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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NORTH CAROLINA, MEMPHIS, CENTRAL VIRGINIA, AND MIAMI-DADE CHAPTERS OF THE A. PHILIP RANDOLF INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NORTH CAROLINA, MEMPHIS, CENTRAL VIRGINIA, AND MIAMI-DADE CHAPTERS OF THE A. PHILIP RANDOLF INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are four chapters (North Carolina, Memphis, Central Virginia, and Miami-Dade) of the A. Philip Randolph Institute ("APRI") located across the South. *Amici* are deeply interested in the outcome of this case because the reading of Section 2 of the Voting Rights Act ("VRA") proposed by petitioners would eviscerate vital protections for voters of color, particularly low-wealth/working-class Black voters, which enable them to participate on equal footing in the political process.

Amici provide services to Black voters to help them overcome a multitude of complex, intersectional barriers rooted in poverty that impede their access to the ballot box. *Amici* desire to illustrate for the Court the relationship between their efforts to help Black voters in the South overcome impediments to political participation—particularly impediments caused by the legacy of socioeconomic discrimination against Black voters—and the need to uphold full and robust protections under Section 2 of the VRA.

APRI is a non-profit organization founded in 1965 that grew out of the legacy of African American trade

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket letters of consent to the filing of *amicus* briefs.

unionists' advocacy for civil rights and the passage of the VRA to advance racial equity and economic justice. Today, APRI has 150 chapters in 36 states. APRI chapters have filed lawsuits across the United States challenging state efforts that unconstitutionally burden the right to vote for historically disenfranchised communities. See *A. Philip Randolph Inst.* v. *Husted*, 907 F.3d 913 (6th Cir. 2018); *N.C. St. Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *Lichtenstein* v. *Hargett*, No. 3:20-cv-00736, 2020 U.S. Dist. LEXIS 174701 (M.D. Tenn. 2020); *Memphis A. Phillip Randolph Inst.* v. *Hargett*, 473 F. Supp. 3d 789 (M.D. Tenn. 2020); *League of Women Voters of Mo.* v. *Ashcroft,* 336 F. Supp. 3d 998 (W.D. Mo. 2018).

The North Carolina APRI is a statewide organization with local chapters in eight regions or cities. It works to increase access to the polls, voter registration, and voter education, particularly among working-class Black people. The North Carolina APRI also organizes transportation to the polls throughout the early voting period and, on Election Day, concentrates its efforts in predominantly Black neighborhoods. Additionally, the North Carolina APRI is involved in many other activities that support significant labor and workers' rights; among other projects it organizes community services programs, attempts to reduce health disparities between White and Black communities, and runs a Feeding the Hungry initiative, which feeds over 800 people per month.

The Central Virginia APRI is dedicated to advancing voter education, voter registration, and voter participation across the areas of Chesterfield County, Henrico County, and the City of Richmond. It works to ensure full political participation among working-class, elderly, and physically challenged Black people

who disproportionately lack transportation, access to the internet, and computer literacy. To do this, the Central Virginia APRI utilizes local urban communication outlets to promote its "All Souls to the Polls" program, which offers free rides to polling places during early voting and on Election Day.

The Memphis APRI in Tennessee works to strengthen ties between the labor movement and the community, increase the political impact of Black voters, and implement structural changes through civic engagement. It sponsors voter education and "Get Out the Vote" programs. Among other efforts, the Memphis APRI successfully challenged the limits Tennessee imposed on qualifying for an absentee ballot, making such ballots available to first-time voters who registered to vote by mail or online if they are otherwise eligible.

The Miami-Dade APRI is the exclusive and chartered local affiliate encompassing the entirety of Miami-Dade County, Florida. It fosters and implements efforts to achieve equality, social and economic justice, and full participation in the electoral process by strengthening the bonds between working-class people, organized labor, and the Black community. To that end, its members work to register, educate, and support voter participation and host a variety of programs focused on educating communities and labor organization members on current issues, proposed state constitutional amendments, voter registration, and voter participation. To help get low-income voters and voters of color to early voting and to their correct polling precinct, the Miami-Dade APRI mails postcards with polling site information; it also participates in phone banking, community walks, and "Get Out the Vote" rallies.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners maintain that Section 2 of the VRA does not address restrictions on the "time, place or manner" of voting, such as limits on out-of-precinct ("OOP") voting, that are race-neutral and do not exceed the "ordinary" burdens of voting. Arizona Republican Party ("ARP") Br. at 15, 16. Section 2, they continue, is primarily designed to target vote dilution. Recent vote denial claims under the Section, they conclude, are "part of a concerted effort to use the federal courts to radically transform the Nation's voting practices for partisan advantage." *Id.* at 1. But these contentions are manifestly wrong. In addressing the flaws in petitioners' position, *amici* make three principal points:

First, petitioners' attempt to find support for their theory in the VRA's history is sophistic. Section 2 found limited use against discriminatory voting practices prior to this Court's decision in *Shelby County* v. *Holder*, 570 U.S. 529 (2013), because the Justice Department denied preclearance for many of those practices under Section 5, making Section 2 litigation unnecessary. But after *Shelby County*, there has been an explosion of such practices, making a meaningful Section 2 remedy essential.

