

LEGISLATIVE PROPOSALS TO STRENGTHEN THE VOTING RIGHTS ACT

HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED SIXTEENTH CONGRESS FIRST SESSION

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LEGISLATIVE PROPOSALS TO STRENGTHEN THE VOTING RIGHTS ACT

Thursday, October 17, 2019

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 10:06 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Scanlon, Dean, Garcia, Jackson Lee, Collins, Johnson of Louisiana, and Cline.

Staff Present: David Greengrass, Senior Counsel; John Doty, Senior Adviser; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Adviser; Julian Gerson, Staff Assistant; James Park, Chief Counsel; Keenan Keller, Senior Counsel; Will Emmons; Professional Staff Member; and Matt Morgan, Counsel.

Mr. COHEN. The Committee Subcommittee on the Constitution, Voting Rights, Civil Rights, Civil Liberties, *et cetera*, will come to order.

Without objection, the chair, in its infinite wisdom, is authorized to declare recesses of the Subcommittee at any time.

Before we get started with this hearing, I want to say what is probably on everybody's mind and hearts is that we are saddened greatly by the loss of a great American, great congressperson, but a great American and human being in Elijah Cummings, who passed away this morning.

Elijah Cummings was a defender of the Constitution, man of great knowledge and wisdom and grace and exhibited that in all his work in Congress, particularly as chairman of the Oversight Committee, where in a position that become and did become somewhat adversarial, he did not allow it to go beyond what was the maximum allowance for differing perspectives and views and worked with the Republicans. I think he had the respect of Mark Meadows and others on that committee.

So, I would suggest that we take a moment of silence and in our own ways reflect on our own time that we are given and the wonderful opportunity we had to share our lives with Congressman Cummings, and send the best to his family. So, with that, we will take a moment of silence.

[Moment of silence.]

Mr. COHEN. I would now like to recognize for comments concerning our departed colleague the Ranking Member, Mr. Johnson.

Mr. JOHNSON of Louisiana. Thank you for that, Mr. Chairman.

It is certainly appropriate here in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for us to honor the memory of this great man. We were all stunned this morning, as you said, to hear of the sudden passing of our colleague Elijah Cummings. A group of our conservative leaders happened to be meeting for breakfast this morning, and I want you to know we prayed for him and our family and our country. It is a really sad day for all of us.

While he and I rarely agreed on matters of public policy, I just want to tell you I always found him to personally be a man of great sincerity and decency and integrity, and I really enjoyed talking with him about his life experiences. We could all learn from one another. We did more of that.

We all deeply respected Chairman Cummings, and I just want to say I think on behalf of all my Republican colleagues, I know that he will be deeply and sorely missed on Capitol Hill. So, thanks for that opportunity.

Mr. COHEN. You are welcome, Mr. Johnson.

I would now like to recognize Chairman of the full committee, who knew Mr. Cummings for many, many years, for his thoughts.

Chairman NADLER. I thank you very much, Mr. Chairman.

I join Chairman and the Ranking Member in mourning the loss of my great friend and colleague Elijah Cummings. He was a man of integrity and intellect. He served his constituents, his country, and the causes he believed in with passion and with grace.

It is fitting that we are considering voting rights today as Elijah was a champion of equality and civil rights on behalf of all those in society who have been left behind. He was also a leader in Government oversight and defending the rights of Congress to hold the executive, any executive accountable. He was a true partner in these efforts. His passing is a great loss for our institution and a great loss for his constituents and a great loss for our country.

Elijah's presence, passion, and moral clarity will be missed. My heart goes out to his family, his constituents, and to all of us who will miss him so very, very deeply.

I yield back. Thank you, Mr. Chairman.

Mr. COHEN. Mr. Collins, you are recognized.

Mr. COLLINS. Thank you, Mr. Chairman.

