Nos. 19-1257, 19-1258

IN THE
Supreme Court of the United States

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

—v.—

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

—v.—

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION AND
THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA
IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality enshrined in the Constitution. The American Civil Liberties Union of Arizona is a statewide, non-profit, non-partisan organization with over 20,000 members and is the state affiliate of the national ACLU. The ACLU has appeared before this Court as counsel for parties in numerous cases involving electoral democracy, including *Trump v. New York*, 141 S. Ct. 530 (2020), *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), *Shelby County v. Holder*, 570 U.S. 529 (2013), *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), *Abrams v. Johnson*, 521 U.S. 74 (1997), *McCain v. Lybrand*, 465 U.S. 236 (1984), *Rogers v. Lodge*, 458 U.S. 613 (1982), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

The ACLU has also appeared before the Court as amicus in numerous cases involving Section 2 of the Voting Rights Act, including *Bartlett v. Strickland*, 556 U.S. 1 (2009) and *Thornburg v. Gingles*, 478 U.S. 30 (1986).

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[1] All parties have lodged blanket consents for the filing of amicus briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should reject Petitioners' interpretation of Section 2 of the Voting Rights Act ("VRA"), which seeks to cabin the statute in several ways that are contrary to its text and purpose, as well as decades of this Court's guidance. It should instead affirm the two-part test for Section 2 liability employed by a majority of circuits to have considered vote denial/abridgment claims. That test has proven manageable and, contrary to Petitioners assertions, has not given rise to runaway liability.

Petitioners commit three interpretive errors. *First*, Petitioners suggest that only facially discriminatory laws that "treat" voters differently can trigger Section 2 liability. But the statute includes no such requirement. Congress amended Section 2 in 1982 to cover not only intentional or facial discrimination, but also any voting practice that "*results* in a denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Petitioners' proposed "differential treatment" requirement thus directly contradicts the statute's text. It is also inconsistent with how courts have applied it for decades. A common application of Section 2's results standard has been to at-large elections, which are facially neutral and "treat" all voters equally, but can produce prohibited discriminatory results under some circumstances.

Second, Private Petitioners assert that Section 2 imposes different standards on voter "qualifications" than on voting "practices" governing the time, place, or manner of elections, even though the statute treats them the same. It expressly prohibits not only discriminatory voting "qualifications," but also any

"standard, practice, or procedure," *id.*, all of which Congress recognized were problems after "explor[ing] with great care the problem of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The statute also forbids practices that result in *either* denial or "abridgement" of a minority group's ability to participate in the political process. 52 U.S.C. § 10301(a).

Third, Petitioners argue for a categorical and ahistorical approach for Section 2 liability that runs contrary to the statute's plain language, which requires an examination of how, under the "totality of circumstances," a challenged practice affects the openness of the "political processes leading to nomination or election *in the State or political subdivision*." 52 U.S.C. § 10301(b) (emphasis added). Section 2 calls for a "searching practical evaluation" and an "intensely local appraisal of the design and impact" of the contested practice, rather than a categorical approach. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citations & internal quotation marks omitted). At-large elections are again instructive. Section 2 does not prohibit them categorically, but only in circumstances where, in light of historical and social conditions, such arrangements operate in practice to deprive minority voters of an equal opportunity for political participation. That same contextual approach applies to vote denial/abridgment claims.

Petitioners assert that their proposed atextual limitations on Section 2's scope are necessary to limit Section 2 liability. But that is not so. The majority of courts to have considered Section 2 claims in the vote denial/abridgment context have employed a two-prong test that has proven manageable, providing for

liability when, under the totality of circumstances, a voting practice or procedure: (1) creates a racial disparity that materially burdens a minority group's actual opportunity to vote; and (2) is linked to historical and social discrimination as a cause of that disparity, rather than mere happenstance.

Rather than sweeping into liability every state voting law accompanied by statistical racial disparities, the consensus test has effectively limited Section 2 only to cases where a challenged practice imposes a material burden on voting rights that, within a broader social and historical context of racial discrimination, falls more heavily on minority voters. As the en banc Fifth Circuit recently held in reaffirming this test, "[j]ust because a test is fact driven and multi-factored does not make it dangerously limitless in application." *Veasey v. Abbott*, 830 F.3d 216, 247 (5th Cir. 2016) (en banc). In practice, the consensus two-prong test for Section 2 vote denial/abridgment liability has been difficult to satisfy, as lower courts have frequently rejected Section 2 claims where plaintiffs have been unable to satisfy one or both prongs.

This Court should affirm the approach of most circuits to consider Section 2 liability in the vote denial/abridgment context, and reject Petitioners' invitation to graft extra-textual limitations onto the statute's scope.

ARGUMENT

I. PETITIONERS' PROPOSED STANDARDS CONTRAVENE THE PLAIN MEANING AND PURPOSE OF SECTION 2.

Section 2(a) of the VRA broadly prohibits the imposition or application of any "voting qualification or prerequisite to voting *or standard, practice, or procedure* . . . in a manner which *results* in a denial *or abridgement* of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). In Section 2(b), Congress provided that a violation is established "if, *based on the totality of circumstances*, it is shown that the political processes . . . are not equally open to participation by members" of a protected group "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) (emphasis added).

