Nos. 19-1257 & 1258

IN THE
SUPREME COURT OF THE UNITED STATES

MARK BRNOVICH, 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

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AMICI CURIAE BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

As part of its election integrity mission, Judicial Watch has a substantial interest in the proper enforcement of Section 2 of the Voting Rights Act (VRA), 52 U.S.C. § 10301(a) and (b). After this Court's decision in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), upholding Indiana's voter identification law, election integrity laws, like Arizona's laws here, have been increasingly subject to challenge under Section 2 of the VRA. It is important to Judicial Watch that in cases arising under Section 2, and specifically under Section 2's discriminatory results standard, that lower courts apply the proper legal standard.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this amici curiae brief.

based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici curiae have submitted several briefs before district courts, courts of appeals, and this Court, regarding the proper role of Section 2 in vote denial cases. *See* Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation, *Ohio Democratic Party v. Husted*, No. 16-3561, Dkt. Entry 43 (6th Cir.) (Section 2 challenge to Ohio's early voting policy); *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017) (No. 16-833) (Section 2 challenge to North Carolina election laws); Brief of Amici Curiae Judicial Watch, Inc. and Allied Educational Foundation, *Greater Birmingham Ministries, et al. v. Secretary of State for the State of Ala.*, No. 18-10151 (11th Cir.) (Section 2 challenge to Alabama's voter ID law).

For the foregoing reasons, amici curiae respectfully request this Court reverse the judgment in *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc) and enter a written opinion that clarifies the need, in cases brought under the VRA's Section 2 results standard, for plaintiffs to prove that the challenged voting procedure causes minority voters not to be able to participate equally in the political process and to elect representatives of their choice.

SUMMARY OF ARGUMENT

In this brief, the arguments presented are focused upon Respondents' statutory claims under the Voting Rights Act (VRA) that arise under Section 2's discriminatory results standard.

Respondents challenged two of Arizona's facially race-neutral regulations designed to protect the integrity of its elections: restrictions on "out-of-precinct" (OOP) voting and on third-party collection and delivery of early ballots. Respondents alleged a host of violations of federal statutory and constitutional provisions, including violations of both the discriminatory results and intent standards of Section 2 of the VRA. After a 10-day bench trial in which seven expert witnesses and thirty-three lay witnesses were heard, the district court ruled in favor of Arizona on all claims. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 833-38 (D. Ariz. 2018). The Ninth Circuit panel affirmed. *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686 (9th Cir. 2018).

But the Ninth Circuit en banc reversed. In a sharply divided decision, it found that Arizona's OOP and third-party ballot collection laws were enacted with a discriminatory purpose and had discriminatory results, in violation of Section 2. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020) (en banc) (hereinafter "*Hobbs*"). [2] Instead of analyzing whether Arizona's election laws *caused* minority voters to have less opportunity to

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[2] *Certiorari* was granted in this case on October 2, 2020.

participate in the political process and to elect candidates of their choice, the Ninth Circuit adopted the faulty argument that disparate impact plus historical discrimination and socio-economic disparities (Senate Factor evidence) is sufficient to show a Section 2 violation.

In applying Section 2's results standard in vote denial cases, courts have developed a two-step analysis. First, courts ask whether the evidence indicates that the challenged voting procedures have *caused* minority voters to have less opportunity to participate in the political process and to elect representatives of their choice. Respondents utterly failed to adduce any evidence that satisfied this step one requirement of causation, *i.e.*, that the challenged voting procedure *caused* minorities to have less opportunity to participate in the political process and to elect representatives of their choice.

Instead, Respondents showed Arizona's laws had a disparate impact upon minority voters in comparison to white voters. That is to say, the evidence showed that more minorities than whites voted OOP and whites relied less on third parties to collect and deliver their early ballots than non-whites. But in a Section 2 results case, disparate impact alone is *not* sufficient to show a violation.[3] Without proof of causation, Respondents have not satisfied step one. A showing of causation is a

[3] Indeed, construing Section 2 in that fashion would convert this law from a statute that demands equality of opportunity to one that requires equality of outcome.

prerequisite to proving a violation of Section 2's racial results standard. Because of this failure, Respondents' Section 2 discriminatory results claims must fail.

The Ninth Circuit erred when it proceeded to the next step of the Section 2 analysis, determining whether the Senate Factors provide evidence of discriminatory results. In a Section 2 results case where a "totality of the circumstances" must be considered, courts may only look to the Senate Factors if they first find causation. But *Hobbs* strayed far from this two-step process by inquiring whether there was a relationship between the challenged procedures and the social and historical conditions that are described in the Senate Factors without first finding causation. In doing so, the en banc majority in *Hobbs* determined that the Senate Factors weighed in favor of the Respondents, and then held that the evidence of disparate impact of the challenged procedures *plus* the Senate Factor evidence proved that the challenged voting procedures violated Section 2's results standard.

On the issues of what is a plaintiff's burden of showing a violation of Section 2's results standard and when evidence of past racial discrimination and present-day socio-economic disparities [*i.e.*, Senate Factor evidence] may be appropriately used, the decisions in the courts of appeals are in conflict both among the circuits and within certain circuits.

