No. 19-1257

In the Supreme Court of the United States

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

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

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

BRIEF OF KENTUCKY SECRETARY OF STATE MICHAEL ADAMS, LOUISIANA SECRETARY OF STATE R. KYLE ARDOIN, AND MISSOURI SECRETARY OF STATE JOHN R. ASHCROFT AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* Secretaries of State[2] are chief election officials responsible for regulating, securing, and overseeing the election processes in each of their respective States. Though each State has different procedures for administering an election, the common goal remains the same: to ensure open, fair, and secure elections—both in fact and in the minds of the electorate. The institutions of government at all levels depend on public faith in the process. Fair and open elections are critical to maintaining that faith.

This case raises a significant question about how to interpret Section 2 of the Voting Rights Act when challenging a State's election procedures. The Courts of Appeals have split over the standard for proving a discriminatory burden under the Act. And this split creates uncertainty for the public officials tasked with ensuring the integrity of each election. It threatens to leave those officials, like the *amici* Secretaries, paralyzed between two possibilities: avoid the threat of litigation with a hands-off approach, leaving elections unordered and unsecured, or impose rules against a

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[1] *Amici* have notified counsel for all parties of their intention to file this brief, and counsel for all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person other than *amici curiae* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

[2] The *amici* Secretaries of State are: Kentucky Secretary of State Michael Adams, Missouri Secretary of State John R. Ashcroft, and Louisiana Secretary of State R. Kyle Ardoin.

backdrop of legal uncertainty that may doom their efforts largely based on geography.

Absent congressional clarification, only this Court can resolve the inconsistencies among the circuits and provide a clear rule. This case presents an excellent opportunity for the Court to expand on its decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and to articulate a clear standard for determining when a State's election procedures impose a discriminatory burden in violation of Section 2 of the Voting Rights Act.

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act prohibits States from implementing voting qualifications, prerequisites, or other election procedures that "result[] in a denial or abridgement of the right" to vote "on account of race or color." 52 U.S.C. § 10301(a). The Act ensures that members of a protected class have an equal "opportunity" to "participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). As this Court explained in *Gingles*, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47.

Generally speaking, Section 2 "encompasses two types of claims." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636 (6th Cir. 2016). A vote-*dilution* claim arises when the plaintiffs allege they have been denied an equal-opportunity to "elect representatives of their

choice." 52 U.S.C. § 10301(b). A vote-*denial* claim, on the other hand, is based on the allegation that the plaintiffs have been denied the opportunity "to participate in the political process." *Id*. "While vote-dilution jurisprudence is well-developed," *Ohio Democratic Party*, 834 F.3d at 636, this Court has never articulated a standard for assessing vote-denial claims. And without guidance from this Court, the lower courts have splintered over the proper legal framework to apply.

The Courts of Appeals seem to agree that the threshold question for a vote-denial claim is whether the challenged election procedure causes a discriminatory burden on the right to vote. But they disagree over what exactly that means. Four circuits—the Fourth, Fifth, Sixth, and Seventh—all require plaintiffs to demonstrate that the State's election process causes members of a protected class to have "less opportunity" to cast a ballot. The Ninth Circuit, however, focuses only on whether the challenged law creates a statistical disparity in minority participation. So long as that disparate impact is more than de minimis, the Ninth Circuit has held, the law creates a discriminatory burden.

Only this Court can resolve this conflict. The lower courts have had ample opportunity to weigh the text, history, and precedents of the Voting Rights Act, and they have reached two incompatible conclusions. Election laws that are legal in one state might be deemed illegal in others. As a result, election officials like the *amici* Secretaries lack the certainty needed to ensure that States administer fair, open, and *lawful*

elections. This Court should grant certiorari to provide that certainty for these kinds of claims.

ARGUMENT

Section 2 of the Voting Rights Act prohibits states from imposing laws that "result[] in a denial or abridgement" of the right to vote. 52 U.S.C. § 10301(a). States violate the Act when an election procedure or process causes members of a minority class to have "less opportunity" to participate in the political process. 52 U.S.C. § 10301(b). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

When a plaintiff challenges an election procedure on the basis that it "results in a denial or abridgement" of the right to vote—a "vote denial" claim—the Courts of Appeals generally apply a two-step framework. Under step one, the courts consider whether the challenged procedure imposes a discriminatory burden on the right to vote for members of a minority class. If so, the courts move to step two and determine whether that burden is "caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Ohio Democratic Party*, 834 F.3d at 637.

This case is about step one. What qualifies as a "discriminatory burden" under Section 2 of the Voting Rights Act? In answering that question, the Courts of Appeals have divided, leaving public officials like the

amici Secretaries uncertain as to what the law requires. As a result, commonly used election procedures face dramatically different review depending on where they are enacted. And election officials are unable to navigate new problems with new solutions without fear of violating the law. The *amici* Secretaries need clarity on this issue to effectively regulate elections within their States and ensure stability in the process.

I. The "equal-opportunity" approach to identifying a discriminatory burden.

At least four circuits have, at some point, applied an equal-opportunity test for identifying the kind of discriminatory burden that gives rise to a vote-denial claim. Under this approach, if an election procedure results in a disparate impact on minority participation, the court must determine whether the challenged procedure causes that disparate impact by diminishing *the opportunity* to cast a ballot. Thus, in these circuits, the potential for a disparate impact alone does not prevent States from implementing new regulations that might otherwise promote the integrity and fairness of an election. So long as election officials ensure that minority voters do not have "less opportunity" to cast a ballot, *see* 52 U.S.C. 10301(b), new procedures or regulations will survive a Section 2 challenge.

