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

BRIEF OF CAMPAIGN LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

Amicus curiae Campaign Legal Center ("CLC") is a leading nonpartisan election law organization. CLC advocates and develops policy on a range of democracy issues. CLC aims to protect Americans' voting rights and secure equal access for historically disenfranchised racial minorities under the Constitution and the Voting Rights Act ("VRA"). CLC regularly represents plaintiffs and *amici* in Section 2 vote denial claims, such as *Veasey v. Abbott* and *Spirit Lake Tribe v. Jaeger*. CLC litigators have decades of expertise enforcing Section 2, both within the U.S. Department of Justice ("DOJ") and in private practice.

CLC writes to emphasize the carefully calibrated textual boundaries of Section 2 as exemplified by its consensus application, and to warn that erosion of Section 2's protections will enable the ingenious and subtle forms of racial discrimination in voting that the VRA was enacted to prohibit.

STATUTORY BACKGROUND

Section 2 proscribes any "standard, practice or procedure ... which results in a denial or abridgement of the right ... to vote on account of race or color [or language-minority status]." 52 U.S.C. § 10301(a).

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[1] Under Supreme Court Rule 37.6, *Amicus* CLC certifies that it authored this brief in its entirety, and no person or entity other than *amicus* made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

Section 2 plaintiffs establish a violation if, "based on the totality of circumstances," "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by" a racial or language minority 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." *Id.* § 10301(b).

Section 2's text broadly "prohibits *all* forms of voting discrimination, not just vote dilution." *Thornburg v. Gingles*, 478 U.S. 30, 44–46 & n.10 (1986) (emphasis added). Section 2 was crafted *specifically* to scrutinize facially race-neutral electoral practices and eliminate discriminatory results. In 1982, Congress clarified that "plaintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race" and "that an application of the results test requires an inquiry into the 'totality of the circumstances.'" *Chisom v. Roemer*, 501 U.S. 380, 394 (1991). Thus, Section 2 rejects any standard (including those proposed by Petitioners) that requires intent or inoculates facially neutral electoral practices. As Justice Scalia illustrated, if a jurisdiction "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 [Section] 2 would therefore be violated." *Id.* at 408 (Scalia, J., dissenting).

The purposes of Section 2 are "apparent from its text." *Id.* at 395. Section 2 was adopted "for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.'" *Id.* at 403 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). It "prohibits practices, which ... result in the denial of equal access to any phase of the electoral process[.]" S. Rep. No. 97-417 ("Senate Report"), at 30 (1982).[2] Section 2 "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). Accordingly, it "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403 (citation omitted).

Following Section 2's textual framework, courts have largely coalesced around a two-part test for vote denial claims: first, "[t]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," and second, "[t]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." J.A. 612–13. This approach mirrors

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[2] Congress defined the terms "vote" and "voting" broadly to encompass "all action necessary to make a vote effective," including "registration, … casting a ballot, and having such ballot counted properly[.]" 52 U.S.C. § 10310(c)(1).

the totality-of-circumstances analyses used in similarly context-dependent circumstances, such as employment discrimination, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993), and determinations of probable cause, *D.C. v. Wesby*, 138 S. Ct. 577, 586 (2018). *See also Veasey v. Abbott*, 830 F.3d 216, 246 & n.36 (5th Cir. 2016) (*en banc*) (collecting examples). It has been applied in numerous jurisdictions to a range of practices, with results that are far from one-sided.[3]

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[3] *Compare League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) ("LWV of N.C.") (granting relief against same-day registration and out-of-precinct voting restrictions), *Veasey*, 830 F.3d at 264–65 (voter-ID law), *and Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) (early voting cutbacks), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), *with Lee v. Va. State Board of Elections*, 843 F.3d 592 (4th Cir. 2016) (denying challenge to voter-ID law), *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (early voting reductions), *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (absentee and provisional voting procedures), *Michigan State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342 (6th Cir. 2018) (elimination of straight-ticket voting), *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997) (land ownership voter eligibility requirement in utility district elections), *and Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (*en banc*) (voter-ID law). Two circuit courts have applied a version of the two-part test, but expressed some skepticism of the second step. *See Greater Birmingham Ministries v. Sec'y of State of Alabama*, 966 F.3d 1202, 1231-38 (11th Cir. 2020); *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014).

SUMMARY OF ARGUMENT

This case presents a straightforward application of Section 2. The *en banc* court engaged in "an intensely local appraisal of the design and impact of" two challenged Arizona electoral practices in light of "a searching practical evaluation of the past and present reality" of inequality in the jurisdiction. *Gingles*, 478 U.S. at 45, 47, 79 (internal quotations omitted). In doing so, the court found that the challenged policies disproportionately inhibit minority voters' access to the ballot; the disproportionate impact is directly linked to the historical and social conditions of racial discrimination in Arizona; and that the policies were not necessary for election administration and only tenuously tethered to legitimate state interests. In other words, the *en banc* court found that Arizona unnecessarily imposed electoral restrictions that predictably and reliably harmed racial minorities given the social and historical context. That is precisely the type of appraisal Section 2 demands, and this Court should uphold the *en banc* court's Section 2 holdings.

