

Nos. 22-11133; 22-11143; 22-11144; 22-11145 (consolidated)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

LEAGUE OF WOMEN VOTERS OF FLORIDA, et al.,

Plaintiffs-Appellees,

v.

FLORIDA SECRETARY OF STATE, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida
In Cases Nos. 4:21-cv-00242MW-MAF; 4:21-cv-00186-MW-MAF;
4:21-cv-00187-MW-MAF; 4:21-cv-00201-MW-MJF
before the Honorable Mark E. Walker

**BRIEF OF AMICI CURIAE
AMERICAN CONSTITUTIONAL RIGHTS UNION AND
ALABAMA CENTER FOR LAW AND LIBERTY
IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL**

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Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *Amicus Curiae* Alabama Center for Law and Liberty, represents that this organization does not issue stock but has one parent company, the Alabama Policy Institute. *Amicus Curiae* American Constitutional Rights Union does not issue stock. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal who have not yet appeared in a certificate of interested persons:

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3. Alabama Policy Institute – Parent corporation of *Amicus Curiae* Alabama Center for Law and Liberty;
4. Clark, Matthew J. – Counsel for *Amici Curiae*; and
5. Park, Jack – Co-counsel for *Amici Curiae*.¹

In addition to the aforementioned, *Amici Curiae* believe that the following people, who are listed in the Appellants' opening brief, have an interest in this appeal:

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IDENTITY AND INTEREST OF *AMICI CURIAE*²

The American Constitutional Rights Union (“ACRU”) and the Alabama Center for Law and Liberty (“ACLL”) (collectively “Amici”) submit this brief in support of the Defendants-Appellants, who are challenging the district court’s invalidation of facially neutral election laws. ACRU is dedicated to defending the constitutional rights of all Americans, which includes the right to vote, against ideologies that would use the judiciary to rewrite the laws. ACLL is dedicated to the same principle and also notes that because Alabama is in the Eleventh Circuit, the Court’s decision in this case will affect similar voting laws in Alabama.

SUMMARY OF THE ARGUMENT

In *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021), the Supreme Court reversed a Ninth Circuit decision that found race-neutral, generally applicable voting rules in violation of Section 2 of the Voting Rights Act. In so doing, the Court established limits on future lawsuits challenging such rules. *Brnovich* should guide this Court’s consideration of the challenge to Florida’s generally-applicable, race-

² Some of the parties have consented to the filing of this brief. Others have taken no position, but none have objected. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amici Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

neutral rule of election procedure. Under *Brnovich*, the district court's judgment should be reversed.

ARGUMENT

Brnovich and the district court's opinion are two ships passing in the night. The district court cited *Brnovich* only three times, one of which is to cite Justice Kagan's dissent. That is because the district court end-ran *Brnovich* by relying on a conclusion of intentional discrimination, which the State of Florida Appellants show to be utterly ungrounded. See generally Appellant's Initial Brief for Secretary Byrd, et al, Nos. 22-11133, 22-11143, 22-11144, 22-11145; cf. *Veasey v. Abbott*, 830 F.3d 216, 284 (5th Cir. 2016) (Jones, J., concurring in part and dissenting in part) ("Nothing in *Arlington Heights* suggests that the Court's listing of relevant factors licenses courts to string together bits of circumstantial evidence that wholly lack racial content and then undo any law with an incidental disparate impact."). Granted, intentional discrimination is not otherwise lawful conduct, but if that finding by the district court is set aside, as it should be, the claims must go no farther than the limits set by *Brnovich*.

1. Introduction

The district court's reliance on intentional discrimination uses the framework established in *Vill. of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, (1977). There, the Court identified eight factors to be considered in determining

whether a public entity's actions were the product of intentional discrimination: (1) "the impact of the challenged law;" (2) "the historical background;" (3) "the specific sequence of events leading up to its passage;" (4) procedural and substantive departures;" (5) "the contemporary statements and actions of key legislators;" (6) "the foreseeability of the disparate impact;" (7) "knowledge of that impact;" and (8) "the availability of less discriminatory alternatives." *Id.* at 266-68.

