the Racial Disparity Matter?

Second, does a policy's disparate racial impact have to reach a certain magnitude before Section 2 can be violated? Some courts have said yes, rejecting claims where the differences in political participation between minority and nonminority citizens were small. *See, e.g.*, *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1274 (N.D. Ala. 2018) (ruling against a challenge to Alabama's photo ID requirement where "the discrepancy in photo ID possession rates among white, Black, and Hispanic registered voters in Alabama is miniscule"), *aff'd sub nom. Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202 (11th Cir. 2020); *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 367–68 (M.D.N.C. 2014), *aff'd in part and rev'd in part*, 769 F.3d 224 (4th Cir. 2014). Conversely, other courts have concluded that any racial discrepancy caused by an electoral requirement is sufficient. *See, e.g.*, *League of Women Voters*, 769 F.3d at 244 ("[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied . . . .").

The usual framework has also resolved this issue. In some of its first decisions interpreting Title VII, this Court held that only employment practices that have "*significantly* different" effects on minorities and nonminorities establish a prima facie case. *Albemarle Paper Co.*, 422 U.S. at 425 (emphasis added); *see also, e.g.*, *Teal*, 457 U.S. at 446 (requiring "a *significantly* discriminatory impact" (emphasis

added)). Consistent with the Court's rulings, the Equal Employment Opportunity Commission ("EEOC") published guidelines in 1978 stating that employment practices' "differences in selection rate" may "constitute adverse impact" when "they are *significant* in both statistical and practical terms." 29 C.F.R. § 1607.4(D) (emphasis added).[4] These guidelines have long been treated as "a rule of thumb for the courts." *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (plurality opinion).

C. What Kind of Racial Disparity Must Be Shown?

Third, how should a racial disparity be measured—in terms of minority and nonminority citizens' likelihoods of compliance with a provision, or based on the provision's downstream effect on voter turnout? Some courts have taken the former approach under Section 2, focusing on a policy's immediate consequences for minority and nonminority citizens. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 260 (5th Cir. 2016) (en banc) ("[W]e decline to require a showing of lower turnout to prove a Section 2 violation."); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 953 (W.D. Wis. 2016), *aff'd in part and rev'd in part sub nom.*

[4] The EEOC's guidelines also suggested a specific threshold for a racial disparity: "[a] selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate." 29 C.F.R. § 1607.4(D). This approach is less useful than determining the statistical significance of the difference between minority and nonminority selection rates, however, when these rates are low or when the number of observations is small. *See, e.g.*, David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* 88–90, 154 (1980).

Luft v. Evers, 963 F.3d 665 (7th Cir. 2020). However, other courts have insisted that a measure ultimately reduce the turnout of minority citizens to a greater extent than that of nonminority citizens. *See, e.g.*, *Ohio Democratic Party*, 834 F.3d at 639; *Frank*, 768 F.3d at 747 (asking "[d]id the requirement of photo ID reduce the number of voters below what otherwise would have been expected?" and "[d]id that effect differ by race or ethnicity?").

Under the usual framework, again, this problem has been solved. In *Teal*, this Court held that disparate impact under Title VII refers to the direct effects of employment practices, not their downstream consequences. The Court faced an employer whose written exam for promotion to supervisor caused a racial disparity but whose affirmative action program ensured a proportional share of minority supervisors. 457 U.S. at 443–44. The Court ruled that the "'bottom line'" of proportionality "does not preclude [plaintiffs] from establishing a prima facie case, nor does it provide [defendants] with a defense to such a case." *Id.* at 442. The Court explained that a racial disparity at one stage of the promotion process, which bars certain minority employees from becoming supervisors, cannot be offset by racial balance after the process has concluded, which benefits a different set of minority employees. "Title VII does not permit the victim of a . . . discriminatory policy to be told that he has not been wronged because other persons of his or her race . . . were hired." *Id.* at 455.

D. Is Interaction with Discrimination Necessary?

Fourth, must a practice's disparate racial impact be linked to its interaction with historical and ongoing discrimination? The second element of the two-part test recently adopted by certain lower courts for Section 2 vote-denial claims requires such a connection. These courts also view the factors identified by the critical 1982 Senate report as valuable evidence of the discriminatory conditions with which a practice must interact. *See, e.g.*, *Veasey*, 830 F.3d at 244–45 (emphasizing the Senate factors); *League of Women Voters*, 769 F.3d at 240 (same). In contrast, other courts have declined to consider private (as opposed to public) discrimination as well as any socioeconomic differences it may have caused. *See, e.g.*, *Frank*, 768 F.3d at 753 (Section 2 "does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters").

