No. 16-833

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,

Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,

Respondents.

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

Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners

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Interest of Amicus Curiae[1]

Amicus Curiae Public Interest Legal Foundation (the Foundation) is a non-partisan 501(c)(3) tax-exempt organization dedicated to promoting the integrity of American elections and preserving the constitutional balance giving states control over their own elections. The Foundation files amicus curiae briefs as a means of advancing its purpose and has appeared as amicus curiae in numerous cases in federal courts throughout the country.

The Foundation employs or is affiliated with national election law experts, scholars, and practitioners who can provide this court with a comprehensive history of the enforcement of these statutes and their traditional enforcement considerations.

The Foundation seeks to preserve a traditional understanding of Section 2 of the Voting Rights Act of 1965, which contains a robust requirement of causality such that a plaintiff must demonstrate that a particular election practice ultimately prevents, in fact, the ability of minorities to fully participate in the political process. The Foundation also seeks to prevent treasured civil rights statutes such as the Voting Rights Act from being turned into mere partisan weapons to leverage federal power over state

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

elections intended to advantage one political party and disadvantage another.

Summary of the Argument

Before this Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Sections 4 and 5 of the Voting Rights Act worked in concert to impose a federal veto on all new election regulations in certain parts of the country. 52 U.S.C. §§ 10301-10508 (2014) (formerly cited at 42 U.S.C. §§ 1973-1973aa-6). This system fundamentally rearranged the constitutional order regarding federal power over state election laws. While the Voting Rights Act certainly has been instrumental in removing voting barriers for minorities, this Court in *Shelby County* decided that the preclearance enforcement mechanism in Section 5 was obsolete in that it placed all or part of sixteen states under federal control for election law changes based on decades-old circumstances. *Shelby County*, 133 S. Ct. at 2631. Nearly all of the other provisions of the Voting Rights Act passed in 1965 were unaffected by the *Shelby County* decision and remain in full effect.

Even though *Shelby County* rejected federal oversight of state elections through Section 5, a conscious effort has been made on several fronts to resurrect federal supremacy over state control of elections. But in place of preclearance power by the executive branch, this effort employs the very same standards that were used under Section 5 and attempts to have them enforced through the courts by means of Section 2 of the Voting Rights Act. This case is part of this broader effort and presents an opportunity for this Court to correct the misunderstandings surrounding analysis under Section 2.

Instead of using traditional Section 2 standards as found in this Court's jurisprudence, challengers seek to import statistical tests for Section 2 liability, which were previously utilized under the Section 5 retrogression standard to block state election laws. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 548-49 (1969). The appropriate standard is one that looks to the totality of the circumstances, as expressed in the very language of Section 2, and does not use statistical disparities between groups of voters to establish liability.

The district court below, in a thorough opinion following two extensive trials, employed the proper standard and found that, based on the evidence, the challenge to North Carolina's law must fail on all counts. Pet. App. 524-32. The Fourth Circuit reversed, however, finding that North Carolina's "asserted justifications" for the law, thoroughly analyzed by the district court, "cannot and do not conceal the State's true motivation." Pet. App. 16A. The district court's opinion, however, was consistent with traditional Section 2 jurisprudence, does not conflict with *Shelby County*, and preserves the constitutional balance between states and the federal government. The Petition should be granted in order for this Court to address the proper standard for this case and other Section 2 cases that are or will soon be pending across the country.

Argument

I. Section 2 and Section 5 of the Voting Rights Act Employ Fundamentally Different Standards.

As originally passed, the Civil Rights Act of 1957 gave the U.S. Attorney General authority to pursue

litigation against racial discrimination in voting and gave courts an avenue to enjoin election practices that were designed to restrict access to voting on the basis of race. 42 U.S.C. § 1971(c) (1964), recodified at 52 U.S.C. § 10101. But as quickly as one particular barrier could be enjoined, another more inventive one took its place. *See*, *e.g.*, *Lopez v. Monterey Cnty.*, 525 U.S. 266, 297 (1999) (Thomas, J., dissenting). Litigation before 1965 proved futile because each time a new restriction was put in place, new litigation had to be pursued.