This Court should reverse the judgment of the en banc majority in *Hobbs* and adopt the appropriate two-step causation analysis, as required by the textual language of the 1982 amendment to Section 2 of the VRA. Namely, this Court should make it clear that to prove a Section 2 results claim, challengers of racially-neutral electoral integrity laws must establish that the enforcement of those voting procedures *cause* minority voters to have less opportunity to participate in the political process and to elect candidates of their choice. If plaintiffs fail to establish this necessary causation element, their Section 2 results claim fails.

ARGUMENT

THE NINTH CIRCUIT ERRED BECAUSE ITS FINDINGS OF DISCRIMINATORY RESULTS UNDER SECTION 2 OF THE VRA WERE NOT SUPPORTED BY EVIDENCE THAT THE CHALLENGED VOTING PROCEDURES CAUSED RACIAL MINORITIES TO HAVE LESS OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS AND TO ELECT REPRESENTATIVES OF THEIR CHOICE.

I. Courts Have Used a Two-Step Framework That Includes a Causation Requirement in Analyzing Whether a Section 2 Results Claim Has Been Proven.

In determining whether a voting procedure violates Section 2's results standard, a number of courts of appeals have developed a two-step analysis.

Hobbs, 948 F.3d at 1012 (collecting cases). "[T]he first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-38 (6th Cir. 2016); *see also*, *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). This step requires plaintiffs to show a causal connection between the challenged voting practice and a prohibited discriminatory result. *Hobbs*, 948 F.3d at 1012. Then, and only then, does the court inquire into whether the discriminatory result is linked to "social and historic conditions," set forth in the Senate Factors, (S. Rep. No. 97-417) at 28-29 (1982). *Hobbs*, 948 F.3d at 1012-14. If plaintiffs do not carry their burden in showing causation, courts need *not* proceed to analyze the Senate Factor evidence. *Id.* *See also*, *Husted*, 834 F.3d at 638 ("If this first element is met, the second step comes into play.")

In this case the en banc Ninth Circuit erred in not correctly applying this two-step approach. *Hobbs*, 948 F.3d at 1012. *Hobbs* rightly noted the first step is to ask whether "as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.*, quoting *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).[4] If it is determined that the challenged

[4] It is important to note that the above-cited textual language from Section 2(b) uses the conjunctive "and" so that the

practice causes a lack of equal opportunity for minority voters and results in them not being able to elect their preferred candidates, courts then proceed to step two and inquire into "social and historical conditions," as described in the Senate Factors. *Hobbs*, 948 F.3d at 1012-14; *see also* (S. Rep. No. 97-417) at 28-29 (1982).

While acknowledging the two-step analysis, *Hobbs* failed, however, to require in step one specific, causal evidence showing that minorities, as a result of the challenged procedures, had "less opportunity to participate" and "elect representatives of their choice." *Id.* at 1012-14, 1043. *Hobbs* thus proceeded to analyze "social and historical conditions" in the Senate Factors without the legal predicate for doing so. As Judge O'Scannlain noted in his dissenting opinion, "[t]hese [Senate] factors—and the majority's lengthy history lesson … simply have no bearing on this case. Indeed, … [these portions] of the majority's opinion may properly be ignored as irrelevant" because Plaintiffs did not satisfy step one. *Hobbs*, 948 F.3d at 1057.

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text requires both the denial of opportunity to participate equally and the inability to elect representatives of their choice. The challenged procedure must cause the denial of opportunity in both of these closely related areas to establish a Section 2 results violation. *See Chisom*, 501 U.S. at 396-97; *see also id.* at 397 ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.")

II. There Are Substantial Conflicts Within and Among the Circuits Regarding the Appropriate Way to Determine Whether the Causation Requirement of Step One Has Been Satisfied.

In the seminal case of *Thornburg v. Gingles*,[5] this Court made clear that to prevail in a discriminatory results claim under Section 2, it is necessary for plaintiffs to prove that because of the challenged voting procedure, minority voters are "experienc[ing] substantial difficulty electing representatives of their choice." 478 U.S. at 48 n.15. The Ninth Circuit in *Hobbs* strayed drastically from the standard provided in *Gingles*.

The Sixth Circuit, by contrast, applied the proper evidentiary requirement in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). There, the plaintiffs challenged Ohio's rule reducing early voting days and eliminating same day registration. *Id.* at 624. African Americans voted during the earlier voting days and used same day registration "at a rate higher than other voters." *Id.* at 627-28. The Sixth Circuit noted, however, that Section 2 requires "proof that the challenged standard or

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[5] Amici curiae believe the central question in this appeal—what is the proper construction of Section 2's results standard in vote denial cases—makes this the most important Section 2 results case since the *Gingles* ruling in 1986. Just as *Gingles* established the framework for bringing vote dilution claims under Section 2's discriminatory results standard, this Court should do the same here for vote denial cases brought under that standard.

practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate." *Id.* at 637-38. Then it ruled that the challenged procedures in *Husted* did not "caus[e] racial inequality in the opportunity to vote." *Id.* at 638, citing *Gingles*, 478 U.S. at 43-47. Without there being a difference in "opportunity," the "existence of a disparate impact" in the rate at which minority and white voters vote cannot "establish the sort of injury that is cognizable and remediable under Section 2." *Husted*, 834 F.3d at 637 (citation omitted).

