January 21, 2021

ATTORNEY GENERAL RAOUL DEFENDS KEY PROVISION OF THE VOTING RIGHTS ACT BEFORE SUPREME COURT

Raoul, AGs Argue That Provision Removes Racial Barriers to Voting Without Infringing on State Sovereignty

Chicago — Attorney General Kwame Raoul joined a coalition of 18 attorneys general urging the U.S. Supreme Court to uphold a robust test for applying Section 2 of the Voting Rights Act (VRA), which prohibits policies and practices that interfere with citizens' right to vote based on their race.

Raoul and the coalition filed an amicus brief in Brnovich v. Democratic National Committee and Arizona Republican Party v. Democratic National Committee, two consolidated cases addressing Arizona laws that challengers allege make it harder to vote. Raoul and the coalition argue that the Supreme Court should maintain the existing test, which asks whether an election law denies voters of color an equal opportunity to participate in the political process, instead of narrowing it or striking down critical voting rights legislation.

"The laws in question deny individuals – particularly people of color – the right to vote, one of the most fundamental rights we have as Americans," Raoul said. "Every American, regardless of race, has a right to cast a ballot and have that ballot counted. I will continue to vigorously oppose any measure that serves to disenfranchise minority voters."

Section 2 of the Voting Rights Act prohibits any "qualification or prerequisite to voting" or "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Since 1982, Section 2 has contained a discriminatory-results provision, which prohibits election laws or structures that create unequal opportunities for participation in the political process.

Two Arizona laws have been challenged because of the discriminatory results they produce. The first is an "out-of-precinct policy," under which provisional ballots cast in person are not counted if the voter, even inadvertently, cast the ballot outside their designated precinct. The second is a "ballot-collection" statute that prohibits so-called ballot harvesting and allows only certain individuals, such as family members, to collect and submit another person's completed early ballot. The 9th Circuit concluded that both laws produced a disparate impact on voters of color by creating unequal opportunities for political participation, and thus violated the VRA. The Arizona attorney general and the Arizona Republican Party are challenging the 9th Circuit's ruling in the Supreme Court. They argue that the 9th Circuit's standard would result in striking down all laws that impose even small differential effects on voters of different races.

Raoul and the coalition supporting the 9th Circuit's ruling filed an amicus brief defending the existing test for assessing VRA violations. Specifically, the states urge the Supreme Court to uphold the 9th Circuit's decision because:

- **Generally applicable election laws like Arizona's can violate Section 2 of the VRA:** Previous cases have demonstrated that seemingly "neutral, generally applicable election laws" can result in denial or abridgment of the vote to people of color. The Supreme Court has interpreted the text of the VRA to provide the broadest possible scope, extending to facially neutral and generally applicable laws.

- **The existing test incorporates a rigorous analysis that threatens only election laws operating to abridge or deny electoral opportunities:** The 9th Circuit's test, which is similar to those used by other courts, requires more than a disparate impact. Once a finding of disparate impact is made, the court engages in a more searching inquiry into whether electoral systems function to exclude minority voters. The plaintiff must demonstrate that the disparate burden denies voters of color equal opportunities to participate in the electoral process. This rigorous analysis provides a workable framework that gives states flexibility while preventing discrimination.

- **The two-part test is constitutional because it prevents and deters lawmakers from enacting discriminatory laws:** Intentional discrimination is very difficult to prove. The results test is important because it helps to weed out intentional discrimination and prevents future unconstitutional conduct by targeting the racially polarized conditions most likely to incentivize intentional discrimination in the regulation of elections.

Joining Raoul in filing the brief are the attorneys general of California, Colorado, Connecticut, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia and Washington.

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 THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The questions presented are:

1. Does Arizona's out-of-precinct policy violate Section 2 of the Voting Rights Act?
2. Does Arizona's ballot-collection law violate Section 2 of the Voting Rights Act or the Fifteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Since 1982, Section 2 of the Voting Rights Act has prohibited any state policy or procedure that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Consistent with other federal appellate courts, the Ninth Circuit employs a two-step test for determining whether a state's ostensibly neutral law, in fact, "results in" vote denial or abridgment. *Id.*; *see* JA 612-13.

