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ENFORCEMENT OF THE VOTING RIGHTS ACT IN THE STATE OF TEXAS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

MAY 3, 2019

Serial No. 116–18

Printed for the use of the Committee on the Judiciary

Available http://judiciary.house.gov or www.govinfo.gov

U.S. GOVERNMENT PUBLISHING OFFICE

38–078 WASHINGTON : 2020

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ENFORCEMENT OF THE VOTING RIGHTS ACT IN THE STATE OF TEXAS

FRIDAY, MAY 3, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 114, Barbara Jordan-Mickey Leland School of Public Affairs, Texas Southern University, 3100 Cleburne Street, McCoy Auditorium, Houston, Texas, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Green, Jackson Lee, and Garcia.

Staff present: James Park, Chief Counsel, Keenan Keller, Senior Counsel, Will Emmons, Professoinal Staff Member.

Mr. COHEN. Good morning, everybody. The Subcommittee of the Judiciary Committee of the United States Congress on the Constitution, Civil Rights, and Civil Liberties is hereby—and I would first like to recognize your provost, Mr. Kendall Harris.

Mr. HARRIS. Good morning, everyone.

VOICE. Good morning.

Mr. HARRIS. Welcome all to the historic campus of Texas Southern University. On behalf of our president, Dr. Austin Lane, I would like to thank everyone for joining us today for this House Judiciary Subcommittee on Constitution, Civil Rights, and Civil Liberties official hearing on the Enforcement of the Voting Rights Act in the State of Texas.

I would like to thank Chairman—I would like to thank Chairman Cohen for hosting it here at Texas Southern University. Of course, our very own representative, Sheila Jackson Lee, thank you very much. But we also would like to recognize and thank everyone that is on the panel today, along with Representative Sylvia Garcia, Chairman of our United States House Judicial Committee, Representative Jerry Nadler, and our very own representative, Al Green. Thank you very much.

Thank you to the witnesses that will be testifying throughout the hearing, for your testimony will bring value and direction to this committee.

Holding this event on a college campus is quite extraordinary, for the topic of civil rights has been somewhat lost as a priority for this generation. Many assumptions are made by our students, but

the awareness of civil liberties must be in their forward consciousness.

So, on behalf of the students, staff, faculty, and administrators of Texas Southern University, I thank you for allowing us to host this hearing. If there is anything that is required of us, please let us know.

Thank you very much.

Mr. COHEN. Thank you, Mr. Provost. We appreciate your hospitality, and we certainly were inspired by the Mickey Leland and Barbara Jordan statements, and history that we are able to see. And we are honored to be here.

This committee has come to order. Without objection, the chair is authorized to prepare recesses of the subcommittee at any time.

I welcome everyone today to this field hearing on the Enforcement of the Voting Rights Act in the State of Texas. Before proceeding, I ask unanimous consent that Representative Al Green be permitted to fully participate in this hearing, including the ability to sit on the dais, and ask questions of witnesses in accordance with subcommittee procedures.

Hearing no objection, I will now recognize myself for an opening statement.

I thank all of you for attending today. This field hearing is part of a series of hearings of the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, which we will be holding over the course of the 116th Congress, to assess the present need for a reinvigoration of the preclearance requirement of Section 5 of the Voting Rights Act of 1965.

Section 5 requires certain jurisdictions with a history of voting discrimination against racial and language minority groups, which up until 2013 would have been those predominantly, though not exclusively, in the Deep South, to obtain approval of any changes to their voting laws or procedures from the Department of Justice, or the U.S. District Court for the District of Columbia, before such changes could take effect.

The purpose of this preclearance requirement is to ensure that jurisdictions that were most likely to discriminate against minority voters, and I can tell you, and you probably well would suspect that it is those states that are formerly part of the Confederacy that still harbor those same feelings through their children, and grandchildren, and others, that has unfortunately been historically passed down generationally, that those states would bear the burden of proving that any changes in the voting laws towards minority voters were not discriminatory before such changes could take effect. This means that they couldn't take action, impede an election, and then force people to sue, and have dilatory tactics, and get through the election in an improper fashion.

By placing the burden on jurisdictions with this history of discrimination to prove their innocence, Section 5 rightly prevented potentially discriminatory voting practices before taking effect—from taking effect before they could harm minority voters. And they did this throughout the South, and they liked to keep doing it. And that is what we are trying to work against.

In this way, Section 5 proved to be a significant means of protection for the rights of minority voters. That is why Congress has re-

peatedly reauthorized Section 5 on an overwhelming bipartisan basis, most recently in 2006, when we passed the Voting Rights Authorization—Reauthorization by a vote of 390 to 33, in the Senate by 98 to nothing. That was in 2006, and it was a republican-controlled House. And I think a Republican-controlled Senate, too, and yet it was overwhelming 390 to 33.

Unfortunately, the Supreme Court effectively gutted Section 5, when in the Shelby County v. Holder decision struck down the coverage formula that determined which jurisdictions would be subject to the preclearance requirement of Section 5. As a result, Section 5 has remained—remains dormant unless and until Congress approves a new coverage formula.

While Section 2 of the Voting Rights Act, which prohibits discrimination of voting, remains in effect, it is by itself less effective and a significantly more cumbersome way to enforce the Voting Rights Act. Most importantly, plaintiffs cannot invoke Section 2 until after an alleged harm has taken place, thereby, eroding the effectiveness of the Act.

The foregoing brief history of Section 5 explains why we are here today in Texas. Texas was a covered jurisdiction under the Voting Rights Act in pre-Shelby County days. Perhaps not surprisingly, within 24 hours after the Shelby County decision was handed down, Texas announced its intention to enact a strict photo identification law, which would have a disproportionate adverse impact on minority voters. So, Texas quickly swung into action and showed why Texas is a state we should visit, and why Texas is a problem state.

The Texas State Advisory Committee on the U.S. Commission on Civil Rights found in 2018 that there were barriers to voting in Texas in three major areas: Voter registration, access to and administration of polling places, and language access. Looking at barriers to voter registration alone, the committee found, among other things, that Texas was the 44th worst state in the nation of voter registration, with only 68 percent of eligible voters registered to vote, that it implemented voter procedures with a disparate impact on Latino voters, that there was low registration rates due to public discourse about voter fraud, that it enacted measures to chill efforts to conduct voter registration drives, and that there was widespread misinformation and confusion against citizens regarding voter registration.

Additionally, Texas has been the subject of a number of lawsuits, both historically and in recent years, charging the legality of its congressional state legislative district maps, jerrymandering. The state has been accused of engaging in intentional racial jerrymandering in minority vote. Dilution and such litigation is ongoing.

There has been recent litigation against Texas as voter ID laws and effort by state election officials to purge voter rolls of those, and that it concluded were non-citizens. In a move by one Texas city, that had been formally been covered under a covered jurisdiction subject to pre-clearance of Section 5, to add at-large city council districts in an alleged effort to dilute minority representation.

Texas is the second largest state in the nation, one that owes a substantial population increase in recent years to a growth of its

racially ethnic minority populations. The rise of the alleged discriminatory voting practices that I mentioned have a serious implication for the citizens of this state, but also highlight the need for enforcement of the Voting Rights Act. And that means the onus is on Congress.

And while I don't want to necessarily give—I want to give a true picture of where these issues stand, and Texas is certainly one of the worst, but so you don't have the worst complex, I want you to know my state of Tennessee has done some really dreadful things as well, and just passed an awful law that makes it criminal to register people in mass voter drives, registration drives, criminally and civilly liable, if you make errors in those registration drives. And that is really pretty unconscionable to make it criminal to register people to vote, and maybe leave off a spot, just because of negligence. And it is jerrymandering all over.

But Congress needs to create a new coverage formula that will reinvigorate the Act's most important enforcement mechanism, this preclearance requirement. Examining the record of voting rights problems here in Texas is an important step in the process.

And I want to thank my chairman, Chairman Nadler, who has been historically involved in this issue, and is really mostly more responsible than anyone other than Congresswoman Jackson Lee for us being here today. And he is a great leader on our committee. And Chairman Jackson, Chairman Jackson Lee, who has been a great leader, too, and somebody who I have learned much from in my 13 years in Congress.

I thank our witnesses and our members for being here today. Our other members, Mr. Green and Ms. Garcia, are outstanding members and friends. And I saw Ms. Fletcher, and I think she wants to come, too. So, hopefully, she will attend.

So, I look forward to our discussion. And now our full committee has an opening statement. Mr. Nadler, you are recognized.

Mr. NADLER. Well, thank you very much. Thank you, Chairman Cohen for calling this important field hearing. Let me just say one thing before I start, it probably surprises most people to know that Manhattan—I represent the district of Manhattan, in Brooklyn. Manhattan, Brooklyn, and the Bronx were subject to Section 5 preclearance by decision of the Supreme Court in 1982, which surprised everybody, but it was—it was justified. And no one objected. No one got upset by it. You know, everybody said, "Okay. Fine." And we were covered until, unfortunately, Shelby County.

The Voting Rights Act of 1965 is considered by most civil rights advocates the most effective civil rights statute ever enacted by Congress. In recent years, however, the Supreme Court has gutted one of its central provisions, the preclearance requirement. And other court decisions and enforcement activity have weakened the act in significant ways. That makes restoring the vitality of the Voting Rights Act of critical importance.

In 2006, when I was ranking member of this subcommittee, we undertook an exhaustive process to build a record demonstrating unequivocally the need to reauthorize the VRA, which was then expired. As we moved forward, and we did reauthorize it, and Chairman Cohen announced the vote, for 25 years. It was authorized for 25 years in 2006. But, of course, we had Shelby County.

As we move forward with similar efforts today, the distressing record of enforcement activity in Texas demands that reappear here in Houston to accept expert testimony on the current state of voting rights in America, and particularly in Texas.

Although advocates readily refer to the state's long history of discrimination against Latino and African-American citizens, it is the state's recent record of voting enforcement, with multiple findings of intentional discrimination at the state level, which demands scrutiny as we build a record supporting Voting Rights Act reauthorization legislation.

The Voting Rights Act contains two primary methods of enforcement. Section 2 enables the government or a private party to bring an action in court alleging discriminatory voting practices. Section 5, preclearance, requires certain jurisdictions with a history of discrimination to submit any changes to their voting laws or practices to the Department of Justice for prior—or to the federal district court in Washington, for prior approval to ensure that they are not discriminatory.

Before the Voting Rights Act, states and localities passed voter suppression laws, secure in the knowledge that it could take many years before the laws could be successfully challenged in court, if at all. As soon as one law was overturned, another would be enacted, essentially setting up a discriminatory game of Whack-a-Mole. Preclearance is an essential tool in preventing this dangerous practice.

Preclearance was effectively gutted in 2013, however, when the Supreme Court issued its disastrous decision in Shelby County v. Holder, which struck down the formula for determining which states and localities are subject to the preclearance requirement. In its absence, the game of Whack-a-Mole predictively has returned. Historically, Texas has led the nation in several categories of voting discrimination, including recent Section 5 violations and Section 2 challenges.

Since the 1982 Voting Rights Act reauthorization, Texas and its political—the 1982 Reauthorization—Voting Rights—since its 1982 authorization, Texas and its political subdivisions have faced over 200 voting rights challenges, and in every decade since 1970 the state of Texas has passed one or more redistricting plans after the decennial census that have been declared either unconstitutional or in violation of the Voting Rights Act.

The subject matter over which the Department of Justice rejected voting changes submitted under Section 5 offers an overview of the challenges to minority voting rights in Texas. Discriminatory voting changes that were halted by Section 5 ranged from statewide voting changes, such as racially jerrymandered redistricting, to local changes involving restrictive election rules, relocating polling places to make them less accessible for minority residents, and methods of electing officials that disadvantaged minority voters.

Historically, the Section 5 preclearance process has also had an important deterrent effect against voting discrimination in Texas. Texas had far more proposed voting changes that were withdrawn following a request by DOJ for additional information than any other jurisdiction during the 1982 to 2006 reporting period. These withdrawals include at least 54 incidences in which the state elimi-

nated discriminatory voting changes after it became evident they would not be precleared by the Justice Department.

Following the suspension of Section 5 preclearance resulting from the Shelby County decision, Texas was one of the first states to exploit the gap in federal voting rights coverage. At the time the state was facing a Section 5 enforcement action for its 2011 redistricting plans in a D.C. district court, and the ruling that its voter identification law, SB–14, violated Section 5.

Within mere hours of the Shelby County ruling, then Texas attorney general, now Governor Greg Abbott, announced that the state would immediately move to reinstate the photo ID law. With the elimination of Section 5 preclearance, both the photo ID and redistricting cases shifted to Section 2 cases, and have been the subject of ongoing litigation since that time.

The recent experience of voting rights litigation in Texas is instructive for the nation, and it demonstrates the need for examining the existing structure of the act. After even a cursory review of the record, one clear fact emerges, reliance on Section 2 litigation alone fails to adequately protect the interest of minority voters.

After nearly a decade of non-stop litigation over redistricting and voter identification, minority voters in Texas have not yet had their rights fully vindicated. At least one discriminatory statehouse district remains unremedied. And the current voter ID statute, in the words of one Fifth Circuit judge, still carries the taint of discrimination.

Today's hearing gives the subcommittee an important opportunity to hear from witnesses directly involved in major voting litigation during the post-Shelby County Section 5 transition. This hearing, however, is only the beginning of our inquiry into Texas VRA compliance.

I am pleased that we have such a distinguished panel of witnesses, whose testimony will assist us greatly in understanding the continuing need for reauthorization of the Voting Rights Act. The experience here in Texas demonstrates just how deeply the loss of Section 5 preclearance cuts into the federal protection of the right to vote. That is why I hope that members on both sides of the aisle and in both chambers of Congress will come together, and pass legislation to restore the full vitality of the VRA.

The last time the VRA was up for renewal it was 2006, and Steve Jabbitt, a conservative republican from Cincinnati, was the chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. I was the ranking member. And he presided, and I was with him. Had hundreds of hours of hearings, compiling a 15,000-page record in order to give us the record that the Supreme Court told us we need to justify the VRA, to justify a particular Section 5.

We reenacted it by a vote of 390 to 30, whatever it was, overwhelmingly. I hope that Republicans will again find the inner voice that led them to support this renewal back in 2006.

We must use this opportunity to promptly craft a legislative solution that enables the Justice Department to effectively enforce the rights of minority voters within the contours of the Constitution. While this is not an easy challenge, given the gravity of the issues

involved, and our long history of bipartisan cooperation in this endeavor, it is one that I believe our committee will and must meet with success.

I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler. To give you an idea about how much the Congress has changed, when that 2006 law passed 330-somethning to 33, it was overwhelming republican majority. Later, we had a voting rights reauthorization introduced, I guess it was about 2010, or 2011, or 2012, and you needed—to be a cosponsor of the bill, you needed to find a republican to be a cosponsor with you so it would be balanced, an equal number of republicans and democrats on the bill.

I wanted to be on the bill. So, there had already been about five republicans on it, and I went to find a republican, and I have lots of republican friends. I searched all over. I must have asked 35 people to be a cosponsor so I could be a cosponsor. It would have been easier to find that airplane that crashed in South Asia than it was to find another republican for the Voting Rights Act. And that was just 6 or 7 years later. That is how much they have changed, and how difficult it has become.

Before we get to the witnesses, I want to recognize Mr. Ryan, who is the county attorney here, and we thank you for your attendance, and you work on this issue. And I understand Mr. Freeman, Professor Freeman, taught Barbara Jordan. And did you teach Ms. Garcia as well? You did good. Thank you, sir. [Laughter.]

Appreciate you being here.

For the witnesses, we welcome you, and thank you for participating in today's hearing. Your written statement will be entered into the record in its entirety, and I ask you to summarize your statements in five minutes.

Before proceeding with the testimony, I remind each witness that you are under oath, and if what you say is false, you can be subject to perjury, unless you are the attorney general of the United States. [Laughter.]

Our first witness is Ernest Herrera. Mr. Herrera is a staff attorney for the Mexican-American Legal Defense Education Fund, which has an acronym, MALDEF, where he has served as public defender and associate district attorney in New Mexico. He has litigated cases involving congressional redistricting and voting rights. He received his JD from the University of New Mexico School of Law, and a BA in political science and Latin American studies from Columbia University. Mr. Herrera, and you are recognized for five minutes.

STATEMENTS OF ERNEST HERRERA, STAFF ATTORNEY WITH THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; GARY L. BLEDSOE, PRESIDENT, TEXAS NAACP; JAYLA ALLEN, CHAIR, ROCK THE VOTE, PRAIRIE VIEW A&M UNIVERSITY; MICHAEL T. MORLEY, ASSISTANT PROFESSOR, FLORIDA STATE UNIVERITY COLLEGE OF LAW; MIMI MARZIANI, PRESIDENT OF THE TEXAS CIVIL RIGHTS PROJECT; JERRY VATTAMALA, DIRECTOR OF THE DEMOCRACY PROGRAM AT THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; JOSE GARZA, VOTING RIGHTS COUNSEL, MEXICAN AMERICAN LEGISLATIVE CAUCUS IN THE TEXAS HOUSE OF REPRESENTATIVES

STATEMENT OF ERNEST HERRERA

Mr. HERRERA. Thank you, Mr. Chairman, and Chairman Nadler. Mr. Chairman and members of the subcommittee, thank you for the invitation to testify regarding the enforcement of the Voting Rights Act in Texas from the perspective of a civil rights attorney.

My name is Ernest Herrera, and I am a staff attorney at MALDEF. Since our founding as a nonpartisan civil rights organization in 1968 in San Antonio, Texas, MALDEF has served as the leading organization that litigates voting rights cases on behalf of Latinos across the United States. Today, Latinos constitute the largest racial minority group in Texas. According to the most recent U.S. Census Bureau estimates, Latinos constitute approximately 40 percent of the Texas population and 29 percent of the Texas eligible voter population.

As the Latino community and other racial minority communities have grown and expanded their share of the Texas electorate, the state of Texas, and some local jurisdictions have sought to impede Latino's access to the ballot. Over the years, MALDEF has been involved in landmark voting rights litigation in Texas and beyond, including Supreme Court victories in 1973, 2006, and 2018.

However, following the U.S. Supreme Court's decision in Shelby County, MALDEF and Latino voters have faced greater obstacles to securing fair election systems. Now it is private litigants, individual Latino voters, and groups like MALDEF who must bear the significant burdens of monitoring discriminatory election changes, and challenging them in court.

One example involves MALDEF's recent successful challenge of an unconstitutional redistricting in Pasadena, Texas, just down the road. Three weeks after the Shelby decision, the mayor of Pasadena, Johnny Isbell, announced a plan to change the method of electing members to the city council. The mayor chose to change the election system in Pasadena precisely because, as he declared at the time, "DOJ can no longer tell us what to do."

In order to prevent the emergence of a Latino majority city council, the mayor proposed and the city's electorate approved converting two single-member district positions on the city council to at-large seats. Shifting these seats from single-member districts to at-large voting solidified Anglo control over the council even as the city became majority Latino in population.

Before the Shelby decision in 2013, Pasadena would have been required to submit this change for preclearance. And in past years,

the U.S. Department of Justice had denied preclearance for similar conversions from single-member districts to at-large seats by cities in Texas.

After Shelby, Pasadena was not required to secure preclearance, and the discriminatory change went into effect immediately upon enactment.

On behalf of several Latino voters, MALDEF filed suit in 2014 challenging Pasadena's new election system. The discovery process was time-consuming and expensive. Nina Perales and I took and defended 35 depositions. In January 2017, the federal court ruled that Pasadena intentionally discriminated against Latino voters in adopting the change and its method of election, and that the change also had the effect of illegally diluting Latino voting strength.

The court ordered Pasadena to restore its previous method of election, and bailed in the city under Section 5, through the next redistricting cycle, until 2023. That ruling still stands.

In the end, Pasadena spent $3.5 million in attorney's fees. Resolution of the controversy took just short of 3 years. Compared to the previous preclearance regime, the Pasadena case took a drastic toll on the city, draining its financial resources, and fraying relationships between community members.

At the same time, MALDEF battled for its Latino clients in the Texas redistricting litigation. Although, Texas's congressional and state redistricting plans were initially blocked under Section 5 in 2012, the U.S. Supreme Court vacated that decision following Shelby, and we were forced into litigation that is still ongoing today, including a hearing yesterday on preclearance.

Most recently, MALDEF took Texas to court in February of this year to challenge the state's attempt to purge close to 100,000 naturalized U.S. citizens from the voter rolls. We represented Latino voters, who proudly took the oath of U.S. citizenship at naturalization ceremonies, and then just as proudly registered to vote.

Texas targeted those same voters, we know from evidence in the record, for elimination from the rolls because they were born outside the United States. With other litigants, MALDEF secured a temporary restraining order that halted the voter purge. And this past Monday, we ended the case and the purge with a favorable settlement for the voters. As with redistricting, this debacle of a voter purge would never have gone into effect if Texas was required to preclear its changes in election practices.

Thank you again for your time, Mr. Chairman.

[The statement of Mr. Herrera follows:]

Mr. Chairman and members of the House Judiciary Committee, thank you for the invitation to testify regarding the enforcement of the Voting Rights Act in Texas from the perspective of a civil rights attorney. My name is Ernest Herrera, and I am a staff attorney at MALDEF, the Mexican American Legal Defense and Educational Fund. Since our founding as a non-partisan civil rights organization in 1968 in San Antonio, Texas, MALDEF has served as the leading organization that litigates voting rights cases on behalf of Latinos across the United States.

Today, Latinos constitute the largest racial minority group in Texas. According to the most recent U.S. Census Bureau estimates, Latinos constitute approximately 40% of the Texas population and 29% of the Texas eligible voter population.

As the Latino community and other racial minority communities have grown and expanded their share of the Texas electorate, the State of Texas and some local jurisdictions have sought to impede Latinos' access to the ballot.

In my time as a MALDEF attorney, I have helped litigate the current Texas redistricting case, the challenge to the 2019 Texas purge, and cases against localities involving voter ID and redistricting. My colleagues and I have also investigated complaints of voters across the state who had concerns about their ability to vote and we have advocated on policies contemplated by Texas and local jurisdictions that limit Latinos' voting power.

Over the years, MALDEF has been involved in landmark voting rights litigation in Texas and beyond. In 1973 MALDEF won a ruling from the U.S. Supreme Court that struck down Texas multi-member State House districts as discriminatory against Latinos. And in 2006 MALDEF won the first favorable U.S. Supreme Court ruling for Latinos advancing a vote dilution claim under the Voting Rights Act. In 2018, MALDEF again won a ruling from the U.S. Supreme Court, this time striking down redistricting in Texas that racially gerrymandered Latino voters.

However, following the U.S. Supreme Court's decision in *Shelby County AL v. Holder*, 570 U.S. 2 (2013), MALDEF and Latino voters have faced greater obstacles to securing fair election systems. The release of previously-covered jurisdictions from federal preclearance, combined with the failure of the DOJ to increase its enforcement, leave Latino and other minority voters less protected than they were before *Shelby*. Now it is private litigants—individual Latino voters and groups like MALDEF—who must bear the significant burdens of monitoring discriminatory election changes and challenging them in court.

One example involves MALDEF's successful challenge of an unconstitutional redistricting in Pasadena, Texas, just outside of Houston. Three weeks after the *Shelby* decision, in July 2013, the Mayor of Pasadena announced a plan to change the method of electing members to the City Council. The Mayor

chose to change the election system in Pasadena precisely because, as he declared at the time, "DOJ can no longer tell us what to do."

At that time, Pasadena elected all eight-members of its council from single member districts. Mayor Isbell and his allies faced increasing opposition from a voting block of four council members who were either elected by or responsive to the growing Latino electorate. In order to prevent the emergence of a Latino-majority city council, the Mayor proposed, and the City's electorate approved, converting two single member district positions on the council to at-large seats. Shifting these seats from single member districts to at-large voting solidified Anglo control over the council even as the City became majority Latino.

Before the *Shelby* decision in 2013, Pasadena would have been required to submit this change for preclearance, and in past years the U.S. Department of Justice had denied preclearance for similar conversions from single member districts to at-large seats by cities in Texas. After *Shelby*, Pasadena was not required to secure preclearance and the discriminatory change went into effect immediately upon enactment.

On behalf of several Latino voters, MALDEF filed suit in 2014 challenging Pasadena's new election system. The discovery process was time-consuming and expensive. We took and defended 35 depositions. Seven expert witnesses served

in the case. We relocated the litigation team to Houston and tried the case in federal court in November and December of 2016.

In January 2017, the federal court ruled that Pasadena intentionally discriminated against Latino voters in adopting the change in its method of election, and that the change also had the effect of illegally diluting Latino voting strength. The court ordered Pasadena to restore its previous method of election and "bailed in" the City under section 5 through the next redistricting cycle.

Pasadena appealed and unsuccessfully sought an immediate order from the Fifth Circuit to block the trial court's order. We then briefed the appeal, which took an additional nine months. Finally, Pasadena agreed to settle the case, drop the appeal, go back to its eight district election plan and submit its election changes for section 5 preclearance until 2023.

In the end, Pasadena spent $3.5 million in attorney's fees (including paying MALDEF's fees). Resolution of the controversy took just short of three years. Compared to the previous preclearance regime, the Pasadena case took a drastic toll on the City, draining its financial resources and fraying relationships between community members.

At the same time, MALDEF battled for its Latino clients in the Texas redistricting litigation. Although Texas's congressional and state house redistricting plans were initially blocked under section 5 in 2012, the U.S. Supreme

Court vacated that decision following *Shelby* and we were forced into litigation that is still ongoing today. After eight years of litigation, MALDEF has won revisions to the State's 2011 maps, several findings of intentional racial discrimination, and the U.S. Supreme Court ruling in 2018 that Texas unconstitutionally racially gerrymandered Latinos in Fort Worth. However, Texas has yet to remedy this racial gerrymander, and the federal three-judge panel in San Antonio that has presided over the case continues to work on a remedy, including at a hearing yesterday.

Most recently, MALDEF took Texas to court in February of this year to challenge the state's attempt to purge close to 100,000 naturalized U.S. citizens from the voter rolls. We represented Latino voters who proudly took the oath of U.S. citizenship at naturalization ceremonies and then just as proudly registered to vote. Texas targeted those same voters for elimination from the rolls because they were born outside the United States. With other litigants, MALDEF secured a TRO that halted the voter purge. And, this past Monday, we ended the case (and the purge) with a favorable settlement for the voters. As with redistricting, this debacle of a voter purge would never have gone into effect if Texas was required to preclear its changes in election practices.

In sum, in the post-*Shelby* era, Latino voters have their hands full in Texas. And DOJ is doing little to help. The *Shelby* decision did not affect the ability of

the Department of Justice to enforce the remaining sections of the Voting Rights Act. If anything, the Voting Section has more resources to investigate and enforce the Voting Rights Act because the Section is no longer processing the same volume of section 5 submissions.

Following the loss of preclearance across the South, private plaintiffs cannot and should not have to bear the burden of challenging post-*Shelby* discriminatory changes alone. The comprehensive solution is to enact a new coverage formula that revives the protections of Section 5 for Latino and minority voters in Texas.

Thank you again for your time, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Herrera, you were perfect on the five minutes. [Laughter.]

I have somebody out here giving me some clues of the time. You all don't. In Congress, we have a green light that says you are on, a yellow light that says you have got a minute, and a red light that says you are over. We don't have it, so what we are going to do, if you get—when you get to a minute, I am going to put my water down like this. [Laughter.]

And when you get to the red spot, I am going to go like this. So that is going to be your clues.

Mr. Gary Bledsoe is our next witness. He is president of the NAACP, the best civil rights organization that has ever been created, and lives today as well. The Texas State Conference, and has served in that role since 1992.

He has also been a member of the NAACP's national board since 2003, serving with my good friend, Julian Bond, one of my heroes of all time. And Ben Hooks, from Memphis, another star, and Maxine Smith. Do you know Maxine?

Mr. BLEDSOE. Very well. Very well.

Mr. COHEN. Yeah. She is a smart——

Mr. BLEDSOE. She is our education chair for many years.

Mr. COHEN. My friend and a great—he has served as acting dean of the Texas Southern—Thurgood Marshall School of Law, and a member of the Board of Regents for Texas Southern University. Has his JD and his BA from the University of Texas, in Austin. And you are recognized for five minutes. And I appreciate your work.

STATEMENT OF GARY L. BLEDSOE

Mr. BLEDSOE. Thank you, Mr. Chairman, and welcome to Texas Southern. I want to first say that I am so proud to see that you have two of our alums that are there with you. We are very proud to say that both Congresswoman Garcia and Congressman Al Green are there. And I must say that I am also honored to be here with two persons I have had the honor to represent in litigation. And that is Congresswoman Jackson Lee, and my friend, Al Green. So, I am so thankful for that.

First of all, let me say that, Mr. Chairman, I was really glad to hear you say, I think Chairman Nadler indicated this, that Texas has never really given full rights of citizenship to its African-American citizens. And obviously that is true as well in reference to our Latino citizens. So, we continue to fight that battle.

And I must make this point here very clear, that Texas was not originally applied to the Voting Rights Act, but when the great Barbara Jordan became a member of the United States Congress, Texas was ultimately joined in 1975. But since the passage of the act in 1965, Texas has been found guilty of discriminating against minorities every single decade.

What is interesting is Congresswoman Eddie Bernice Johnson testified in the redistricting litigation that what occurred in 1970, what occurred in 1980, what occurred in 1990, it was discrimination by democrats. And since that time, it has been discrimination by republicans. But it doesn't matter who is in power, the maps

that are passed do not do justification for African-Americans and Latinos.

And I think if—when we talk about the need for coverage in Texas, I don't think we need to go any further than take a look at the LULAC v. Perry opinion in 2006. And we look at that opinion, it primarily looked at CD 23, out in Southwest Texas.

And CD–23, they said, was discriminatorily constructed. And so, what did Texas do? Five years later, at the very, very, very first instance that Texas had to redistrict, it did the same thing again. And that is a finding that is still standing from the three-judge panel in San Antonio. So, I think that shows that clearly we are in need of support.

Secondly, I want to say that in terms of the voter identification litigation, it is extremely important to note that even though the intentional discrimination findings have not been upheld by the Fifth Circuit, the effects findings have been upheld. And what is occurring in voter identification is really criminal in our state. Because right here in Harris County we had so much bellicosity coming from public officials threatening to prosecute individuals wrongfully if they made a mistake on filing an affidavit saying that they were not able to obtain an identification. The compromise that we came up with Judge Ramos in order to go forward and have the election 2016.

And so, with that kind of intimidation tactics that even the Texas attorney general has engaged in, it presents a chilling effect on minorities in terms of the exercise of their vote. And there hasn't been any real basis or any showing of any vote fraud. The law in Texas adequately covered that issue to begin with.

I do want to say that one of the things I want to add to the record is one of our professors has a law review that was published in the Southern California Law Review, Darnell Wheaton, Larry Darnell Wheaton. And I think it lays out the ridiculous idea behind these voter ID laws that actually exist. But these voter ID laws, you know—and I do want to put this in the record.

In 2009, there were a group of us that met in Austin over many, many months. MALDEF was part of the meeting group, and was led by two individuals, Todd Smith, who was a republican, and Rafael Anchia, with the democrat. And we came up with a reasonable voter identification law that wouldn't have the disparate impact that could address this alleged integrity issue that is out there, but that would be fair to voters. And that was rejected.

I explain that a lot more in my written testimony, but because of time I won't go into it too much. But let me say that one of the things that these laws should always have, they should have—the votes should be counted, and it should—the burden should be on the government to disprove the person.

Because when you have provisional votes, those are just like—they are not worth anything. Eighty-five, ninety percent of provisional votes are never counted. So, you give somebody some feeling that their vote is going to be counted when you give them a provisional ballot, but they don't have the time and the opportunity to go and to make a difference.

We were also concerned by actions for state officials. Many laws have been passed to make it more difficult to get identifications in

Texas. More impediments were put on individuals to get driver's licenses renewed. The laws were changed so that the individuals who prevailed in a county allowed that party to designate who would be the election officials at the precinct level.

And we find all kinds of intimidation and discrimination that are occurring in the precinct level, many right here in Harris County. And we see where election judges don't enforce the law.

We had one instance of an individual who was——

Mr. COHEN. By the election judge, you mean the administrator or a judge, or whatever——

Mr. BLEDSOE. Well, in each precinct there is someone who runs the precinct, and that is——

Mr. COHEN. And that is called a judge?

Mr. BLEDSOE. And that is called a judge. Right. And that individual has the power of appointing clerks and making decisions. And you find people who are hostile to people in a community going into those communities and actually taking over, and wreaking all kinds of havoc within those communities. And so that has created a real problem at the precinct level for people being able to vote.

We got involved in reference to the Coba Commission, because the Coba Commission was a real problem, and so with the Coba—I see you holding the gavel up, Mr. Chairman. [Laughter.]