Second, there can be no serious doubt that, as the Court recognized in *Shelby County*, Section 2 is a "permanent, nationwide ban on racial discrimination in voting." 570 U.S. at 557. Congress enacted Section 2 to be an all-purpose weapon against voting practices that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat 131 (codified at 52

U.S.C. § 10301(a)) (amending Section 2). Courts consistently have recognized that restrictions on the time, place, or manner of elections may be used to suppress minority voting. And the test applied by the Ninth Circuit to assess the legality of the restrictions at issue in this case has been applied for decades, in a manner that has been workable and effective.

Third, *amici* offer a detailed look at practices regarding use of OOP voting in North Carolina, to illustrate how facially neutral schemes can have a profound, and inevitable, adverse effect on minority voting—precisely the outcome that Congress meant to avoid when it enacted and amended the VRA. That experience confirms the essential nature of an effective Section 2 remedy.

ARGUMENT

I. State and local governments have frequently used discriminatory voting practices, both before and after *Shelby County*.

In petitioners' telling, the use of discriminatory voting practices by state and local government—as opposed, perhaps, to vote dilution and abusive redistricting schemes—is not a serious problem at all. Their evidence for this assertion is the observation that Section 2 was infrequently invoked against such practices prior to *Shelby County* (see ARP Br. at 6), and the claim that facially neutral voting rules pose no danger of denying or abridging minority voting rights. *Id*. at 22-25.

But petitioners' approach to Section 2 rests on a profound misunderstanding of both the relevant history and the reality of voting practices, as reflected in state law and judicial decisions. In fact, private litigants had little occasion to invoke Section 2 against

discriminatory practices pre-*Shelby County* because the Justice Department rejected those—sadly ubiquitous—practices under Section 5 of the VRA. See *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) (the "predominance of vote dilution" cases under Section 2 "likely [stemmed] from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring"). And in the years since the decision in *Shelby County* made Section 5 enforcement unavailable, many state and local jurisdictions have resurrected strikingly similar discriminatory practices, with disturbingly adverse effects on minority voting participation. A robust Section 2 remedy, available to challenge these discriminatory "time, place, or manner" restrictions on voting, is therefore essential to give force to the promise that "any racial discrimination in voting is too much." *Shelby Cty.*, 570 U.S. at 557.

Amici document below a sample of voting practices, both pre- and post-*Shelby County*, that had the effect of suppressing minority voting participation. These practices contribute to the totality of circumstances making it essential that voters of color, particularly in locales across the South, have access to a meaningful Section 2 remedy.

A. Voter identification laws

Certain States require voters to present a government-issued photo identification in order to vote. These strict voter identification laws can have discriminatory results because racial minorities disproportionately lack government photo identifications and face economic barriers to acquiring them.

In 2011, Texas enacted SB 14, a strict voter identification law estimated to disenfranchise as many as 600,000 registered voters because they lacked the proper identification. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Mar. 12, 2012), https://perma.cc/J3NQ-6Y4Q. Denying preclearance, the Department of Justice noted that, "according to the state's own data, a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack [the required] identification"—a "statistically significant" disparity. Ibid. A district court agreed with the Justice Department that the law was "likely to lead to 'retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise,'" and that the State failed to demonstrate that the law lacked discriminatory purpose or effect. *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (citation omitted), vacated and remanded, 570 U.S. 928 (2013) (vacating and remanding in light of *Shelby County*).

Within hours of the *Shelby County* decision, the Texas Attorney General announced that SB 14 would take immediate effect. See Jennifer L. Patin, *The Voting Rights Act at 50: The Texas Voter ID Story*, LAW. COMM. FOR C.R. UNDER L. 1 (Aug. 6, 2015). The Fifth Circuit upheld a decision striking down the law under Section 2 of the VRA, among other grounds. *Veasey* v. *Abbott*, 830 F.3d 216, 272 (5th Cir. 2016). The district court had found "a stark, racial disparity between those who possess or have access to SB 14 ID, and those who do not," and that "SB 14 worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result." *Id*. at 264-265.

B. Voter list purges

Federal law requires States to routinely audit their voter rolls and make reasonable efforts to purge the names of ineligible registrants. National Voter Registration Act, 52 U.S.C. § 20507(a)(4). But both before and after *Shelby County*, States and localities have misused list maintenance to eliminate minorities from the rolls.

1. Alabama

In the early 1980s, several Alabama counties located in the State's "Black Belt" forced voters to "reidentify" themselves in order to remain on the voter rolls because Black political participation was perceived as "threatening to the status quo." H.R. Rep. 97-227 at 16 (1981) ("H.R. Rep.").

The Department of Justice intervened in four separate counties to stop the process. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Dec. 11, 1984) https://perma.cc/5SME-8L3U; U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Oct. 26, 1981) https://perma.cc/KT82-TBEF; U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter, (Oct. 2, 1981) https://perma.cc/8ZJU-TFJM; U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Sept. 25, 1981) https://perma.cc/7GMV-QR6K. Due to the continuing effects of past disenfranchisement, the lower socioeconomic status of Black residents, and the limited hours and locations at which to "reidentify," the Justice Department concluded in the first of these reviews that the protocol would disproportionately burden Black voters. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Sept. 25, 1981), https://perma.cc/7GMV-QR6K.