Petitioners in this case attempt to pit Section 2 against states' sovereign interests by arguing that the Ninth Circuit's two-part test unduly conflicts with states' "major role . . . in structuring and monitoring the election process." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). The District of Columbia and the States of California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington ("*Amici* States") submit this brief as *amici curiae* in support of respondents because, put simply, that conflict is illusory.

The *Amici* States have a critical interest in preserving the balance Congress struck through Section 2's results test. They are "joint participants in the governance of the Nation," as well as sovereigns in their own right. *Alden v. Maine*, 527 U.S. 706, 748 (1999). The *Amici* States derive that sovereignty and their continued legitimacy from "that pure, original fountain of all legitimate authority": the people themselves. *The Federalist* No. 22, at 148 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And because "republican liberty" demands "not only, that all power should be

derived from the people; but that those [e]ntrusted with it should be kept in dependence on the people," *id.*, No. 37, at 223 (James Madison), states have a paramount interest in ensuring that their electoral processes are responsive to *all* citizens, regardless of race. Although no state has perfected the democratic process, all the *Amici* States share Section 2's "goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

Simultaneously, the *Amici* States seek to preserve their primacy over "'the power to regulate elections,'" and their "constitutional responsibility for the establishment and operation of [their] own government[s]." *Sugarman v. Dougall*, 413 U.S. 634, 647-48 (1973) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970)). States, accordingly, have a countervailing interest in ensuring that legislation enacted under Congress's Reconstruction authority furthers collective commitments to multi-racial democracy without unduly intruding on state prerogatives.

States have long planned and conducted elections against the backdrop of Section 2: "the major statutory prohibition of all voting rights discrimination." S. Rep. No. 97-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207. The *Amici* States' experience reveals that while Section 2's goal is profound, its burden on state election systems is not. Seeking to vindicate the Constitution's guarantee that government remains "collectively responsive to the popular will," *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), Section 2 simply asks whether, under "the totality of the circumstances," 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).

The Ninth Circuit's two-part test for vote-denial claims effectuates this reasonable demand. Rooted in the familiar framework of *Thornburg v. Gingles*, 478 U.S. 30 (1986), the test asks first whether the challenged law "results in a disparate burden on members of the protected class." JA 612. If it does, the test then interrogates "whether, under the 'totality of circumstances,'" the disproportionate burden on minority voters interacts with existing conditions of discrimination so as "'to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives' or to participate in the political process." JA 623 (quoting *Gingles*, 478 U.S. at 46-47). That inquiry furthers Section 2's critical goal of insulating the political process from discrimination's crippling effects while preserving state autonomy. The *Amici* States therefore urge this Court to uphold it.

SUMMARY OF ARGUMENT

1. Section 2 applies to facially neutral, generally applicable laws like the ones at issue here. The Voting Rights Act's plain text is "[i]ndicative of an intention to give the Act the broadest possible scope," *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-67 (1969), prohibiting any "standard, practice, or procedure" that denies an individual the right to vote on account of race, 52 U.S.C. § 10301(a). It expressly reaches "all action necessary to make a vote effective," including "registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." *Id.* § 10310(c)(1). Indeed, this Court has already explained how ostensibly neutral election procedures might implicate Section 2. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas,

J., concurring) (Section 2's results test "covers all manner of registration requirements," as well as "the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted."). Arizona's election procedures are no exception.