The Ninth Circuit's analysis does not impose the sweeping vote-maximizing mandate that Petitioners suggest. Although Congress designed Section 2 to reach both obvious and subtle forms of voting discrimination under a familiar "totality of circumstances" approach, it does not prohibit all practices that exhibit bare statistical racial disparities. Instead, Section 2 requires proof that the contested practice "results in" a disproportionate

denial or abridgment of the right to vote, and that the harm occurred "on account of" race. These "robust causality requirement[s]" mandate that the prohibited result is attributable both to the challenged law and to the effects of enduring discriminatory conditions in the jurisdiction. *See Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Communities*, 576 U.S. 519, 542 (2015). Moreover, applying the Senate Factors at stage two requires courts to consider the jurisdiction's legitimate policy rationales as a countervailing factor in assessing liability. *See* J.A. 655, 667–70.

Federal courts, including the Ninth Circuit below, have overwhelmingly incorporated these causation standards, and the results have been modest and tempered, striking down some restrictions while upholding many others. *See supra* note 3. Yet Petitioners and DOJ invent a series of proposed limitiations on Section 2, including a more onerous proximate cause standard that is unsupported in Section 2's text, history, or precedent.

Section 2's two-part causation requirement ensures that courts intervene only when necessary to vindicate the Constitution and VRA's "firm intention to rid the country of racial discrimination in voting." *Katzenbach*, 383 U.S. at 315. It closely hews to the constitutional harm Congress sought to prevent and achieves its goals through a searching analysis of the past and present reality without prompting excessive race-consciousness or engaging in race-based assumptions. The results test is critical to "the apparatus chosen by Congress to effectuate this

Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting" and is "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quoting Senate Report at 4, 27). This Court recently reaffirmed that Section 2, which "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgement" of the right to vote on account of race, creates a "permanent, ... nationwide" remedy that "is available in appropriate cases to block voting laws from going into effect." *Shelby County v. Holder*, 570 U.S. 529, 537 (2013) (quoting 52 U.S.C. § 10301). Yet, Petitioners' proposed atextual interpretations would render Section 2 fundamentally incapable of its task: prohibiting racial discrimination in voting, including discrimination reflecting "the unintended consequence of a political culture that simply ignores the needs of minorities." J.A. 645.

The integrity and equality of our democracy for all Americans regardless of race is among the Nation's most valiant goals, but it can be achieved only through active vigilance and incisive mechanisms for rooting out discrimination. Section 2's two-part causation requirement is one such vital mechanism to advance the promise of an equal right to vote.

ARGUMENT

Section 2 instructs courts to engage in distinct causation analyses at each step of the two-part results

test. The Ninth Circuit applied the appropriate causation analyses below, requiring a finding of contributory cause at step one and but-for causation at step two. This Court should affirm that proper standard for evaluating Section 2 vote denial claims.

Congress's use of two different causal terms in Section 2—"results in" and "on account of"— indicates that it intended two distinct causation analyses. Courts must first identify a sufficient causal nexus between the challenged practice and the disparate impact on minority voters, and then connect that disparate impact to the protected trait by engaging in a totality of the circumstances analysis of the societal and historical conditions of discrimination in the particular jurisdiction. *See Gingles*, 478 U.S. at 78–79; *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (observing that Section 2 rejects reliance on "[a]n inflexible rule" that fails to conduct a "'totality' review" and "searching practical evaluation of the 'past and present reality'").

The Circuits that have considered Section 2 vote denial cases have largely agreed upon the prevailing two-part test, which embeds these two causal connections, but have not always demarcated how the inquiries take shape and the level of causation required. This brief provides that analytical clarity, which further bolsters the consensus view among the Circuits and the Ninth Circuit's decision here.

I. "Results In" Requires a Showing of Contributory Cause.

To establish a Section 2 violation, plaintiffs must first show that the challenged law "results in" disproportionately reduced electoral opportunities for minority voters. This threshold showing "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Communities*, 576 U.S. at 521 (describing analogous standard in the Fair Housing Act context).

Plaintiffs demonstrate a sufficient causal connection by showing, *inter alia*, that the law either (a) imposes a voting requirement that minority voters are disproportionately less likely to satisfy, or (b) eliminates a voting opportunity that minority voters have been disproportionately more likely to use. *See, e.g.*, *Veasey*, 830 F.3d at 264–65; *LWV of N.C.*, 769 F.3d at 244. But as the Ninth Circuit correctly observed, "[t]he mere existence—or 'bare statistical showing'—of a disparate impact on a racial minority, in and of itself, is not sufficient," J.A. 612–13 (citation omitted); the disparate impact must be causally linked to the challenged practice. The Ninth Circuit required the plaintiffs below to show an "adverse disparate impact" at step one "by demonstrating 'a causal connection between the challenged voting practice and a prohibited discriminatory result.'" J.A. 622.

Concerning Arizona's out-of-precinct policy, for example, Plaintiffs established contributory

causation because "[t]he challenged practice—not counting OOP ballots—results in 'a prohibited discriminatory result'; a substantially higher percentage of minority votes than white votes are discarded." J.A. 622. That standard—requiring a contributory causal connection, rather than something more stringent, such as but-for cause—is consistent with guidance from this Court's causation decisions.[4] *See Paroline v. United States*, 572 U.S. 434, 458 (2014) ("[C]ourts need not read phrases like 'results from' to require but-for causality where there is 'textual or contextual' reason to conclude otherwise") (internal citation omitted).