The Sixth Circuit in *Husted* made abundantly clear what is *not* required for a Section 2 results analysis. The 2016 *Husted* court was critical of the Section 2 analysis in the vacated 2014 *Husted* decision relied on by *Hobbs*.[6] *Husted*, 834 F.3d at 638-40. More specifically, it noted that the 2014 *Husted* opinion's use of the Senate Factors

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[6] To be clear, *Hobbs* relied on the earlier decision reported at *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014). The injunction obtained there was stayed by this Court. *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014). It was then vacated in *Ohio State Conference of NAACP v. Husted*, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014). This vacated case was cited numerous times in *Hobbs* as precedent for how to determine whether the Section 2 results test has been satisfied. *See*, 948 F.3d at 1012, 1013-14, 1017, 1033. However, the controlling law in the Sixth Circuit, as now set out in *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016), is not referenced at all in *Hobbs*. But it is the case upon which amici curiae rely.

> could be erroneously misunderstood to mean that an alleged disparate impact that is linked to social and historical conditions make out a Section 2 violation … [I]f the second step is divorced from the first step requirement of causal contribution by the challenged standard or practice itself, it is incompatible with the text of Section 2 and incongruous with Supreme Court precedent.

Id. at 638. In light of this warning by the 2016 *Husted* court, it is particularly troubling that *Hobbs* relied exclusively upon the 2014 vacated *Husted* opinion while neglecting to mention the 2016 *Husted* opinion at all.

The Seventh Circuit applied the same causation requirement in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). The court there found that plaintiffs failed to prove that Wisconsin's voter ID law had a discriminatory result. *Id.* at 752. The court in *Frank* reasoned that the fact that minorities "do not get photo IDs at the same frequency as whites" does not show unequal voter *opportunity*, only unequal outcomes. *Id.* at 753. The court noted that the Section 2 results standard "does not condemn a voting practice just because it has a disparate effect." *Id.*

The Seventh Circuit in *Luft v. Evers*, 963 F.3d 665, 668-69, 672-73 (7th Cir. 2020) followed *Frank*. There plaintiffs challenged various Wisconsin voting rules, including a requirement that voters present

"[p]hotographic identification … for in-person voting," as violations of Section 2's discriminatory results standard, asking the court to overrule *Frank*. *Id.* at 669, 672. The Seventh Circuit refused. Judge Easterbrook, writing for the *Luft* court, observed that Section 2's results standard "is an equal-treatment requirement, not an equal-outcome command." *Id.* at 672, citing *Frank*, 768 F.3d at 754. He agreed with *Frank* in rejecting the argument that Section 2's results standard does not alone "forbid[] any change in state law that makes voting harder for any identifiable group." *Id.* at 673.[7]

Before *Hobbs*, the Ninth Circuit required a showing of causation in Section 2 results claims. In *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), the court addressed whether Arizona's Proposition 200, which required proof of U.S. citizenship in order to register to vote, violated Section 2's results standard. In ruling against the plaintiffs, the Ninth Circuit stated, "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." *Id.* at 405, citing *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997) (emphasis added); *see also*, *Ruiz v. City of Santa Maria*, 160 F.3d

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[7] In this regard *Luft* noted that Section 2 of the VRA does not have an anti-retrogression standard, as does Section 5 of that Act. "Section 2 must not be read as equivalent to §5(b)." *Id.* at 673.

543, 557 (9th Cir. 1998) (per curiam) ("proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial.") (citation omitted).

In *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202 (11th Cir. 2020) (hereinafter "*GBM*"), plaintiffs challenged Alabama's "voter ID law and its implementation" as a violation of Section 2's results standard. *Id.* at 1231-32. The Eleventh Circuit noted that, "[d]espite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect." *GBM*, 966 F.3d at 1233, quoting *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) (internal quotations omitted). *GBM* held that a Section 2 violation is shown if the enforcement of challenged voting procedures is proved to "deprive[] minority voters of an equal opportunity to participate in the electoral process *and* to elect representatives of their choice." *Id.* at 1233.

GBM went on to require that the challenged voter ID law must "have caused the denial or abridgment of the right to vote on account of race." *Id.* at 1233. Given that 99 percent of white voters and 98 percent of minority voters possessed a compliant photo ID, *GBM* determined that the voter ID requirement had not caused a denial or abridgment of the right to vote within the meaning of the Section 2 results standard. *Id.* at 1233, 1238. *GBM* cited *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) from the Fourth Circuit, *Husted*

from the Sixth Circuit, *Frank* from the Seventh Circuit, and *Gonzalez* and *Salt River Project* from the Ninth Circuit, discussed *supra*, for the proposition that causation is a required element of a Section 2 results vote denial claim. *See GBM*, 966 F.3d at 1234 (collecting cases).