So, I am ready to end here. But let me just say that since Shelby County there have been innumerable instances of all kinds of intimidation and voter suppression that have occurred throughout the state. So many different kinds. And Pasadena is not alone. We also had the same thing happening in Odessa and other places, but I think everyone knows without a Section 5, minority voters are in jeopardy in Texas.

Thank you.

[The statement of Mr. Bledsoe follows:]

Good morning Mr. Chairman, Ranking Member and members of the Judiciary Committee. My name is Gary Bledsoe. I am President of the NAACP in Texas and a National Board member of the NAACP. I have dedicated my professional career to safe-guarding the rights of citizens in Texas and across this country stemming from our Constitution to include in no small part the right to vote and thus participate equally to preserve free and full elections to ensure the continuing well-being of our Republican form of government. Equal Voting Rights are essential to guaranteeing stability in a democracy. Thinking back to the birth or our nation, the colonists fought for independence from Britain in order to obtain responsive democratic representation. Those colonists fought because they had taxation without representation, like so many other minorities in Texas today. Our nation requires that all citizens have access to meaningful participation and representation in order to continue to thrive. Voting is so important that the great Thurgood Marshall thought that *Smith v. Allwright* victory might be his most important win, possibly even more so than *Brown v. Board of Education*. We should not invite people to our land, pronounce them citizens and thereby expose them to our Constitution but then lock them out from participating in one of the most basic fruits of our society as Texas has attempted to do with its purge list. Once you are a citizen you should be a citizen for all purposes. This is not only morally wrong to treat them this way, it is dangerous to continue and deny full citizenship privileges to African-Americans, Latinos and others, because it undercuts the very core of our Democracy and threatens the continued existence of our Constitution and democracy.

In Texas we have a consistent and yet unbroken history that shames all decent and fair citizens of our great state. That is government sponsored and promulgated racial discrimination against its non-white citizens from the very beginning of citizenship for African-Americans. That is, although slaves had been freed by Lee's surrender to Grant at Appomattox. The slaves in Texas were not freed until June 19, 1865, 2 months and 10 days later. Notably this is also 2 ½ years after the issuance of the Emancipation Proclamation by President Lincoln.

Texas has thereafter acted against the equal rights of its black and Hispanic citizens without respite since then. At first, through what is commonly referred to as the Jim Crow form of separate and unequal treatment of racial minorities. When it came to voting, alone, Texas brutalized Blacks for even contemplating the right to vote. Texas passed law after law and engaged in practices that were designed and intended to disenfranchise Blacks and Hispanics. When women obtained the right to vote, Texas wanted to make sure that African-Americans did not get the right to vote. Texas passed a law to actually prevent Blacks from voting in the primary at that time; the significance of that act being that the primary blacks were restricted from was the only election that mattered at that time. Texas has, up to this very day throughout the period from June 19, 1865 to the present, continued to institute laws that are designed to deny African Americans and Hispanic voters the equal right to vote and elect candidates of their choice.

The Texas NAACP and many other groups are currently still involved in a lawsuit against the State of Texas for it having intentionally discriminated against its citizens in passing redistricting laws that have consistently been found to be racially discriminatory. We have a hearing this same week seeking to have Texas placed under preclearance pursuant to Section 3(c) of the Voting Rights Act. As you know, this is the only way that victims of race discrimination in voting can currently obtain preclearance relief since the Supreme Court invalidated Section 4 of

the Voting Rights Act and thus rendering Section 5 inoperable in the Shelby County case in June 2015. That is, of course, until Congress passes a law fixing Section 4 of the Voting Rights Act.

This provision may provide for required Pre-clearance similar to Section 5 which we all know is now inoperable. Because of our history and what continues to occur, it is essential that we get some protection for our vote, As the NAACP, African-American Congresspersons Eddie Bernice Johnson, Sheila Jackson Lee and Alexander Green, and others noted in our brief seeking 3(c) relief, the 3 Judge panel of two Republican and one Democratic Judge in *Perez v. Abbott* found "Texas and its political subdivisions have had over 200 Voting Rights challenges since 1982." The panel further noted 'in every decade since 1970 Texas has passed one or more Redistricting plans after the census that have been declared either unconstitutional or violations of the Voting Rights Act." This is our reality.

Because of our history in Texas and what continues to occur, here, it is essential that we get some protection for equal voting rights. As the NAACP, African-American Congresspersons and others noted in our brief seeking 3(c) relief, the 3 Judge panel of two Republican-appointed and one Democratic-appointed Judge in *Perez v. Abbott* found "Texas and its political subdivisions have had over 200 Voting Rights challenges since 1982." The panel further noted 'in every decade since 1970 Texas has passed one or more Redistricting plan after the decennial census that have been declared either unconstitutional or violations of the Voting Rights Act." This is our consistent/incessant reality.

In the arena of voter identification we have also seen how reason makes no difference and is in fact absent from the Texas legislature's actions against its black and Hispanic citizens. Back in 2009 a bipartisan group lead by Republican Todd Smith and Democrat Rafael Ancia had extensive meetings to come up with a fair voter identification law that would have broad bipartisan support. Conservative and liberal nonprofits were part of this group, including the NAACP and MALDEF. The broad group agreed after many weeks to compromise legislation that had integrity and was supported by the group as a whole. However, the legislation got nowhere but it included some important features that were never considered for inclusion in the current bill. The group agreed that the requested ballot security could be realized without the need to negatively impact racial minority populations by providing for more than only a few hard to obtain verifiable identification documents (it must be mentioned that there has been no evidence of any voter fraud in Texas to justify a Voter ID law). Further, the parties recognized that there should not be a draconian application of any rule regarding expired identification. They also recognized that in fairness to the voter, many of whom were working people or elderly, the provisional ballots should be automatically counted unless it was shown prior to counting that there were issues with the individual's identity.

Two years later, 2011, when the Legislature convened, there was no more bipartisan effort. The bill, SB14, was rammed through the Legislature and numerous discriminatory features were kept in the bill despite many people speaking out against the undeniable effects that the statute would have on African Americans and Hispanics. The election integrity justification for the bill has been shown to be a hollow claim without any reasonable evidentiary support. It was already a felony to wrongfully cast a vote under a fraudulent name or obtained voter registration card so the need for this law was non-existent.

Dr. Vernon Burton testified in the voter identification trial that the same reasons that the State of Texas used this time to try to justify its actions against black and Hispanic voters were the same ones used in previous periods such as after reconstruction when anti-Black laws and Black codes were adopted. The bill disenfranchised hundreds of thousands of voters, mostly minority and elderly. It had restrictive identification options, restrictive time periods for voters to prove who they were and it provided for the ballots tendered without the identification to go to the burial ground for ballots that is otherwise known as provisional ballots. Usually working people or the elderly are unable to go and provide other information that may be needed. It may be that they have work when the office is open or they have no way to get there or no means to do so. One-third of the counties in Texas do not have motor vehicle license facilities, where voters could get the required IDs. There are also counties with no public transportation and very long distances between residences and county administrators.

The option to provide a free election certificate was of no use or value. The requirements to get one were unreasonable, there were costs still associated with getting one, and there was an intimidation factor associated with acquiring one—the use of such a certificate for any other purpose would bring other problems. This means the free certificates cost, are not easy to get and can be used to cause harm to you if used for any other purpose. This makes the free certificates either a meaningless gesture or a dangerous trap. The 3 Judge panel in DC under Section 5 agreed and they invalidated that Texas Law, only to have it given rebirth by the tragic opinion in *Shelby County v. Holder*. We and other groups were forced to sue again, under Section 2 of the Voting Rights Act, and after years of litigation, the Fifth Circuit, sitting en banc, ruled that the law discriminated against Black and Hispanic voters. Later, a district court in Texas had passed the Voter ID law as a result of intentional discrimination.

Because of the strenuous efforts in the Section 2 litigation, we and the other groups were able to obtain relief in the form of an Interim Remedial Order that allowed Texans to vote, even if they did not have the SB14 ID, upon execution of a declaration of reasonable impediment, stating that they did not have the ID. SB5 adopted in the 2017 Legislative session of the Legislature was adopted in order to implement that Interim Remedial Order. But, as usual, the Legislature could not leave it alone, without tinkering with it to make it harder for people to vote. They made the penalty for wrongfully executing the declaration into a higher grade felony. This is an intimidating feature in the bill and everyone knows that the intent is to scare off minority voters. Coincidentally, during the 2016 election when an Affidavit alternative to the photo identification requirement was first used, an election official in Harris County and the Texas Attorney General both made public statements about prosecuting individuals who executed such declarations if any information contained within them was not true. In light of the history of wrongful prosecutions of African-Americans by prosecutors in Texas, these kinds of statements tend to have a chilling effect on the exercise of the franchise because many black and Hispanic voters have experienced the very real possibility that they could be falsely prosecuted and convicted. It is these kinds of provisions that would bear strict scrutiny if we had a reviewing body like the Civil Rights Division of the Department of Justice. Though the effectiveness of the Division has varied over time, it has generally tried to enforce civil rights matters within its jurisdiction under all Presidents except George W. Bush. Unfortunately, it is even less so under the current administration, where efforts at enforcement of the Voting Rights Act appear to have ground to a dead-halt. Some of our NAACP units refuse to educate their community about or encourage the

use of these declarations, because they believe the law can be used to prosecute people for innocent mistakes. I am aware of a prosecution in Tarrant County where a woman mistakenly voted because she thought once she was released that she could vote. She was prosecuted for this mistake.

Texas is becoming majority minority, over 50% of the adult population are African-American or Latino combined, and unfortunately, this fact has instilled fear in those in power. Instead of working cooperatively with minority populations and realizing the strength of this nation's diversity, those in power are doing all they can to place obstacles in the path of minority voters participating equally in our political process. And to make matters even worse, this fear has motivated the most anti-minority of our citizens who are turning out to vote at such an incredibly large numbers their candidates are winning and defeating many conservatives who are much less extreme. In the Redistricting litigation described above, Dr. Richard Murray of the University of Houston testified that the two principal reasons that fuel the motivation for such high voter turnout by extreme conservatives are: (1) the election of President Obama; and (2) their beliefs about illegal immigration. At the same time, the historic discrimination against minorities in Texas and the new barriers to the franchise that those in power are erecting contribute to lower minority voter registration and lower minority voter turn-out. This further demonstrates the shared need for protection by the Latino and African-American communities.

Acts of discrimination in voting continue to occur all over Texas. Our members have reported: discrimination against minority voters by polling officials; hostility to minority voters by polling officials: failure of officials to process voter registrations of minority voters; dysfunctional electronic voting equipment; disproportionately in minority voting locations; hostility to minority voters by official poll watchers; intimidation by state troopers at polling places; harassment of African-American voters by vigilante groups; late changes to voting locations at sites with large proportions of minority voters; location of voting sites inconvenient to minority voters or discouraging voting sites convenient to minority voters or discouraging voting sites convenient to minority voters; the appointment of election judges hostile to minorities and a host of other tactics. We even had one voter who was subjected to repeated use of the N-word by a voter at a polling site in Rusk County when the officials declined to stop the rants even though the African-American voter complained. Sadly it appears too many of our election officials who could help simply too partisan and/or unsympathetic themselves to correct the problems within their jurisdiction when they become aware of them. When news surfaced that electronic voting machines were showing votes for Ted Cruz when the voter believed he or she had voted for Beto O'Rourke, the Secretary of State took action that was sorely inadequate. This has become something to be expected by minorities in too many areas around our State.

When the Kobach Commission sought to obtain sensitive and confidential data from Texas in an alleged attempt to address nationwide voter fraud, the Secretary of State agreed and we had to join with the League of Women voters and sue them. Sensitive data that would include residence addresses and partial social security information for all voters, including important military officials who may be involved in too secret activities but somehow known to the opposition. Subsequently the Commission dissolved, the lawsuit was dismissed and we believe the data would not be turned over and had not been turned over. I talked with security officials for the United States military who indicated if foreign adversaries obtained this type of data it could

have national security implications. I say this because if someone does not put brakes on these types of actions there could be other consequences than voter suppression that have other very serious implications.

Most recently, the Texas Secretary of State in concert with the Attorney General engaged in a public display of a botched attempt to purge voter rolls of minority voters. To great fanfare, they announced that they had discovered nearly 100,000 non-citizens who had registered to vote and that almost 60,000 of them had actually voted. It soon became apparent that the Secretary of State was relying on completely inaccurate data — stale drivers' license records that did not reflect that naturalized citizens who had legally obtained licenses had become naturalized during the 6-years that the licenses were valid. Ultimately, after litigation, the Secretary of State had to rescind the list, but the recklessness with which the Secretary of State and the Attorney General acted is further evidence of a mind-set that toys nefariously with the voting rights of minorities.

We also note that polarized voting is still very high in Texas. As we have seen in Pasadena and Odessa, there are serious desires to simply take away minority electoral gains. A storm did this in Galveston, coupled with how the "rebuilding" has taken place. Whether it is a storm or simply hostile voters who dominate elected officials, minority voting interests are at risk. Good solid minority candidates have been defeated in both regular and general elections.

There is so much to say in a short time. It starts with a motivated critical mass of citizens who have staked their political positions on adversity to racial and ethnic minorities. Many County Commissioners Courts or local election and/or elected officials are now providing for polling sites, staffing personnel and other processes that disadvantage minority voters. The Legislature is passing laws that disadvantage minorities in a host of areas, including on driver's license renewals, voting procedures and qualifications and the redistricting of the Texas Congressional delegation, the Texas Senate and the Texas House of Representatives. We have no reasonable avenue in our State.

Our country is best when it is unified and it treats or provides for treatment of its citizens in a fair manner. We implore you to act as if the term "We the People" as still provided in our living Constitution, actually includes all people: racial ethnic and racial minorities who are equally deserving of the full protections of our citizenship impact as are any other group of citizens.

Mr. COHEN. Thank you, sir. Just like Congresswoman Jackson Lee sometimes has a voice that reminds me of Barbara Jordan, yours has inflections on occasion that remind me of Julian Bond, and I had no way to cut you off. [Laughter.]

Mr. BLEDSOE. Well, he is my mentor, so—he was.

Mr. COHEN. Ms. Jayla Allen is chair of Rock the Vote, and is a student at Prairie View A&M. She is a plaintiff in a lawsuit against Waller County, Texas, alleging that it provided less favorable treatment in terms of voting opportunities for students at Prairie View when compared to other voters in Waller County, thereby discriminating against African-American and young voters.

Ms. Allen, thank you for your advocacy, and you are recognized for five minutes.

STATEMENT OF JAYLA ALLEN

Ms. ALLEN. Thank you. Good morning, Chairman Cohen, Chairman Nadler, and members of the subcommittee. My name is Jayla Allen, and I am a proud undergraduate student at Prairie View A&M University, a historically black university in Prairie View, Texas, not far from where we are today.

Thank you for the opportunity to testify before the committee on the importance of voting—on the Voting Rights Act in my home state of Texas.

I am here today as a young person, a student, a voter, and a passionate advocate of voting rights. I am chair of Rock the Vote, and a member of IGNITE, an organization that seeks to increase woman's involvement in politics on our campus. I am also one of the five plaintiffs who are currently suing the county where Prairie View is located in Waller County for its anti-democratic attempts to restrict the voting rights of Prairie View A&M University students.

As an undergraduate student, an aspiring civil rights lawyer, and a black woman, the Right to Vote was of profound personal importance to me. Along with many of my classmates I strive to engage—encourage other students to become engaged on our campus and in local and state affairs to participate in candidate forums, and most important of all, to exercise their fundamental rights to vote, a right that our ancestors and many of our grandparents were long denied.

I believe in voting. And as a student leader, I assist and encourage other students to vote, because I know that voting is an expression of our power and our ability to elect representatives who will make policies that will transform our lives and the communities for the better.

Members of the committee, if you have yet to visit Prairie View A&M University, I sincerely encourage you to do so. My classmates and I are engaged in democracy, excellent, and encourage you—excellent academics, and are aware of our history, where we—what we expect from our country, and what has been promised to us. We will inspire you and challenge you, and we understand the value of our votes.

While I urge other young people to register to vote and become engaged with the democratic process, there are pervasive systems in place that make it difficult, if not impossible, for far too many

of us to do so. This particular history of Prairie View A&M University is located in a predominantly black city of Prairie View, and its relationship with Waller County is largely one of the ever evolving, but still yet attempts to suppress the vote of predominantly young black communities in a county where the overall population, and most of our elected officials are older and white.

Most recently, just before the early voting period begun in October 2018, it became clear to my classmates and I that our university had not been provided nearly enough voting hours. We are a student body of more than 8,000 people. Many of us have incredibly busy schedules and do not own cars. Campus is the center of our lives. Because of this, many of my predecessors at PV fought hard for an on-campus voting location, and finally obtained one in 2013.

That on-campus early voting location is a lifeline for students who seek to participate in our democracy. Last fall, when county officials refused to provide even one day of early voting at the location during the first week of the two weeks of early voting, it became clear that it was an intentional, orchestrated attempt to prevent black students from voting once again.

With the support of the NAACP Legal Defense and Education Fund, and the law firm of Norton Fulbright Rose, my classmates and I are seeking remedy to this injustice. As you may know, LDF was founded in 1940 by Thurgood Marshall, who later became the first black U.S. Supreme Court Justice.

In the nearly 80 years since LDF has been a leader in the struggle to secure, protect, and advance voting rights for black voters and other people of color, beginning with Smith v. Allwright, Thurgood Marshall's successful Supreme Court case challenging the use of white-only primary elections in Texas back in 1944, LDF has been fighting to overcome the discriminatory barriers to the full, equal, and active participation of black voters.

Among Texas County, Waller County stands out as its primarily shameful history of judicially recognized discrimination against black voters at Prairie View A&M University. When the 26th Amendment was ratified and PVAMU students between the ages of 18 and 21 became eligible to vote, county officials changed the rules so that student voters would require to fill out a residency questionnaire documenting that their own family owned property in the county.

It wasn't until 1979 when the Supreme Court stepped in and the students in Waller County, in fact, students across the country could finally vote without the constraints of discriminatory residency questionnaires. Since then, Waller County has attempted to prevent PVAMU students from exercising their fundamental rights to vote by repeatedly discriminatory burdens and barriers to their access and their franchise.

As the 2018 midterm revealed, Texas counties like Waller has not abandoned the shameful practices that have made voting extremely difficult and historically for Prairie View A&M University students. During this historic election, Waller County officials have failed to provide black students with or similar adequate voting opportunities that are provided to white and older residents. Thank you.

[The statement of Ms. Allen follows:]

I. Introduction

Good morning, Chairman Cohen, Chairman Nadler and Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

My name is Jayla Allen and I am a proud undergraduate student of Prairie View A&M University (PVAMU), a Historically Black University in Prairie View, Texas, not far from where we speak today. I also was born and raised in Dallas, Texas. Thank you for the opportunity to testify before the Committee on the importance of the Voting Rights Act in my home state of Texas.

I am here today as a young person, student, voter, and passionate advocate for voting rights. I am Chair of Rock the Vote and a member of IGNITE, an organization that seeks to increase women's involvement in politics at PVAMU. I also am one of five plaintiffs who are currently suing the county where Prairie View is located, Waller County, for its antidemocratic attempts to restrict the voting rights of PVAMU students.

As an undergraduate student, an aspiring civil rights lawyer, and a Black woman, the right to vote is of profound personal importance to me. Along with many of my classmates, I strive to encourage other students to become engaged on campus and in local and state affairs, to participate in candidate forums, and, most important of all, to exercise their fundamental right to vote, a right that our ancestors—and even many of our grandparents—were long denied. I believe in voting, and, as a student leader, assist and encourage other students to vote because I know that voting is an expression of our power and our ability to elect representatives who will make policies that can transform our lives and the communities that we care about for the better. Indeed, as a young person, I know that elected leaders make many important decisions that people like me care about such as: access to high quality, affordable and safe educational environments; a strong economy that produces employment opportunities; affordable and comprehensive health care for ourselves and our loved ones; and an environment that is healthy and safe for us as we grow older and for those who come after us.

Members of the Committee, if you have yet to visit Prairie View A&M University, I sincerely encourage you to do so. My classmates and I are engaged in democracy, excellent in academics, and aware of our history and what we expect from our country and what it has promised us. We will inspire you and challenge you. And we understand the value of our votes. Yet while I urge other young people to register to vote and become engaged with the democratic process, there are pervasive systems in place that make it difficult, if not impossible, for far too many of us to do so. The particular history of PVAMU, located in the predominately-Black City of Prairie View, and its relationship with Waller County is largely one of ever-evolving, but still insidious attempts to suppress the vote of a predominantly young, Black

community—in a county where the overall population, and most of our elected leaders, are older and white. Most recently, just before the early voting period began in October of 2018, it became clear to my classmates and I that our university had not been provided nearly enough early voting hours. We are a student body of more than 8,000 people. Many of us have incredibly busy schedules and do not own cars. Campus is the center of our lives. Because of this, my predecessors at PVAMU fought hard for an on-campus early voting location—and finally obtained one in 2013. That on-campus early voting location is a lifeline for students who seek to participate in our democracy. Last fall, when county officials refused to provide even one day of early voting at that location during the first week of two weeks of early voting, it became clear that this was an intentional, orchestrated attempt to prevent Black students from voting.

With the support of the NAACP Legal Defense and Educational Fund, Inc. (LDF) and the law firm Norton Fulbright Rose, my classmates and I are seeking a remedy to this injustice. As you may know, LDF was founded in 1940 by Thurgood Marshall, who would later become the first Black U.S. Supreme Court justice. In the nearly 80 years since then, LDF has been a leader in the struggle to secure, protect, and advance voting rights for Black voters and other people of color. Beginning with *Smith v. Allwright*,[1] Thurgood Marshall's successful Supreme Court case challenging the use of whites-only primary elections in Texas back in 1944, LDF has been fighting to overcome discriminatory barriers to the full, equal, and active participation of Black voters.

For years, the Voting Rights Act (VRA) protected us from state-sanctioned voter suppression. It guaranteed that we would not be denied the most fundamental right of citizenship—the right to vote. It was reauthorized by Congress on four occasions, each time on a bipartisan basis. Section 5 of the VRA was designed not just to address and prevent known discriminatory practices, but also to protect against new and evolving methods meant to suppress the voting rights of Black Americans and other racial minority people.

However, in the 2013 case of *Shelby County, Alabama v. Holder*,[2] the Supreme Court gutted the preclearance provisions of Section 5 of the VRA. Since then, Black and Latinx voters in places like Waller County have seen discriminatory policies reemerge. The decision in *Shelby* ignored the historical and ongoing record of discrimination, which clearly demonstrated that preclearance was necessary to ensure equal protection for voters of color. If fully restored, the preclearance provisions of Section 5 could have prevented some of the voter suppression schemes that Texas voters have been subjected to in recent years. For example, until the

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1 *Smith v Allwright*, 321 U.S. 629 (1944).

2 *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

Shelby County, decision, Section 5 blocked Texas from implementing one of the strictest photo ID laws in the country. PVAMU students served as plaintiffs, represented by LDF as well, in a subsequent case, *Veasey v. Perry*, that challenged that law as racially discriminatory; Texas implemented its law within hours of the *Shelby County* decision.[3] Similar to me, other PVAMU students stood up to Texas's attempt to enact a strict photo ID law that would allow voters to use a handgun license to vote in person but prevent students from using their student IDs. As you can see, the VRA has been an important protector of the voting rights of PVAMU students.

II. History of Voting Rights Discrimination at Prairie View A&M University in Waller County, Texas

The history of Waller County, Texas is rife with judicially-recognized voter suppression. In the 1970s, Waller County was the only county in Texas that had a majority Black population, even without including the students of PVAMU.[4] When the Twenty-Sixth Amendment was ratified and PVAMU students between the ages of 18 and 21 became eligible to vote, county officials changed the rules so that student voters were required to fill out a "residency questionnaire" documenting that they or their family owned property in the county. One PVAMU student, Charles Ballas, sued the county and successfully proved that the questionnaire's use against him was a violation of the Fourteenth Amendment to the U.S. Constitution.[5] However, that victory was narrow, and it wasn't until 1979, when the Supreme Court stepped in,[6] that students in Waller County—and in fact students across our country—could finally vote without the constraints of discriminatory residency questionnaires.[7]

Decades later, officials in Waller County were still using false claims of residency fraud to prevent PVAMU students from voting. In 2004, the county District Attorney claimed that students were not "automatically eligible to vote in county elections because of state-mandated residency standards."[8] Students again filed suit

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[3] *Veasey v. Perry*, 71 F. Supp. 3d 627, 693 (S.D. Tex. 2014), (*aff'd in part and vacated in part on other grounds sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *See also* Ed Pilkington, *Texas rushes ahead with voter ID law after supreme court decision* The Guardian (June 25, 2013), https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision.

[4] https://www.pvamu.edu/1876/2017/03/31/the-walk-of-political-engagement-at-pvamu/

[5] *Ballas v. Symm*, 351 F. Supp. 876, 888 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974).

[6] *Symm v. United States*, 439 U.S. 1105 (1979) (*summarily aff'ing United States v. Texas*, 445 F. Supp. 1245, 1257 (S.D. Tex. 1978) (three-judge court).

[7] *See* Prairie View A&M Univ., *The Walk of Political Engagement* (Mar. 31, 2017), https://www.pvamu.edu/1876/2017/03/31/the-walk-of-political-engagement-at-pvamu/.

[8] Juan A. Lozano, *Prairie View students file another voting rights suit*, Plainview Daily Herald (Feb. 16, 2004), https://www.myplainview.com/news/article/Prairie-View-students-file-another-voting-rights-8814873.php.

challenging these voting changes—which were not precleared by the Department of Justice as mandated by Section 5 of the VRA. In protesting these egregious voting restrictions, two thousand PVAMU students were joined by the former Mayor of the City of Prairie View, Frank D. Jackson, State Representative Al Edwards, and U.S. Congresswoman Sheila Jackson Lee as they marched from campus to the city courthouse.[9]

In 2008, roughly 3,000 of the approximately 8,000 students at PVAMU had registered to vote. But for many, the nearest polling place was 30 miles away—an effectively insurmountable distance for students juggling classes, working, and in many cases lacking cars or access to transportation, similar to the reality for many students today. To call attention to the issue, student-led groups and local civil rights organizations organized a 50-mile march of more than 1,000 students from PVAMU campus to the heart of Houston—where we are assembled today. Before the march took place, the Department of Justice launched an investigation that ultimately pressured the Commissioners Court to provide three temporary polling places.[10] But in a demonstration of the county's ongoing resistance to letting Black students vote, the closest of those polling places was still a mile from campus.

The long history of voter suppression in Waller County and on PVAMU's campus suggests that those polling places would never have been made available if the Department of Justice had not intervened Indeed, while additional polling places were ultimately provided by County officials, the damage had already been done as many students were unable to participate in the state's 2008 presidential primary.

III. Post-*Shelby* Voting Rights Landscape

In recent years, Waller County has continued to pursue and implement discriminatory voting practices. Unfortunately, these documented attempts to limit voting on PVAMU's campus form part of a larger, state-wide and local narrative about elected leaders choosing to restrict rather than expand access to the polls for Black and other voters of color. As I mentioned above, this campaign includes the states' implementation of its photo ID law in 2013 after the *Shelby County* decision.

Moreover, as the November 2018 midterm elections revealed, Texas counties like Waller have not abandoned the startling practices that have made voting extremely difficult historically for PVAMU students. During this historic election, Waller County officials failed to provide Black PVAMU students with anything close to the same, similar, or adequate early voting opportunities that were provided to

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[9] Prairie View A&M Univ., *The Walk of Political Engagement* (Mar. 31, 2017), https://www.pvamu.edu/1876/2017/03/31/the-walk-of-political-engagement-at-pvamu/.

[10] *Id.*

white, older residents in other areas of the county.[11] During the first week of early voting, *no* polling sites were provided on the PVAMU campus. During the second week of early voting, the entire City of Prairie View was allowed only five early polling days, and two of the polling sites were at an off-campus location, inaccessible to many PVAMU students who lack transportation. The County did not grant the PVAMU campus any weekend early voting hours either. By contrast, some majority-white cities in Waller County were given as many as 11 days of early voting over a two-week period, along with voting sites that were open for longer hours and on weekends.[12]

As of the Spring 2018 semester, there were 8,470 people enrolled at PVAMU. The majority of us are eligible voters between the ages of 18 and 21, and more than 80% of us are Black.[13] According to recent Census estimates, Waller County has around 30,700 citizen residents of voting age. This suggests that PVAMU's politically active student body may constitute one fourth of all eligible voters in Waller County. Yet we are consistently denied access to voting opportunities as compared to what the County provides to other residents. Considering the well-documented history and reality of racism and discrimination in Waller County, this stark racial disparity cannot be ignored—and should help to demonstrate to this Committee that legislation to reinstate the full protections of the Voting Rights Act is urgently needed.

IV. Conclusion

Restoring the Voting Rights Act of 1965 to its intended strength is critical to fulfilling the foundational promise of our democracy and removing discriminatory and irrational barriers to our exercise of the right to vote. At the same time, we look to our existing officials, including locally in Waller County, to serve us and not impede us, as has been the case in Waller County's past and present treatment of PVAMU students. To be sure, we need federal legal protections of our voting rights, but we also demand that our representatives uplift our communities and work to improve and not hinder them.

I hope that the information that I have provided today about the state of voting rights for Black students in Waller County, Texas, assists this Committee in documenting the continued need for federal legislation to protect the right to vote. If the recent rise of discriminatory voting laws is not stopped, I fear that more and more people—and particularly young people of color—will become discouraged, disengaged

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[11] NAACP Legal Defense and Educational Fund, Inc., *NAACP Legal Defense Fund Files Suit Against Waller County, Texas for Restricting Early Voting Rights of Black Students* (Oct. 23, 2018), https://www.naacpldf.org/press-release/naacp-legal-defense-fund-files-suit-waller-county-texas-restricting-early-voting-rights-black-students/.

[12] *Id.*

[13] Prairie View A&M Univ., *Enrollment Statistics: Spring 2018*, http://www.pvamu.edu/ir/wp-content/uploads/sites/98/Enrollment-Statistics_SP18.pdf.

and shut out of the democratic process. The right to vote is perhaps the most fundamental component of citizenship. It must not only be restored but strengthened. Thus, I ask all Members of Congress, and the Members of this Committee in particular, to commit themselves to supporting legislation to advance and encourage the voting rights of Black and other minority voters like me.

Mr. COHEN. Thank you, Ms. Allen. And thank you for your efforts.

The next witness is Mr. Michael T. Morley, assistant professor of law at Florida State University. He teaches and writes in the areas of election law, Constitution law, remedies, and federal courts. Received his JD from Yale in 2003. Senior editor of the Yale Law Journal. Served on the Moot 14. Received the Thurmond Arnold prize for best moralist in the Morris Tyler Moot Court of Appeals.

Received his BA from Princeton University. He also served as law clerk for a U.S. Court of Appeals judge in the 11th District, and a special assistant in the U.S. Army's Office of the General Counsel.

Mr. Morley, you are recognized for five minutes.

STATEMENT OF MICHAEL T. MORLEY

Mr. MORLEY. Chairman Cohen, Chairman Nadler, and members of the committee, thank you very much for inviting me here today to testify concerning the Voting Rights Act. As this committee is well aware, the Voting Rights Act is one of the most important and most successful laws Congress has ever enacted.

Within two years of its passage, a majority of voting age African-Americans were registered to vote in every southern state. Today, African-American participation in the electoral process has become—has risen to levels comparable to that for Caucasians. It is extremely rare for a law to make such profound progress on such a critical social problem.

In recent years, the Supreme Court has called into question the constitutionality of various aspects of the Voting Rights Act. Opinions from some individual justices, including in cases arising under Section 2 of the act, voice concerns about applying a disparate impact standard, particularly in the context of voting rights.

In NAMUDNO v. Holder, the court expressed federalism-related concerns about requiring states and municipalities to obtain preclearance for changes to their voting laws under Section 5. And, of course, in Shelby County v. Holder, the Supreme Court invalidated Section 4(b) of the VRA, which identified the covered jurisdictions subject to Sections 5's preclearance requirements.

Congress, including this committee, is considering various alternatives for replacing the coverage formula, and adopting a new one to determine the applicability of Section 5's preclearance requirements.

I urge this committee to adopt a coverage formula that the Supreme Court will uphold under its ruling in City of Boerne v. Flores. Any new coverage standards should be based primarily on a jurisdiction's recent history of constitutional violations, meaning intentional racial discrimination with regard to the electoral process.

Section 3 of the VRA already allows jurisdictions to be bailed into preclearance requirements on a case-by-case basis for engaging in such discrimination. A new coverage standard should not be based on a jurisdiction's violations of Section 2 of the Act, if they are based exclusively on a disparate impact theory of liability, especially when such findings arise in the context of vote dilution cases.

Because the VRA applies to——

Mr. NADLER. Excuse me. Be based on that, could you say why it shouldn't be based on that.

