Nos. 19-1257 and 19-1258

In The
Supreme Court of the United States

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

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,

Respondents.

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

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit, non-partisan legal organization founded in 1940 under the leadership of Justice Thurgood Marshall. LDF's mission is to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other people of color. Because the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for over 80 years to combat threats to Black people's right to vote and political representation. LDF has been involved in many of the precedent-setting cases regarding racial discrimination in voting before this Court and other federal courts. *See, e.g.*, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399 (2006); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Smith v. Allwright*, 321 U.S. 649 (1944); *Greater Birmingham Ministries v.*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* certify that *Amicus* and their counsel authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amicus* or their counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

Sec'y of State for Ala., 966 F.3d 1202 (11th Cir. 2020); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Miss. State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *People First of Ala. v. Merrill*, __ F. Supp. 3d __, No. 2:20-cv-00619-AKK, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020); *Allen v. Waller Cty.*, 472 F. Supp. 3d 351 (S.D. Tex. 2020).

This case raises important issues about the application of Section 2 of the Voting Rights Act of 1965 ("the VRA"), 52 U.S.C. § 10301. For more than 55 years, the VRA has operated as one of the most successful pieces of federal civil rights legislation. Since this Court's *Shelby County* decision in 2013 rendered the VRA's Section 5 preclearance requirement unenforceable, however, states and local jurisdictions have unleashed a torrent of new voting rules that deny or burden the ability of Black people to vote and to participate equally in the political process. Section 2 is now the principal tool under the VRA to block and remedy these new discriminatory measures. Notwithstanding the VRA's historical successes, racial discrimination in voting still poses a unique threat to our democracy. LDF has a significant interest in meeting that threat through the continued enforcement of Section 2.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The historical and contemporary record of voting discrimination by federal, state, and local governments against Black people is long, persistent, and egregious. The Reconstruction Amendments' collective promise of equality for Black Americans—including the Fifteenth Amendment's guarantee in 1870 that the right of all citizens "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude," U.S. Const. am. XV, § 1—was blatantly obstructed for nearly a century after the Amendments' ratification. Post-Reconstruction, state and private actors subjected Black Americans to racial violence and flagrant discrimination in all areas of life, including education, employment, healthcare, housing, and transportation. States and municipalities then used the disadvantaged socio-economic status of Black people to create discriminatory voting policies, including literacy tests and poll taxes, whose very success was premised on the existence of racial discrimination in other aspects of social, economic, and political life. *See*, *e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 & nn.9–10 (1966) (the effectiveness of literacy tests at blocking Black Americans from voting resulted, in significant part, from the pervasiveness of racial discrimination in education).

Faced with this reality, heroic Black Americans and their allies organized and agitated to ensure that our country reckoned with the inherent conflict between its discriminatory actions and its democratic ideals. The Civil Rights Movement generally, and the

violent events of Bloody Sunday in Selma, Alabama, specifically, compelled Congress's enactment of the VRA. The purpose of the VRA was ambitious: to finally "banish the blight of racial discrimination in voting." *Katzenbach*, 383 U.S. at 308. The VRA sought to address electoral practices aimed at interfering with Black voters' ability to participate in the political process, including those voting laws that interacted with the historical and current socio-economic plight of Black citizens to deny or burden their ability to vote.

The VRA became the most effective piece of federal civil rights legislation in this country's history. *See Nw. Austin*, 557 U.S. at 198, 201 (the "historic accomplishments of the [VRA] are undeniable"). The VRA's approach to voting discrimination was comprehensive and carefully constructed to enforce the principles of the Fourteenth and Fifteenth Amendments to the Constitution. Through prophylactic and remedial measures, the VRA outlawed the most egregiously discriminatory voting tests and devices, including literacy and good character tests, *see* 52 U.S.C. § 10303(a)(1), that prevented Black people from registering to vote. The VRA also provided litigants with the tools to challenge any other new voting laws or policies that resulted in vote dilution or vote denial. The VRA's success derives from its prohibition on voting practices that tend to interact with the effects of racial discrimination in other areas of life to deny or abridge the right to vote.

Since its enactment, the VRA has deployed two primary means of combatting racial discrimination in voting: Section 2's general, nationwide ban on discriminatory voting laws and Section 5's limited-

jurisdiction preclearance requirement. Both Sections 2 and 5 were intended to reach not only voting practices that overtly limited voting opportunities for minority voters, but also more subtle laws that interact with social conditions to perpetrate discrimination.

In *Shelby County*, this Court rendered preclearance inoperative, thus weakening the statute and unleashing jurisdictions, including Arizona, to pass new voting rules that hinder voters of color's rights. *Shelby Cty.*, 570 U.S. at 530. The Court emphasized, however, that the *Shelby County* decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in [Section] 2." *Id.* at 557. "Section 2 is permanent, applies nationwide," and broadly "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.'" *Id.* at 536–37 (quoting 52 U.S.C. § 10301(a)).