Although *GBM* concluded that disparate treatment plus Senate Factor evidence is not sufficient to prove a Section 2 results claim, the court did not employ the two-step analysis used by other circuits, where causation is established before discussing Senate Factors. Relying on Judge Tjoflat's concurrence in *Johnson*, 405 F.3d at 1238, which demanded a "showing that racial bias in the relevant community *caused* the alleged vote-denial," the court required that any abridgment in violation of Section 2 be "on account of race." *GBM*, 966 F.3d at 1233.[8] Amici curiae respectfully submit that the two-step analysis used by various courts of appeals outlined herein, whose first step asks specifically *whether* the challenged voting procedure causes minority voters a denial of an equal opportunity to participate and to elect candidates of their choice, and not the modified

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[8] Judge Tjoflat's concurrence in *Johnson* and *GBM*'s reliance thereon; 966 F.3d at 1233, that "racial bias in the relevant community *caused*" the vote denial could be read to suggest that racially discriminatory *intent* must be shown to prove a Section 2 results violation. However, prior precedent of this Court clearly holds that proof of discriminatory intent is not required in a Section 2 results claim. *See Chisom*, 501 U.S. at 403-04 ("Congress amended the Act [Section 2 of the VRA] in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent.").

analysis used by the Eleventh Circuit in *GBM*, should be the standard analysis used in determining whether challenged procedures in fact cause racially discriminatory results within the meaning of Section 2.

In *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (hereinafter "*LWV*"), the Fourth Circuit seemed to reject a causation requirement. Plaintiffs there challenged North Carolina's prohibition against counting OOP ballots on the grounds that it violated the Section 2 results standard. *Id.* at 245. In reversing the district court's denial of plaintiffs' motion for a preliminary injunction, the Fourth Circuit did *not* require proof that North Carolina's OOP policy caused minorities to have "less opportunity to participate" and "to elect representatives of their choice." *Id.* at 245, 248-49. Instead, the court applied a disparate impact analysis, in conjunction with the Senate Factor evidence, to support a Section 2 results claim. *Id.* at 243, 245.[9] This approach is the same analysis used by the en banc majority in *Hobbs* (*i.e.*, disparate

[9] Importantly, *Hobbs* understood *LWV* to strike "down a state statute that would have prevented the counting of OOP ballots . . . *without inquiring into whether the number of affected ballots was likely to affect election outcomes.*" *Hobbs*, 948 F.3d at 1043 (emphasis added). *Hobbs*' reference to this language in *LWV* as the standard in Section 2 results cases and *Hobbs*' reliance upon *LWV* clearly show it *did not require* Respondents in this case to prove that the challenged procedures, including the OOP rule, caused minority voters not to be able to participate equally and elect representatives of choice. *Id.* at 1043. Such a failure of proof was fatal to Respondents' case.

impact plus proof of Senate Factors equals discriminatory results). 948 F.3d at 1012-14, 1043.

But two years after *LWV*, the Fourth Circuit went the other way, creating an apparent intra-circuit conflict on this point. In *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), the court upheld Virginia's voter ID law on the grounds that all Virginia voters were "afforded an equal opportunity to obtain a free voter ID." *Id.* at 600. The fact that "a lower percentage of minorities ha[d] qualifying photo IDs" (*i.e.*, disparate impact) was not deemed to be sufficient to establish a discriminatory result under Section 2. *Id.* *Lee* held the plaintiffs "simply failed" to prove that the challenged voter ID law caused minorities "less opportunity than others to" vote (*id.* at 598, 600) falling in line with precedents from the Sixth, Seventh, Ninth (before *Hobbs*) and Eleventh Circuits. *See also*, *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (upholding the challenged procedure where the evidence "cast considerable doubt on … a causal link between the appointive system and Black underrepresentation").

The Fifth Circuit does not require a showing of causation. In *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), a divided court found that the challenged Texas voter ID law "disparately impact[ed]" minority voters. *Id.* at 251, 252. But rather than asking whether the challenged practice *caused* plaintiffs less opportunity to participate and to elect candidates of their choice, the *Veasey* court next examined the "social and historical conditions"

of minorities in Texas which, of course, is Senate Factor evidence, and concluded that the Texas voter ID law violated Section 2's results standard. *Id.* at 245. In other words, *Veasey* incorrectly held that disparate impact plus Senate Factor evidence establishes a violation of Section 2's results standard. *See id.* at 313 (Jones, J., concurring in part and dissenting in part) ("The majority's opinion fundamentally turns on a statistical disparity in ID possession among different races. . . .").

