Nos. 19-1257 and 1258

In the Supreme Court of the United States

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

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

ARIZONA REPUBLICAN PARTY, ET AL., PETITIONERS

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES OF COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF STATE AND LOCAL ELECTION OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former state and local election officials. *Amici* include officials from 38 States and the District of Columbia and from all different levels of the electoral system. *Amici* come from large States

[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amici* or counsel made a monetary contribution to its preparation or submission.

and small States; from the Northeast Corridor to the Deep South to the Great Plains to Alaska; from urban centers and rural counties; from jurisdictions that have never faced Section 2 litigation, others that sometimes have (as well as some that were once covered under Section 5). They include individuals who are currently in office, others who are no longer in office (and even one who has recently been appointed U.S. Senator), and include individuals from both major parties.

State and local election officials are the primary stewards of our federal, state, and local elections. The responsibility for administering elections in the United States is shared by state and local election officials, and the way these duties are distributed varies by State. *Amici* include current and former statewide officials, who bear the ultimate authority for administering and protecting elections in their jurisdictions. Among these are 18 current or former secretaries of state, charged with ensuring the equal application of laws to all voters within their States, issuing guidance for the smooth and secure administration of elections, promulgating administrative rules, overseeing state voter registration systems, and providing critical public information on many election issues such as military and overseas voting, polling place locations, and election results. In addition to statewide officials, *amici* also include current and former local election officials, whose titles range from county commissioners to municipal clerks to supervisors of elections and who serve vital roles administering elections in their communities.

Amici have devoted much of their careers as public servants to ensuring that all eligible voters, in fact, have an equal opportunity to cast a meaningful ballot. Racial

disparities in voting access are anathema to good election administration. A decision weakening Section 2 of the Voting Rights Act could undermine the efforts of *amici* by protecting from legal challenge discriminatory obstacles to equal voting. *Amici* accordingly write to share their experience that Section 2 is both a valuable part of election administration and that it is perfectly feasible to conduct successful and secure elections consistent with Section 2.

A complete list of *amici* is attached as Appendix A.

SUMMARY OF ARGUMENT

Although some of the parties' arguments in this case are limited to the two specific Arizona policies at issue, petitioners and several of their *amici* also launch broader challenges to the scope of Section 2's protections. In particular, they contend that applying the factors this Court set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and that the courts of appeals have applied for decades, creates a slippery slope under which virtually any state or local election law will be vulnerable to challenge, thus creating an insurmountable obstacle to running free and fair elections. See, *e.g.*, Br. of Private Pets. 31; Br. of Ohio *et al.* 21; Br. of Election Integrity Project *et al.* 21-22; Br. of Gov. Ducey *et al.* 3; Br. of Sen. Cruz *et al.* 24-25; Br. of Wis. Majority Leader Fitzgerald *et al.* 9.

Amici file this brief to emphasize their real-world experience that those concerns are fundamentally misplaced. Section 2 is an important tool for ensuring that *all* eligible voters, in fact, have an equal opportunity to cast a meaningful ballot. Indeed, ensuring equal opportunity for all eligible voters to vote is the basic goal of election administration, protected by myriad federal and state election laws. Section 2 focuses specifically on

eliminating racial disparities in opportunities for casting a ballot, which are anathema to good election administration. Section 2 thus provides important protections against arbitrary barriers to equal access, without requiring proof of discriminatory intent. And it plays a particularly important role now that Section 5, through the application of Section 4(b), is no longer in force. Section 2 is thus a boon, not a burden, for the proper administration of the election laws.

Section 2's important role is, however, a bounded one. Although petitioners and their *amici* contend that aggressive Section 2 litigation threatens to usurp the role of state and local law in administering elections, decades of experience conducting elections under Section 2 shows that those allegations are unfounded.

Since Congress adopted the results test in 1982, tens of thousands of elections have been conducted in thousands of jurisdictions, with countless election laws and practices administered by election officials nationwide. The overwhelming majority of those state and local electoral practices have been implemented without interference from Section 2 litigation. Section 2 litigation has been largely utilized in the narrow context of vote-dilution challenges to at-large voting practices. Vote-denial challenges to time, place, and manner policies, like those at issue in this case, contextualized against all the policies and practices undertaken by election administrators, are indisputably rare.

There is no sound basis to conclude that, after decades of relative quiescence, there will suddenly be an explosion in Section 2 litigation challenges to run-of-the-mill voting laws and policies. In addition to the lessons drawn from real-world experience, there are many legal and practical limits to bringing a successful Section 2

challenge. Section 2 vote-denial cases are unusually complex and expensive to litigate—and even harder to win. The burden is on the plaintiff, who faces numerous barriers to success. Those include the difficulty of identifying and proving a disparate impact on opportunities to participate in the political process, which typically requires extensive statistical evidence; tying the claimed disparity to historical discrimination, which similarly requires complex proof; and demonstrating that a challenged law lacks a real and substantial justification under the "tenuousness" inquiry of *Gingles*, 478 U.S. at 37. That last step can be particularly difficult in a challenge to a facially legitimate anti-fraud measure.

Section 2 thus has not, as a practical matter, proved to be a roadblock to the effective administration of state and local election laws. To the contrary, it has served a vital but cabined role in the administration of American elections by providing a backstop against laws and policies that have markedly discriminatory impacts on the equality of opportunity to participate in the political process. This Court accordingly should leave in place the context-specific and "intensely local appraisal" that Section 2 and *Gingles* require, *id.* at 78 (citation omitted), and that the Ninth Circuit applied below.

ARGUMENT

I. Section 2 helps election officials run elections that are efficient, fair, and secure

1. Election officials' basic mission is to ensure that every eligible voter in fact has an equal opportunity to cast a meaningful ballot and have their vote counted. Section 2 of the Voting Rights Act of 1964, 52 U.S.C. 10301, aligns with and complements that basic mission.

In many ways, Section 2 asks election officials to do what they are already committed to doing: protecting

the right of all citizens to vote on equal terms. See *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964) ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); see also *Baker* v. *Carr*, 369 U.S. 186, 237 (1962).