Mr. MORLEY. That is exactly what the rest of my testimony is about.

Mr. NADLER. Okay. Very good.

Mr. MORLEY. Because the VRA applies to elections at all levels of government, Congress enacted the law pursuant to its powers under Section 5 of the 14th Amendment and Section 2 of the 15th Amendment. Both of these provisions allow Congress to enact appropriate legislation for protecting constitutional rights.

The Supreme Court has held that only intentional racial discrimination in voting violates the 14th and 15th Amendments. Facially neutral laws adopted for race-neutral purposes that have racially disparate impact, according to the court, do not violate the Constitution.

The City of Boerne v. Flores, returning to Attorney Nadler's question, holds that laws enacted pursuant to Congress's power under Section 5 of the 14th Amendment must be congruent and proportional to preventing actual violations of constitutional rights. This is much narrower than the standard the Supreme Court previously used during the civil rights era in upholding the VRA's constitutionality.

To maximize the chances a new coverage formula will survive review under Boerne. It should be crafted to target jurisdictions that have engaged in actual constitutional violations, meaning intentional racial discrimination concerning voting rights. Going beyond that, and imposing coverage on jurisdictions that violate Section 2, only under a disparate impact theory, would impose preclearance requirements on jurisdictions that haven't actually violated anyone's constitutional rights.

The Supreme Court has struck down many laws for exceeding Congress's Section 5 powers, including provisions of the Violence Against Women Act, the Americans with Disabilities Act, the Age Discrimination and Employment Act, the Family Medical Leave Act on the grounds they were overbroad, sweeping in too much state conduct that didn't actually violate the Constitution.

This committee has an opportunity to prevent the same thing from happening to the VRA. Put another way, Section 2 of the VRA's prohibition on election laws with disparate impact is a prophylactic protection. It prevents states and localities from adopting certain constitutionally valid laws in order to provide an extra layer of protection for the underlying constitutional rights.

Section 5 preclearance requirements are also another prophylactic protection. They require the Department of Justice or federal court to review changes in coverage jurisdictions, election rules, and procedures to ensure they don't have a discriminatory purpose, or diminish people's ability to elect preferred candidates based on race.

In McCutcheon——

Mr. COHEN. Quickly.

Mr. MORLEY. In McCutcheon v. FEC, the Supreme Court cautioned about adopting prophylactics upon prophylactics. That was a First-Amendment case. Similar reasoning could apply with regard to federalism.

In conclusion, in light of Boerne v. Flores and its progeny, if Congress adopts a replacement formula for triggering Section 5 preclearance, it should be tailored to jurisdictions that have engaged in intentional racial discrimination and not those found to violate Section 2's prophylactic restrictions on laws with disparate impacts.

Thank you very much.

[The statement of Mr. Morley follows:]

Prepared Testimony of Professor Michael T. Morley
Before the U.S. House of Representatives Judiciary Committee
Hearing on "Enforcement of the Voting Rights Act in the State of Texas"
May 3, 2019

Disparate Impact, Preclearance, and Reauthorization of the Voting Rights Act

Introduction

Chairman Nadler, Ranking Member Collins, and Members of the Committee, thank you very much for inviting me here to testify today concerning the Voting Rights Act ("VRA"). The VRA is one of this nation's most important laws. Widely regarded as a "super-statute,"[1] the Act has played a critical role in reducing racial discrimination in voting and eliminating barriers to voting for African-Americans and members of other minority groups.[2] "Within two years of the VRA's enactment, a majority of voting-age African-Americans were registered to vote in every southern state, primarily as a result of the Act's suspension of literacy tests throughout the region and deployment of federal examiners to register new voters."[3] Over the following decades, voter registration rates and voter participation rates for African-Americans have come to generally equal those of whites.[4]

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[1] WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 117-18 (2010) (identifying the VRA as a "classic example of a superstatute"); Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students' Project*, 2014 U. CHI. LEGAL F. 433, 437 (explaining that the VRA is "rightly . . . understood as [a] 'superstatute[]'"). Professors William N. Eskridge, Jr. and John Ferejohn define a "superstatute" as a law that imposes "a new normative or institutional framework for state policy," becomes integrated into the culture, and has a "broad effect" on the law beyond its "four corners." William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

[2] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 264 (2000).

[3] Michael T. Morley, *Republicans and the Voting Rights Act*, 54 TULSA L. REV. 281, 282 (2019) (citing U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 12-13 (1968); Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006)).

[4] U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT, at 200, 211.

In an era where partisanship frequently dominates debates over election reforms, it is useful to reflect on the VRA as it was originally enacted, with strong bipartisan support. In the Senate, Democrats voted in favor of the Act by a vote of 47-16 (75%); Republicans supported it even more overwhelmingly, voting 30-2 (94%) in favor of it.[5] Similarly, House Democrats voted 221-62 (78%) for the Act, while House Republicans voted 111-23 (83%) for it.[6] The bill provides a model for modern-day reforms because it sought to fully protect all aspects of the right to vote for African-Americans and other voters.

The U.S. Supreme Court has recognized that the right to vote is comprised of two complementary and equally important components: the *affirmative right to vote* and the *defensive right to vote*.[7] The affirmative right to vote is the right to be recognized as an eligible voter and permitted to cast a ballot. The Voting Rights Act sought to guarantee this right to African-Americans and other voters by prohibiting racial discrimination with regard to voting[8] and imposing preclearance requirements on states with a history of racial discrimination to prevent them from devising new ways to discriminate.[9]

The defensive right to vote is the right to have one's ballot be counted and "given full value and effect, without being diluted or distorted by the casting of fraudulent" or otherwise invalid ballots.[10] The U.S. Supreme Court has recognized that a person's right to vote is "denied by a

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[5] Anthony J. Gaughan, *Has the South Changed?* Shelby County *and the Expansion of the Voter ID Battlefield*, 19 TEX. J. ON C.L. & C.R. 109, 116 (2013).

[6] *Id.*

[7] *See* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 192-93 (2014).

[8] Voting Rights Act of 1965 ("VRA"), Pub. L. No. 89-110, §§ 2, 11(a)-(b), 12(a), (c)-(e), 79 Stat. 437, 443-45; *see also id.* § 3(b), 79 Stat. at 437.

[9] *Id.* § 5, 79 Stat. at 439; *see also id.* § 3(c), 79 Stat. at 437-38.

[10] Anderson v. United States, 417 U.S. 211, 226 (1974).

debasement or dilution of the weight of [his or her] vote just as effectively as by wholly prohibiting the free exercise of the franchise."[11] The VRA protected the defensive right to vote by prohibiting various types of election fraud. Section 11(c) made it a federal offense to "knowingly or willfully gives false information" about one's "name, address, or period of residence in the voting district for the purpose of establishing [one's] eligibility to register or vote" in a federal election, or to conspire to do so.[12] Likewise, § 11(d) made it illegal to "knowingly and willfully falsif[y] or conceal[] a material fact, or make[] any false, fictitious statements or representations, or make[] or use[] any false writing or document" in any matter within the jurisdiction of a federally appointed election examiner or hearing officer.[13]

Thus, our most fundamental voting law embodies a balance between expanding access to the vote and protecting the integrity of those votes by fighting election fraud. Later statutes such as the National Voter Registration Act[14] and Help America Vote Act[15] continue to reflect that balance, containing measures to facilitate both voter registration and voting while seeking to minimize errors, fraud, and inaccurate information that can undermine the integrity of the electoral process.

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[11] Reynolds v. Sims, 377 U.S. 533, 555 (1964); *see also* Baker v. Carr, 369 U.S. 186, 208 (1962) (holding that the right to vote is violated by "dilution" of a person's vote through means such as "stuffing of the ballot box").

[12] VRA, § 11(c), 79 Stat. at 443.

[13] *Id.* § 11(d).

[14] National Voter Registration Act, Pub. L. No. 103-31, §§ 8(a)(4), 12, 107 Stat. 77, 83, 88-89 (May 20, 1993).

[15] Help America Vote Act, Pub. L. No. 107-252, § 303(a)(2), (4)-(5), (b), 116 Stat. 1666, 1709-12 (Oct. 29, 2002).

Developing a Constitutional Coverage Formula for § 5's Preclearance Requirements

Congress' Power to Prevent Racial Discrimination in Voting—Because the VRA regulates elections for offices at all levels of government, rather than just federal elections (over which Congress may exercise plenary authority[16]), it must be enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. Section 5 permits Congress to enact "appropriate legislation" to enforce the Fourteenth Amendment's substantive provisions,[17] such as the Due Process Clause and Equal Protection Clause[18] (which prohibits racial discrimination and protects the fundamental right to vote), while § 2 empowers Congress to enact "appropriate legislation" to combat racial discrimination in voting.[19]

Historically, the Supreme Court has interpreted these clauses extremely broadly, holding they grant Congress the same sweeping discretion as the Necessary and Proper Clause.[20] Under this approach, the Court deferred to Congress' judgment as to the appropriate steps to take to prevent racial discrimination and protect voting rights.[21] It may use "any rational means" to

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[16] U.S. CONST., art. I, § 4, cl. 1; Smiley v. Holm, 285 U.S. 355, 366 (1932); Burroughs v. United States, 290 U.S. 534, 545 (1934); *see generally* Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV ONLINE 103, 105-09 (2017).

[17] U.S. CONST. amend. XIV, § 5.

[18] *See id.* amend. XIV, § 1.

[19] *Id.* amend. XV, § 2.

[20] U.S. CONST. art. I, § 8, cl. 18; *see* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) ("By including § 5 the draftsmen sought to grant to Congress . . . the same broad powers expressed in the Necessary and Proper Clause . . . ."); South Carolina v. Katzenbach, 383 U.S. 301, 324-27 (1966).

[21] *Morgan*, 384 U.S. at 651 (holding Congress may "exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment"); *South Carolina*, 383 U.S. at 326 ("Congress was to be chiefly responsible for implementing the rights created in § 1 [of the Fifteenth Amendment].").

achieve those goals.[22] Applying this reasoning, the Court easily rejected constitutional challenges to the VRA in the years following its enactment.[23]

In *City of Boerne v. Flores*, however, the Supreme Court rejected this understanding of § 5 of the Fourteenth Amendment, instead adopting a much narrower interpretation.[24] It held that the judiciary is responsible for defining the scope of rights protected by § 1 of the Fourteenth Amendment, and Congress has discretion to decide how to protect those rights—as defined by the judiciary—under § 5. The Court explained that Congress "has been given the power 'to enforce' [the Fourteenth Amendment], not the power to determine what constitutes a constitutional violation."[25] To preserve this boundary, "[t]here must be a congruence and proportionality" between actual constitutional violations as determined by the judiciary and a law Congress enacts under § 5 to prevent or remedy them.[26]

Boerne recognized that § 5 allows Congress to go beyond prohibiting unconstitutional conduct, and may enact reasonably tailored prophylactic legislation to prevent or deter constitutional violations. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[27] The *Boerne* Court pointed to the VRA's preclearance requirement as a permissible type of prophylactic legislation, in large part

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[22] *South Carolina*, 383 U.S. at 324.

[23] *Morgan*, 384 U.S. at 658 (upholding the constitutionality of § 4(e) as a valid exercise of Congress' authority to enforce the Fourteenth Amendment); *South Carolina*, 383 U.S. at 324-27 (upholding the constitutionality of the § 4 coverage formula and § 5 preclearance requirements under Congress' authority to enforce the Fifteenth Amendment).

[24] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[25] *Id.* at 519.

[26] *Id.* at 520.

[27] *Id.* at 532.

because it was "placed only on jurisdictions with a history of intentional racial discrimination in voting."[28] Such limits "tend to ensure" that a statute is a "proportionate" means of combatting constitutional violations.[29]

Preclearance and the Statutory Coverage Formula—In *Shelby County v. Holder*, the U.S. Supreme Court invalidated § 4(b) of the VRA, which set forth the formulas for determining which jurisdictions are subject to § 5's preclearance requirements.[30] Section 5 provides that a covered jurisdiction must obtain either permission ("preclearance") from the U.S. Department of Justice or a declaratory judgment from the U.S. District Court for the District of Columbia before making any change to any of its voting-related "standard[s], practice[s], or procedure[s]."[31] To obtain preclearance or a declaratory judgment, the jurisdiction must show that the change neither had the purpose, nor would have the effect, of "diminishing the ability of any citizen of the United States . . . to elect their preferred candidates of choice" on account of race, color, or membership in a language minority group.[32]

Section 4(b) identified covered states, counties, and municipalities "by reference to literacy tests and low voter registration and turnouts in the 1960s and early 1970s."[33] The Court pointed out that, in the 40 years since the VRA was originally enacted, "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans

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[28] *Id.* at 533 (citing City of Rome v. United States, 446 U.S. 156, 177 (1980)).

[29] *Id.*

[30] Shelby County v. Holder, 570 U.S. 529 (2013).

[31] 52 U.S.C. § 10304(a).

[32] *Id.* § 10304(b).

[33] *Shelby County*, 570 U.S. at 551.

attained political office in record numbers."[34] Section 4(b) "ignore[d] these developments, keeping the focus on decades-old data . . . rather than current data reflecting current needs."[35] The Court held that, if Congress is to subject certain jurisdictions to preclearance requirements, it must do so based on current facts and data and "cannot simply rely on the past."[36] Consequently, it held § 4(b)'s coverage formula unconstitutional,[37] thereby precluding any jurisdictions from being deemed "covered" unless Congress amends the formula or they are brought within the aegis of the VRA pursuant to individualized determinations under § 3(c).[38]

Developing a New Coverage Formula—If Congress attempts to develop a new coverage formula to replace § 4(b) and revitalize § 5, it should identify covered jurisdictions based on:

(i) current or otherwise contemporaneous disparities in voter registration or participation rates for racial and language minority groups between covered and non-covered jurisdictions, and

(ii) a pattern of violations of the Fourteenth Amendment right to vote or Fifteenth Amendment's prohibition on racial discrimination in voting.

It should avoid adopting a coverage formula based on violations of § 2 of the VRA based on a law's disparate impact on members of certain groups, in the absence of intentional racial discrimination.

The Voting Rights Act is a broad remedial statute that allows Congress to prevent and combat racial discrimination in voting to assure that all Americans have an equal chance to

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[34] *Id.* at 553.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 557.

[38] 52 U.S.C. § 10302(c).

participate in the democratic process and elect candidates of their choice. At its core, the VRA prohibits unconstitutional laws that facially discriminate based on race or that were enacted with invidiously discriminatory motives. As amended in 1982, § 2 of the VRA also establishes broad prophylactic protection against laws with racially disparate impacts.[39] The U.S. Supreme Court has held that laws with racially disparate impacts do not violate the Fourteenth or Fifteenth Amendments.[40] Thus, many of the state and local election-related laws that § 2 prohibits as a preventive measure may very well be constitutional. *Boerne* recognizes that laws enacted to enforce constitutional rights may be somewhat overbroad, sweeping in some constitutionally valid state and local enactments to provide extra protection to those underlying rights.

Section 5 of the VRA is another prophylactic measure that requires covered jurisdictions to receive permission from the federal government before changing their election-related laws and procedures. The Supreme Court has recognized that preclearance imposes a heavy burden on state sovereignty, disrupting the typical balance of authority between the federal government and the states in our federal system and upending the presumption of validity typically accorded governmental enactments.[41] Again, the Court has upheld § 5 as a valid prophylactic measure, at least when applied to jurisdictions with a relatively recent history of engaging in intentional racial discrimination and violating the constitutional right to vote.

To subject jurisdictions to § 5's preclearance requirements based on violations of § 2 resulting from a disparate impact theory, however, raises strong constitutional concerns under

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[39] *See* Voting Rights Amendments Act of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (June 29, 1982), *codified at* 52 U.S.C. § 10301.

[40] City of Mobile v. Bolden, 446 U.S. 52, 62, 66 (1980) (plurality op.) (citing Washington v. Davis, 426 U.S. 229 (1976)); *see also* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481 (1997).

[41] *Shelby County*, 570 U.S. at 535 (characterizing § 5 as a "drastic departure from the basic principles of federalism").

Boerne. Such a measure would subject a jurisdiction to § 5's preclearance requirements based on its enactment of laws or adoption of other voting-related procedures that were never held unconstitutional. Under *Boerne*'s "congruence and proportionality" test, a jurisdiction likely cannot be subject to § 5's prophylactic requirements based solely on its violations of § 2's prophylactic requirements. The Supreme Court has rejected such a "prophylaxis-upon-prophylaxis" approach in the context of campaign finance law,[42] and is likely to do so here, as well. It has likewise invalidated broad remedial measures Congress tried to enact under § 5 that were not sufficiently predicated upon actual constitutional violations.[43] Thus, if Congress adopts a new coverage formula that allows jurisdictions to be subject to § 5's preclearance requirements based on violations of § 2 of the VRA arising solely from a disparate impact theory, a strong likelihood exists the Supreme Court would invalidate it under *Boerne*.[44] If Congress wishes to re-activate § 5, it should do so based on evidence of actual constitutional violations (*i.e.*, intentional racial discrimination).

Texas and the Voting Rights Act

The State of Texas has been embroiled in numerous VRA cases over the past two decades. This Section will discuss Texas' VRA litigation concerning three main issues: congressional

[42] McCutcheon v. FEC, 572 U.S. 185, 221 (2014).

[43] Coleman v. Court of Appeals of Md., 566 U.S. 30, 33, 37 (2012) (plurality op.) (invalidating provision of the Family Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D)); Bd. of Trs. v. Garrett, 531 U.S. 356, 364, 374 (2001) (invalidating provision in Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12201-02); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000) (invalidating provision in the Age Discrimination in Employment Act, 29 U.S.C. § 216(b)); United States v. Morrison, 529 U.S. 598, 625-27 (2000) (invalidating provision in the Violence Against Women Act, 42 U.S.C. § 13981); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 631, 640, 645-47 (1999) (invalidating provision in the Plant Remedy Act, 35 U.S.C. §§ 271(h), 296(a)).

[44] For a more detailed analysis of *Boerne* and the VRA, see Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053 (2018).

redistricting following the 2000 census, congressional redistricting following the 2010 census, and Texas' voter identification law.

Congressional Redistricting Following the 2000 Census—Following the 2000 census, the state legislature was unable to agree to a plan for redrawing its congressional districts. Due to the substantial population growth confirmed by the new census, its existing congressional map was invalidated and replaced with districts drawn by a three-judge panel of the U.S. District Court for the Eastern District of Texas.[45] The court's map largely left in place a strong political gerrymander in favor of the Democratic party that had been established during redistricting following the 1990 census.[46] That 1990 plan "was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other."[47] The U.S. Supreme Court recognized that the plan "entrenched" the Democratic party within Texas' congressional delegation, despite the fact that it was "on the verge of minority status" within the state.[48]

In 2003, the Texas legislature adopted a mid-decade replacement plan that made "party balance" in the state's congressional delegation "more congruent to statewide party power."[49] When the challenge to that mid-decade redistricting reached the U.S. Supreme Court, Justice Anthony Kennedy opined that the legislature was entitled to replace the court-drawn plan with its

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[45] Balderas v. Texas, No. 6:01-CV-158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 16, 2001).

[46] Henderson v. Perry, 399 F. Supp. 2d 756, 768 (E.D. Tex. 2005) ("The map drawn by this court in 2001 perpetuated much of this gerrymander."), *aff'd in part and rev'd in part sub nom.* League of United Latin Am. Citizens ("LULAC") v. Perry, 548 U.S. 399 (2006).

[47] *Id.* (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1510 (2003)).

[48] *LULAC*, 548 U.S. at 419 (Kennedy, J.).

[49] *Id.*

own, and "no presumption of impropriety should attach" to it.[50] A majority of the Court joined Justice Kennedy in concluding that one of the districts in the map, District 23, covering a "large land area in West Texas," violated § 2 of the VRA because it impermissibly diluted Hispanic voting strength.[51] A plurality went on to reject a VRA challenge to District 24, holding it did not impermissibly dilute African-American voting strength.[52] On remand, the district court redrew the boundaries of five congressional districts to correct the defect in District 23.[53]

Congressional Redistricting Following the 2010 Census—Following the 2010 census, the Texas legislature adopted a new congressional district map adding four new districts.[54] Because Texas was a covered jurisdiction under the VRA, the map had to receive preclearance under § 5 of the VRA before it could take effect. By the time of the 2012 congressional election, the U.S. District Court for the District of Columbia still had not reached a decision as to whether the new maps violated § 5. Accordingly, a three-judge panel of the U.S. District Court for the Western District of Texas adopted its own new map, declining to "give any deference to the Legislature's enacted plan."[55] In a per curiam opinion, with Justice Thomas concurring separately, the U.S. Supreme Court reversed. It explained the three-judge panel should have "tak[en] guidance" from the state's proposed map, except for the parts the plaintiffs could show likely violated the

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[50] *Id.* at 416.

[51] *Id.* at 423, 442 (majority op.).

[52] *Id.* at 446 (plurality op.).

[53] LULAC v. Perry, 457 F. Supp. 716, 721 (E.D. Tex. 2006).

[54] *See* Abbott v. Perez, 138 S. Ct. 2305, 2314 (2018).

[55] Perez v. Perry, 835 F. Supp. 2d 209, 213 (W.D. Tex. 2011), *rev'd*, 565 U.S. 388 (2012) (per curiam).

Constitution or § 2 of the VRA, or that stood "a reasonable probability of failing to gain § 5 preclearance."[56]

On remand, the Western District crafted and preliminarily imposed a new congressional map that "departed significantly" from the state's proposed plan.[57] Shortly thereafter, the U.S. District Court for the District of Columbia denied the state's plan preclearance under § 5.[58] In 2013, the state legislature repealed its proposed redistricting plan and adopted the Western District's new map as its own.[59] Four years later, in a challenge to the legislature's enactment of the Western District's plan, that very court held that District 27 violated § 2 of the VRA because it impermissibly diluted the Latino vote, and District 35 was an unconstitutional racial gerrymander—even though the court itself had included those districts in the map it ordered.[60]

The U.S. Supreme Court reversed in a 5-4 decision. The majority declared, "[W]hen all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination."[61] It explained, "Not only does the direct evidence suggest that the 2013 Legislature lacked discriminatory intent, but the circumstantial evidence points overwhelmingly to the same conclusion."[62] The Court went on to reject the § 2 claim on the grounds "the geography and demographics of south and west

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[56] Perez v. Perry, 565 U.S. 388, 394-95 (2012) (per curiam).

[57] *Abbott*, 138 S. Ct. at 2316.

[58] Texas v. United States, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013).

[59] *Abbott*, 138 S. Ct. at 2317.

[60] Perez v. Abbott, 274 F. Supp. 3d 624, 686 (W.D. Tex. 2017), *rev'd sub nom.* Abbott v. Perez, 138 S. Ct. 2305 (2018).

[61] *Abbott*, 138 S. Ct. at 2327.
[62] *Id.* at 2328.

Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan."[63]

Texas' Voter Identification Law—In 2011, the Texas legislature enacted Senate Bill 14 ("SB 14"), which required voters to show identification to vote at a polling place. The U.S. District Court for the Southern District of Texas held that the law was passed at least partly due to intentional racial discrimination against minority voters, and that it violated § 2 of the VRA due to its disparate impact against such voters.[64] The U.S. Court of Appeals for the Fifth Circuit, sitting *en banc*, held that the district court's evidence of intentional racial discrimination was "infirm," and remanded for reconsideration of that issue.[65] It affirmed the district court's ruling, however, that the law's disparate impact violated § 2.[66] Due to the "interlocutory" posture of the case, the U.S. Supreme Court denied immediate review.[67]

On remand, the district court reinstated its finding that the legislature had acted, "at least in part," with a discriminatory purpose.[68] A few months later, the state legislature amended its voter ID law to attempt to address the defects in its previous enactment, but the district court enjoined the amended version of the law.[69] Based on its finding of intentional discrimination, the

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[63] *Id.* at 2331. The Court did conclude that one district for the Texas House of Representatives was an invalid racial gerrymander because the State tried to increase Latino voting power by redrawing an African-American district so that its population would be over 50% Latino. *Id.* at 2334.

[64] Veasey v. Perry, 71 F. Supp. 3d 627, 694 (S.D. Tex. 2014), *aff'd in part and rev'd in part*, 796 F.3d 487 (5th Cir. 2015), *aff'd in part and rev'd in part sub nom.* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc). The district court entered a preliminary injunction against the voter ID law, *Veasey*, 71 F. Supp. 3d at 707 & n.583, but a panel of the Fifth Circuit stayed the ruling, Veasey v. Perry, 769 F.3d 890, 895 (5th Cir. 2014), and the Supreme Court declined to disturb that ruling, Veasey v. Perry, 135 S. Ct. 9 (2014).

[65] Veasey v. Abbott, 830 F.3d 216, 234 (5th Cir. 2016) (en banc).

[66] *Id.* at 243.

[67] *See* Abbott v. Veasey, 137 S. Ct. 612 (2017) (Roberts, C.J., statement respecting denial of certiorari).

[68] Veasey v. Abbott, 249 F. Supp. 3d 868 (S.D. Tex. 2017).

[69] Veasey v. Abbott, 265 F. Supp. 3d 684 (S.D. Tex. 2017), *rev'd*, 888 F.3d 792 (5th Cir. 2018).

district court also "ordered the commencement of a VRA § 3(c) preclearance bail-in hearing."[70] The U.S. Court of Appeals for the Fifth Circuit, however, reversed.[71] It held the district court "had no legal or factual basis" for enjoining the amended version of the voter ID law.[72] The Fifth Circuit noted that the statute "affords a generous, tailored remedy for the actual violations found."[73] It added, "[T]he State has acted promptly following this court's mandate, and there is no equitable basis for subjecting Texas to ongoing federal election scrutiny under Section 3(c)."[74]

Conclusion

The Voting Rights Act is a critical statute that ensures the election process remains open to all. In reauthorizing the law, considering a new coverage formula for § 5's preclearance requirements, and studying the scope and application of § 2, Congress should ensure the statute continues to fall within the scope of its powers as construed by the U.S. Supreme Court.

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[70] Veasey v. Abbott, 888 F.3d 792, 798 (5th Cir. 2018).

[71] *Id.*

[72] *Id.* at 801.

[73] *Id.*

[74] *Id.* at 804.

Mr. COHEN. Thank you, sir. Ms. Mimi Marziani——

Ms. MARZIANI. That is correct.

Mr. COHEN [continuing]. Is the president of the Texas Civil Rights Project, previously directed the voting rights program for multiple political campaigns, and committees, also overseeing compliance with election law. Served as council for the Democracy Program of the Brennan Center for Justice at NYU School of Law, where she litigated election law cases in federal courts across the country, including before the United States Supreme Court. In that role, she worked to promote voting rights.

She received her JD Cum Laude from NYU School of Law, and her BA—dynamite, dynamite——

Ms. MARZIANI. Vandy. I know.

Mr. COHEN [continuing]. When Vandy starts to fight, down the field, with blood to yield for Vanderbilt University. My alma mater.

Ms. Marziani, you are recognized for five minutes.

STATEMENT OF MIMI MARZIANI

Ms. MARZIANI. Thank you. It is a great honor to be here this morning and testify before the subcommittee. As noted, I draw my testimony from my experience as president of the Texas Civil Rights Project and appear on behalf of that organization today.

I also bring my experience as chairwoman of the Texas State Advisory Committee to the U.S. Commission on Civil Rights, so I appreciate you talking about our report. And as a professor of election law and policy at UT, I have a lot of thoughts about what you just said. And I also bring my decades-long career in voting rights and election reform.

So, in Texas, since Shelby County, the voting rights of people of color and language minorities have suffered since the preclearance provisions were rendered inoperable. And we have heard a little bit about the court findings and the photo ID cases and the redistricting cases that have concluded as much, based on voluminous records.

So today I wanted to highlight a couple of newer laws and policies by the state that create additional barriers to voting, and are almost certainly disproportionately born by communities of color.

First, I am going to talk about a 2019 policy targeting naturalized citizens to be purged from the voter registration rolls. This is a litigation that TCRP, and MALDEF, and others work together to happily resolve. Second, I want to talk about a 2017 law eliminating straight ticket voting, which is more commonly used by voters of color. And third, I want to talk about a 2017 state law that creates a new class of election crimes that will expand the power and discretion of the Texas attorney general, and increase the already high legal risk for Texans engaged in voter registration drives, again, which are disproportionately used by communities of color.

In my written testimony I actually said that Texas had the worst laws around voter registration drives. Unfortunately, we may have just ceded that to Tennessee. Crazy times.

So, without Section 5, all of these laws in Texas have been enacted despite their retrogressive effects. So, indeed, a federal court has now ruled that the state's efforts to target almost 100,000 vot-

ers in an elicit voter purge use, and I'm quoting, "The power of the government to intimidate perfectly legal naturalized American."

In Texas, nine in ten naturalized citizens are people of color. Of course, large majorities are also language minorities. But the state proceeded with a sloppy ham-handed, that's the court's word, it is not mine, ham-handed purge effort despite this obviously disparate impact. At worst, the disparate impact, indeed, was a feature of this program, and not just a bug.

In 2017, state lawmakers passed a law to eliminate straight-ticket voting apparently with the hopes that voters in urban areas would skip down ballot races. We have done a preliminary analysis of voting data in San Antonio which shows that voters of color use straight-ticket more than Anglo voters, and that is regardless of party preference.

It is also well known, and I see Representative Green nodding, that in Harris County here, where we have the largest non-white population in the entire state, there are particularly long ballots because of the number of judicial seats that are at play every election cycle.

So not only does removing straight-ticket voting have a retrogressive effect, but it also guarantees that we will have longer lines in the largest communities of color in Houston in the next election. And this law is set to go into effect in 2020.

Finally, and despite whatever information you have nationally, in Texas there is no doubt that Texas's voter rolls are much older and whiter than the population at large, and, indeed, than the citizen voting age population—voting age population. And one reason for this is because Texas criminalizes voter registration drives, even though black and Latino voters are twice as likely to use voter registration drives to get registered.

Since just before the Shelby County decision, the state has continued to ratchet up rules to make the process of organizing drives complicated, confusing, and wrought with legal liability. And then in 2017, the state created a new class of felony crimes to penalize simple mistakes made by organizers and volunteers when they were trying to register their neighbors to vote.

The predictable results of this law will be to further decrease voter registration drives and penalize communities of color. Without preclearance the full impact of these laws is actually not known right now. The information rests with government actors. But I know enough to be confident that these measures would have been subjected to heightened scrutiny by any U.S. attorney general serious about enforcing the Voting Rights Act.

Thank you again for having me this morning, and I'm, of course, happy to answer any questions you all might have.

[The statement of Ms. Marziani follows:]

INTRODUCTION

It is a great honor to testify before this body, the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives' Committee on the Judiciary. Thank you for inviting me to share on-the-ground insights about the state of voting rights in Texas.

For my testimony this morning, I draw from my work as President of the Texas Civil Rights Project ("TCRP"),[1] and appear on behalf of that organization. I also bring my experience as Chairwoman of the Texas State Advisory Committee to the U.S. Commission on Civil Rights ("Texas SAC"),[2] as an adjunct professor of "Election Law and Policy" at the University of Texas School of Law, and from my decade-long career working to advance voting rights and election reform.[3]

I have been asked to identify voting law changes in Texas that have harmed voters of color and voters who speak a language other than English since the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder* rendered Section 5 of the Voting Rights Act inoperable. That decision lifted preclearance requirements from Texas, permitting our state to enact voting law changes without federal oversight. I understand that other members of my panel will discuss Texas' discriminatory photo ID law and racially gerrymandered statewide maps, laws that were initially rejected by federal courts pursuant to Section 5 but enforced by the State after the *Shelby County* ruling. These discriminatory acts, as documented by voluminous litigation records and factual findings by federal courts, are clear and egregious examples of the need for the protection that Section 5 provided. I thank my fellow panelists for sharing this information.

I focus my testimony elsewhere, on newer state laws and policies that create additional barriers to voting and are almost certainly borne disproportionately by voters of color. Unfortunately, without the preclearance process, the burden of proving this disparate burden falls upon targeted communities themselves, as well as organizations like TCRP that serve Texas communities. Such proof often requires access to data and other information that is held by state actors and can be

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[1] We are Texas lawyers for Texas communities, serving the rising movement for equality and justice. Our Voting Rights Program tackles the systemic issues that suppress democratic participation in Texas—from voter registration to the moment when an individual casts their ballot. Through litigation and advocacy, TCRP fights to turn the tide on the Texas' abysmal voting rights record by removing barriers to voter registration and participation, supporting grassroots voter mobilization efforts and opposing new attempts to suppress voting. Learn more at texascivilrightsproject.org.

[2] Our committee conducted a study of voting rights in Texas in 2018, including an all-day public hearing in Houston in March 2018. Our findings were published in a report entitled *Voting Rights in Texas* available at https://www.usccr.gov/pubs/2018/07-23-TX-Voting-Rights.pdf.