Since *Shelby County*, plaintiffs have relied primarily on Section 2 to block and remedy new discriminatory measures. Although less effective than Section 5 in important ways, Section 2 broadly "prohibits all forms of voting discrimination." *Gingles*, 478 U.S. at 45 n.10. The plain statutory text prohibits "*any* 'standard, practice, or procedure' that '*results in* a denial *or abridgment*'" of the right to vote on account of race. *Shelby Cty.*, 570 U.S. at 537 (quoting 52 U.S.C. § 10301(a)) (emphasis added). In assessing the discriminatory result of a voting law or policy, Section 2 requires courts to consider the "totality of circumstances." 52 U.S.C. § 10301(a), (b). The statute neither enumerates nor confines the "totality of

circumstances" requirement. The inquiry is both broad and intensely fact-based, requiring courts to conduct a "searching practical evaluation of the past and present reality [with] a functional view of the political process." *Gingles*, 478 U.S. at 45. In conducting the totality of circumstances analysis, courts look to nine congressionally delineated factors (the "Senate Factors") drawn from the 1982 Senate Report, S. Rep. 97-417 at 28–29 ("Senate Report"). The *Gingles* Court recognized the Senate Report as the "the authoritative source for legislative intent" on the VRA. *See id*. at 43–46, n.7. But these factors are "neither comprehensive nor exclusive;" courts are not required to use any or all of them, or to find that most of them weigh for or against a finding of a Section 2 violation. *Id*. at 45. The analysis is meant to reveal the presence or absence of a causal link between the challenged practice's racially discriminatory impact and the "social and historical conditions" of the jurisdiction in which the practice operates. *Id*. at 47. The inquiry is intended to expansively capture facially race-neutral election laws that operate with past and present social conditions to deny or abridge the right to vote.

Section 2's text, history, and purpose directly undercut Petitioners' and their Amici's argument that the statute prohibits only voting laws that interact with racial discrimination, and the effects thereof, committed by the government defendant to cause significant disparities in access to the franchise. *See* State Pet. Br. at 24 (citing *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014)); *see also* United States Amicus Br. in Supp. of Pet'rs at 21–24 ("U.S. Br."); Ariz. Republican Party Pet. for Writ of Cert. at 29–30 ("ARP Br."). No doubt remedying the effects of state-

perpetrated discrimination is one important aim of Section 2 and the VRA. Many of the Senate Factors are highly probative of state-sponsored discrimination. But that is not a limitation contemplated by the text of Section 2. Rather, the "textual command" of Section 2 is that the presence or absence of a violation be assessed "based on the totality of circumstances." *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994) (citing 52 U.S.C. § 10303(b)).

For decades, this Court has also accepted that actions of the government defendant—either in passing and implementing the challenged voting rule or in historical acts of discrimination—is not to be considered in a vacuum and is not itself dispositive of the Section 2 inquiry. *See*, *e.g.*, *LULAC*, 548 U.S. at 438–40 (finding that a voting scheme violated Section 2 in the context of Latino voters' increasing political activity and electoral cohesion and "the 'political, social, and economic legacy of past discrimination'" against "Latinos in Texas'") (citations omitted); *Rogers v. Lodge*, 458 U.S. 613, 624–25 (1982) (assessing discrimination by state and local actors *and* private political parties in a Section 2 and constitutional challenge to a county's election system). For example, in *Gingles*, this Court affirmed a finding that "racial discrimination in public *and private* facility uses, education, employment, housing and health care," including "public *and private* employment" disparities, had hindered Black voters' "ability to participate effectively in the political process." *Gingles v. Edmisten*, 590 F. Supp. 345, 361–62 (E.D. N.C. 1984) (three-judge court) (emphasis added), *aff'd in relevant part at Gingles*, 478 U.S. at 38.

A holding limiting the Section 2 inquiry to the discrimination committed or sanctioned by the government defendant would flout Section 2's plain text, depart from settled precedent, and severely curtail Congress's intended broad application of Section 2. It would also fundamentally shift the focus of Section 2 from eliminating discrimination in voting to parsing which actor played what role in contributing to it. The line between state-sponsored, local, or private discrimination is often hard to delineate. Unravelling who perpetrated what discrimination is a daunting and burdensome—if not impossible—task. *Cf. Missouri v. Jenkins*, 491 U.S. 274, 276 (1989) (describing the costly, protractive litigation necessary to determine whether federal, state, or local officials were responsible for racial discrimination in Kansas City schools). By contrast, adhering to decades of precedent in which state and private acts of discrimination are considered will not create new liability, threaten existing election laws, or guarantee Section 2 plaintiffs' widespread victory across jurisdictions, as Petitioners argue. The totality of circumstances analysis is a limitation on this kind of liability because it requires courts to conduct an extremely local and fact-intensive inquiry into the specific conditions in the jurisdiction at issue. This time-tested mode of inquiry necessarily limits the reach of discrete Section 2 challenges and reinforces the VRA's causation requirement by examining the local context in which specific voting laws operate. This Court should affirm.