Congress enacted Sections 2 and 5 of the Voting Rights Act in 1965 to counteract these amorphous and ever-shifting barriers to voting. 52 U.S.C. §§ 10301, 10304. Section 5 required certain states with histories of racial discrimination in voting to submit any election related change, no matter how small, to the U.S. Attorney General for approval. *Id.* § 10304. Thus, new voting restrictions could be caught and halted before they went into effect. Section 2 was enacted at the same time, but effectively only provided an individual cause of action for intentional discrimination under the 15th Amendment. 52 U.S.C. § 10301.

A. Section 5's Retrogression Standard.

Section 5 required covered jurisdictions to obtain preclearance for "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting…." 52 U.S.C. § 10304(a). Preclearance could be obtained from either the U.S. Attorney General or from the United States District Court for the District of Columbia. *Id*. Both methods employed a retrogression standard, that is, the jurisdiction had to affirmatively prove the absence of

any negative impact or diminishment of electoral access by minorities. *See generally Beer v. United States*, 425 U.S. 130, 141 (1976) (Stating that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.") and *Bush v. Vera*, 517 U.S. 952, 982-83 (1996).

Section 5's retrogression standard for triggering an objection to an election regulation change was further modified by Congress in 2006 by making it explicit that a change must be blocked if it "will have the effect of diminishing the ability" of minorities to vote. 52 U.S.C. § 10304. *See also Shelby County*, 133 S. Ct. at 2627. In practice, the Department of Justice or the court would look to the status quo and then analyze whether the new change in the law would diminish the electoral strength of minorities. If there was any such diminishment, the proposed change was blocked. *See*, *e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("[T]he baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied . . . .").

Under Section 5, the burden was on the submitting jurisdiction to prove the absence of any diminishment in electoral ability. *Id*. at 328. The Department of Justice was not required to show the extent or existence of diminishment. If the jurisdiction could not show through quantitative evidence that the proposed change in its election laws would have no negative effect whatsoever on minorities, that change would not be precleared. *Id*. at 336.

After the 2006 amendments, Section 5 operated in such a way that bare statistical evidence of retrogression automatically resulted in freezing any change to state election practices. Submissions were often blocked when no evidence of retrogression was presented, simply because the submitting jurisdiction could not prove the total absence of any discriminatory effect. *See*, *e.g.*, Objection Letter of Loretta King, Assistant Attorney General, to Thurbert E. Baker, Attorney General of Georgia (May 29, 2009), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf. Furthermore, any ambiguity would be weighed against the jurisdiction. *See McCain v. Lybrand*, 465 U.S. 236, 257 (1984). And finally, there was little or no consideration given to the totality of the circumstances or any non-discriminatory factors or reasons for the change in election procedures. *See*, *e.g.*, *LaRoque v. Holder*, 650 F.3d 777, 794 (D.C. Cir. 2011).

This was the status of federal veto power over the ability of States to control their own elections under Section 5. After *Shelby County*, however, this statistical tripwire has been rendered obsolete. But instead of continuing to stop truly discriminatory election practices using the remaining traditional Section 2 jurisprudence, the Department of Justice[2] and other groups are attempting to graft the *de minimis* statistical thresholds used in Section 5 onto the enforcement of Section 2. This is both unprecedented and in direct contravention of *Shelby County*. The

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[2] Interestingly, the Department of Justice filed its Opposition in this case on the day before the Inauguration of President Trump, eleven days before the response due date.

district court was correct to dismiss the claims in this case because they rely on a theory of Section 2 at odds with the law. Bare statistical data that supposedly shows some kind of retrogression in the electoral influence of minorities is not the essence of a Section 2 claim.