[3] My curriculum vitae has been submitted to the Subcommittee under separate cover.

onerous and expensive—and sometimes, impossible—for members of the public to access and analyze.

Thus, without preclearance, the full impact of the laws and policies I highlight today is not known. I am confident, however, that the data available to TCRP strongly suggests that these measures would have been subjected to heightened scrutiny by any U.S. Attorney General committed to meaningful enforcement of the Voting Rights Act. It's also clear that, in Section 5's absence, Texas lawmakers failed to undertake any meaningful review of the effect these changes would have on persons of color or, worse yet, undertook the changes *despite* knowing they would have a negatively disparate impact on these communities.

Before we begin, consider an important background fact about Texas: race, age and socioeconomic status are closely correlated. Indeed, the population of Texans under 40 is 35.5% Anglo (meaning, non-Hispanic Caucasian) and 58% Black or Latinx; over 40, those numbers flip to 56.5% Anglo and 38% Black or Latinx. Moreover, the extensive record in the Texas photo ID litigation confirmed that, "African-Americans and Hispanics are more likely than Anglos to be living in poverty because they continue to bear the socioeconomic effects caused by decades of racial discrimination."[4] Accordingly, in Texas, voting changes that disparately impact young people or poor people necessarily also disparately impact people of color. A law or policy that may not target persons of color on its face will discriminate against persons of color in fact if it has the effect of suppressing the voting rights of young or poor people.

HARMS FROM RECENT VOTING LAW CHANGES

Since 2017, at least three state law and policy changes have created additional barriers to voting that are almost certainly borne disproportionately by persons of color:

- a 2019 policy targeting naturalized citizens to be purged from the voter registration rolls;
- a 2017 state law eliminating straight ticket voting; *and*
- a 2017 state law creating a new class of election law "conspiracy" crimes, increasing liabilities for Texans engaged in voter registration drives.

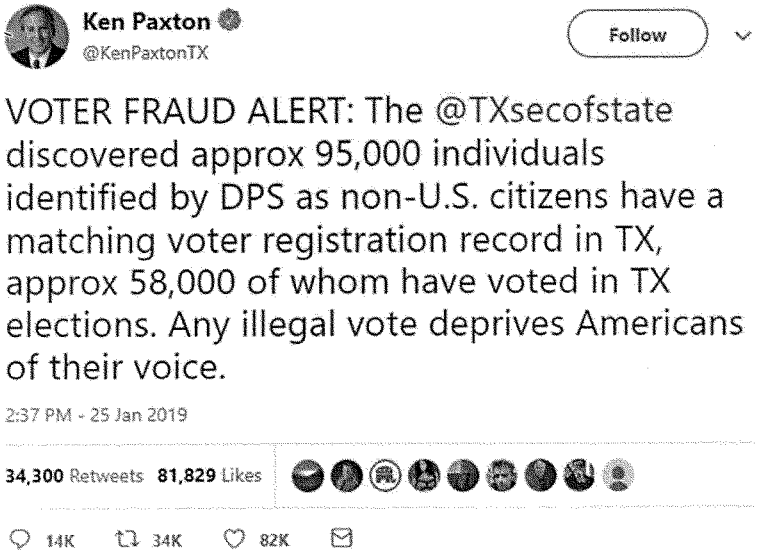
Without the oversight imposed by Section 5, these laws and policies were enacted with no meaningful review of their impact. Post-implementation, the voter purge policy was subject to litigation and the State's policy changed due to a court settlement finalized just days ago. The other

[4] *Veasey v. Perry*, 71 F. Supp. 3d 627, 664 (S.D. Tex. 2014).

two laws remain on the books. Their full effects are just now being realized as affected communities weigh their legal options with the best use of their limited resources.

2019 VOTER PURGE

In Texas, as everywhere, election officials have an obligation to remove voters from the rolls if they have moved, died or are otherwise ineligible, but can only do so based upon a careful, uniform, reliable process. On January 25, 2019, the Texas Secretary of State issued an explosive advisory claiming that there are 95,000 people on the voter rolls who indicated that they were not citizens in paperwork submitted to the department of motor vehicles, and that 58,000 of these individuals subsequently voted in at least one election. The Secretary immediately sent lists of these "fraudulent" voters to Texas counties and the Texas Attorney General for investigation and created a media firestorm, fanned by instant cries of "voter fraud" on social media by the President of the United States, Texas' Governor, Texas' Attorney General, and others.



It became apparent, almost immediately, that the State's process was deeply flawed and in fact erroneously flagged tens of thousands of naturalized citizens. Nearly 30,000 individuals, for instance, had already proven their citizenship to state agencies. In some counties, such as McLennan County, every name on the Secretary of State's list proved erroneous, following investigations by county officials. In Harris County, Texas' largest, roughly 60% of the list was immediately eliminated because the voters had either already proven their citizenship at the department of motor vehicles or had been registered by Harris County officials themselves at naturalization ceremonies.

Litigation ensued within days, including a lawsuit brought by TCRP and other legal advocacy groups on behalf of civic engagement organizations and a targeted voter.[5] A federal judge quickly halted the attempted purge, describing it as "ham-handed" and as exemplifying "the power of government to intimidate the least powerful among us."[6] The court emphasized that the burden was borne by "perfectly legal naturalized Americans" and that "no native born Americans were subjected to such treatment."[7]

The parties settled on April 26, 2019, less than 90 days after the purge was announced. According to the terms of the settlement, the State will rescind its original advisory announcing the purge effort and agree to a new voter database maintenance process that is much more limited in scope. The State has also agreed to provide and maintain information regarding the implementation of the process, which the plaintiffs will monitor. Texas will pay nearly half a million dollars in attorneys fees and litigation costs.

According to Census data, over 87% of Texas's naturalized citizens are people of color—specifically, Black, or of Latinx or Asian origin. Large numbers are, of course, language minorities. At best, the State proceeded with a sloppy, "ham-handed" purge effort despite the obvious disparate impact on persons of color. At worse, the disparate impact was a feature of the program, not a bug. Either way, had Section 5 been in effect, Texas would have been forced to publicly grapple with the racially discriminatory effects of this policy *before* it threatened the voting rights of tens of thousands of

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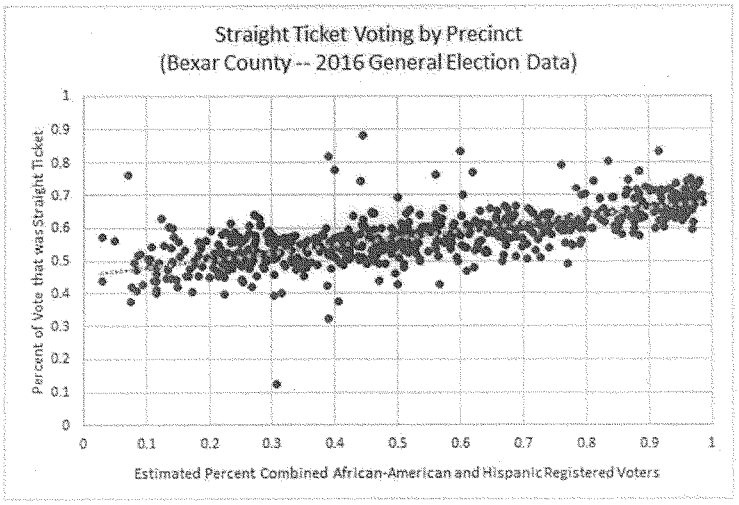
[5] TCRP, ACLU of Texas, the national ACLU Voting Rights Project, Demos, and the Lawyers' Committee for Civil Rights Under Law filed the lawsuit against Texas Secretary of State David Whitley and Director of Elections Keith Ingram, as well as local elections officials in eight counties, representing Move Texas Civic Fund, Jolt Initiative, the League of Women Voters of Texas and an individual voter. Two separate lawsuits were filed by Texas LULAC and the Campaign Legal Center and by the Mexican American Legal Defense and Education Fund on behalf of additional community organizations and Texas voters. The cases were consolidated as Texas *LULAC v. Whitley*, 5:19-cv-00074.
[6] Order, *LULAC v. Whitley*, No. 5:19-cv-00074, Dkt. 61 at 1 (Feb. 27, 2019).
[7] *Id.*

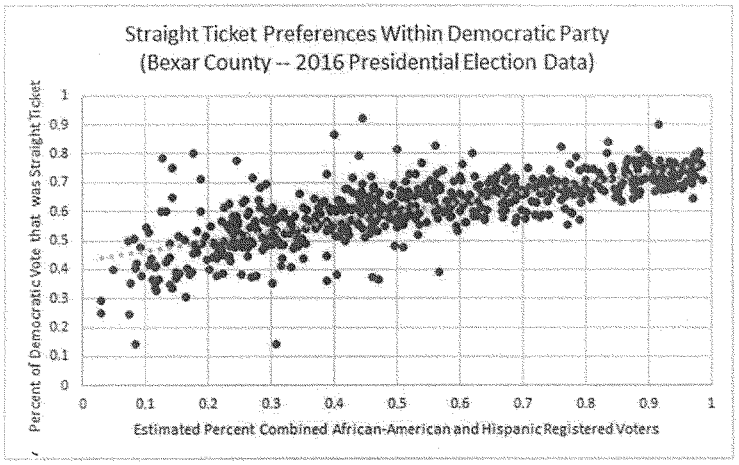
persons of color and sowed fear into immigrant communities. It is hard to imagine that this program would have been precleared.

2017 LAW PROHIBITING STRAIGHT TICKET VOTING

In 2017, the Texas Legislature passed House Bill 25, which eliminated straight ticket voting in Texas and is set to take effect for the first time in the 2020 elections. Although facially neutral, the discriminatory impact of eliminating straight ticket voting is evident from our preliminary analysis of available data from Bexar County (shown below). Accordingly, we believe this law would have had little chance of getting pre-cleared under the pre-*Shelby County* regime.

Our preliminary analysis of voting patterns in Bexar County, home to San Antonio, indicates a strong relationship between race and straight ticket preference. Moreover, this correlation is not simply a product of partisan preference since the relationship appears to grow even stronger when one limits the analysis to voters who voted for the Democratic presidential candidate in the last election. Out of those who voted for the 2016 Democratic candidate, voters in majority Black and Latinx precincts strongly preferred casting straight party tickets, while the majority Anglo precincts tended towards casting individual votes for the candidate.





In certain jurisdictions the practical impact of taking away straight ticket voting is especially pronounced for communities of color. In particular, Harris County, home to Houston, is known for having long ballots given the large number of countywide judicial offices that are in play each cycle. The 2018 ballot, for instance, featured a total of 92 races, including 78 state judicial races. Harris County is also home to the largest non-White population in the state, including the largest Black population in Texas and the second largest Latinx population in the entire nation. Thus, the direct result of eliminating straight ticket voting will be to drastically increase the time it takes for Texas's largest communities of color to cast their votes.

This law was seemingly passed with the hope that voters of color would skip the down-ballot races in urban areas such as Harris County. Regardless of whether that turns out to be true in practice, the Texas Legislature's choice to remove the preferred voting method of voters of color is retrogressive in effect and, accordingly, suspect. Indeed, even the State leadership's purported rationale for the law is questionable. They claimed that eliminating straight-ticket voting forces greater individualized consideration of each candidate, but this logic indicates that voters of color are incapable of making their own well-reasoned voting decisions.

The discriminatory impact of the no-straight-ticket-voting law is precisely what the Voting Rights Act was meant to prevent. But the absence of Section 5 protection allowed the Texas Legislature to freely enact this law, despite its retrogressive effects and suspect rationale. Without federal oversight,

the only recourse to communities of color is expensive litigation under Section 2 of the Voting Rights Act after the law is implemented.

2017 "ORGANIZED ELECTION FRAUD" LAW

Texas consistently boasts some of the lowest voter registration rates in the country, with millions of eligible voters excluded from the rolls. But even worse is that the current electorate does not adequately represent the population. Asian-American and Latinx voters are significantly less likely to be registered than their Anglo peers, and young voters are woefully underrepresented,[8] translating to an electorate that is older and whiter than Texas' citizen voting-age population as a whole. Disparate registration rates are at least partially due to laws and policies that create systemic barriers to voter registration for people of color, young people and poor people.

One such set of policies govern third-party voter registration activities, such as voter registration drives. These policies have a disparate impact because it is well established that persons of color and young people are much more likely to register to vote through third-party activities. For instance, in the November 2016 election, Black and Latinx voters were nearly twice as likely as white voters to have registered through a voter registration drive than through other means.[9] Additionally, more than 10% of all young voters registered to vote at school, resulting (almost certainly) from voter registration drives at those schools.[10]

The registration drive laws are complicated, but the upshot is this: it is a crime to register voters in Texas unless you are certified in advance by every Texas county where you register voters. If you mistakenly collect a form from a voter who resides in a county where you have not been deputized, you have "purport[ed] to act as a volunteer deputy registrar" without "effective appointment" and have committed a misdemeanor crime punishable by $500.[11] Once deputized in a county, the State

[8] For the 2016 general election, only 48% of Texans ages 18 to 24 were registered to vote, while 78% of Texans over the age of 65 were registered. This is seven percentage points lower than the national average rate for eligible voters ages 18-24.
[9] *See* U.S. Census Bureau, Voting and Registration in the Election of November 2016 (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html. Note that while these counts include voter registration by other means, voter registration drives are viewed as an increasingly important source of registration, "especially for low-income citizens, students, members of racial and ethnic minority groups, and people with disabilities." Wendy R. Weiser & Lawrence Borden, Brennan Center for Justice, *Voting Law Changes in 2012* (2011), *available at* https://www.brennancenter.org/publication/voting-law-changes-2012.
[10] *Id.*
[11] Tex. Elec. Code § 13.044.

strictly regulates the conduct of "volunteer deputy registrars" and thus, effectively restricts voter registration drives themselves. Freedom summer would have been illegal in Texas.

Beginning just before the *Shelby County* decision, the State has continued to introduce new rules to make the process of organizing voter registration drives increasingly complicated, confusing and wrought with legal liability. As one community organizer memorably put it, Texas law requires "a PhD in voter-obstacle-ology to navigate the system."[12] As I have detailed elsewhere, the predictable result of this regime has been to significantly chill voter registration drives since 2011, one of the most effective methods to engage historically disenfranchised voters of color and young voters who are new to the process.[13] No other state has imposed such a punishing web of regulations on voter registration drives.

In 2017, Texas upped the stakes yet again by adding a new layer of criminal penalties in a sweeping law entitled "Engaging in Organized Election Fraud Activity." Effective September 1, 2017, this law makes it a state jail felony to act with three or more persons in a so-called "vote harvesting organization" which is broadly defined as any collaborative effort that runs afoul of the Texas Election Code, including the laws governing voter registration drives.[14] Violations under the new scheme are punishable by a mandatory minimum sentence of at least 180 days in jail.

Under the 2017 "Organized Election Fraud" law, the Attorney General could prosecute, *for felony crimes*, persons associated with civic engagement groups who are engaged in voter registration activities just because they mistakenly run afoul of complicated and often vague regulations. This might mean, for instance, that community organizers and grassroots volunteers unwittingly collect registration forms from voters who live in counties encompassed by their city but in which they are not deputized.[15] Or perhaps volunteers accidently deliver registration forms to county officials six

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[12] Ari Berman, *Texas's Voter-Registration Laws Are Straight Out of the Jim Crow Playbook*, THE NATION, Oct. 6, 2016, https://www.thenation.com/article/texass-voter-registration-laws-are-straight-out-of-the-jim-crow-playbook/.

[13] *See generally* Mimi Marziani & Robert Landicho, *What Starts in Texas Doesn't Always Stay in Texas: Why Texas's Systematic Elimination of Grassroots Voter Registration Drives Could Spread*, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY (May 2018) https://www.acslaw.org/wp-content/uploads/2018/07/What-Starts-in-Texas.pdf.

[14] Tex. Elec. Code § 276.011. "Collaboration" is a tenuous term, and may be found even if "participants may not know each other's identity, membership in the organization may change from time to time, and participants may stand in a candidate-consultant, donor-consultant, consultant-field operative, or other arm's length relationship in the organization's operations."

[15] Dissenting in *Voting for America v. Steen*, 732 F.3d 382 (2013), Court of Appeals Judge W. Eugene Davis, made this point:

days after collection, violating the five-day period prescribed by law, or unwittingly put registration forms in the mail rather than deliver them in person.[16]

The full effects of this law are just now being realized. But two facts point to a likely disparate impact on communities of color: *First,* the Texas Attorney General has ramped up prosecutions under the Texas Election Code in recent months, under a new "Election Fraud Unit."[17] Based on data collected by TCRP, people of color appear to be targeted and are receiving longer sentences. *Second*, as detailed above, restricting third-party registration activity in and of itself disparately impacts communities of color in Texas, given their greater use of drives to become registered to vote.

Thus, the combination of the Attorney General's newly expanded power, direct attacks on voters of color and the morass governing voter registration drives creates an environment where community registration efforts will almost certainly continue to decrease—the risks are just too high. If even one high-profile case was brought against a civic engagement group, justified or not, registration activity would surely plunge.

At the very least, the preclearance process would have required the State to provide data and other information to ascertain the justifications for the 2017 "Organized Election Fraud" law and the extent to which the law will in fact decrease registration opportunities in communities of color. Without Section 5, communities of color are simply left waiting for the "other shoe" to drop, with little recourse available in the meantime.

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As of the date of this testimony, there are multiple pending bills that threaten voting rights in communities of color in the current legislative session but, nonetheless, have significant support from Texas political leaders. Without the deterrent effect of Section 5, at least some of these bills have been advancing in the legislative process with no meaningful inquiry into their likely impact on

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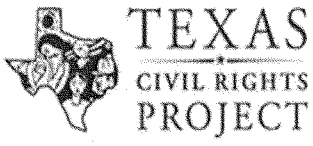
> [A] VDR must be appointed in every county in which an applicant resides so that a VDR who is appointed in County A yet submits an application for a citizen who resides in County B is subject to criminal prosecution. . . . These rules force the organizations to have their canvassers and managerial staff appointed as VDRs in multiple counties. This is especially burdensome in the larger metropolitan areas where voters may reside in one of several area counties.

[16] Tex. Elec. Code § 13.043.
[17] Ashley Lopez, *Ahead of the 2018 Election, Texas AG Ramps Up Voter Fraud Prosecutions*, NPR.ORG (Oct. 28, 2018), https://www.npr.org/2018/10/28/661020113/ahead-of-the-2018-election-texas-ag-ramps-up-voter-fraud-prosecutions.



voters of color.[18] If one of more of these bills pass, once again, expensive, after-the-fact litigation will be the only recourse available for affected communities—depending, of course, on the resources to support such litigation.

If any of these bills significantly advance before the end of the hearing submission period, we will update this testimony accordingly.

I am happy to answer any questions the Subcommittee might have and provide additional information upon request. Once more, thank you for the honor of testifying today.

Respectfully submitted by:

Mimi Murray Digby Marziani, Esq.
President, Texas Civil Rights Project
[redacted]

[18] One example is HB 3964, and its companion, SB 1255, which have both passed out of their respective committees in the Texas Legislature and are eligible to be considered by the whole House and Senate any day. These bills would change the methodology governing the locations of Election Day vote centers within a county, pegging the allocation of polling places to the proportion of registered voters in a certain area. But, given the lower registration rates in communities of color, this law would in effect eliminate polling places from communities of color while simultaneously increasing the number of polling places in heavily Anglo areas. TCRP's preliminary analysis, shared with the legislature in written testimony on April 15, 2019, demonstrates the significant, discriminatory impacts associated with the bill's provisions. (Available here: https://texascivilrightsproject.org/wp-content/uploads/2019/05/TCRP-Testimony-Against-HB-3964.pdf). If passed, this law would constitute a textbook Section 5 violation.

Mr. COHEN. Thank you so much. You made Vanderbilt proud.

Ms. MARZIANI. Ah. Thank you. [Laughter.]

Mr. COHEN. Mr. Jerry Vattamala is director of Democracy Program at Asian-American Legal Defense and Education Fund. He served as the lead attorney in Favors vs. Cuomo, a federal redistricting case in New York, resulting in more Asian majority and influence districts at all legislative levels.

He also litigates cases concerning violations of Sections 203 and 208 of the Voting Rights Act, regularly meets with the board of elections across the country to ensure full compliance with federal and local language assistance provisions.

He received his JD from Hofstra, and his BS in computer engineering—computer engineering from Binghamton University. You will be recognized for five minutes. Thank you.

STATEMENT OF JERRY G. VATTAMALA

Mr. VATTAMALA. Thank you, Chairman. Thank you, members of the committee for allowing me to testify this morning, and put forth the Asian-American perspective, a perspective that is often ignored or looked over.

I am the director of the Democracy Program at the Asian-American Legal Defense and Education Fund, AALDEF. We are headquartered in New York. We are a national organization. Our mission is to protect the civil rights of Asian-Americans through litigation, advocacy, community organizing, and education.

We conduct an Asian-American exit poll. It is a national exit poll. We surveyed over 8,000 voters in the last mid-term election, and we were in numerous poll sites in Texas, including in Houston, Dallas, and Austin. The focus of our work really revolves around language assistance, specifically the language assistance provisions of the Voting Rights Act's Section 203 and Section 208. And we tend to be involved in cases that are targeting naturalized citizens, because oftentimes we, along with the Latinx community, are the largest percentage of the naturalized citizen community in a state.

We were co-council with MALDEF, representing OCA Greater Houston, and the Asian-American community in this recent voter purge case that settled on Monday. One of the reasons that we were involved again is the targeting of naturalized citizens here in Texas. Almost 52 percent of naturalized citizens in Texas are Latinx, about 29 percent are Asian-American, only 11.6 percent are non-Latino white, right, so we saw what the impact of this voter purge would have on the Latinx and Asian-American communities.

I also wanted to direct you to footnote 21 in my testimony that was submitted. This is a document that MALDEF put together, it is on their website, of the admissions by Texas officials that it knew that U.S. citizens were on its purge list. Not 1, not 2, but at least 25,000. Likely more than that. So, it shows the impact that this is going to have, and they knew that they were targeting citizens. We were pleased with the result to settle that case.

We also, as I mentioned, talk about we are involved with cases that involve Section 203 and Section 208. Asian-Americans traditionally and currently have to rely on Section 208 to receive language assistance. One thing that we have noticed from our Asian-American exit poll and poll matching program, just about a third

of all Asian-American voters that we survey are limited English proficient, meaning that they read or understand English less than very well. And that means they oftentimes will need some type of language assistance in order to vote.

The threshold to be covered under Section 203, which once you are covered, you will have translated materials, interpreters, is pretty high, and Asian-Americans oftentimes cannot meet those thresholds. So, in Texas only two counties are covered under Section 203 for Asian language assistance, Harris County, for Chinese and Vietnamese, and Tarrant County, for Vietnamese.

Back in 2015, we filed litigation against the state of Texas, OCAV Texas, for Texas's violation of Section 208 of the Voting Rights Act. Now there is not too much litigation around Section 208, because all it simply allows you to do is be assisted by a person of your choice inside the voting booth, if you need that assistance.

If you cannot see the ballot, if you cannot read the ballot, or if you cannot mark the ballot, you are allowed under the Voting Rights Act to be assisted by any person of your choice inside the voting booth. Oftentimes, almost always, Asian-Americans are assisted by their minor children.

The state of Texas had a law that required all interpreters to be a registered voter in the county in which they were providing their service, clearly, in conflict of Section 208. We had to sue and litigate this case. We won at the district court level and won at the Fifth Circuit Court of Appeals, and received attorney's fees in that case. Just another example of something that is very easy to comply with, but Texas refused to comply with it, and we had to litigate to obtain the rights that are available to voters under the Voting Rights Act.

ALDEF has limited resources. We litigate cases around the country where we think Asian-American voters are being targeted, or there is an impact, disproportional impact on them. We will continue to play the Whack-a-Mole game, and go all over the country, including Texas. You know, as I had mentioned, we are a national organization. We are headquartered in New York. We are coming down to Texas too often, right? And we will work with MALDEF, the Texas Civil Rights Project, LDF, all the other groups here to try and keep playing this game of Whack-a-Mole.

We are looking to DOJ for assistance. It is not coming, and I don't think it is coming under this Administration. So, we need Section 5 to prevent a lot of these things that could have been preventable from happening.

So, I thank you for allowing me to testify. I look forward to answering your questions. Thank you.

[The statement of Mr. Vattamala follows:]

The Asian American Legal Defense and Education Fund (AALDEF), is a 45-year-old national civil rights organization based in New York City that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF has monitored elections through annual multilingual exit poll surveys since 1988, and has conducted exit polls for every major election in Texas since 2008. Consequently, AALDEF has collected valuable data that documents both the use of, and the continued need for, protection under the federal Voting Rights Act (VRA), particularly in the State of Texas. In 2018, AALDEF dispatched over 600 attorneys, law students, and community volunteers to 81 poll sites in 54 cities in 14 states to document voter problems on Election Day. The survey polled 8,058 Asian American voters.

AALDEF has previously submitted testimony to Congress,[1] testified at hearings, submitted amicus briefs to the Supreme Court of the United States, and released detailed reports regarding Asian American voting experiences and the continued need for the full protections of the VRA, including Section 5 preclearance. AALDEF incorporates by reference the previously submitted documents and the attached documents:

- Third Amended Complaint in *LULAC v. Whitley*, No. 5:19-CV-00074 (W.D. Tex., Mar. 6, 2019)
- Settlement Agreement in *LULAC v. Whitley*, No. 5:19-CV-00074 (W.D. Tex., Apr. 26, 2019)
- Letter submitted to Harris County RE: Section 208 Interpreters at Poll Sites (Oct. 31, 2018)
- Complaint in *OCA-Greater Houston v. Texas*, No. 1:15-CV-00679 (W.D. Tex., Aug. 6, 2015)
- District Court decision in *OCA-Greater Houston v. Texas*, No. 1:15-CV-00679 (W.D. Tex., Aug. 12, 2016)
- Fifth Circuit Court of Appeals decision in *OCA-Greater Houston v. Texas*, No. 16-51126 (5th Cir., Aug. 16, 2017)
- Injunction in *OCA-Greater Houston v. Texas*, No. 1:15-CV-00679 (W.D. Tex., May 15, 2018)
- *Amicus* brief submitted to the Supreme Court in *Perry v. Perez*, 11-715 (Dec. 22, 2011)
- Letter submitted to Harris County RE: Section 5 Preclearance for Change in Policy of Sending Harris County Voter Registrar Representative to Naturalization Ceremonies (June 22, 2011)
- Harris County Post-2004 General Election Language Assistance Program Assessment Report (including Memorandum of Understanding with Department of Justice)
- Election Day Observation Letters:
  - 2018 Election – Collin County, Fort Bend County, Harris County, Travis County
  - 2016 Election – Dallas County, Fort Bend County, Harris County, Travis County, Williamson County
  - 2014 Election – Fort Bend County, Harris County
  - 2012 Election – Fort Bend County, Harris County
  - 2010 Election – Fort Bend County, Harris County

[1] *See* Joint Statement of the Asian American Legal Defense and Education Fund and Asian Americans Advancing Justice before the Committee on the Judiciary, United States Senate Hearing "From Selma to *Shelby County*: Working Together to Restore the Protections of the Voting Rights Act," submitted July 17, 2013.

AALDEF submits this testimony to describe the history and current landscape of enforcement of the Voting Rights Act in the State of Texas, and its impact on Asian American[2] voting rights in particular. AALDEF respectfully asks that this testimony be entered into the record. Thank you.

Discrimination Against Asian Americans Creates a Barrier to Voting

Since Asian immigrants arrived in the United States more than a century ago, they have faced ongoing discrimination and the denial of basic rights. This shameful history of discrimination against the Asian American community in the United States is well known. Until 1943, federal policy barred immigrants of Asian descent from even becoming United States citizens, and it was not until 1952 that racial criteria for naturalization were removed altogether.[3] Indeed, history is replete with examples of anti-immigrant sentiment directed towards Asian Americans, manifesting in legislative efforts to prevent Asian immigrants from entering the United States and becoming citizens.[4] In the not-so-distant past, Asian immigrants were legally identified as aliens "ineligible for citizenship," and were prohibited from voting and owning land.[5]

Both immigrant and native-born Asian Americans have experienced pervasive discrimination in everyday life.[6] Perhaps the most egregious example of discrimination was the incarceration of 120,000 Americans of Japanese ancestry during World War II without due process.[7] White immigrant groups whose home countries were also at war with the United States were not similarly detained; only Japanese Americans were forced to endure this extraordinary level of unfounded fear and accusation regarding their loyalty, trustworthiness, and character.[8]

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[2] The notion of "Asian American" encompasses a broad diversity of ethnicities, many of which have historically suffered their own unique forms of discrimination. Discrimination against Asian Americans as discussed here addresses both discrimination aimed at specific ethnic groups and discrimination directed at Asian Americans generally.

[3] *See* Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 415 (2005).

[4] *See, e.g.*, Philippines Independence Act of 1934, ch. 84, 48 Stat. 456, 462 (imposing annual quota of fifty Filipino immigrants; amended 1946); Immigration Act of 1924, ch. 190, 43 Stat. 153 (denying entry to virtually all Asians; repealed 1952); Scott Act of 1888, ch. 1064, 1, 25 Stat. 504, 504 (rendering 20,000 Chinese re-entry certificates null and void); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (providing one of the first laws to limit naturalization to aliens who were "free white persons" and thus, in effect, excluding African-Americans, and later, Asian Americans; repealed 1795).

[5] *See Ozawa v. United States*, 260 U.S. 178, 198 (1922); *see also, e.g.*, Cal. Const. art. II, § 1 (1879) ("no native of China . . . shall ever exercise the privileges of an elector in this State"); *Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that California's Alien Land Law "was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien").

[6] *See, e.g.*, *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren); *People v. Brady*, 40 Cal. 198, 207 (1870) (upholding law providing that "No Indian. . . or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man" against Fourteenth Amendment challenge).

[7] *See* Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing Japanese incarceration); *see also Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the incarceration under strict scrutiny review).

[8] *See Korematsu*, 323 U.S. at 233, 240-42 (Murphy, J., dissenting) (noting that similarly situated American citizens of German and Italian ancestry were not subjected to the "ugly abyss of racism" of forced detention based on racist assumptions that they were disloyal, "subversive," and of "an enemy race," as Japanese Americans were); Natsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 Duke F. for L. &

Racist sentiment towards Asian Americans is not merely a matter of historical injustice but a continuing reality, fueled in more recent years by reactionary post-9/11 prejudice and a growing backlash against immigrants.[9] Numerous hate crimes throughout the country have been directed against Asian Americans, either because of their minority group status or because they are perceived as unwanted immigrants.[10] As the Asian American population grows, these incidents are likely to increase.

Asian Americans have become the fastest growing racial group in the United States. While the total population in the United States rose by 10 percent between 2000 and 2010, the Asian American population increased by 46 percent during that same time span.[11] The Asian American population has grown most rapidly in the South, increasing by 69 percent from 2000 to 2010.[12] The growth of the Asian American community has been especially notable in the State of Texas. From 2000 to 2010, the Asian American population in Texas grew by 72 percent, and Texas was the state that experienced the second largest numeric growth of its Asian American community (behind only California), increasing from a population of 644,000 in 2000 to 1.1 million in 2010.[13]

When groups of minorities move into or outpace general population growth in an area, reactions to the influx of outsiders can result in racial tension.[14] Thus, as Asian American populations continue to increase rapidly, particularly in Texas, levels of racial tension and discrimination against this community can also be expected to increase. In fact, many hate crimes and other racist incidents have been reported in Texas in recent years.[15]

Soc. Change 71, 75 (2009) (noting "the presumption made by the military and sanctioned by the Supreme Court that Japanese Americans, unlike German or Italian Americans, could be presumed disloyal by virtue of their national origin").

[9] *See, e.g.*, U.S. Dep't of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, at 4 (Oct. 19, 2011) (noting that the FBI reported a 1,600 percent increase in anti-Muslim hate crime incidents in 2001), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911summit_report_2012-04.pdf.

[10] *See, e.g.*, *id.* at 7-9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ).

[11] U.S. Census Bureau, *The Asian Population: 2010*, at 1, 3 (2012), *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf. These figures include people who reported themselves as belonging to only one Asian group, as well as members of the Asian American community's rapidly growing multiracial population; this population is collectively referred to as "Asian alone or in combination." From 2000 to 2010, the "Asian alone" population increased by only a slightly lower rate of 43 percent.

[12] *Id.* at 6.

[13] *Id.* at 8.