The *en banc* Fifth Circuit's decision in *Veasey v. Abbott* reinforces this causation analysis at step one, holding that the "first part of this two-part framework inquires about the nature of the burden imposed and whether it creates a disparate effect[.]" 830 F.3d at 244. Applying this standard, the court determined that Texas's challenged voter-ID law causally contributed to the disparate impact because it resulted, even if indirectly, in "multiple plaintiffs [being erroneously] turned away when they attempted to vote" at the polls. *Id.* at 254–55. It also imposed substantial "additional obstacle[s] for many plaintiffs," such as acquiring costly "underlying documents necessary to obtain" identification or burdensome travel to ensure compliance. *Id.* at 253–56. The Fifth Circuit emphasized that although other factors existed, Texas's law "*itself* caused minorities

[4] Here, the challenged out-of-precinct policy and ballot collection prohibition would *also* have satisfied a but-for causation standard.

to disproportionately lack the documentation that is required to vote by dictating that the documents and IDs required would be those that minorities disproportionately lack." *Id.* at 264 n.61.

Thus, Section 2's first causation requirement is a "demanding but still practicable causal standard" that requires the challenged policy to have "somehow contributed" to the discriminatory result. *See Maslenjak v. United States*, 137 S. Ct. 1918, 1925–26, 1930 (2017) (describing a similar contributory cause standard for statute criminalizing "knowingly procur[ing], contrary to law, the naturalization of any person"). Although this causation standard may be somewhat less stringent than but-for cause, courts have used it to screen out claims based on lack of causation. The Sixth Circuit, applying this standard, denied a Section 2 challenge to the reduction of early voting in Ohio in part because the plaintiffs were unable to show that the challenged law "causally contribute[d]" to the alleged discriminatory impact. *Ohio Democratic Party*, 834 F.3d at 637–38. A different Ninth Circuit decision followed a similar analysis and rejected a Section 2 claim challenging a voter-ID provision for lack of causation. *Gonzalez*, 677 F.3d at 407 (rejecting a Section 2 claim because the plaintiffs failed to show the challenged law "*resulted in* Latinos having less opportunity to participate in the political process and to elect representatives of their choice" (emphasis added)).

Contemporaneously with the 1982 VRA amendments, the Court interpreted the same "results in" or analogous language in other statutes to require

a similar two-part causation standard, the first of which is met by showing that the challenged practice leads to a disparate impact. In *Board of Education of City School District v. Harris*, the Court considered a challenge under the Emergency School Aid Act ("ESAA"), which provided federal aid to educational agencies for desegregation and support for minority students. 444 U.S. 130 (1979). The ESAA made ineligible any educational agency that had a practice "which *results in* the disproportionate demotion or dismissal of instructional or other personnel from minority groups[.]" *Id.* at 130 (citation omitted) (emphasis added). The Court held that the statute employed a disparate impact test, *id.* at 141, and presenting a "proper statistical study" that connected the disparity to the challenged policy was sufficient to establish a causal relationship, *id.* at 131, 151.

The Court's ESAA causation framework parallels the Section 2 analysis. The first step, disparate impact, can be established through statistical disparities. *See id.* But like Section 2, an alleged ESAA violation required more. At the second step, the Court engaged in a contextual analysis of the alleged educational necessity of challenged policies. *Id.* at 151. That fact-intensive second step mirrors Section 2's "totality of circumstances" analysis—particularly the consideration of the tenuousness of the challenged policy rationales—undertaken using the Senate Factors in Section 2 cases as discussed *infra*.

Similarly, in the employment discrimination context, plaintiffs must demonstrate an employer's

policy causes a discriminatory impact "because of" an individual's protected trait. *See Griggs v. Duke Power*, 401 U.S. 424, 430 (1971). Like Section 2 plaintiffs, claimants challenging employer policies under Title VII begin by showing that the policy causes a disparate impact on minorities. *See Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977). Again, a second step ensures that bare statistical disparities alone do not doom a justified policy. After finding a disparate impact, courts then consider whether the challenged policy has a "manifest relationship to the employment in question" and any evidence suggesting that the practice was a pretext for discrimination. *Id.* at 446–47 (citing *Griggs*, 433 U.S. at 432).[5]

These cases—decided shortly before the 1982 Section 2 amendments—are instructive. In both the ESAA and Title VII contexts, Congress evinced a clear intent through the statutory text to allow plaintiffs to establish a violation by demonstrating that the challenged law led to discriminatory results. Like Section 2, in both of these statutory contexts the first step requires only statistical disparities while the second step separates important and justified policies from those that bake in and reinforce systemic discrimination. The contributory cause standard applied below is consistent not only with this Court's contemporaneous causation jurisprudence in 1982, but also with the text and purpose of the statute—

[5] The Court also paralleled this approach in the ADEA context. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121–22 (1985).

particularly in light of the additional causation showing required in the second step of the test.