Congress added the discriminatory results standard in 1982 to provide "the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotation marks & citation omitted). Section 2 therefore provides a "powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination," *id.* at 406 (Scalia, J., dissenting), without creating any right to racial proportionality, *see* 52 U.S.C. § 10301(b).

Petitioners' proposed standards for Section 2 liability cannot be squared with the statute's text, flout this Court's guidance, and would defeat the statute's broad, remedial purpose. Petitioners commit three interpretive errors. *First*, Petitioners would

cabin Section 2 liability to cases alleging unequal "treatment." But the statute's text unambiguously prohibits voting laws with discriminatory "results," regardless of whether they are facially neutral. *Second*, Private Petitioners would apply different standards to voter qualifications and to laws governing the time, place, or manner of voting. The statute, however, recognizes no such difference. And *third*, Petitioners propose a categorical approach under which laws that are relatively commonplace, or that do not make voting altogether impossible, are largely immune from liability. But that would replace the fact-bound "totality of circumstances" analysis required by Section 2's text, and ignore this Court's guidance that Section 2 requires a localized appraisal of a challenged practice's operation within the historical and social context of the jurisdiction.

A. Petitioners' Proposed Differential Treatment Requirement Is Contrary to Section 2's Text and Purpose.

Petitioners argue that Section 2 embodies only an "equal-treatment requirement," and therefore prohibits voting procedures with discriminatory results only if they are also *facially* discriminatory. State Petrs' Br. 34; Private Petrs' Br. 29 (citing *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (holding that Section 2 should be understood as an "equal-treatment requirement.")). State Petitioners contend that Section 2 requires only "equal treatment," and that, "'[s]o long as a state treats all voters equally, §2 does not limit the state's control of details' in its election systems." State Petrs' Br. 22 (citation omitted). Private Petitioners likewise argue that Section 2 is only "offended when the state disproportionately renders minority voters ineligible

to participate in the process or generally subjects them to *different rules* that yield a lesser 'opportunity' to participate." Private Petrs' Br. 30 (emphasis added).

This proposed limitation conflicts with the statute's unambiguous text and purpose. It would also require courts to ignore decades of this Court's guidance that Section 2 requires an analysis of the real-world effects of a challenged practice.

First, as a textual matter, Section 2 outlaws not discriminatory *treatment* but discriminatory *results*, *i.e.*, any voting procedure "which *results in* a denial or abridgement" of the right to vote "on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). A "result" is a "consequence, effect, or conclusion." Black's Law Dictionary (11th ed. 2019). Thus, Section 2's direction to consider a law's "results" requires an examination of the law's *effects*. To "treat" is "to behave toward (someone or something) in a particular way." *Id.* In contrast to a *results*-oriented test, a standard that considers how a law "treats" different classes of people asks only whether the law categorizes different classes of people.

Anti-discrimination law has long drawn a distinction between disparate *treatment* and disparate *effects*. *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015). Nowhere does Section 2 provide that voting procedures must *treat* some voters differently to be unlawful. It prohibits *any* "practice" that produces discriminatory "results" and provides no carve-out for facially neutral practices that "treat" groups equally. Petitioners' proposed disparate treatment

requirement would read Section 2's results standard out of the statute.

Second, Petitioners' proposal to rewrite the statute to prohibit only disparate treatment runs contrary to Congress's purpose in adopting the results standard. Courts must "construe the details of an act in conformity with its dominating general purpose. . . ." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943). Congress added Section 2's results standard in 1982 in direct response to this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which had limited Section 2 to intentional discrimination. Congress explicitly *rejected* that interpretation, because it placed an "'inordinately difficult' burden of proof on plaintiffs" due to the subtlety of some of the challenged laws. *Gingles*, 478 U.S. at 44.

Congress thus amended Section 2 by replacing language that prohibited practices that a jurisdiction "imposed or applied . . . to deny or abridge" the franchise based on race, *City of Mobile*, 446 U.S. at 60, with new language prohibiting practices "which *result*[] in a denial or abridgement" of the franchise based on race, 52 U.S.C. § 10301(a) (emphasis added). In doing so, it intended to provide "the broadest possible scope in combating racial discrimination," *Chisom*, 501 U.S. at 403 (internal quotation marks & citation omitted), in order "to prevent . . . invidious, subtle forms of discrimination," *Veasey*, 830 F.3d at 247, not just those that are facially discriminatory. *Cf. Katzenbach*, 383 U.S. at 355 (Black, concurring and dissenting) (Congress had the power "to protect this right to vote against any method of abridgement no matter how subtle.").