B. Section 2 Jurisprudence, Based on *Gingles*, Dictates a Totality of the Circumstances Standard.

Unlike Section 5, Section 2 applies nationwide and functions as a ban on racial discrimination in voting with enforcement provided by litigation in federal court. It forbids any "standard, practice, or procedure" that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). In contrast to the retrogression standard in Section 5, the clear language of Section 2 targets denial of the right to vote "on account of" race. The first subsection bans election laws that were enacted with a discriminatory intent, but the second subsection also prohibits election laws that have discriminatory results. While Petitioners address the Fourth Circuit's problematic findings of discriminatory intent, Petition 13-16, this brief will focus on the proper standard that should be used when applying the results subsection. That standard requires a far more robust showing than a statistical demonstration that a given minority might be less likely to be able to vote at a certain time, use a particular voting practice more often than non-minorities, or possess certain types of documentation at different rates.

After the amendments in 1982, Section 2 allowed a cause of action when a particular election practice

was not necessarily enacted with a racially discriminatory intent, but had the result or effect of discriminating on the basis of race. The foundational case for the application of this "results" section is *Thornburg v. Gingles*, 478 U.S. 30 (1986). Though the case involved a redistricting plan challenge, it provides the central guidance for courts addressing Section 2 challenges. *See*, *e.g.*, *Growe v. Emison*, 507 U.S. 25, 40-41 (1993); *Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994).

The *Gingles* Court set forth a standard by which certain factors must be present in order to meet the "totality of the circumstances" portion of Section 2 and to find that a violation has occurred. These factors were taken from the Senate Judiciary Committee's majority report on the 1982 amendment to Section 2 and they include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections…is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority

group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office.

Gingles, 478 U.S. at 36-37 (quoting S. Rep. No. 417, 97th Cong., 2d Sess., 28-29 (1982).)

While some of the analysis in *Gingles* might only apply in the reapportionment context, two central thresholds can be discerned for all Section 2 claims. First, the plaintiff must show than a discriminatory effect came about "on account of" race. There must be some causal nexus between the supposed statistical retrogression and some concrete indicia of discrimination, such as one or more of the Senate factors. Second, the disparate impact must result in actual real world unequal access to the political process. Ultimately, a plaintiff must do more than show a statistical difference in how an election law impacts minority voters by demonstrating how the election law actually impairs access to the electoral process.

If, based on the totality of the circumstances, a plaintiff can show that the statistical differences

were generated by one or more of the Senate factors or other indicia of discrimination that result in unequal access to the political process, then Section 2 is violated. *See Gingles*, 478 U.S. at 44-46, 50-51. A plaintiff must show some causality between disparate treatment, disparate impact, and a demonstrable impact on actual election outcomes. If Section 2 liability were to lie in simple statistical disparity, absent causality and unsupported by a broad non-quantitative body of evidence, then that version of Section 2 may well face serious constitutional challenge in light of *Shelby County*. In addition, if plaintiffs were not required to show some close nexus between statistical retrogression and actual disparate treatment and electoral results, then the words "totality of the circumstances" and "on account of" in Section 2 would be without meaning.

II. This Case Represents One of Several Deliberate Attempts to Graft a Retrogression Standard Onto Section 2.

Two months after this Court decided *Shelby County*, the Justice Department filed a challenge to Texas's voter photo identification law as a violation of Section 2 because of statistically disparate impact. The Fifth Circuit looked to statistical racial disparities to find the law to have a discriminatory effect. *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) The Texas officials recently sought review by this Court but, just last week, their petition was denied. *Abbott v. Veasey*, 580 U.S. ____ (2017), No. 16-393 (Jan. 23, 2017) (Statement of C.J. Roberts) ("Although there is no barrier to our review, the discriminatory purpose claim is in an interlocutory posture, having been remanded for further consideration. As

for the §2 claim, the District Court has yet to enter a final remedial order. Petitioners may raise either or both issues again after entry of final judgment. The issues will be better suited for certiorari review at that time.")[3]

The arguments of the plaintiffs in these cases depart from traditional Section 2 jurisprudence as established in *Gingles* and advocate for an unprecedented federal usurpation of control over state elections nationwide. Instead of considering the fact that there was no barrier to obtaining photo identification based on race and that the times and places for voting are equally open to all, these claims instead focused on statistical differences in ID ownership. If that difference is greater than zero, according to the challengers, the voting rules at issue violate Section 2.