At the outset, state and local election officials must administer all elections consistent with the Fifteenth Amendment's guarantee that "the right of citizens of the United States to vote shall not be denied or abridged … on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, and the Fourteenth Amendment's guarantee of equal protection. See *Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

State and local election officials are also chiefly responsible for implementing a range of federal statutes that encourage all eligible voters to vote. For example, the Help America Vote Act of 2002, 52 U.S.C. 20901 *et seq.*, establishes minimum standards for States to follow for several aspects of election administration, including for voting systems, voter registration databases, and provisional ballots. Similarly, Congress enacted the National Voter Registration Act of 1993 (NVRA), 52 U.S.C. 20501 *et seq.*, to combat "discriminatory and unfair registration laws … [that] disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. 20501(a). The NVRA requires States to enable people to register to vote while obtaining or renewing a driver's license, and asks election officials to

make mail voter registration forms available for distribution. See 52 U.S.C. 20501-20511. And under the Voting Accessibility for the Elderly and Handicapped Act of 1984, election officials must also "assure that all polling places for Federal elections are accessible to handicapped and elderly voters." 52 U.S.C. 20102. State and local election officials take the lead in actually putting those provisions into operation.

A vast body of state and local law guides election administration. In addition to state constitutional provisions protecting the right to vote, *e.g.*, Ariz. Const. Art. II, § 21; see Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vanderbilt L. Rev. 89, 101-106 (2014), state law specifically requires election officials to protect the right to vote and ensure that elections are administered fairly to enable the broadest possible exercise of the franchise. See, *e.g.*, Cal. Elec. Code § 10 (tasking the secretary of state with promoting voter registration, encouraging eligible voters to vote, and "[p]romot[ing] civic learning and engagement to prepare students and new citizens to register to vote and to vote"); Cal. Gov't Code § 12172.5 (providing that if the secretary of state "concludes that state election laws are not being enforced," the secretary shall "call the violation to the attention of the district attorney … or to the Attorney General"); Mont. Code Ann. § 13-1-201 (secretary of state "to obtain and maintain uniformity in the application, operation, and interpretation of the election laws"); N.M. Stat. Ann. § 1-2-1 (similar); N.Y. Elec. Law § 3-102(11) and (14) (state board of election to "take all appropriate steps to encourage the broadest possible voter participation in elections"); N.D. Cent. Code Ann. § 16.1-01-01(2)(a)-(b) and (j) (secretary of state to "[d]evelop

and implement uniform training programs for all election officials in the state," "[p]repare information for voters on voting procedures", and "[e]stablish standards for voting precincts and polling places"); Okla. Stat. Ann. tit. 26, § 2-107 (secretary of state to "promote and encourage voter registration and voter participation in elections"); 17 R.I. Gen. Laws Ann. § 17-6-13 (secretary of state to "identify communities within the state in need of electoral process education by outreaching community organizations" and to "furnish electoral process education throughout the state").

2. Section 2 complements the goals of good election administration by specifically ensuring that even apparently neutral election practices and procedures must not, in fact, have the invidious effect of depriving individuals of an equal opportunity to participate in the political process on account of race. 52 U.S.C. 10301(b). The focus on outcomes, rather than intent, is especially important given the perniciousness of racial discrimination and the lingering consequences of past discrimination in American society. As Congress found when reenacting the Voting Rights Act in 2006, "[d]iscrimination today is more subtle than the visible methods used in 1965," even though "the effect and results are the same, namely a diminishing of the minority community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." H.R. Rep. No. 109-478, at 6 (2006).

Because Section 2 does not require definitive proof of discriminatory intent, and because it defines voting to "include all action necessary to make a vote effective," 52 U.S.C. 10310(c)(1), Section 2 provides a powerful tool to ensure all voters have their voices heard by protecting

the equal right to vote without regard to race. The Voting Rights Act "has proved immensely successful at redressing racial discrimination and integrating the voting process." *Shelby County* v. *Holder*, 570 U.S. 529, 548 (2013). And Section 2, which is "permanent" and "applies nationwide," plays a vital role, especially now that Section 5 is not operative because the pre-clearance formula is invalid. *Id.* at 537.

From the point of view of an election official, Section 2 serves as an affirmative reminder that "voting discrimination still exists." *Id.* at 536. Section 2 directs election officials to remain ever-vigilant to the presence of "sophisticated rules to prevent an effective minority vote." S. Rep. No. 97-417, at 6 (1982) (*Senate Report*); see also Ellen D. Katz *et al.*, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, at 11 (2005) ("Federal judges adjudicating Section 2 cases over the last twenty-three years have documented an extensive record of conduct by state and local officials that they have deemed racially discriminatory and intentionally so."). This focus on real-world disparities aligns with the goals of election officials. Racial discrimination is more complicated today than it was in 1965, and election officials accordingly scrutinize election practices to ensure they are not reinforcing racial discrimination through facially neutral policies. Section 2 buttresses these efforts by providing an enforcement mechanism against sophisticated methods of discrimination that allows courts to evaluate the same context considered by election officials.

These complex types of discrimination may be subtle in form. For example, it may be easy to assume that anybody can get down to the polling place and cast a ballot

in person, or that anybody can receive an absentee ballot by mail and then get down to the post office to send it in. But some constituencies face real-world obstacles that can make those simple-sounding steps quite difficult in practice and in turn impede their opportunity to participate in the electoral process. For example, the district court below noted the lack of home mail service in rural San Luis, where almost 13,000 residents rely on a post office located across a major highway. Pet. App. 473-475. Or consider the "particularly acute" problems experienced by some of Arizona's Native American communities, where "[t]he majority of Native Americans in non-metropolitan Arizona do not have residential mail service." *Ibid.* On the Navajo Reservation, "most people live in remote communities, many communities have little to no vehicle access, and there is no home incoming or outgoing mail, only post office boxes, sometimes shared by multiple families." *Ibid.*

State and local election administrators focus on these on-the-ground realities, not on abstract possibilities. Section 2 shares that same intensely local and practical focus, and in turn complements administrators' goal of ensuring that all voters can, in fact, equally participate in the electoral process, without regard to past or current racial discrimination.

II. Compliance with Section 2 is not difficult and the statute does not create a slippery slope

A. Section 2 litigation is rare and successful vote-denial challenges are limited to outlier policies

1. Although Section 2 plays an important role in good election administration, Section 2 *litigation* plays a very limited role in contemporary election administra-

tion. Section 2 litigation is rare, especially when compared to the broader universe of legal challenges faced by state and local election officials.