Third, this Court and lower courts—with the exception of the erroneous Seventh Circuit decision Petitioners cite, *see Frank,* 768 F.3d at 754—have consistently held that Section 2 does *not* require disparate treatment. The paradigmatic application of Section 2's results standard in the vote-dilution context, for example, is to at-large elections. This type of districting "treats" all voters equally, but sometimes produces discriminatory results by denying voters of color an opportunity to elect their preferred candidates. *See Gingles*, 478 U.S. 30. There is no reason why facially neutral laws governing ballot access itself—vote "denial or abridgment," as opposed to "dilution"—cannot similarly produce discriminatory results.

In his dissenting opinion in *Chisom*, a vote-dilution case concerning judicial elections, Justice Scalia offered a concise description of how, in the vote denial/abridgement context, a facially neutral voting practice that makes it more difficult for minority groups to vote can violate Section 2. 501 U.S. at 408 (Scalia, J., dissenting). He explained that if a county "permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated." *Id.* (emphasis added). This restriction, while facially neutral and involving no disparate treatment, may nonetheless make voting "more difficult" for voters of color, abridging the right to vote in a discriminatory manner in violation of Section 2.

Lower courts have routinely applied Section 2's results standard to facially neutral practices that produce discriminatory results in a manner consistent

with Justice Scalia's *Chisom* example. For example, in *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom. Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991), the court found that Mississippi's requirement that some residents register to vote separately at the local and state levels, and its prohibition on satellite registration sites, had "a discriminatory impact on blacks," *id.* at 1255, and "result[ed] in a denial or abridgement of the right of black citizens in Mississippi to vote and participate in the electoral process," *id.* at 1253. *See also Veasey*, 830 F.3d at 264 (finding restrictive voter-ID law violated Section 2); *League of Women Voters of N.C. v. North Carolina* ("*LWVNC*"), 769 F.3d 224, 247 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015) (holding elimination of early-voting week and same-day registration, and prohibition on counting out-of-precinct ballots violated Section 2).

Private Petitioners appear to recognize the untenably limited scope of their proposed differential treatment requirement, and thus assert that race-neutral practices that are facially discriminatory in other respects might run afoul of Section 2. *See* Private Petrs' Br. 27. But their examples only reaffirm why Section 2 necessarily applies to all policies with racially discriminatory results. Private Petitioners concede, for example, that "sending unsolicited ballot applications to residents of white neighborhoods . . . but not to residents of black neighborhoods" would violate Section 2 by "treating different voters *differently*." *Id.* But mailing absentee applications to residents of predominantly white areas, but not to residents in disproportionately Black areas, is facially race-neutral. The rule treats voters differently

depending on where they live, not their race. Despite that facial racial neutrality, Private Petitioners concede that the rule is discriminatory and violates Section 2. *See id.* But the example is racially discriminatory not because of the differential geographic treatment, but because of the racially unequal *result*, disadvantaging Black voters relative to white voters.

Differential treatment is unnecessary for a prohibited discriminatory "result." Uniform laws of general application, such as an undue limitation on the hours of registration or voting, can have a discriminatory result by affording minority voters less "opportunity" to participate in the process. *Cf. Florida v. United States*, 885 F. Supp. 2d 299, 329 (D.D.C. 2012) (in Section 5 case, likening the reduction in early voting, which was disproportionately used by Black voters, to closing polling places in predominantly Black neighborhoods). That is precisely the kind of discriminatory result that Congress designed Section 2 to prevent.

In sum, facial neutrality is no defense to a Section 2 claim, because "even a facially neutral voting scheme can operate as a circuit for the oppression of minority voters by powerful private parties regardless of legislative intent." *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1238 n.7 (11th Cir. 2005) (en banc) (Tjoflat, J., concurring). Petitioners' effort to limit Section 2 to facially discriminatory laws would render the results test meaningless.

B. Petitioners' Attempts to Limit Section 2's Results Standard to Voter Qualifications Lacks any Textual or Historical Basis.

By its plain terms, Section 2's prohibition on discriminatory results applies equally to voting "qualification[s] or prerequisite[s] to voting," and to any voting "standard, practice, or procedure" that denies or abridges the right to vote. 52 U.S.C. § 10301(a). It is not limited to laws that disenfranchise voters altogether. As the statute's text makes clear, Section 2 "broadly prohibits the use of voting rules to *abridge* exercise of the franchise on racial grounds." *Katzenbach*, 383 U.S. at 316 (emphasis added).

Private Petitioners, however, argue that a law's "disparate racial effect" is relevant only in the context of "qualifications" that govern eligibility to vote, and not for other practices that regulate the time, place, or manner of access to the franchise. Private Petrs' Br. 27. In their view, a facially neutral voter *qualification*, such as a real-property requirement for voting, that has a disparate racial effect could violate Section 2. *See id.* But they maintain that challenges to "race-neutral time, place or manner rules" are not cognizable, no matter how disproportionate their results, so long as they impose only so-called "ordinary burdens inherent in the [voting] process." *Id.* at 27, 30.

But there is no textual basis for the notion that different standards apply to "voter qualifications"—which may *deny* the right to vote altogether—and "time, place, or manner restrictions" that make voting *more difficult*. Private Petitioners' proposed distinction contravenes the text of Section 2 in two ways.