ARGUMENT

Section 2 of the VRA is an essential tool in the fight against racial discrimination in voting. Section 2's text prohibits all voting practices and laws that, under the "totality of circumstances," result in a denial or abridgment of the right to vote. 52 U.S.C. § 10301(a), (b). The totality of circumstances analysis is critical, as it reveals the presence or absence of a causal link between the challenged practice's racially discriminatory impact and the social and historical conditions of the jurisdiction in which the practice operates. This inquiry captures those facially race-neutral laws that may interact with social and political conditions to abridge the right to vote based on race.

I. Since *Shelby County*, Section 2 Is the Primary Provision Used to Challenge Election Laws that Have a Discriminatory Result.

The VRA "had a dramatic effect in increasing the participation of black citizens in the electoral process, both as voters and elected officials." *Briscoe v. Bell*, 432 U.S. 404, 405 (1977); *see also Shelby Cty.*, 570 U.S. at 547–48 (showing that Black voter registration in Alabama climbed from 19 percent to 73 percent between 1965 and 2004). Its passage represented a significant, though delayed, step forward in the long-fought and ongoing struggle to achieve racial equality in access to the ballot box and political representation. Section 2, along with Section 5, have played an integral role in eliminating and deterring the most blatant forms of voting discrimination. Today, Section 2 is the leading tool used to combat new and evolving

efforts to leverage historical, social, and political conditions to suppress Black voting power.

a. The VRA's Passage Came After Decades of States Implementing Facially Race-Neutral Election Laws That Interacted with the Socio-Economic Conditions of Black People to Deny Their Right to Vote.

Following the end of Reconstruction, Black Americans experienced the gamut of harrowing vote suppression tactics, many of which had as their lynchpin the social stratification of that ignominious period—with recently freed Black citizens heavily reliant on their white counterparts for employment, with limited access to educational opportunities, and subject to wanton discrimination and violence. After 1890, Southern state legislatures "resort[ed] to facially neutral tests that took advantage of differing social conditions" between Black and white voters. *Underwood v. Hunter*, 730 F.2d 614, 619 & n.10 (11th Cir. 1984) (citation omitted). These facially race-neutral tests included property qualifications, literacy tests, residency and employment requirements, and poll taxes. *Id.* Each of these devices sought to use the effects of public and private discrimination in education, employment, and housing to make it more difficult for Black people to vote.

In the 1890s, for example, most Southern States enacted literacy tests as preconditions to registering to vote or voting. Southern legislators knew that, at that time, "more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult

whites were unable to read." *Katzenbach*, 383 U.S. at 310–11. This disparity was largely because it was illegal to teach enslaved Black people to read. *Id*. at 311 n.10. Even after Emancipation, States severely underfunded and racially segregated schools, with schools attended by Black people often the targets of intense violence by private and state actors. *See* Arnold Rose, *The Negro in America* 117–118 (Harper, 1948) (describing Southern, white-controlled school authorities' strategies for underfunding schools attended by Black students to maintain white dominance). Thus, while literacy tests and similar rules were facially race-neutral, they would interact with other public and private discrimination to prevent Black people from voting.

b. Section 2's Broad Proscription of Discriminatory Voting Laws Has Become More Necessary Since This Court's Decision in *Shelby County*.

In 1965, Congress passed the VRA "not only" to correct this "active history of discrimination, the denying of [Black people] the right to register and to vote, but also to deal with the accumulation of discrimination." Senate Report, at 5. Congress crafted the VRA to comprehensively address voting discrimination and enforce the Reconstruction Amendments; through prophylactic and remedial measures, the VRA outlawed the most egregiously discriminatory voting tests and devices, including literacy and good character tests. 52 U.S.C. § 10303(a)(1). But the Act's primary provisions—Sections 2 and 5—were two of the most important "weapons in the Federal Government's formidable

arsenal." *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 477 (1997). Each one targeted voting schemes that interacted with historical and ongoing discrimination to impede Black people from voting.