The usual framework has answered this question as well: The reason for a policy's disparate impact need not be the policy's interaction with discriminatory conditions. In *Dothard v. Rawlinson*, this Court examined two hiring criteria for Alabama prison guards: a minimum height of five feet two inches and a minimum weight of 120 pounds. 433 U.S. 321, 323–24 (1977). In tandem, these criteria excluded far more women than men. *Id.* at 329–30. But they did so not through any interaction with historical and ongoing discrimination, but rather because women, as a biological matter, tend to be shorter and lighter than men. The Court nevertheless

found Alabama liable under Title VII on a disparate-impact theory. *Id.* at 331. As scholars have recognized, the Court thus codified the principles that "the reason the [practice] has an adverse impact is [not] at issue" and that "the mere fact of adverse impact requires the employer to justify its practice." Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 Wis. L. Rev. 937, 963.

E. What Is the Proper Remedy?

Lastly, what relief is appropriate when an electoral requirement violates Section 2? Some courts have opted to invalidate unlawful practices, permanently enjoining their future use. *See, e.g.*, *N.C. State Conf. of NAACP*, 831 F.3d at 239 ("[T]he proper remedy . . . is invalidation."); *Frank v. Walker*, 17 F. Supp. 3d 837, 879 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014). Conversely, other courts have ruled that measures should be softened when they contravene Section 2—relaxed for minority and nonminority citizens alike—not struck down in their entirety. *See, e.g.*, *Veasey*, 830 F.3d at 271 ("The remedy must be tailored to rectify only the discriminatory effect on those voters who do not have [photo] ID or are unable to reasonably obtain such identification."); *Frank v. Walker*, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016), *aff'd in part and rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

Under the usual framework, once more, this issue has been decided. Under Title VII, "the usual remedy in a disparate impact case" is "general

invalidation of the challenged policy." Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642, 680 (2001). The court simply nullifies the unlawful employment practice; it does not try to reduce the practice's racial disparities or to make the practice more "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under the FHA, likewise, this Court held in *Inclusive Communities* that "[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice." 576 U.S. at 544. Unlike such relief, "[r]emedial orders that impose racial targets or quotas might raise more difficult constitutional questions" and so are disfavored. *Id.* at 545.

* * *

If the usual framework were imported to Section 2, then, vote-denial cases would follow the same rules as disparate-impact proceedings under Title VII, the FHA, and many other laws. (1) Plaintiffs would challenge particular electoral practices, not whole systems of election administration. (2) Significant (but not all) racial disparities in citizens' access to the franchise would be actionable. (3) Disparities caused directly by disputed practices would be relevant, while ultimate voter turnout would not be. (4) Disparities would not have to be linked to practices' interaction with historical and ongoing discrimination. And (5) if liability were imposed, invalidation of the offending measure would typically be the remedy.

To be clear, these doctrinal parameters may or may not be *optimal*. But they are certainly

reasonable—comporting with the goals of disparate-impact law and plausibly balancing plaintiffs' and defendants' interests. Equally important, these rules are *settled* by decades of legislative, administrative, and judicial precedent. The unification of disparate-impact law would thus answer many of the lingering questions about Section 2 vote-denial claims and answer them in defensible ways. It would provide the benefit of doctrinal coherence without exacting any serious cost.

III. THE USUAL DISPARATE-IMPACT FRAMEWORK WOULD BOLSTER SECTION 2'S CONSTITUTIONALITY.

The other advantage of adopting the usual framework for Section 2 vote-denial claims is constitutional rather than doctrinal. If Section 2 is construed as a pure disparate-impact provision—imposing liability for racial discrepancies, standing alone—then it runs into two constitutional objections. First, it may exceed Congress's enforcement powers under the Reconstruction Amendments. Second, it may conflict with the equal protection norm of colorblindness. Both of these concerns dissipate, however, if Section 2 is implemented through the usual framework. In that case, Section 2's fit with underlying constitutional violations tightens, and jurisdictions may comply with Section 2 without fixating on race.

