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The Implications of *Brnovich v. Democratic National Committee*
and Potential Legislative Responses

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Introduction

Chair Nadler, Vice Chair Dean, Ranking Member Jordan, and distinguished Members, thank you for inviting me to testify before you.

My name is Nicholas Stephanopoulos and I am the Kirkland & Ellis Professor of Law at Harvard Law School, where I teach Election Law, Constitutional Law, and several other classes. Much of my work over the years has involved the Voting Rights Act, which I consider to be the single most impactful statute ever passed by Congress on the subject of elections. Most relevant here, I wrote a 2019 article in the *Yale Law Journal* entitled “Disparate Impact, Unified Law,” which proposed a standard for racial vote denial claims under Section 2 of the Voting Rights Act. I also submitted an amicus brief to the Supreme Court while it was still deliberating in *Brnovich v. Democratic National Committee*. This brief was repeatedly referenced by the Justices at oral argument, and my earlier article was cited as well by the Court’s eventual decision.

In my testimony today, I want to make three points about the Court’s decision in *Brnovich*. First, it is indefensible as a matter of statutory interpretation. The Court imposed one extratextual constraint on Section 2 after another. These limits are nowhere to be found in the language of Section 2, and they are also inconsistent with Congress’s goal of ending racial inequities in American elections. Second, the Court’s decision will hinder efforts by litigants to bring Section 2 vote denial claims in the future. Several of the extratextual factors devised by the Court will be difficult for plaintiffs to satisfy in most cases. And third, Congress can and should overrule the Court’s mistaken decision. Congress should make clear that Section 2 forbids electoral practices that cause statistically significant and unnecessary racial disparities. Congress should also take steps to protect the precious right to vote for all Americans, of all races.

Let me begin with my first point: the poor quality of the Court’s statutory interpretation. The Justices in the *Brnovich* majority consider themselves to be textualists. When construing a statute, they say, they begin with the text and they end with the text. Yet the very first factor the Court announced as a relevant consideration for future cases is entirely extratextual. This factor is “the size of the burden imposed by a challenged voting rule.”¹ You can stare at Section 2 for as long as you like, but you will never find any language like this. Section 2 actually prohibits *any* “denial or abridgement”² of the right to vote on racial grounds. The Court effectively inserted the word “substantial” before “abridgement,” in defiance of the statutory text.

The Court’s second factor is even worse from a textualist perspective. This factor is “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.”³ But Section 2 never states, or even hints, that the electoral status quo in 1982 is in any way relevant to the disposition of a vote denial claim. At least the Court’s first factor can be seen as a modification of a word that is really in the statute (“abridgement”). The 1982 baseline is manufactured out of whole cloth, not even purporting to be linked to any statutory language.

Bad textualism is bad enough. My second point, though, is that the Court’s extratextual inventions will have serious negative consequences for Section 2 litigation. Consider the factor about the size of the voting burden. Future defendants will latch onto this factor and argue that their voting restrictions cause nothing more than “the usual burdens of voting”—a “[m]ere

¹ *Brnovich v. Dem. Nat’l Comm.*, No. 19-1257, slip op. at 16 (U.S. July 1, 2021).

² 52 U.S.C. § 10301(a).

³ *Brnovich*, slip op. at 17.

inconvenience” at worst.⁴ Future defendants will also find a friendly audience for this argument in the Court. In *Brnovich*, after all, the Court opined that Arizona’s laws discarding ballots cast in the wrong precinct and banning third-party mail-in ballot collection “fall[] squarely within the heartland of the usual burdens of voting.”⁵ If these onerous practices are inside the heartland, few rules will be outside.

Or take the 1982 baseline for comparison. In that era, many policies that facilitate voting today were either unknown or very rare. In particular, as the Court pointedly observed, “in 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots.”⁶ The implication is that, going forward, states will be able to limit early and mail-in voting without a serious prospect of Section 2 liability. This is because curbs on these modes of voting, at most, could return states to the 1982 status quo.