From 1965 until 2013, Section 5 required jurisdictions with the most egregious histories of discrimination to satisfy a preclearance process. *See* 52 U.S.C. § 10304(a). Under that process, those jurisdictions were required to obtain federal approval before implementing any potentially discriminatory voting-related changes. 52 U.S.C. § 10304(a), (b). "The specific purpose of § 5 was to prevent these jurisdictions from continuing the pervasive practice of adopting new voting procedures which *perpetuated existing discrimination*." *City of Lockhart v. United States*, 460 U.S. 125, 139 (1983) (Marshall, J., concurring in part and dissenting in part) (emphasis added). And "promot[ing] the attainment of voting equality by preventing the adoption of new voting procedures which perpetuate past discrimination" remained a core aim of Section 5 each time Congress reenacted the provision. *Id.* at 140.[2] After this Court

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[2] As originally enacted, the coverage provision asked whether, on November 1, 1964, the state or political subdivision maintained a "test or device" and whether less than 50 percent of the voting age population were registered to vote or had voted in the 1964 presidential election. The original covered jurisdictions included States within the Deep South and counties in Arizona and several other states. *Shelby*, 570 U.S. at 537. Section 4(b) was subsequently reauthorized in 1970, 1975, 1982, and 2006. In 1975, the entire state of Arizona came within Section 5's preclearance requirement because the State had employed English-only elections and had less than 50 percent voter registration or turnout as of 1972. *Id.*

found Section 4 unconstitutional in *Shelby County*, Section 5 became unenforceable until Congress enacts a new coverage provision to identify the covered jurisdictions.

But Section 2's "permanent, nationwide ban on racial discrimination in voting" was in "no way" affected by the *Shelby County* decision. 570 U.S. at 537. Section 2 bars any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement" of the right to vote on account of race, color or language minority status. 52 U.S.C. § 10301(a). Similar to Section 5's purpose, Section 2 was an "attempt to do something about accumulated wrongs and the continuance of the wrongs." Senate Report, at 5. Although much of the case law around Section 2 concerns its application in vote-dilution claims because of the effectiveness of Section 5 in blocking vote-denial schemes until *Shelby County*, Section 2's text has long encompassed vote-denial claims where, as here, a state employs a "standard, practice, or procedure" that results in the denial or abridgement of the right to vote based on race. 52 U.S.C. § 10301(a); *Chisom*, 501 U.S. at 398 ("The results test mandated by the 1982 amendment is applicable to all claims arising under § 2."). Section 2 encompasses "direct, over[t] impediments to the right to vote [and] more sophisticated devices." *DeGrandy*, 512 U.S. at 1018 (citation omitted).

Since 1965, courts have entertained vote-denial claims regarding a broad range of practices, including inequalities in access to voter registration, *League of Women Voters of N.C. v. North Carolina* ("*LWV*"), 769

F.3d 224 (4th Cir. 2014); *Operation PUSH*, 932 F.2d at 408; changes to early voting and polling locations, *Allen v. Waller Cty.*, 472 F. Supp. 3d 351 (S.D. Tex. 2020); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 973 (D. Nev. 2016); *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); voter purges, *Toney v. White*, 488 F.2d 310 (5th Cir.1973); *Allen v. City of Evergreen*, No. 13-0107, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014); property qualifications, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997); *Murray v. Kaple*, 66 F. Supp. 2d 745 (D.S.C. 1999); English-literacy requirements, *P.R. Org. for Political Action v. Kusper,* 490 F.2d 575 (7th Cir.1973); *United States v. Berks Cty.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003); *Hernandez v. Woodard*, 714 F. Supp. 963 (N.D. Ill. 1989); notary requirements, *People First*, 2020 WL 5814455, at *68; *Goodloe v. Madison Cty. Bd. of Elect. Comm'rs*, 610 F. Supp. 240 (S.D. Miss. 1985); and practices related to election workers, *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988). In assessing a challenged practice, courts often consider whether the alleged voting discrimination results from its interaction with public and private socio-economic discrimination. *See*, *e.g.*, *LWV*, 769 F.3d at 245–46 (finding that the racial impact of eliminating same-day registration was "clearly linked" to socioeconomic discrimination); *Berks Cty.*, 277 F. Supp. 2d at 581 (finding that English-only elections resulted in "substantial barriers" for Spanish-speaking voters who "suffer from significant socioeconomic inequality, which is

ordinarily linked to lower literacy rates, [and] unequal educational opportunities").

Prior to 2013, Section 5 was largely effective at "tamping down vote denial in covered jurisdictions." *LWV,* 769 F.3d at 239. Since *Shelby County,* however, voters of color have confronted new voting rules that make it harder for them to vote. No longer obligated to satisfy preclearance, the formerly covered jurisdictions immediately began enforcing voting rules that would have been or were blocked by Section 5 and which Section 2 subsequently has been effective at curbing.