2. That uncontroversial conclusion—that generally applicable election policies *can*, in some cases, trigger Section 2 liability—hardly means that the results test threatens to "dismantle every state's voting apparatus." Ohio et al. Br. 15 (quoting *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014)). Contrary to petitioners' and their *amici*'s framing, Section 2 is not a pure disparate-impact statute—and that is why *no* appellate court, including the Ninth Circuit, imposes Section 2 liability based on disparate impact alone. Instead, the two-part test protects regulated parties from unnecessary liability by requiring a rigorous, context-specific factual inquiry—drawn from this Court's decision in *Gingles*—to determine whether the disparate impact of a challenged procedure *actually operates* to render a political process "not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). By drawing on this Court's substantial vote-dilution jurisprudence, the two-part test creates "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 v. Abbott*, 830 F.3d 216, 247 (5th Cir. 2016) (en banc). The test's rigorous factual requirement, moreover, imposes both legal and practical constraints on liability, making reflexive invalidation of any state's election procedures improbable.

3. Finally, the two-part test raises no constitutional concerns. The crux of petitioners' challenge is that because the Fourteenth and Fifteenth Amendments prohibit only intentional discrimination, Section 2's results test exceeds Congress's authority under the Reconstruction Amendments. But permissible remedial legislation may lawfully "prohibit[] conduct which is not itself unconstitutional" if it "deters" or "prevent[s]" unconstitutional acts. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). A test like the Ninth Circuit's—which takes disparate impact as a starting point before engaging in a more searching inquiry into whether electoral systems actually function to exclude minority voters—operates as a "congruen[t]" and "proportional[]" mechanism for addressing intentional discrimination in two ways. *Id.* at 520. *First*, it smokes out ostensibly neutral polices enacted or enforced with discriminatory animus. *Second*, it prevents *future* unconstitutional conduct by eliminating the conditions most likely to incentivize "intentional discrimination in the regulation of elections." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016). Finally, because Congress relied on its enforcement authority under the Reconstruction Amendments, this Court need not analyze Section 2 using "background principles of [statutory] construction . . . grounded in the relationship between the Federal Government and the States." *Bond v. United States*, 572 U.S. 844, 857 (2014). The Court's test from *City of Boerne* already accounts for any abstract federalism concerns.

ARGUMENT

I. Generally Applicable Election Laws Can Violate Section 2.

Petitioners suggest that, as a rule, "[r]ace-neutral time, place, or manner regulations that are equally applied and impose only the ordinary burdens of voting do not implicate § 2—period." Private Pet'rs Br. 19 (emphasis omitted); *see* State Pet'rs Br. 20 (arguing that Section 2 "does not invalidate neutral, generally applicable voting laws" because these laws "give every registered voter the full ability to participate in the political process." (internal quotation marks omitted)). But as text and precedent make plain, generally applicable, facially neutral laws *can*, in fact, "result[] in a denial or abridgement" of the right to vote "on account of race." 52 U.S.C. § 10301(a). Indeed, the *Amici* States have long operated against the background that generally applicable election policies can create Section 2 liability and have crafted their election policies accordingly.

The statutory text confirms the *Amici* States' understanding. Since its enactment, the Voting Rights Act has expressly applied to any "standard, practice, or procedure," including any "qualification or prerequisite to voting," that denies an individual the right to vote on account of race. *Id*. Congress adopted a capacious definition of "vote," incorporating "all action necessary to make a vote effective," including "registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." *Id.* § 10310(c)(1). These definitional provisions—described by this Court as "[i]ndicative of an intention to give the Act the broadest possible scope"—extend to facially neutral state policies that structure the electoral process.

Allen, 393 U.S. at 566-67. That should be unsurprising, given that "the record which confronted Congress and the Judiciary in the voting rights [context]" detailed "modern instances of generally applicable laws passed because of [racial] bigotry." *City of Boerne*, 521 U.S. at 530.

When amending the statute to include a results test—as opposed to mere prohibition of intentional discrimination—Congress preserved the expansive scope of practices regulated by the Voting Rights Act. Indeed, it would be particularly odd for Congress to have excluded generally applicable rules from the scope of Section 2's results test given that the 1982 Amendments sought to cover *more* practices, and Congress emphasized that it intended the revised Section 2 to operate as "the major statutory prohibition of all voting rights discrimination." S. Rep. No. 97-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207.

