Nos. 21-1086, 21-1087

IN THE

Supreme Court of the United States

JOHN H. MERRILL, ET AL.,
Appellants,
v.
EVAN MILLIGAN, ET AL.,
Appellees.

JOHN H. MERRILL, ET AL.,
Petitioners,
v.
MARCUS CASTER, ET AL.,
Respondents.

On Appeal from and Writ of Certiorari to the United States District Court for the Northern District of Alabama

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

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Table of Contents

Table of Authorities

Cases

Constitutions and Statutes

Other Authorities

INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae has a significant and long-standing interest in this matter. The Public Interest Legal Foundation ("Foundation") is a 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving the constitutional balance between states and the federal government regarding election administration procedures. The Foundation has sought to advance the public's interest in balancing state control over elections with Congress's constitutional authority to protect the public from racial discrimination in voting. This is best done by ensuring that the Voting Rights Act and other federal election laws are preserved and followed as the drafters intended. Specifically, the Foundation has filed *amicus* briefs in cases across the country to fight against the growing effort to misapply Section Two of the Voting Rights Act.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to reconsider how a violation of Section Two of the Voting Rights Act ("VRA") may be established. Specifically, the lower court's evaluation of the so-called Senate Factors demonstrates how the assessment of the Factors can create an absurdist burden on states and an impermissible intrusion into the power to run their own elections.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Each party provided a blanket consent to the filing of *amicus curiae* briefs.

Without proper guardrails, Section Two becomes an improper intrusion into the federalist arrangement. *See Shelby County v. Holder*, 570 U.S. 529, 543 (2013) ("[T]he federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (internal citations omitted).

ARGUMENT

I. The Application of the Senate Factors Merits Reconsideration.

Section Two of the VRA "requires consideration of 'the totality of circumstances' in each case and demands proof that 'the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation' by members of a protected class…." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021) (quoting 52 U. S. C. §10301(b)) (emphasis in *Brnovich*).

In order to evaluate "whether a Section Two violation has occurred based on 'the totality of the circumstances[,]'" the lower court "consider[ed] the Senate Factors." *Milligan* Stay Appendix (MSA) 50. As articulated by this Court in *Thornburg v. Gingles*, these Senate Factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986). The lower court further noted that "[t]he Senate Factors are not exhaustive." MSA 51. Indeed, as the lower

court's evaluation of the Senate Factors demonstrates, they provide an opportunity for evidence not germane to the evaluation of a Section Two violation to be considered and weighed. It is time for the Court to reconsider the Senate Factors.

II. In Evaluating Senate Factors One, Three, and Five, the Lower Court Elevated the Importance of Justice Department Activities.

The three-judge panel considered Senate Factors 1, 3, and 5 "together because much of the evidence that is probative of one of them is probative of more than one of them." MSA 192.

The three-judge panel misapplied what is probative evidence under Senate Factor One, any history of official discrimination. Senate Factor One should only allow the *recent* history of actual official discrimination to enjoy relevance. Moreover, evidence pertaining to Senate Factor One should not include the decision by federal employees at the Department of Justice to send election observers to a given jurisdiction as that decision has no probative value, and is conducted in a largely standard-free fashion by bureaucrats in the Department of Justice Voting Section acting on a variety of criteria, some of which are wholly divorced from merit.

The State did not deny the state's history of racial discrimination—nor could it. But the State did argue that much has changed, arguments that the three-judge panel found unpersuasive. "Defendants argue that Alabama has come a long way, but the question for us is more pointed: has it come far enough for

these factors to be neutral or to weigh in favor of Defendants?" MSA 192. "Nevertheless, even if we focus primarily on the more recent evidence, we find that these Senate Factors still weigh against Defendants." MSA 193. The "more recent evidence" relied upon included the fact that "(1) since the passage of the Voting Rights Act, the Justice Department has sent election observers to Alabama nearly 200 different times, and (2) that between 1965 and 2013, more than 100 voting changes proposed by the State or its local jurisdictions were blocked or altered under Section 5 of the Voting Rights Act." MSA 193-94 (citations omitted.)

In so doing, the lower court improperly elevated the import of such actions by the Justice Department and also ignored the significance of the amount of time that has passed since such actions took place.

First, the lodging of an objection pursuant to Section 5 of the VRA does not equate to a finding of racial discrimination. In a review of changes in election practices under Section 5, the jurisdiction making the change must show to the satisfaction of the Voting Section at the Justice Department "whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 C.F.R. 51.52(a). "An objection shall be interposed to a submitted change if the Attorney General is *unable to determine* that the change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority

group." 28 C.F.R. 51.52(c) (emphasis added.) Therefore, the issuance of an objection cannot be equated to a finding of racial discrimination.[2]