The Ninth Circuit's decision in *Hobbs* squarely conflicts with its prior decisions in *Salt River Project*, *Ruiz* and *Gonzalez*. One would have thought that, after these three cases, it was clear in the Ninth Circuit that plaintiffs in a Section 2 results case had to prove that the challenged voting procedures caused racial minorities to have less opportunity to participate and to elect representatives of their choice. While paying lip service to Section 2's statutory language and its own circuit precedents, *Hobbs*, in fact, chose *not* to follow the existing precedent for Section 2's results cases, as set forth in the Fourth [*i.e.*, *Lee*], Sixth [*i.e.*, *Husted*] and Seventh Circuits [*i.e.*, *Frank*], as well as the aforementioned pre-*Hobbs* precedents in the Ninth Circuit.

Instead, *Hobbs* followed the reasoning of the Fifth Circuit in *Veasey* and the Fourth Circuit's earlier decision in *LWV* in holding that disparate impact plus Senate Factor evidence is sufficient to prove a Section 2 discriminatory results claim. *Hobbs*, 948 F.3d at 1016, 1032, and 1043. *See also*, *supra* at 16 n. 9, where it is clearly shown that *Hobbs*

read *LWV* to allow for the finding of a Section 2 results violation without even inquiring into whether the challenged procedure "affect[ed] election outcomes." 948 F.3d at 1043. To enforce the Section 2 results standard in this manner is, in effect, to read out of Section 2 the statutory language that prohibits a voting procedure which "results in a denial or abridgement of the right … to vote on account of race or color" in that minorities "have less opportunity … to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301 (a) and (b). Disparate impact plus Senate Factor evidence does *not* show causation. To hold otherwise would be indisputably inconsistent with Section 2's clear textual language.

For jurisdictions that have past histories of racial discrimination in voting and present-day, race-based socio-economic disparities, this statutory construction would convert Section 2 into a federal prohibition against state and local voting laws that have only disparate effects. As Judge Branch stated in *GBM*, "we also reiterate our caution against allowing the old, outdated intentions of previous generations to taint Alabama's ability to enact voting legislation." 966 F.3d at 1236. *See also*, *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion) ("But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."); *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013) ("The [Fifteenth] Amendment is not designed to punish for the past; its purpose is to ensure a better future.").

If Congress in amending Section 2 in 1982 had intended to create a federal prohibition against any voting procedure that could be shown to have a disparate impact, even where the procedure cannot be shown to have caused any denial of the right to vote, it most certainly would have used statutory language different from the language found in Section 2. *See* 52 U.S.C. § 10301 (a) and (b). Indeed, Congress did so in 1965 when it enacted a discriminatory effect standard applicable to the federal preclearance requirements of Section 5 of the VRA, 52 U.S.C. § 10304(a) (providing that changes in voting standards, practices and procedures of covered jurisdictions shall not be federally precleared if they "will have the effect of denying or abridging the right to vote on account of race or color").[10] Any request that the Court convert Section 2's discriminatory results standard into a new Section 5-like "discriminatory effects test" by judicial fiat should be rejected.

Failure to focus upon the statutory text of Section 2 is an open invitation to inconsistent constructions of this portion of the Act. These varying constructions are noted in the conflicting cases cited in this brief. The correct approach in such rulings as *Lee*, *Husted*, *Frank*, *Luft*, *Gonzalez*, *Salt River Project*, and *Ruiz*, requires parties to actually produce evidence that the challenged procedure "results in" minorities having less opportunity "to participate in the political process and to elect

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[10] In *Shelby County*, this Court held that Section 4 of the VRA's coverage formula applicable to federal preclearance determinations under Section 5 was unconstitutional, rendering Section 5 unenforceable at present. 570 U.S. at 556-57.

representatives of their choice," as the textual language of Section 2(a) and (b) of the VRA mandates.

The other approach, which is *not* based upon the text of the statute, requires only a showing of "disparate impact" or "disparate burden," to satisfy step one. This is clear from *Hobbs*, 948 F.3d at 1016, where the court stated that the Respondents only had to show that the OOP rule had a "disparate burden on minority voters." In the same vein, *Hobbs* described its analysis of the third-party ballot collection issue with a sub-heading entitled "Step One: Disparate Burden," and then went on to indicate that the "question at step one is whether H.B. 2023 results in a disparate burden on a protected class." *Id.* at 1032. It is abundantly clear that *Hobbs* did not require Respondents to show that either the OOP rule or third-party ballot collection procedure caused or resulted in minority voters not being able to elect candidates of their choice. *Hobbs*, along with *LWV* and *Veasey*, fundamentally erred in not requiring this requisite causation evidence in step one. This Court should correct this error.

III. Respondents Failed to Prove That Arizona's Out-of-Precinct Rule Caused Minority Voters to Have Less Opportunity to Participate in the Political Process and to Elect Representatives of Their Choice.

The Arizona law restricting OOP voting is the majority rule in this country. Thirty American

jurisdictions (*i.e.*, twenty-six states, the District of Columbia, and three U.S. territories) have rules that wholly disregard OOP ballots, while twenty-two jurisdictions (*i.e.*, twenty states and two territories) partially count the votes in OOP ballots if the voter is entitled to vote in certain races on the ballot. *Hobbs*, 948 F.3d at 1064 (Bybee, J., dissenting).