This past year is a vivid example. As a Presidential election year, 2020 was particularly busy for election litigation. Lawsuits ranged from pre-election challenges to drive-thru voting, see *Hotze* v. *Hollins*, No. 4:20-cv-03709, 2020 WL 6437668, at *3 (S.D. Tex. Nov. 2, 2020), to post-election challenges to poll watching and the curing of mail-in ballots, see *Donald J. Trump for President, Inc.* v. *Secretary of Pa.*, 830 Fed. Appx. 377, 382 (3d Cir. 2020); see Brennan Center for Justice, *Voting Rights Litigation 2020* (Jan. 11, 2021) (tracking voting rights litigation in 2020).[2]

The COVID-19 pandemic also put great stress on the system for administering American elections. States and localities adopted numerous measures in response, including expanding absentee or mail-in voting as well as early voting. See *Voting Laws Roundup*, Brennan Center for Justice (Dec. 8, 2020).[3] Many States and localities coupled those expansions with anti-fraud measures, including stricter or additional voter ID requirements and limitations on third-party ballot collection campaigns. See *ibid.* Election officials rose to the occasion, successfully conducting the election notwithstanding all of these changes and challenges.

Those countless changes all went into place without meaningful interference from Section 2 litigation. Indeed, although there were myriad adaptations to election laws and policies in response to the pandemic, there

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[2] https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020

[3] https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020-0

were relatively few Section 2 challenges—and no pandemic-related measure was ultimately blocked. For example, in one rare Section 2 challenge, a district court initially found that an Alabama law requiring two witnesses and a photo ID to cast an absentee ballot violated Section 2 because those requirements exposed African-American voters to disparate risks of contracting COVID-19. See *People First* v. *Merrill*, No. 2:20-cv-00619-AKK, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020). Within two weeks, however, the Eleventh Circuit stayed the injunction for the witness requirement and the photo ID requirement, see *People First of Ala.* v. *Secretary of State for Ala.*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. Oct. 13, 2020), so the election went forward with those measures still in place.[4] Section 2 litigation thus was largely a non-issue.

2. The relative lack of Section 2 litigation in 2020 mirrors a much longer pattern. Though critics of Section 2 have long expressed concern that Section 2's results test would result in boundless and protracted litigation, see, *e.g.*, *Senate Report* 99-103 (Remarks of Sen. Hatch), those fears have not come to pass. Over the last 40 years, Section 2 litigation—and in particular Section 2 vote-denial litigation—has proven to be rare.

In 2018, there were 6,459 electoral jurisdictions in the United States (comprising 230,871 polling places).

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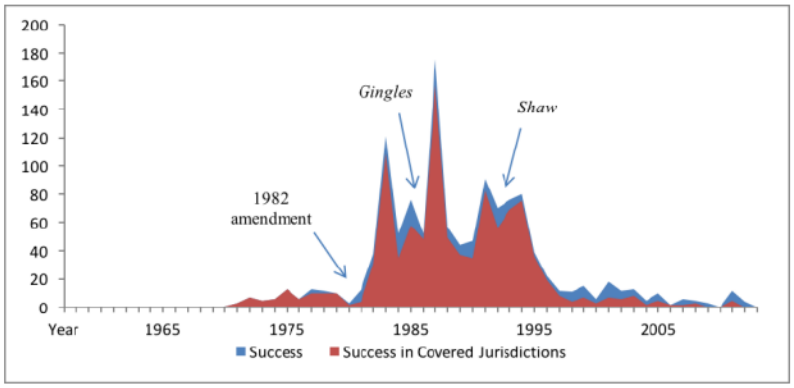
[4] The district court also entered an injunction pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, against a ban on curbside voting. *People First of Ala.* v. *Merrill*, 2020 WL 5814455. After the Eleventh Circuit declined to stay that injunction on appeal, see 2020 WL 6074333, this Court entered a stay, see *Merrill* v. *People First of Ala.*, 141 S. Ct. 25 (2020). This case does not present any question about the ADA.

See U.S. Election Assistance Comm'n, *Election Administration and Voting Survey: 2018 Comprehensive Report* 4, 7 (2019).[5] Each of those jurisdictions has been through many election cycles for myriad different federal, state, and local offices. Each State and locality has its own unique set of election laws and policies. See Kathleen Hale, *et al.*, *Administering Elections: How American Elections Work* 51 (2015). And election laws are constantly changing, with state legislatures considering over 2500 bills related to elections and voting in 2018—and enacting over 300. See National Conference of State Legislatures, *State Elections Legislation Database* (Oct. 5, 2020).[6]

Yet Section 2 litigation has left undisturbed the vast majority of that electoral apparatus over time. The graph below depicts the number of successful Section 2 cases from 1957 through 2014:

Figure 21: Successful Section 2 Cases in Covered and Non-Covered Jurisdictions, 1957-2014[1295]



[5] https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf

[6] https://www.ncsl.org/research/elections-and-campaigns/elections-legislation-database.aspx

U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 222 (2018) (*USCCR Report*).[7] As it vividly illustrates, Section 2 claims were almost never successful before 1982. There was then a marked increase in the wake of Congress's amendment of Section 2, when a number of vote-dilution challenges were successful.

If Section 2 really threatened any and all electoral measures, as petitioners and their *amici* suggest, then one would expect to see a consistently large—and ever-increasing—number of successful Section 2 cases during the decades since 1982. It has not happened. Instead, in the mid-1990s, the number of successful Section 2 cases fell sharply. They have been rare ever since.

To be sure, in the wake of *Shelby County*, there was an uptick in Section 2 litigation as jurisdictions that were previously subject to the preclearance requirement enacted measures that Section 5, through Section 4(b)'s coverage formula, otherwise would have blocked. See *USCCR Report* 227-228. But that increase was relatively small.