First, Section 2 applies without distinction to any "voting qualification or prerequisite to voting *or standard, practice, or procedure*" that results in discrimination. 52 U.S.C. § 10301(a) (emphasis added). The statute sets forth a discriminatory results standard that applies equally to voter-eligibility qualifications and to other voting "practice[s]" that structure the voting process. There is no textual basis for applying a different standard to different kinds of voting rules.

Indeed, the purpose of the VRA was to capture not just voter qualifications, but all forms of voting discrimination. Prior to 1965, jurisdictions "came up with new ways to discriminate" against Black and other minority voters "as soon as existing ones were struck down." *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013). Congress's passage of the VRA altered that course, creating a powerful remedy to root out discriminatory voting practices, however common or unusual, obtuse or subtle. Section 2 ensures the VRA's effectiveness by "broadly prohibit[ing] the use of voting rules to abridge exercise of the franchise on racial grounds." *Katzenbach*, 383 U.S. at 316.

Second, Section 2 prohibits not only the outright "denial," but also any discriminatory "abridgment," of the right to vote. 52 U.S.C. § 10301(a). The "core meaning" of "abridge" is to "'shorten.'" *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333–34 (2000) (quoting Webster's New Int'l Dictionary (2d ed. 1950)); *see also Veasey*, 830 F.3d at 259–60 (an "abridgment" is a "reduction or diminution") (quoting Black's Law Dictionary (10th ed. 2014)). By contrast, the term "deny" means "[t]o decline to grant or allow; refuse." Am. Heritage Dictionary (3d ed. 1992).

Courts must "give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citations omitted). By prohibiting any discriminatory practice that results in a denial *or abridgment* of the right to vote, the statute is plainly not limited to voter-qualification laws. Rather, Section 2 extends to practices that "abridge the right to vote even if they do not deny it altogether" by use of a required voter qualification. Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 Ohio St. L.J. 763, 772 (2016); *see also LWVNC*, 769 F.3d at 243 ("nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance."). As Professor Karlan has explained, "even if a voter ultimately makes it to the polls, her right to vote may have been abridged if she gets there only after overcoming new or different burdens." Karlan, at 774.[2]

Once again, Justice Scalia's example from *Chisom* is instructive. There, he explained that if a law—such as a restriction on the times of voter registration—"ma[kes] it more difficult for blacks to register than whites," such that "blacks would have less opportunity '*to participate* in the political process' than whites,"

[2] The First Amendment, which prohibits laws "abridging the freedom of speech," further demonstrates that an abridgment need not be a total denial. One may "have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of N.J., Town of Irvington*, 308 U.S. 147, 163 (1939); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 n.18 (1983) (rejecting argument that a prohibition on unsolicited mailing of contraception advertisements was not an abridgement of speech, because it does not bar other channels of communication).

then "§ 2 would . . . be violated." 501 U.S. at 408 (Scalia, J., dissenting).

Consistent with that guidance, courts have invalidated time/place/manner regulations on voting that produce discriminatory results, such as the closure, location, or relocation of polling places. *See Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 973–74 (D. Nev. 2016) (inequitable distribution of polling places that disproportionately burdened Native American voters); *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (closure of reservation polling places); *Brown v. Dean*, 555 F. Supp. 502, 504–05 (D.R.I. 1982) (relocation of minority polling places); *cf.* Order, *Navajo Nation Human Rights Comm'n*, No. 2:16-cv-00154, ECF No. 199 (D. Utah Feb. 22, 2018) (approving settlement adding polling places closer to Navajo Nation after denying summary judgment to defendants under Section 2).

Petitioners' attempt to narrow Section 2's reach to voter qualifications is thus contrary to the statute's text, and to how lower courts have consistently applied it.

C. Neither the Widespread Use of a Practice, Nor the Theoretical Availability of Other Opportunities to Participate, is Sufficient to Defeat a Section 2 Claim, Which Requires a Localized, Fact-Specific Analysis.

Consistent with its purpose of prohibiting subtle forms of discrimination, Section 2 demands a contextual analysis based on the real-world effects of a challenged restriction on voting opportunity in a particular jurisdiction. It is designed to ferret out

discriminatory practices that may not appear pernicious on their face, but in practice make it more difficult for minority voters to participate equally in the political process.

Subsection 2(b) instructs that, in determining whether a voting denial or abridgment is unlawful, courts must assess whether, "based on the totality of circumstances, . . . the political processes . . . are not equally open to participation by members" of a protected racial group, "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) (emphasis added). This requires an "intensely local appraisal" of whether the disparity is linked to historic or societal discrimination, *Gingles*, 478 U.S. at 79, as Section 2 focuses on whether, under the "totality of circumstances," the "political processes leading to nomination or election *in the State or political subdivision*" abridge or deny the right to vote based on race." 52 U.S.C. § 10301(b) (emphasis added). Thus, the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality" of opportunity based on race. *Gingles*, 478 U.S. at 47.