Furthermore, the OOP rule affects a very small group of Arizona voters. For example, in 2016 "of those casting in-person ballots on election day, approximately 99% of minority voters and 99.5% of non-minority voters cast their ballots in their assigned precincts." *Hobbs*, 948 F.3d at 1051 (O'Scannlain, J., dissenting). As noted by *Hobbs*, one in one hundred minority voters voted OOP, while one in two hundred white voters voted OOP. *Id.* at 1004-05, 1014. Of the very small number of OOP voters, minority voters, according to *Hobbs*, "were twice as likely as white voters to vote out-of-precinct and not have their votes counted."[11] *Id.* at 1014 (citation omitted).

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[11] *GBM* characterized the labeling of miniscule percent differences as a "misuse of data" that "mask[s] the fact that the populations were almost identical." 966 F.3d at 733, citing *Frank*, 768 F.3d at 753 n. 3. In labeling the difference between minority voters (99 percent of whom voted in the correct precinct) and white voters (99.5 percent of whom voted in the correct precinct) as representing that minorities were "twice as likely … to vote out-of-precinct," the *Hobbs* court was similarly misusing data.

The fundamental flaw in the *Hobbs*' conclusion that the OOP rule had a racial result is that the record here contains *no* statistical or nonstatistical evidence showing: (1) which candidates in local and state races in Arizona elections were preferred by minority voters;[12] (2) the vote margins by which those minority preferred candidates were defeated; and (3) whether the number of minority-cast OOP votes, if counted, was sufficient to have caused the election to go in favor of the minority preferred candidates. Without this type of specific evidence, Respondents utterly failed to carry their burden of showing that minority preferred candidates were defeated because of the rejection of minority cast OOP ballots.

Hobbs unsuccessfully attempted to fill this vacuum in Respondents' evidence by pointing to numerous other types of evidence, all irrelevant to showing causation. 948 F.3d at 1013-16, 1017-31. None of this evidence is a substitute for the nonexistent causation evidence showing that the OOP rule caused minority voters to have less opportunity to participate and to elect representatives of their choice. First, the *Hobbs* majority pointed to the fact that "[v]oting in Arizona is racially polarized." *Id.* at

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[12] In *Gingles*, this Court stated that in identifying the minority preferred candidates, it was "crucial to that inquiry" to consider "the correlation between race of voter and the selection of certain candidates." 478 U.S. at 63. Moreover, according to this Court, use of bivariate statistical analysis is appropriate in Section 2 results cases to identify candidates preferred by minority voters. *Id.* at 61, 63.

1026.[13] Although admissible in step two as Senate Factor evidence, evidence of racially polarized voting does not prove that the enforcement of the OOP ballot-rejection rule caused minority voters' preferred candidates to be defeated. Those two issues—racially polarized voting and causation—are separate and distinct issues. The *Hobbs* majority incorrectly believed that the existence of polarized voting helped answer the causation question, which it does not.

Second, the *Hobbs* majority "assumed" the number of OOP ballots that were cast but not counted in the 2016 election [3,709 statewide] were not a de minimis number, reasoning that minority voters cast twice the number of OOP ballots as white voters. 948 F.3d at 1015. If the *Hobbs* majority's assumptions are correct, that would mean that in the 2016 election 2,475 minority OOP ballots and 1,234 white OOP ballots were rejected in an election in which 2,661,497 total ballots were cast. *See Reagan*, 329 F. Supp. 3d. at 856. But whether the minority-cast portion of the discarded ballots is deemed de minimis or not misses the point. Even if the minority-cast portion of the

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[13] In support thereof, *Hobbs* pointed to the district court's finding of polarized voting, *Reagan*, 329 F. Supp. 3d at 876, and to twelve elections in 2008 and 2010 found by an unidentified entity to have been racially polarized. *Hobbs*, 948 F.3d at 1027. Furthermore, the majority also noted that election polls taken at the time of the 2016 general election indicated racial polarization and that the Arizona Independent Redistricting Commission had found racially polarized voting in one of nine of Arizona's congressional districts and in five of its thirty state legislative districts. *Id.*

3,709 OOP ballots is more than de minimis, such evidence does not suggest, much less prove, that enforcement of the OOP policy caused minorities less opportunity to elect candidates of their choice. Quite simply, even if the adverse impact of the challenged procedure were more than de minimis and the more than de minimis impact was shown to be connected to social and historical conditions (Senate Factor evidence), this would not be a substitute for the missing causation evidence.

Third, instead of analyzing how OOP ballot rejections affected Arizona's elections, the en banc majority in *Hobbs* referred to the 2000 presidential election in Florida. 948 F.3d at 1016. This election was the only close election (537 votes) referenced by the majority. *Id.* Clearly, what happened in Florida two decades ago has no bearing on Arizona's elections or the two voting procedures challenged in this case. Nothing in this Florida election in any way addresses whether the use of the OOP rule in Arizona elections causes minority voters to have less opportunity to participate and to elect representatives of their choice.