A. The Usual Framework Tightens Section 2's Fit with Underlying Constitutional Violations.

The first constitutional issue that arises if Section 2 is understood as a pure disparate-impact provision is easy to spot. Under the Fourteenth Amendment, there must be "congruence and proportionality" between Congress's chosen means and the "injury to be prevented or remedied." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Under the Fifteenth Amendment, Congress must use "rational means" to enforce "the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). And under both of these provisions, the essential evil to be avoided or cured is *intentional* racial discrimination. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fourteenth Amendment).

Consequently, if Section 2 could be violated by racial disparities, without more, then it would prohibit a broad swath of conduct that is constitutionally innocuous: electoral regulation that lacks a discriminatory purpose but produces a disparate impact. This wide reach could arguably make Section 2 noncongruent with, and disproportionate to, the underlying injury of intentional racial discrimination. Similarly, a provision of such sweep could arguably be an unreasonable response to deliberate racial discrimination in voting. *See, e.g.*, *Veasey*, 830 F.3d at 315 (Jones, J., concurring in part and dissenting in

part) (if Section 2 "eliminate[s] disparate impact," then it is "not congruent and proportional as a remedy for violation of voting rights"); *Farrakhan v. Washington*, 359 F.3d 1116, 1123 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (if Section 2 is breached by "nothing but disparities," that "destroys Section 2's congruence and proportionality").

Of course, the two-part test recently adopted by certain lower courts does *not* make Section 2 a pure disparate-impact provision. The test's second element requires an electoral policy's disparate impact to be caused by the policy's interaction with historical and ongoing discrimination. This second element, though, can usually be satisfied when plaintiffs comply with the test's first criterion by identifying a racial disparity caused by an electoral practice. In fact, "of all the recent Section 2 vote denial decisions, only *one* seems to have found a racial disparity but then concluded that it was not the result of a measure's interaction with discrimination." Stephanopoulos, *Disparate Impact, Unified Law*, *supra*, at 1591. "In every other case, if a court discerned a disparate impact, it also managed to link that impact to past and present discrimination, as illuminated by the Senate factors." *Id.* at 1591–92; *see also id.* at 1592 n.141 (collecting cases).[5]

[5] The two elements' correlation should not be surprising. When an electoral policy causes a racial disparity, it rarely does so at random—because a condition for voting just happens to be associated with race. Rather, the causal chain connecting the policy with the disparity usually includes a role for historical and

In contrast, the usual framework does not risk collapsing into a single requirement that a policy cause a racial disparity. Plaintiffs who satisfy the usual framework's first step frequently lose in Title VII and FHA cases. And the reason for their defeats is that the usual framework's second step has real teeth. Defendants, that is, are often able to show that their challenged practices are necessary to achieve their substantial interests. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 738–39, 749 (2006) (finding that plaintiffs bringing disparate-impact claims under Title VII win only 20–25 percent of the time, and that "the business necessity prong . . . always proved [a] greater hurdle" than establishing a racial disparity); Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 393, 413–14 (2013) (finding that plaintiffs' win rate in FHA disparate-impact cases is about 20 percent, and that defendants generally have an "easier time" justifying their policies).

The constitutional implications of the usual framework's rigor are straightforward. Intentional racial discrimination can rarely be inferred from a racial disparity alone. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.15 (1977) (noting "the limited probative value of

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ongoing discrimination. Discrimination helps explain minority citizens' worse education, higher poverty, and greater residential isolation. These socioeconomic disadvantages, in turn, help explain why minority citizens are less likely to register to vote, to have photo IDs, to vote on Election Day, and so on.

disproportionate impact"). But when a racial discrepancy cannot be justified by a defendant's valid interests, it becomes easier to conclude that the defendant's motivation is invidious. As this Court stated in *Inclusive Communities*, a needless discrepancy helps to "uncover[] discriminatory intent" and so "permits plaintiffs to counteract unconscious prejudices and disguised animus." 576 U.S. at 540.

If Section 2 were enforced through the usual framework, then, the provision would forbid only electoral practices that are, or plausibly might be, driven by racial bias. In other words, Section 2 would bar only governmental activity that unjustifiably causes a racial disparity—and that thus supports a finding of a discriminatory purpose. This narrow scope, in turn, would enhance Section 2's fit with the Reconstruction Amendments. These Amendments are offended only by deliberate racial discrimination, and that is all that Section 2 would target: voting requirements that are actually invidious or from which an invidious objective can reasonably be inferred. Section 2 would not reach the wider zone of governmental conduct, involving disparate impact alone, that does not permit this inference to be drawn.