After *Shelby County*, no longer subject to preclearance, formerly covered States began removing voters at disproportionately high rates. Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CTR. FOR JUST. 3-4 (2018), https://perma.cc/F6MA-NJQA. In Alabama, for example, counties rapidly purged the rolls. *Id*. at 26-27 app. C. In Shelby County itself, the removal rate doubled from 2013 to 2014, when 18 percent of the county's voters were purged. *Id.* at 26 app. C. With removal from the rolls came a surge in provisional ballot usage, suggesting people may have been incorrectly removed. *Ibid*.

2. Texas

In 1975, Texas sought to purge its entire voter roll and require prospective voters to re-register. The Justice Department objected. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Dec. 10, 1975), https://perma.cc/WA7N-JEXT. The Department was concerned that "a substantial number" of minority voters would be "confused, unable to comply with the statutory registration requirements * * * or only able to comply with substantial difficulty." *Id*. at 3. Given problems minorities faced registering in the past, the new registration procedure threatened to "cause significant frustration and result in creating voter apathy among minority citizens, thus erasing the gains already accomplished in registering minority voters." *Ibid*.

After *Shelby County*, a Texas official challenged the citizenship status of almost 100,000 registered voters, many incorrectly. *Tex. League of United Latin Am. Citizens* v. *Whitley*, No. CV SA-19-CA-074-FB, 2019 WL 7938511, at *1 (W.D. Tex. Feb. 27, 2019). Voters errantly received advisories threatening to

purge them from the rolls unless they proved their citizenship. A federal court found that "perfectly legal, naturalized Americans were burdened with * * * ham-handed and threatening correspondence from the state which did not politely ask for information but rather exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us." *Ibid*. Only after extensive litigation did the State end the review in a settlement. Alexa Ura, *Texas Will End Its Botched Voter Citizenship Review and Rescind Its List of Flagged Voters*, TEXAS TRIB. (Apr. 26, 2019), https://perma.cc/ZR4Z-BJLS.

C. Registration restrictions

Registration restrictions can serve as a voter suppression tactic by disproportionately limiting the ability of minorities to register to vote. Prior to *Shelby County*, the Department of Justice preempted dual registration requirements, mail-in and pre-registration restrictions, and other state laws impeding minority registration—many of which have reemerged since 2013.

1. Mississippi

One of the most notorious registration restrictions was Mississippi's "dual-registration" system, which required voters to register separately for federal and municipal elections. The system was finally challenged and struck down under the VRA in 1987. *PUSH* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom*. *PUSH* v. *Mabus*, 932 F.2d 400 (5th Cir. 1991). But a decade later, the Department of Justice found that Mississippi's administrative plan for implementing the National Voter Registration Act had de facto resurrected a dual-registration system—a result the Department found "hardly surprising" given

"the long history of discrimination against [B]lack citizens in Mississippi, and the persistence of severe socio-economic disadvantages among [B]lack citizens in Mississippi." U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Sept. 22, 1997), https://perma.cc/NS6P-KBKY.

Following *Shelby County*, several states, including Arizona, have attempted to implement dual-registration regimes. See*, e.g.*, STATE OF ARIZONA ELECTIONS PROCEDURES MANUAL 10-17 (2014), https://perma.cc/VM7L-8ZE7. Arizona eventually agreed to eliminate the dual-registration system in a 2018 federal consent decree after being sued by civil rights organizations. See Consent Decree, *League of United Latin Am. Citizens of Ariz.* v. *Reagan*, No. 2:17-v-0102 (D. Ariz. June 18, 2018), https://perma.cc/4CH-U4JZ.

2. North Carolina

The development of registration restrictions in North Carolina demonstrates how the same voter suppression tactics have continued in former preclearance States. In 1993, the Department of Justice objected to an attempt by North Carolina to delay implementing a mail-in registration system—which the State itself acknowledged as an important step in equalizing voter registration rates between White and non-White citizens. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter 2-3 (Nov. 16, 1993), https://perma.cc/6VG5-5MQD.

In the immediate aftermath of *Shelby County*, the North Carolina legislature enacted an omnibus voting bill that abridged the early voting period, eliminated same-day registration and provisional OOP voting, and stopped pre-registration of 16- and 17-year-olds.

The Effects of Shelby County v. Holder, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://perma.cc/QF2R-TCH7 (discussing House Bill 589). The effect on *amici* and Black voters in North Carolina will be detailed below.

3. Georgia

Georgia is similar. In the 1980s, the Department of Justice blocked state- and county-level efforts in the State to restrict or ban voter registration drives in areas with under-registered Black populations and to reduce satellite voting registration sites. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Mar. 5, 1982), https://perma.cc/2QRL-LJB2; U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Sept. 11, 1980), https://perma.cc/ZYU9-GEDU. The Department also objected to a state statute that required voters to show a driver's license, birth certificate, or "any other document reasonably reflecting" their "true identity," finding that the requirement might produce a discriminatory result against Black voters, who were already registered at a lower rate. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter 1-2 (Sept. 18, 1981), https://perma.cc/EK6Y-P48S.