[14] *See, e.g.*, Gillian Gaynair, *Demographic shifts helped fuel anti-immigration policy in Va.*, The Capital (Feb. 26, 2009), *available at* http://www.hometownannapolis.com/ news/gov/2009/02/26-10/Demographic-shifts-helped-fuel-anti-immigration-policy-in-Va.html (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, N.Y. Times, Feb. 22, 2009 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing), *available at* http://www.nytimes.com/2009/02/22/ nyregion/thecity/22froz.html?_r=3&pagewanted=1; Ramona E. Romero and Cristóbal Joshua Alex, *Immigrants becoming targets of attacks*, The Philadelphia Inquirer, Jan. 25, 2009 (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift is in Store*, L.A. Times, Apr. 12, 2007, at B1 (describing protest of Chino Hill residents to Asian market opening in their community where 39% of residents were Asian), *available at* http://articles.latimes.com/2007/apr/12/ local/me-chinohills12.

[15] *See, e.g.*, Margaret Kadifa, *Houston man charged with hate crime after attacking Lyft driver*, HOUSTON CHRONICLE (Sept. 21, 2017), https://www.houstonchronicle.com/neighborhood/champions-klein/news/article/Man-charged-with-hate-crime-after-attacking-Lyft-12217494.php (verbal and physical assault of Lyft driver due to

Even a Texas lawmaker, Betty Brown, publicly commented that Asian American voters should change their names to accommodate poll workers. At a hearing regarding voter identification, Brown stated: "Rather than everyone here having to learn Chinese—I understand it's a rather difficult language—do you think that it would behoove *you and your citizens* to adopt a name that *we* could deal with more readily here? . . . Can't you see that this is something that would make it a lot easier for you and the people who are poll workers if you could adopt a name just for identification purposes that's easier for *Americans* to deal with?"[16] Beyond the indignity of this request and the implications that Chinese Americans are not really *Americans*, this statement also demonstrates ignorance of an obvious and significant problem faced by many Asian American voters: by sometimes using their legal names and sometimes using names that are "easier for Americans to deal with," the names listed on these voters' various forms of identification may not match with their names on the voter rolls, and this inconsistency may prevent them from voting.

Such discrimination creates an environment of suspicion and resentment towards Asian Americans, who are often still perceived as perpetual "outsiders," "aliens," or "foreigners,"[17]

Pakistani background); Alex Zielinski, *Fake Cards Appear in San Antonio, Offering $100 to Anyone Who Reports Undocumented Immigrants to ICE*, SAN ANTONIO CURRENT (Aug. 10, 2017), https://www.sacurrent.com/the-daily/archives/2017/08/10/fake-cards-appear-in-san-antonio-offering-100-to-anyone-who-reports-undocumented-immigrants-to-ice?media=AMP+HTML (distribution of unofficial business cards in San Antonio offering $100 reward for reporting an "undocumented alien" to ICE who would then be arrested and deported); Lindsay Ellis, *Posters at UT latest display of campus post-election racism*, HOUSTON CHRONICLE (Feb. 14, 2017), https://www.chron.com/local/education/campus-chronicles/article/Racist-posters-at-UT-latest-post-election-10931366.php (anti-immigrant fliers posted at University of Texas-Austin campus stating: "A notice to all citizens of the United States of America, it is your civic duty to report any and all illegal aliens to U.S. Immigration and Customs Enforcement[.] They have broken the law"); Sanya Mansoor, *Students at Plano East allege racial slurs after Trump victory*, DALLAS NEWS (Nov. 2016), http://www.dallasnews.com/news/education/2016/11/10/students-plano-east-allege-racial-slurs-trump-victory (Texas high school teacher's remarks to Asian American student that "Trump [will] build a wall and deport him"); Lindsay Wise, *Family says attack on Muslim man in Tomball should be hate crime*, HOUSTON CHRONICLE (Dec. 18, 2011), https://www.chron.com/news/houston-texas/article/Islamic-group-family-say-attack-on-Muslim-may-be-2407967.php (Pakistani man assaulted after being asked about the origin of his name and where he was from, resulting in partially bitten ear and ten broken ribs); *Marl Stroman Executed: Texas Man Received Death Penalty for Killing Store Clerk*, HUFFINGTON POST (Sept. 19, 2011), https://archive.fo/20130125231423/http://www.huffingtonpost.com/2011/07/20/mark-stroman-executed_n_905292.html?icid=maing-grid7 (execution of Texas inmate who killed two South Asian men and injured third South Asian man in "retaliation for the Sept. 11 terrorist attacks"); Jasmine K. Singh, *Everything I'm Not Made Me Everything I Am: The Racialization of Sikhs in the United States*, 14 ASIAN PAC. AM. L.J. 54, 85 (2008) (describing police violence against Sikh family in Houston, where police officers questioned family member about kirpan, ordered her to "shut up," aimed taser at her head, forced her to the ground with a "knee . . . put to her back," handcuffed her and her other family members, and asked if family members had "heard about the bombings in Bombay").

[16] R.G. Ratcliffe, *Texas lawmaker suggests Asians adopt easier names*, HOUSTON CHRONICLE (Apr. 8, 2009), https://www.chron.com/news/houston-texas/article/Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php. (emphasis added)

[17] *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them). In 2001, a comprehensive survey revealed that 71% of adult respondents held either decisively negative or partially negative attitudes toward Asian Americans. Committee of 100, *American Attitudes Toward Chinese Americans and Asians* 56 (2001), *available at* http://www.committee100.org/publications/ survey/C100survey.pdf. Racial representations and stereotyping of Asian Americans, particularly in well-publicized instances where public figures or the mass media express such attitudes, reflect and reinforce an image of Asian Americans as "different," "foreign," and the "enemy," thus stigmatizing Asian Americans, heightening racial tension, and instigating discrimination. Cynthia Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with*

based on their physical and cultural attributes. This perception, coupled with the growing sentiment that foreigners are destroying the country, could threaten Asian Americans' ability to exercise their right to vote free of harassment and discrimination.

Asian American voting rights are in even greater jeopardy since the Supreme Court gutted the Voting Rights Act in *Shelby County v. Holder*[18] in 2013, by effectively eviscerating the Section 5 preclearance requirement for proposed changes in certain states' election practices or procedures. In the past, the federal preclearance process worked extremely well to prevent states from enacting discriminatory voting laws and procedures, and also allowed covered jurisdictions to "bail-out" from preclearance coverage if they could show that they no longer discriminated. For Texas alone, the Department of Justice has issued dozens of objection letters regarding proposed election practices and procedures under Section 5 of the Voting Rights Act.[19] Unfortunately, without any current Section 5 coverage for Texas (or any other state), Asian Americans are susceptible to extensive discrimination in voting. Voters in Texas are particularly vulnerable because under the current administration, AALDEF is unaware of *any* VRA actions brought by the Department of Justice to protect voters.[20]

AALDEF supports both the bipartisan Voting Rights Amendment Act and the Voting Rights Advancement Act, which would update the coverage formula and make Section 5 preclearance operational again. Neither coverage formula is ideal, and would not adequately cover jurisdictions that should be subject to preclearance, but would be an improvement from what we currently have – no coverage. In the years since *Shelby County*, multiple federal circuit and district courts have found intentional racial discrimination in state legislation in formerly covered jurisdictions, including Texas. This is precisely why these jurisdictions could not "bail-out" of coverage pre-*Shelby*, and illustrates why Congress must enact a new coverage formula now to prevent continued and pervasive voting discrimination.

Additionally, limited English proficient (LEP) voters, including many Asian American voters, face additional barriers at the polls. Section 203 of the Voting Rights Act requires some jurisdictions to provide translated ballots and voting materials as well as oral language assistance for LEP voters. Two counties in Texas are currently covered for Asian language assistance under Section 203: Harris County is covered for Chinese and Vietnamese language assistance, and Tarrant County is covered for Vietnamese language assistance.

O.J., 6 Hastings Women's L.J. 165, 181 (1995); Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 UCLA Asian Pac. Am. L.J. 72, 74-75 (2001); Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. Personality & Soc. Psychol. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not "American").

[18] 570 U.S. 529 (2013).

[19] *See Section 5 Objection Letters*, Dep't of Justice, *available at* http://www.justice.gov/crt/records/vot/obj_letters/index.php.

[20] *See* U.S. Dep't of Justice, *Voting Section Litigation, Cases Raising Claims Under Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/voting-section-litigation (last updated Sept. 27, 2018) ("*Voting Section Litigation*"). The DOJ's last listed complaint under Section 2 of the VRA was filed on January 10, 2017, before former Attorney General Jeff Sessions was sworn into office. As far as Amici are aware, the only VRA-related action taken by the current DOJ administration was the voluntary withdrawal of a key argument in a Section 2 discriminatory purpose claim in an existing case involving Texas voter identification laws. The court granted the DOJ's motion, but specifically rejected the basis of DOJ's given reasoning for withdrawing the claim. *See Veasey v. Abbott*, 248 F. Supp. 3d 833 (S.D. Tex. 2017).

AALDEF's Voting Rights Work in the State of Texas

For more than a decade, AALDEF has worked to promote voting rights in Texas, and can testify about the vital need for full enforcement of the Voting Rights Act in this state.

LULAC v. Whitley

Most recently, AALDEF worked with the Mexican American Legal Defense and Educational Fund (MALDEF) and Asian Americans Advancing Justice | AAJC to represent the Asian American and Latinx communities in challenging a recent statewide voter purge initiated by acting Texas Secretary of State David Whitley. On January 25, 2019, the Texas Secretary of State's office issued Election Advisory 2019-02, announcing that it would send county voter registrars "actionable information" about a list of over 95,000 alleged potential non-citizens who had registered to vote. Whitley directed the county registrars to send letters to these voters threatening to purge them for non-U.S. citizenship. This list was comprised of registered voters who had *at some point* provided documentation showing that they were not citizens, without accounting for the many voters who may have first reported their non-citizen status while obtaining a driver's license or other form of identification, then subsequently registered to vote *after* becoming naturalized citizens. Texas Attorney General Ken Paxton also rushed to herald this announcement with a "VOTER FRAUD ALERT" tweet and a press release declaring that the Secretary of State had discovered that "Nearly 95,000 People Identified by DPS as Non-U.S. Citizens are Registered to Vote in Texas."

The compilation of this list by the Texas Secretary of State was particularly egregious given that other states had already used similarly flawed methodology to identify non-citizen voters, leading to wildly inaccurate results. Indeed, the errors in the Texas Secretary of State's list were almost immediately apparent: within days of the release, reports already surfaced that tens of thousands of naturalized U.S. citizens had been improperly included on this list, but Whitley did not withdraw the list or advisory. Indeed, Texas admitted on numerous occasions that it knew that its purge list included thousands of naturalized citizens.[21] The vast majority of affected naturalized citizens were Latinx or Asian American.[22]

Plaintiffs challenged this Texas voter purge as a violation of Section 2 of the Voting Rights Act, as well as the Constitution and other federal laws. On April 26, 2019, plaintiffs reached a settlement with the State of Texas to address the flawed methodology and other errors associated with this voter purge effort, to help ensure that no naturalized citizens—including many Latinx

[21] *See* https://www.maldef.org/wp-content/uploads/2019/04/SOS-admissions-re-citizenship-4-26-2019.pdf, "*Admissions by Texas That its Purge List Included US Citizens*". Texas knew that its voter purge would target thousands of naturalized U.S. citizens before commencing the purge. Exhibits from Garibay Plaintiffs' preliminary injunction motion and transcripts of court and Texas legislative hearings show when Texas officials admitted that they were endangering the voting rights of legally registered U.S. citizens.

[22] According to data from the United States Census Bureau, among Texas naturalized U.S. citizens, 51.7% are Latino and 28.8% are Asian American. Only 11.6% of Texas naturalized citizens are non-Latino White. *See* American Community Survey FactFinder, Selected Characteristics of the Native and Foreign-Born Populations (Texas), United States Census Bureau (2017 5-year ACS data), available at https://factfinder.census.gov/bknik/table/1.0/en/ACS/17 5YR1S0501 104000001JS48 (accessed January 31, 2019).

and Asian American naturalized citizens—would be disenfranchised through improper removal from the voter rolls. The Amended Complaint and the Settlement Agreement in this case have been submitted for the record.

Section 208 Interpreters at Poll Sites In Harris County

About one week before the 2018 Midterm Election, AALDEF received reports that Harris County officials had just announced that volunteer Korean interpreters would no longer be allowed to offer their assistance to limited English proficient voters within Harris County poll sites. Instead, these Korean interpreters would now have to stay beyond the 100-foot zone outside of poll sites, where they would not be able to assist nearly as many LEP voters.

While Harris County is required under Section 203 of the Voting Rights Act to offer language assistance to Chinese and Vietnamese voters, this federal requirement does not extend to Korean language assistance, despite the significant Korean American population in Harris County. Thus, these volunteer Korean interpreters were filling a void by offering much-needed language assistance to members of their community who would otherwise struggle to vote without language assistance.

On October 31, 2018, AALDEF sent a letter to the Harris County Clerk to oppose these efforts to restrict Section 208 language assistance for Korean American voters. With support from twenty-three other national and community organizations, AALDEF urged Harris County to allow these volunteer Korean interpreters from established local Korean American community groups to offer crucial language assistance to voters within Harris County poll sites. AALDEF's letter to the Harris County Clerk has been submitted for the record.

OCA-Greater Houston v. Texas

On August 6, 2015—the 50th anniversary of the signing of the Voting Rights Act—AALDEF sued the State of Texas, the Williamson County Elections Department, and the City of Round Rock, Texas for denying an Indian American voter the right to assistance by a person of her choice, in violation of Section 208 of the Voting Rights Act. This voter was limited English proficient and required language assistance in order to vote, so she brought her son to assist as a Section 208 interpreter. Section 208 provides voters with broad discretion to be assisted in voting by any person of their choice, except by the voter's employer or a representative of the voter's employer or union. However, the Texas Election Code limited interpreters to only those individuals who were registered to vote in the same county as the voter, thus preventing this Indian American voter from being assisted by her son, who was registered to vote in a neighboring county.

As AALDEF has observed through years of election monitoring throughout the country, many LEP Asian American voters have utilized Section 208 to choose their own trusted interpreters to assist them at the poll site, and most often, these LEP voters choose to be assisted by their minor child. By restricting interpreters to only registered voters—which categorically prevented anyone under the age of eighteen from assisting LEP voters—the Texas legislature not only impermissibly narrowed the plain language of the Voting Rights Act, but also demonstrated, at best, a complete lack of understanding of how most LEP voters exercise their rights under the Voting Rights Act. The impact of this Texas law disproportionately impacted Asian American

voters because in places like Texas, they must rely on Section 208 interpreters for language assistance, because there is little to no coverage under Section 203. At the time of the lawsuit, only one county in Texas was covered under Section 203 to provide federally required Asian language assistance (Harris County for Chinese and Vietnamese).

In this case, the federal district court ruled in our favor, holding that this Texas election law violated Section 208 of the Voting Rights Act, and the court issued an injunction to block the Texas law. The Fifth Circuit Court of Appeals later affirmed on the merits, noting that "[i]t should go without saying that a state cannot restrict this federally guaranteed right by enacting a statute tracking its language, then defining terms more restrictively than as federally defined." The Fifth Circuit also remanded the case to the district court to enter a new and more narrowly tailored injunction. These court rulings and the revised injunction have been submitted for the record.

Perry v. Perez

Before the Supreme Court effectively eviscerated the preclearance requirement of Section 5 of the Voting Rights Act in its *Shelby County* decision, the Court considered the discriminatory intent and effect of a proposed Texas redistricting plan in *Perry v. Perez*. AALDEF submitted an *amicus* brief urging the Supreme Court to affirm the Texas district court's interim redistricting plan after the Department of Justice contended that the Texas state legislature's plan diluted the voting power of Asian Americans and other people of color.

At the time of this case, Texas State House District 149 had a combined minority citizen voting-age population of around 62 percent.[23] Since 2004, the Asian American community in District 149 has voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their state representative. Vo's election was particularly significant for the Asian American community because he was the first Vietnamese American state representative in Texas history.[24]

In 2011, the Texas Legislature sought to eliminate Vo's State House seat and redistribute the coalition of minority voters to the surrounding three districts. Plan H283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149 (Vo's district), to districts with larger non-minority populations.[25] Plan H283 would have thus hindered the Asian American community's right to vote in Texas by diluting the large Asian American populations across the state.

Following a trial in January of 2012, the three-judge district court in Washington, D.C. denied Section 5 preclearance on August 28, 2012, in a comprehensive and mostly unanimous opinion. The court found that the congressional and state redistricting plan had both a retrogressive effect

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[23] *See* United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

[24] *See* Test. of Ed Martin, Trial Tr. at 350:15-23, *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2011) (hereinafter "Martin Test."); Test. of Rogene Calvert, Trial Tr. at 420:2-421:13, *Perez*, 835 F. Supp. 2d 209; Test. of Sarah Winkler, Trial Tr. at 425:18-426:10, *Perez*, 835 F. Supp. 2d at 209.

[25] *See* Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. *See* Plan H283, *available at* http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf.

and a racially discriminatory purpose (though this decision later had to be vacated and remanded in light of the Supreme Court's decision in *Shelby County* and its implications for all Section 5 preclearance claims). Since Section 5 of the Voting Rights Act no longer applies to the State of Texas, disruptive changes to redistricting plans, polling sites, and voting systems can now occur unfettered, wreaking havoc on Asian American voters' ability to cast an effective ballot. As mentioned above, the DOJ under this administration has not brought a single VRA case, so it will fall on AALDEF and other such groups to continue to identify and litigate each individual discriminatory act or action to protect naturalized citizen voters, LEP voters and other targeted groups.

AALDEF's *amicus* brief has been submitted for the record.

Harris County Section 5 Preclearance for Changes in Voter Registration Procedures

For years, the Harris County Voter Registrar's office routinely sent a representative to naturalization ceremonies to pick up voter registration forms following the swearing in of new citizens. Because this Voter Registrar representative was present at the ceremony, the Texas Secretary of State waived a requirement whereby volunteers working to register voters would have had to issue receipts to each person registering to vote. In December of 2010, the newly elected Harris County Voter Registrar planned to withdraw support for this practice, which would have subjected all volunteer voter registrars to the receipt requirement. In light of the large crowds of newly eligible voters to assist at naturalization ceremonies, this receipt requirement would have significantly slowed down the voter registration process and reduced the number of people who could have successfully registered to vote at these ceremonies. Since this change in voting procedures would only affect naturalized (as opposed to native-born) United States citizens, it could have disproportionately impacted minority group voters.
On June 22, 2011, AALDEF sent a letter to the Harris County Voter Registrar, urging him to continue sending a representative to naturalization ceremonies. At this time, Section 5 of the Voting Rights Act was still operative, so AALDEF advised the Voter Registrar that changing this practice would require Section 5 preclearance. The Harris County Voter Registrar did not seek preclearance, and continued to send representatives to naturalization ceremonies, thus allowing the continued waiver of the receipt requirement. AALDEF's letter to the Harris County Voter Registrar has been submitted for the record.

Harris County Memorandum of Understanding with the Department of Justice Regarding Section 203 Vietnamese Language Assistance

AALDEF has worked with community based organizations in Texas, such as OCA-Greater Houston for several decades and has reached out to local county registrars or clerks to offer our assistance and expertise concerning full compliance and best practices for Section 203 of the VRA. We have reached out to Harris County in the past to assist with Section 203 compliance for both Chinese and Vietnamese language assistance. Harris County struggled to fully comply with Section 203 for both Chinese and Vietnamese language assistance, and ultimately entered into a Memorandum of Understanding with the DOJ regarding Section 203 compliance for Vietnamese language assistance. The Harris County Language Assistance Program Assessment Report, Post-2004 General Election (which includes the MOU with the DOJ for Vietnamese language assistance) has been submitted for the record.

AALDEF Election Day Observation Letters

As AALDEF has documented through years of exit poll surveys, Asian American voters in Texas have faced and continue to face significant barriers to voting, often due to the lack or shortage of language assistance at their poll sites. After each major election, AALDEF follows up with each jurisdiction in which we conducted exit polls by submitting detailed observation letters describing specific voter incidents and the need for Asian language assistance in these jurisdictions. AALDEF's observation letters to election officials in Texas have been submitted for the record.

Conclusion

American citizens of Asian ancestry have long been targeted as "foreigners" and unwanted immigrants, and racism and discrimination against this community persists to this day. These negative perceptions have real consequences for the ability of Asian Americans to fully participate in the electoral and political process. The Voting Rights Act has offered crucial protections for minority group voters, including many Asian American voters. AALDEF has witnessed firsthand the immense value of federal protection of voting rights under Sections 2, 203, and 208 of the Voting Rights Act. Section 5 of the Voting Rights Act was also a particularly effective tool in protecting Asian American voters against a host of actions that threaten to curtail their voting rights. However, the Supreme Court's *Shelby County* decision dismantling the coverage formula has left a large gap in protections for Asian American voters that requires Congressional action and renewed DOJ enforcement of remaining VRA provisions. We look to Congress to work in a bipartisan fashion to respond to the Court's ruling and strengthen the Voting Rights Act as it did during the 2006 reauthorizations and each previous reauthorization. AALDEF respectfully offers its assistance in such a process.

Mr. COHEN. Thank you, sir. Mr. Jose Garcia is a member of the law firm of Garza—Garza—excuse me—Garza Golando Moran. He represents government entities in federal litigation, including 1st-Amendment and 14th-Amendment issues, redistricting federal voting rights, and civil rights. He's argued twice before U.S. Supreme Court, taught voting rights seminars as an adjunct professor at two law schools, received his law degree from St. Mary's University, we welcome you, and you are recognized for five minutes.

STATEMENT OF JOSE GARZA

Mr. GARZA. Thank you, Chairman Cohen.

Mr. COHEN. You are welcome, Mr. Garza.

Mr. GARZA. Chairman Nadler, members of the committee, I am honored to have been asked to come and testify before this committee. It is an honor also to be on the campus of Texas Southern, and to see so many young attorneys on our table as a veteran of the civil rights fight. It is good to see that there are young lawyers coming in behind us to take up the mantel on these very important issues.

My testimony today, I would like to emphasize a couple of things that I think merge together the importance of the Section 5 of the Voting Rights Act, and what happens when it gets taken away from us.

In the voter ID case, for example, that has been mentioned numerous times in the testimony and in the opening statements, we had a situation where Section 5 worked. The state of Texas adopted the voter ID law in 2011, and instead of seeking justice of department preclearance, filed a lawsuit in Washington, D.C. to seek preclearance. It failed. It was unable to enforce the provisions of the voter ID law because of Section 5.

In 2013, when the Supreme Court announced Shelby, as was mentioned earlier, Governor Abbott immediately announced that it would be enforcing the provisions of the voter ID law.

Now we have talked in general terms about the importance of enforcing these provisions and of blocking discriminatory election laws. In my capacity as one of the lawyers in the Section 2 portion of the lawsuit against the voter ID case, I came in contact with, and we presented evidence to the court of real-life impact of this law.

One of my clients, an elderly, extremely poor resident of South Texas, of Sebastian, Texas, Mr. Margarito Lara, testified in that court about the honor, and the pride, and the joy that he had from walking to his house. He didn't have an automobile, didn't have the IDs that Texas required, but he had a voter registration card.

And he would walk to the polling place, and the polling place workers knew Margarito Lara, and they welcomed him to the polling place. And they said, you know, they had coffee with him. They conversed with him. This was one of the pleasures of being a United States citizen, is going and casting his vote in every election in his adult life.

And in 2013, when Governor Abbott decided to enforce the provision, there was an election that year. And that was the first election in the life of Margarito Lara that he ever missed. We tried that case in 2014, and in October of 2013, Judge Ramos, from Cor-

pus Christi ruled that the law was illegal under Section 2 of the Voting Rights Act, and unconstitutional under the 14th Amendment.

The state of Texas sought a stay from the fifth circuit of that order, and it was granted. And in November of 2014, Margarito Lara missed his second election in his life. In his life. That was the second election that he missed.

There was a third election in 2015, before we finally got not just the Fifth Circuit, but the court of the Fifth Circuit to rule that the voter ID law was illegal. Margarito Lara passed away in 2015. The last three elections of his life he was unable to vote because of the voter ID law in Texas. And because it took that long to litigate a Section 2 case against the voter ID law.

Section 5 has real impact——

Mr. NADLER. Could you tell us why he couldn't get a voter ID?

Mr. GARZA. So, Margarito Lara was an elderly Mexican-American in a rural community of South Texas, Sebastian, as I mentioned. He didn't have a birth certificate. He testified in the—at court that he couldn't afford to go get—to pay for what was required in order for him to get a delayed birth certificate so that he could take that and secure the voter ID law that the state of Texas required.

One of the things that was really moving about his testimony is that he was embarrassed to tell the court that it was something that he could not afford, that his wife literally lived month to month off the subsistence that they secured.

So, let me close with this. Frederick Douglass once said that "Power gives nothing without demand." The Voting Rights Act, Section 5, demands that states and local jurisdictions not discriminate. We need that coverage back.

Thank you.

[The statement of Mr. Garza follows:]

Mr. Chairman and members of the Judiciary Committee, thank you for the opportunity to testify regarding the enforcement of the Voting Rights Act in Texas. I come to you as a long time litigator, who has represented the minority community in challenges to local, as well as state-enacted practices of voting discrimination. My name is Jose Garza, and I am the voting rights counsel for the Mexican American Legislative Caucus. The Mexican American Legislative Caucus (MALC) was founded in 1973 in the Texas House of Representatives by a small group of lawmakers of Mexican American heritage for the purpose of strengthening their numbers and better representing a united Latino constituency across the State. MALC is the oldest and largest Latino legislative caucus in the United States.

As of 2019, MALC has a membership of 41 House members from all parts of the State and is the largest nonpartisan caucus in the Texas Legislature. MALC Members sit on all but 3 Committees in the Texas House of Representatives and work together on matters of consequence to our state's large and growing Latino constituency. For almost 30 years MALC has been active in protecting Latino voting rights, not only in the legislative process, but also in the courts.

I am also the Litigation Director for Texas RioGrande Legal Aid, Inc. (TRLA). While TRLA is forbidden from participation in redistricting efforts of any

kind, TRLA has represented poor people of color against efforts to limit or deny our clients the right to vote.

In one recent case, my role as voting rights counsel for MALC and my work as Litigation Director for TRLA came together. In *Veasey v. Abbott,* MALC challenged Texas' efforts to infringe on the right of minority voters, especially poor and elderly Texas voters, to participate in the political process. In addition. poor, elderly Latino and African American clients of TRLA sued Texas, because the restrictions placed on voting through the Texas voter ID law would disenfranchise them. I represented both MALC and my TRLA clients in that action.

I also represented MALC in the Texas redistricting litigation, which commenced in 2011 and continues even now. In fact I come here directly from a hearing in San Antonio yesterday afternoon dealing with final remedy issues.

Today, I will focus my presentation on the voter ID litigation efforts and on the Texas Redistricting litigation.

TEXAS VOTER ID LITIGATION

In 2011, Texas (the "State") passed Senate Bill 14 ("SB 14"), which required individuals to present one of a limited set of acceptable forms of photo identification to vote. *See* Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex.

Gen. Laws 619. SB 14 was initially blocked by the Voting Rights Act's preclearance provisions. *See Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012). However, on June 25, 2013, immediately after the Supreme Court decided *Shelby County, Alabama v. Holder*, Texas began enforcing SB 14, ignoring the findings of discrimination in the Section 5 proceedings. Numerous Plaintiffs, including MALC and my TRLA clients, filed legal challenges to the voter ID law pursuant to Section 2 of the Voting Rights Act as well as the United States Constitution. We alleged that SB 14 was enacted by the State with a racially discriminatory purpose, and that it had a racially discriminatory impact on Latino and African American voters of Texas in that it placed an undue burden on their fundamental right to vote. [1]

After a nine-day bench trial featuring both live and deposition testimony from dozens of expert and lay witnesses, the Federal District Court issued a comprehensive opinion holding:

> SB 14 creates an unconstitutional burden on the right to vote [under the First and Fourteenth Amendments], has an impermissible discriminatory effect against Hispanics and African-Americans [under Section 2], and was imposed with an unconstitutional discriminatory purpose [in violation of the Fourteenth and Fifteenth Amendments and Section 2]. [SB 14 constitutes an unconstitutional poll tax [in violation of the Fourteenth and Twenty-Fourth Amendments].

[1] The resources necessary to litigate this case were extreme. Without resources devoted to this case by MALC, TRLA, NAACP, BRENNAN CENTER, LAWYERS' COMMITTEE etc. this case could not have been properly prosecuted.

Veasey v. Perry, 71 F.Supp.3d 627, 633 (S.D. Tex. 2014) (footnote omitted).

Pursuant to that opinion, the Court entered "a permanent and final injunction against enforcement of the voter identification provisions" of SB 14 and directed the State to "return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14." *Id.* at 707.

However, Texas appealed that decision to the Fifth Circuit and secured a stay of the District Court order. The Fifth Circuit panel affirmed this Court's finding that SB 14 had discriminatory results in violation of Section 2 and remanded for consideration of the proper remedy. *Veasey v. Perry*, 796 F.3d 490, 493, 498 (5th Cir. 2014). The State filed a petition for rehearing en banc, which was granted. *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016) (granting rehearing *en banc*). Upon rehearing, the full Fifth Circuit again affirmed the District Court's finding that SB 14 violated Section 2 because of its discriminatory results and remanded to determine the appropriate remedy. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc decision). On September 23, 2016, the State filed a petition for a writ of certiorari before the U.S. Supreme Court. Private Plaintiffs opposed that petition, and on January 23, 2017, the Supreme Court denied the petition.

On August 10, 2016, following the instructions of the full Fifth Circuit, the District Court ordered interim relief for the November 8, 2016 election (as well as prior and subsequent state and local elections) directing, *inter alia*, the State and its election officials to accept several forms of identification in addition to those mandated by SB 14 upon the completion and signing of a reasonable impediment declaration by the voter. This relief remained in place until SB 14 was amended to largely incorporate this Court's interim relief into State law. The Fifth Circuit held that this amendment did not moot the case but, by "essentially mirror[ing the] agreed interim order," constituted an acceptable remedy under the Fifth Circuit's 2016 ruling that SB 14 violated Section 2. *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

MALC presented evidence of the hostile legislative environment surrounding the enactment. Representatives Ana Hernandez, Rafael Anchia and Trey Martinez Fischer gave dramatic testimony of how the legislation was forced to a vote, rules changed to ensure passage, and the acrimonious atmosphere during debate that infected the process.

The TRLA presented the testimony of the Plaintiffs and of an expert witness, exhibits and arguments that demonstrated the real and personal injuries caused by SB 14. The Court cited to that testimony in her opinion. *See Veasey v. Abbott*, 71 F. Supp. 3d 627, 667-678 (S.D. Tex. 2014)(e.g. describing the financial burden

imposed by the requirements: "Some Plaintiffs testified that they were either unable to pay or that they would suffer a substantial burden in paying the cost associated with getting a qualified SB 14 ID or the necessary underlying documents. Mr. Mendez testified about his family's "very sad" financial state, explaining that "[e]ach month by the last week there's no food in the house and nothing with which to buy any, especially milk for the children. Then my wife has to go to a place to ask for food at a place where they give food to poor people." Mr. Mendez was embarrassed to admit at trial that having to pay for a new birth certificate was a burden on him and his family. Mr. Lara described his financial situation by stating that "we got each our little ... small amount of cash ... and we try to ... stretch it out as possible by the end of the month, and sometimes we'll make it and sometimes we won't." Ms. Lara described her financial state as both difficult and very stressful." *Veasey,* 71 F. Supp. 3d at 671-729(citations omitted)). TRLA Plaintiffs' expert testified that the financial burdens of compliance with SB 4 on these voters placed an undue burden, unlike others who had the ID. *See e.g. Veasey*, 71 F. Supp. 3d at 668, n.272, and 705, n. 570.

These elderly, poor U. S. citizen voters testified about the importance of voting in their lives. They testified about how they had never missed an election. They described the joy of walking, on Election Day, to the polling location in their neighborhood, where everyone knew each other and everyone knew them and the

pride they felt when they voted. Yet, without the limited ID allowed by the State, nor the means to secure the IDs allowed, they would miss an election and just simply didn't understand why. In fact, one of our clients, Margarito Lara, missed the last election shortly after trial in the case, because of the stay of the Court's order secured by the State. It was the first election he had ever missed in his adult life. Tragically Mr. Lara passed away before the remedy in the case was imposed.

Finally, the evidence in the case and the findings of the different courts that reviewed the SB 14, also determined that, while Texas has the right to impose rules for voting, whatever voter misconduct the Voter ID law was supposed to cure, no such problem was ever identified or proved.

TEXAS REDISTRICTING LITIGATION

The 2010 census showed that Texas's population had grown by over four million since 2000. That growth was not evenly distributed; so to comply with the "one person, one vote" standard, Texas had to redraw the districts from which the members of the legislature are elected.

The district court described the context in which the Legislature undertook the post 2010 round of redistricting as one of "strong racial tension and heated debate about Latinos, Spanish-speaking people, undocumented immigration and sanctuary cities and the contentious voter ID law." Moreover, the over-all heavy population

growth in Texas was attributable to growth in the minority, primarily Latino, population. For instance, in Nueces County, the growth "was attributable to Hispanics, as both African-American and Anglo population declined." In Bell County, "more than 70% of the growth" was attributable to an increase in minority population. In Dallas County, the minority population grew by 350,000, while Anglo population decreased "by over 198,000". Overall more than 80% of the population growth in Texas was attributable to minority population growth.