For example, on June 25, 2013, the *same day* as the *Shelby County* decision, Texas began enforcing its voter photo ID law, which was previously blocked under Section 5. *Veasey*, 830 F.3d at 227 & n.7. Even before the photo ID law was passed, a federal court warned Texas that its law would "have a disparate impact on minorities and would likely fail the . . . preclearance requirement." *Id.* at 239. In 2016, an en banc court of the Fifth Circuit affirmed that Texas's strict photo ID law had discriminatory results in violation of Section 2. *Id.* at 272. Similarly, a court found that the sweeping new voting restrictions that North Carolina began pursuing a day after *Shelby County* had intentionally targeted Black voters with "surgical precision" in violation of Section 2. *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214–16 (4th Cir. 2016); *see also Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681–82, 728–29 (S.D. Tex. 2017) (enjoining an intentionally discriminatory change in the method of electing a city council, which Section 5 had blocked, but was pursued a few days

after the *Shelby County* ruling, under Section 2 and the Constitution).

Here, too, mere days before the *Shelby County* decision and anticipating that its preclearance obligations would be removed, Arizona began pursuing the now Section 2-challenged out-of-precinct rule—which Arizona previously withdrew from a preclearance request after the Department of Justice learned that the policy appeared to target predominantly Latino areas. *See Dem. Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1008 (9th Cir. 2020) (en banc).

Without the preclearance requirement, Section 2 is the primary tool for combating racial discrimination in access to the political process. Section 2's ability to identify discriminatory voting laws continues to require an assessment of the full local context in which those laws operate, including discriminatory acts of government defendants and other actors.

II. Section 2's Text, History, and Purpose Prohibit Voting Measures That Interact with Social or Historical Discrimination Outside the Electoral Sphere to Burden Black Voters' Access to the Franchise.

a. This Court Has Interpreted the Plain Text of Section 2 to Broadly Prohibit Election Laws That Interact with Social and Historical Conditions to Deny the Right to Vote.

In 1982, Congress amended Section 2 to "adopt[] a results test," *Chisom*, 501 U.S. at 395; the statute now proscribes any "voting qualification or prerequisite to

voting or standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a).[3] Under subsection (b), an unlawful result is established where, under the "totality of circumstances," it is "shown that the political processes leading to nomination or election . . . are not equally open . . . in that . . . members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). The key aim of Section 2 is to determine "whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44. To answer that question, the statute mandates that courts consider the "totality of circumstances" to evaluate the openness of the voting process to minority voters. *Id.* § 10301(b).

This totality of circumstances inquiry is far-reaching and "springs from the demonstrated ingenuity of state and local governments in hobbling

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[3] Prior to 1982, this statute was interpreted by this Court in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), to require a showing of discriminatory intent. The 1982 amendments explicitly added the results test. Thus, although proof of intent is not required under Section 2, plaintiffs can still sustain a Section 2 challenge by proving racially discriminatory intent. *See Chisom*, 501 U.S. at 394 n.21 (stating that to establish a Section 2 violation, "Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process").

minority voting power." *DeGrandy*, 512 U.S. at 1018. States have often capitalized on Black voters' diminished economic standing to deny them the right to vote through property requirements and poll taxes. *Id*. Section 2 thus "covers *every* application of a qualification, standard, practice, or procedure that results in a denial or abridgment of 'the right' to vote." *Chisom*, 501 U.S. at 397 (emphasis added).

"The essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Gingles*, 478 U.S. at 47. This Court has thus instructed that lower courts should conduct "a searching practical evaluation of the past and present reality" within the jurisdiction to determine whether an electoral practice results in a discriminatory denial or abridgment of the right to vote. *Id*. at 45.

In light of Section 2's broad application to voting laws that result in minority voters "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and this Court's instruction that Section 2 claims are intended to ascertain how an election law interacts with social and historical conditions to cause a discriminatory result, most circuits have devised a two-part framework for Section 2 vote-denial claims. *See Veasey*, 830 F.3d at 273. Under this framework, a plaintiff must show that: (1) the challenged policy imposes a discriminatory burden on people of color, meaning that they "have less opportunity than other members of the electorate to participate in the political process and to elect

representatives of their choice," 52 U.S.C. § 10301(b); and (2) that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Gingles*, 478 U.S. at 47. These courts have found the following nine objective factors, outlined in the Senate Report, useful in determining whether there exists a sufficient causal link between the discriminatory burden imposed and the social and historical conditions produced by discrimination:

1. The history of official voting-related discrimination in the State or political subdivision;

2. The extent to which voting in the elections of the State or political subdivision is racially polarized;

3. The extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;

4. The exclusion of members of the minority group from the candidate slating processes;

5. The extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;

6. The use of overt or subtle racial appeals in political campaigns;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction;

8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

9. Whether the policy underlying the State or political subdivision's use of the challenged voting practice is tenuous.

Id. at 44–45. *See*, *e.g., Veasey*, 830 F.3d at 244; *LWV*, 769 F.3d at 240; *Mich. State A. Philip Randolph Inst. v. Johnson* ("*Johnson*"), 833 F.3d 656, 667 (6th Cir. 2016); *Gonzalez v. Arizona*, 677 F.3d 383, 405–06 (9th Cir. 2012) (en banc); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197–98 (11th Cir 1999). The Senate Factors are "useful in examining both elements of the two-part test, especially the causal linkage between disparate impacts and conditions of discrimination." *Veasey*, 830 F.3d at 245 n.34 (citing *LWV*, 769 F.3d at 240, 245). These factors are non-exhaustive tools for using the Section 2 framework to ensure "there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination." *Veasey*, 830 F.3d at 245.