This brings me to my third point: Congress need not and should not accept the shackles the Court has placed on Section 2. To restore Section 2 to its proper role, Congress should consider adopting the disparate impact framework that is already used in areas such as employment and housing—and that Justice Kagan endorsed in her powerful dissent. Under this approach, the plaintiff would first have to prove that an electoral practice causes a statistically significant racial disparity. The defendant would then have the chance to demonstrate, through particularized evidence, that the practice is necessary to achieve an important state interest. Finally, the plaintiff could try to show that this interest could be achieved by a different, less discriminatory policy.

This framework is deeply familiar to litigants and courts, having been in place for almost half a century. This framework also avoids the constitutional issues that might be raised by a pure disparate impact standard—one that invalidates laws solely because of their racial disparities. Most importantly, unlike the extratextual factors of the *Brnovich* Court, this framework is *effective*. It would impose liability whenever electoral regulations give rise to statistically meaningful and unnecessary racial disparities. It would thus further Congress’ objective, expressed in Section 2 but thwarted by the *Brnovich* Court, of American elections no longer plagued by racial inequities.

But Congress should not just revise Section 2 in response to *Brnovich*. It should also protect the right to vote on a nonracial basis in two further ways. One of these is affirmatively specifying which electoral practices states must and must not use, at least in federal elections. This is the strategy of H.R. 1, the For the People Act, as the bill currently stands. The other way that Congress should safeguard the franchise is by creating a new cause of action, available to all citizens of all backgrounds, against unjustifiably burdensome electoral policies. This claim would be an ideal complement to Section 2, targeting needless *burdens* rather than *racial disparities* in the electoral process. In combination, the two theories would make voting both more racially equitable and more universally accessible.

Flawed statutory interpretation

I will now provide more detail about my three points, starting with the Court’s flawed statutory interpretation in *Brnovich*. I explained above that the Court’s first pair of factors—the size of the voting burden and the 1982 baseline—are textually unmoored. The same is true for the

⁴ *Id.* at 16 (internal quotation marks omitted).

⁵ *Id.* at 30 (internal quotation marks omitted).

⁶ *Id.* at 17.

Court's remaining considerations: "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups,"⁷ "the opportunities provided by a State's entire system of voting,"⁸ and "the strength of the state interests served by a challenged voting rule."⁹

The factor about the size of racial disparities, first, suggests that Section 2 might not be violated by small disparate impacts. However, Section 2 specifies that it is breached whenever voting is not "*equally* open" to minority citizens in that they have "*less* opportunity" than white citizens to cast ballots.¹⁰ This language indicates that *any* racial disparity is sufficient (as long as it is statistically shown, in fact, to be a disparity). The Court thus implicitly revised Section 2 again, replacing "equally open" and "less opportunity" with phrases to the effect of "not too unequally open" and "considerably less opportunity."

Next, the factor about a state's whole electoral system runs headlong into Section 2's opening words. These words identify what kind of policy can transgress Section 2: a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure."¹¹ Notably, each of these terms denotes a specific, singular regulation of the electoral process. None of the terms calls for an examination of *other* electoral policies not challenged by the plaintiff. Nor does any term hint (as the Court held) that a racially discriminatory measure can be excused if a state makes available other, supposedly less burdensome modes of voting.

Lastly, the factor about the strength of a state's interests is textually adrift as well. Section 2 says nothing about the justifications that might be offered for a disputed practice. True, one of the considerations in the Senate report that accompanied the 1982 amendments to Section 2 is "whether the policy underlying [the law at issue] is tenuous."¹² But this Senate factor means that courts should *discount* rationales that are *weak* because of their inherent implausibility or lack of evidentiary backing. In contrast, the Court's factor is aimed at crediting interests, like the avoidance of fraud, that are persuasive in theory but often factually unsupported in practice. This evidence-free approach to justifications is evident in the Court's categorical pronouncement that "the prevention of fraud" is always a "strong and entirely legitimate state interest."¹³

To be clear, these textualist critiques of the Court's opinion are not mine alone. They were also made forcefully by Justice Kagan in her scathing dissent. "The majority's opinion mostly inhabits a law-free zone," she remarked.¹⁴ The opinion "leaves [Section 2's] language almost wholly behind."¹⁵ Rather than focus on the statutory text, the majority "finds its decision on a list of mostly made-up factors, at odds with Section 2 itself."¹⁶ This list is "a set of extra-textual restrictions on Section 2—methods of counteracting the law Congress actually drafted."¹⁷ The majority thus abandons its usual methodology under which "it must interpret a statute according to its text" and

⁷ *Id.* at 18.