Yet, Republican legislators were very reluctant to create any new minority opportunity districts. They worried any such districts would likely elect Democrats. As a result, despite the massive minority population growth, the Legislature not only failed to create any new minority opportunity districts, but also it actually reduced the number of minority opportunity districts. Section 5 in 2011 was invaluable in preventing the reduction of minority districts initially. Without Section 5 in effect, the 2013 redistricting plan adopted by the Texas Legislature was ratified by the United States Supreme Court, even though: 1) a Latino opportunity district in Nueces County was eliminated in the 2011 plan and carried forward in the 2013 plan; 2) the minority community in Killeen, (Bell County) was split in order to avoid drawing a minority majority district, (Rep. Aycock, the Bell County Rep. and author of the districts in Bell County testified that he tried to avoid creating a majority-minority district because it likely "would have probably got me unelected."); and 3)

Dallas County Anglo voters were provided nearly 60% control of the Texas House districts in Dallas, although only a third of the population of the County. Moreover, in Dallas the 2013 plan used "bizarre configurations" to pack Latino population into Latino districts HD103 and HD 104, while using "jagged, bizarrely shaped" protrusions of "disproportionately Anglo" populations from HD 104 to be added into HD 105, which had been growing in Latino population. This was this kind of evidence relied upon by the District Court that let it to conclude that HD 103, HD 104 and HD 105 in Dallas County had been intentionally designed to dilute Latino voting strength.

Without Section 5, Section 2 jurisprudence continues to evolve in a manner that makes enforcement of the Voting Rights Act more difficult for minority voters. In 2018, a highly partisan and divided Supreme Court issued an opinion allowing the kind of discrimination against minority voters describe above, because the challenged districts had been part of the 2011 plan and the District Court had not specifically ruled on these challenges in its preliminary injunction rulings.

CONCLUSION

Texas has a long history of imposing restrictions on the right to vote that target minority voters. This practice was evident with the adoption of the voter ID law and in the redistricting plans adopted in 2011 and 2013 and has continued through today.

The loss of Section 5 protections and the weakening of Section 2 standards has been severely felt by minority Texas voters. In addition, while the litigation on these issues has been successful to this point, it took years to litigate. In fact the redistricting litigation, commenced in 2011 with two trips to the Supreme Court continues today. There was a hearing in the case just yesterday. The prosecution of these case required millions of dollars and thousands of hours of legal and expert time to properly develop and present and then defend on appeal.[2] And it just goes on and on.

Reform of the Voting Rights Act is vital. We need some form of Section 5 again. We need to clarify the standards by which a Section 2 plaintiff can prosecute a case of voting discrimination and we need the fee shifting provisions of the Act to be meaningful again.

Thank you.

[2] In addition to the need to reform the substance of the Voting Rights Act, the fee shifting provisions need to be addressed as well. This especially true with the jurisprudence on prevailing party that has developed out of the 5th Circuit. Without a vibrant and realistic standard, VRA enforcement will be greatly hampered. Perhaps a topic for another time.

Mr. COHEN. Thank you, Mr. Garza, and thank you to all of our witnesses. We will now go into a five-minute rule for questions from our panelists. Normally, I recognize myself for five minutes. That is the power of being chairman. But I am not going to do that, because we are here in Texas, and I am first going to recognize your alumnus, or alumna, Ms. Garcia, for questions.

Ms. GARCIA. Thank you.

Mr. COHEN. Valuable member of our committee. Thank you for sending us. Ms. Garcia.

Ms. GARCIA. Thank you, Mr. Chairman, and to Chairman Nadler, thank you for working on getting this field hearing here.

Obviously, you know, Texas likes to brag about a lot of things, but in this area, it is just almost shame on us for always being in the leader of the pack, if you will, on the amount of complaints that go to the civil rights division.

I know that when I testified before the Senate Judiciary Committee on the extension of the Voting Rights Act, I knew why I was chosen, because I was there representing a state with so many problems. I knew it wasn't my charm and good personality. [Laughter.]

Ms. GARCIA. It was about——

Mr. NADLER. It could have been.

Ms. GARCIA. It could have been, but it is doubtful. And nothing new has happened since then. In fact, I think it is even getting worse. So for me, the most troubling part is that, as it has evolved, as you said Dean Bledsoe, it, you know, we started out with the Civil Rights Act, and we started out with targeting of African-Americans to keeping them from the ballot, you know. Nobody wants to be first on anything. Nobody wants to be the leader, but it happened, and then it has evolved now to Latinos, and now we are moving to naturalized citizens. We are moving to Asians.

I mean this is not a competition. This is about making sure we have access to the ballot. And having experienced some of this myself, I was kind of reflecting on a purging letter that I got telling me that I may not be eligible to vote, because they had gotten driver's license records and voter records, and it didn't match.

And I see my friend, Gerry Birnberg down there, you remember all those letters we got, Gerry. So, I have gotten one of those letters. So, we may have settled the issue on the purging letters that you are talking about, but they can still do those kinds of letters.

I remember going to vote in the runoff for mayor, for Mayor Turner, was ready to go vote for him. They were not going to let me vote because they insisted that my name was not on the voter rolls. And I looked at them, and I said, "Get real. I am a state senator, you know. You have to be eligible to vote to run for office." And they were just—but for me staying in there, and fighting them, and yelling—almost yelling and screaming did I finally get to vote provisionally. Provisionally. And then finally things got settled because they discovered they had made a mistake. Of course, I accused them of having double books, and a number of other things, but these things happen.

When I went to vote for myself in the primary for Congress, there was another scheme that we haven't talked about, and that is when they consolidate precincts. And they consolidate more in

the precincts of people of color, and they don't tell you that they have moved them. And then when I got there about 9:00, there was a line a mile long, and I thought, "This is great, all these folks are here to vote for me." But they weren't. [Laughter.]

They were in line because they had not started at 7:00 because the machines were down. And that the—they were having a hard time getting enough technicians to go to all the problem spots. Think of the number of voters who gave up.

So, all things are very real. And my question to all of you, all of you can, very quickly, because I am running out of time, you know, what is the one thing that you would want us to do in Congress to just kind of get a handle on all of this, and just very quickly, we will start with you, Mr. Herrera.

Mr. HERRERA. Thank you, Representative Garcia. Of course, it is from your district that we have seen so many problems, and the ones——

Ms. GARCIA. I know.

Mr. HERRERA [continuing]. You have mentioned, and in Pasadena. And as one of—a local councilman in Pasadena said, a Latino councilman, who had served in the military, wanted to fight for his community, said in the lawsuit to me, "This fight is one of, we feel in the Latino community, of moving goalposts. Every time we get closer to full franchise, they move the goalposts farther back.

But to answer your question, Representative, I think that in MALDEF we are for a reauthorization, preclearance that pulls in jurisdictions with a recent historical mechanism. The bad actors that we know, who have done things, Tennessee and Texas, in the last decade or two, and also something that where jurisdictions have committed known practices. So, we call that our belt and suspenders approach, covering everyone that—covering all the areas where there may be these violations. So, I think that is part of it.

But I also think there—there has to be something done in a much broader sense, perhaps, to address these registration issues, which seem to be happening in Texas, but also in other parts of the country.

Ms. GARCIA. Okay. Gary.

Mr. BLEDSOE. I think that is a great question, and what I would say would be we need Section 5. And when I look at Shelby County, and try to understand their decision—it is such a bad decision. When the Supreme Court says there is no foundation for Section 4, when there is 18,000 pages of testimony, expert reports that is in evidence.

So, I think that since we look at the Supreme Court, that has now gotten to be more conservative than it was in 2013, I think we need to have a real solid database record. And so to the extent that this committee or others can have taskforces, or identify individuals who can help collect data and information to show, I think just hearing today, you just open up the newspaper, and you'll see everyday something going on, whether it is Senate Bill 9, over at the legislature right now, there are things that continue to happen every day, but they need to be pooled together, so that that will give you all—empower you to get something passed at your level, and maybe provide for bipartisan support.

Ms. GARCIA. Thank you. Jayla, anything you would want to add?

Ms. ALLEN. Yes. Thank you, Representative Garcia. Restoring the Voting Rights Act, I believe, is something that needs to be done on a greater level. But also, speaking from a student leader, and someone who is just 20 years old, I believe that to address the problems that there are with voting and the voter suppression that is going on, I speak for the students at Prairie View A&M University, but I speak for students, and minorities, and women everywhere, just like the students who are in this very room.

So when we have problems with voting, it is not only at a level of—at your level, but also discouraging students at 18—between the ages of 18 and 24. If they don't start voting at those ages, it is almost very difficult for them to form that habit, and to become civically engaged later on in their years.

Thank you.

Ms. GARCIA. Thank you. Professor, anything you want to add?

Mr. MORLEY. I think funding is a critical piece of the picture. I think that if Congress is able to make available funds to local jurisdictions that might face declining tax bases, they will not have to make some of the tradeoffs that we have been hearing about, about combining—about combining polling places, eliminating polling places.

If we make funding available to local jurisdictions to have adequate staff, to have modern voting machines, and either for other aspects of the process, like free postage for absentee ballots, as well as even if you need a birth certificate to get a voter ID, to me, it is unconscionable that you should have to pay for that, that having—that if you are going to have voter identification requirements, being able to obtain a free birth certificate in order to do that seems to be an important piece of the picture. So, making that funding available, I think, would be a critical supplement to the VRA.

Ms. MARZIANI. Thank you. I feel like I unfortunately had too many presentations lately about why our democracy is in trouble. So, I could go on and on, but I will say we absolutely need preclearance restored, so that we are not backsliding.

I also believe that this is a moment where we need affirmative expansive solutions, such as those contained in H.R. 1. I think that is an extraordinarily important piece of legislation that could, indeed, match the Voting Rights Act of 1965, if we could get that passed.

So, I would really encourage folks to keep a close eye on that bill.

Ms. GARCIA. Thank you.

Mr. VATTAMALA. I would say, you know, echoing again, yes, obviously, preclearance, we need the coverage back. As Chairman Nadler mentioned, New York, certain counties recovered. We actually had multiple instances where we successfully used Section 5 to protect Asian-American voters in New York City.

But one thing that we are thinking about is federal observers from the DOJ, having them stationed in poll sites, and getting more cooperation with them. Whatever you could do on that front I think would be appreciated. We have seen decline in numbers of discriminatory incidents when we have DOJ observers at poll sites where we know there is going to be a large number of Asian-American or Latinx community voters.

Ms. GARCIA. Mr. Garza.

Mr. GARZA. So, I think that the problems that we have faced in litigating under the Voting Rights Act are so many that there can't be just one thing that this committee or that the Congress does to fix the Voting Rights Act.

One of the things that I think is really important is to revisit the standards—in addition to Section 5 is revisit the standards under Section 2. The interpretations that have come out of the Fifth Circuit, and in many instances, unfortunately, buttressed in the Supreme Court, make litigating under Section 2 as difficult as it was when the amendment to Section 2 was enacted in response to Bolden.

We are back at that stage, where it is almost impossible, not because there isn't discrimination, but because the standards that have been established by jurisprudence, by our courts, make it extremely difficult, extremely expensive, and extremely long to litigate a case under the Voting Rights Act.

Ms. GARCIA. Thank you. Thank you, Mr. Chairman.

Mr. COHEN. Thank you, Ms. Garcia. I now recognize the next member on our panel on the committee, and that is Ms. Sheila Jackson Lee, who needs no introduction.

Ms. JACKSON LEE. Let me thank the chairman very much, and what a bittersweet moment, Mr. Birnberg, if I could ask for a moment, so I can get your name on the record. But what a bittersweet moment, but an emotional moment for me to be here at the historic Texas Southern University, founded in the ashes of segregation, how pleased I am to be here with these powerful students representing the progeny and the historic leaders of all that we have invested, the blood, the sweat, and tears.

So, I will take a moment to be able to thank all the witnesses, and thank both Chairman Cohen and Nadler, and my colleagues that have joined me. I am very glad to have been part of creating the opportunity for this field hearing here in the field hearing here in the 18th Congressional District. And I want to acknowledge Vince Ryan, who has been so effective in dealing with injustices in our county; President James Douglas, of the NAACP; the provost, and head of the Mickey Lehman Center, we thank you; Dean Bledsoe, in particular, for Thurgood Marshall School of Law; Gerry Birnberg, who has been outstanding in his work; Rhonda Skillern-Jones, Doris Ellis, other leaders in law enforcement; and particularly Aaron Dallas, Marcus Nash, and Brianna Spaulding, who has helped us.

And Ms. Greenley, who is here, who has been a fighter for the justice of women, who has been blinded by a domestic violence act, and knows that elections count, and voting count. And we are just so grateful for your presence here, and hope to see you later on this evening. I wanted to make mention of you as well. So, I will quickly thank you so very much.

And then, of course, Thomas Freeman, a professor, won the highest award from the Congressional Black Caucus. Our oldest professor, teacher, Barbara Jordan, who we know what her work resulted in. And I just wanted you to be in this historic voting rights hearing.

Let me say that it has been an honor to be on the Judiciary Committee and work on the reauthorization with the leaders who are here, to be able to work on language in this legislation, and to see the mighty vote that we got, and a republican president who signed it. We are here to make the record that there is need and to follow Judge Ginsburg's admonition that just because polio may not be in place, it does not mean you need to get rid of the vaccination.

I will say to you that the legislation was named in this last time after Fanny Lou Hamer, Rosa Parks, Coretta Scott King, Cesar Chavez, and I put in Barbara C. Jordan, who put Texas in, William C. Velasquez, and Dr. Hector P. Garcia, Voting Rights Act reauthorization, and Amendment Act of 2006, to capture all these heroes.

What you may not know is standing in the courtroom the day after the Shelby case was issued, fighting against the elimination of North Independent School District, an all-black school district and board, and it was because of the Shelby case and the lack of preclearance that they threw that board out, and closed that school district to the sadness of all of the people.

So here is my question for you all, and I would appreciate it, Mr. Garza, you gave me pain of that gentleman who wanted to vote, and it happens every day, purging happens every day. Can I just particularly ask you the question of the pain of not having preclearance and being confronted with the oppression of not being able to vote.

I will start with you, Ms. Allen. Mr. Garza, I would like to hear from you. And Mimi, I think we saw each other in South Texas, if I am not mistaken. What is the pain of being purged, being a citizen, and being purged, and also being challenged by an individual citizen because of a law in Texas that I don't like your last name? It is Islamic. It is Asian. It is Hispanic. It is African. And we don't like your last name, and I am going to challenge you, because you don't seem like you're an American.

Ms. Allen, speak for all the students, and the pain, and indignity of the insults that you have experienced.

Ms. ALLEN. Thank you, Representative Jackson Lee. The pain is—it is hard to put into words almost. As a student leader, a precinct chair, someone who is leader of Rock the—chair of the Rock the Vote, every day I encounter voter registration—I mean I put on voter registration drives, and I encounter students who come to me and say, "Well, Jayla, I can't vote today, and I couldn't vote because my name wasn't on the ballot," or "Because they have told me that I have been—my registration card has been thrown out due to addresses that have been given to us to specifically put on there, but it is the wrong address."

So, you have students who are coming to campuses, are leaving home for the very first time, and are looking to vote for the very first time, and as soon as they get to the ballot, they are to register, they come across all these problems. And they are ultimately turned away, and denied their fundamental right of voting on their college campus. And if they are not necessarily denied, then they are denied their polling place on the actual campus.

So, these students, especially like freshmen, or not even just freshmen, but anybody who doesn't have access to a car, who has

to go off of campus to vote, they once again have been—has been hit with a roadblock of being able to vote for the very first time.

So, the pain is incredible. I mean you hear students tell you stories about how their families haven't necessarily had the, not necessarily the right, but also just the push of voting, and being civically engaged. When they come to you, and they say, "Well, I want to change that, I want to become civically engaged, I want to spread that to my family, and the children that I will have one day," but they go to vote, and they are ultimately turned away, I mean the pain isn't just with one student or a couple of students, it spreads across the campus. It spreads across the county, and ultimately, this country, and speak for the thousands of students, or the thousands of minorities who are running into these problems.

Ms. JACKSON LEE. Thank you. The preclearance impact.

WOMAN IN AUDIENCE. Excuse me. Is there anyone who wants to say anything here?

Ms. JACKSON LEE. Witnesses. She was asking——

Mr. COHEN. We have questions from the panel, and then maybe later we can have some comments, if that is what you would like to make.

Ms. JACKSON LEE. Thank you.

Ms. MARZIANI. Thank you. As I shared with you in South Texas when we were preparing to sue the state over the voter purge, I spoke with a woman, a naturalized citizen, who has been politically active with a close ally of the Texas Civil Rights Project, a group called the Workers Defense Project. And this woman has organized on behalf of domestic workers.

And she very much wanted to participate in the lawsuit. She had been targeted by the state. She was extraordinarily upset, because she so values her United States citizenship. But we spoke, and it is just seared in my brain. It was a Sunday evening. I could hear both of our kids in the background. And she was scared to participate in the lawsuit. She was scared, because she had already been targeted. She was scared because she thought, and asked whether the government could come and take away her citizenship. She felt like a second-class citizen, because of how she had been treated.

And ultimately, she did not participate, because it was just too scary for her, despite how politically active she has been in her community.

Ms. JACKSON LEE. Thank you.

Mr. GARZA. I think that is an excellent question.

Ms. JACKSON LEE. On the need for preclearance, if you would.

Mr. GARZA. Absolutely. I think that is an excellent question, because so many times when we view the right to vote, it is sort of an amorphous kind of thing, and we don't realize how important it is to our citizens, this vote. Margarito Lara is a prime example, but every one of our seven plaintiffs that testified and talked about how they couldn't get the voter ID.

And they would call us after Judge Ramos issued her order in 2014, and they would say, "Well, now I can vote, right?" And then we had to tell them, "No. The state secured a stay. You have to wait until we get this thing finally resolved." And they were just dumfounded. They couldn't understand—they had done everything

in their life right. This is the one thing that they really cherished, being able to go and cast a vote.

One of the most important things about my career as a voting rights lawyer is the people that I represented, the courage that it takes for them to fight for their right to vote. I had a client out of Taft, Texas. I tell the story about Miguel all the time. It was a Korean vet, who couldn't understand why things in his community were so different than just across the highway where the white community lived, and wanted a seat at the table of governance there. And would come to MALDEF on a pilgrimage almost every three months. "Can you file a lawsuit for us? Can you represent us in this?" And over and over we had told them we were too busy.

Eventually, we did represent Miguel. We tried a case against the city of Taft. And unfortunately, Miguel had to have bone marrow transplant between the time of our preliminary injunction hearing and the trial on the merits, and he passed away on the operating table.

And this is what he told his wife as he was going into the operating table. "You call Jose, and you tell him this has got to go all the way until we win, whether I make it or not." That is the kind of importance that our community feels about the right to vote. And that is why Section 5 and anything that can be done to improve Section 2 and all of those provisions are so important.

Ms. VATTAMALA. If I could just add, for Asian-Americans, you know, we conduct this survey poll monitoring every major election. There are hundreds, hundreds of Asian-American voters that are required to prove their citizenship, their citizenship at the poll site, because the exact words from the poll workers are, "You do not look like an American. Prove your citizenship to me." And obviously, most people that go to the polls don't have their passport or birth certificate with them. So those voters are turned away.

And, you know, with our OCA case that we brought regarding Section 208 of the Voting Rights Act, that grew out of an incident that happened in 2014 in Williamson County, in the Austin area. Malika Dass, a naturalized citizen. She was Indian-American, limited English proficient. She went to vote during early voting with her son, Sarab, and she was prevented from being assisted by him because he was registered to vote in the neighboring county where he went to school.

We had to convince Ms. Dass, along with her son, to convince her to come forward to be a named plaintiff. How daunting it was to be So-and-So versus the State of Texas. So many times we have really great cases, but we can't bring the action because we don't have somebody willing to come forward. Because many times, our clients, they have to be limited English proficient, and oftentimes, they are a naturalized citizen.

The state of Texas persisted in trying to depose her. She was identified with stage 4 esophageal cancer during the course of the case, and passed away during the course of the litigation. And her son was really concerned that this was for nothing, but we won, and, you know, it is a testament to her and her courage, and it was really——

VOICE [continuing]. The case?

Mr. VATTAMALA. No, because we had another organization plaintiff, OCA Greater Houston, thank God.

Mr. COHEN. Thank you, Mr. Vattamala. I would like to recognize the chairman of the committee, Mr. Nadler.

Mr. NADLER. Thank you very much. First, let me state that I appreciate all the witnesses here, and these harrowing stories.

Mr. Garza, and anyone else, I hope you will, if you have suggestions as to specific amendments to Section 2, send them to the committee, please, because we should be looking at that.

Professor Morley, you said that under the city of Boerne case, which threw out state applicability of the Religious Freedom Restoration Act, that the court had greatly narrowed the 14th—the Section 5 enforcement provision of the 14th Amendment, which is true. But you also said that, in effect, it had set a standard that you couldn't use legislation based on Section 5 or the 14th Amendment for disparate impact cases. You had to prove intentional discrimination. Is that the case, as you read the law?

Mr. MORLEY. No, Mr. Chairman. The——

Mr. NADLER. I misunderstood you. Good.

Mr. MORLEY. What the Supreme Court said is in order for a federal law to be a constitutional exercise of Congress's Section 5 power, it has to be congruent and proportional to actual constitutional violations. So, it is the congruence and proportionality standard that is Boerne's key holding.

Mr. NADLER. But disparate impact can be a congruence in proportionality requirement.

Mr. MORLEY. Yes, Mr. Chairman. The Supreme Court has held you can have some prophylactic effect in a law passed under Section 5. If you look at some of the cases issued after City of Boerne v. Flores, however——

Mr. NADLER. Okay.

Mr. MORLEY [continuing]. In particular, the Kimel vs. Florida Board of Regents and Coleman vs. Maryland Court of Special Appeals, one of the main reasons the Supreme Court said the law at issue was not a valid exercise for Section 5 was because it targeted state conduct with a disparate impact that didn't amount to intentional discrimination.

So, it is not a per se rule. It is not that the Supreme Court said that you can never have a law that addresses disparate impact under Section 5. Because the Supreme Court has held disparate impact doesn't violate the Constitution, targeting disparate impact under Section 5 would be a substantial factor that, at least under the Court's approach, weighs against the——

Mr. NADLER. But under the Court's approach with those progeny of city of Boerne, we could tailor a Section 5, that that, with disparate impact, if we figured out—if we did proportional and congruent.

Mr. MORLEY. That would be a factor weighing against proportionality and congruence.

Mr. NADLER. That is disparate impact.

Mr. MORLEY. Right.

Mr. NADLER. So, we will have to be much more careful.

Mr. MORLEY. Yes, Mr. Chairman.

Mr. NADLER. Ms. Marziani, you shook your head before and said you didn't agree with Professor Morley on this point. Could you elaborate, please?

Ms. MARZIANI. Yes. I mean I think, briefly, in the Shelby County case, the court was clear that it was not seeking to undermine congressional power in passing the Voting Rights Act as a whole. And, of course, the Voting Rights Act is derived from both the 14th Amendment, but also the 15th Amendment, of course. So, there is another source of power there as well.

In my reading of Shelby County, the court was very clear that it was concerned about the record not being based, as you had noted before, on recent history, but was not casting any significant doubt on congressional power in this realm.

Mr. NADLER. And the subsequent cases that Professor Morley cites? Are you familiar with it?

Ms. MARZIANI. I mean Shelby County is more recent than the City of Boerne.

Mr. NADLER. That was Shelby.

Ms. MARZIANI. Yes.

Mr. NADLER. Okay. So, you think we can deal with the—we can have a new Section 5 that deals with disparate impact. Do we have to write it more narrowly or more carefully than we would have had to in the past?

Ms. MARZIANI. I think that it is imperative that the committee do what it is doing right now, and make sure that any coverage formula is tailored to address the current situation.

Mr. NADLER. Well, yes, that we know. That is why we are holding these hearings.

Ms. MARZIANI. That is right.

Mr. NADLER. But having shown current problems, current discriminations, current disparate impacts, do you think we can write a Section 5 more as broad as we could have in the past, or do you think the—or it has to be more careful, given these recent Supreme Court decisions? Or more narrow, I should say.

Ms. MARZIANI. I think it can be as broad as it was in the past.

Mr. NADLER. You think it can be?

Ms. MARZIANI. Yes.

Mr. NADLER. Okay. We may have to—I am going to ask Mr. Garza, too. Yes.

Mr. GARZA. So, one thing I would say in response is that I would caution the committee and the Congress from enacting a coverage formula that is limited by a court finding of intentional discrimination. And I will give as an example——

Mr. NADLER. Well, obviously, we don't want to do that.

Mr. GARZA. Yeah. I give as an example the voter purge that was—that has been talked about. There is no judicial finding that that was an intentional act of discrimination. But the record in that case shows that the state of Texas before it sent the letters telling people they were going to get purged knew that as many as 25,000 people should not be getting that letter, and they sent it anyway.

Mr. NADLER. No. It is clear that lots of disparate impact like that, like the law eliminating straight-ticket voting, like a million

other things, are done for discriminatory reasons, or have a discriminatory effect, which you cannot prove the reason, necessarily.

Mr. GARZA. That is right.

Mr. NADLER. So, we clearly want to cover disparity impact. My question is are we more limited, or do we have to write a renewal in order to cover disparate impact differently than we would have had to a few years ago, given these recent Supreme Court decisions?

Mr. GARZA. So, I think there is an important part of Shelby County that we need to sort of remember. Shelby County did not undo the provisions of Section 5.

Ms. MARZIANI. Right.

Mr. NADLER. It just did six and four.

Mr. GARZA. The scope of Section 5 has not ever been ruled to be unconstitutional. So, the scope of the coverage of the Act was never——

Mr. NADLER. So, we shouldn't change that at all. We should leave Section 5 as is, and re-do Section 4.

Ms. MARZIANI. Yes.

Mr. GARZA. That is right. Have the coverage formula be more relevant to today, essentially.

Mr. NADLER. Yeah. Does anybody disagree with that?

Mr. HERRERA. No, Chairman Nadler. May I add to——

Mr. NADLER. Please.

Mr. HERRERA [continuing]. Garza said. And the advocates at this table, the attorneys at this table know better than I do about how difficult some of this litigation can be. But I think it is important to reiterate the difficulty, the higher burden of proving intentional discrimination in these cases, compared to disparate impact, in Texas—Right. In a Texas redistricting case, how even when there are smoking-gun e-mails about wanting to design a mathematical device by which you can make districts look like they are strong, Latino districts, but then have those same districts not perform because they are low turnout districts, even that not convincing some members of the judiciary. And then in the——

Mr. NADLER. Especially a new judiciary.

Mr. HERRERA. Right. And in Pasadena, there is a specific piece of evidence. We did successfully—MALDEF did successfully get an intentional discrimination finding in that case. And one of the pieces of evidence there was the mayor's right-hand man sending—I just want to give like a practical very, if you will forgive me, in the weeds example.

One piece of evidence was that among other dog whistles in that case, there was one piece of evidence where the right-hand man of the mayor, the communications director, said, "How about to get this measure passed, by which we changed the districting system, in order to get it passed, we only send—we take the Hispanic names out of the mailing list for the advertisements." He said, "I want to take out the Hispanic names." He said, "We are only sending these mailers to white people in Pasadena, so that they are the ones who go vote."

And when we went to court, Judge Rosenthal here was shocked by that. And that was an important piece of evidence among many others. But when we went up to the Fifth Circuit, one of the judge's

questions, she—this judge asked us on the panel, "How does this show racism? That could mean anything." It is just amazing sometimes how judges can, even when you have the smoking gun, still call in and question this kind of evidence.

Mr. NADLER. Well, thank you very much. My time has expired.

Mr. BLEDSOE. Can I add one thing to that, Mr. Chairman?

Mr. COHEN. Surely.

Mr. BLEDSOE. Two things. I would ask you to take a look at the Supreme Court case on fair housing in Texas, where they allowed the disparate impact to be a basis for a violation. But secondly, I think that just depending on—depending upon the severity of the difference shown or illustrated by the disparate impact, you could infer intent even from such a great level.

I have used that in grand jury litigation, for example, that where the experts say if you are two standard deviations away from where you ought to be, there is something extraordinary going on, and yeah—and some have said that that implies discriminatory intent.

Mr. NADLER. But the bottom line seems to be that we should leave Section 5 alone. If the courts, unfortunately, want to—its application, we can't stop them. But there is nothing about it. And just get a good Section 4 to delineate proper coverage.

Mr. BLEDSOE. Coverage. Absolutely

Mr. NADLER. Everybody agree with that?

VOICE. Yes.

Mr. NADLER. Thank you.

Mr. COHEN. Thank you, Mr. Nadler. Mr. Green. Gentleman from Texas, and a great friend, and a great supporter of the Constitution, and an opponent of bad people. [Laughter.]

Mr. GREEN. Thank you for your very kind and warm introduction, Mr. Chairman. You are a true patriot, and I thank all of the members of this Augusta panel for allowing me to interlope today. Mr. Nadler, thank you so much. Long-time friend, Ms. Jackson Lee, Ms. Garcia.

Dear friends, we have one among us that I would like to pay tribute to, if I may. He holds the distinct honor of holding two positions. Mr. Overstreet, would you just stand for a second so that they can see you, please. Morris Overstreet. He holds two positions. He is the first African-American ever elected to the court of criminal appeals.

[Applause.]

Now you will have to retract what you just did, because he is also the last and only ever elected. Thank you, Mr. Overstreet. The last and only. Morris Overstreet.

Mr. Chairman, I do want to just say to you, I thank you for coming, not only to Texas, but also to Harris County, because Harris County is really the belly of the beast. We heard someone mention Smith v. Allwright, 1944. Well, Lonnie Smith was a dentist right here in Harris County. It was Lonnie Smith, the dentist, leading citizen, who could not vote in a Texas democratic primary.

Went to the Supreme Court, and the Supreme Court overturned lower court decision. Smith was allowed to vote. Well, they metamorphosed down in Fort Bend County, and had something called a Jaybird Association, and they had a pre-election primary, lit-

erally. They Jaybird Association would hold a pre-election, and the winner would then be the nominee for the democratic party.

It sent all the way to the Supreme Court. The Supreme Court said, "No. Not only can you not have discrimination in the primary, you can't have it in a pre-primary." So, Texas has been a bad actor for a very long time. And we have to do what we are doing today, and I am so honored that you are doing it.

This difference is a congressional ID. With this ID I can vote on the budget for this country. I can vote on issues of war and peace. And this is the only time I am going to say this word, I can also vote to impeach a president, with this ID. [Laughter.]

But I cannot vote in an election in the state of Texas with this ID. Someone mentioned other forms of ID.

Mr. COHEN. And I will vote with you. [Laughter.]

Mr. GREEN. You did already. Other forms of ID. Well, it is important to note this about these other forms of ID. Texas, in theory, Mr. Bledsoe, you are well aware, you are my lawyer, in theory, they give you an ID at no cost, in theory. But you do have to get the birth certificate.

I tested it. I went to the polls and tried to vote without—with this ID and no other. When I was turned away, I was told you have to have the proper ID. So, I sent to the state of Louisiana, Mr. Chairman, where I was born to get my ID. You have to pay to get that ID from Louisiana. The state of Texas doesn't cover that cost.

And this was some few elections ago. To this day, I have not received the ID that I paid for, the birth certificate, which is really what we are talking about. I haven't received that birth certificate. To this day.

So, it is onerous not only in that it requires you to get your birth certificate, but also in that there is a cost. And if you are a person who was not born in Texas, you don't benefit from what they consider a free ID.

My questions will be these. You mentioned the long ballot. You have mentioned the birth certificates being free. We have talked about other forms of ID. In Texas, for many years, you could vote with something that showed proof of your residence, light bill, gas bill, water bill, phone bill. What is the significance of having an affidavit for you to sign such that you would be penalized criminally if you do not truthfully state that you are a citizen in that affidavit? Has anyone had any experience with affidavits as a possible means of—on a polling day, allowing that to suffice, and then prosecute you if you—if you state that you're—if you make a misstatement or an untruthful statement? Mr. Garza.

Mr. GARZA. So the——

Mr. GREEN. Could you pull the microphone a little bit closer?

Mr. GARZA. Yeah. So, the remedy that was adopted in the voter ID law is that you can use those alternative forms of ID if you sign what they call a reasonable impediment affidavit. And much of the debate that we had with the state of Texas, in terms of how that affidavit was going to be drawn up was how much emphasis the state was going to put on the proposition that if you sign that affidavit, and somehow you have made a mistake, that you would prosecuted for perjury, and that that would be on the document itself.