Petitioners, however, propose a categorical approach to Section 2 liability that ignores both the statutory text and this Court's guidance in two respects. *First*, Petitioners would largely immunize a practice from Section 2 liability if it is (in their view) widely used. *See* State Petrs' Br. 36; Private Petrs' Br. 25. But whether a given practice or requirement in a particular state is lawful under Section 2 necessarily depends on the specific circumstances present in that

state. A practice that is legal in one or many states may not be in others, depending on its effects and the local conditions. While other provisions of the VRA ban specific types of voting practices categorically, such as literacy tests, *see* 52 U.S.C. § 10101(a)(1)(C), Section 2 requires a particularized analysis.

The paradigmatic application of Section 2's results standard to at-large elections illustrates this point. At-large elections are not categorically prohibited. But as this Court explained in *Gingles*—its first decision applying Section 2's results standard—under some circumstances, "at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population,'" even though they "are not *per se* violative of minority voters' rights." 478 U.S. at 47–48 (quoting *Burns v. Richardson,* 384 U.S. 73, 88 (1966)). At-large elections are prohibited only if they operate in a context of historical and societal discrimination, such that they deprive minority voters of an opportunity to elect their preferred candidates. And in practice, courts find Section 2 violations in only about one-third of cases. *See* Adam B. Cox & Thomas J. Miles*, Judging the Voting Rights Act*, 108 Colum. L. Rev. 1, 11–12 (2008) (finding that Section 2 litigation "resulted in liability . . . 34% of the time for challenges to at-large districts").

Thus, the mere fact that a practice is common does not preclude a VRA violation. A 1968 Civil Rights Commission report noted that at least two states' adoption of at-large elections "had the purpose or effect of diluting the votes of newly enfranchised" Black voters. U.S. Comm'n on Civil Rights, *Political Participation* 171 (1968). The near-ubiquity of at-large elections has never been thought to preclude Section

2 liability where they have a disparate effect on minority voters that is linked to historical and social discrimination factors in a particular jurisdiction.

Similarly, prior to the VRA, Black citizens "had been denied access to the political process by means such as literacy tests, [and] poll taxes," which were once widespread. *Rogers v. Lodge*, 458 U.S. 613, 624 (1982). Indeed, the former were sustained by this Court in 1959 as constitutionally permissible, *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), and at the time, were not considered beyond the "ordinary burdens" of voting. Private Petrs' Br. 15. Yet these common devices plainly discriminated against Black voters by denying them an equal opportunity to participate in the political process; no one would question that they may run afoul of Section 2, even if they were not categorically banned.

Second, State Petitioners would immunize voting practices regardless of their *actual* effects, so long as alternative *theoretical* voting opportunities remain. State Petrs' Br. 22. But the "abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise [the] franchise." *Perkins v. Matthews*, 400 U.S. 379, 387 (1971).

Take, for instance, a state that allows both mail-in and in-person voting. State Petitioners would argue that there could be no Section 2 liability for new restrictions on either means of voting in such a state, because the state provides multiple means of voting that anyone can theoretically use. But if Native American voters living on reservations far from in-

person voting sites cannot realistically access mail-in voting because of significant mail-service issues, they may in fact lack an equal opportunity to vote—even if the state appears, on paper, to provide ample opportunities to all voters regardless of race. This is not merely hypothetical: lower courts have found Section 2 liability for failing to provide sufficiently accessible polling locations in precisely that situation. *See, e.g.*, *Sanchez*, 214 F. Supp. 3d at 973–74; *Spirit Lake Tribe*, 2010 WL 4226614, at *3. Yet Petitioners would have courts ignore such practical realities.

That is contrary to this Court's guidance. Section 2 liability demands a "determination [that] is peculiarly dependent upon the facts of each case, . . . and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (citations & internal quotation marks omitted). Failing to evaluate how voters interact with or rely upon the voting procedure at issue in practice would, in State Petitioners' words, "flout[ ] § 2's command to consider 'the totality of circumstances.'" State Petrs' Br. 14.

Again, Section 2's application to at-large elections is instructive. In at-large elections, there is, in theory, nothing stopping voters of color from electing their preferred candidates. But the appropriate question is whether, under the actual circumstances of the jurisdiction in question (*e.g.*, the presence of racial bloc voting), at-large elections have the practical effect of denying minority voters the ability to elect their preferred candidates. That is why at-large elections are permissible in some jurisdictions and for some elections, but not others—even though the *theoretical* opportunity to elect preferred candidates is the same. *Cf. Gingles*, 478 U.S. at 46 ("electoral devices, such as

at-large elections, may not be considered *per se* violative of § 2").

II. THE COURT SHOULD ADOPT THE TEST FOR LIABILITY EMPLOYED BY THE MAJORITY OF CIRCUITS TO HAVE CONSIDERED VOTE DENIAL/ ABRIDGMENT CLAIMS.

