No. 19-1257

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.

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

Brief of the Public Interest Legal Foundation and Former Justice Department Civil Rights Division Officials as *Amici Curiae* in Support of Petitioners

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Table of Contents

Table of Authorities

Cases

Constitutions and Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae have a significant and long-standing interest in this matter. The Public Interest Legal Foundation ("Foundation") is a 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving the constitutional balance between states and the federal government regarding election administration procedures. The Foundation has sought to advance the public's interest in balancing state control over elections with Congress's constitutional authority to protect the public from racial discrimination in voting. This is best done by ensuring that the Voting Rights Act and other federal election laws are preserved and followed as the drafters intended. Specifically, the Foundation has filed *amicus* briefs in cases across the country to fight against the growing effort to misapply Section 2 of the Voting Rights Act.

The other signatories are each former officials with the Department of Justice who have spent their careers enforcing the Voting Rights Act.

Thomas E. Wheeler, II served as an Assistant Attorney General in the U.S. Department of Justice's Civil Rights Division. Bradley Schlozman was Acting Assistant Attorney General for Civil Rights and Principal Deputy Assistant Attorney General in the Civil

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Each party provided a blanket consent to the filing of *amicus curiae* briefs.

Rights Division. Roger Clegg was Deputy Assistant Attorney General in the Civil Rights Division. Robert "Bob" N. Driscoll served as a Deputy Assistant Attorney General and Chief of Staff in the U.S. Department of Justice's Civil Rights Division. Hans A. von Spakovsky served as the career Counsel to the Assistant Attorney General for Civil Rights.

Each *amici* has a strong dedication to and interest in preserving the proper Constitutional arrangement between the states and the federal government as it relates to administration of elections. Their significant experience enforcing the Voting Rights Act provides the Court with unique and considerable help.

INTRODUCTION

This case presents the opportunity to correct an increasing disregard of the requirement of Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, that there be some causal connection between a state election practice or procedure and actual denial or dilution of a vote on account of race. The decision below disregards the causality requirement and was instead based on an impermissible element—disparate impacts. Allowing disparate racial impacts as an element giving rise to a Section 2 violation is not only contrary to this Court's longstanding requirement that a practice or procedure must have some causal connection to actual denial or dilution, it also intrudes into the federalist presumption where states have power to run their own elections. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, 570 U.S. 529, 543 (2013) (internal quotation marks

omitted). "States retain broad autonomy in structuring their governments and pursuing legislative objectives." *Id.* The challenge here to Arizona's election laws, like challenges in other circuits, did not rest on traditional theories of liability under Section 2 and therefore erodes the Constitutional arrangement of power between states and the federal government.

SUMMARY OF ARGUMENT

The Court should reverse the decision below because the Ninth Circuit Court of Appeals applied an analysis that conflicts with this Court's causality requirements of a Section 2 claim articulated in *Thornburg v. Gingles*, 478 U.S. 30, 44-46 (1986). Causality, namely the notion that a practice or procedure is under the totality of the circumstances responsible for a denial or dilution of the vote on account of race, is constitutionally essential for Section 2's intrusion into state powers. Without genuine causality, and certainly by replacing causality with a disparate impacts element, Section 2 becomes an impermissible intrusion into the federalist arrangement. *See Shelby County*, 570 U.S. at 543 ("[T]he federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (internal citations omitted).

The Ninth Circuit's opinion is the latest example of a misapplication of Section 2 in a vote dilution or denial case. Other circuits have also misapplied Section 2 and may continue to do so absent guidance from this Court.

ARGUMENT

I. A Section 2 Analysis Requires a Causal Connection Between the Challenged Practice or Procedure and Actual Vote Dilution or Denial on Account of Race.