I want to, before we get started today, just echo what has already been said in the kind words of Chairman and also Chairman of the full committee. When I first got to Washington, DC, I didn't realize it at the time was the privilege of serving on OGR. I had three committees—Foreign Affairs, OGR, and then this committee. Mr. Cummings was the Ranking Member, and it was during a very contentious time, and many times I can remember seeing him, as we would travel back and forth on the train back and forth between the Capitol and the hearings and the long hearings.

The thing that amazed me always was that even when we could have the most sharpest disagreements—this was during the time of him and Mr. Issa going at it a great deal—it was always we

would get on that train, and it was, "How is your family?" It was always about, what is going on in your world?

We actually bound on an issue of pharmacy. He had worked in a pharmacy when he was younger, and we were talking about PBMs. He joined me in my dislike and great dislike of pharmacy benefit managers. To see that humanity, and I can see you shaking your head, there is a great equalizer here. We are all passionate about what we do, and that is what we are sitting here for.

At the end of the day, there is a commonality of death and loss that remind us, one, of our own mortality, but also of the process. I saw something this morning on the TV screen as I was running because it happened and announced right after I got up, and it had the date of his birth and the date of his death. Those will be brought out again, but it was that middle bash that is what Elijah Cummings will be known for. It is why he will be a picture on the wall in OGR.

There will many things discussed. He personally meant to me a great competitor, a great fighter for what he believed in and the people he fought for, but also would be one that also could reach across the aisle. He and I had a bill together that continued our criminal justice reform. It is sitting in the Senate today, and I will actually challenge the Senate, today or tomorrow will be a great day to honor him and pass that bill as we go forward.

So, again, thank you, Mr. Chairman, for allowing me to do that. I will have an opening statement later, but I wanted to yield back.

Mr. COHEN. So, I welcome everyone to today's hearing on "Legislative Proposals to Strengthen the Voting Rights Act," and I will recognize myself for an opening statement.

Today's hearing on "Legislative Proposals to Strengthen the Voting Rights Act" is part of a series of hearings that the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties is holding this Congress to assess ways we can once again give effect to the preclearance requirement of section 5 of the Voting Rights Act of 1965.

The Supreme Court effectively gutted that requirement in *Shelby County v. Holder*, when it struck down the coverage formula to determine which jurisdictions would be subject to preclearance. As a result, the preclearance provision remains dormant unless and until Congress adopts a new coverage formula. Our focus of today's hearing is on proposals that would create a new coverage formula, as the Supreme Court invited Congress to do so in the *Shelby* decision. It would also strengthen the Voting Rights Act in other ways.

H.R. 4, introduced by Representative Sewell, Terri Sewell of Alabama, would, among other things, establish a coverage formula that would cover States where 15 or more voting rights violations have occurred over the previous 25 years or where 10 or more violations occurred if at least one of those violations was committed by the State itself.

A political subdivision would be covered if it committed 3 or more violations within the previous 25 years. A jurisdiction would be covered for a maximum of 20 years.

Similarly, H.R. 1799, introduced by Representative Sensenbrenner of Wisconsin, would, among other things, established a coverage formula, although this bill proposes a shorter, 15-year

lookback period in covered jurisdictions with fewer violations over that shorter lookback period.

The right to vote is the right that guarantees all other rights in our democracy. Unfortunately, the right of African Americans and other Members of racial and language minorities to vote has been threatened and undermined throughout our Nation's history. The Voting Rights Act with an effective preclearance provision went a long way towards righting that wrong.

Sadly, since the effective neutering of the preclearance provisions, voting rights for minorities once again is under sustained assault in many parts of this country. We have gathered substantial evidence over the course of six prior hearings before this subcommittee, as well as in one hearing before the full House Judiciary Committee, and hearings before other committees that has resulted in a detailed record of voter suppression efforts by States and localities in the effective absence of preclearance since the *Shelby County* decision.

North Carolina, for example, passed a sweeping voter suppression law that a Federal appeals court ultimately held to be unconstitutional, finding that it intentionally "targeted African Americans with almost surgical precision."