Notwithstanding Petitioners' assertions that extra-textual limitations on Section 2 liability are necessary to limit its scope, most circuits that have addressed vote denial/abridgment claims—including the Fourth, Fifth, Sixth, and Ninth Circuits—have applied a two-part test that has proven manageable. That test examines whether: (1) the challenged practice "impose[s] a discriminatory burden on members of a protected class"; and (2) the burden is "in part [ ] caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey*, 830 F.3d at 244; *see also Ohio Democratic Party v. Husted* ("*ODP*"), 834 F.3d 620, 637 (6th Cir. 2016); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020) (en banc), *cert. granted sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 222 (2020); *LWVNC*, 769 F.3d at 240.

This test has garnered a consensus and has been workable. It is faithful to Congress's mandate to prohibit voting practices that have a discriminatory result by denying minority voters equal opportunity to participate in the political process, while still affording states wide regulatory latitude. Petitioners imagine a parade of horribles stemming from this test. But years of experience do not bear this out. This test

has effectively screened out practices creating only a mere disparate impact disconnected from social and historical discrimination.

A. Prong One Limits Section 2 Liability by Requiring Plaintiffs to Establish a Material Burden on Voting that Falls More Heavily on Minority Voters, Not Mere Statistical Disparities.

The first prong of the consensus test asks whether a challenged "voting qualification or prerequisite to voting or standard, practice, or procedure," 52 U.S.C. § 10301, imposes a discriminatory burden on minority voters. *Veasey*, 830 F.3d at 244; *see also Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1232 (11th Cir. 2020); *LWVNC*, 769 F.3d at 245; *ODP*, 834 F.3d at 637. When assessing the nature of the burden, courts must consider whether minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). This prong requires more than just statistical disparities, but rather that a challenged practice materially burdens voting in a manner that falls more heavily on voters of color.

The en banc Fifth Circuit's decision in *Veasey* illustrates this point. There, the court held that Texas's voter identification requirement for in-person voting resulted in a disparate burden on Black and Hispanic voters because (1) these voters were "more likely than their Anglo peers to lack [one of the forms of] ID" required for voting, 830 F.3d at 250, and (2) they were disproportionately represented among voters who had substantial difficulty affording the cost and navigating the logistics associated with

obtaining an ID card in Texas, *id.* at 251, 254–55. In particular, the court cited "the cost of underlying documents necessary to obtain an [ID card]" (for one plaintiff, $81 for a birth certificate); the "difficulties with delayed, nonexistent, out-of-state, or amended birth certificates"; and the logistical hurdles associated with obtaining an ID card, as some Texas voters had to travel 90 minutes or more to reach the nearest ID-issuing office. *Id.* It determined that, together, these facts showed that the Texas voter-ID law made voting materially more difficult (even if not impossible), and that this burden fell disproportionately on voters of color, satisfying the first prong. *Id.* at 256.

But courts have found no violation when reviewing less onerous voter-ID requirements that, notwithstanding racial disparities in ID-possession rates, do *not* impose a material burden on voting. Consistent with this Court's guidance to eschew a categorical approach in favor of a localized, context-specific analysis, courts applying the first prong have routinely rejected claims where a voter-ID requirement is not so restrictive as to make voting significantly more difficult. For example, in *Lee v. Virginia State Board of Elections*, 843 F.3d 592, 601 (4th Cir. 2016), the Fourth Circuit found that, despite racial disparities in ID-possession rates in Virginia, the plaintiffs failed to establish that Virginia's voter ID law caused a disparate impact because "Virginia allows everyone to vote and provides free photo IDs to persons without them." In other words, mere statistical disparities by race were insufficient to establish the first prong, because—unlike the Texas voter-ID law—the Virginia law did not materially burden the right to vote. *See also Gonzalez v. Arizona*,

677 F.3d 383, 407 (9th Cir. 2012) (rejecting Section 2 claim where there was no substantial disparity in the ability of minority voters "to obtain or possess identification for voting purposes"), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

The first prong has also weeded out claims in other contexts. In *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 627–28 (6th Cir. 2016), the Sixth Circuit found that the plaintiffs—who were challenging, among other things, a reduction in the period that Ohio permits to cure defective absentee ballots—had failed to satisfy prong one despite evidence of racial disparities in absentee ballot rejection rates. It explained that, notwithstanding that evidence, the "plaintiffs fail[ed] to show that the [cure-period reduction] will have much of an impact on the right to vote at all." *Id.* at 628. Although "[h]ypothetically speaking," the shortened cure period might make it harder for some voters to cure their ballots, in practice, "that has not been the case in Ohio," as there was little evidence that many voters "took advantage of the cure days eliminated." *Id.*; *see also ODP*, 834 F.3d at 639–40 (elimination of early voting days did not violate Section 2 due to lack of material burden on Black voters).

In sum, experience does not bear out Private Petitioners' assertion that the first prong exposes states to automatic liability based on minor racial disparities in their voting systems. *See* Private Petrs' Br. 32. Rather, plaintiffs must show that racial disparities are accompanied by real-world burdens that, in Justice Scalia's words, make voting "more difficult" for minority voters. *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). Circuit courts have routinely

rejected claims where plaintiffs are unable to make that showing.