Section 2(b) provides that a violation has occurred if, "based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation" by a class based on race or color "in that its members 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). This Court established a framework for analyzing a Section 2 "results" cause of action challenging at-large elections in *Thornburg v. Gingles*. 478 U.S. at 44-46. In the absence of a different standard, the general *Gingles* framework has been used to analyze Section 2 cases outside of the legislative redistricting context as well, albeit with some adjustments for the particular challenged practice or procedure. *See e.g., U.S. v. Brown*, 494 F. Supp.2d 440, 446-48 (S.D. Miss. 2007).

According to *Gingles*, to establish a Section 2 claim, a plaintiff must prove (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the group "is politically cohesive"; and (3) that a majority's bloc voting usually defeats the minority's preferred candidate. 478 U.S. at 50-51. Moreover, even if those *Gingles* preconditions are satisfied, a plaintiff must show that based on the totality of the circumstances, the challenged procedure results in a denial or dilution of the vote on account of

race. *Id.* at 44-45 ("The Senate Report specifies factors which typically may be relevant to a § 2 claim… The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive.")

The three *Gingles* preconditions are elements that a plaintiff must prove to establish a causal connection between the challenged practice or procedure and actual vote dilution or denial on account of race under Section 2, as amended. As to the first precondition, the Court stated: "If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates." *Id.* at 50. As to the second precondition, this Court stated: "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests." *Id.* at 51. And as to the third precondition, this Court inferred that the actual recurring defeat of a minority candidate demonstrates an impediment. *Id.* The emphasis on causality and tangible results contained in the third *Gingles* precondition is core to a Section 2 claim. For a federal court to intrude into a state's constitutional prerogative to run their own elections, the challenged law must, in reality, result in unequal access to participation on account of race, or, concrete barriers to full participation. Otherwise, Section 2's federal intrusion would strain the federalist structure in the Constitution.

The Ninth Circuit below, and other courts reviewing Section 2 claims, have replaced this Court's emphasis on causality in *Gingles* with an emphasis on disparate racial impacts. The Ninth Circuit conducted a "two-step analysis" because "the jurisprudence of

vote-denial claims is relatively underdeveloped … ." JA 612. Under its analysis, the first step is to "ask 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.'" JA 612-613 (quoting *Gingles*, 478 U.S. at 44). "Second, if we find at the first step that the challenged practice *imposes a disparate burden*, we ask whether, under the 'totality of circumstances,' there is a relationship between the challenged 'standard, practice, or procedure' on the one hand, and 'social and historical conditions' on the other." JA 613 (emphasis added). The second step then uses the Senate factors, albeit incorrectly, to assess the totality of circumstances. JA 613-615.

In the leap between the first and second steps, the Ninth Circuit asks the wrong question. Instead of asking whether the law provides minorities with the same or equal opportunity to participate in the political process, it changes the question to whether the law disparately impacts minorities. JA 617. The Ninth Circuit has conflated the two:

> First, we ask whether the challenged standard, practice or procedure *results in a disparate burden* on members of the protected class. *That is*, we ask 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.'

JA 612-13 (emphasis added).[2]

The standard used by the Ninth Circuit would turn the VRA into a one-way federal racial ratchet. The fact is that every election regulation will burden someone.[3] "Very few new election regulations improve everyone's lot, so the potential allegations of severe

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[2] *See generally,* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, 85 MISS. L.J. 1357-1372 (2017), originally published as a Heritage Foundation paper, *available at* http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf (criticizing aggressive "disparate impact" interpretations of Section 2 because of the constitutional problems that would raise).

[3] Indeed, such a twisted application of Section 2 would consider every election law through a racial lens where the impacts on every racial subset could be purportedly cataloged by experts, and if any discriminatory effect could be detected, would give rise to a claim as long as some other long-ago instance of discrimination could be exhumed. This would create a 50-state standard where any discriminatory effect could be a basis to strike down state election laws, similar to the analysis under Section 5 of the VRA, 52 U.S.C. § 10304, before *Shelby County*, found the Section 4 triggers to be outdated. *Shelby County*, 570 U.S. at 557 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

burden are endless." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring, joined by Thomas, J., Alito, J.).