The U.S. Commission on Civil Rights did a detailed survey and determined that, to its knowledge, only 61 cases had been filed under Section 2 since *Shelby County*, and only 23 of those had been successful as of 2018. *Id.* 10, 227-232.[8] Of those 23 successful suits, most (14) involved vote-dilution. Only nine included vote denial or abridgement. *Ibid.* And those cases each involved

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[7] https://perma.cc/J5K9-JZGN

[8] The U.S. Commission on Civil Rights is an independent, bipartisan, fact-finding agency directed by Congress to examine "[f]ederal civil rights enforcement efforts." 42 U.S.C. 1975a(c)(1); see *USCCR Report* 7.

an intensely local appraisal of the application of a narrow set of controversial policies in specific places. Those include stricter voter ID laws in North Carolina, North Dakota, and Texas, see *North Carolina State Conf. of NAACP* v. *McCrory*, 831 F.3d 204 (4th Cir. 2016); *Brakebill* v. *Jaeger*, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); *Veasey* v. *Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); a lack of polling sites in Nevada and South Dakota, see *Sanchez* v. *Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016); *Bear* v. *County of Jackson*, No. 5:14-cv-05059, 2017 WL 52575 (D.S.D. Jan. 4, 2017); restriction of early and absentee voting in Ohio, South Dakota, Wisconsin, and Indiana, see *Ohio State Conf. of NAACP* v. *Husted*, 768 F.3d 524 (6th Cir. 2014); *Bear*, 2017 WL 52575; *One Wis. Inst.* v. *Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016); *Common Cause Ind.* v. *Marion Cty. Election Bd.*, 311 F. Supp. 3d 949 (S.D. Ind. 2018); and elimination of straight-party voting in Michigan, see *Michigan State A. Philip Randolph Inst.* v. *Johnson*, 833 F.3d 656 (6th Cir. 2016).[9]

Successful Section 2 vote-denial claims have also been rare in the years since. By and large, even where Section 2 claims were raised regarding changes to election law and rules in 2020, they largely have been unsuccessful. See, *e.g.*, *Texas All. for Retired Ams.* v.

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[9] Moreover, several of these Section 2 cases were later either rendered moot or ultimately unsuccessful in subsequent litigation. See *One Wis. Inst.*, 198 F. Supp. 3d 896, *rev'd sub nom. Luft* v. *Evers*, 963 F.3d 665, 681 (7th Cir. 2020); *Husted*, 768 F.3d 524, *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th. Cir. Oct. 1, 2014); *Michigan State A. Philip Randolph Inst.* v. *Johnson*, No. 16-cv-11844, 2019 WL 2314861, at *2 (E.D. Mich. May 31, 2019) (explaining that Michigan voters voted to add an amendment to their state constitution preserving straight ticket voting, rendering moot the Section 2 claim).

Hughs, 976 F.3d 564 (5th Cir. 2020) (granting a stay of a Section 2 preliminary injunction); *Mi Familia Vota* v. *Abbott*, No. 20-50907, 2020 WL 6498958, at *1 (5th Cir. Oct. 30, 2020) (same); *Cordero* v. *Kisner*, No. 3:20-cv-2195-JFA-PJG, 2020 WL 5230888, at *4 (D.S.C. Sept. 1, 2020) (dismissing a Section 2 claim at the pleading stage), *adopted by* 2020 WL 5742802 (D.S.C. Sept. 25, 2020); *Chestnut* v. *Merrill*, 446 F. Supp. 3d 908, 915 (N.D. Ala. 2020) (finding the Section 2 claim moot). Overall, these challenges reach only a tiny fraction of the electoral laws and policies nationwide.

The Department of Justice's litigation experience reflects a similar pattern. DOJ has been enforcing Section 2 for decades, applying the familiar *Gingles* factors from the Senate Report, which DOJ still highlights on its website. See DOJ, *Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/section-2-voting-rights-act. Yet in the decades since Congress amended Section 2, DOJ has brought only 38 Section 2 cases, according to its own figures. See DOJ, *Voting Section Litigation*, https://www.justice.gov/crt/voting-section-litigation. Most of those cases have focused on at-large voting practices that cause vote dilution.

Since *Shelby County*, DOJ has brought only two Section 2 enforcement actions involving vote-denial claims. In one, DOJ challenged a North Carolina omnibus elections bill that, among other things, dramatically cut the period for early voting, eliminated same day registration, prevented the counting of out-of-precinct provisional ballots, and adopted stringent new voter ID requirements. See *McCrory*, 831 F.3d 204. After three years of litigation and multiple appeals, DOJ was ultimately successful in proving both an impermissible discriminatory effect and intentional discrimination. See

ibid. In the other, DOJ joined a number of individuals and advocacy groups challenging Texas's voting identification law. See *Veasey*, 830 F.3d 216. Texas later amended its law and DOJ dropped the claim. See *ibid.* DOJ has not pursued any other Section 2 vote-denial challenges.

3. Section 2 cases are rare in part because they are among the hardest cases to litigate in federal court. A Section 2 plaintiff must identify a law or practice that constitutes a "denial or abridgement of the right … to vote," 52 U.S.C. 10301(a), by showing that "the political processes … are not equally open to participation by" members of a racial group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). In making its case, a Section 2 plaintiff bears the burden of proof. See *Gingles*, 478 U.S. at 46. And proving both the disparate impact and all the other factors relevant under the totality of the circumstances "ordinarily involves a considerable amount of statistical evidence derived from population figures, demographics, and voter behavior," which requires reliance on experts and considerable cost. See Bruce M. Clarke & Robert Timothy Reagan, *Redistricting Litigation, An Overview of Legal, Statistical, and Case-Management Issues*, Federal Judicial Center 10 (2002).[10]

Experienced practitioners in the field report that Section 2 cases are "in a class of their own" when it comes to the time, expense, and complexity of proof required. Dale E. Ho, *Voting Rights Litigation After Shelby*