We also heard about recent measures to make it difficult or impossible for minority voters to exercise their right to vote. These measures include polling place closures and relocations, the purging of voter rolls that disproportionately target racial and ethnic minority voters, discriminatory photo ID laws, and restrictions on ex-felon voting, all of which are designed to make it harder for African Americans and other racial and ethnic minorities to vote.

The extent that these measures have historically been used to suppress the voting rights of racial and ethnic minorities is worth considering whether Congress should adopt a practice-based preclearance regime in addition to a geographic coverage formula. Last month, in Memphis, we learned about Tennessee's third-party registration law that would impose draconian penalties on groups like the League of Women Voters, who work to register new voters, for minor errors and omissions in registration forms. This law was the subject of a successful legal challenge.

Back in May, we learned about a similar law in Texas and about many other examples of voter discrimination in that State, and we have seen States engage in racial gerrymandering designed to dilute the strength of minority voters.

The Voting Rights Act preclearance provision requires certain jurisdictions with a history of voting discrimination against racial and language minority groups—those predominantly, though not exclusively, in the Deep South—to obtain approval of any changes to their voting laws or procedures with the Department of Justice or the U.S. District Court for the District of Columbia before that change could take effect.

This mechanism ensured that new voting rules and practices in jurisdictions with a history of discrimination were fair to all voters. It rightly prevented potentially discriminatory voting practices from taking effect before they could harm minority voters, and in this way, preclearance proved to be a significant means of protection of minority voting rights.

Therefore Congress had repeatedly reauthorized the preclearance provision on an overwhelmingly bipartisan basis, most recently in 2006, when the House passed the Voting Rights Act reauthorization by a vote of 390 to 33 and the Senate by a 98 to 0 vote. A result due in no small part to the substantial efforts of then House Judiciary Committee Chairman James Sensenbrenner.

In the absence of an effective preclearance regime, it is unsurprising that discriminatory measures have and will continue to undermine the voting rights of racial and language minority voters and erode our democracy. While section 2 of the Voting Rights Act, which prohibits discrimination in voting, remains in effect, it is, by itself, a less effective, significantly more cumbersome, and often prohibitively expensive way to enforce the act.

Most importantly, plaintiffs cannot invoke section 2 until after an alleged harm has taken place. Requiring discrimination victims to rely solely on such a remedy effectively neuters the act. The onus, therefore, is on Congress to create a new coverage formula to restore the act's most important enforcement mechanism, its preclearance requirement. Moreover, Congress should consider other ways to strengthen enforcement of the act, including provisions to extend bail-in preclearance, use of election observers, and notice and transparency requirements, as well as ways to facilitate the enforcement litigation by private parties.

With preclearance, you stop the harm before it exists. Without preclearance, the harm exists, and then later, you can do something to nullify the law, but the harm has been done, closing the barn door after the horse is out.

I thank our witnesses and our Members for being here today, and particularly Congressman Sewell for her sponsorship and her long work on this effort, and I look forward to a lively and substantive discussion.

Now I recognize Mr. Johnson for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chairman.

As I have said at previous hearings of this subcommittee, we all agree that discriminatory treatment in voting based on race or sex is abhorrent. It is prohibited by the Constitution, as it should be, and it is prohibited by Federal statute, as it should be. We all agree on that.

We have come a long, long way in the history of this country, and at hearings like this, we hear a lot about the most shameful chapters of our history, and we have to acknowledge that. I mean, it is important to note that some of the worst political violence of the Reconstruction era following the Civil War occurred in my own home State of Louisiana, where African-American Republicans, by the way, died defending the integrity of the ballot box.

In 1873, for example, William Kellogg was the Republican running for Governor in Louisiana, and he won with the support of African-American Republicans. The biographer of Ulysses S. Grant, Ron Chernow, writes about some of the episodes of that time period. It was violent. It was bloody.

Many Democrats refused to accept the results of that election, and when William Ward, an African-American Republican, ran against Christopher Nash, a White Democrat in Grant Parish, Louisiana, on Easter Sunday in that year so long ago, as the biog-

rapher describes, Mr. Nash led a mob of several hundred whites to set the Colfax courthouse ablaze, and dozens of African Americans were killed in that fire, despite surrendering. This was perhaps one of the worst injustices perpetuated against African Americans during Reconstruction.