The misapplication of Section 2 jeopardizes scores of other presumptively valid state election administration laws. Advocates active in this area often brand these state election administration laws, wrongly, as "voter suppression." *See generally* Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CENTER FOR AMERICAN PROGRESS (July 11, 2018, 12:01 AM), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/ ("Furthermore, states must have in place affirmative voter registration and voting policies in order to ensure that eligible voters who want to vote are able to and are not blocked by *unnecessary and overly burdensome obstacles such as arbitrary voter registration deadlines and inflexible voting hours*.") (emphasis added).

Among the practices targeted by the contorted version of Section 2 are preregistration for elections, in precinct voting, list maintenance procedures, election-day only voting, laws permitting observers to observe the election, witness requirements on absentee ballots, procedures to assess a registrant's citizenship, and naturally, voter identification requirements. Basic, accepted American norms such as registering to vote at all is now a "voter-suppression tool." Ellen Kurz, *Registration Is a Voter-Suppression Tool. Let's Finally End It*, WASHINGTON POST (Oct. 11, 2018), https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-

it/2018/10/11/e1356198-cca1-11e8-a360-85875bac0b1f_story.html.

The contorted interpretation of Section 2 as containing a disparate impact element and dispensing with genuine causality analysis is the primary weapon advocates are using to undermine the laws that have governed election administration in the states for at least a century. Indeed, this interpretation allows courts to become "entangled, as overseers and micromanagers, in the minutiae of state election processes." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016).

Section 2 of the VRA does not permit a disparate impact analysis and instead requires an analysis of the equal opportunity to participate and of causality and real-world results. According to *Gingles*:

> The "right" question . . . is whether "*as a result of* the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." . . .
>
> In order to answer this question, a court must assess the impact of the contested structure or practice on minority *electoral opportunities* "on the basis of objective factors."

Gingles, 478 U.S. at 44 (emphasis added). The *Gingles* Court was not using "impact" in the sense of statistical disparities. Instead, it is referring to how the structure impacts actual access to election processes and how the structure has impacted actual elections.

Distilled to its essence, *Gingles* requires courts to look to real-world electoral results and to be able to draw a causal nexus between them and the challenged practice. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (Section 2 has a "requisite causal link between the burden on voting rights" and historical conditions that affect racial minorities differently.)

II. The Ninth Circuit's Analysis Erroneously Used Disparate Impact as a Threshold Element.

By making disparate racial impact the threshold element in a Section 2 case, the Ninth Circuit employed an improper standard. The dissent in the Ninth Circuit noted correctly that the "majority's reading of the VRA turns § 2 into a 'one-minority-vote-veto rule' that may undo any number of time, place, and manner rules." JA 726.

The Ninth Circuit's decision imports the analysis formerly used by the Department of Justice in reviewing election law changes pursuant to Section 5 of the VRA by jurisdictions covered by Section 4 of the VRA. Under Section 5, covered jurisdictions had to show that there would be no statistical impact, or retrogression, on minorities in order to obtain federal preclearance for an election law change. 52 U.S.C. § 10304(b) (referring to "diminishing the ability" of minorities to vote); *see generally Bush v. Vera*, 517 U.S. 952, 983 (1996) (referring to Section 5 as precluding any change that would lead to "a retrogression in the position of racial minorities") (internal citations omitted). But the coverage formula under Section 4, which captured all or parts of sixteen states, was struck

down by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 529. Section 5's statistical retrogression standard, therefore, was effectively rendered dormant.

Section 2 remains to prohibit racially discriminatory voting rules, but it does not employ the strict statistical retrogression trigger of Section 5. The Supreme Court foreclosed using Section 2 as a substitute for Section 5's statistical retrogression standard in *Holder v. Hall*, 512 U.S. 874 (1994). Statistical "retrogression is not the inquiry in § 2 . . . cases." *Id*. at 884. This Court should reject the attempt to make an end-run around the *Shelby County* decision and Congress's creation of very different burdens for Section 2 as compared to Section 5.