Subsequently, in 1986, the Court pointed to the Senate Judiciary Committee majority report from 1982, when the Voting Rights Act was last amended, to set forth "the circumstances that might be probative of a § 2 violation." *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). Those factors are: (1) past discrimination; (2) racially polarized voting; (3) "unusually large election districts, majority vote requirements, anti-single-shot provisions;" (4) candidate slating process and minority access; (5) effects of past discrimination on "education, employment, and health;" (6) racial appeals in political campaigns; (7) minority electoral success; (8) responsiveness to minority needs; and (9) whether the State's justification for its policy is "tenuous." *Id.* (The *Gingles* or Senate factors).

2. Disparate impact claims under Section 2 of the Voting Rights Act are subject to constitutional limitations.

The Supreme Court has made it clear that the Fourteenth Amendment prohibits only intentional discrimination. *Arlington Heights*. There, it noted, "[O]ur decision last term in *Washington v. Davis*, 246 U.S. 229 (1976), made it clear that

official action will not be held unconstitutional solely because it results in a racially disproportionate impact.” *Id.* at 264-65. Likewise, a plurality of the Court held that the Fifteenth Amendment “prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote ‘on account of race, color, or previous condition of servitude.’” *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980).

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment empower Congress to enforce the amendments “by appropriate legislation.” U.S. Const., amend. XIV, § 5; amend XV, § 2. Those powers are not, however, “unlimited.” *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). Rather, where those Fourteenth Amendment powers are exercised, “[t]here must be a congruence and proportionality between the injury to be remedied and the means adapted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

City of Boerne addresses the powers of Congress under the Fourteenth Amendment, but there is “no reason” to conclude that its powers under the Fifteenth Amendment are different from or greater than those under the Fourteenth Amendment. Von Spakovsky & Clegg, “*Disparate Impact*” and Section 2 of the *Voting Rights Act* at 3 (Heritage Foundation 2014) (Von Spakovsky & Clegg).³ Those authors explain that “the two post-Civil War Amendments were ratified within 19 months of each other, have nearly identical enforcement clause, were

³ Available at <https://report.heritage.org/lm119>.

prompted by a desire to protect the rights of just-freed slaves, and have been used to ensure citizens' voting rights." *Id.* Accordingly, the Enforcement Clauses in these Amendments must be read *in pari materia*, such that a federal statute enacted pursuant to Section 2 of the Fifteenth Amendment must also be a proportional and congruent remedy for a problem identified by Congress.

When Congress amended Section 2 of the Voting Rights Act in 1982 so that it would reach the results of the application of voting rules, it necessarily went farther than the Constitution. Assuming that Congress has the power to enact the results test in Section 2 of the Voting Rights Act, it cannot constitutionally open the door to all kinds of disparate impact claims. Rather, its legislation must be tailored to the "end of ensuring no disparate treatment." *Von Spakovsky & Clegg* at 4. As the Supreme Court has explained, even when Congress enacts "so-called prophylactic legislation" that reaches otherwise constitutional conduct, it can do so only "in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 7287-28 (2003); *see also id.* at 728 ("Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations."). Once again, even such prophylactic legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

3. *Brnovich* guides the interpretation of Section 2’s results test and imposes further restraints.

The *Brnovich* Court started with the statute. Section 2(b) of the Voting Rights Act provides:

A violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members a class of citizens protected [on the basis of their race or color] in that its member have less opportunity that other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C § 10301(b).