Private petitioners nevertheless contend that because "race-neutral time, place, or manner" laws dictate identical requirements for every individual, "the state is not providing any disparate opportunities and its political processes are 'equally open' to all voters." Private Pet'rs Br. 27 (quoting 52 U.S.C. § 10301(b)). This Court has already recognized, however, that ostensibly neutral laws might "abridge" an individual's right to vote under Section 2. Abridge means "[t]o reduce or diminish." *Abridge,* Black's Law Dictionary (11th ed. 2019). And the Voting Rights Act's prohibition on "abridgement" of the right to vote extends to any "cumbersome procedure" or "material requirement" that "erects a real obstacle to voting." *Harman v. Forssenius*, 380 U.S. 528, 541-42 (1965). As Justice Thomas has explained, that means Section 2's results

test "covers all manner of registration requirements," as well as "the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted." *Hall*, 512 U.S. at 922 (Thomas, J., concurring); *see Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If, for example, 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.").

In short, Section 2 reaches ostensibly neutral voting procedures. But the fact that generally applicable election policies *can*, in some cases, trigger liability hardly means that Section 2 threatens to "dismantle every state's voting apparatus." Ohio et al. Br. 15 (alterations and citation omitted). Just the opposite: Section 2 makes clear that states face liability only if, under the "totality of circumstances," voting procedures result in minorities having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). And because most facially neutral, generally applicable laws structuring the electoral process will not result in "less opportunity" for any group, most will pass Section 2's test.

As explained further below, the *Amici* States' experience bears this out. Just as in vote-dilution cases, judges applying Section 2's results test to vote-denial claims have developed administrable, principled standards for differentiating between laws that merely impose differential burdens and laws that operate to

actually diminish electoral opportunities. Because most election administration policies do not operate to deny or abridge any individual's right to vote because of race, most do not lead to Section 2 liability. The Ninth Circuit's test—like that of nearly every other circuit to have addressed the issue—successfully distinguishes between the two.

II. The Two-Part Test Limits Liability To Only Those Election Laws That Actually Operate To Deny Or Abridge The Right To Vote.

Like its sister circuits, the Ninth Circuit has adopted a two-part test for Section 2 vote denial claims. That test works. It effectuates Section 2's statutory language. It vindicates the constitutional values that animated Congress's passage of Section 2. And—most importantly for the *Amici* States—it protects regulated parties from unnecessary liability by requiring a rigorous, context-specific factual inquiry into how electoral mechanisms operate on the ground to determine whether a policy or procedure prevents minority participation. Under the existing two-part test, plaintiffs alleging discriminatory results must prove that the challenged procedure *actually functions* in a manner resulting in discrimination.

Petitioners and their *amici*, however, see the Ninth Circuit's straightforward test as an assault on state sovereignty that "transform[s]" Section 2 from "a *prohibition* on voting rules that treat minorities *worse* into a *mandate* to adopt any rules that *maximize* [their] participation," Private Pet'rs Br. 32; "allows anything more than a de minimis disparity to invalidate state electoral laws," State Pet'rs Br. 26; and "turns Section 2 into a prohibition on all laws that impose *any* disparate impact," threatening commonplace election procedures because of "any" impact "whatsoever"

with "no meaningful showing of causation," Ohio et al. Br. 19-20.

Those colorful descriptions bear no resemblance to the Ninth Circuit's actual two-step inquiry. That test asks first whether the challenged standard, practice, or procedure "results in a disparate burden on members of the protected class." JA 612. If it does, the test then interrogates "whether, under the 'totality of circumstances,'" the disparate burden on minority voters interacts with existing conditions of discrimination so as "'to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives' or to participate in the political process." JA 623 (quoting *Gingles*, 478 U.S. at 46-47). Nearly every other circuit has adopted a similar formulation. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey*, 830 F.3d at 244-45; *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342, 353 (6th Cir. 2018).