Fourth, the en banc majority in *Hobbs* pointed to the fact that "minorities make up 44% of Arizona's total population, but they hold 25% of Arizona's elected offices," noting that "it is undisputed that American Indian, Hispanic, and African American citizens are underrepresented in public office in Arizona." 948 F.3d at 1029. The fact that racial minorities are "underrepresented" in holding Arizona public offices does not aid Respondents in carrying

their burden of proving causation, and certainly does not show whether the OOP rule has caused minority-preferred candidates to lose. It would be strange, indeed, if a statute, such as Section 2, with a specific anti-proportional representation proviso, 52 U.S.C. § 10301(b), were construed to mean that underrepresentation of minorities in elected positions could serve as a substitute for the critical causation evidence required to show a Section 2 violation. *See Gingles*, 478 U.S. at 43.

Clearly, the *Hobbs* court's conclusion that the Arizona OOP rule had a racially discriminatory result was based upon a misunderstanding of the prohibitions of Section 2. Accordingly, this judgment in *Hobbs* should be reversed.

IV. Respondents Failed to Prove That Arizona's H.B. 2023 Procedure That Restricts Ballot Collection and Delivery by Third Parties Caused Minority Voters to Have Less Opportunity to Participate in The Political Process and to Elect Representatives of Their Choice.

Prior to 2016, an unknown number of Arizona's minority voters used the assistance of third parties to collect their early ballots and deliver them to election officials more than white voters did. *Hobbs*, 948 F.3d at 1005, 1006. In 2016, Arizona enacted legislation known as H.B. 2023, which limited third party collection and delivery of early

ballots [14] to a "family member, house member, caregiver, United States postal service worker" or other authorized officials. *Id.* at 1048 (O'Scannlain, J., dissenting).

Respondents' attempts to prove that this Arizona procedure restricting collection and delivery of early ballots caused minority-preferred candidates to lose were even less persuasive than their showing regarding the OOP policy. Respondents' evidence on this point consisted almost entirely of testimony that, prior to the enactment of H.B. 2023, "third parties collected a large and disproportionate number of early ballots from minority voters." *Hobbs*, 948 F.3d at 1032. Witnesses "testified … to having personally collected, or to having personally witnessed the collection of, thousands of early ballots from minority voters." *Id.* at 1032. But Respondents provided no evidence of specific numbers of ballots cast with the type of assistance proscribed by H.B. 2023. *Id.* at 1005-06. Importantly, *no* individual voter testified that these ballot-collection and delivery restrictions made it "significantly more difficult to vote." *Id.* at 1055 (O'Scannlain, J., dissenting). "[A]necdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in

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[14] The practice of third parties collecting ballots from voters and delivering those ballots to postal or election officials, in lieu of voters themselves mailing or delivering the ballot to election officials is commonly referred to as "ballot harvesting." This is particularly the case where the third parties collecting and delivering the ballots are political operatives acting on behalf of partisan political parties or candidates for public office.

other ways or would be burdened by having to do so." *Id.*

Hobbs pointed to no testimonial or documentary evidence comparing the number of early ballots delivered to election officials by third parties before and after enactment of H.B. 2023. The majority in *Hobbs*, citing only testimonial evidence of a "large and disproportionate number of" assisted early ballots from minority voters, then "found that "[n]o better evidence was required." 948 F.3d at 1033. *Hobbs* then went on to hold that "H.B. 2023 results in a disparate burden on minority voters," and that Respondents had "succeeded at step one of the results test." *Id.* at 1033.

In addition, Respondents made no showing concerning whether the enforcement of the challenged H.B. 2023 restrictions caused minority-preferred candidates to lose elections, an error fatal to Respondents' Section 2 results claim. As Judge O'Scannlain stated in his dissent, quoting *Gingles*, at 48 n.15,[15] "It is obvious that unless minority group members experience *substantial difficulty* electing representatives of their choice, they cannot prove

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[15] *Hobbs*' attempts to diminish the impact of this language in *Gingles* by pointing out that *Gingles* was a vote dilution case under Section 2, and not a vote denial case, such as here. *Hobbs*, 948 F.3d at 1043-44. However, legal precedents in the Ninth Circuit stand for the proposition that the standards for proving a discriminatory result claim under Section 2 are very similar regardless of whether the case involves a vote denial or a vote dilution claim. *See e.g.*, *Salt River Project*, 109 F.3d at 596 n. 8; and *Gonzalez*, 677 F.3d at 405 n. 32.

that a challenged electoral mechanism impairs their ability 'to elect.'" *Hobbs*, 948 F.3d at 1051. Clearly, Respondents in this case did not prove the causation element. They did not show that the ballot-collection policy caused the defeat of any minority-preferred candidates.

By way of example, a persuasive showing that the restrictions of H.B. 2023 were causing minority voters "substantial difficulty" electing their preferred candidates might have included evidence: (1) identifying minority preferred candidates who ran and lost in Arizona elections since the 2016 enactment of H.B. 2023; (2) showing how many minority voters who were entitled to vote in those elections did not vote because of restrictions on third-party assistance; and (3) showing at least by statistical methods testimony that, if this number of minority voters had cast ballots for the minority-preferred candidates, those votes would have likely caused those preferred candidates to win. Without a showing of this kind, plaintiffs in Section 2 results claims cannot carry their burden of proving causation in step one.