B. Prong Two Limits Liability by Requiring Plaintiffs to Establish a Causal Relationship Between Disparate Results and Social and Historical Conditions.

The second prong of the consensus Section 2 test for denial/abridgment claims draws on this Court's guidance in *Gingles*. 478 U.S. at 36–37. It asks whether the disparate burden was "caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey*, 830 F.3d at 244 (quoting *LWVNC*, 769 F.3d at 240); *see also ODP*, 834 F.3d at 638. The second prong limits Section 2 liability by ensuring that, as Judge Tjoflat in the Eleventh Circuit has explained, "something more than a mere showing of disparate effect is essential to a prima facie vote-denial case." *Johnson*, 405 F.3d at 1238 (Tjofat, J., concurring). The "second part of the framework provides the requisite causal link between the burden on voting rights" and "social and historical conditions that have produced discrimination against minorities." *Veasey*, 830 F.3d at 245.

1. Prong 2 Requires that Plaintiffs Demonstrate the Disparity was Caused By or Linked to Historical and Social Conditions that Produce Current Discrimination.

The second prong of the consensus test seeks to ensure that material burdens are connected to social and historical conditions in a way that denies minority voters an equal opportunity to participate in the political process. In applying the second prong, lower

courts have followed this Court's guidance that they may look to the nine nonexclusive factors set forth in the Senate Report to the 1982 Amendments (the "Senate Factors"). *Gingles*, 478 U.S. at 44–45; *see also Veasey*, 830 F.3d at 247–64; *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 626. The Senate Factors are:

(1) a "history of official discrimination in the state or political subdivision" concerning voting or political participation;

(2) racial polarization in voting;

(3) use of "unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices" that "enhance the opportunity for discrimination";

(4) denial of minority access to a "candidate slating process";

(5) "discrimination in such areas as education, employment and health, which hinder [a group's] ability to participate effectively in the political process";

(6) "overt or subtle racial appeals" in campaigns;

(7) election of minority group members "to public office in the jurisdiction."

Gingles, 478 U.S. at 36–37 (citation omitted). *Gingles* also identified two additional factors that may have probative value: responsiveness of "elected officials to the particularized needs of the members of the minority group"; and "whether the policy underlying the [challenged practice] is tenuous." *Id.* (citation omitted).

The Fourth Circuit's application of this fact-bound approach in competing cases is illustrative. In

LWVNC, the court struck down a North Carolina law that, among other things, eliminated same-day registration and prohibited the counting of out-of-precinct ballots, because of "undisputed evidence" that "African American voters disproportionately used those electoral mechanisms," and that African Americans' need for these provisions was linked to historical discrimination that created continuing deficits in "education, employment, income, access to transportation, and residential stability." 769 F.3d at 246.

By contrast, in *Lee*, the Fourth Circuit rejected a Section 2 challenge to Virginia's photo identification law. 843 F.3d at 594. In doing so, it affirmed the district court's findings that racial disparities in photo-ID possession were merely incidental in light of Virginia's "aggressive steps to eliminate" historical barriers to access identified by the plaintiffs. *Lee v. Virginia State Bd. of Elections*, 188 F. Supp. 3d 577, 604 (E.D. Va. 2016); *see also Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 354 (6th Cir. 2018) (granting stay and finding plaintiffs unlikely to succeed under the Senate factors in case challenging elimination of straight-ticket voting).

Thus, only those laws that have a burdensome racial effect *and* reinforce existing inequality in the political process connected to historical and social conditions will violate Section 2.

2. Prong 2 Acts as an Effective Limit on Section 2 Liability.

The second prong acts as a limit on disparate impact liability. In keeping with the statute's disclaimer that is does not require strict racial proportionality, *see* 52 U.S.C. §10301(b), the second

prong ensures that it is not enough to show that a voting practice disparately burdens voters by race. Rather, plaintiffs must also establish a relationship between broader patterns of racial discrimination and the challenged law's disparate impact. A "facially neutral, nondiscriminatory standard or practice that results in a disparate impact" will not "be actionable as an impermissible denial or abridgment of the right to vote," on its own. *ODP*, 834 F.3d at 638. It becomes actionable only when "a disparate impact in the opportunity to vote is shown to result not only from operation of the law, but from the interaction of the law and social and historical conditions that have produced discrimination." *Id.* (emphasis omitted).

Although the Senate Factors were drawn from vote-dilution cases, *see White v. Regester*, 412 U.S. 755, 765–67 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd sub nom. E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636 (1976), they "are transferrable to the vote-denial context," *Johnson*, 405 F.3d at 1238 (Tjofat, J., specially concurring), for at least two reasons.

First, several factors are probative of discriminatory intent. While a showing of intent is not *required* for a Section 2 violation—that was Congress's purpose in amending it in 1982—factors that support an inference of intentional discrimination make disparate results more suspect. Indeed, many of the Senate Factors are drawn from discriminatory intent case law. This Court has recognized that "unresponsiveness of elected officials to minority interests, a tenuous state policy underlying" a challenged practice, and "the existence of past discrimination which precludes effective participation in the elector process" are all "relevant

to the issue of intentional discrimination." *Rogers*, 458 U.S. at 620 n.8, 624; *see also id.* at 625.