⁸ *Id.*

⁹ *Id.* at 19.

¹⁰ 52 U.S.C. § 10301(b) (emphasis added).

¹¹ *Id.* § 10301(a).

¹² S. Rep. No. 97-417, at 29 (1982).

¹³ *Brnovich*, slip op. at 19.

¹⁴ *Id.* at 20 (Kagan, J., dissenting).

¹⁵ *Id.*

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 22.

“has no warrant to override congressional choices.”¹⁸ Instead, “the majority flouts those choices with abandon.”¹⁹

Tellingly, the Court did not respond explicitly to any of these textualist objections. That is, the Court did not claim—because it could not claim—that its factors were grounded in particular terms or phrases in Section 2. In fact, the Court’s only textualist defense was that Section 2 mentions the “totality of circumstances.”²⁰ According to the Court, this reference authorizes it to recognize any factor it wants: “any circumstance” that, in the Court’s sole opinion, “has a logical bearing” on whether voting is racially discriminatory.²¹

But the “totality of circumstances” has never been construed this way—as an open-ended invitation to the Court to devise the factors of its choice. To the contrary, this phrase has always been understood to refer to the ten or so circumstances identified by the 1982 Senate report. The Court made this clear in its very first Section 2 case, *Thornburg v. Gingles*. “The Senate Report specifies [the] factors which typically may be relevant to a § 2 claim,” the Court observed.²² The Court emphatically confirmed this understanding in the 2006 case of *LULAC v. Perry*. “The general terms of the statutory standard ‘totality of circumstances’ require judicial interpretation.”²³ “For this purpose, *the Court has referred to the Senate report on the 1982 amendments to the Voting Rights Act . . .*”²⁴ The Court has *not* referred—until now—to its own platonic judgment as to which factors have a “logical bearing” on racial discrimination in voting.²⁵

Negative practical consequences

The problems with *Brnovich*, though, run deeper than deficient statutory interpretation. The Court’s factors are not just textually unsupported. They will also be difficult for plaintiffs to satisfy in many future Section 2 vote denial cases. A good deal of racial discrimination in voting that should be unlawful will thus be upheld by courts applying the Court’s new framework. As Justice Kagan remarked in her dissent, the Court’s factors “all cut in one direction—toward limiting liability for race-based voting inequalities.”²⁶ They “stack[] the deck against minority citizens’ voting rights.”²⁷ The negative impact of this stacked deck is the second point I want to highlight in my testimony.

I explained earlier how the Court’s first two factors will be stumbling blocks for future plaintiffs. States will argue that their voting restrictions impose the usual burdens of voting, mere inconveniences, hardships no worse than those caused by the Arizona laws approved in *Brnovich*. And conservative courts following the Court’s lead will frequently accept this argument. Similarly, states will invoke the 1982 baseline whenever their challenged limits to voting were common in the early years of the Reagan presidency. Tight constraints on early and mail-in voting were prevalent in that era, and modern innovations like automatic voter registration, ballot drop boxes, and curbside voting did not exist at all. So conservative courts are likely to countenance all kinds of cutbacks to these pro-voting policies.

¹⁸ *Id.* at 41.

¹⁹ *Id.*

²⁰ 52 U.S.C. § 10301(b).

²¹ *Brnovich*, slip op. at 16; *see also id.* at 21 (asserting that the Court’s five factors “follow[] directly from what § 2 commands: consideration of ‘the totality of circumstances’”).

²² 478 U.S. 30, 44 (1986).

²³ 548 U.S. 399, 426 (2006).

²⁴ *Id.* (emphasis added).

²⁵ *Brnovich*, slip op. at 16.

²⁶ *Id.* at 22 (Kagan, J., dissenting).

²⁷ *Id.*

The same dynamic will unfold under the Court’s third factor, the size of racial disparities. States will assert that the disparate impacts of their electoral regulations are small and therefore do not call for judicial intervention. To back this assertion, states will cite the *Brnovich* Court’s analysis of Arizona’s law discarding ballots cast in the wrong precinct. Fully *twice* as large a share of minority voters had their ballots rejected under this measure.²⁸ Yet in the Court’s eyes, this “racial disparity in burdens . . . is small in absolute terms.”²⁹ Conservative courts will probably reach the same conclusion about other policies that disenfranchise minority citizens no more than twice as often as white citizens.