II. "On Account Of" Prompts But-For Causation and Analysis of the Senate Factors.

Vote denial plaintiffs must additionally establish that, based on the totality of circumstances, the challenged practice's disproportionate burden on minority voters is "on account of" their minority status. At this step, an identified disparate impact is actionable only if the voter's race or language-minority status is the but-for cause of the prohibited result, as revealed by the challenged practice's "interact[ion] with social or historical conditions" of discrimination in the jurisdiction. *Gingles*, 478 U.S. at 47. This causation analysis is guided by Section 2's objective, non-exclusive Senate Factors, which assess the factual environment in which the challenged practice operates and connects its disparate impact to race. *Id.* at 36–37. The factors expose how past and present discrimination, existing biases, and lasting disadvantages visited upon minority groups explain the prohibited result, while also weighing the jurisdiction's legitimate non-racial policy rationales.

A. "On Account Of" Requires But-For Causation.

Section 2's use of "on account of" requires plaintiffs to establish a but-for connection between the challenged practice's discriminatory result and race or language-minority status. 52 U.S.C. § 10301(a). Under this statutory language, but-for causation "supplies the 'default' or 'background' rule

against which Congress is normally presumed to have legislated when creating its own new causes of action." *Comcast Corp. v. Nat'l Ass'n of African Am. Owned Media*, 140 S. Ct. 1009, 1014 (2020) (citation omitted).[6] To determine whether Section 2 deviates from that presumption, the Court examines "the ordinary public meaning of [the statute's] terms at the time of its enactment," *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020), in relation to its history, context, and purpose, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266–68 (1992); *see also Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018). All of these considerations weigh in favor of a but-for causation rule for vote denial claims, and Petitioners' gambit to constrict the standard to proximate causation must fail.

First, contemporaneous dictionaries from 1982 suggest that the ordinary meaning of "on account of" is "by reason of" and "because of." *Rousey v. Jacoway*, 544 U.S. 320, 326 (2005) (citing Random House Dictionary of the English Language 13 (2d ed. 1987); Webster's Third New International Dictionary 13 (1981)). The Court has consistently interpreted these synonymous causal terms to entail but-for causation. *See, e.g.*, *Bostock*, 140 S. Ct. at 1739 (collecting cases). Accordingly, in the absence of contrary evidence, "on account of" is among the phrases that "indicate a but-

[6] Although Congress did not explicitly designate the causation level, "[i]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Gingles*, 478 U.S. at 71 n.34 (quoting Senate Report, at 27–28 & n.109).

for causation requirement." *Comcast*, 140 S. Ct. at 1015 (citation omitted).

Second, Section 2's text, context, and history provide no support for deviating from a but-for standard to impose a more demanding proximate cause requirement. By its text, Section 2's use of "on account of" is not accompanied by adverbial modifiers such as "solely," "primarily," or "foreseeably" that suggest a heightened standard. Given that "Congress could have taken [this] more parsimonious approach" to Section 2, its refusal to do so reinforces that but-for cause is appropriate. *Bostock*, 140 S. Ct. at 1739–40 (collecting examples). Looking to the VRA's context, the analogous Section 5 identically prohibits denials or abridgments of "the right to vote on account of race," 52 U.S.C. § 10304, yet the Court has never interpreted Section 5 to entail a "narrow" causation component, *see, e.g.*, *Fla. v. United States*, 885 F. Supp. 2d 299, 315–16 (D.D.C. 2012) (three-judge court). Further, nothing in Section 2's history indicates that Congress designed "on account of" to require a more onerous standard, and the legislative reports suggest the opposite. *See, e.g.*, Senate Report at 29 n.114.

In urging the Court to deviate from the presumptive but-for standard, Petitioners and DOJ ignore Section 2's text, context, and history. They rely instead on distinguishable cases analyzing dissimilar statutory language, with causation analyses that turn on concerns not at issue here. In *Holmes*, for example, the Court required proximate causation because indications in "statutory history" signaled "the very

unlikelihood that Congress meant to" adopt but-for causation. 503 U.S. at 265–67. The Court further emphasized that the circuit courts had "overwhelmingly held that ... proximate[] causation is required." *Id.* at 266 n.11. Likewise, the Court in *Husted* deviated from a but-for standard by engaging in a "process of elimination" that was necessary to "harmonize[]" conjoined provisions of the NVRA and HAVA. 138 S. Ct. at 1843. None of these considerations apply here: no statutory history supports deviating from but-for cause, the lower courts have not overwhelmingly applied a proximate cause standard, and there is no overriding need to harmonize Section 2's causation requirement with any related provision.