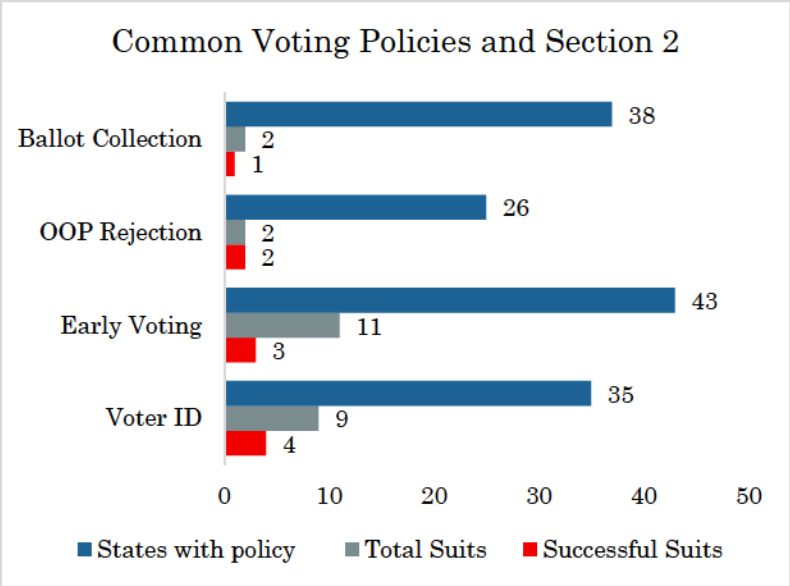
[10] https://www.fjc.gov/sites/default/files/2012/Redistri.pdf

County: Mechanics and Standards in Section 2 Vote Denial Claims, 17 N.Y.U. J. Legis. & Pub. Pol'y 675, 682-83 (2014). That litigation can be cost-prohibitive, particularly when "seeking to challenge voting changes at the local level." *Ibid.* And even when a group can bear the costs of litigation, "[p]rivate entities with developed expertise in voting rights litigation may be able to muster a challenge to at most a few policies at a time, and often no more than one." *USCCR Report* 266 (quoting Justin Levitt, Loyola L. Sch., Written Testimony for the U.S. Comm'n on Civil Rights, Feb. 2, 2018 at 12-13). Moreover, "Section 2 lawsuits often take years" to litigate to fruition. *Id.* at 9. And unless the plaintiff succeeds in obtaining the extraordinary relief of a preliminary injunction, the pending suit will "not prevent elections from occurring under procedures later found to be discriminatory." *Ibid.*

4. In practice, Section 2 litigation thus does not impact the overwhelming majority of day-to-day election administration. Instead, Section 2 litigation has typically been limited to outlier policies or policies that, due to a confluence of unusual local circumstances, have an outlier disparate impact in a specific jurisdiction.

Petitioners and their *amici* note that some of the policies that have been challenged, like voter ID laws and out-of-precinct policies, are fairly common. But those policies are subject to liability only when a unique confluence of local circumstances produces discriminatory results. This is clear by looking at common policies that have been subject to some Section 2 challenges over the last fifteen years: limitation on third-party ballot collection, rejection of out-of-precinct ballots, early voting, and voter ID requirements. Although many States have

those policies, few States have faced Section 2 challenges to those policies—and successful challenges are ever rarer:



Specifically, all 50 States currently have at least one these four policies: 38 States have provisions regulating ballot collection; 26 States have provisions barring the counting of out-of-precinct ballots; 43 States have provisions regulating early voting; and 35 States have (or recently had) provisions imposing voter ID requirements.[11] Yet of those 142 policies in all of those States, only a handful have been successfully challenged under

[11] A full list of state provisions is reproduced in Appendix B. Hawaii recently eliminated prior provisions imposing voter ID requirements. See 2019 Haw. Sess. Laws 136 §§ 49-52.

Section 2 in the last 15 years.[12] Unsuccessful challenges are more common.[13] The large majority of these policies have never faced a Section 2 challenge.

There is thus no sound basis to conclude that Section 2 creates a slippery slope that threatens run-of-the-mill state and local election administration. Decades of experience in actual elections shows that Section 2 litigation, and Section 2 vote-denial litigation in particular, is rare

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[12] The successful challenges are in this case as well as *Veasey*, 830 F.3d 216 (Voter ID); *McCrory*, 831 F.3d 204 (Voter ID, Early Voting, OOP Rejections); *Brakebill* v. *Jaeger*, 932 F.3d 671 (8th Cir. 2019) (Voter ID); *Spirit Lake Tribe* v. *Jaeger*, No. 1:18-cv-222, 2020 WL 625279 (D.N.D. Feb. 10, 2020) (same, and later consolidated with the challenge in *Brakebill*, whereupon the parties entered into a consent decree); *Common Cause Ind.* v. *Marion Cty. Election Bd.*, 311 F. Supp. 3d 949 (S.D. Ind. 2018) (Early Voting); *Sanchez* v. *Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016) (same).

[13] Unsuccessful challenges include *Frank* v. *Walker*, 768 F.3d 744 (7th Cir. 2014) (Voter ID); *Gonzalez* v. *Arizona*, 677 F.3d 383 (9th Cir. 2012) (same); *Greater Birmingham Ministries* v. *Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018) (same), *aff'd*, 966 F.3d 1202 (11th Cir. 2020); *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340 (11th Cir. 2009) (same); *Lee* v. *Virginia State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D. Va. 2016) (same), *aff'd*, 843 F.3d 592 (4th Cir. 2016); *Luft* v. *Evers*, 963 F.3d 665 (7th Cir. 2020) (Early Voting); *Navajo Nation Human Rights Comm'n* v. *San Juan County,* 215 F. Supp. 3d 1201 (D. Utah 2016) (same); *Wandering Medicine* v. *McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012) (same); *Brooks* v. *Gant*, No. 12-cv-5003-KES, 2012 WL 4482984 (D.S.D. Sept. 27, 2012) (same); *Brown* v. *Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012) (same); *Ohio Democratic Party* v. *Husted*, 834 F.3d 620 (6th Cir. 2016) (same); *Pascua Yaqui Tribe* v. *Rodriguez*, 2020 WL 6203523, No. 20-cv-00432-TUC-JAS (D. Ariz. Oct. 22, 2020) (same); *Jacob* v. *Board of Dirs. of the Little Rock Sch. Dist.*, No. 4:06-cv-01007 GTE, 2006 WL 8206657 (E.D. Ark. Sept. 1, 2006) (same); *Middleton* v. *Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590 (D.S.C. Sept. 18, 2020) (Ballot Collection), *appeal filed*, No. 20-2022 (4th Cir. Sept. 22, 2020).

and has been limited to policies with sharply disparate impacts on the equality of opportunity to vote. To the extent the outcome of any of those individual cases is incorrect or debatable, the proper tool for remedying the problem is a scalpel, not a sledgehammer.