Under the Court’s fourth factor, too, states will be able to make a potent new claim: that no matter how discriminatory certain practices may be, that discrimination should be overlooked because of other, supposedly less burdensome aspects of states’ electoral systems. At present, most states permit voters to cast ballots in multiple ways: in person on election day, in person before election day, or by mail. In response to a Section 2 suit aimed at a restriction on any one of these forms of voting, then, states will be able to point to the existence of the other voting modes. That is just what Arizona did in *Brnovich*—and just what the Court endorsed in its opinion. Arizona’s wrong-precinct rule is acceptable, according to the Court, in part because “the State offers other easy ways to vote” such as early and mail-in voting.³⁰

Lastly, it takes no imagination to see how states will exploit the Court’s factor about the strength of state interests. States will simply cite justifications like the prevention of fraud, and conservative courts will concur with the Court that these rationales are “strong and entirely legitimate.”³¹ Strikingly, the Court conceded that “there was no evidence that fraud in connection with early ballots had occurred in Arizona.”³² It thus appears that fraud avoidance is a weighty interest even when the relevant type of fraud has not been committed in a jurisdiction. In that case, states will need no facts, no evidentiary record, to defend their voting limits on an antifraud basis. Their mere say-so will suffice.

Considering the Court’s factors in combination, the following assessment emerges: From the perspective of conservative courts, Section 2 vote denial plaintiffs will have strong cases only if regulations (1) impose unusually heavy burdens, (2) were rare in 1982, (3) cause large racial disparities, (4) are not complemented by other, supposedly easier forms of voting, and (5) are not justified by familiar state interests. Of course, this is tantamount to saying that, in the view of conservative courts, Section 2 vote denial plaintiffs will *never* have strong cases after *Brnovich*. Perhaps if a state tried to revive a Jim Crow-era exclusion, a litigant would be able to establish each factor, though even that is unclear.³³ But with respect to modern restrictions like photo ID requirements for voting, proof-of-citizenship requirements for registering to vote, cutbacks to early and mail-in voting, voter roll purges, and the like, one or more factors will always be unprovable to conservative courts’ satisfaction.

²⁸ See *id.* at 28 (majority opinion).

²⁹ *Id.* at 27.

³⁰ *Id.*

³¹ *Id.* at 19.

³² *Id.* at 33.

³³ For example, the Supreme Court itself has held that a literacy test “promote[s] intelligent use of the ballot.” *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959). So even with respect to a literacy test, a plaintiff might not be able to show that a jurisdiction lacks a strong interest served by the policy.

That said, I certainly do not think that all Section 2 vote denial suits are now doomed. For one thing, not all federal courts share the Supreme Court’s hostility to the Voting Rights Act’s mission of ending racial discrimination in voting. In the hands of more sympathetic courts, the Court’s factors could well be applied in ways that enable some plaintiffs to prevail, even against modern voting limits. For example, nothing in *Brnovich* prevents courts from finding that challenged policies impose sizeable voting burdens when presented with persuasive evidence to that effect. Nor does *Brnovich* bar courts from determining that racial disparities are substantial when they exceed the half-percentage-point difference that the Court deemed small. And nor does *Brnovich* mean that facts are wholly irrelevant to courts’ evaluations of state interests. In one passage, notably, the Court hinted that it would give more credence to a state’s antifraud justification if the state “could point to a history of serious voting fraud within its own borders.”³⁴

Additionally, the Court’s factors are just that: a non-exhaustive set of circumstances that courts should usually consider when deciding Section 2 vote denial cases. Before naming its factors, the Court “ma[d]e clear that we decline . . . to announce a test to govern all VRA § 2 [vote denial] claims.”³⁵ The Court also described its factors as “guideposts”³⁶ and “relevant circumstances”³⁷—not elements to be satisfied—and confirmed that they were not an “exhaustive list”³⁸ of pertinent issues. Consequently, after *Brnovich*, courts remain free to weight or discount the Court’s factors as they see fit. Courts can also analyze circumstances ignored by the Court, such as the factors from the 1982 Senate report. And courts can conclude that liability is warranted even if only some of the Court’s factors point in that direction.