The Court noted that “[t]he key requirement” is that the political process of voting be “equally open.” 141 S. Ct. at 2337. It explained, “equal openness and equal opportunity are not separate requirements.” *Id.* at 2337-38. Rather, “equal opportunity helps to explain the meaning of equal openness.” *Id.* at 2338. But, neither “equal openness” nor “equal opportunity” is absolute. As the Court observed, “[E]very voting rule imposes a burden of some sort.” *Id.*

The Court went on to identify several “important” guideposts for analysis of results-based challenges to race-neutral voting rules. *Id.* “First, the size of the burden imposed by the challenged voting rule is highly relevant.” *Id.* Indeed, “because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is ‘equally open’ and that furnishes an equal ‘opportunity’ to

cast a ballot must tolerate the ‘usual burdens of voting.’” *Id.* (last quoting *Crawford v. Marion County Elections Bd.*, 534 U.S. 181, 198 (2008) (opinion of Stevens, J.).

The Court next pointed to “the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982.” Such a departure would provide a basis for measuring the burdens associated with a voting rule. The Court explained, “The burdens associated with the rules in widespread use when § 2 was amended are . . . useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally ‘open’ or furnishing an equal ‘opportunity’ to vote in the sense meant by § 2.” *Id.* at 2338-39. In short, “the degree to which a challenged rule has a long pedigree or is in widespread use in the United States must be taken into account.” *Id.* at 2339.

Third, the Court identified “the size of any disparities in a rule’s impact on members of different racial or ethnic groups” as “an important factor to consider.” *Id.* at 2339. Because parties claiming a disparate impact almost invariably point to socioeconomic and educational differences “even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules.” *Id.* Accordingly, it is not the fact of a disparity, but its size that matters. And, the disparity must not be the product of statistical manipulation. See *Greater Birmingham Ministries v. Sec’y of State for Ala.*, 996 F.

3d 1202, 1233 (11th Cir. 2021); *Frank v. Walker*, 768 F. 3d 744, 752 n.3 (7th Cir. 2014) (identifying “a misuse of data”).

A fourth consideration is “the opportunities provided by a State’s entire system of voting.” 141 S. Ct. at 2339. This factor allows for consideration of a State’s voting processes “as a whole.” *Id.* “Thus, where a State provides multiple ways of to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without taking into account the other available means.” *Id.*

Finally, the Court pointed to the “strength” of the State interests, observing, “Rules that are supported by strong state interests are less likely to violate § 2.” *Id.* at 2340. Two such strong interests are the prevention of fraud and the protection of voters from intimidation.

Next, the Court, having outlined the considerations that are “important,” identified others that it characterized as “less helpful.” *Id.* at 2340. It observed that the 1982 “*Gingles* or ‘Senate’ factors grew out of and were designed for use in vote-dilution cases.” *Id.* at 2340. Their application to so-called vote-denial cases is not seamless. As Judge Edith Jones of the Fifth Circuit noted, “[I]n transitioning from redistricting cases . . . to the new generation of ‘vote abridgement’ claims, the courts have found it hard to apply the Section 2 results test.” *Veasey v. Abbott*, 830 F. 3d at 304-05 (Jones, J., concurring in part and dissenting in part.).

While it did “not suggest that these factors should be disregarded,” it did state that “their relevance is much less direct.” *Id.* at 2340. Some, like majority vote requirements, anti-single-shot provisions, and candidate slating process rules are “plainly inapplicable in a case involving a challenge to a facially neutral time, place, or manner voting rule.” *Id.* Others, such as racially polarized voting, “have a bearing on whether a districting plan affects the opportunity of minority voters to elect their candidates of choice.” *Id.* Only past discrimination and its effects might bear on a results-based challenge to a racially neutral rule. Even then, their relevance must not be overstated.

The Court then confirmed that the results provision in Section 2 is not unlimited in a different respect. In particular, it declined to “read § 2 to impose a strict ‘necessity requirement’ that would force States to demonstrate that their legitimate interest can be accomplished only by means of the voting regulations in question.” 141 S. Ct. at 2341. The Court advanced two reasons for its decision not to impose a necessity requirement. First, “[d]emanding such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests.” *Id.* Second, such a rule would “transfer much of the authority to regulate election procedures from the States to the federal courts.” *Id.*

The result of *Brnovich* is not simply to reground the analysis of results claims. It sets limits to the Section 2 results-based disparate impact inquiry. In that regard, the Court rejected the dissent’s proposal “to rewrite the text of § 2 and make it turn entirely on just one circumstance—disparate impact.” *Id.* at 2341. The dissent’s approach would resemble the Borg in Star Trek, sweeping all before it. As the Court said, “That requirement . . . would have the potential to invalidate just about any voting rule a State adopts.” *Id.* at 2342.