This two-part inquiry simply operationalizes Section 2's text. The test first requires a disparate impact because the statute refers to discriminatory "results"—that is, "the consequences of actions and not just to the mindset of actors." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015); *see Chisom*, 501 U.S. at 394 ("[P]roof of intent is no longer required to prove a § 2 violation."). The second step then looks to whether longstanding patterns of racial inequality interact with the challenged practice to cause disparate vote denial—in other words, whether the disparate impact is, truly, evidence that challengers "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). As this Court emphasized in *Gingles* itself, that inquiry forms the "essence of a § 2 claim"—whether "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

As the *Amici* States know from experience, the test's second step is critical. Section 2 seeks to ensure that political processes remain responsive to all citizens regardless of race. But because "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system," disparate impact alone tells a court little about whether electoral processes are truly inclusive. *Frank*, 768 F.3d at 754 (Easterbrook, J.). That is why Section 2 is not a pure disparate-impact statute—and why *no* circuit, including the Ninth, imposes Section 2 liability based on disparate impact alone. *See Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry."); *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) ("[A] § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected." (internal quotation marks omitted)), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). Instead, the two-step nature of the test ensures that disparate impact is not the sole barometer of Section 2 violations.

Petitioners and their *amici* incorrectly contend that the second step "may as well be" "automatic," Private Pet'rs Br. 33, and is "just a formality," Ohio et al. Br. 20, predicting that the two-step test will reflexively "sweep away almost all registration and voting rules" nationwide, Ohio et al. Br. at 22 (citations and alterations omitted). But even a cursory glance at a Section 2 decision—including the Ninth Circuit's here—reveals how mistaken that characterization is. The fifty-plus page opinion below is typical: far from "automatic[ally]" imposing liability, lower courts faithfully apply this Court's admonition that any inquiry into the "totality of the circumstances" requires "a searching practical evaluation of the 'past and present reality' . . . of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (quoting S. Rep. No. 97-417, at 30, *as reprinted in* 1982 U.S.C.C.A.N. 177, 208). The standard may be flexible, but plaintiffs face a high bar. To prevail on a Section 2 claim, challengers must conclusively show—using complex demographic, historical, and political data often analyzed by experts—that the disparate impact of a challenged procedure *actually operates* to render a political process "not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). And because Section 2 liability is "peculiarly dependent upon the facts of each case," *Rogers v. Lodge*, 458 U.S. 613, 621 (1982) (internal quotation marks omitted), plaintiffs must demonstrate—in each individual suit—how a particular procedure operates on the ground.

The context-specific focus of the second step thus serves a critical claim-limiting function. As the Fifth Circuit has explained, it constrains "Section 2 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.

Indeed, mechanical invalidation of any state's laws—including ballot collection or out-of-precinct laws—is a non-starter under Section 2, as the statute requires examining "all the circumstances in the jurisdiction in question." *Chisom*, 501 U.S. at 394 n.21. Challenges to identical laws in two different states will therefore proceed differently because any inquiry requires an "intensely local appraisal of [a law's] design and impact." *Rogers*, 458 U.S. at 622 (quoting *White v. Regester*, 412 U.S. 755, 769 (1973)). This Court has held, moreover, that "the State's interest" in a particular electoral mechanism—which will necessarily vary between jurisdictions—"is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." *Hous. Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426 (1991). And, should "other parts of the State's election code offset whatever diminution in voting opportunities the challenged laws impose," Ohio et al. Br. 7, the "totality of circumstances" test will account for that overall equality of opportunity.

Practical considerations further limit Section 2's interference with state election systems. As the *Amici* States know, the mechanics of Section 2 litigation are "slow and expensive," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) ("*NAMUDNO*")—and often insurmountable for challengers hoping to alter voting regimes before an election, *see, e.g.*, Tr. of Oral Arg. at 38*, Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (statement of Solicitor General Verrilli) (noting that courts issued preliminary injunctions in "fewer than one-quarter of ultimately successful Section 2 suits"); *More Observations on Shelby County, Alabama and the Supreme Court*,