Possible congressional responses

But this is not much of a silver lining. *Brnovich* may not make it impossible to win Section 2 vote denial claims, but it clearly makes doing so considerably more difficult. Fortunately, *Brnovich* is nothing more than a decision interpreting a federal statute. The Court’s factors are based only on its flawed reading of Section 2 and its dislike of the Voting Rights Act’s mission. There is not a word in *Brnovich* intimating that other, more robust approaches to fighting racial discrimination in voting might be constitutionally suspect. This means that Congress has the authority to override *Brnovich* and restore the teeth that were extracted from the statute by the Court. Congress should exercise this power as soon as possible. Congress should both revise Section 2 to reject the Court’s crabbed understanding of the provision and further protect the right to vote on a universal basis.³⁹ This is the third point I want to make in my testimony.

My preferred amendments to Section 2 would be two new subsections, one negating the *Brnovich* Court’s factors,⁴⁰ the other setting forth a burden-shifting framework for Section 2 vote denial claims. Under this framework, the plaintiff would first have to prove that an electoral practice causes a statistically significant racial disparity. The defendant would then have the chance to demonstrate, through particularized evidence, that the practice is necessary to achieve an important state interest. Finally, the plaintiff could try to show that this interest could be achieved by a

³⁴ *Brnovich*, slip op. at 24.

³⁵ *Id.* at 12.

³⁶ *Id.* at 13.

³⁷ *Id.* at 22.

³⁸ *Id.* at 16.

³⁹ Additionally, Congress should revive Section 5 of the Voting Rights Act by enacting a new coverage formula. I do not further address Section 5 in my testimony because it is the subject of extensive separate proceedings.

⁴⁰ Instead of negating the factor about the strength of the state’s interests, I recommend addressing this issue through the burden-shifting framework, under which a practice must be necessary to achieve an important interest.

different, less discriminatory policy. I include below some sample statutory language that would accomplish these aims of quashing the *Brnovich* Court’s factors and adopting a burden-shifting framework. Note that there are many other ways in which Section 2 could be helpfully revised, some of which I survey later in my testimony. Note also that this draft language would *not* supplant the 1982 Senate report factors. As part of the totality of circumstances, they would remain relevant considerations.

(c) In a case involving a challenge to a regulation of the time, place, or manner of voting, the following factors shall not be considered under the totality of circumstances: (1) the size of the voting burden imposed by the regulation; (2) the historical or current prevalence of the regulation; (3) the size of any racial disparity caused by the regulation; and (4) other aspects of the jurisdiction’s electoral system not challenged by the plaintiff.

(d) In a case involving a challenge to a regulation of the time, place, or manner of voting, the following factors shall be analyzed under the totality of circumstances on the basis of particularized evidence: (1) whether the plaintiff has established that the regulation results in a statistically significant racial disparity; (2) if so, whether the defendant has established that the regulation is necessary to achieve an important state interest; and (3) if so, whether the plaintiff has established that this interest could be achieved by another practice that results in a smaller racial disparity.

In her dissent in *Brnovich*, Justice Kagan endorsed essentially this approach (though without the formal shifting of burdens). After extensively discussing Section 2’s text and purpose, she distilled the following test for vote denial claims: “Section 2 demands proof of *a statistically significant racial disparity* in electoral opportunities (not outcomes) resulting from a law *not needed to achieve a government’s legitimate goals*.”⁴¹ With respect to the statistical significance requirement, she added that it is “standard in all legal contexts addressing disparate impact” because it ensures that a racial disparity did not “arise[] from chance alone.”⁴² With respect to the necessity requirement, she stressed “the need for the closest possible fit between means and end—that is, between the terms of the rule and the State’s asserted interest.”⁴³ This tight means-end nexus “filters out” justifications for voting restrictions that are “assert[ed] groundlessly or pretextually.”⁴⁴

As Justice Kagan observed,⁴⁵ this disparate impact framework is used in many other contexts (with the formal shifting of burdens). It applies to employment under Title VII of the Civil Rights Act,⁴⁶ to recipients of federal funds under Title VI of the Civil Rights Act,⁴⁷ to housing under the Fair Housing Act,⁴⁸ to age discrimination under the Age Discrimination in Employment Act,⁴⁹ to lending discrimination under the Equal Credit Opportunity Act,⁵⁰ and to disability discrimination

⁴¹ *Id.* at 19–20 (Kagan, J., dissenting) (emphasis added); *see also, e.g., id.* at 12 (Section 2 “requires courts to eradicate voting practices that make it harder for members of some races than of others to cast a vote, unless such a practice is necessary to support a strong state interest”).