The *de minimis* trigger in Section 5 has never been understood to apply to Section 2 because Section 2 does not rely on the concept of reduction or diminishment. Instead, Section 2 focuses on whether an equal opportunity to participate in the political process exists and whether a practice or procedure, in reality, denies or dilutes a vote on account of race.[4]

Other circuits have rejected Section 2 claims built on a disparate impact analysis. *See, Frank v. Walker,* 768 F.3d 744, 753 (7th Cir. 2014) ("Although these findings document a disparate outcome, they do not show a 'denial' of anything … as § 2(a) requires.");

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[4] Importantly, this Court acknowledged that Section 5, which "required States to obtain federal permission before enacting any law related to voting[,]" was "a drastic departure from basic principles of federalism." *Shelby County*, 570 U.S. at 535.

Johnson v. Governor of State of Fla., 405 F.3d 1214, 1228 (11th Cir. 2005) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect."). Section 2 does not incorporate a disparate impact standard for liability. Instead, it evaluates whether a standard, practice or procedure gives less opportunity to a protected class to participate in the voting process than it gives to an unprotected class. If the opportunity is given to all, it is generally applicable and facially neutral, and the inquiry ends.

If disparate racial impacts had any relevance to a Section 2 claim, the burden on states would raise similar constitutional concerns as those addressed in *Shelby County*. Simply put, if the Section 2 standards employed by the Ninth Circuit were correct, every state could face litigation for every voting practice that might have the slightest adverse statistical consequence on any minority group. This case presents the opportunity for this Court to ensure that the correct analysis of vote denial or dilution claims brought under Section 2 can be consistently and correctly evaluated.

III. The History of the VRA and the *Shelby County* Decision Preclude Grafting Section 5's Retrogression Standard onto Section 2.

The VRA was enacted in 1965 to combat contemporaneous methods that were used to prevent minorities from registering to vote. Rather than formally disenfranchising minorities, some states had devised voting qualifications that were either only applied to

minorities (such as separate tests) or effectively applied disproportionately to minorities (literacy tests). *See*, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 937 (1995); *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Because of these procedures, the registration process was not equally open to all.

As recognized by this Court in *Shelby County*, the application of a disparate impact retrogression standard was a constitutionally burdensome means to combat a specific and grave historical problem. *Shelby County*, 570 U.S. 529, 534-535; *see also id*. at 557-59 (Thomas, J., concurring) (characterizing Section 5's retrogression standard as an unconstitutional burden). The Court struck down the Section 4 coverage formula because it no longer matched modern circumstances. *Id*. at 534-536. Thus, while Section 2 remains to combat racial discrimination in election laws, it employs a different analysis than Section 5. If Section 2 were to employ a standard based on statistical disparate impacts, this burden on states would effectively raise the same constitutional concerns in *Shelby County* and impose an effective preclearance requirement (through the federal courts) on the entire country.

Simply, if the Section 2 standards set forth by the Ninth Circuit in this case were correct, every state might face litigation for every voting change that might have the slightest adverse statistical consequence for the political party preferred by a racial minority group. That would be an exceedingly perverse result, especially given this Court's opinion in *Shelby County*.

IV. The Ninth Circuit Misapplied Senate Factors.

Courts across the country, and the Ninth Circuit in this case, have grotesquely misapplied the Senate Factors and considered evidence outside of the relevant inquiry under Section 2.

As the district court in this case explained, "When determining whether, under the totality of the circumstances, a challenged voting practice interacts with social and historical conditions to cause inequality in the electoral opportunities of minority and non-minority voters, courts may consider…the following factors derived from the Senate Report accompanying the 1982 amendments to the VRA." JA 312. As articulated by this Court in *Gingles*, these Senate Factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 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 unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 36-37.