So, what we have now is better than what the state adopted, but we still have this problematic affidavit. That is what Mr. Lara would have to sign when he would go to the polling place without a driver's license, or the other four—a gun license, which you can use to cast a vote in Texas. And the other three items that you can. If he didn't have access to any of those, he would have to sign this reasonable, what they call a reasonable impediment affidavit, swearing that he couldn't get those five forms of documentation.

And it is problematic for that reason, that the state of Texas made a lot of noise about how we would prosecute anybody that would lie on that affidavit. So you would think twice before you sign and swear to anything that you, you know, first of all, don't understand why you have to go through this, because you have voted all of your life, but now you have to sign this affidavit, in which you are threatened with felony prosecution for if you make a mistake on it.

Mr. GREEN. Okay. Mr. Bledsoe, I want to ask you quickly, SB–9, you mentioned 9t. Is there a provision in there that relates to persons being in the polling place with you when you actually cast your ballot in the voting booth?

Mr. BLEDSOE. Well, I think that it is really an intimidating bill, because I think it even limits——

Mr. GREEN. Is your microphone on?

Mr. BLEDSOE. The law seems to limit who can even be transported to be able to vote. And so you imagine the significance of that, if you can't transport people to vote, and a lot of people will not be able to go to the polling places. And you will have to file an affidavit for that as well.

And let me say in reference to the——

Mr. GREEN. Mr. Chairman was asking you——

Mr. NADLER. You can't transport? You can't give a ride?

Ms. MARZIANI. That's correct.

Mr. BLEDSOE. Right. That's correct. That's correct. It passed in Senate. It's in the House. It has not passed the House as yet. But it is pending now. I mean you are the expert on that one. I know you guys have probably been supporting you on that.

But in reference to the other reasonable impediment affidavit, we have many of our NAACP branches that do not train individuals to—they discourage people from executing the affidavits, because it is very easy that you can get a hostile DA who will prosecute you.

Let me give you for an example, because the question is do you have an impediment that prevented you from going to register, right, to get the ID? And so it is not whether or not you are who you say you are, it goes further. And let's say you go to a nursing home, and someone from the nursing home has gotten an escort, and gone up and gotten their ID. But you were somehow not on the bus, and didn't go get your ID. So, are you going to prosecute that individual? Very possible, because it is very—we had a big argument when they were passing the bill about what the coupled mental state would be, because we wanted it to be intentionally, rather than knowingly, because knowingly allows you to go after more individuals in different types of conduct.

But the law that was passed was very broad, and allows you to go after people for what we think are innocent reasons. So, we are

very concerned about actually sending people forward, especially in some communities, because Texas has been rife with discrimination against minority voters. And so it is a real possibility that people will get prosecuted.

And when you have the attorney general of the state and the chief election official here in Harris County both talking about that, you understand that that has a clear impact.

Mr. GREEN. Did you want to make a comment, Mimi?

Ms. MARZIANI. I would be happy to follow-up with the committee, with more information about the SB–9 bill, which we have been monitoring closely, and hoping that it will not actually be passed into law.

Mr. GREEN. Thank you, Mr. Chairman. I greatly appreciate it. I yield back.

Mr. COHEN. With that, we will conclude our hearing, except for the fact that I want to recognize the county attorney, if he would like to say anything.

COUNTY ATTORNEY. I will only say that I second virtually everything that has been said. Here in Harris County we have had to face these issues, and any help we can get from Congress to subdue some of these efforts by certain elected and appointed officials is welcome. Thank you for having this hearing.

Mr. COHEN. Thank you, sir. And your attendance speaks volumes. Yes, ma'am.

Ms. SANCHEZ. Hi. I represent Texas Southern University, and I am the government seat for disability. And I am thinking——

Mr. COHEN. Would you like to come up and use a microphone? And tell us your name, please.

Ms. JACKSON LEE. Thank you, ma'am.

Ms. SANCHEZ. Yes, ma'am. My name is Valara Sanchez. And I represent Texas Southern University, and I was sworn as the government seat as a senator. And I am representing the disability. And I am asking you if there is any way that you could help the disability. That, they need.

There is nothing. And I will say this, because I am, today, representing the disability, because I am a hard-of-hearing person. We don't have that here. You don't even have anything for the blind. Need that. That is why I came and asked.

Mr. COHEN. Would anybody like to—thank you. We are concerned about people with disabilities. I understand it personally, and I think it is a priority of all of us on the panel. And it does not necessarily relate to the Voting Rights Act, but it certainly does have to do with voting. And there might be some areas. Ms. Garcia?

Ms. SANCHEZ. Because whenever you go and vote, sometimes people don't understand.

Mr. NADLER. Let me say that there are provisions in the law not strong enough in the Voting Rights Act and in the Help America Vote Act. The committee is actively engaged in discussions with various disability groups right now, looking to possible amendments to the Voting Rights Act to strengthen protections for people with disabilities.

Ms. JACKSON LEE. And I think we should do that.

Mr. NADLER. Yes.

Ms. GARCIA. Mr. Chairman, Texas law does provide—you can ask for assistance, and you can also ask for assistance in the ballot materials, and the ballot be brought to the car. Sometimes it is hard to convince judges at the polls that are actually working that that is true, but people have an absolute right, if they have any kind of physical disability, or feeling ill, or just can't walk to get to the ballot box, they could make a request, and the ballot can be brought to them at the car.

It doesn't solve the blindness issue, but they do have a right to have assistance much like in the case of an interpreter.

Ms. SANCHEZ. Well, I just know that whenever people speak, for instance, whenever they go anywhere, and some people don't have the interpreters. Sometimes they are not ready for them. So, what do we do? We are lost. So, then you lose a voice.

Ms. JACKSON LEE. Right.

Ms. GARCIA. Right. No. You are absolutely right. And I still remember well the case that the attorney was talking about, because when I was in the Senate, I filed a bill to pretty much codify what the case had said. In other words, what the case said, make it into law, and then to be able to make sure that people got trained.

And unfortunately, across the state, we are not finding that the counties are in compliance. So, we will continue to work on it on the federal level, and then down here in the state level to make sure it gets implemented the right way.

Ms. JACKSON LEE. So, thank you for being here.

Ms. SANCHEZ. I appreciate that very, very much. So, thank you.

Ms. JACKSON LEE. Thank you.

Mr. COHEN. Thank you, senator. That does conclude our hearing. It has been an outstanding hearing, thanks to you and the panel. I want to thank you for your participation and helping to re-codify this law.

[Applause.]

Mr. COHEN. So, thank you for the witnesses, and I want to—before I recognize Congresswoman Lee, without objection, all members have five legislative days to submit additional written questions for the witnesses, and material, additional material for the record.

Congresswoman Lee, you are recognized.

Ms. JACKSON LEE. Thank you for your indulgence and your courtesy extending me the moment to close. Let me give the thank you's to, first, three members, Congresswoman Garcia, Congressman Al Green, and myself may be the living example of civil rights laws, desegregation, because we started our life in a segregated America. We are, besides our own parents and God, we are here because laws of the federal government acted as hammers to make people do the right thing.

So I am not embarrassed by the leadership of Judge Nadler and—I called him Judge Nadler—Chairman—maybe in another life——

[Laughter.]

Chairman Nadler and Chairman Cohen, who joined us here in this epicenter, in 2019, the year of return, for those of you who may not know, to provide the extra hammer.

And Professor Morley, I hope in listening to your fellow panelists we can work together for you to understand not only the pain, but the legitimacy of a constitutional and federal hammer to ensure people do the right thing, because I have lived in Harris County over the years.

I won an election at 12:00 midnight, and in the morning, I had lost. And I could win nothing. I could get no votes counted to be able to say, "Didn't you win that election," but I lost it in the morning. And it was when African-Americans and Hispanics, few ran, and ran, and ran, and lost, and lost, and lost.

The Honorable Barbara Jordan lost every race that she had until we passed a 1965 Voting Rights Act, and created redistricting that—districts that allowed her to represent one person, one vote.

This is the historical Texas Southern University, a place that did not exist because there was no place for us to go, Hispanics or African-Americans.

And so I would simply say, to put on the record, I want to put on the record H.R. 1, which prohibits voter caging, restores the voting franchise in federal elections in the formerly incarcerated persons, prohibits deceptive practices and voter intimidation, reaffirms Congress's commitment to restore the voting rights, which is what we are doing, and contains, among other things, several measures to combat congressional gerrymandering. Today, the courts rule that the Ohio redistricting was partisan and unconstitutional. It is happening every day.

My final word is that every single one in this place—Danny, thank you for being here. He is the only minority, I think, on the Harris County School Board, maybe, but in any event, problematic in their redistricting. But in any event, everyone has to be committed to exposing voter infractions, there is no fraud, but voter infractions, to help us build a case, not a false case, but a case of reality, so that we can truly empower people's right to vote.

It hurts my heart that we are dealing with this, and 2020 is going to be the year of the hack, the year of oppression, and suppression, unless this great body is able to do its work. So, I am grateful that we are here, but we will not be able to do it alone.

Finally, in concluding, elections matter. The Trump Administration is in the Fifth Circuit right now arguing to take away your healthcare. They are there right now to take away your healthcare, because elections do matter. And elections matter because maybe in this judiciary committee we will be able to have a hearing on H.R. 40 reparations, because elections matter.

Thank you all so very much for giving us the opportunity to have this historic hearing at Texas Southern University, Thurgood Marshall School of Law, which we are going to at this point. We are honored to be in your presence. Thank you all very much.

Mr. Chairman, I yield back. Thank you so very much.

Mr. COHEN. And with that, this hearing is adjourned.

[Applause.]

[Whereupon, at 12:54 p.m., the subcommittee was adjourned.]

APPENDIX

H.R. 1: For the People Act of 2019

https://www.congress.gov/bill/116th-congress/house-bill/1/text

May 14, 2019

We are writing to you today to express our deep concerns over pending legislation set to be heard in your Committee, namely Senate Bill 9 ("SB 9") by Senator Hughes. This dangerous bill is a sharp attack on the voting rights of our citizens, especially those who have a disability or who do not speak English. It further criminalizes the voting process and imposes substantial new burdens on our county election systems without any new funding from the State Government. We urge you to turn this legislation aside and focus instead on voting reforms that would expand access to the ballot box and bolster election security which your committee has already considered and voted out such as HB362 by Representative Israel which would assist counties in replacing aging voting equipment that both increase access and security.

In our capacity as County Judges for Bexar, Dallas, El Paso, Harris, and Travis counties, we represent a combined 11.5 million Texans, or nearly 40% of the entire Texas population, in each geographic region of the State. Officials like us at the local level must implement the laws and policies drafted in the State Capitol. And when those laws are poorly thought out and result in voters being disenfranchised, we are the ones who must explain to our neighbors how and why their fundamental rights have been infringed.

SB 9 is one more example of a poorly conceived policy that would do more to damage elections than improve them. First, SB 9 directly attacks the voting rights of some of our most vulnerable citizens, those with disabilities and who do not speak English. Second, SB 9 further suffocates our election rules with new and enhanced criminal penalties, without doing anything to improve election security. Moreover, SB 9 would substantially raise the costs that counties across Texas will have to pay to administer elections--without any new financing from the State Government to help us pay for it.

Worse yet is the new methodology that would require our counties using countywide polling places to apportion voting centers based on the percentage of registered voters in a state representative district. We are acutely aware of the discrepancies in voter registration rates across different demographic groups. This requirement would force our hand in removing polling places from communities of color and placing them in White-majority communities. The scheme is also not sound methodologically because the geography of each district is so unique -- so, for instance, just because there is a large cluster of registered voters in one part of the district does not mean it is logical to require more polling places in the sparsely populated parts of that district.

We all believe in election security, but this bill does nothing to increase faith in the integrity of our democracy. Instead, at every turn, SB 9 makes voting harder, scarier, and more confusing to voters. There is a better way and your committee has already voted it out – HB362 by Israel. We ask that your committee turn aside from this misguided bill.

NELSON W. WOLFF
Bexar County Judge

CLAY LEWIS JENKINS
Dallas County Judge

RICARDO SAMANIEGO
El Paso County Judge

LINA HIDALGO
Harris County Judge

SARAH ECKHARDT
Travis County Judge

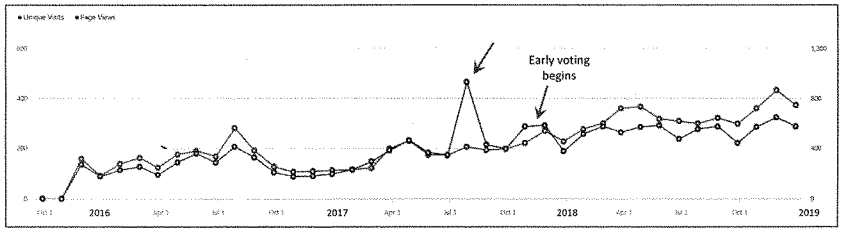
DISCLAIMER NOTICE: I cannot attest to the accuracy of the document but the document was provided to me in good faith by a local unit of the Texas NAACP regarding a matter that I believe has an impact on voting.

Gary L. Bledsoe

Russian Traffic
on the Website for
Montgomery County, TX
NAACP #6304
https://www.mcnaacp6304.org/
2017-2019

The website for the Montgomery County NAACP #6304 was built on Weebly in October 2015. I took over website maintenance in March 2017. Weebly lists the web addresses from which people navigated to our site. It also lists how many unique visitors look at the site and how many pages they looked at.

In July 2017, some of our visitor traffic looked odd, with hundreds of page views by five individuals. That was after I had posted links to national and local NAACP statements on the Charlottesville "unite the right" rally. The purple spike on the chart below shows that activity.



I first noticed Russian addresses in our NAACP #6304 website visitors October 22, 2017 (the day before Early Voting began for the November 7th election). I took Russian in college, so I was able to recognize some words in the addresses as Russian. American website domains usually end in ".com," ".org" or ".net" There were multiple domain suffixes that were not American. I looked up the odd suffixes and learned that many were Russian.

Internet country domains list	
Russia	.ru
Ukraine	.ua *(stands for Україна, or, in the Latin alphabet, Ukraïna)*

During the last week of October, the site received visits from 23 Russian addresses. I contacted Weebly (the website's platform). They said Russian "bots" were visiting the site. They said the only effect was to inflate our visitor data. Weebly said that there was no risk to any of our legitimate site visitors. Weebly recommended protecting the site by upgrading it to an "https" site, increasing its security. I upgraded the site.

October 22, 2017 screenshots (Early voting started October 23rd)

REFERRING SITES (THIS MONTH)

REFERRER		VIEWS
www.google.com		13
missis.top	Cyrillic alphabet site	3
www.sribno.net	Russian	3
bizlist.com.de	Germany	3
moskva.nodup.ru	Russia	3
yes-com.com		3
com.google.android.googleq...		3
ooomeru.ru	Russia	3
frbizlist.com		3
optom-deshevo.ru	Russia	3

View More

kiskinhouse.com		3
vsdshnik.com	Cyrillic alphabet site	3
lawyersinfo.org		3
weburok.com		3
liky.co.ua	Ukraine	3
www.bing.com		3
mcnaacp6304.org		3
www.muz-baza.net		3
whois.domaintools.com		2
burger-imperia.com	Spanish site	2
ilmexico.com		2
kino2018.club		2
rockprogblog.com		2
irkutsk.zrus.org	Russian virus site?	1
www.marinetraffic.com	Global Ship Tracking Intelligence site?!	
www.osnova3.ru	Russia	1
yandex.ru	Russia	1

October 30, 2017 screenshots

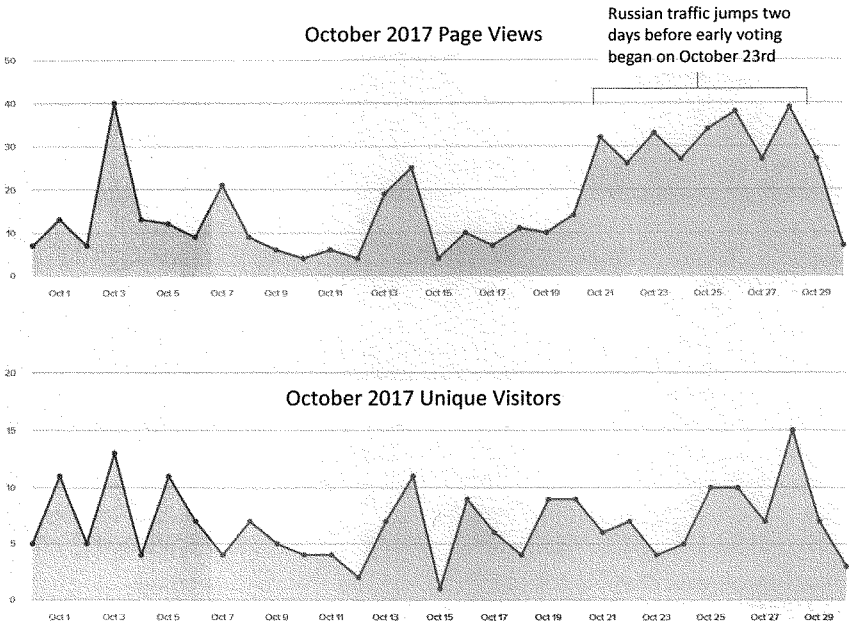
Referring Sites (this month) **Done**

REFERRER	VIEWS
www.google.com	14
yes-com.com	12
multgo.ru **Russia**	10
cotobit.biz	9
frbizlist.com	9
mega-polis.biz.ua **Ukraine**	8
missis.top	8
undergroundcityphoto.com	8
buyclomidonline.com	7
velso.ru **Russia**	6
adobereader-free.ru **Russia**	6
artel116.ru **Russia**	6
kiskinhouse.com	6
landmania.ru **Russia**	6
lawyersinfo.org	6
liky.co.ua **Ukraine**	6
ooomeru.ru **Russia**	5
www.muz-baza.net	5
englishtopic.ru **Russia**	5
kino2018.club	5
com.google.android.googlequicksearchbox	4
www.osnova3.ru **Russia**	4
creditmoney.com.ua **Ukraine**	3
optom-deshevo.ru **Russia**	3
www.bing.com	3
dverimegapolis.ru **Russia**	3
proprostatit.com	3

October 30, 2017 (cont.)

proprostatit.com		3
www.credit-respect.ru	Russia	3
grand-chien.ru	Russia	3
resant.ru	Russia	3
www.sribno.net		3
klumba55.ru	Russia	3
spravka-medosmotr.ru	Russia	3
www.zaimite.ru	Russia	3
bank.uz	Uzbekistan	3
komputers-best.ru	Russia	3
topcar-krasnodar.ru	Russia	3
besthoro.ru	Russia	3
terpom.info		3
vsdshnik.com	Cyrillic alphabet site	3
biographiya.com	Korean	3

mcnaacp6304.org		3
vykupavto-krasnodar.ru	Russia	3
bizlist.com.de	Germany	3
moskva.nodup.ru	Russia	3
weburok.com		3
pl.id-forex.com		2
rockprogblog.com		2
whois.domaintools.com		2
www.zacreditom.ru	Russia	2
burger-imperia.com		2
copenergo.ru	Russia	2
creditwell.ru	Russia	2
ilmexico.com		2


October 2017 Page Views
Russian traffic jumps two days before early voting began on October 23rd
50
40
30
20
10
0
Oct 1
Oct 3
Oct 5
Oct 7
Oct 9
Oct 11
Oct 13
Oct 15
Oct 17
Oct 19
Oct 21
Oct 23
Oct 25
Oct 27
Oct 29
20
October 2017 Unique Visitors
15
10
5
0
Oct 1
Oct 3
Oct 5
Oct 7
Oct 9
Oct 11
Oct 13
Oct 15
Oct 17
Oct 19
Oct 21
Oct 23
Oct 25
Oct 27
Oct 29

Upgrading the site security reduced the number of Russian visits to our website, but did not eliminate it: Yandex.ru continues to monitor our site.

January 30, 2018
(.ru was not there on 1-18-18)

REFERRING SITES (THIS MONTH)

REFERRER	VIEWS
www.google.com	15
www.emailmarketingrobot.com	9
m.facebook.com	4
google.com	3
com.google.android.googlequicks...	2
mcnaacp6304.org	2
r.search.yahoo.com	2
whois.domaintools.com	2
yandex.ru Russia	2
www.bing.com	1

April 30, 2018

REFERRING SITES (THIS MONTH)

REFERRER	VIEWS
www.google.com	26
com.google.android.gm	2
r.search.yahoo.com	2
yandex.ru Russia	1
199.34.228.47	1
m.facebook.com	1
mcnaacp6304.org	1
search.suddenlink.net	1
www.bing.com	1
www.yandex.ru Russia	1

July 24, 2018

REFERRING SITES (THIS MONTH)

REFERRER	VIEWS
www.google.com	18
www.bing.com	5
mcnaacp6304.org	2
search.yahoo.com	1
yandex.ru Russia	1

The website for NAACP #6304 attracted international attention, starting just before early voting in 2017. In spite of a site security upgrade it continues to be watched. NAACP needs to be aware of cyber-surveillance, especially before elections.

October 31, 2018

Entry Details Done

OCT 31, 2018 IP 185.112.82.49

Name
DavidMobCQ DavidMob

Email
poxmelkina.talsiya@mail.ru

Comment
Добрый день! Как вы думаете, положительные упоминания о вашей компании в интернете увеличивают ваши продажи? Мы уверены, что ваши клиенты интересуются тем, что пишут о вас в сети. У нас есть хорошее решение для вас - написание и размещение положительных комментариев о вас в интернете. По ссылке вы можете заказать отзывы с хорошей скидкой Что скажете? Заинтересовало пишите на почту: kaxancev@mail.ru

Delete Entry

Google translation: "Good day! Do you think positive references to your company on the Internet increase your sales? We are sure that your clients are interested in what they write about you on the net. We have a good solution for you - writing and posting positive comments about you on the Internet. Under the link you can order reviews with a good discount. What do you say? Interested write on mail: kaxancev@mail.ru"

PS: I don't know who Global Marine Tracking Intelligence is, but they have an odd interest in Montgomery County NAACP #6304.

January 26,2019

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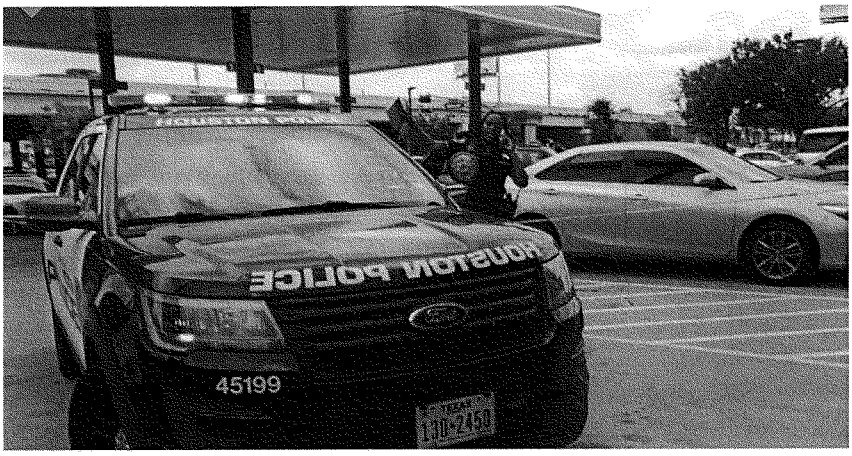

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Texas official apologizes for inaccuracy of voter purge list

By Jeremy Wallace **Updated 10:07 pm CST, Thursday, February 14, 2019**

Secretary of State David Whitley, center, attends his confirmation hearing, Thursday, Feb. 7, 2019, in Austin, Texas, where he addressed the backlash surrounding Texas' efforts to find noncitizen voters on voter rolls. (AP Photo/Eric Gay)

Nearly three weeks after he sent out a report suggesting 58,000 non-U.S. citizens may have voted illegally in past Texas elections — a report that was quickly proven to have significant flaws in it — embattled Secretary of State David Whitley is apologizing to the Legislature.

In a letter to all members of the House and Senate, Whitley said the list of potential noncitizen voters should have been reviewed more carefully before being sent to county elections officials across the state.

The list was based on an analysis of the voter rolls and driver license data from the Department of Public Safety.

Since the list went out in late January, it has been found to include tens of thousands of names of people who indeed are U.S. citizens. Additionally, the effort sparked intense criticism from county elections officials and lawsuits from civil rights advocacy

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groups who say the voter purge list was calculated to dissuade immigrants from voting.

"Before announcing the number of people who may not be eligible to vote, more time should have been devoted to additional communication with the counties and DPS to further eliminate anyone from our original list who is, in fact, eligible to vote," Whitley said in the letter sent Wednesday.

Whitley, the acting secretary of state selected for the job in December by Republican Gov. Greg Abbott, said he knows his efforts to notify counties and the public caused "some confusion."

"To the extent my actions missed that mark, I apologize," Whitley wrote in the letter, first reported by the Texas Tribune.

The apology, which comes as the Senate considers Whitley's confirmation, is a dramatic difference from a week ago.

During a confirmation hearing, Whitley refused to say if his office made any mistakes or whether he had any regrets about the way the lists were created and communicated to counties. Instead, Whitley defended his mission to assure the state's voter lists are accurate and don't include ineligible voters.

"I will readily level with you that we can always improve the process," Whitley said during that hearing, responding to questions from state Sen. Kirk Watson, D-Austin. "But the data is what the data is. And we were confident that that was the best data that we could get from DPS."

In his letter to the Legislature, Whitley characterizes the effort as part of his office's mission to keep accurate voter rolls. The list released last month was the first attempt — using some data more than 20 years old — at an analysis he plans to conduct on a monthly basis.

"The secretary of state is required by law to ensure that voter rolls are accurate and do not include persons who are ineligible to vote while ensuring that all eligible voters can participate in the electoral process," Whitley said in the letter. "The tasks are complementary: they promote integrity in elections and that, in turn, promotes voter turnout. Democracy in Texas will be strengthened and will endure by striving to achieve two goals: protecting the integrity of elections and combating voter suppression. I will never waver in my commitment to achieving those goals."

The lists Whitley's office sent to counties, which are in charge of voter rolls, included a total of more than 95,000 names of suspected noncitizens who had registered to vote.

State elections officials also had forwarded the names of 58,000 potential non-citizen voters to the Texas attorney general, saying those people had cast ballots in past elections. It's a felony for a noncitizen to vote in a Texas election.

Attorney General Ken Paxton said his office will not begin investigating those names until county elections officials sort through the entries to determine if there in fact are eligible voters on the lists.

Texas has 15.8 million voters. The list of 95,000 of potential noncitizen voters initially was hailed by Republicans, including President Donald Trump, as evidence of rampant voter fraud.

County officials say many of the names on the list are people who later were naturalized and became U.S. citizens. There's no requirement for people to update their documents with DPS, and few do. About 50,000 people are naturalized each year in Texas, voting rights advocates say.

One civil rights advocacy was quick to dismiss Whitley's letter.

"Let's be clear: our top election official isn't apologizing for actions that could have thrown thousands of eligible voters off the rolls, but rather for the way he bungled the release of his voter purge," the Texas Civil Rights Project said in a statement on social media.

A Senate committee had been scheduled to cast a preliminary vote on Whitley's nomination Thursday. However, nominations committee Chairwoman Dawn Buckingham, R-Lakeway, postponed that vote earlier this week.

Whitley eventually will need a two-thirds vote of the Senate to approve his appointment. There are 31 Senators, 19 Republicans and 12 Democrats.

Several Democrats last week made clear they were not pleased with Whitley or his testimony at the nominations committee meeting. State Sen. Carol Alvarado, D-Houston, said Whitley's answers during the hearing showed a lack of accountability.

"I'm not satisfied with the answers I got," she said at that time.

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S.B. No. 9: https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-20190503-SD004.pdf

L. Darnell Weeden, "Unreasonably Restrictive Voter Photo Identification Requirements Are Unequal Economic Barriers to Equal Access to the Right to Vote," Southern California Review of Law & Social Justice, Spring 2018: https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-20190503-SD006.pdf

REPUBLICANS AND THE VOTING RIGHTS ACT

Michael T. Morley†

JESSE H. RHODES, BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT (STANFORD UNIVERSITY PRESS 2017). PP. 280. HARDCOVER $90.00. PAPERBACK $27.95.

The Voting Rights Act of 1965[1] is one of the most important federal laws of the Twentieth Century. It swept away restrictions used throughout the South to disenfranchise African-Americans,[2] tightened federal antidiscrimination provisions concerning voting rights,[3] and authorized federal officials to monitor elections[4] and even register voters[5] in southern states. The Act also imposed preclearance requirements on states with a history of racial discrimination to prevent them from devising new ways to discriminate.[6] Complementing these provisions expanding access to the ballot, the statute simultaneously enhanced federal protections against fraudulent voter registrations,[7] thereby preventing legitimately cast ballots from being diluted or nullified by fraudulent ones.[8]

Until recent Supreme Court rulings revisiting its constitutionality,[9] the Voting Rights Act had long been regarded as a superstatute, part of the firmament of American law that helped shape the backdrop against which ordinary legislative and political

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1. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 [hereinafter "VRA"].

2. *See, e.g.*, *id.* § 4(a), 79 Stat. at 438; *cf. id.* § 10, 79 Stat. at 442 (authorizing Attorney General to bring constitutional challenges against poll taxes).

3. *Id.* §§ 2, 11(a)–(b), 12(a), (c)–(e), 15, 79 Stat. at 437, 443–45; *see also id.* § 3(b), 79 Stat. at 437.

4. *Id.* § 8, 79 Stat. at 441.

5. *Id.* §§ 3(a), 6–7, 9, 79 Stat. at 437, 439–42.

6. VRA § 5, 79 Stat. at 439; *see also id.* § 3(c), 79 Stat. at 437–38. A jurisdiction subject to preclearance requirements is prohibited from changing any election-related policies, practices, or procedures unless either the U.S. Attorney General or a three-judge panel of the U.S. District Court for the District of Columbia concludes the modification will not reduce minority participation in the electoral process. *See* Beer v. United States, 425 U.S. 130, 141 (1975).

7. *Id.* § 11(c)–(d), 79 Stat. at 443.

8. *See* Anderson v. United States, 417 U.S. 211, 226 (1974) (holding that a person has the constitutional right to have his or her vote be "given full value and effect, without being diluted or distorted by the casting of fraudulent [or otherwise ineligible] ballots"); *see also* Reynolds v. Sims, 377 U.S. 533, 555 (1964).

9. *See* Shelby Cty v. Holder, 570 U.S. 529 (2013); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S 193 (2009).

decisions were made.[10] Within two years of the law's enactment, a majority of voting-age African-Americans were registered to vote in every southern state,[11] primarily as a result of the Act's suspension of literacy tests throughout the region and deployment of federal examiners to register new voters.[12] Over the decades that followed, African-American participation in the electoral system has come to equal that of whites,[13] the African-American community has evolved into a cornerstone of the Democratic Party's coalition,[14] and African-Americans have held office at every level of government including, of course, the Presidency.[15]

Numerous histories have been written specifically about the Voting Rights Act,[16] and it plays an important role in broader histories of voting rights in the United States.[17] Professor Jesse H. Rhodes adds to this literature with *Ballot Blocked: The Political Erosion of the Voting Rights Act*.[18] The book's main thesis is that Republican officials "adopted a sophisticated long-term strategy" of publicly supporting the Voting Rights Act while surreptitiously attempting to weaken and undermine it.[19]

Relying on extensive primary source research, the author argues that Republicans repeatedly voted to adopt, reauthorize, and expand the Act over the course of several decades because those actions received substantial public attention[20] and they feared political backlash if they appeared to oppose voting rights for minorities.[21] At the same time, Republicans "craft[ed] esoteric administrative rules," "exploit[ed] bureaucratic procedures," hired conservative attorneys in the U.S. Department of Justice's ("DOJ") Civil Rights Division, and nominated conservative Supreme Court Justices "to weaken the act on their behalf."[22] Republicans relied on such techniques, the author maintains, because bureaucratic decisions and judicial appointments generally do not receive the same public attention and scrutiny as congressional debates over the Voting Rights Act.[23] Thus, Rhodes concludes, Republicans could disingenuously "limit federal voting rights

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10. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 117–18 (2010).

11. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 12–13 (1968).

12. Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006).

13. U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT 200 (registration rates), 211 (turnout rates).

14. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1427 (2015).

15. Janai S. Nelson, *Defining Race: The Obama Phenomenon and the Voting Rights Act*, 72 ALB. L. REV. 899, 900–02 (2009).

16. *See, e.g.*, ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2016); CHARLES S. BULLOCK III, ET AL., THE RISE AND FALL OF THE VOTING RIGHTS ACT (2016); *see also* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7 (Bernard Grofman & Chandler Davidson, eds. 1992); Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903 (2008).

17. *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE 211–16, 221–23, 226–46 (rev. ed. 2009).

18. *See* JESSE H. RHODES, BALLOT BLOCKED: THE POLITICAL EROSION OF THE VOTING RIGHTS ACT (2017).