Justice Scalia's hypothetical "registration for only three hours one day a week" scenario in *Chisom* further demonstrates why a proximate causation standard is unfounded. 501 U.S. at 408 (Scalia, J., dissenting). This illustration recognizes that the registration restriction cannot be evaluated in a vacuum; courts must instead follow Congress's admonition to examine the effects of race related to a challenged voting practice using a context-specific, "totality of circumstances" analysis. *See Gingles*, 478 U.S. at 65. But-for causation fits this approach by enabling courts to assess how such a limited registration window imposes a disparate impact related to race because of the enduring effects of discrimination in areas such as employment, access to transportation, and education. *See, e.g.*, J.A. 647–50, 664. Requiring a proximate cause standard would unwarrantedly curtail Section 2's totality analysis by

asking courts to draw a direct line between race and voters' inability to register during a narrow timeframe. *See Paroline*, 572 U.S. at 444–45. In doing so, it would permit savvy discriminators to capitalize on existing socio-economic disparities to achieve the discriminatory results they could not mandate directly. Section 2's functional, flexible, and fact-intensive approach does not countenance such a rigid inquiry. *See De Grandy*, 512 U.S. at 1018. The Court must reject Petitioners and DOJ's proximate cause invitations to avoid "adopt[ing] a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach." *Paroline*, 572 U.S. at 458.

B. Section 2's But-For Causation Follows the "Totality of Circumstances" Approach.

Establishing a but-for causal relationship between the challenged practice's disparate impact and the Section 2 protected characteristic requires plaintiffs to show that conditions of discrimination and enduring inequalities also explain the prohibited result. To meet the "sweeping standard" of but-for causation, Section 2 plaintiffs need not establish that race is the "primary or most direct cause" of the challenged practice's disparate voting burden and "it has no significance here if another factor"—such as disproportionate levels of poverty or residential mobility—"might also be at work, or even play a more important role in the" prohibited result. *See Bostock*, 140 S. Ct. at 1739, 1744–45. As the *Bostock* Court explained, "[o]ften in life and law two but-for factors

combine to yield a result that could have also occurred in some other way." *Id.* at 1748. Thus, it is sufficient for but-for causation that race "played a necessary part in the" result, *see Husted*, 138 S. Ct. at 1843, and a Section 2 "defendant cannot avoid liability just by citing some *other* factor that [also] contributed to" the denial or abridgement of minority voters' rights, *see Bostock*, 140 S. Ct. at 1739.

Following this general framework, the Section 2 but-for causation standard draws its specific approach from what "the statute's language and history indicate," *Comcast*, 140 S. Ct. at 1016, and must be read "in light of the purpose underlying" the VRA, *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997). Section 2 mandates a "totality of circumstances" approach, examining the factual environment in which a challenged practice operates to determine whether the "political processes ... are not equally open" to minority voters because of their protected trait. 52 U.S.C. § 10301(b). Congress has made clear that, in the Court's words, such an assessment centers on "a 'functional' view of the political process" by taking "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms" in light of "a searching practical evaluation of the 'past and present reality'" of inequality in the jurisdiction. *Gingles*, 478 U.S. at 45, 47, 79 (citations omitted). Thus, Section 2 is designed to counteract "a challenged system or practice" that "in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." Senate Report at 27.

To effectuate Section 2's text, history, and prophylactic purpose, plaintiffs must prove but-for causation by connecting evidence under the Senate Factors to the challenged practice's disparate impact. Following the required totality approach, these nine factors can elucidate when a voter's race is the but-for cause of the challenged practice's disparate harm by establishing how conditions of discrimination interact with the challenged practice to infect the political process with inequality. *See Gingles*, 478 U.S. at 36–37, 46; *see also Holder v. Hall*, 512 U.S. 874, 938 (1994) (Thomas, J., concurring) (describing the factors as "a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction").

For example, Senate Factors One (history of official voting discrimination) and Five (effects of non-voting discrimination) uncover how the challenged practice exacerbates conditions of discrimination and enduring disadvantages to compromise the integrity of the electoral process as a race-neutral zone in society. Senate Factors Three (discrimination enhancing devices), Six (racist campaigning), and Seven (lack of minority group representation) assess the effects of community racial biases on minority voters' inability to equally participate in the political process. And Senate Factors Two (racial polarization), Eight (lack of official responsiveness), and Nine (policy tenuousness) reveal the existence of perverse partisan incentives to perpetuate the effects of racial discrimination and biases. Factor Nine also ensures that the jurisdiction's legitimate policy rationales are

given adequate weight. These considerations "cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). Section 2 "plaintiffs could show a variety of factors, depending upon the kind of rule ... called into question" and "there is no requirement that any particular number of factors be proved or that a majority of them point one way or the other." Senate Report at 28–29; *see also id.* at 29 n.118.

C. The "Totality of Circumstances" Includes Historical and Nongovernmental Discrimination.

The Senate Factors are not artificially limited to only examining modern or state-sponsored discriminatory conditions, and a contrary requirement would negate Congress's decision to adopt a results-based, totality-of-circumstances approach. Although jurisdictions must be afforded opportunities to atone and reverse the damage of past discrimination, "racial discrimination and racially polarized voting are not ancient history." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009); *see also Shelby County*, 570 U.S. at 536. Under Section 2, courts must evaluate "the past and present reality" to discern the "inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 69; *see also id.* at 44 n.9. Indeed, Section 2 expresses the "duty to ... so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Knowing that a minority group "has suffered

discrimination in the past" is necessary to appreciate how the "group currently bears the effects of that discrimination," *Hall*, 512 U.S. at 938 (Thomas, J., concurring), and whether challenged "voting practices and procedures that have discriminatory results perpetuate" those inequalities in the current political process, Senate Report at 40.