Such an analysis matches the statistical inquiry used in a Section 5 retrogression analysis, but not a consideration of a causal link with actual disparate treatment and the actual results of the electoral system as required by *Gingles* and the plain language of Section 2. In a Section 5 review, the Department of Justice may well have concluded that an election law change should be blocked when a disproportionate number of minorities populate the group of potentially disenfranchised voters. But in a Section 2 claim, something more than a calculation as to how a

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[3] In contrast, as the Fourth Circuit did not remand this case for further review, the issues presented here are well suited for this Court's review now.

racially neutral administrative rule lands among differing racial groups is necessary.

Section 2 does not rely on the concept of reduction or diminishment, as does Section 5. Instead, the language of Section 2 focuses on whether an equal opportunity to participate in the political process exists. 52 U.S.C. § 10301. The plain language of Section 2 mandates a broad "totality of the circumstances" inquiry into the practice or procedure in question. 52 U.S.C. § 10301(b). Section 2 inherently incorporates concepts of causality. A violation of Section 2 in challenges to at-large election systems, for example, occurs only after racial minority groups are effectively shut out of the political process because their preferred candidates actually lose elections more often than not.

The broad totality of the circumstances inquiry also provides defendants an opportunity to establish defenses such as mitigating measures to remedy discrimination from long ago, increases in minority participation and office holding, and other measures. *See*, *e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995); *Teague v. Attala Cnty., Miss.*, 92 F.3d 283 (5th Cir. 1996).

In fact, the Fourth Circuit here appears to have ignored mitigating measures that may well have survived the heightened Section 5 analysis. Prior to *Shelby County*, South Carolina suffered an objection to its voter photo identification law. *See* Objection Letter of Thomas Perez, Assistant Attorney General, to C. Havird Jones, Jr., Esq., Assistant Deputy Attorney General of South Carolina (Dec. 23, 2011),

available at http://www.justice.gov/crt/records/vot/obj_letters/letters/SC/l_111223.pdf. Little or no weight was attached by the Justice Department to South Carolina's "reasonable impediment" provision wherein an individual may affirm that he or she cannot obtain photo identification because of a reasonable impediment and be permitted to cast a ballot and vote. *Id*. at 4. But this mitigating mechanism was not disregarded by the federal court and indeed became the basis for preclearance after South Carolina successfully sued the Attorney General in the United States District Court for the District of Columbia seeking court-approved preclearance. *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012). Preclearance was granted and South Carolina's voter photo identification law went into effect despite the Attorney General's very public opposition to the provision.

The district court determined here that, "[u]pon close examination, North Carolina's reasonable impediment provision is effectively a codification of the three-judge panel's holding in *South Carolina*." Pet. App. 397a; *see also* Pet. App. 76a. The district court also found that "evidence of reasonable impediment voting in South Carolina suggest that only a fraction of the small fraction of individuals who lack qualifying ID will cast a ballot under the reasonable impediment exception." Pet. App. 173a. Despite this compelling evidence, the Fourth Circuit found that it "cannot discern any basis upon which this record reflects that the reasonable impediment exception amendment fully cures the harm from the photo ID provision." Pet. App. 69a.

Fundamentally, Section 2 examines whether the electoral system in question is equally open to participation by racial minorities. The plain terms of the statute look forward and ask whether a practice or procedure results in unequal opportunities to vote.

III. A Retrogression Standard Should Be Rejected.

A. A Retrogression Standard Conflicts with *Shelby County*.

In *Shelby County*, this Court struck down Section 4 of the Voting Rights Act. Section 4 determined which states were subject to Section 5 preclearance obligations. *Shelby County*, 133 S. Ct. at 2631. The plaintiffs had successfully challenged the coverage formula, which was based on turnout data from the 1964, 1968, and 1972 presidential elections. *Id*. at 2619-20. Thus, this Court effectively halted the enforcement of Section 5 by finding that the coverage parameters were an outdated intrusion into state sovereignty to run their own elections.