In 2009, the Department of Justice objected to a Georgia law requiring officials to compare voter registration information against other state-held information, including driver's licenses, Social Security, and citizenship records. If the records did not match, officials could call applicants to appear and address the disparity. The Department found that officials placed many people on the no-match list due to typographical errors or recent naturalization and that "[t]he impact of these errors" fell "disproportionately on minority voters." U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (May 29, 2009), https://perma.cc/JM2E-8XWK. It noted that "[t]hese

burdens are real, are substantial, and are retrogressive for minority voters." *Ibid*.

In 2017, Georgia enacted a strikingly similar "no match, no vote" law with the same results, except this time it was not subject to preclearance requirements. Officials held up registration applications that did not precisely match state records, impeding over 50,000 registration applications in 2018. Mark Niesse, *Changes Coming to Georgia Purges, Vote Counts and Voting Machines*, ATLANTA J.-CONST. (Mar. 19, 2019), https://perma.cc/8BJP-YUEC.

Lawsuits claimed that the policy "unfairly and disproportionately prevent[ed] voters of color from voting." Amended Complaint for Declaratory and Injunctive Relief ¶¶ 82-93, *Fair Fight Action* v. *Raffensperger*, No. 1:18-cv-05391 (N.D. Ga. Feb. 19, 2019), ECF 41. They pointed to the discriminatory effect on Black voters, who represented 70% of the "pending" voter registrations, and new citizens, whose applications were marked as pending if they had not alerted the state driver's license agency of their naturalization. *Id*. ¶¶ 90-91. A federal court enjoined part of the policy in 2018, and Georgia largely ended it through legislation in 2019. *Ga. Coal. for the People's Agenda, Inc.* v. *Kemp*, 347 F. Supp. 3d 1251, 1260-1268 (N.D. Ga. 2018); *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. 3 (Nov. 18, 2019), https://perma.cc/5FCK-E8VU (discussing HB 316).

D. Polling location changes and closures

When counties move or close polling locations, minority voters may struggle to get to the polls, cut off from their franchise by distance and lack of transportation. They sometimes are unaware that their polling location has changed. Location changes also work

hand-in-glove with OOP voting restrictions like those at issue in this case. When polling locations change, voters may vote at the wrong location.

Since *Shelby County*, jurisdictions previously covered by preclearance have unleashed a torrent of location changes. Between 2012 and 2018, these jurisdictions have closed at least 1,688 polling sites. *Democracy Diverted: Polling Place Closures and the Right to Vote*, LEADERSHIP CONF. EDUC. FUND 12 (Sept. 2019), https://perma.cc/2B9M-HCZ7.

1. Texas

Prior to *Shelby County*, the Department of Justice lodged numerous objections to polling location changes that were likely to have a discriminatory effect. In many cases, election officials moved polling locations to places convenient for White voters and inconvenient for minority voters. The new polling places frequently required minority voters to travel unreasonable distances. In 1991, a hospital district in Texas reduced the polling places for its elections from 13 to just 1, placing the sole location in a majority-White city. This new location was 30 miles away from most Black voters and 19 miles from most Mexican American voters, leading the total votes to fall from 2,300 in the previous election to just 300. U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter 1 (June 5, 1981), https://perma.cc/RAX7-YGXA. Often, such new locations lacked meaningful transportation options, either by car or public transportation. See*, e.g.*, U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (Apr. 18, 1994), https://perma.cc/VP2D-J8DY; U.S. Dep't of Justice, Civ. Rts. Div., Objection Letter (May 2, 1977), https://perma.cc/GN9H-A68U.

Texas has closed 750 polling places from 2012 to 2018, mostly after *Shelby County*, disproportionately affecting the State's Latino and Black voters. *Democracy Diverted: Polling Place Closures and the Right to Vote*, *supra*, at 26.

2. Georgia

Georgia has closed at least 214 polling locations since 2012, mostly after *Shelby County*. *Democracy Diverted: Polling Place Closures and the Right to Vote*, *supra*, at 12. More than half of the counties to close polling places had a significant Black population. Mark Niesse & Maya Prabhu, *Voting Precincts Closed Across Georgia Since Election Oversight Lifted*, ATLANTA J.-CONST. (Sept. 4, 2018), https://perma.cc/T5JN-DNUX.

3. Arizona

Arizona has closed 320 polling sites since 2012, with Maricopa County alone closing 171 locations, more than any other county nationwide. *Democracy Diverted: Polling Place Closures and the Right to Vote*, *supra*, at 17. These closures have especially burdened the State's Indigenous peoples, with the Chairman of the Pascua Yacqui Tribe describing them as "reminiscent of when Native American voting rights were limited." Rob Arthur & Allison McCann, *How the Gutting of the Voting Rights Act Led to Hundreds of Closed Polls,* VICE (Oct. 16, 2018), https://perma.cc/Z4NQ-BA2K.

* * *

As this account shows, minority voters have suffered state-imposed impediments in southern States for decades. Prior to *Shelby County*, minority voter turnout improved not because States had ceased these

discriminatory practices, but because the Department of Justice succeeded in impeding them. Petitioners draw the wrong lesson from this history: The ongoing reality of voter discrimination calls for a robust Section 2 test, not an interpretation of the statute that would enfeeble it.