Although Section 2 does not require intentional discrimination by state actors, many of the Senate Factors are probative of such discrimination. Indeed, the Senate Factors are derived from those circumstances that this Court has found relevant to identifying unconstitutional discrimination. *See White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*,

485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub. nom. on other grounds East Carroll Par. Sch. Board v. Marshall*, 424 U.S. 636 (1976).

This, in part, reflects the fact that there is rarely a clean line between "official" and "private" discrimination that interacts with a specific voting practice to burden access to the franchise based on race. In the Jim Crow-Era, for example, only widespread private discrimination in housing and employment could ensure the effectiveness of "gainful employment or property" requirements. *Underwood*, 730 F. 2d at 619 n.10; *see also Rogers*, 458 U.S. at 625 (noting a property requirement's racially discriminatory impact).

b. Section 2 Examines All Circumstances Bearing on the Issue of the Causal Link Between Social and Historical Conditions and a Challenged Voting Practice's Discriminatory Result.

Section 2's flexible "totality of circumstances" standard allows the consideration of the Senate Factors individually, applying only those that are relevant to a particular case. *Veasey*, 830 F.3d at 256–65 (affirming a Section 2 discriminatory results finding based on this Court's analysis of four of the relevant Senate Factors); *LWV*, 769 F.3d at 245–47 (applying three of the relevant Senate Factors to identify a Section 2 violation). Any number of the factors or other non-enumerated circumstances might contribute to the existence of a Section 2 vote-denial

claim. "[N]o one factor has determinative weight." *Veasey*, 830 F.3d at 246 (citing *Gingles*, 478 U.S. at 45).

Petitioners argue that the Senate Factors have no place in the vote-denial context and are inconsistent with the causal nexus requirement under Section 2. State Pet. Br. at 23; *see also id*. at 16, 32–33, 40, 43.[4] This is because, Petitioners and certain Amici argue, the Senate Factors are only appropriate in the vote-dilution context, and because Section 2's totality of circumstances inquiry is about determining whether "the substantial disparate impact arises from the state's actions rather than those of other persons." *Id*. at 24; *see id*. ("Section 2's robust causality requirement . . . thus protects defendants from being held liable for racial disparities they did not create."). *See also* U.S. Br. at 21–24; ARP Br. at 29–30. Petitioners are wrong for three main reasons.

First, to the extent Petitioners' argument is premised on differences between vote-dilution and vote-denial claims, their argument is foreclosed by the text of Section 2, which does not distinguish between claims based on denial versus dilution. *See generally* 52 U.S.C. § 10301; *see also Gingles*, 478 U.S. at 45, n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution."). So, while some Senate Factors may be more relevant in dilution cases, *id*. at 48 n.15, nothing in the text of the statute would permit dilution

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[4] The United States as amicus does not appear to support this argument. *See* U.S. Br. at 31 (arguing that "[t]o the extent any of the Senate Factors bear on the proper Section 2 inquiry in a particular case, courts may consider them among the 'totality of circumstances', 52 U.S.C. 10301(b)").

cases to have one causation standard that considers social and historical discrimination and its interaction with a voting practice and require a different standard in denial cases. The basic "totality of circumstances" standard is the same because the text, on its face, broadly encompasses both types of claims. 52 U.S.C. § 10301(b).

Second, Section 2 is not limited to remedying only the discriminatory results of voting practices that interact with official discrimination perpetrated by government defendants. Surely, that is one goal. Some of the Senate Factors focus on official acts of discrimination. *See*, *e.g.*, *Gingles*, 478 U.S. at 36–37 (noting that the first factor probes the "history of *official* discrimination in the state or political subdivision") (emphasis added).

But other factors do not. Indeed, "the literal language of the fifth Senate Factor does not even support the reading that only discrimination by [the governmental defendant] may be considered; the limiting language describes the people discriminated against, not the discriminator." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988); *see also Gingles*, 478 U.S. at 69 (observing that the fifth Senate Factor considers "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health"). And "under the results standard of [S]ection 2, pervasive private discrimination should be considered, because such discrimination can contribute to the inability of blacks to assert their political influence and to participate equally in public life." *United States v. Marengo Cty.*

Comm'n, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984) (Wisdom, J.); *see also* Janai Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C.L. Rev. 579, 596 (2013).