As terrible as that era was, less than 20 years later, in 1890, Frederick Douglass was still able to give a speech in Washington, DC, here, in which he said, "I have seen the darkness gradually disappearing and the light gradually increasing. One by one, I have seen obstacles removed, errors corrected, prejudices softened, proscriptions relinquished, and my people advancing in all the elements that make up the sum of the general welcome."

Fortunately, and by God's grace, America has continued to grow in innumerable ways since Mr. Douglass' moving speech all those years ago. Over the last several decades, in a reversal of prior history trends, we are delighted to say African Americans have been moving to and not from Southern States, which now offer more economic opportunities for everyone.

In fact, statistics show that Southern States are actually the most popular destinations for African Americans and Hispanic Americans who are moving to better opportunities. According to the Center for Opportunity and Urbanism, among cities ranked by the African-American home ownership rate, median household income, and the share of total self-employment, almost all of the best cities today are in the South. We are proud of that. The employment rate among African Americans without a college degree is highest in the South.

Too often, complaints of discrimination in voting really have nothing to do with discriminatory treatment. Instead, rules entirely neutral on their face are sometimes claimed to be discriminatory simply because they have disparate impact on one group or another. Disparate impacts are not proof of discrimination. Indeed, they are statistically inevitable.

To speak on the bill, we will be discussing today, H.R. 4 would prevent States from enforcing their neutral voting laws if they aren't approved by the Justice Department, which, as we all have to acknowledge here, is an entity with a history of politicizing its power in the past. It would do so based on claims of disparate impact, which are statistically inevitable and not evidence of any discriminatory treatment, as I said.

The disparate impact approach to civil rights and the assumption that different outcomes are the result of discrimination is fundamentally unsound for the same reason social scientists are trained that correlation does not imply causation. In other words, there can be all sorts of correlations between one event and another, but that doesn't answer the question as to why that correlation exists.

Sometimes we give a simple example. The price of a loaf of bread may be \$2.50. It may be that it is statistically more difficult for the average member of one group or another to afford that loaf of bread, but that doesn't mean the price of a loaf of bread is discriminatory on its face.

Regarding discriminatory treatment in voting that is actually based on race, we have section 3 of the Voting Rights Act, which

is permanent Federal statutory law, remains in place and in full effect, and it is really important because it allows any Federal judge, upon proof of discriminatory treatment in voting based on race, to subject the offending jurisdiction to whatever preclearance regime the court deems appropriate.

Our fear is that H.R. 4 would go far beyond what is constitutionally permissible and allow a politicized Justice Department to veto or amend State voting laws to the political advantage of the party in power, whichever party that may be. As one of the witnesses before us today will explain, Congress can't constitutionally enact legislation denying States and localities control over their voting rules when there is no evidence, they have been engaging in discriminatory treatment in voting based on race.

The Supreme Court's holding in *City of Boerne v. Flores* held that a law enacted pursuant to the Fourteenth amendment must be congruent and proportional to actual constitutional violations that can be established in an evidentiary record. In considering whether a law satisfies *Boerne's* congruence and proportionality standard, the Court assesses whether a record of actual constitutional violations exist that is intentional discrimination in voting based on race.

The Supreme Court has taken a dim view of statutes aimed primarily at eliminating disparate impacts that don't themselves violate the Fourteenth Amendment. That is just what H.R. 4 does. This Committee and other organizations claim to have compiled evidence to demonstrate the need to amend the Voting Rights Act, but the list of examples overwhelmingly includes DOJ objections to State and local voting Rule changes under section 5 of the old Voting Rights Act section 2 cases, in cases in which a discrimination may be stopped—a jurisdiction may have stopped defending the case after the district court level.

Department of Justice section 5 objections are just that and not official determinations by a court of ultimate jurisdiction that a State or locality actually engaged in disparate treatment in voting based on race. Section 2 cases can continue to be brought today; just as other civil rights cases are brought. So, such cases don't demonstrate the need to amend the Voting Rights Act.