The existence of racially polarized voting also "bear[s] heavily on the issue of purposeful discrimination." *Id.* at 623. Where voting is racially polarized, elected officials have "an incentive for intentional discrimination in the regulation of elections," because laws that suppress voting along racial lines help incumbents "entrench themselves." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016); *see also* Karlan, *supra*, at 784 (Racial polarization creates "an incentive for politicians who receive little support from the minority community to adopt rules that will keep minority voters from turning them out of office."). As Justice Kennedy explained, it is precisely because "racial discrimination and racially polarized voting are not ancient history" that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions[.]" *Bartlett*, 556 U.S. at 25 (Kennedy, J., plurality op.).

The fact that many of the Senate Factors are probative of intent is by design. Congress adopted Section 2's results standard in part to capture instances of discrimination where direct evidence of intent was difficult to obtain, as well as to avoid "placing local judges in the difficult position of labeling their fellow public servants 'racists.'" *United States v. Blaine Cty.*, 363 F.3d 897, 908 (9th Cir. 2004); *see also* S. Rep. No. 97-417, at 36 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 214 ("[Tlhe intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities.").

Second, in vote denial/abridgment cases, as in dilution cases, the Senate Factors help ensure that Section 2 liability is not triggered by statistical disparities resulting from mere happenstance, but only where they are connected to and perpetuate longstanding patterns of racial discrimination. As the en banc Fifth Circuit explained, an assessment of the Senate Factors reveals whether "vestiges of discrimination act in concert with the challenged law to impede minority participation in the political process." *Veasey*, 830 F.3d at 259. Factors such as the ability of minority candidates to obtain public office "contextualize[] the degree to which vestiges of discrimination continue to reduce minority participation in the political process." *Id.* at 261.

This Court's discussion of pre-VRA barriers such as literacy tests is instructive. Literacy tests and their companion laws were often facially neutral.[3] But their social and historical context revealed the causal discriminatory relationship. Beginning in 1890, some states made literacy a registration qualification and also required that would-be voters complete a registration form. Given differential literacy rates by race, such facially neutral requirements had predictable discriminatory results. *Katzenbach*, 383 U.S. at 310–11.

This Court sustained the VRA's prohibition on literacy tests, notwithstanding their facial neutrality

[3] While some literacy test exemptions were obviously intended to prevent African Americans from voting and allow white citizens to vote, others relied on their vague scope which allowed for discriminatory application. *See South Carolina v. Katzenbach*, 383 U.S. 301, 312–13 (1966) ("The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.").

and even in jurisdictions that had not themselves operated *de jure* segregated educational systems, because literacy tests impermissibly perpetuated racial discrimination, given that Black voters had been "deprived . . . of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test." *Gaston Cty. v. United States*, 395 U.S. 285, 291 (1969). As Justice Stewart explained, "Congress has ample authority under [section] 2 of the Fifteenth Amendment to determine that literacy requirements work unfairly against Negroes in practice because they handicap those Negroes who have been deprived of the educational opportunities available to white citizens." *Oregon v. Mitchell*, 400 U.S. 112, 283 (1970) (Stewart, concurring in part, dissenting in part). Section 2 operates in much the same way, by prohibiting practices that, while not facially discriminatory, produce discriminatory results that are tied to and reinforce broader patterns of racial discrimination.

This analysis is necessarily fact-dependent. But as the en banc Fifth Circuit explained, "[j]ust because a test is fact driven and multi-factored does not make it dangerously limitless in application." *Veasey*, 830 F.3d at 247. For example, in *Smith v. Salt River Project Agricultural Improvement and Power District*, 109 F.3d 586, 595–96 (9th Cir. 1997), the Ninth Circuit rejected Section 2 liability in a challenge to property qualifications for voting in a utility district because, despite a disparate impact, there was no link between differential rates of homeownership by race and racial discrimination in the jurisdiction. Similar cases exist in the vote-dilution context as well. *See, e.g.*, *NAACP v. Fordice*, 252 F.3d 361, 367–74 (5th Cir. 2001) (upholding district court's finding that plaintiffs failed

to established vote dilution based on the "totality of circumstances" Senate-factors analysis); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866–68 (5th Cir. 1993) (same); *see also NAACP, Inc. v. City of Niagara Falls,* 65 F.3d 1002, 1020 (2d Cir. 1995) (affirming district court's conclusion that despite "substantial evidence of racially polarized voting . . . , many of the other Senate Report factors weighed against a finding" for plaintiffs).

In sum, requiring plaintiffs to supplement disparate impact evidence with social and historical evidence circumscribes Section 2's reach, and thus "serve[s] as 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 246–47; *see also ODP*, 834 F.3d at 638.

CONCLUSION

The Court should reject Petitioners' attempts to rewrite the text and purpose of Section 2 and affirm the propriety of the majority two-part test.

Respectfully submitted,

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