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 Petition for a 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 Petition for a Writ of Certiorari

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae have a significant and long-standing interest in this matter. The Public Interest Legal 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 Public Interest Legal 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.

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 Rights Division. Roger Clegg was Deputy Assistant Attorney General in the Civil Rights Division. Robert

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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. All parties were timely notified and have consented to the filing of this brief.

"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

The Court should grant certiorari to correct an increasing disregard of this Court's jurisprudence that Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, requires 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 causal requirements 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 structur-

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

SUMMARY OF ARGUMENT

The Court should grant certiorari review 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.

The Court should grant certiorari because the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). And to the extent that the

Ninth Circuit has applied Section 2 outside the confines of challenges to legislative districts, the Ninth Circuit, and other circuits, have "decided an important question of federal law that has not been, but should be, settled by this Court." *Id.*

ARGUMENT

I. The Ninth Circuit Disregarded the Causal Standard for a Section 2 Claim as Required Under *Thornburg v. Gingles.*

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. After 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 constant defeat of a minority candidate demonstrates an impediment. *Id.* All three preconditions require cause and effect, with the third one requiring a concrete, real-world electoral impact of losing elections. The causal connection between a practice and procedure and actual vote denial or dilution insulates Section 2's intrusion into state prerogatives from constitutional infirmity.

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 …". App. 37. 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.'" App. 37-38 (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." App. 38 (emphasis added). The second step then uses the Senate factors, albeit incorrectly, to assess the totality of circumstances. App. 38.

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. App. 42. 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.'

App. 37 (emphasis added).[2]

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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.amazo-

The standard used by the Ninth Circuit would turn the Voting Rights Act 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 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,

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naws.com/2014/pdf/LM119.pdf (criticizing aggressive "disparate impact" interpretations of Section 2 because of the constitutional problems they 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 Voting Rights Act, 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.")

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), (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 Voting Rights Act 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 Voting Rights Act turns § 2 into a 'one-minority-vote-veto rule' that may undo any number of time, place, and manner rules." App. 151.

In addition, using any racially disparate impact as an element of a Section 2 violation is significantly similar to the standard used to justify an objection under Section 5 of the Voting Rights Act. Prior to *Shelby County*'s holding that the Voting Rights Act Section 4 triggers were unconstitutional, an election law change could be blocked if a state could not prove the absence of any racially discriminatory effect. *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 *de minimis* trigger in Section 5 has never been understood to apply to Section 2 because it 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."); *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 change that might have the slightest adverse statistical consequence on any minority group.

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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.

This Court should grant certiorari so that the correct analysis of vote denial or dilution claims brought under Section 2 can be consistently and correctly evaluated.

III. The Ninth Circuit Misapplied Senate Factors.

This Court should grant certiorari because courts, 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 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." App. 459. 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.

Thornburg v. 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 "Present Day." App. 50-67. 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. App. 50.

In *Shelby County v. Holder*, this Court noted that the Voting Rights Act "imposes current burdens and must be justified by current needs." 570 U.S. 529, 536 (2013) (internal citation omitted). This Court went on to explain that the Voting Rights Act'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. Senate Factor One should be similarly clarified.

In a different context from a Voting Rights Act 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" have 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.*

The Court should grant certiorari in order to resolve an important question of federal law that has not been, but should be, settled by this Court – namely the proper application of the Senate Factors, particularly limits on the relevance of historical evidence under Senate Factor One.

IV. Circuits Are Split Over Application of *Gingles* in Vote Denial Cases Brought as Section 2 Claims.

The Circuits are split over how to analyze a Section 2 vote denial claim. Where a Circuit split exists,

this Court should resolve it. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1172 (2020) (granting certiorari to resolve a Circuit split); *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1846 (2016) (granting review to resolve a Circuit split).

In the 4th, 5th, 6th and 7th Circuits, an election law that may disparately impact a group does not impose a "discriminatory burden" under Section 2 unless "members of the protected class have less opportunity than other members of the electorate to participate in the political process …" *Ohio Democratic Party v. Husted*, 834 F.3d at 637; *Frank v. Walker*, 768 F. 3d at 753 (upholding Wisconsin's voter ID law because everyone has the same opportunity to get a qualifying photo ID); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (upholding voter ID law concluding that "§ 2 does not sweep away all election rules that result in a disparity in the convenience of voting."); *Veasey v. Abbott*, 830 F.3d at 253 (*en banc*).

To further illustrate the confusion in the circuits and the importance of deciding an important question of federal law that has not been, but should be, settled by this Court, even the Fourth Circuit itself has conflicting application of *Gingles* and the relevance of disparate racial impacts. Despite the rejection of disparate impacts in *Lee,* the Section 2 standard articulated in another Section 2 case was "what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities *but simply that 'any' minority voter is being denied equal electoral opportunities." League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (emphasis added).

CONCLUSION

For these reasons, the Court should grant certiorari review.

Respectfully submitted,

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