19. *Id.* at 3, 18, 59, 95.

20. *Id.* at 16–17.

21. *Id.* at 14–15, 95.

22. *Id.* at 3.

23. RHODES, *supra* note 18, at 16–17, 107.

enforcement . . . while simultaneously maintaining the electorally useful appearance of fealty to the ideal of racial equality."[24] Through this deceptive strategy, Republicans "eroded the promise of American democracy by rendering the voting rights of people of color and minority-language speakers more vulnerable."[25]

The book presents a lively and interesting overview of the Voting Rights Act's history over the past half-century. In particular, it adds to the literature criticizing the Act's implementation under Republican administrations, particularly that of President George W. Bush.[26] I believe the author overstates his conclusions, however, and his evidence and analysis fall short of establishing them. Nevertheless, this work highlights the important issues that arise in attempting to implement a somewhat vague, politically charged, expressly race-conscious law that regulates the electoral process and, by extension, the allocation of political power in this country.

Part I of this Review explores the book's pervasive tendency to present most Republicans from across all branches of government throughout a period of over fifty years as acting in an almost monolithic fashion to achieve their supposedly shared goal of surreptitiously undermining the Voting Rights Act. Part II argues that important evidence the book did not consider might lead to different conclusions. At a minimum, the record could be read as showing that Republican administrations did not attempt to undermine the Voting Rights Act, but rather interpreted and enforced it somewhat differently than Democratic administrations—a common occurrence with many statutes. Ironically, Republican interpretations sometimes led to broader enforcement of the Act. Additionally, several of the considerations Rhodes cites as evidence of an alleged Republican strategy to secretly erode the Act apply equally to Democratic administrations. Part III briefly concludes.

I. ANOTHER "VAST RIGHT-WING CONSPIRACY"?

As noted above, the book centers around Rhodes's argument that, from the enactment of the Voting Rights Act through the present day, Republican officials across all branches of government have "adopted a sophisticated long-term strategy" of supporting the Act in public while simultaneously attempting to dismantle it through less visible channels.[27] The book appears to treat almost any action relating to the Act over the course of the past half-century by any Republican—whether a Member of Congress, Senator, President, Department of Justice official, or even Supreme Court Justice—as furthering this plan. He implies that hundreds of Republicans across all branches of government, including the judiciary, cooperated in some sense to allow the party to publicly support the Voting Rights Act while working to undermine it just out of public

24. *Id.* at 4.

25. *Id.* at 3.

26. *See, e.g.*, Pamela S. Karlan, *Lessons Learned: Voting Rights and the Bush Administration*, 4 DUKE J. CONST. L. & PUB. POL'Y 17, 27 (2009); Sen. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211 (2008); *see also* OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESP., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (July 2, 2008).

27. RHODES, *supra* note 18, at 3, 18, 59, 95.

view.[28]

The book's empirical evidence does not support such sweeping conclusions, for three main reasons. First, Rhodes's evidence of Republican legislators' subjective intentions and goals is tenuous and speculative. Whenever most Republican legislators voted in favor of the Voting Rights Act, Rhodes contends, it is because they were outfoxed by the civil rights community and pressured or shamed into it.[29] Whenever Republicans voted to adopt or reauthorize the Act, Rhodes contends, they did so "grudgingly,"[30] "unenthusiastic[ally],"[31] or despite "deplor[ing]" it.[32] Yet the book offers very little empirical evidence concerning the purported subjective intent, feelings, and motives of hundreds of Republican legislators throughout several decades. Rhodes relies primarily on the fact that, before voting to adopt the VRA or its reauthorizations, many of them—like many Democrats—had voted in favor of alternatives[33] or amendments that would have narrowed the law in certain respects or, ironically, expanded its geographic applicability.[34]

Legislators often have diverse motives for supporting or opposing legislative amendments, however,[35] particularly amendments they know will not pass. The fact that they may have preferred a different version of a bill does not suggest hostility to the version that was ultimately enacted. In any event, attempting to infer the intent of a large group of legislators based on the legislation they enact is a precarious enough endeavor.[36] Going even further by attempting to infer their supposed subjective preferences, motives, and desires based on voting patterns concerning failed amendments merely exacerbates the speculation.

Moreover, the book offers no evidence that Members of Congress or Senators considered the possibility of Republican appointments to either DOJ or the Supreme Court when deciding whether to adopt or reauthorize Act. In other words, there is no affirmative evidence that any Members of Congress or Senators viewed their votes as merely the public-facing part of a broader plan to ultimately undermine the very measures they were approving. Indeed, the vast majority of people voting on the Act—Members of the U.S. House of Representatives—were not even in a position to participate in the confirmation processes concerning senior DOJ officials or Supreme Court Justices.

Second, Rhodes's evidence that Republican Supreme Court Justices sought to aid Republican elected officials in a strategy to surreptitiously undermine the Voting Rights Act is even more tenuous. The central question his book presents is, "Why did key

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28. *Id.* at 4 (describing the "partisan coalition" to use "administrative and judicial institutions . . . to advance cherished but controversial programmatic objectives"); *id.* at 141 (discussing "[t]he stark divergence in behavior between Republican elected officials acting in high-profile and politically open arenas and Republican political and judicial appointees operating in more opaque and impermeable venues").

29. *See, e.g.*, *id.* at 95, 107, 131.

30. *Id.* at 16, 108; *see also id.* at 76.

31. *Id.* at 70.

32. RHODES, *supra* note 18, at 17.

33. *Id.* at 68.

34. *Id.* at 76, 103, 151.

35. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 40-41 (1991).

36. *See* John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423, 438 (2005).

conservative Republican officials consistently adopt administrative and judicial decisions that undermined the very legislation they previously endorsed?"[37] But Republican legislators, of course, did not "adopt" any "judicial decisions." And Supreme Court Justices played no role in enacting or "endors[ing]" the Voting Rights Act. Rhodes maintains that elected Republicans "deliberately and repeatedly invite[d] . . . [and] empower[ed] unelected allies to weaken or overturn" the Act,[38] "delegat[ing] to the Court the task of terminating the [Act's] preclearance regime."[39] In Rhodes's view, when Republican Justices ruled in Voting Rights Act cases, they did so on "behalf" of the Presidents who appointed them.[40] Republican Justices may be surprised to learn they had received any such delegations or assignments.

Similarly, the book contends that, by having the courts narrow and invalidate parts of the Voting Rights Act, "Republican elected officials retained 'plausible deniability' of responsibility."[41] What the book presents as plausible deniability is, from a constitutional perspective, separation of powers.[42] One of the Court's main functions is to act as a check on Congress, rather than acting consistently with Congress' publicly declared positions.[43] Thus, Rhodes's conceptions of the relationship between the legislative and judicial branches, as well as the judiciary's role with regard to the Voting Rights Act, are misguided.

Third, Rhode suggests Republican Presidents selected Justices with an eye toward their likely attitudes toward the Voting Rights Act.[44] But the book does not provide any evidence that concerns about the Act led Republican Presidents or Senators to modify their approach toward the judicial nomination process. To the contrary, since President Reagan's failed nomination of Judge Bork to the U.S. Supreme Court,[45] the nomination process has focused primarily on judicial philosophy: whether nominees are textualists or originalists and believe judges should attempt to neutrally "call balls and strikes,"[46] or instead embrace a "living Constitution" and approach cases with "empathy" toward

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37. RHODES, *supra* note 18, at 3.

38. *Id.* at 4.

39. *Id.* at 160; *see also id.* at 18 (arguing that Republican officials pursued their "narrow vision of federal voting rights enforcement" in the "judicial arena"); *id.* at 131 (discussing Republicans' "strategic delegation to the Court of the unpopular business of weakening federal voting rights safeguards").

40. *Id.* at 3.

41. *Id.* at 19.

42. Of course, some commentators have argued that the rise of political parties has dampened the willingness of the various branches to actually check party members in other branches. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2317–19 (2009).

43. To the extent Congress disapproves of the Court's rulings, it retains a wealth of powers with which to respond. *See* Michael T. Morley, *Spokeo: The Quasi-Hohfeldian Plaintiff and the Non-Federal Federal Question*, ___ GEO. MASON L. REV. ___, at 17 n.124 (2019) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946482 (identifying constitutional mechanisms for congressional control over federal courts).

44. RHODES, *supra* note 18, at 3 (arguing Republican Presidents "empowered conservative justices . . . to weaken the act on their behalf"); *id.* at 9 (contending Republicans "obstructed implementation of the VRA through . . . the courts"); *id.* at 19 (alleging Republicans "exploited" the judicial nomination process "to circumscribe federal voting rights enforcement").

45. *See* ROBERT BORK, THE TEMPTING OF AMERICA 267–345 (1990).

46. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Hon. John G. Roberts, Jr.).

particular litigants.[47] While judicial appointments undoubtedly had consequences for the Act, there is little evidence they were viewed and treated as a component of a comprehensive fifty-year-long Republican strategy to covertly undermine the Act while publicly supporting it. It is also worth noting that, according to Rhodes's data, three out of President Richard Nixon's four appointees to the Supreme Court voted for the ostensibly "liberal" position in the majority of VRA cases they confronted.[48]

In short, there are definitely stories to be told about the differing approaches the Democrat and Republican parties have adopted toward the electoral process, the Voting Rights Act, and judicial appointments. The conclusions that Rhodes seeks to draw, however, far outstrip the underlying evidence. Despite Rhodes's commendably extensive primary source research, the book relies too much on speculation and overgeneralization to draw unsupported connections.

II. REPUBLICANS, DEMOCRATS, AND THE VRA

Rhodes presents a narrative of Republicans attempting to undermine, weaken, frustrate, and erode the Voting Rights Act over more than fifty years.[49] If the historical record is viewed in greater context, however, a competing narrative—one familiar from administrative law—may emerge. As with many broadly written laws, Democratic and Republican administrations simply adopted different interpretations of the Act. In some cases, Republican administrations construed it more broadly than their Democratic counterparts.

Agencies such as DOJ "often exercise broad discretion with respect to enforcement of the statutes and regulations they administer."[50] They "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"[51] Many of the Voting Rights Act's most important provisions are written in generalities,[52] and it is not immediately apparent from their plain text exactly how they apply to situations that do not involve intentional discrimination, particularly redistricting decisions in which an effectively infinite number of outcomes are generally possible. DOJ often must weigh numerous considerations that may sometimes be in tension with each other. Election laws with disparate racial impacts raise serious questions under § 2,[53] yet states must protect the right to vote equally for all citizens,[54] regardless of race, and racially proportional representation is generally not required.[55] One scholar explains, "The combination of the change in the focus of the Voting Rights Act from official discriminatory policies to

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47. Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009), *at* https://obamawhitehouse.archives.gov/the-press-office/remarks-president-justice-david-souter; *see also* Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

48. RHODES, *supra* note 18, at 85.

49. *Id.* at 3.

50. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 683 (2014).

51. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)).

52. *See, e.g.*, VRA, *supra* note 1, §§ 2, 5, 79 Stat. at 437, 439.

53. 52 U.S.C. § 10301(a); *see* Thornburg v. Gingles, 478 U.S. 30, 43–44 (1986).

54. *See* Bush v. Gore, 531 U.S. 98 (2000).

55. 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

discriminatory results, coupled with the shift to a more polarized national political environment created 'enforcement space' . . . . Each new administration is able to determine the type of voting rights violations that will take priority."[56]

DOJ's Office of the Inspector General has concluded that, despite their differences, both President George W. Bush's and President Barack Obama's Administrations implemented the Voting Rights Act appropriately. It explained that, while "some changes in enforcement priorities" accompanied changing administrations, "our review generally did not substantiate the allegations we heard about partisan or racial motivations and did not support a conclusion that the Voting Section has improperly favored or disfavored any particular group of voters in the enforcement of the Voting Rights laws."[57]

At least three examples demonstrate how differences between Democrat and Republican administrations cannot simply be reduced to questions of greater or lesser enforcement of the Act. First, President George W. Bush's Justice Department launched *United States v. Brown*, the first-ever § 2 case against an African-American defendant for discriminating against white voters.[58] Its decision to pursue the suit triggered enormous controversy. Many career attorneys within the Voting Section opposed the suit, primarily on the grounds § 2 could not or should not be enforced against minority defendants.[59]

In *Brown*, the DOJ sued the Noxubee County Democratic Executive Committee ("Democratic Committee"); its chairman, Ike Brown, who was African-American; and the county election commission for violating § 2.[60] Noxubee County's population was 70% African-American; 93% of its elected officials, as well as the majority of the county's Democratic Party, were African-American, as well.[61] The Democratic Committee was almost exclusively responsible for running the party's primary elections in Noxubee County, and Brown exercised tremendous influence and control over the committee's operations.[62]

Following a bench trial featuring dozens of witnesses, the district court declared it was "convinced that Ike Brown, and the [Democratic Committee] under his leadership, have engaged in racially motivated manipulation of the electoral process in Noxubee County to the detriment of white voters."[63] It further explained, "[T]here is no doubt from the evidence presented at trial that Brown, in particular, is firmly of the view that blacks,

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56. Donald Campbell, *Partisanship, Politics, and the Voting Rights Act: The Curious Case of* U.S. v. Ike Brown, 29 HARV. J. RACIAL & ETHNIC JUST. 33, 58 (2013).

57. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 113 (Mar. 2013).

58. *See* United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007) [hereinafter "*Brown I*"], *aff'd* 561 F.3d 420 (5th Cir. 2009) [hereinafter "*Brown II*"].

59. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 44 (explaining that multiple staff attorneys in DOJ's Voting Section "did not believe the Voting Section should pursue cases on behalf of White victims"); *see also* William R. Yeomans, *The Politics of Civil Rights Enforcement*, 53 WASHBURN L.J. 509, 532 (2014) (discussing the "enormous tension" *Brown* generated within the Voting Section).

60. *See Brown I*, 494 F. Supp. 2d 440. The Government also sued Noxubee County and the county clerk for violating § 11 of the VRA, but those defendants entered into a consent decree. *Id.* at 440 n.1. Section 11 makes it a federal offense for any person acting under color of law to refuse to allow a qualified voter to cast a ballot or to refrain from counting such votes. 52 U.S.C. § 10307(a).

61. *Brown I*, 494 F. Supp. 2d at 443.

62. *Id.*

63. *Id.* at 449.

being the majority race in Noxubee County, should hold all elected offices, to the exclusion of whites; and this view is apparently shared by his 'allies' and 'associates' on the [Democratic Committee], who, along with Brown, effectively control the election process in Noxubee County."[64]

The court determined that, as chairman of the county Democratic party, Brown recruited African-Americans from outside the county to run against the few white county officials.[65] He then excluded the two white members of the Democratic Committee's executive committee from a hearing concerning the eligibility of one of those candidates.[66] Prior to a 2003 election, Brown also issued a press release identifying 174 white voters whom he intended to challenge at the polls.[67] Most were constituents of the only white member of the county commission.[68] At trial, he could provide no evidence that most of those people were ineligible to vote, or that he had performed any investigation into their eligibility.[69]

The court further found that Brown and members of the Democratic Committee "intentionally selected a nearly all-black work force primarily as a means of facilitating a scheme to disenfranchise and dilute white voting strength by pushing through absentee ballots that had been collected by Brown's people."[70] As party chair, the court explained, Brown hired and paid notaries to assist only black voters in completing and submitting absentee ballots, including people ineligible to vote absentee under state law. In at least one case, the notary actually completed the ballots, deciding the candidates for whom they would be cast.[71] Brown also oversaw the counting of absentee ballots, directing poll workers to ignore statutory requirements and procedures.[72] The court found that he instructed poll workers to disregard any challenges to absentee ballots and prohibited them from rejecting absentee ballots from African-American voters that were invalid under state law.[73] At the same time, he ordered poll workers to reject some white voters' absentee ballots, despite allowing ballots with similar defects from African-Americans to be counted.[74]

The incredulous district court declared, "While the Government's theory in this regard, that Brown and his 'associates' and 'allies' orchestrated such a scheme, may seem improbable, having thoroughly reviewed and considered the evidence, the court has come to the firm and definite conclusion that there is substance to the Government's position."[75] It concluded, "If the same facts were presented . . . on behalf of the rights of black voters,

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64. *Id.*

65. *Id.* at 452–53; *Brown II*, 561 F.3d at 429–30.

66. *Brown I*, F. Supp. 2d at 454–55. Brown also admitted to making a false charge of racial discrimination against a white county supervisor to try to get him voted out of office. *Id.* at 455; *Brown II*, 561 F.3d at 429.

67. *Brown I*, 494 F. Supp. 2d at 474–77; *Brown II*, 561 F.3d at 429, 433–34.

68. *Brown II*, 561 F.3d at 429.

69. *Id.*

70. *Brown I*, 494 F. Supp. 2d at 463; *see also Brown II*, 561 F.3d at 428, 433.

71. *Brown I*, 494 F. Supp. 2d at 459–60; *Brown II*, 561 F.3d at 427–28.

72. *Brown I*, 494 F. Supp. 2d at 464–65; *Brown II*, 561 F.3d at 428.

73. *Brown I*, 494 F. Supp. 2d at 457, 461, 464–65.

74. *Brown I*, 494 F. Supp. 2d at 469–70; *Brown II*, 561 F.3d at 428, 434–35.

75. *Brown I*, 494 F. Supp. 2d at 457.

this court would find that Section 2 was violated."[76] The court refused to afford white voters any less protection, despite defendants' insistence that whites had neither experienced an extensive history of racial discrimination nor faced ongoing discrimination elsewhere in the state.[77] The U.S. Court of Appeals for the Fifth Circuit affirmed,[78] and commentators have since debated the case.[79]

During the Obama Administration, Attorney General Eric Holder expressed opposition to such "reverse-discrimination" suits, declaring that he did not wish "to expand the use of the power of the Civil Rights Division in such a way that it would take us into areas that, though justified, would come at . . . the cost of people [that the] Civil Rights Division had traditionally protected."[80] Likewise, when Deputy Assistant Attorney General Julie Fernandes was asked about the possibility of pursuing a Section 2 case against a black defendant, she instructed Section attorneys that they "should focus on 'traditional civil rights' cases and . . . political equality for racial and ethnic minorities."[81] Consistent with these policies, the Obama Administration did not bring any lawsuits under the Voting Rights Act against African-American defendants. To the contrary, shortly after the transition, the Obama Administration dropped almost all claims in a lawsuit the Bush Administration had already won (through default judgments) against the New Black Panther Party for voter intimidation during the 2008 election.[82]

A second example of the parties' differing interpretations of the Voting Rights Act concerns the need for majority-minority districts under § 5 of the Act. The issue arose in connection with Georgia's 2001 redistricting plan for its state senate. The state's previous legislative map included ten districts with a voting-age population ("VAP") that was more than 50% black, as well as eight other districts with VAPs that were between 30-50% black.[83] The Georgia legislature, controlled by Democrats, sought to increase the number of Democrat senators by spreading African-American voters among more districts.[84] It adopted a map including 13 districts with VAPs that were more than 50% black (an increase of three), another 13 districts with VAPs that were 30-50% black (an increase of five), and 4 other districts with VAPs that were between 25-50% black.[85] Republicans in the legislature unanimously opposed the plan and President George W. Bush's Justice

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76. *Id.* at 486.

77. *Id.*

78. *Brown II*, 561 F.3d at 438.

79. *Compare* Cody Gray, *A New Proposal to Address Local Voting Discrimination*, 50 U. RICH. L. REV. 611, 640 n.169 (2016) ("[*Brown*] was certainly justifiable on a legal basis . . . ."); Denny Chen, Note, *Section 2 of the 1965 Voting Rights Act and White Americans*, 2 U.C. IRVINE L. REV. 453, 477 (2012) ("[C]ourts should interpret Section 2 of the Voting Rights Act as applicable to any citizen; such an interpretation best effectuates the purpose of the VRA—protecting the voting rights of all Americans."); *with* Karlan, *supra* note 26, at 28 (citing *Brown* as one of several factors demonstrating that "a politicized Department of Justice cannot perform its tasks fully and fairly"); Campbell, *supra* note 56, at 66 (arguing the *Brown* case "demonstrates the unique problems that arise when using the [VRA] . . . against African Americans"); Yeomans, *supra* note 59, at 532 n.168 ("[T]here remains a question of whether § 2 can properly be applied in many instances to protect white voters.").

80. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 52.

81. *Id.* at 75.

82. *See* Amanda C. Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425, 454–58 (2014); *see also* Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 366–67 (2010).

83. Georgia v. Ashcroft, 539 U.S. 461, 470 (2003).

84. *Id.* at 469.

85. *Id.* at 470–71.

Department refused to pre-clear it under Section 5 of the VRA.[86]

The Government argued, and the district court found, that the plan violated Section 5 because it reduced the black VAPs of three districts (Districts #2, 12, and 26) from between 55.43% and 62.45% to slightly over 50%.[87] These reductions in black voting strength diminished the opportunity of black voters in those districts to elect candidates of their choice.[88] The Government and district court believed § 5's anti-retrogression principle prohibited the Government from jeopardizing those districts' status as "safe" majority-minority districts.

The Supreme Court reversed, holding that Section 5 does not require states to maintain a consistent number of majority-minority districts.[89] Rather, the Court held, Section 5 leaves states free to choose between preserving majority-minority districts in which minorities are able to elect the candidates of their choice, or instead establishing districts with lower proportions of minority voters, who may either enter into coalitions to elect the candidates of their choice or impact the political process in other ways.[90]

Rhodes presents *Georgia v. Ashcroft* as yet further evidence of how conservative Supreme Court Justices worked behind the scenes, away from public view, to undermine the Voting Rights Act.[91] He claims the *Georgia* majority watered down Section 5, "demoting the ability of minority voters to elect a candidate of choice to only one of a number of factors to be evaluated in determining whether a redistricting plan was retrogressive."[92] The ruling, he argued, "made it more probable that minority voters . . . would be subjected to the dilution of their voting power, at least as traditionally understood."[93] It "furthered the conservative project . . . of limiting the potential of the Act to protect majority-minority districting."[94]

The book does not explain, however, that President George W. Bush's Justice Department objected to the redistricting scheme at issue in *Georgia*, effectively rejecting the theory the Supreme Court ultimately adopted.[95] It likewise does not mention the fact that Georgia Democrats—including virtually all black members of the legislature—were the ones who crafted the map the Court upheld.[96] And some voting rights scholars, such as Samuel Isaacharoff, have suggested the *Georgia* Court's holding enhances the ability of African-Americans voters to participate in coalition politics and expand their political influence far beyond what an exclusive focus on majority-minority districts would allow.[97]

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86. *Id.* at 471.
87. *Id.* at 472–73.
88. *Georgia*, 539 U.S. at 474.
89. *Id.* at 482–83.
90. *Id.*
91. RHODES, *supra* note 18, at 140.
92. *Id.*
93. *Id.* at 141.
94. *Id.*
95. *See Georgia*, 539 U.S. at 472.
96. *Id.* at 471.
97. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) (arguing that the traditional understanding of § 5 prior to *Georgia* could cause "mischief . . . in stalling coalition politics" involving African-Americans); *see also* Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1557–58 (2002); Cameron, Epstein, & O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in*

Thus, while the book uses *Georgia v. Ashcroft* as evidence supporting its narrative, it overlooks the many ways in which the case actually cuts against it.

Finally, Republican administrations enforced provisions of voting rights law that Democratic Administrations allowed to languish. For example, the Bush Justice Department brought several suits to enforce Section 8 of the National Voter Registration Act ("NVRA"),[98] which requires jurisdictions to update voter registration lists to eliminate outdated records to reduce the possibility of mistake, double voting, or absentee ballot fraud.[99] Under the Obama Administration, in contrast, Deputy Assistant Attorney General Fernandez announced to Voting Section staff attorneys she "'did not care about' or 'was not interested' in pursuing Section 8 cases."[100]

In many other respects, Democrat and Republican administrations' records of enforcing the Voting Rights Act are comparable. Republican President Nixon's Attorney General largely continued Democrat President Johnson's enforcement policies.[101] Rhodes acknowledges that both Republican President Gerald Ford's Attorney General, Edward H. Levi, and President George H.W. Bush's Attorney General, Richard Thornburgh, enforced the Voting Rights Act vigorously.[102] With regard to Section 2, DOJ's Office of Inspector General found the George W. Bush and Obama Administrations' records comparable:

> [W]e found it significant that following the change in administrations in 2009, there was no surge in new Section 2 cases as might be expected if valid cases had been suppressed or discouraged in the prior administration. Indeed, the number of Section 2 enforcement actions dwindled to just four matters from 2009 through 2012.[103]

Rhodes criticizes the low rate of Section 5 objections during George W. Bush's administration, claiming "key provisions of the Act went into administrative hibernation."[104] Yet the first term of the Obama Administration (prior to *Shelby County*)[105] had the same rate.[106] And the volume of voting rights litigation that Obama's DOJ pursued never exceeded that of the Bush Administration (and, indeed, was less than during Bush's first term).[107]

The book sometimes seems to offer diametrically opposite assessments when different administrations adopt substantially similar policies. For example, when the Bush Administration pursued majority-minority districts, it was facilitating the election of white Republicans in neighboring districts;[108] when Assistant Attorney General Deval Patrick did so in the Clinton Administration, he was making "voting rights enforcement a top

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Congress?, 90 AM. POL. SCI. REV. 794, 806 (1996).

98. 52 U.S.C. § 20507(a)(4).

99. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 94.

100. *Id.* at 100.

101. RHODES, *supra* note 18, at 3.

102. *Id.* at 81–82, 111.

103. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 25.

104. RHODES, *supra* note 18, at 137.

105. *See* Shelby Cty. v. Holder, 570 U.S. 2 (2013) (invaliding § 4(b) of the Voting Rights Act, which identified the jurisdictions subject to preclearance requirements under § 5).

106. RHODES, *supra* note 18, at 169.

107. *Id.* (quoting Michael L. Selmi, *The Obama Administration's Civil Rights Record: The Difference an Administration Makes*, 2 J. L. & SOC. EQUALITY 108, 120 (2013)).

108. RHODES, *supra* note 18, at 112.

priority," with no assessment of potential political motivations or consequences.[109] Likewise, when Republican administrations—even apart from George W. Bush—sought to hire conservative attorneys in the Voting Section who shared the administration's view of the Voting Rights Act, they were inappropriately politicizing the office.[110] Yet when the Obama Administration hired almost exclusively from left-wing groups, it was faithfully implementing the Act.[111]

III. CONCLUSION

The history of the Voting Rights Act—and federal election law more broadly—is more complicated and nuanced than Rhodes's central narrative suggests. Rather than Republican administrations secretly trying to weaken and undermine the Act, there is ample reason to conclude Democratic and Republican administrations both faithfully enforced it, albeit according to their differing interpretations and priorities. These differences sometimes lead to broader or more aggressive enforcement of various voting rights provisions by Republican administrations.

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109. *Id.* at 118.
110. *See id.* at 79, 108, 133–34.
111. *Id.* at 166–67.

Michael T. Morley, "Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks," Emory Law Journal: https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-20190503-SD008.pdf

Michael T. Morley, "Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote," William & Mary Law Review, Vol. 59:2053: https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-20190503-SD009.pdf

Enforcement of the Voting Rights Act in the State of Texas

May 3, 2019
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Written Testimony of
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To the House Judiciary Committee:

My name is Bobbie Cohen and I am a State Policy Advocate of Texas for the National Council of Jewish Women. The National Council of Jewish Women (NCJW) strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. Throughout its history, NCJW has educated and engaged our members and supporters to drive voter turnout and expand voting rights, including advocating for women's suffrage and the historic Voting Rights Act of 1965 (VRA), in pursuit of the Jewish value of *tzedek*, or justice. Today, we work for election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified.

Efforts across the country to suppress the vote have multiplied since the 2013 US Supreme Court decision in *Shelby County v. Holder* gutted a key provision of the VRA. Texas was one of the states required to obtain preclearance before implementing changes in voting laws and practices before *Shelby*. Texas has a long history of discriminatory voter suppression efforts, including a post-Reconstruction poll tax that remained in place until 1964, when the Supreme Court intervened to end the practice in the five remaining states where it was still imposed. In my testimony, I highlight voter suppression and recent election problems in Texas

Voter Suppression in Texas
Texas has suppressed the vote in a variety of ways. In a recent effort, Acting Secretary of State David Whitley claimed to have identified almost 100,000 registered voters as "possible" non-citizens, and provided that list to county election officials with instructions to investigate them for possible removal from the rolls. These individuals had at sometime in the past 20 years self-identified as a non-citizen when obtaining a driver's license or state ID card and had since become naturalized citizens. After several civil rights organizations filed suit, a federal judge intervened to stop the practice in its tracks and ordered the state to pay $450,000 in costs and attorney's fees. In his ruling, Judge Fred Biery wrote, "It appears this is a solution looking for a problem" and that the practice "exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us."

The voter registration process itself is an impediment to some voters. Texas does not have online voter registration. Voters may register in-person at the county office responsible for voter registration. These offices are not always conveniently located and easily accessible to voters who depend on public transportation. Voters can also mail in a voter registration application; the

application can be picked up at designated locations depending on the county, or downloaded from the Secretary of State's office and mailed back. However, the website is confusing: it's titled Voter Registration Application, asks the user a few screening questions, loads an application to the screen for the user to complete, and finally has a submit button at the bottom. Many people complete the application, hit submit, and think that they have registered to vote. The information that the form must be printed, signed, and mailed back is in fine print at the bottom.

Texas also does not have same-day registration. Voters must submit their Voter Registration Application at least 30 days prior to an election to be eligible to vote in that election. Any minor mistake on a mailed in application can result in the application not be processed in time.

In 2011, Texas passed SB 14, a strict voter ID law requiring voters to show a government issued photo ID at the polls in order to vote. Experts estimated at least 600,000 eligible voters did not have the type of ID required in the new legislation. The law could not be implemented until 2013 when the Shelby decision took Texas out of federal preclearance. Now fully implemented with some modification, the law requires voters to produce a Texas driver's license or state ID card obtained from the Department of Public Safety (DPS). DPS offices are limited in number, and many are not easily accessible by public transportation. Other forms of acceptable ID include concealed handgun licenses, military ID, U.S. citizenship papers with photo and a U.S. passport. The most marginalized voters are the least likely to have access to these forms of ID. A voter who cannot obtain an acceptable ID may sign a "Reasonable Impediment Declaration" affidavit, checking which state identified acceptable reason prevents them from obtaining an ID and produce a copy or original of one of the following supporting forms of ID: government document that shows the voter's name and an address; voter registration certificate; current utility bill; bank statement; government check; paycheck; or (a) a certified domestic (from a U.S. state or territory) birth certificate or (b) a document confirming birth admissible in a court of law which establishes the voter's identity (which may include a foreign birth document). Many of these documents are difficult to obtain, particularly for those already marginalized as they only apply to the person whose name appears on the document, e.g. a utility bill must have the name of the voter and cannot be used by a spouse, adult child, or other member of the household. In the most recent election, low-income young voters from were most likely to experience an issue with voter ID. Many have only a student ID, which the state does not accept. Additionally, many voters find the Reasonable Impediment Declaration intimidating as it begins with a paragraph explaining in legal terms that the voter is subject to perjury charges if anything on the form is incorrect.

The Texas Legislature is currently in session and there is a no shortage of proposed legislation that would result in additional voter suppression. As I write this testimony, a bill is in play that would make it a crime to take more than three people who are not relatives to the polls without filling out a raft of paperwork, criminalize honest mistakes made on voter applications or through the voting process, and eliminate curbside voting for voters unable to enter the voting site (known as motor voter). This harmful bill passed the Senate and will likely receive a hearing in the House as early as Monday, May 6. A sampling of other bills would require proof of citizenship to register to vote, slash the number of early voting days to seven (including weekends), and further complicate the process for voters using alternate forms of ID. One bill would codify and implement processes for purging voter rolls, including the process applied to naturalized citizens that Judge Biery already ruled illegal.

How can Texas address voter suppression?

1. Texas should implement online voter registration, currently available in 37 other states.

2. Texas should implement same-day voter registration. States with this option experience higher voter turnout. Several counties currently use e-poll books, so the technology is available to eliminate duplication.
3. Texas should eliminate or greatly streamline its voter ID laws. These laws unfairly impose barriers most likely to affect youthful voters, the elderly, voters with disabilities, economically disadvantaged who are often unable to obtain the required or alternate forms of ID. Additionally, the State should also remove all "scary" or threatening language from all voting documents, including affidavits.

Conclusion

Voter suppression most harms already marginalized communities. Laws and actions designed to make it harder to vote — including strict voter ID requirements, limits to early voting, and voter roll purges — disproportionately impact communities of color, minority-language speakers, low-income voters, elderly and young voters, women, and transgender individuals. But there are also activists across our state, mobilizing on the ground, taking action, and making major progress to strengthen and expand the right to vote. I am proud to be a part of these efforts, and thank the House Judiciary Committee for the opportunity to provide written testimony.

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