In cases in which a jurisdiction may have stopped defending the case or settled the case after the district court level, it may simply indicate the jurisdiction simply couldn't afford to continue appealing the case up to a higher court, where the jurisdiction may ultimately have won if it could have afforded its own defense.

With all that said, I look forward to hearing from all our witnesses today. We always have an open ear. It is an important discussion.

I yield back. Thank you.

Mr. COHEN. Thank you, Mr. Johnson.

It is now my pleasure to recognize Chairman of the full Judiciary Committee, the gentleman from New York and a longtime supporter of voting rights, Mr. Nadler, for his opening statement.

Chairman NADLER. Thank you, Mr. Chairman.

Over the past several months, this Subcommittee under Chairman Cohen has held a series of hearings examining the State of voting rights in America. In 2006, Mr. Chabot chaired the same hearings, and I was the Ranking Member on the subcommittee,

and we held many hearings preparatory—to establish the record preparatory to the renewal of the Voting Rights Act in 2006.

The hearings that have been held over the past several months have documented a disturbing set of challenges, particularly in light of the Supreme Court's decision in *Shelby County v. Holder*, which effectively gutted the Voting Rights Act section 5 preclearance requirement by striking down the formula for determining which jurisdictions are subject to preclearance.

Today, we turn our attention to legislative proposals that would reinvigorate section 5, including H.R. 4, the Voting Rights Advancement Act, introduced by Representative Terri Sewell, and H.R. 1799, the Voting Rights amendment Act, introduced by Representative James Sensenbrenner. While these bills differ in their particulars, both propose new coverage formulas that, if enacted, would once again give effect to section 5 and would add other enhancements to the act.

I applaud both Members for their longtime leadership and bipartisan congressional efforts on this issue. I also especially thank Mr. Sensenbrenner for his leadership in shepherding the 2006 reauthorization of the Voting Rights Act, including its section 5 preclearance requirement, to enactment with overwhelming bipartisan support when he served as chairman of the full committee.

When Congress passed the Voting Rights Act in 1965, it aimed to deliver on what had long been an empty promise to African Americans and other people of color—the right to participate in our democracy as equal citizens. The Act not only prohibited States from denying the right to vote based on race, but it also required certain States and other local jurisdictions that had practiced the most severe forms of discrimination to get approval from the Justice Department or from a Federal district court before making any changes to their voting laws.

Congress enacted this preclearance requirement to address what the Supreme Court called an “unremitting and ingenious defiance of the Constitution” by States determined to suppress the vote. States would enact laws designed to disenfranchise Black voters, like literacy tests, and when those laws were struck down by the courts after years of litigation, the States would simply switch to some other method of voter suppression, like poll taxes.

This meant that Black voters could be shut out of the polling place even if they succeeded in every lawsuit against a discriminatory voting law practice because a new one would already be in place to keep them from the ballot box. Preclearance helped to curtail sharply this relentless game of whack-a-mole and helped to ensure full and equal voting rights for the first time for all Americans.

Six years ago, however, the Supreme Court effectively gutted the section 5 preclearance provision in its disastrous decision in *Shelby County v. Holder*. Despite the fact that this subcommittee, of which I was the Ranking Member at the time, heard from dozens of witnesses and assembled thousands of pages of evidence of ongoing discrimination when it last reauthorized the act, the Supreme Court decided to substitute its judgment as to the facts for that of Congress.

By a 5 to 4 vote, the Court essentially held that the law was a victim of its own success. In the Court's view, because things had improved in the jurisdictions subject to preclearance, Congress could no longer justify imposing preclearance on those jurisdictions.

Justice Ruth Bader Ginsburg put it this way in her dissent. "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."

She was right. The *Shelby County* decision unleashed an almost immediate deluge of voter suppression laws across the Nation, including in many States and other jurisdictions that had been subject to preclearance before *Shelby County*. Within 24 hours of the decision, Texas and North Carolina moved to reinstitute draconian voter ID laws, both of which were later held in Federal courts to be intentionally racially discriminatory, but they were in effect for several years and suppressed the vote.