⁴² *Id.* at 15 n.4.

⁴³ *Id.* at 26.

⁴⁴ *Id.* at 27.

⁴⁵ *See id.* at 26 (“[W]e apply that kind of means-end standard in every other context—employment, housing, banking—where the law addresses racially discriminatory effects.”).

⁴⁶ *See* 42 U.S.C. § 2000e-2(k).

⁴⁷ *See* Civil Rights Div., U.S. Dep’t of Justice, *Title VI Legal Manual*, § 7, at 6 (2017).

⁴⁸ *See* 24 C.F.R. § 100.500.

⁴⁹ *See Smith v. City of Jackson*, 544 U.S. 228, 233–40 (2005).

⁵⁰ *See* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994).

under the Americans with Disabilities Act.⁵¹ If this framework were also employed under Section 2, then, disparate impact law would be unified, proceeding the same way in each substantive area.

The benefits of such unification would extend well beyond intellectual coherence. Because the burden-shifting framework has been used for so long in other fields—approximately half a century⁵²—litigants and courts have managed to work out a host of tricky issues. For instance, which statistical methods should be used to calculate racial disparities?⁵³ Which racial disparities are most relevant, ones following directly from a practice or ones further downstream?⁵⁴ Do racial disparities have to be the product of a practice’s interaction with historical and ongoing discrimination?⁵⁵ What if racial disparities are attributable instead to minority citizens’ subjective preferences?⁵⁶ And what is the right remedy once liability is established, the invalidation or the relaxation of a practice?⁵⁷ Section 2 vote denial law has barely begun to address these questions. The answers courts have reached have also often conflicted. The painstaking resolution of these matters could be avoided if the burden-shifting framework were imported into Section 2. Thanks to decades of litigation and scholarship, this framework would come with ready-made solutions to Section 2’s outstanding problems.

Additionally, this framework would allay the constitutional concerns that might arise if Congress adopted a *pure* disparate impact approach—a test that invalidated policies *solely* because of their racial disparities. To reiterate, the Court did not voice any such concerns in *Brnovich*. Then again, no one in *Brnovich* proposed a pure disparate impact approach: certainly not Justice Kagan, who advocated a statistical significance requirement *and* a necessity requirement. The Court’s pre-*Brnovich* precedents do suggest two constitutional landmines for a disparate-impact-only test. One is that such a test might exceed Congress’s authority to enforce the Reconstruction Amendments. According to the Court, those provisions are violated only by discriminatory intent.⁵⁸ A test reaching all racial disparities might be too untethered from underlying constitutional violations. The other danger is excessive race-consciousness in violation of the equal protection principle of colorblindness. To comply with a pure disparate impact approach, jurisdictions might have to focus on race when they enact and amend their electoral rules. “[S]erious constitutional questions then could arise” if “race [was] used and considered in a pervasive way.”⁵⁹

The burden-shifting framework evades the congressional authority objection because it reaches only conduct for which a discriminatory purpose can reasonably be inferred. When a practice causes a statistically meaningful racial disparity *and* that disparity could have been mitigated at no cost to any state interest, an invidious aim is at least plausible and maybe even likely. In that scenario, “disparate-impact liability under the [framework] plays a role in uncovering discriminatory intent.”⁶⁰ Likewise, the burden-shifting framework is not overly race-conscious because it does not ask jurisdictions to eradicate all racial disparities. Rather, it only asks them to reduce these disparities to the extent they can do so without compromising their legitimate objectives. This more modest

⁵¹ See 42 U.S.C. § 12112(b)(6).