Campaign Legal Ctr. Blog (Mar. 1, 2013)[1] (suggesting that the true figure is likely "less than 5%"); Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143, 2159 (2015) (describing how "the fact-intensive nature of section 2 claims" means "preliminary relief [is] hard to obtain"). Given these hurdles, it is unsurprising that the Federal Judiciary Center concluded that out of sixty-three types of litigation, voting-rights cases are the sixth most complicated for the courts—thornier "than an antitrust case, and nearly twice as cumbersome as a murder trial." *An Assessment of Minority Voting Rights Access in the United States: Hearing Before the U.S. Comm'n on Civ. Rts.* 8 (Feb. 2, 2018) (statement of Justin Levitt) (describing findings of Federal Judicial Center, *2003-2004 District Court Case-Weighting Study: Final Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States* (2005)).[2] Litigants who expect the two-part test to "enlist the courts in a partisan project of maximizing minority voting rates," Private Pet'rs Br. 31, are likely to be sorely disappointed. *See, e.g.*, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636-40 (6th Cir. 2016) (upholding the state's policy under the two-part test); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) (same); *Gonzalez*, 677 F.3d at 407 (same).

To be sure, the *Amici* States recognize that employing vote-dilution standards in vote-denial cases can be an awkward fit at times. Congress indisputably enacted the 1982 amendments with an eye toward this Court's

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[1] *Available at*: https://bit.ly/38zKtl9.

[2] *Available at*: https://bit.ly/2MGKyL9.

decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980)—a vote dilution case. *See* Thomas M. Boyd & Stephan J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1356-1425 (1983). By drawing on *Gingles* and the Senate Report, the current two-part test adapts aspects of the more-developed vote-dilution caselaw, analogizing those standards to vote-denial harms.

From the perspective of the *Amici* States regulated by Section 2, however, adapting existing precedent to the vote-denial context makes good sense. In laying out its now-familiar framework, even *Gingles* acknowledged that Section 2 "prohibits *all* forms of voting discrimination, not just vote dilution." 478 U.S. at 45 n.10 (emphasis added). And both vote dilution and vote denial operate to deny racial minorities "equal access to the process of electing their representatives." *Id.* at 73 (quoting S. Rep. 97-417, at 36 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 214). At worst, the two-part test for vote denial acts as a creative-but-faithful heuristic; in the Fifth Circuit's words, it is "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 247. This Court should reject claims that the two-part test threatens neutral state election systems by creating expansive liability. As the *Amici* States' experience shows, that "gloomy forecast" has proven to be "unsound." *Id* at 246.

III. The Two-Part Test Raises No Constitutional Concerns Because It Prevents And Deters Unconstitutional Conduct.

Finally, petitioners and their *amici* suggest that the Ninth Circuit's test would render Section 2 unconstitutional. They claim that if the two-part test stands, the results test "exceed[s] Congress's powers to enforce the Reconstruction Amendments." State Pet'rs Br. 25; *see* Private Pet'rs Br. 41 ("[T]he Ninth Circuit's approach . . . is plainly not a 'congruent and proportional' means of combating purposeful discrimination."); Ohio et al. Br. 30 ("[A] disparate-impact test along the lines the Ninth Circuit adopted below . . . is not 'appropriate' Fifteenth Amendment legislation and Congress had no power to enact it."). Although the *Amici* States do not lightly accept intrusion into their autonomous processes, an honest appraisal of the two-part Section 2 test shows it to be "remedial" within Congress's enforcement power. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

The *Amici* States are well-equipped to address these claims. Questions of congressional power to enforce the Reconstruction Amendments are, at bottom, questions about the scope of federal authority to intrude on state sovereignty. Unlike other constitutional provisions, "[t]hose Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty," *City of Rome v. United States*, 446 U.S. 156, 179 (1980), and are "secured by way of prohibition against State laws and State proceedings," *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). The *Amici* States, accordingly, are well-positioned to evaluate whether Congress has faithfully exercised its power "to enforce" the Constitution, *Katzenbach*, 383 U.S. at 326, or has instead exceeded its authority by "decree[ing] the

substance of the [Reconstruction Amendments'] restrictions on the States," *City of Boerne*, 521 U.S. at 519-20. And as the *Amici* States' experience demonstrates, the two-part test passes constitutional muster even applying this Court's more demanding language from the Fourteenth Amendment context.[3]