The Section 2 analysis is similarly not limited to only evidence of state-sponsored discrimination. Rather, this Court has emphasized that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions," including "the effects of past discrimination in areas such as education, employment, and health[.]" *Gingles*, 478 U.S. at 47, 45, 80; *see also Voinovich*, 507 U.S. at 153.[7] Further, Congress explicitly drew the amended Section 2 from the Court's decision in *White v. Regester*, *see Gingles*, 478 U.S. at 35, which examined the effects of nongovernmental discrimination and how a challenged practice is "overlaid ... on the cultural and economic realities" of the community to discriminate against minority voters, 412 U.S. 755, 768–69 (1973).

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[7] The lower courts have also long recognized that "under the results standard of section 2, pervasive private discrimination should be considered, because such discrimination can contribute to the inability of [minorities] to assert their political influence and to participate equally in public life." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984) (Wisdom, J.); *see also Solomon v. Liberty County*, 899 F.2d 1012, 1032 (11th Cir. 1990) (*en banc*) (Tjoflat, J., concurring) (observing that "Congress ... revised section 2 to prohibit election practices that accommodate or amplify the effect that private discrimination has in the voting process" (citation omitted)).

Among these realities, "Congress was fully cognizant of the potential effect of unequal educational opportunities upon exercise of the franchise" in enacting the VRA, and sought to prohibit electoral devices that "would serve only to perpetuate these inequities in a different form" as much as devices perpetuating intentional state-sponsored discrimination. *See Gaston County v. United States*, 395 U.S. 285, 289, 296–97 (1969). Any other rule permits a jurisdiction to achieve its discriminatory ends by merely aggravating existing structural inequalities it did not necessarily create.

Again, Justice Scalia's vote-denial registration example is instructive. *See Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). The reason why minority voters would likely face greater hardship registering during a three-hour, once-a-week window in a given jurisdiction may be the enduring effects of historical or nongovernmental discrimination "in areas such as education, employment, and health." *See Gingles*, 478 U.S. at 45. As the district court found here, the consequences of this discrimination today make "minority voters ... more likely to work multiple jobs, less likely to own a car, and more likely to lack reliable access to transportation." J.A. 649. In Justice Scalia's hypothetical, minority voters facing these lasting discriminatory barriers may be prevented from registering because they are unable to take off work, afford to sacrifice wage-earning hours, or travel to a registration site. Evaluating these hindrances and their sources helps explain why the disproportionate burden on minority voters occurs because of race discrimination and not chance

misfortune or idiosyncratic preferences. Requiring courts to blind themselves to this reality would artificially exclude probative evidence from Section 2's totality analysis and flout this Court's and Congress's directive to evaluate the effects of discriminatory conditions external to the political process. *Gingles*, 478 U.S. at 45–47. Thus, "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule," *Bostock*, 140 S. Ct. at 1747, including considering the effects of historical and nongovernmental discrimination under Section 2's totality approach.

D. The Prevailing Section 2 Test Correctly Applies a But-For and Totality Standard.

The lower courts, including the Ninth Circuit below, have faithfully applied the results test to track but-for causation standards and Section 2's totality-of-circumstances approach. The *en banc* Fifth Circuit's decision in *Veasey* typifies the correct use of the Senate Factors as an analytical tool to establish a "sufficient causal link between the disparate burden imposed" by the challenged practice (there, a strict voter-ID law) "and social and historical conditions produced by discrimination." 830 F.3d at 245.[8] For example, the court analyzed Factor One and concluded that "Texas's history of discrimination in voting acted in concert with [the voter-ID law] to limit minorities' ability to participate in the political process." *Id.* at 257. Similarly, under Factor Five, the

[8] The Fourth and Sixth Circuits have similarly applied the Senate Factors to establish causation. *LWV of NC*, 769 F.3d at 245–46; *Ohio NAACP*, 768 F.3d at 553–57.

court ruled that "the vestiges of discrimination" in conditions outside of voting "act in concert with the challenged law to impede minority participation in the political process." *Id.* at 259. And evidence of a "lack of responsiveness to minority needs by elected officials" under Factor Eight was "coupled with [the voter-ID law's] effect on minorities in Texas" to reveal that race explained the prohibited result. *Id.* at 261. Taking a functional view of Texas's political processes and the combined effect of these considerations and others, the court concluded that the identified disparate "impact is a product of current or historical conditions of discrimination such that it" occurred on account of race and violated Section 2. *Id.* at 244 (citing *Gingles*, 478 U.S. at 44–45).

The Ninth Circuit below similarly used the Senate Factors to draw a but-for causal link between the challenged practices' disparate impact and race. J.A. 613. The court scrutinized multiple Senate Factors concerning Arizona's extensive history of election discrimination, current conditions of discrimination in other social contexts, racially polarized voting patterns, racialized campaign rhetoric, elected officials' lack of representativeness and responsiveness to minority groups, and the tenuousness of Arizona's policy justifications. *See* J.A. 623–659, 662–670. The Ninth Circuit then drew sharp causal connections between the identified disparate impacts and these discriminatory conditions. For example, it concluded that H.B. 2023's disparate impact "grows directly out of" Arizona's history of electoral discrimination under Factor One; "is closely linked to the effects of discrimination that

'hinder' the ability of American Indian, Hispanic, and African American voters 'to participate effectively in the political process'" under Factor Five; and "was the direct result of racial appeals in a political campaign" under Factor Six. J.A. 663–65. Thus, the Court determined that—in accordance with Section 2's text, following but-for causation principles, and extensively discussing the Senate Factors—the contested practices' disparate impacts occurred "on account of" race. *See* J.A. 658–59, 669–70.