Additionally, the fact that the Justice Department sent election observers to a jurisdiction does not equate to a finding of racial discrimination. Under the VRA, election observers may be appointed "by order of a federal court pursuant to Section 3(a), or, (prior to the *Shelby County* decision) with regard to political subdivisions covered under Section 4 of the Voting Rights Act, upon the certification by the Attorney General, pursuant to Section 8 (previously Section 6)." About Federal Observers and Election Monitoring, U.S. Department of Justice, https://www.justice.gov/crt/about-federal-observers-and-election-monitoring. Prior to this Court's decision in *Shelby County*, "a total of 153 counties and parishes in 11 states were certified by the Attorney General for federal observers: Alabama (22 counties), Alaska (1) Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3), North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18)." *Id*. Section 6 allowed the Attorney General to certify a location for federal examiners if "he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be

[2] Nor can the sordid history of meritless objections by the Voting Section at the Department of Justice be ignored when assessing the probative value of an objection under Senate Factor One. *See, Miller v. Johnson*, 515 U.S. 900, 924 (1995); *Johnson v. Miller*, 864 F. Supp. 1354, 1362 (S.D. Ga. 1994).

meritorious." *South Carolina v. Katzenbach*, 383 U.S. 301, 343 (1966) (quoting Section 6 of the VRA.)

In short, the decision to send observers is made by bureaucrats without transparent criteria, usually in response to facts or circumstances which offer no probative evidence for the lower court. Indeed, the decision to send observers is usually infused with the wishes of local politicians and other community activists. For example, "federal observers were sometimes sent to Noxubee County [Mississippi] due to information provided to the DOJ by" an individual eventually found to be violating the VRA.[3] The decision to send Justice Department observers hardly is a process warranting any evidentiary weight.

Second, the lower court's finding did not take into account *when* the Justice Department's actions were taken. The last objection lodged against the State of Alabama was in April of 1994, despite the fact that the State was required to submit its electoral changes to the Attorney General for Section 5 review for the *nineteen* years that followed until the decision in *Shelby County*. *See* Voting Determination Letters for Alabama, U.S. Department of Justice, https://www.justice.gov/crt/voting-determination-letters-alabama. Similarly, the last time a county in Alabama had been certified for federal observers was 1994. *See* About Federal Observers and Election Monitoring, U.S. Department of Justice, https://www.justice.gov/crt/about-federal-observers-and-election-

[3] J. CHRISTIAN ADAMS, INJUSTICE 44 (2011). *See also, United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007); ADAMS at 153-155 (discussing the motives behind the sometimes chaotic implementation of Justice Department observer coverage.)

monitoring. Of the twenty-two times a county in Alabama has been certified in general, thirteen of the certifications occurred in 1965 and 1966, four occurred in the 1970's, four in the 1980's, and just one in 1994. *Id.* Further, once a jurisdiction was "certified" it was up to the jurisdiction to terminate the Justice Department's observer authority. The grounds for such termination are onerous, and include a finding "that more than 50% of the nonwhite persons of voting age are registered to vote" and "there is no longer reasonable cause to believe that persons will be deprived or denied the right to vote on account of race or color, or in contravention of the guarantees set forth in Section 4(f)(2)…." About Federal Observers and Election Monitoring, U.S. Department of Justice, https://www.justice.gov/crt/about-federal-observers-and-election-monitoring. Therefore, the fact that election observers were once authorized in the past should not hold much weight when analyzing a jurisdiction in the present.

This Court has made it clear that the VRA "imposes current burdens and must be justified by current needs." *Shelby County*, 570 U.S. at 536 (internal citation omitted). However, the lower court here found decades-old Justice Department activities relevant to the current analysis.

III. The Application of Senate Factor Six Merits Reconsideration.

Additionally, Senate Factor Six is in need of wholesale reevaluation by this Court. Senate Factor Six considers "whether political campaigns have been characterized by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37.

The lower court found that a campaign "video of a white man narrating as images of prominent persons of color (and only persons of color) are juxtaposed with images of the 9/11 terrorist attacks, in or on or hovering above a crackling fire, could be understood as a racial appeal." MSA 201. As a result, the lower court determined that "there is some evidence that political campaigns (more particularly, congressional campaigns) in Alabama are characterized by overt or subtle racial appeals." MSA 201-02.

Assuming this finding is correct, the mere existence of racial appeals under *Gingles* unfairly attaches as relevant evidence against a defendant regardless of who made the racial appeal. In other words, the mere existence of a racial appeal in any context in a jurisdiction is now relevant evidence to aid a plaintiff in a Section Two case. Indeed, there is no limit on Senate Factor Six and it results in a state's map being subject to a Section Two challenge in part because of statements or political speech by private parties. Senate Factor Six, as currently constituted, creates an absurdist burden on states and an impermissible intrusion into the power to run their own elections. The functioning of Senate Factor Six to allow third party actions to be probative evidence against a state implicates questions of fundamental fairness and due process. Indeed, a defendant has no means to rebut a plaintiff presenting third party statements except to argue they are fictional or manufactured. All such evidence, otherwise, weighs against a defendant. Senate Factor Six should be reexamined by the Court because of the abusive and unfair burden on defendants.

It is crucial that this Court settle the issue of the proper application of the Senate Factors.

CONCLUSION

For these reasons, the Court should reverse the lower court's decision.

Respectfully submitted,

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