B. The overwhelming majority of electoral policies readily withstand a Section 2 vote-denial challenge

Section 2 contains numerous safeguards that together ensure that election officials can faithfully perform their duties while avoiding policies with undue disparate impacts.

At the outset, the all-encompassing "totality of circumstances" test, 52 U.S.C. 10301(b), protects against blindly extending the result of any given Section 2 decision to a different jurisdiction: By definition, the "totality of circumstances," *ibid.*, will be different in each jurisdiction. So administrators in each jurisdiction can focus on local facts and circumstances, without undue concern about a Section 2 decision involving a different confluence of circumstances. For example, the "totality of circumstances" in Arizona with regard to its out-of-precinct voting policy is markedly different from those in any other State. See Pet. App. 44-45, 71-72; see also *id.* at 13 (reproducing chart showing outlier effect of policy in Arizona).

Second, the vast majority of state and local electoral laws and policies are plainly valid under Section 2 because they do not cause any meaningful disparity in "opportunity" for members of a racial group "to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). Furthermore, as the courts of appeals recognize, "a bare statistical showing of disproportionate *impact* on a racial minority does not

satisfy the § 2 'results' inquiry." *Smith* v. *Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997); see also *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 540 (2015). Rather, a plaintiff must overcome a series of additional hurdles.

For instance, in assessing whether a challenged policy meaningfully abridges the equality of "opportunity … to participate in the political process," 52 U.S.C. 10301(b), the inquiry must take into account the extent to which the affected voters have, in fact, real alternatives to allow them to participate, not just alternatives in theory. A Section 2 plaintiff also must show that the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities" of a racial group "to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Thus, if the disparities do not arise from the interaction between the challenged practice and historical discrimination, then a Section 2 claim fails.

Perhaps most significant in a vote-denial challenge to a facially neutral policy is whether the policy is, in fact, supported by a valid and non-tenuous justification, such as the interest in preventing fraud or the appearance of fraud. See *Gingles*, 478 U.S. at 45. "Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 540, (2015) (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)).

For example, anti-fraud measures can *protect* the "opportunity" for a racial group "to participate in the political process and to elect representatives of their

choice," 52 U.S.C. 10301(b), by preventing fraudulent efforts to undo their electoral success at the polls. Just as the right to vote can be denied or diluted on the front end through restrictions or burdens on casting meaningful ballots, it can also be "destroyed by alteration of ballots" or "diluted by ballot-box stuffing" or other forms of fraud. See *Reynolds*, 377 U.S. at 555. To avoid such problems, election officials routinely implement a wide variety of measures designed to ensure the integrity of American elections. See, *e.g.*, Cal. Elec. Code § 10.5 (establishing an "Office of Elections Cybersecurity" to "reduce the likelihood and severity of cyber incidents that could interfere with the security or integrity of elections" and "monitor and counteract false or misleading information regarding the electoral process"); Fla. Stat. Ann. § 102.031 (local election board "to maintain order at the polls and enforce obedience to its lawful commands during an election and the canvass of the votes"); Tex. Elec. Code Ann. § 31.005(a) (secretary of state to "take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes"); W. Va. Code Ann. § 3-1A-5(b)(3) (state election commission and secretary of state "[t]o consider and study the election practices of other jurisdictions, with a view to determining the techniques used in eliminating fraud in elections and in simplifying election procedures"); Wyo. Stat. Ann. § 22-2-121(b) (secretary of state to "promulgate such rules as are necessary to maintain uniform voting and vote counting procedures and orderly voting").

The tenuousness inquiry provides election administrators with considerable comfort. When a jurisdiction has a commonplace rule for maintaining election integrity and any disparate effect in a jurisdiction on voting

patterns is negligible or similar to that in myriad other jurisdictions, then the justification for that restriction will be readily apparent, not tenuous, and the provision will likely satisfy Section 2. State and local election administrators in turn have substantial flexibility in crafting valid election practices.

Of course, if a jurisdiction adopts an unusual rule that causes a markedly disparate impact, or if circumstances on the ground in that jurisdiction mean that an otherwise commonplace rule actually has an outlier effect on equality of opportunity to vote, then the mere invocation of a potentially valid justification will be insufficient. As the Ninth Circuit properly noted, the asserted justification must be actual and substantial, not pretextual or tenuous. Pet. App. 80-81.[14]

Section 2 thus demands a context-sensitive inquiry. Decades of experience show that it does not create a slippery slope, and instead is narrowly tailored to protect the equal opportunity to vote.

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[14] The absence of a valid non-tenuous justification is particularly clear where, as here with regard to the ballot-collection prohibition, there is a factual finding that the asserted justification was pretextual and that the real motivation was invidious racial discrimination. See Pet. App. 103 ("[D]iscriminatory intent was a motivating factor in enacting H.B. 2023").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2021

APPENDIX

APPENDIX A

List of *Amici Curiae*[1]

Cathy Darling Allen, Clerk, Shasta County, California

Aaron Ammons, Clerk, Champaign County, Illinois

Julie Anderson, Auditor, Pierce County, Washington

Gary Bartlett, former Executive Director, Board of Elections, North Carolina

Shenna Bellows, Secretary of State, Maine

Jocelyn Benson, Secretary of State, Michigan

Chris Biggs, former Secretary of State, Kansas

Timothy Burke, former Member, Board of Elections, Hamilton County, Ohio

Damon Circosta, Chair, State Board of Elections, North Carolina

Jim Condos, Secretary of State, Vermont

Mike Cooney, former Secretary of State, Montana

Edgardo Cortes, former Elections Commissioner, Virginia

Devarieste Curry, former Member, Board of Elections, District of Columbia

Dustin Czarny, Commissioner, County Board of Elections, Onondaga County, New York

Sherry L. Daigle, former Clerk, Teton County, Wyoming

Connor Degan, Town Clerk, Hopkinton, Massachusetts

Mark Earley, Supervisor of Elections, Leon County, Florida

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[1] The views of individual board members do not necessarily reflect the views of the board on which they serve.