In sum, "on account of" requires a but-for causal link between the challenged practice's disparate impact and the Section 2 protected trait under the totality of circumstances.

III. Section 2's Robust Causation Requirements Affirm its Constitutional Grounding.

Section 2's totality approach and two-part causation requirement ensure that the vote denial standard is constitutionally sound and far from a bare disparate impact test. It sufficiently limits liability[9] by reserving successful "challenges to those that properly link the effects of past and current discrimination with the racially disparate effects of the challenged law." *Veasey*, 830 F.3d at 246–48. Requiring causal nexuses to both the challenged practice and race, along with an exhaustive functional assessment of voting inequality, anchors Section 2 in the Reconstruction Amendments while still fulfilling its purpose to "protect voting rights that are not adequately protected by the Constitution itself."

[9] *See supra* note 3.

Chisom, 501 U.S. at 403. Section 2's vote denial test also heeds this Court's warning that "robust causality requirement[s]" must accompany results-based antidiscrimination statutes. *Inclusive Communities*, 576 U.S. at 542.

A. Section 2 is Appropriate Enforcement Legislation.

Section 2's results test and two-part causation requirements ensure that it remains an appropriate enforcement statute for the Fifteenth and Fourteenth Amendments' guarantees of equality in the political process. The Fifteenth Amendment "reaffirm[s] the equality of races at the most basic level of the democratic process, the exercise of the voting franchise." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). It "nullifies sophisticated as well as simple-minded modes of discrimination" and prohibits "onerous procedural requirements which effectively handicap exercise of the franchise by [minority groups] although the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, 307 U.S. 268, 275 (1939). To enforce these protections, the Fifteenth Amendment authorizes Congress to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," a mandate that is "no less broad than its authority under the Necessary and Proper Clause." *City of Rome v. United States*, 446 U.S. 156, 175, 178 (1980) (citations omitted). This includes the authority to prohibit "voting practices that have only a discriminatory effect." *Id.* at 172; *see also Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J.).

The Fourteenth Amendment similarly preserves every citizen's "constitutionally protected right to participate in elections on an equal basis with other citizens[.]" *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Remedial legislation enforcing the Fourteenth Amendment must have "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). Congress's enforcement power is at its height when it acts to protect a suspect class against discrimination, *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 735–39 (2003), or to safeguard a fundamental right, *Tennessee v. Lane*, 541 U.S. 509, 530–34 (2004).

Both Amendments empower Congress to "enact so-called prophylactic legislation that prohibits facially constitutional conduct." *Hibbs*, 538 U.S. at 727–28; *see also City of Rome*, 446 U.S. at 172. Section 2 is appropriate prophylactic legislation that safeguards the Reconstruction Amendments' guarantees but limits liability through robust causation analyses and a totality-of-circumstances approach. *See Veasey*, 830 F.3d at 246–48, 253–54 & n.47. Identifying a statistical racial disparity is merely the threshold inquiry; Section 2 additionally requires plaintiffs to link the prohibited result to both the challenged practice and race, *see id.*, while also establishing a range of circumstantial factors that weigh the State's legitimate justifications and parallel the same considerations used to uncover discriminatory intent in constitutional vote-dilution cases, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 624–27

(1982); *Regester*, 412 U.S. at 766–69. Moreover, Section 2 imposes no blanket prohibition of any electoral device or practice, focusing instead on barring only those that disproportionately and unjustifiably have "the effect of diminishing or abridging the voting strength of the protected class." *Voinovich*, 507 U.S. at 155–57. "[W]here such an effect has not been demonstrated, § 2 simply does not speak to the matter." *Id.* at 155. Thus, Section 2's causation requirements and totality analysis ensure that it is a limited, rational means of effectuating the Fifteenth Amendment and remains congruent and proportional to the Fourteenth Amendment harm that the statute seeks to prevent.

B. Section 2 Advances Equal Protection Principles by Reducing Racial Divisiveness.

Despite Petitioners' unsupported assertions, Section 2 does not compel excessive race-consciousness. The results-based test "plays a role in uncovering discriminatory intent," including rooting out more subtle forms of "unconscious prejudices," "disguised animus," and "covert and illicit stereotyping." *Inclusive Communities*, 576 U.S. at 540. It does so by drawing causal connections between a disparate impact on minority voters, the challenged practice, and conditions of discrimination while using circumstantial evidence to expose racial biases that might infect the electoral process. *See Veasey*, 830 F.3d at 245–48. But the vote denial test stops short of prompting state actions that could be interpreted as "balkaniz[ing] us into competing racial factions."