⁵² Disparate impact law originated in the Supreme Court’s decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁵³ See Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1611-13 (2019) (discussing the methods used under Title VII and the FHA).

⁵⁴ See *id.* at 1613-14 (racial disparities stemming directly from a practice are most relevant).

⁵⁵ See *id.* at 1614-16 (interaction with discriminatory conditions is unnecessary).

⁵⁶ See *id.* at 1616-17 (attribution to minority citizens’ preferences is not a defense).

⁵⁷ See *id.* at 1619-20 (invalidation is the usual remedy).

⁵⁸ See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fourteenth Amendment).

⁵⁹ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 542 (2015).

⁶⁰ *Id.* at 540.

scope means that the framework does not “inject racial considerations into every [regulatory] decision” or “perpetuate race-based considerations rather than move beyond them.”⁶¹

Lastly, even if the burden-shifting framework is not as aggressive as a disparate-impact-only test, it is still quite potent. American elections are replete with regulations that cause statistically significant and unnecessary racial disparities. Across the country, states are busy enacting still more such regulations out of a combination of partisanship, racial bias, and non-racist obliviousness to rules’ effects on different groups. The burden-shifting framework would bring these efforts to a halt. It would require either the nullification of measures that give rise to unwarranted racial disparities or their substantial revision so that their disparities are smaller and genuinely necessary. This positive impact on American democracy is why Justice Kagan lauded the “sweep and power” of Section 2, if only it were correctly construed.⁶² Understood to reach needless racial disparities, Section 2 would be “a statute of significant power and scope”⁶³ that vindicates “the right of every American, of every race, to have equal access to the ballot box.”⁶⁴

The burden-shifting framework, though, is not the only way to revitalize Section 2. Per Justice Kagan’s dissent, the framework’s main elements—a statistically significant racial disparity and a lack of necessity—could be embraced without varying which party must prove each point. In that case, the plaintiff would presumably have to satisfy both criteria. Alternatively (and as also flagged by Justice Kagan), the statistical significance requirement could be complemented by a *practical* significance requirement. This bar would preclude liability given “a level of inequality that, even if statistically meaningful, is just too trivial for the legal system to care about.”⁶⁵ Furthermore, Congress could declare that the *Brnovich* Court’s factors should *not* be considered without specifying which circumstances *should* be analyzed. This would amount to enacting just the first of the two subsections I outlined earlier. It would effectively return Section 2 vote denial law to its pre-*Brnovich* state.

Congress should carefully study these and other options for revising Section 2. Congress should also implement new protections for the right to vote on a nonracial, universal basis. By this I mean legislation that targets neither racially discriminatory intent nor racially disparate impact but rather voting burdens on all Americans, of all races. One example of this universal strategy is H.R. 1, the For the People Act, which prohibits numerous voting restrictions and mandates various pro-voting policies (for federal elections only).⁶⁶ The restrictions banned by H.R. 1 include voter caging, voter intimidation, ex-felon disenfranchisement, and photo ID requirements for voting. In turn, the pro-voting policies instituted by H.R. 1 include automatic and same-day voter registration, early voting for at least fifteen days, and the universal distribution of mail-in ballot applications.

H.R. 1’s universal prohibitions and mandates would bolster Section 2 (even an amended Section 2) in several ways. First, they would take effect immediately and without any need for litigation. In contrast, even successful Section 2 suits are typically expensive and time-consuming. Second, H.R. 1’s protections would apply everywhere. They would not be limited (as Section 2 litigation is) to racially diverse areas where disparate racial impacts can be shown. And third, there would be no way for states to circumvent H.R. 1’s protections. States’ existing regulations would be

⁶¹ *Id.* at 543.

⁶² *Brnovich*, slip op. at 11 (Kagan, J., dissenting).

⁶³ *Id.* at 21 n.7.

⁶⁴ *Id.* at 29.

⁶⁵ *Id.* at 15 n.4.

⁶⁶ *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021).

preempted even if they could convincingly argue that the rules are necessary to achieve important interests.