This Court has made clear that "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. To preserve the "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," this Court has required "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-20. This Court has made equally clear, however, that Congress's "power is not confined to the enactment of legislation that merely parrots the precise wording of the . . . Amendment," and that the "power 'to enforce' the Amendment includes the authority both to remedy and *to deter* violation of rights guaranteed thereunder

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[3] This Court has yet to address whether the constitutional test differs for legislation enacted under the Fifteenth Amendment as opposed to the Fourteenth. *See NAMUDNO,* 557 U.S. at 204. Scholars have suggested that the Fifteenth Amendment's more limited application may negate many of the far-reaching harms that concerned this Court in *City of Boerne*, and Fifteenth Amendment legislation would therefore require a less onerous test. *See, e.g.*, Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 Harv. L. Rev. F. 109, 120 n.30 (2013) (suggesting that Thirteenth Amendment decisions like *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), "provide[] the sounder analogy for proper Fifteenth Amendment doctrine"). Because the *Amici* States believe that the Ninth Circuit's two-part test survives under either Amendment's doctrine, this brief addresses petitioners' claims using the Fourteenth Amendment framework.

by prohibiting a somewhat broader swath of conduct." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (emphasis added). That "broader swath" may include conduct "which is not itself forbidden by the Amendment's text." *Id.*; *see City of Boerne*, 521 U.S. at 518 (describing how proportional and congruent legislation may still "prohibit[] conduct which is not itself unconstitutional").

The crux of petitioners' challenge is that, because the Fourteenth and Fifteenth Amendments prohibit only intentional discrimination, Section 2's results test exceeds Congress's authority. The *Amici* States' experience, however, shows how the two-part test functions to combat intentional discrimination in at least two ways.

First, while "proof of intent is no longer required to prove a § 2 violation," *Chisom*, 501 U.S. at 394, discriminatory results may still be probative evidence of past discriminatory motive. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). As this Court only recently explained, statutory language like Section 2's plays an important role in "uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Cmtys. Project*, 576 U.S. at 540. Congress enacted the results test precisely because of concerns that the "test for identifying [intentional] discrimination . . . is difficult, if not impossible, to satisfy." S. Rep. 97-417, at 128 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 300. Indeed, that is why this Court concluded, in an opinion issued the same day as *Bolden*, that "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome*, 446 U.S. at 175; *cf. Miss.*

Republican Exec. Comm. v. Brooks, 469 U.S. 1002 (1984) (summarily affirming *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984), where a three-judge court "rejected the contention . . . that Section 2, if construed to reach discriminatory results, exceeds Congress's enforcement power under the [F]ifteenth [A]mendment," *id.* at 811).

Whether legislation is congruent and proportional "is a question that 'must be judged with reference to the historical experience which it reflects.'" *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (quoting *Katzenbach*, 383 U.S. at 308). As this Court recognized in *City of Boerne* itself, Congress did not enact a results test lightly. 521 U.S. at 526-27. Instead, Congress authorized effects-based liability to "counter the perpetuation of 95 years of pervasive voting discrimination" and in response to "modern instances of *generally applicable* laws passed because of [racial] bigotry." *Id.* (emphasis added). Given this history, a test like the Ninth Circuit's—which takes disparate impact as a starting point before engaging in a more searching inquiry into whether electoral systems actually function to exclude minority voters—operates as a congruent and proportional mechanism for smoking out ostensibly neutral polices enacted or enforced with discriminatory animus.

Second, permissible remedial legislation may lawfully "prohibit[] conduct which is not itself unconstitutional" if it "deters" or "prevent[s] unconstitutional actions." *City of Boerne*, 521 U.S. at 518-19. To be sure, many disparate impacts in the voting sphere will *not* be traceable to covert racial animus. But the more racial polarization exists, the greater the risk that *future* state action may be improperly motivated by race. Simply put, disparate impacts along racial lines "provide an incentive for intentional discrimination in the regulation of elections." *McCrory*, 831 F.3d at 222.