Importantly, this Court has held that the enumerated Senate Factors are "neither comprehensive nor exclusive." *Gingles* 478 U.S. at 45. "Thus, even if the first factor does embrace only discrimination committed by [the government defendant], that does not imply that the district court may not consider any relevant history or effects of discrimination committed by others." *Gomez*, 863 F.2d at 1418. Courts often consider private and public discrimination perpetrated by those other than the government defendant in assessing a challenged law's discriminatory result. *See, e.g.*, *Johnson*, 833 F.3d at 668–69. "[T]he source of past pervasive discrimination does not change its impact on present-day [minority] access." *McIntosh Cty. Branch of NAACP v. City of Darien* ("*McIntosh NAACP*"), 605 F.2d 753, 757 & n.5 (5th Cir. 1980).

This reading of Section 2 is also consistent with this Court's interpretation of the VRA in the literacy test cases. In *Gaston County v. United States*, the Court upheld a literacy test ban in Gaston County because discrimination in education had resulted in Black people being less likely to pass the test. 395 U.S. 285, 297 (1969). The unanimous Court did not require a proof that the county was the sole perpetrator of discrimination in education or the only cause of the relevant racial disparities in literacy. Rather, the Court saw "no legal significance" in the fact that some Black residents had likely been educated "in other

counties or States also maintaining segregated and unequal school systems." *Id.* at 293 n.9; *see also Oregon v. Mitchell,* 400 U.S. 112, 118 (1970); *see also id.* at 233–35 (1970) (Op. of Brennan, White, Marshall, JJ., concurring in part) (unanimously rejecting Arizona's argument that, because it purportedly had not engaged in discrimination in education, Arizona should be exempt from the VRA's nationwide literacy test ban).

Petitioner's more "restrictive reading places too much emphasis on the plaintiff's ability to prove intentional discrimination." *Gomez*, 863 F.2d at 1418; *see also McIntosh NAACP*, 605 F.2d at 759 n.5 (noting that distinctions between discrimination by a governmental defendant versus others is only relevant when inferring intent).

The text of Section 2 does not impose any state-action limitation. *See generally* 52 U.S.C. § 10301. *But see* State Pet. Br. at 24 (arguing that Section 2's application to "any State or political subdivision" imposes an "express textual limit" on the totality of circumstances analysis). Section 2(b)'s reference to the "State or political subdivision" is merely a jurisdictional limitation and does not alter the scope of Section 2's analysis. *Cf. Morse v. Republican Party of Va.*, 517 U.S. 186, 220 (1996) (concluding that the similar use of the phrase "State or political subdivision" in Section 5 of the VRA has a "territorial reach that embrace[s] actions that are not formally those of the state," including actions of political parties).

Nothing in the text of Section 2 or the Senate Report suggests that Section 2's aim is to ferret out the

effects of discrimination perpetrated by government defendants versus others on minority voters' ability to vote. It would be improper and illogical to extrapolate from that language a limitation on evidence of discrimination that includes only state action, especially when the Senate Factors on which courts have relied for decades expressly include actions that may involve non-state actors. Thus, the statute imposes no state-action limitation. Under the text's "totality of circumstances" analysis, "the actions of the members of the voting community as a whole, not just the conduct of officials responsible for designing or maintaining the electoral structure at issue, are relevant to inquiries into discrimination in the voting process." *Nipper v. Smith*, 39 F.3d 1494, 1518 (11th Cir. 1994) (en banc) (Tjoflat, C.J.).

Third, in vote denial cases, the analysis of the "totality of circumstances," 52 U.S.C. 10301(b), through the Senate Factors reflects "Congress's intent to provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process." *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1166 (citation omitted). Section 2's analysis of "whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 45 (citation omitted). This inquiry compels a "fact intensive" consideration of all circumstances bearing on how a challenged voting practice might impact minority voter participation. *Id*. at 46. "[T]hese factors are simply guideposts in a broad-based inquiry in which district judges are expected to roll up their

sleeves and examine *all* aspects of the past and present political environment in which the challenged electoral practice is used." *Goosby v. Hempstead*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997) (emphasis added).

In vote-denial cases, the first, fifth, and ninth Senate Factors are "particularly relevant to a vote denial claim in that they specifically focus on how historical or current patterns of discrimination" interact with challenged law. *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 555 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1 2014); *see also Hobbs*, 948 F.3d at 1014 (en banc) (citation omitted).