Myla Eldridge, Circuit Court Clerk, Marion County, Indiana

Shemia Fagan, Secretary of State, Oregon

M. Catherine Fanello, Chair, Election Board, St. Joseph County, Indiana

Caleb Faux, Member, Board of Elections, Hamilton County, Ohio

Patrick Gill, Auditor, Woodbury County, Iowa

Joe Paul Gonzalez, Clerk, Auditor, & Recorder Registrar of Voters, San Benito County, California

Nellie Gorbea, Secretary of State, Rhode Island

Alison Lundergan Grimes, former Secretary of State, Kentucky

Mary Hall, Auditor, Thurston County, Washington

Tricia Herzfeld, Secretary, Election Commission, Davidson County, Tennessee

Terri Hollingsworth, Clerk, Pulaski County, Arkansas

Chris Hollins, former Clerk, Harris County, Texas

Yvette Isburg, Auditor , Buffalo County, South Dakota

Toni Johnson, Chair, Election Commission, Hinds County, Mississippi

Jason Kander, former Secretary of State, Missouri

Phil Keisling, former Secretary of State, Oregon

Kevin Kennedy, former Chief Election Official, Wisconsin

Judge Alan King (Retired), Probate & Chief Election Officer, Jefferson County, Alabama

Brianna Lennon, Clerk, Boone County, Missouri

John Lindback, former Chief of Staff to Lieutenant Governor, Alaska; former Head, Division of Elections, Oregon

Dean Logan, Registrar-Recorder and County Clerk, Los Angeles County, California

Isabel Longoria, Election Administrator, Harris County, Texas

Abbie Mace, Clerk, Freemont County, Idaho

Richard Mahoney, former Secretary of State, Arizona

Gwen McFarlin, Chair, County Board of Elections, Hamilton County, Ohio

Paddy McGuire, Auditor, Mason County, Washington

Amber McReynolds, former Director of Elections in Denver, Colorado

Denise Merrill, Secretary of State, Connecticut

Alice P. Miller, Director, Board of Elections, District of Columbia

Willie M. Miller, Election Commissioner, Noxubee County, Mississippi

David Orr, former Clerk, Cook County, Illinois

Alex Padilla, former Secretary of State and U.S. Senator-designate, California[2]

Vechel D. Radford, former Member, Board of Elections, Hamilton County, Ohio

Miles S. Rapoport, former Secretary of State, Connecticut

William D. Rich, Chairman, Board of Elections, Summit County, Ohio

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[2] Mr. Padilla agreed to participate as an *amicus curiae* while serving as Secretary of State, but has been appointed to fill a vacancy in the U.S. Senate.

Mark Ritchie, former Secretary of State, Minnesota

Jesse Salinas, Clerk-Recorder, Yolo County, California

Ion Sancho, former Supervisor of Elections, Leon County, Florida

Steve Simon, Secretary of State, Minnesota

George Stern, Clerk, Jefferson County, Colorado

Sherrie Swensen, Clerk, Salt Lake County, Utah

Sylvester Tate, Election Commissioner, Noxubee County, Mississippi

Natalie Tennant, former Secretary of State, West Virginia

Maggie Toulouse-Oliver, Secretary of State, New Mexico

Francis Ulmer, former Lieutenant Governor, Alaska

Grant Veeder, Auditor and Commissioner of Elections, Black Hawk County, Iowa

Patty Weeks, Clerk, Nez Perce County, Idaho

Travis Weipert, Auditor, Johnson County, Iowa

Julie Wise, Director of Elections, King County, Washington

Maribeth Witzel-Behl, Clerk, Madison City, Wisconsin

Leon Wright, Municipal Clerk, Van Buren Township, Michigan

David Worley, Member, State Board of Elections, Georgia

Michael J. Zickar, Member, Board of Elections, Wood County, Ohio

APPENDIX B

State-law provisions regulating ballot collection:

Ala. Code § 17-11-9

Alaska Stat. §§ 15.20.081(a), 15.20.072

Ariz. Rev. Stat. § 16-1005

Ark. Code Ann. § 7-5-403

Cal. Elec. Code § 3017

Colo. Rev. Stat § 1-7.5-107

Conn. Gen. Stat. Ann. § 9-140b

Fl. Stat. Ann. § 101.051

Ga. Code Ann. § 21-2-385

10 Ill. Comp. Stat. Ann. 5/19-6, 5/19-13

Ind. Code Ann. § 3-11-10-1

Iowa Code Ann. §§ 53.17, 53.22

Kan. Stat. Ann. § 25-1128

Ky. Rev. Stat. § 117.0863

La. Stat. Ann. § 18:1308(B)

Me. Rev. Stat. tit. 21-A, § 753-B

Md. Code Ann., Elec. Law § 9-307

Mass. Gen. Laws Ann. ch. 54, § 92

Mich. Comp. Laws Ann. § 168.764a

Minn. Stat. Ann. § 203B.08

Mo. Ann. Stat. § 115.291

Mont. Code Ann. § 13-35-703

Neb. Rev. Stat. § 32-943

Nev. Rev. Stat. § 293.353

N.H. Rev. Stat. § 657:17

N.J. Stat. Ann. §§ 19:63-9, 19:63-16

N.M. Stat. Ann. § 1-6-10.1

N.C. Gen. Stat. Ann. §§ 163-226.3, 163-231

N.D. Cent. Code § 16.1-07-08

Ohio Rev. Code Ann. §§ 3509.05, 3509.08

Okla. Stat. Ann. tit. 26, § 14-108

Ore. Rev. Stat. § 254.470

25 Pa. Cons. Stat. § 3146.2a

S.C. Code Ann. § 7-15-385

S.D. Codified Laws §§ 12-19-9, 12-19-2.2

Tex. Elec. Code Ann. § 86.006

Va. Code Ann. § 24.2-705

W. Va. Code Ann. § 3-3-5

State-law provisions barring the counting of out-of-precinct ballots:

Ala. Code § 17-9-10

Ariz. Rev. Stat. § 16-584(E)

Conn. Gen. Stat. Ann. §§ 9-232, 9-232n

Del. Code Ann. tit. 15, § 4948(h)(7)–(8)

Fla. Stat. Ann. § 101.048(2)(a)

Haw. Code R. § 3-177-554

10 Ill. Comp. Stat. Ann. 5/18A-15(b)(1)

Ind. Code Ann. § 3-11.7-5-3(a)