B. Compliance with the Usual Framework Requires Less Focus on Race.

The second constitutional issue with construing Section 2 as a pure disparate-impact provision involves the Equal Protection Clause rather than Congress's authority under the Reconstruction Amendments. In *Inclusive Communities*, this Court

warned that if a statute "cause[s] race to be used and considered in a pervasive way," "serious constitutional questions then could arise" under the Equal Protection Clause. *Id.* at 542–43. The statute could conflict with the equal protection principle of colorblindness by, as Justice Scalia put it on a different occasion, "plac[ing] a racial thumb on the scales" and "requiring [jurisdictions] to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

Under the two-part test recently adopted by certain lower courts, jurisdictions might be induced to act in such race-conscious ways. To the extent the test's two elements are mistakenly reduced to a single criterion—whether an electoral practice causes a racial disparity—jurisdictions might decide to take race into account when they change (or maintain) their electoral regulations. They might analyze each potential (or existing) measure's racial effects, and depending on what they find, they might implement race-related policies in order to avoid liability. *See, e.g.*, *Veasey*, 830 F.3d at 317 (Jones, J., concurring in part and dissenting in part) (arguing that a pure disparate-impact approach "force[s] considerations of race on state lawmakers who will endeavor to avoid litigation by eliminating any perceived racial disparity in voting regulations").

Under the usual framework, on the other hand, jurisdictions would lack this incentive to operate race-consciously. Suppose a state wants to ensure that one of its electoral practices is lawful. The state would not have to amend or annul the practice if it turns out

that it produces a racial disparity. To the contrary, the state would only have to confirm that the practice is necessary to achieve its substantial interests (and that these interests could not be equally achieved by a different policy choice with a smaller disparate impact). Put differently, a pure disparate-impact provision induces jurisdictions to try to *eradicate* racial disparities. The usual framework, however, merely asks jurisdictions to *reduce* racial disparities to the extent they may do so without compromising their legitimate objectives. This is a less intrusive—and less race-conscious—command.

For precisely this reason, this Court held in *Inclusive Communities* that as long as "disparate-impact liability [is] properly limited in key respects," the usual framework "avoid[s] the serious constitutional questions that might arise" otherwise. 576 U.S. at 540. One of these limits is allowing defendants "to state and explain the valid interest served by their policies." *Id.* at 541. "This step of the analysis . . . provides a defense against disparate-impact liability." *Id.* Another constraint is "[a] robust causality requirement" compelling a plaintiff to "point to a defendant's policy or policies causing th[e] disparity." *Id.* at 542. With these safeguards in place, the usual framework does not "cause[] race to be used and considered in a pervasive and explicit manner." *Id.* at 543. It does not "inject racial considerations into every [regulatory] decision" or "perpetuate race-based considerations rather than move beyond them." *Id.*

IV. THE COURT IS FREE TO ADOPT THE USUAL DISPARATE-IMPACT FRAMEWORK AS A MATTER OF STATUTORY INTERPRETATION.

Finally, as a matter of statutory interpretation, it would be straightforward for this Court to adopt the usual framework for Section 2 vote-denial claims. Section 2's text is more consistent with the usual framework than with a pure disparate-impact approach. Section 2's text also refers to relevant circumstances—one of which, the tenuousness of a jurisdiction's rationale for an electoral practice, is essentially shorthand for the usual framework. And because Section 2 facially reaches discriminatory results, not just discriminatory purposes, the usual framework's adoption in the voting context would be less complex than under other statutes that do not explicitly mention disparate impacts.

To start the statutory analysis, consider the proviso at the end of 52 U.S.C. § 10301(b). "[N]othing in this section," the proviso reads, "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* This language was "essential to the compromise that resulted in passage of" Section 2 in its current form. *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring in the judgment). This language also identifies an obvious kind of racial disparity that could be caused by an electoral policy—disproportionately low representation for a minority group—and states that, alone, it cannot give rise to liability. Nothing in Section 2 creates a right to proportional representation for a minority group. By

the same token, a jurisdiction cannot violate Section 2 simply by failing to provide a minority group with proportional representation.