II. The test applied by the Ninth Circuit is clear and workable.

Petitioners also make additional errors that stem from a misunderstanding of the VRA's history and application. They are wrong to argue that Section 2 is not directed at discriminatory voting practices. And their assertion that the test applied in this case by the Ninth Circuit is unworkable cannot be squared with myriad decisions that have applied that test over the last half-century.

A. Section 2 applies to discriminatory voting practices.

The ARP petitioners assert that Section 2 is aimed only at vote-dilution and redistricting claims, and not at "race-neutral regulation of the when, where and how of voting." ARP Br. at 36. Petitioners posit that such regulations violate Section 2 only when they impose "extraordinary" burdens on the ability to vote or are not race-neutral, imagining that a contrary reading would have rendered "nearly every electoral system in the country" illegal since 1982. *Id.* at 36-38.

Petitioners are wrong. When Congress amended Section 2, it was concerned with all manner of discriminatory voting practices; Congress was aware of and meant to proscribe discrimination perpetrated by restrictions on the "how" of voting. The House Judiciary Committee heard "[e]xtensive testimony * * * de-

tailing the variety of methods used by inventive registrars and other state officials to keep racial minorities off the voting rolls and out of the voting booths." H.R. Rep. at 13-14. "Despite gains in increased minority registration and voting," the Committee observed "continued manipulation of registration procedures and the electoral process which effectively exclude minority participation from all stages of the political process." *Id.* at 14. The Committee's Report highlighted, and condemned, "inconvenient location and hours of registration, dual registration for county and city elections * * * frequent and unnecessary purgings and burdensome registration requirements." *Ibid*.

The Senate Judiciary Committee Report ("the Senate Report") that accompanied the 1982 VRA amendments likewise recognized Section 2 as the "major statutory prohibition of *all* voting rights discrimination." S. Rep. No. 97-417 at 30 (1982) ("S. Rep.") (emphasis added). Any voting practice that "operates to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice" violates Section 2. *Ibid.* This requirement that the political process be "equally open" to minority groups "extends beyond formal or official bars to registering and voting, or to maintaining a candidacy." *Ibid.* The Senate Report illustrates this point with a series of examples: absentee ballots made available only to White voters; a voter purge that was unfair, unnecessary or limited opportunities for re-registration; and "administration of an election" with a discriminatory result. *Id.* at 30 n.119.

No doubt, Congress's foremost concern in amending Section 2 in 1982 was addressing this Court's then-recent decision in *City of Mobile* v. *Bolden,* 446 U.S. 44 (1980). See S. Rep. at 2. But Congress also was

keenly aware of the many nefarious ways in which state officials can use facially race-neutral regulations of voting practices to suppress minority vote. See *id.* at 30. It intended Section 2 to address all forms of discriminatory conduct enacted through seemingly neutral electoral regulations. See*, e.g.*, *League of Women Voters of N.C.*, 769 F.3d at 239 ("Section 2's plain language makes clear that vote denial is precisely the kind of issue Section 2 was intended to address"); *Ohio St. Conf. of NAACP* v. *Husted*, 768 F.3d 524, 552 (6th Cir. 2014), vacated *Ohio St. Conf. of NAACP* v. *Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot"). Section 2's reach was recognized by Justice Scalia, who provided a paradigmatic illustration of a seemingly race-neutral procedure that violates Section 2: "If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for [B]lacks to register than [W]hites, [B]lacks would have less opportunity 'to participate in the political process' than [W]hites, and § 2 would therefore be violated." *Chisom* v. *Roemer*, 501 U.S. 380, 403 (1991) (Scalia, J., dissenting).

B. The Section 2 standard, which focuses on local conditions and history, is workable and effective.

The genesis of the language of the amended Section 2 is this Court's decision in *White* v. *Regester*, 412 U.S. 755, 766 (1973), which evaluated the "totality of the circumstances" using objective factors that reflected "a blend of history and an intensely local appraisal of the design and impact of the * * * multimember district in the light of past and present reality, political and otherwise." *Id.* at 770. Following

White, the Fifth Circuit's influential decision in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. E. Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636 (1976), found that an "aggregate of these factors"—but not all of them—needed to be proved to obtain relief. *Id.* at 1305. In the years following *White* and *Zimmer*, courts across the country applied their test in adjudicating Section 2 claims. See*, e.g.*, *Robinson* v. *Comm'rs Ct.*, 505 F.2d 674 (5th Cir. 1974) (Texas); *Bradas* v. *Rapides Parish Police Jury*, 508 P.2d 1109 (5th Cir. 1975) (Louisiana); *Aranda* v. *Van Sickle*, 600 F.2d 1267 (9th Cir. 1979) (California); *Black Voters* v. *McDonough*, 421 F. Supp. 165 (D. Mass. 1976), aff'd, 565 F.2d 1 (1st Cir. 1977) (Massachusetts).

This standard, which emphasized the local social and historical conditions in which the voting practice was being imposed, proved workable and durable.