In striking down the coverage of Section 5, this Court noted that the statistical retrogression standard of review used in Section 5 enforcement placed a heavy burden on states. *Id*. at 2631. This observation is very significant for the efforts to permit a Section 2 claim to rest on statistical disparities. This Court spoke disapprovingly of this statistical standard:

> Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." In light of those two amendments, the bar

> that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

Id. at 2627 (internal citations omitted) (emphasis added).

While not directly challenged in *Shelby County*, the strict retrogression standard used in Section 5 implicates constitutional concerns of federalism. The district court below was correct to look closely at the evidence presented and come to the conclusion that little more was presented in this case beyond bare statistical differences, without showing any causal connection with actual access to the political process or any empirical impact on electoral results.

The Fourth Circuit, while noting what this Court said in *Shelby County* regarding relying on past discrimination to inform the present analysis, *see* Pet. App. 33a, still determined that "because the legislation came into being literally within days of North Carolina's release from the preclearance requirements of the Voting Rights Act, that long-ago history bears more heavily here than it might otherwise." Pet. App. 33-34a. It claimed to be applying the standard for Section 2 but instead framed the challenged law as "removing voting tools." Pet. App. 52a.

B. A Retrogression Standard Misapplies this Court's Section 2 Precedents.

Using a statistical retrogression standard to support liability under Section 2 is a plain misapplication of this Court's Section 2 jurisprudence, particularly of the test established in *Gingles*. The *Gingles* decision does not support the application of a statistical disparate impact test. *Gingles*, particularly the

third precondition, relies heavily on notions of electoral causality, where minorities ultimately lose because of the electoral practice. The Court explained:

> The "right" question . . . is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. . . . In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors."

Gingles, 478 U.S. at 44 (internal citations omitted). What *Gingles* said here differs a great deal from the idea that a statistical disparate impact analysis gives rise to Section 2 liability. Instead, this Court refers to "equal opportunity" and empirical election results. *Id*. at 44-46.

Nowhere does *Gingles* support a statistical retrogression test for Section 2 liability whenever an election law, equally open to all and facially race neutral, has some *de minimis* statistical difference in how the law interacts with racial subgroups. If conformity with the law is equally open to all, any differentiation in impact is highly detached from legitimate federal interests under Section 2. Absent a showing that an election regulation was enacted with discriminatory intent, denies equal opportunity to participate in the political process, or has real world electoral impact on the ability to elect candidates of choice, Section 2 is simply not implicated.

C. Other Circuits Have Refused to Employ a Retrogression Standard for Section 2 Liability.

In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), the Seventh Circuit rejected a statistical disparate effect challenge to Wisconsin's voter identification requirement. The court observed that "Section 2(b) tells us that Section 2(a) does not condemn a voting practice just because it has a disparate effect on minorities." *Id*. at 753. Rather, Section 2(b) says that Section 2(a) requires that the evidence demonstrate a denial of the right to vote on account of race. *See id*. According to the court, "unless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter" as far as Section 2 is concerned. *Id*. Moreover, none of the evidence at trial, like in the trial below here, demonstrated that minorities have less opportunity to get photo IDs. *Id*. Whether or not minorities are statistically less likely to use those opportunities "does not violate § 2." *Id*.

In so far as the impact of a voting regulation on "opportunity," that effect cannot be assessed in isolation, but must be considered along with the "entire voting and registration system." *Id*. The Seventh Circuit found that minorities did "not seem to be disadvantaged by Wisconsin's electoral system as a whole." *Id*. Using a pure statistical retrogression standard risks dismantling every piece of a state's voting system on the showing of mere statistics. *Id*. at 754 ("At oral argument, counsel for one of the two groups of plaintiffs made explicit what the district judge's approach implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white

turnout on election day is 2% higher, then the requirement of in-person voting violates § 2.").

Conclusion

The Petition should be granted because this case provides the vehicle by which this Court may preserve the proper analysis under Section 2 and ensure that States continue to have the power to run their own elections. As this Court stated in *Shelby County*, "the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" *Shelby County*, 133 S. Ct. at 2623 (*quoting Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

Respectfully submitted,

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