The usual framework is true to the letter and spirit of this proviso. It does not impose liability due to a minority group's disproportionately low representation, standing alone. Indeed, it does not impose liability due to any type of racial disparity solely on that basis. The usual framework thus necessitates neither proportional representation for minority citizens nor the elimination of any other disparate impact. On the other hand, the two-part test recently adopted by certain lower courts could be construed as requiring the eradication of many racial disparities caused by electoral practices. As explained above, many such disparities are attributable to challenged measures' interaction with historical and ongoing discrimination. Accordingly, the two-part test risks "establish[ing] a right to have members of a protected class" affected by an electoral policy "in numbers equal" to nonminority citizens. 52 U.S.C. § 10301(b).

Turn next to the beginning of § 10301(b), which mandates the consideration of "the totality of circumstances" to find liability. *Id.* The "circumstances that might be probative of a § 2 violation" are listed by the Senate report "accompanying the bill that amended § 2." *Gingles*, 478 U.S. at 36. One of these factors is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is *tenuous*." *Id.* at 37 (quoting S. Rep. No. 97-417, at 29 (1982)

(emphasis added)). This Court has emphasized the tenuousness factor in its post-*Gingles* vote-dilution decisions. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 441 (2006); *Holder v. Hall*, 512 U.S. 874, 878 (1994). So have numerous lower courts in Section 2 vote-denial cases. *See, e.g.*, *Veasey*, 830 F.3d at 262–64; *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 440–65 (M.D.N.C. 2016), *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016).

The usual framework's second and third steps are essentially an elaboration of the tenuousness factor. Under the second step, a jurisdiction has the burden of showing that its challenged practice is necessary to achieve its substantial interests. When a practice is not actually necessary to attain a jurisdiction's substantial goals, or when a jurisdiction's goals are not actually substantial, the policy underlying the jurisdiction's use of the practice is tenuous. Under the third step, a plaintiff has the burden of proving that a jurisdiction's substantial interests could be served equally by some different, less discriminatory measure. Again, when a plaintiff makes this demonstration, the policy underlying the practice is tenuous. *See, e.g.*, Issacharoff, *supra*, at 316 (arguing that the tenuousness factor is "the statutory hook for shifting the inquiry onto the state's justification").

A last textual point involves a comparison of 52 U.S.C. § 10301(a)'s wording to that of other statutes under which this Court has embraced the usual framework. Section 2 forbids any electoral practice that "*results in* a denial or abridgement of the

right . . . to vote on account of race or color." *Id.* (emphasis added). In contrast, when the Court applied the usual framework to Title VII in *Griggs*, the provision did not explicitly state whether it could be violated solely by disparate treatment or also by disparate impact. *See* 42 U.S.C. § 2000e-2(a)(2) (making it unlawful for an employer to "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race"). The ADEA and the FHA are similarly unclear, on their face, as to whether they encompass disparate-impact liability. *See, e.g.*, 29 U.S.C. § 623(a)(2) (paralleling Title VII's language except with respect to age rather than race); 42 U.S.C. § 3604(a) (making it unlawful to "otherwise make unavailable or deny[] a dwelling to any person because of race"). The Court nevertheless extended the usual framework to the ADEA in *Smith*, *see* 544 U.S. at 233–40 (plurality opinion), and to the FHA in *Inclusive Communities*, *see* 576 U.S. at 530–46.

Textually, the usual framework's further extension to Section 2 would be even easier. Again, Title VII, the ADEA, and the FHA are ambiguous as to whether they can be breached without a showing of discriminatory intent. In *Griggs*, *Smith*, and *Inclusive Communities*, the Court therefore had to resolve this ambiguity first; only then could it rule that the usual framework would govern disparate-impact claims in these areas. However, there is no doubt that Section 2 can be infringed even in the absence of an invidious motive. The whole point of its 1982 revision was to make this clear, *see, e.g.*, *Gingles*, 478 U.S. at 71, and the provision now overtly bans electoral practices that

"*result[] in*" a race-based denial or abridgment of the franchise, *see* 52 U.S.C. § 10301(a) (emphasis added). Consequently, it would take the Court just one step, not two, to apply the usual framework to Section 2. The Court would not have to puzzle over whether Section 2 recognizes disparate-impact discrimination since it obviously does. Instead, the Court could skip ahead to holding that this form of discrimination, when it relates to voting, is regulated by the usual framework.

CONCLUSION

For the foregoing reasons, the Court should consider applying the usual disparate-impact framework, already used in many other contexts, to claims of racial vote denial under Section 2.

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