Thus, the Senate Report identified nearly two dozen lower court cases decided between 1973 and 1978 applying the *White*/*Zimmer* test—which Congress intended to incorporate into Section 2 as the "actual judicial understanding and application of the *White* standard." S. Rep. at 67. As the Senate Report explained, Congress intended "to incorporate that [*White*] precedent and extensive case law which developed around it, into the application of Section 2." *Id.* at 32. Congress did so, in part, to refute criticisms that its test would be unworkable, pointing to the "extensive, reliable and reassuring track record of court decisions using the [*White*] standard" as incontrovertible proof to the contrary. *Ibid.*

This history, and the decisions invoked by Congress in 1982, refute the ARP's assertion that a test resting on the Senate Factors either is too indefinite

or effectively invalidates all voting practices that have a disparate impact on minority voters. ARP Br. at 20 ("On [Respondents'] construction, *any* voting rule implicates § 2 if it can be tied to racially disproportionate *outcomes*."). Of the 23 decisions analyzed in the Senate Report, the defendant prevailed in more than half. S. Rep. at 33. Some plaintiffs who had proven one or two or even three of the *Zimmer* factors (now Senate Factors) fell short of the showing required to render an electoral scheme void. *Ibid*. This remains true today, even in vote denial cases. See, *e.g.*, *Lee* v. *Va. St. Bd. of Elections*, 188 F. Supp. 3d 577, 603 (E.D. Va.), aff'd, 843 F.3d 592 (4th Cir. 2016); *Burton* v. *City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999); *Ala. St. Conf. of NAACP* v. *Alabama*, No. 2:16-CV-731-WKW, 2020 WL. 583803 (M.D. Ala. Feb. 5, 2020); *N.C. St. Conf. of NAACP* v. *Cooper*, 430 F. Supp. 3d 15, 23 (M.D.N.C. 2019), rev'd *sub nom. N.C. St. Conf. of the NAACP* v. *Raymond*, 981 F.3d 295 (4th Cir. 2020).

Moreover, and critically, the Senate Factors give emphasis to local issues and history. See *Veasey*, 830 F.3d at 257-58 (evaluating as evidence both Texas's history of discrimination and the district court's finding that "[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts."); see also *Husted*, 768 F.3d at 556. By focusing on localized socioeconomic and historical conditions, the Senate Factors offer a workable test for assessing the interaction between the electoral device and local social and historical conditions.

The proof is in the pudding: courts recognize that a test looking to the Senate Factors *is* administrable and effective, offering "a sufficient and familiar way to limit courts' interference with 'neutral' election

laws to those that truly have a discriminatory impact under Section 2 of the Voting Rights Act." *Veasey*, 830 F.3d at 246–247. See*, e.g.*, *League of Women Voters of N.C.*, 769 F.3d at 224; *Feldman* v. *Ariz. Sec'y of State's Off.*, 843 F.3d 366, 379 (9th Cir. 2016*); Burton*, 178 F.3d at 1198.

In fact, ARP's assertion that the test results in courts rubber-stamping plaintiffs' claims in a manner that destabilizes the electoral systems simply rehashes the arguments made by critics of the *White* standard's codification in Section 2 nearly 40 years ago. The assertion is no more true now than it was in 1982, when Congress rejected it. Now, as in 1982, the real argument against use of the *White/Zimmer* test is that "racial politics no longer affect minority voters." S. Rep. at 23. The "regrettable reality" (*ibid.*), then and today, is that petitioners' are wrong. *Id.* at 33.

III. *Amici's* experience in North Carolina in recent years vividly demonstrates the need for a vigorous Section 2.

Amici's review of history is not academic. *Amici*, particularly the North Carolina APRI, have dealt with electoral practices that interacted with socioeconomic disparities resulting from hundreds of years of racial discrimination; have assisted Black voters in participating in the political process; and have sued when the barriers of complex electoral schemes cannot be overcome by the assistance of small non-profit organizations. *Amici*'s lived experience can help the Court understand why Section 2 remains critically important to racial equity in this country's democracy.

In the aftermath of *Shelby County*, the North Carolina General Assembly passed an omnibus elections

bill (H.B. 589)—parts of which would later be deemed intentionally discriminatory because they targeted Black voters with "surgical precision." *McCrory*, 831 F.3d at 214. Although the Fourth Circuit invalidated the statute based on intentional discrimination, its factual conclusions (and those of the district court, which the Fourth Circuit essentially adopted, *id.* at 214), offer a local appraisal that illustrate how facts on the ground should lead this Court to reject petitioners' invitation to narrow Section 2.

From 2005 to 2013, North Carolina allowed OOP voting—that is, voters could cast a provisional ballot if they attempted to vote in the incorrect precinct, and their votes would be counted for every contest in which the voter was eligible to vote. In 2005, after the North Carolina Supreme Court held that voters "must cast ballots on election day in their precincts of residence" (*James* v. *Bartlett*, 607 S.E.2d 638, 642-44 (N.C. 2005)), the state legislature passed clarifying legislation establishing that voters could vote in another precinct, in their county of registration, on Election Day. N.C. Gen. Stat. § 163-55. That 2005 statute explicitly mentioned the disparate reliance on OOP voting by Black voters. *McCrory*, 831 F.3d at 217. In the immediate aftermath of *Shelby County* in 2013, however, the state legislature sought to eliminate OOP voting in HB 589. *Amicus* North Carolina APRI filed a lawsuit immediately. The Fourth Circuit found the repeal of OOP voting invalid. *Id.* at 238.