The Ninth Circuit considered evidence far beyond the relevant inquiry in analyzing Senate Factor One, "the extent of any history of official discrimination." The Ninth Circuit went as far back as the period when Arizona was not even a state, beginning with "the Territorial Period" in 1848, right up to the present day. JA 625-642. Included in its historical analysis were 64 years of events that occurred *before Arizona's statehood* in 1912, complete with references to massacres and "blood thirsty efforts by whites" to exterminate American Indians. JA 625. Only a small portion of the Ninth Circuit's analysis pertains to the current millennium and focused on one Arizona County's reduction of the number of polling places, JA 642-43, and translation errors in Spanish-language materials, JA

643. The Ninth Circuit improperly downplayed Arizona's recent history in favor of focusing on centuries-old evidence. "Further, the 'mixed bag of advancements and discriminatory actions' in 'Arizona's recent history' does not weigh in Arizona's favor." JA 645.

Yet, this Court made it clear that the VRA "imposes current burdens and must be justified by current needs." *Shelby County*, 570 U.S. at 536 (internal citation omitted). This Court went on to explain that the VRA's encroachment on the States' Constitutional authority to regulate elections cannot be based on "decades-old data and eradicated practices," but can be justified only by "current needs" to prevent discrimination. *Id.* at 550-51. Yet that is what the Ninth Circuit has done.

In a different context from a VRA claim, this Court has similarly held that historical evidence, to be relevant, must be "reasonably contemporaneous." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). Historical evidence dating back to "laws in force during and just after the Civil War," rather, provide "little probative value." *Id.* "Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken so long ago as evidence of current intent." *Id.*

It is crucial that this Court settle the issue of the proper application of the Senate Factors, particularly limits on the relevance of distant historical evidence under Senate Factor One.

Regarding Senate Factor Two, the degree of racial polarization, this Court should clarify that partisan polarization is not the same thing as racial polariza-

tion. A defendant should enjoy the ability to conclusively rebut Senate Factor Two evidence with evidence that partisan polarization exists in the elections of the state or political subdivision.

Regarding Senate Factor Three, this Court should clarify that evidence is only relevant under Senate Factor Three if the evidence of unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices directly relate to the challenged practice or procedure. For example, evidence of "unusually large election districts" should never be admissible evidence in a Section 2 challenge to absentee ballot witness signature requirements. Otherwise, evidence of wholly unrelated and potentially longstanding voting practices will be used to intrude on a state's power to enact voting practices having nothing whatsoever to do with the other practices listed in Senate Factor Three. There should be a close fit between the challenged practice and plaintiff's evidence under Senate Factor Three. Without this close fit, the federalist arrangement is unduly burdened.

Regarding Senate Factor Four, evidence of candidate slating should not be admissible in a Section 2 challenge to a practice or procedure unless that slating process can be shown to have a *de minimis* nexus to the challenged practice or procedure. Otherwise, treating that evidence as relevant to a Section 2 claim would also intrude into the federalist arrangement where states have power to run their own elections.

Senate Factor Six is in need of wholesale reevaluation by this Court. The mere existence of racial ap-

peals under *Gingles* attaches unfairly as relevant evidence against a defendant regardless of who made the racial appeal. In other words, the mere existence of a racial appeal in any context in a jurisdiction is now relevant evidence to aid a plaintiff in a Section 2 case. Private third party behavior wholly unrelated to the challenged practice or procedure in a Section 2 case, therefore, is used against a state or subdivision. A state defending a practice or procedure has only one means of rebutting evidence under Senate Factor Six related to any private party behavior constituting a racial appeal – argue the evidence presented is imaginary or fake. Indeed, that is no limit on Senate Factor Six and results in a state election procedure being subject to a Section 2 challenge in part because of statements or political speech by private parties that have nothing to do with the challenged practice or procedure. Senate Factor Six, as currently constituted, creates an absurdist burden on states and an impermissible intrusion into the power to run their own elections.

CONCLUSION

For these reasons, the Court should reverse the lower court's decision and make it plain that a violation of Section 2 of the VRA requires some causal connection between a state election practice or procedure and actual denial or dilution of a vote on account of race.

Respectfully submitted,

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