Iowa Code Ann. § 49.9

31 Ky. Admin. Regs. 6:020(14)

Mich. Comp. Laws Ann. § 168.813(1)

1 Miss. Code R. Pt. 10, Exh. A

Mo. Ann. Stat. § 115.430(2)(1)

Mont. Code Ann. § 13-15-107

Neb. Rev. Stat. Ann. § 32-1002(5)(e)

Nev. Rev. Stat. Ann. § 293.3085

N.C. Gen. Stat. Ann. § 163-182.2

Okla. Stat. Ann. tit. 26, § 7-116.1(C)

S.C. Code Ann. § 7-13-830

S.D. Codified Laws § 12-20-5.1

Tenn. Code Ann. § 2-7-112(a)(3)(B)(v)

Tex. Elec. Code Ann. § 65.054(b)(1)

Vt. Stat. Ann. tit. 17, §§ 2121(a), 2557

Va. Code Ann. § 24.2-653.01

Wis. Stat. Ann. § 6.97(4)

Wyo. Stat. Ann. § 22-15-105(b)

State-law provisions regulating early in-person voting:

Ala. Code §§ 17-11-3(a), 11-5(a), 11-9

Alaska Stat. Ann. §§ 15.20.064, 15.20.045; Alaska Admin. Code tit. 6, § 25.500

Ariz. Rev. Stat. §§ 16-541, 16-542

Ark. Code Ann. § 7-5-418

Cal. Elec. Code §§ 3001, 3018

Colo. Rev. Stat. Ann. § 1-7.5-107.2

Fla. Stat. Ann. § 101.657

Ga. Code Ann. §§ 21-2-380, 21-2-381, 21-2-382

Haw. Rev. Stat. Ann. § 11-109

Idaho Code Ann. §§ 34-1006, 34-1002

10 Ill. Comp. Stat. Ann. 5/19A-15, 5/19A-20

Ind. Code Ann. §§ 3-11-4-1, 3-11-10-26

Iowa Code §§ 53.10, 53.11(b)

Kan. Stat. Ann. §§ 25-1119, 25-1122a, 25-1123

La. Stat. Ann. §§ 18:1303, 1309

Me. Stat. tit. 21-A, §§ 753-B(2), (8)

Md. Code Ann., Elec. Law § 10-301.1

Mass. Gen. Laws Ann. ch. 54, § 25B

Mich. Const. art. 2, § 4 (as amended by 2018 Mich. Legis. Serv. Ref. Meas. 18-3 (Proposal 18-3))

Minn. Stat. Ann. §§ 203B.081, 203B.085

Mont. Code Ann. § 13-13-205

Neb. Rev. Stat. Ann. §§ 32-808, 32-938, 32-942

Nev. Rev. Stat. Ann. § 293.356 et seq.

N.J. Stat. Ann. §§ 19:63-6, 19:63-12

N.M. Stat. Ann. § 1-6-5.7

N.Y. Elec. Law § 8-600

N.C. Gen. Stat. Ann. § 163-227.2

N.D. Cent. Code § 16.1-07-15

Ohio Rev. Code Ann. §§ 3509.01, 3509.051

Okla. Stat. Ann. tit. 26, § 14-115.4

Or. Rev. Stat. Ann. § 254.470

25 Pa. Stat. Ann. §§ 3146.2a, 3146.6

R.I. Gen. Laws § 17-20-2.2

S.D. Codified Laws §§ 12-19-1.2, 12-19-2.1

Tenn. Code Ann. § 2-6-102(a)(1)

Tex. Elec. Code Ann. §§ 85.001, 85.002

Utah Code Ann. § 20A-3a-601

Vt. Stat. Ann. tit. 17, §§ 2531–2537

Va. Code Ann. § 24.2-701.1

Wash. Rev. Code Ann. § 29A.40.160

W. Va. Code Ann. § 3-3-3

Wis. Stat. Ann. § 6.86(1)(b)

Wyo. Stat. Ann. §§ 22-9-105, 22-9-125

State-law provisions requiring voter ID:

Ala. Code § 17-9-30

Alaska Stat. Ann. § 15.15.225

Ariz. Rev. Stat. Ann. § 16-579(A)(1)(a)

Ark. Const. amend. LI, § 13; Ark. Code Ann. § 7-5-305

Colo. Rev. Stat. Ann. §§ 1-1-104(19.5), 1-7-110

Conn. Gen. Stat. Ann. § 9-261

Del. Code Ann. tit. 15, § 4937

Fla. Stat. Ann. § 101.043

Ga. Code Ann. § 21-2-417

Haw. Rev. Stat. Ann. § 11-136 (Repealed effective July 1, 2019 by 2019 Haw. Sess. Laws 136 §§ 49-52)

Idaho Code Ann. §§ 34-1106, 34-1113, 34-1114

Ind. Code. Ann. §§ 3-5-2-40.5, 3-11-8-25.1

Iowa Code § 48a.7a

Kan. Stat. Ann. §§ 25-2908, 25-1122, 8-1324

Ky. Rev. Stat. Ann. § 117.227

31 Ky. Admin. Regs. 4:010
La. Stat. Ann. § 18:562
Mich. Comp. Laws Ann. § 168.523
Miss. Code Ann. § 23-15-563
Mo. Rev. Stat. § 115.427
Mont. Code Ann. § 13-13-114
N.H. Rev. Stat. Ann. § 659:13
N.C. Gen. Stat. Ann. § 163-166.16
N.D. Cent. Code § 16.1-05-07
Ohio Rev. Code Ann. § 3505.18
Okla. Stat. Ann. tit. 26, § 7-114
R.I. Gen. Laws § 17-19-24.2
S.C. Code Ann. § 7-13-710
S.D. Codified Laws §§ 12-18-6.1, 12-18-6.2
Tenn. Code Ann. § 2-7-112
Tex. Elec. Code Ann. §§ 63.001, 63.0101
Utah Code Ann. §§ 20a-1-102, 20a-3a-203
Va. Code Ann. § 24.2-643
Wash. Rev. Code Ann. § 29a.40.160
W. Va. Code Ann. § 3-1-34
Wis. Stat. §§ 5.02(6m), 6.79(2a)