A. OOP voting is necessary to safeguard minority voters in North Carolina.

OOP voting is critical in North Carolina because it corrects the unequal opportunity that Black voters—who bear socioeconomic scars from hundreds of

years of official discrimination—face in trying to participate in the political process. As the district court found in *McCrory*, Black voters disproportionately utilize OOP voting in comparison to White voters. 182 F. Supp. 3d 320, 405 (M.D.N.C. 2016).

Indeed, in North Carolina, the disparate use of OOP voting by Black voters (and the disproportionate disenfranchisement of those voters after its repeal) was so clear that the Fourth Circuit reversed the district court's legal conclusions *based* on the district court's factual findings. See *McCrory*, 831 F.3d at 238 (citing *McCrory*, 182 F. Supp. 3d at 489 (finding that the legislature requested a racial breakdown of provisional voting, including OOP voting, in deciding to eliminate OOP voting)).

The history of discrimination in North Carolina has resulted in many lasting socioeconomic disparities, including a lack of transportation, health disparities, and lower-paying and more restrictive work obligations, all of which prevent Black voters from voting in their precinct of registration. The Senate Factor analysis in *McCrory* highlighted three specific considerations that interacted with the lack of OOP voting to create unequal opportunity to participate in the political process: (1) poverty; (2) high residential mobility; and (3) the lack of transportation.

1. Poverty in North Carolina

Poverty is extremely high in North Carolina, and OOP voting helps prevent poverty from impeding Black voter participation. The record in *McCrory* demonstrated that Blacks, Native Americans, and Hispanics are disproportionately more likely to be poor than Whites. 182 F. Supp. 3d at 430; see also *id.* at 432 n.145. Moreover, the poor in North Carolina

have relatively high disability rates, and the poor who are non-Whites are more likely to be disabled. *Id.* at 431. The adverse effect on voting from non-White disability rates is exacerbated by the fact that 27 percent of Black people living in poverty do not have a vehicle available to them. *Ibid.*

Further, poverty, lack of transportation, and other socioeconomic disparities are obvious vestiges of *de jure* and *de facto* discrimination against Black voters. In North Carolina, these Senate Factors indisputably caused OOP voting to be critical in leveling the playing field for Black voters.

2. High residential mobility

The high residential mobility of Black voters is another, related impediment to participation in the political process. In *McCrory,* the district court found that from "2006 through 2012, unreported movers accounted for 25.4% of provisional ballots, while OOP voters accounted for 14.7% of provisional ballots." 182 F. Supp. 3d at 462 (internal footnote omitted). In 2012, people who were considered poor were almost twice as likely to have moved over the last year in North Carolina than the non-poor. *Id.* at 431. Further, non-Hispanic Whites resided in new residences at a lower percentage than non-Hispanic Blacks and Hispanics, at 13.6% and 18.5% respectively. *Ibid.* Members of minority groups who moved within the year were "significantly more likely" to be poor. *Ibid.*

Poverty leads to housing instability. Poor voters who must move often just to maintain a roof over their heads will frequently need to update their registrations and will have a more difficult time ascertaining their correct precinct.

3. Lack of transportation

Also, associated with poverty and high residential mobility is the fact that many Black North Carolinians do not have access to transportation. This impediment inherently limited Black voters' ability to commute to work, let alone travel to a polling site. As of 2014, 10.7% of North Carolina Blacks did not have access to a vehicle, whereas only 2.4% of Whites were so limited. *Id.* at 430.

This cannot be regarded as a matter of choice or "voter preference." The Fourth Circuit effectively debunked any such argument in *McCrory*:

> These *socioeconomic disparities* [such as having to move from year to year or lack of transportation] *establish that no mere 'preference' led African Americans to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration.* * * * Registration and voting tools may be a simple 'preference' for many [W]hite North Carolinians, but for many African Americans, they are a necessity.

McCrory, 831 F.3d at 233 (emphasis added). As of 2013, almost 12 percent of North Carolina's White (non-Hispanic) adults lived below the poverty line, while the poverty rate for Black North Carolinians was more than twice as high, at 27 percent. *McCrory*, 182 F. Supp. 3d at 430. OOP may sometimes be a preference for White voters, but the disproportionate number of Black voters living in poverty makes it a necessity.

B. Elimination of OOP voting caused disenfranchisement of minority voters in North Carolina.

In 2013, in enacting H.B. 589, the North Carolina legislature eliminated several important components of the State's robust voter engagement plan that had been set in motion over the prior approximately 15 years. The legislature had extensive data demonstrating that Black voters more often relied on OOP voting (and were more often disenfranchised when it was prohibited). *McCrory*, 831 F.3d at 217. It proceeded nonetheless to eliminate this important mechanism that evened the field of political participation, and many voters were predictably disenfranchised. These voters' stories make plain the way that the legacy of North Carolina's ugly racial discrimination, including severe socioeconomic disparities between Black and White voters, interacted with the repeal of OOP to result in disenfranchisement and unequal access to the political process.

1. Timothy and Yvonne Washington

In the case of Mr. Timothy and Mrs. Yvonne Washington, the combination of lack of transportation and physical disabilities led to them casting OOP ballots.