Courts often apply the first and fifth factors to find that the effects of past and ongoing discrimination in voting, education, employment, and other areas of life interact with the challenged provision to hinder the ability of voters of color to participate in the political process. *See*, *e.g.*, *Veasey*, 830 F.3d at 257–61 (finding that a photo ID law did "not disproportionately impact African-Americans and Hispanics by mere chance. Rather, it does so by its interaction with the vestiges of past and current racial discrimination"); *Johnson*, 833 F.3d at 668–69 (accepting that a straight ticket voting ban could interact with "racist policies such as redlining and housing discrimination" to cause racial inequalities in voter wait times); *Sanchez*, 214 F. Supp. 3d at 973 (finding that Native Americans had "greater difficulty" reaching polling places because of "socioeconomic disparities limiting the ability to travel" caused by "discrimination and its lingering effects"); *Spirit Lake Tribe*, 2010 WL 4226614, at *3 (finding that "pervasive discrimination" against

Native Americans contributed to "entrenched problems of poverty, alcoholism, illiteracy, and homelessness" that made it harder for them to get to distant voting locations).

Taken together, the Senate Factors provide a familiar means of establishing the requisite causal connection between past discrimination and the challenged voting rule. Petitioners' interpretation of Section 2's causation inquiry would nearly eviscerate Section 2's application to vote denial claims, leaving rampant voter suppression efforts unchecked and beyond court review.

c. An Expansive Totality of the Circumstances Analysis Does Not Threaten States' Election-Administration Autonomy.

Recognizing a strict state-action limitation would be inconsistent with the plain text of Section 2, which on its face contains no such limitation. *See* 52 U.S.C. § 10301. It would depart from this Court's settled precedent, which has consistently interpreted Section 2 to broadly proscribe voting laws that interact with all "social and historical conditions" to cause unequal voting opportunities for Black people. *Gingles*, 478 U.S. at 47. It would severely curtail Congress's expansive purpose of eliminating discrimination in voting and contravene its directive to conduct a "searching practical evaluation of the past and present reality" to determine whether minority voters have an equal opportunity to vote. *See id*. at 45 (quoting Senate Report, at 30). Most importantly, it would task district courts with unravelling the interconnected web of discrimination perpetrated by state and local actors,

an unduly burdensome task that fundamentally shifts the focus of Section 2 from eliminating racial discrimination in voting to parsing which actor played what role in contributing to it. *Cf. Jenkins*, 491 U.S. at 276 (describing the costly, protractive litigation necessary to determine whether federal, state, or local officials were responsible for racial segregation in Kansas City schools).

Contrary to Petitioners' arguments, the searching totality of circumstances analysis that Section 2 requires does not mean that any bare statistical disparity in voting opportunities can sustain a Section 2 challenge, or that the totality of circumstances analysis would render unlawful all voting policies and procedures that result in some disparities in voting. *See* Pet. Br. 32, 35. Section 2's "results" test is not an easy test for plaintiffs to satisfy. *See* Senate Report, at 31.

Petitioners speculate that, if this Court affirms the Section 2 violation, then similar election laws across the country will also fall in droves. This is false. "[E]lectoral devices . . . may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of circumstances, the devices result in unequal access to the electoral process." *Gingles*, 478 U.S. at 46. That is, in each challenge to an election rule, plaintiffs must successfully prove that, under the totality of circumstances, the challenged rule violates Section 2. No two states or jurisdictions have identical social and historical backgrounds, demographics, and electoral contexts. Thus, even if a particular voting rule violates Section 2 in one state, it might be upheld in another. *See LWV,* 769 F.3d at 243–44 (explaining

that, given the "intensely local" review, a finding that a rule violated Section 2 in one State would not "throw other states' election laws into turmoil").

History confirms this truth. For example, despite some success in challenging voter ID laws in Texas and North Carolina, *Veasey*, 830 F.3d at 272; *McCrory*, 831 F.3d at 241–42, plaintiffs have failed in Section 2 challenges to voter ID laws in multiple other states. *See*, *e.g.*, *Greater Birmingham Ministries*, 966 F.3d 1202 (rejecting plaintiffs' Section 2 challenge to Alabama's voter ID law); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (upholding Virginia's photo ID law); *Frank*, 768 F.3d 744 (concluding that Wisconsin's photo ID law did not violate Section 2); *Gonzalez*, 677 F.3d at 407. To suggest that continuing to follow decades of precedent will result in a deluge of Section 2 victories concerning specific voting practices across jurisdictions is disingenuous and ahistorical.

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As this Court recently reminded, "voting discrimination still exists; no one doubts that." *Shelby Cty.*, 570 U.S. at 536. Black Americans know it best, having been subjected to ever-evolving forms of voting discrimination (i.e., old poison in new bottles) since first securing the right to vote. Section 2 remains one of the few available and effective tools that Black voters have to address racial discrimination in voting in the electoral arena. It is imperative that this Court continue to construe Section 2 expansively, as Congress intended. Only that way can the VRA's original purpose of ridding the political process of racial discrimination be fulfilled.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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January 20, 2021