4. The Constitution can go no farther than the limits *Brnovich* set on results-based lawsuits under the Voting Rights Act.

The Constitution vests the States with powers that cannot be lightly overridden. Article I, § 4 of the United States Constitution gives the States the power to manage “the Time, Place, and Manner of holding Elections for Senators and Representatives.” U.S. Const., Art. I, § 4. The States also have the power to determine the qualifications of voters in federal elections. *See* U.S. Const., Art. I, § 2; amend. XVII.

Overriding these State prerogatives comes with “substantial federalism costs.” *Shelby County v. Holder*, 133 S. Ct. 2612, 2621 (2013) (quoting *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 202 (2009)). This Court should reject the underlying attempt to “transfer much of the authority to regulate election procedures from the States to the federal courts.” *Brnovich*, 141 S. Ct. at 2341.

5. None of the challenged Florida voting rules violates the Constitution or the Voting Rights Act.

The district court invalidated Florida's provision regulating the use of drop boxes for the collection of vote-by-mail ballots, its regulation of the locations at which third parties can lawfully deliver voter-registration applications, its specification of the information third party voter registration groups must provide to voter registrants, and prohibiting the solicitation of voters within 150 feet of a polling place. Florida has repealed the registration-disclaimer provision, and *amici* concur in the suggestion that the district court's ruling on that issue is moot and should be vacated.

As the Florida Appellants note, drop boxes were used statewide in Florida for the first time in 2020. Appellants Initial Brief for Secretary Byrd, *et al* at 25. And, in that COVID-19-affected election, they were widely used. Florida is entitled to learn from that experience and tighten the security around them. Doing so deters fraudulent activity and contributes to voter confidence.

Third-party voter registration efforts have been marked by fraud in the past. In a number of cases, ACORN, a community-based advocacy organization, or its employees were convicted of fraud. *See ACORN and Voter Registration Fraud*, Ballotpedia, https://ballotpedia.org/ACORN_and_voter_registration_fraud (last viewed July 18, 2022) (collecting sources detailing ACORN and voter-registration fraud). In addition, the Florida Appellants point to their need for timely delivery of

the forms and to spread the burdens associated with processing the forms. *See* Appellants' Initial Brief for Secretary Byrd, *et al.* at 270-28.

The prohibition of voter solicitation within 150 feet of a polling place is grounded on Supreme Court precedent. In 1992, the Supreme Court upheld a ban on campaign-related activity within 100 feet of a polling place. *Burson v. Freeman*, 504 U.S. 191 (1992). The Tennessee rule at issue in *Burson* was justified by the desire to deter fraud, voter intimidation, confusion, and prevent general disorder that might discourage voter participation. The State of Florida's action cannot be said to be tenuous.

Finally, the district court's focus on recent elections ignores the fluidity of politics. The Supreme Court has twice cautioned against a short-term political focus. *See Davis v. Bandemer*, 478 U.S. 109, 135 (1986) (plurality op.) (“[R]elying on a single election to prove unconstitutional discrimination is unsatisfactory.”); *id.* at 139 (“[A] mere lack of proportionate results in one election cannot suffice” to show unconstitutional political gerrymandering); *Thornburg*, 478 U.S. at 51 (“[W]e observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election.”). Put simply, it is not the job of the federal courts to predict the future of political events.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and vacate the injunction issued in favor of Plaintiffs-Appellees below.

Respectfully submitted,

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I certify that on June 19, 2022, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on counsel for all parties.

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