The Washingtons reside in Wayne County, North Carolina, and rely on public assistance which, in part, prevents them from being able to own a car or to have sufficient money for public transportation. Consequently, they either walk to places they need to go or rely on others' benevolence to transport them. Pretrial Disclosures at 12, *League of Women Voters of N.C.* v. *North Carolina*, 1:13-CV-660, (M.D.N.C. June 30, 2015), ECF 304-75 ("LWV"); see also LWV, ECF

304-76 at 14-15. Further, in addition to not having easy access to transportation, the Washingtons have physical disabilities that severely limit how far they can walk without excessive fatigue. *Id.* at 20.

In November 2014, the Washingtons voted on Election Day. They walked to vote at the closest polling site to their home, the Goldsboro Public Library, only to be told that they were at the wrong precinct and needed to vote at a precinct that was over twice the distance from their home. LWV, ECF 304-75 at 12-13, 44. Because of their inability to walk the extra distance to get to their correct precinct, they had to vote with a provisional ballot. Ultimately, their provisional votes did not count. *Id.* at 10-11.

The Washingtons' experience makes them living embodiments of the socioeconomic and health disparities suffered by Black voters as a result of the history of discrimination against them. Mrs. Washington explained that even after being informed of her correct precinct, she would not be able to vote there without accessible public transportation (which is notably lacking in Wayne County, North Carolina) or the ability to secure a safe ride from a friend or voter assistance group. LWV, ECF 304-76 at 26.

2. Michael Owens

Like the Washingtons, during the November 2014 election, Mr. Michael Owens, a resident of Robeson County, North Carolina, found his political participation adversely affected by a lack of transportation. He did not have access to a car because his vehicle had been repossessed after he faced financial challenges from job instability. He, too, was unable to vote at the precinct in which he was registered on Election Day. *McCrory*, 182 F. Supp. 3d at 481-83.

In the fall of 2014, Mr. Owens worked in Lumberton, North Carolina, during the week and returned home, to Shannon (which is on the other side of Robeson County) on the weekends. *Id.* at 482. On Election Day, Mr. Owens was far from his assigned precinct, but thought that, because he was registered in the county, he could vote anywhere in Robeson County—specifically, near his place of employment in Lumberton. *Id.* at 407. Mr. Owens had only one hour for lunch, the period in which he voted, and had to find transportation to the polling place. *Id.* at 482.

Mr. Owens could not have made it to Shannon and back to work in Lumberton on election day. *Id.* at 483. If he was late returning, he risked disciplinary action from his employer. Mr. Owens therefore decided to try to vote at a precinct close to where he worked. *Ibid.* He went to two different polling places in Lumberton, neither of which was the precinct in which he was registered, and ultimately he was not able to vote because he was not offered a provisional ballot. *Id.* at 482. Mr. Owen's lack of transportation and confusion about the voting process ultimately led to his disenfranchisement—which would not have been the case were OOP voting allowed.

3. Gwendolyn Farrington

Ms. Gwendolyn Farrington was also disenfranchised during the pendency of *McCrory*, when her November 2014 provisional ballot was disregarded. Like Mr. Owens, Ms. Farrington was not aware of the state legislature's 2013 changes that precluded her from casting an OOP ballot, especially as she had previously voted in the incorrect precinct (right county, wrong polling place) but her vote was counted, at least in part. LWV 304-29 at 11-12.

Ms. Farrington went to vote at a polling place closer to her workplace than to her assigned polling place because her work obligations precluded her from voting prior to 6 PM. She testified that she could not have picked up her children and made it to her assigned precinct in time. Ms. Farrington cast a provisional ballot that she was told, for the first time in November 2014, would not count. LWV 304-29 at 10. Ms. Farrington did not have the luxury of a job that allowed her more flexibility in voting, nor access to alternative transportation for her children.

4. Terrilin Cunningham

Ms. Terrilin Cunningham originally moved to North Carolina (Charlotte, in Mecklenburg County) in 2012 and successfully voted on a Sunday in the early voting period that year. LWV 304-17 at 25-26. Because she did not have a vehicle, her son-in-law had taken her to vote at a church near her home in 2012. *Id*. at 26. She was not aware that the state legislature eliminated OOP voting in 2013. Because Ms. Cunningham was unaware of these changes, she not only planned to vote at another precinct (one closer to her job), but also used social media to encourage others to vote anywhere in the county. LWV 304-17 at 7-8.

Ms. Cunningham expressed pride in voting and posted a picture of herself on her Facebook page after she voted, along with a narrative about the importance of voting, because she wanted to encourage others to follow suit. See *id*. at 6-8. She further explained that because she had voted at a location that was designated as a polling site (even though not her precinct of registration) in 2012, she understood that North Carolina law allowed her to vote at any precinct in her county of registration. *Id.* at 27-29. As she at-

tempted to vote in 2014, however, she was disenfranchised because the State eliminated the option for her to use OOP voting on Election Day.

* * * *

As each of these stories demonstrates, Section 2 is necessary to provide protection when an election scheme interacts with such socioeconomic conditions as poverty, disabilities, and lack of transportation—remnants of historical discrimination—to prevent Black voters from fully participating in the political process. Unfortunately, the policies and procedures that make Section 2 necessary are not ancient history in the South.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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