In the clear language of Section 2, Respondents were required to prove that the restrictions on third-party assistance resulted in denying minority voters an opportunity to participate *and* to elect representatives of their choice. However, in explaining why it found that Respondent had satisfied its burden of proof, *Hobbs* did not point to any elections in which minority preferred candidates were defeated because of the restrictions in the

ballot-collection policy. 948 F.3d at 1032-33. *See also*, *id.* at 1056 ("Thus, from the record, we do not know either the extent to which voters may be burdened by the ballot-collection policy or how many minority voters may be so burdened.") (O'Scannlain, J., dissenting).

Importantly, *Hobbs* stated that a "particular connection to statewide office does not exist between H.B. 2023 and election of minorities."[16] 948 F.3d at 1035. However, *Hobbs* went on to opine that H.B. 2023 is "likely to have a pronounced effect in rural counties with significant" racial minority populations. *Id.* *Hobbs* further opined that discriminatory results under Section 2 would more likely occur in counties that "lack reliable" mail and transportation services, "and where a smaller number of votes can have a significant impact on election outcomes." *Id.* Such observations by *Hobbs* are not supported by evidence in the record. Respondents' failures of proof concerning the alleged discriminatory results of H.B. 2023's restrictions cannot be corrected by appellate court conjecture. Accordingly, the *Hobbs* majority's speculation about what may occur in smaller counties does not cure Respondents' failure of proof. Indeed, Respondents' failure to offer any such evidence regarding the

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[16] *Hobbs*' conclusion that H.B. 2023's restrictions do not have a discriminatory result in Arizona's statewide elections has important ramifications for this case. It would mean that, even though the ballot-collection and delivery restrictions are not violative of the Section 2 results standard in statewide elections, Arizona would nevertheless be enjoined from enforcing the restrictions in such elections as well as in local elections.

impact of H.B. 2023 in Arizona's smaller counties calls into question whether this claim challenging H.B. 2023 was even ripe for adjudication.

Moreover, in its inquiry concerning the legality of H.B. 2023, *Hobbs* gave great weight to the fact that "no one has ever found a case of voter fraud connected to third-party ballot collection in Arizona." 948 F.3d at 1035. But this misses the mark. In *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195-96 (2008), this Court rejected a challenge to an Indiana law that required voters to provide a photo ID if voting at the polls. *Id.* In doing so it also rejected the argument that actual evidence of voter fraud was needed to justify a state's decision to enact prophylactic laws aimed at preventing voter fraud:

> The record contains no evidence of any such [in-person voter] fraud actually occurring in Indiana at any time in its history …. It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, … demonstrate[ing] that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Id. at 194-96 (footnotes omitted).

Crawford went on to recognize that while protecting public confidence in the "legitimacy of

representative government" is "closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance." *Id.* at 197. Unregulated collection of third-party ballots can undermine public confidence in the integrity of elections. This is demonstrated by the ballot collection fraud that recently occurred in North Carolina in 2018.[17]

Arizona's interest in preventing voter fraud and protecting public confidence in the electoral process provided two legitimate bases for enacting anti-fraud election regulations, such as H.B. 2023, without any direct evidence that ballot-collection fraud had been committed in the State. *Hobbs*' failure to "even mention *Crawford*" in its opinion may indicate that it overlooked *Crawford* and did not "grapple with its consequences on this case." *Hobbs*, 948 F.3d at 1059 (O'Scannlain, J., dissenting). The majority failed to recognize that *Crawford* clearly indicated that states do not have to have evidence of voter fraud to enact prophylactic statutes against fraud. That failure caused the majority in *Hobbs* to place undue importance on the lack of such evidence in this case. The majority erred in believing that the lack of voter fraud evidence weighed in favor of Respondents' Section 2 results claims. Certainly, a lack of voter fraud evidence does not replace the

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[17] *See* "Election Fraud in North Carolina Leads to New Charges for Republican Operative," *The New York Times*, available at https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html.

required evidence that is missing—proof of causation.

Therefore, the ruling in *Hobbs* by the en banc Ninth Circuit that restrictions on ballot collection and delivery, as provided in H.B. 2023, violated Section 2's discriminatory results standard is manifest error.[18]

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[18] Petitioners argue in their briefs that to construe Section 2's results standard as requiring only a showing of disparate racial impact plus Senate Factor evidence, rather than a showing of causality as well, raises serious concerns about the constitutionality of the Section 2 results standard. *Brief for State Petitioners*, Nos. 19-1257 at pp. 24-30; and *Brief for Private Petitioners*, Nos. 19-1257 and 1258 at pp. 39-42. Amici Curiae believe that those constitutional concerns are further legitimate reasons for not adopting the expansive reading Respondents are seeking for the Section 2 results standard in this case.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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