For an illustration of H.R. 1's efficacy, consider Arizona and its laws discarding ballots cast in the wrong precinct and banning third-party mail-in ballot collection. If the burden-shifting framework were adopted for Section 2, plaintiffs would have a strong case against the measures for the reasons laid out by Justice Kagan. They could file suit, and after significant time and expense, prevail. On the other hand, if enacted, H.R. 1 would instantly and costlessly override these Arizona policies. One of the bill's provisions requires votes to be counted for each race in which an individual is eligible to vote, no matter in which precinct the person actually voted.⁶⁷ Another section authorizes a voter to designate any other person to return her mail-in ballot.⁶⁸ H.R. 1 would also override these policies everywhere, not just in Arizona and anyplace else litigants managed to bring successful Section 2 claims. Nationwide, wrong-precinct rules and limits on mail-in ballot collection would become relics of the past.

However, H.R. 1's universal prohibitions and mandates have a disadvantage, too, compared to Section 2. Because H.R. 1's protections are *specific*—referring to particular regulations that are forbidden or compelled—they are useless against new voting restrictions that creative vote suppressors manage to devise. Over the last few months, for example, states have banned mobile voting centers, criminalized giving food or water to voters waiting in line, and undermined the integrity of the vote-counting process.⁶⁹ H.R. 1 is silent with respect to these new threats to voting.

Congress should therefore supplement H.R. 1 with another universal approach: a new cause of action under which plaintiffs of all races could challenge rules that unjustifiably impede voting. An amendment to H.R. 1, introduced by Rep. Mondaire Jones (D-NY), would codify such a claim.⁷⁰ Under this amendment, a policy that imposes a severe or discriminatory burden on voting would be upheld only if the measure is necessary to achieve a compelling state interest. Additionally, a policy that imposes a non-severe, non-discriminatory burden would be allowed only if the measure significantly furthers an important state interest. A constitutional theory similar to this does already exist.⁷¹ But that theory has been applied extremely narrowly by the Roberts Court, which has never ruled in favor of a plaintiff objecting to a voting restriction.⁷² Rep. Jones's amendment would enshrine a more aggressive statutory standard under which litigants would be better positioned to attack all kinds of voting limits—common or rare, familiar or novel, resulting in disparate racial impacts or not.

In combination with a fortified Section 2, these two universal tactics would provide sturdy, reinforcing protections for the right to vote. H.R. 1 would establish an impressively high floor for federal elections through its explicit prohibitions and mandates. Above this floor, if revised to incorporate the burden-shifting framework (or some other similarly effective proposal), Section 2 would nullify regulations that cause statistically meaningful and unnecessary racial disparities. Also above H.R. 1's floor, the new statutory cause of action would invalidate unjustifiably burdensome rules. In this way the franchise would be triply safeguarded against efforts to undermine it. H.R. 1

⁶⁷ See *id.* § 1601(a)(2).

⁶⁸ See *id.* § 1621(a)(2).

⁶⁹ See, e.g., Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. Times, Apr. 3, 2021, at A12.

⁷⁰ See amend. 62, For the People Act of 2021, H.R. 1, 117th Cong. (2021).

⁷¹ See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁷² See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (upholding a photo ID requirement for voting).

would sweep away most voting restrictions. As amended, Section 2 would target remaining limits based on their disparate racial impacts. And the new statutory claim would catch any further stragglers that hinder voting for no good reason.

Conclusion

The factors for Section 2 vote denial suits that the Supreme Court announced in *Brnovich* are indefensible as a matter of statutory interpretation. They are entirely detached from the statutory text and in some cases directly contravene it. The Court's factors also reveal its ideological opposition to the Voting Rights Act's mission of ending racial inequities in American elections. At every turn, the factors put a thumb on the scale against Section 2 plaintiffs, making it more difficult for them to challenge policies that cause racial disparities. Congress should not accept the Court's neutering of Section 2. It should revise Section 2 to reject the Court's factors and to make clear that regulations that result in statistically significant and unnecessary racial disparities are unlawful. Congress should also pair these amendments to Section 2 with two nonracial, universal responses. One of these is the enactment of H.R. 1, which would protect the franchise through a series of specific measures. The other is the creation of a new cause of action that would guard more generally against the future schemes of would-be vote suppressors.

I hope my testimony helps the Committee to better understand the implications of *Brnovich* and what Congress could do to override the Court's mistaken decision. I thank you again for the opportunity to testify before you, and I look forward to answering any questions you may have.