Hall, 512 U.S. at 905 (Thomas, J., concurring) (citation omitted). The prevailing two-part analysis makes no inferences about minority voters' political preferences, does not categorize voters in a manner that could precipitate polarization, never divvies up fixed resources using racial preferencing, nor compels proportional representation or any political outcomes at all. *Cf. id.* at 905–08. In short, Section 2 enforces rather than affronts the Equal Protection Clause by probing the effects of race on voting inequality, without provoking divisions or relying on race-based assumptions.

Section 2's results-based analysis is analytically preferable to an intent standard, which fails to safeguard electoral equality and avoid racial fractiousness. As Justice Thomas emphasized, "[a] law ... limiting times and places at which registration can occur might be adopted with the purpose of limiting black voter registration, but it could be extremely difficult to prove the discriminatory intent behind such a facially neutral law." *Id.* at 924. Indeed, in the time before the 1982 amendment, the "'intent' standard was so difficult to meet that the Justice Department stopped bringing suits under Section 2" altogether. *Marengo County*, 731 F.2d at 1556. These difficulties are due in part to "legislative immunity, incomplete legislative history, and the ease with which non-racial purposes for a law can be offered." *Id.* at 1558 n.19 (citing Senate Report at 36–37).

Moreover, Section 2's Senate Factors causation analysis parallels the circumstantial factors the Court considers to uncover purposeful voting

discrimination, but without requiring a burdensome or stigmatizing discriminatory intent ruling. *Compare Gingles*, 478 U.S. at 36–37, *and* Senate Report at 37, *with Regester*, 412 U.S. at 766–69, *and Rogers*, 458 U.S. at 624–27. Evaluating these factors through a results test prompts the incisive analysis required to prevent voting discrimination while avoiding the divisive "added burden of placing local judges in the difficult position of labeling their fellow public servants 'racists.'" *United States v. Blaine County*, 363 F.3d 897, 908 (9th Cir. 2004). Thus, the results test is necessary to "allow plaintiffs to mount a successful challenge to the law under § 2 without such proof" of intent, *Hall*, 512 U.S. at 924 (Thomas, J., concurring), and is preferable because an "[i]nquiry into the motives of elected officials can be both difficult and undesirable, and such inquiry should be avoided when possible," *Marengo County*, 731 F.2d at 1558.

C. Section 2 Offers Due Regard to the State's Legitimate Interests.

Section 2 also requires courts to consider whether a "State's justification for its electoral system" is legitimate and the challenged practice is tailored to that end. *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419, 426–27 (1991). Indeed, results-based "liability mandates the removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies." *Inclusive Communities*, 576 U.S. at 540 (citations omitted). As such, vote denial claims examine the extent to which "the policy underlying the State's"

contested practice "is tenuous" or legitimate, *Gingles*, 478 U.S. at 45, and lower courts have given this consideration substantial weight, *see, e.g.*, J.A. 655–58, 666–70; *Veasey*, 830 F.3d at 262–64.

However, "the articulation of a legitimate interest is not a magic incantation a state can utter to avoid a finding of" liability. *Veasey*, 830 F.3d. at 262.[10] Although Petitioners contend that Arizona's restrictions are justified to prevent voter fraud, that alleged objective must be subject to judicial scrutiny. *See Inclusive Communities*, 576 U.S. at 541. The rationale may be legitimate in the abstract but tenuous in reality, and this Court has not hesitated to hold election laws unconstitutional even when they purport to prevent voter fraud.[11] Too often, the unsupported specter of "voter fraud"—or the accompanying need to bolster the public's confidence in elections, itself only shaken by the rhetoric of the very elected officials citing this rationale—has been used to erect discriminatory barriers. *See, e.g., Veasey,* 830 F.3d at 237 (considering all-white primaries, secret ballot provisions, poll taxes, re-registration requirements, and voter registration purges). Indeed, only two weeks ago, such rationales disconnected from evidence were used to disrupt the

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[10] Moreover, partisan motivations for a challenged law are per se tenuous under Section 2, given that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Dunn*, 405 U.S. at 355; *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008).

[11] *See, e.g.*, *Dunn*, 405 U.S. at 346; *Harman v. Forssenius*, 380 U.S. 528, 543 (1965); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999).

orderly transition of political power and incite a violent uprising at the seat of the Nation's government. Thus, whether an anti-fraud justification is legitimate or "seems to have been contrived" is an important part of the Section 2 analysis. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

The Ninth Circuit's evidence-based analysis strikes the appropriate balance between respecting the need for orderly elections and protecting racial equality in access to the ballot. The court properly maintained the precinct-based voting system, while restricting Arizona from discarding valid votes in appropriate races without justification. Likewise, it did not err in finding the anti-fraud justification was "contrived" where Arizona failed to put forward *any* evidence of voter fraud related to third-party ballot collection, while Plaintiffs offered substantial evidence that legislators were more focused on stymying Hispanic voter turnout. *See* J.A. 655, 667–70.

States must harmonize their priorities in promoting voter integrity with the fundamental right to vote on an equal basis. Section 2 ensures this careful balance by enabling courts to consider policy justifications in the totality analysis.

CONCLUSION

For the reasons stated herein, *amicus curiae* CLC respectfully requests that the Court affirm the judgment of the Ninth Circuit and the appropriate Section 2 vote denial causation analysis.

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