Judge Easterbrook explained the equal-opportunity approach in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), a case in which the Seventh Circuit rejected a challenge to Wisconsin's photo-ID law despite statistical evidence showing that minority voters were

less likely to have the required identification. As the Seventh Circuit explained, "in Wisconsin everyone has the same opportunity to get a qualifying photo ID." *Id.* at 755. So whatever statistical disparity might exist among racial groups, the court reasoned, it did not arise because there was less *opportunity* for minorities to vote. *Id.* at 753 ("[T]hese groups are less likely to *use* that opportunity."). And since the text of Section 2 addresses the "opportunity" for members of a protected class to participate in an election, 52 U.S.C. 10301(b), the Seventh Circuit concluded that a disparate impact on participation is itself not enough to raise a claim.

The Fourth, Fifth, and Sixth Circuits have adopted a similar approach. In *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), the Fifth Circuit sustained a challenge to Texas's voter-ID law based on significant evidence that minorities faced "specific burdens in attempting to obtain [identification] or vote." *Id.* at 254. Unlike *Frank*, *Veasey* was not a case about disparate impact alone. The Fifth Circuit found that the burden on minority opportunity "rest[ed] on far more than a statistical disparity." *Id.* at 253–54. Because of that, the court held that the plaintiffs had demonstrated the requisite discriminatory burden under Section 2.

Applying a similar standard in *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016), the Fourth Circuit rejected a challenge to Virginia's voter-ID law because "the plaintiffs . . . simply failed to provide evidence that members of the protected class have less of an opportunity than others to participate in the political process." *Id.* at 600. This was true, the Fourth Circuit explained, even though minority voters

were statistically less likely to have the qualifying identification. *Id.* at 600–01. "We conclude that § 2 does not sweep away all election rules that result in a disparity in the convenience of voting," the court held. *Id.* at 601. Because Virginia "provides every voter an *equal opportunity* to vote," the voter-ID law did not violate Section 2. *Id.* (emphasis added).

Likewise, the Sixth Circuit adopted the equal-opportunity approach in *Ohio Democratic Party v. Husted*. 834 F.3d at 623. There, the Court of Appeals reversed an injunction against Ohio's law that reduced the early-voting period from 35 days to 29 days and eliminated same-day registration and voting. *Id.* In doing so, the court clarified the standard by explaining that "the 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 in the political process." *Id.* (emphasis added).

Each of these courts grounded its analysis in the text of Section 2 and provided a clear roadmap for election officials to ensure their practices conform to the law. So long as new procedures do not diminish the "opportunity" of minority voters to participate in the "political process," 52 U.S.C. 10301(b), officials following this roadmap can take proactive steps to ensure elections remain open and fair without fear of violating the law.

II. The disparate-impact approach to proving a discriminatory burden.

The second approach to proving a discriminatory burden, adopted most prominently by the Ninth Circuit below, dispenses with the focus on the "opportunity" of members in a protected class to vote, instead focusing on the statistical disparity between participation rates. Election officials weighing new procedures under this standard must consider whether the procedure will cause a more-than-de-minimis disparate impact on the participation of minority voters. If so, the procedure imposes a discriminatory burden. *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1015–16 (9th Cir. 2020).

In the decision below, the plaintiffs challenged two different voting procedures in Arizona under Section 2. The first is Arizona's rule that only allows counting in-person ballots if the voter actually lives within the precinct in which he or she votes. The second is Arizona's prohibition on allowing third parties to collect absentee ballots on behalf of other voters. These provisions, the plaintiffs claim, disproportionally burden the ability of minorities to participate in the election.

The Ninth Circuit agreed. Finding that the evidence showed "more than a de minimis" statistical impact on minority voters, *id.*, the court held that the plaintiffs met the threshold step of proving a discriminatory burden under Section 2. In doing so, the court (sitting en banc) departed from precedent in which the Ninth Circuit had previously held that a "showing of disproportionate *impact* on a racial minority does not

satisfy the § 2 'results' inquiry." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Under the new rule announced below, a statistical disparity is enough so long as that disparity is more than de minimis.

Other courts have articulated a similar standard. Before rejecting the disparate-impact approach in *Lee*, the Fourth Circuit seemed to endorse it in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 244–45 (4th Cir. 2014). There, the court explained that the first question in a Section 2 claim is "whether [the challenged law] imposes a discriminatory burden on members of a protected class." *Id.* at 245. The court then answered that question by considering only whether the law "disproportionately impact[ed] minority voters." *Id.* Similarly, the Sixth Circuit tacitly approved of this same approach when it affirmed a district court's injunction based on a law's "disproportionate effect on African-American voters." *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 668 (6th Cir. 2016). The court issued this decision less than a week before a different panel in the same circuit adopted the equal-opportunity approach discussed above. *Compare Johnson*, 833 F.3d at 668, *with Ohio Democratic Party*, 834 F.3d at 637–38. So while the Ninth Circuit was not the first court to pioneer its interpretation of Section 2, other courts doing so have run into intra-circuit conflicts over the proper framework.

The intra-circuit conflicts combined with the Ninth Circuit's change in direction sow confusion in an area where certainty is of paramount importance. If a mere

statistical disparity is enough to demonstrate a discriminatory burden under Section 2, public officials responsible for ensuring the integrity of elections must take that into account when crafting new solutions for problems that arise. But officials like the *amici* Secretaries cannot afford to gamble on the legality of their election procedures, not knowing which standard might apply.

CONCLUSION

The Court should grant the Petition and resolve this conflict. Without a clear rule, the *amici* Secretaries face uncertainty about the legal standard governing the election practices and procedures of their respective States. And this uncertainty arises in an area of critical importance: the administration of our electoral process. Only this Court can clear up the confusion by providing guidance to both the public officials responsible for ensuring fair and open elections and the courts that will apply the Voting Rights Act when procedures are challenged.

Respectfully submitted,

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