That core insight is what led this Court to declare, in the vote-dilution context, that racially polarized voting "bear[s] heavily on the issue of purposeful discrimination," *Rogers*, 458 U.S. at 623, and prompted Congress to write in 2006 that racial stratification is the "clearest and strongest evidence" of the continuing need for the Voting Rights Act, H.R. Rep. No. 109-478, at 34 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618, 638.

Indeed, these purposeful acts of disparate treatment may be entirely unrelated to invidious animus. But they may still entail, in a sense, "purposefully discriminating between individuals on the basis of race." *Shaw*, 509 U.S. at 642. As Judge Kozinski has explained:

> The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. . . . Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza v. City of Los Angeles, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). So too in elections: "[W]hen political preferences fall along racial lines, the natural inclinations of

incumbents and ruling parties to entrench themselves have predictable racial effects. Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages." Stephen Ansolabehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 Harv. L. Rev. F. 205, 209 (2013). The results test avoids these perverse incentives by prophylactically targeting the conditions most likely to produce unconstitutional discrimination in the future. Far from unduly hampering state processes, the test assists states by removing incentives for officials or local jurisdictions to engage in potentially unconstitutional discrimination.

A pre-emptive approach based on discriminatory effects also avoids stigma and further racial division down the line: As Congress explained when enacting Section 2, requiring courts to conclude that "individual officials or entire communities" acted with racial animus was spectacularly "divisive, threatening to destroy any existing racial progress in a community." S. Rep. No. 97-417, at 36, *as reprinted in* 1982 U.S.C.C.A.N. 177, 214 (quoting the testimony of Arthur S. Flemming, Chairman, U.S. Comm'n on Civ. Rts.). Avoiding direct allegations of *intentional* discrimination alleviates the need for divisive finger-pointing.

For all of these reasons, Section 2's "results" test successfully "deters" or "prevent[s]" future intentional acts in direct furtherance of the Reconstruction Amendments. *City of Boerne*, 521 U.S. at 518-19.

This conclusion disposes of another, related constitutional principle that *Amici*'s sister states invoke in support of reversal. In their view, the Ninth Circuit's test "would radically alter the balance of federal and

state authority over election laws," and this Court should insist on a "'plain statement'" before authorizing "so radical an alteration." Ohio et al. Br. 21, 25 (quoting *Bond*, 572 U.S. at 857). Two points bear emphasis:

First, as described in Part II, *supra*, the two-part inquiry hardly constitutes an invasive intrusion into state election systems that "alter[s]" the federal-state balance. Properly characterized, Section 2's results test imposes limited liability only where challengers conclusively demonstrate that a state electoral process is "not equally open to participation by members of a class of citizens." 52 U.S.C. § 10301(b). That has been true since 1982 and this Court's decision in *Gingles*. Applying that familiar framework to vote-denial claims—the original target of the Voting Rights Act—hardly constitutes a "radical" reorientation of state and federal authority.

Second, when Congress invokes its authority under the Fourteenth and Fifteenth Amendments, as with Section 2, it makes little sense to apply "background principles of [statutory] construction . . . grounded in the relationship between the Federal Government and the States." *Bond*, 572 U.S. at 857. Although it is true that the Constitution intended, as a default, for "States to keep for themselves . . . the power to regulate elections," *Sugarman*, 413 U.S. at 647 (quoting *Mitchell*, 400 U.S. at 125), this Court has made clear that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation,'" *City of Rome*, 446 U.S. at 179; *see City of Boerne*, 521 U.S. at 518 (explaining how Congress's enforcement power authorizes intrusion into "legislative spheres of autonomy

previously reserved to the States" (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). If Congress's chosen means unduly usurp state autonomy, that is the precise harm that the "congruent and proportional" test exists to prevent. And, as described above, Section 2 qualifies as "appropriate" remedial legislation under this Court's precedent.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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