We have heard substantial evidence about these and other ongoing voter suppression laws in six hearings before this Subcommittee so far this year. Another troubling aspect of the Court's reasoning in *Shelby County* was its emphasis on the supposed "equal sovereignty" of the States and on States' authorities to administer elections, even when they had abused that authority by denying the right to vote.

The Court's reasoning barely acknowledged that the constitutional amendments enacted after the Civil War during Reconstruction were intended fundamentally to reorder Congress' relationship to the States and to give Congress the power to supersede State sovereignty when needed to enforce the mandates of those amendments.

Indeed, before the Civil War, before those amendments, the United States was generally described in the plural, "The United States have done this" or "are considering that." After the Civil War, it was replaced by the singular to show where the sovereignty really resided.

The Fourteenth amendment guarantees equal protection under the law, and the Fifteenth amendment prohibits any State from denying the right to vote on the basis of race. Crucially, both amendments give Congress the power to enforce these rights by "appropriate legislation." The Supreme Court has held that this authority under the Fifteenth amendment means Congress "may use any rational means" to make laws against racial discrimination in voting.

Notwithstanding the *Shelby County* decision, the Court has thus far left this highly deferential rationality test in place. In short, Congress has the power, indeed the obligation, to reverse this tide of voter suppression laws. The Fourteenth and Fifteenth Amendments expressly empower us to enact laws protecting the right to vote and guaranteeing the equal protection of all citizens.

Although the Supreme Court's decision in *Shelby County* did great damage, the Court made clear that it was not striking down preclearance altogether. In fact, the Court expressly said that Congress could "draft another formula based on current conditions."

So that is what we have set out to do. We have already held a series of hearings this year documenting an ongoing and pervasive threat to voting rights in various parts of the country. If we can

target a coverage formula to those jurisdictions that have been the worst offenders in recent years, as well as towards those voting practices that are known to have a history of being used in a racially discriminatory manner, including racial gerrymandering, annexations to dilute minority voting power, shifts from single member to at-large or multi-member districts, imposition of strict voter ID laws, and the removal of polling places from minority voting areas, then there is every reason to believe that under current law, Congress has the full authority to act.

We can no longer afford to wait. The right to vote lies at the very core of our democracy and is the foundational—and is foundational to the Rule of law and is under assault in many places across this country.

I look forward to hearing from today's witnesses and to forging a path ahead to protect the sacred right to vote for all Americans.

I thank you, Mr. Chairman. I yield back.

Mr. COHEN. Thank you, Chairman Nadler.

It is now my pleasure to recognize the Ranking Member of the full committee, the gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate that.

The right to vote is of paramount importance in a democracy, and its protection from discriminatory barriers has been grounded in Federal law since the Civil War and more recently through the Voting Rights Act of 1965. A Supreme Court decision called *Shelby County* will be mentioned many times today, but it is important to remember that in that decision, the Supreme Court only struck down one outdated provision of the Voting Rights Act, namely an outdated formula based on decades-old data that doesn't hold true anymore describing which jurisdictions had to get approval from the Department of Justice before their voting rules went into effect.

It is important to point out the very important provisions of the Voting Rights Act remain in place, including Sections 2 and Sections 3. Section 2 applies nationwide and prohibits voting practices or procedures that discriminate based on race, color, or the ability to speak English. Section 2 is enforced through Federal lawsuits, just like other Federal civil rights laws, and the United States and civil rights organizations have brought many cases to enforce the guarantees of section 2 in court, and they may do so in the future.

Section 3 of the Voting Rights Act also remains in place. Section 3 authorizes Federal courts to impose preclearance requirements on States and political subdivisions that have enacted voting procedures that treat people differently based on race in violation of the Fourteenth and Fifteenth Amendments.

If a State or political subdivision is found by the Federal court to have treated people differently based on race, then the court has the discretion to retain supervisory jurisdiction and impose preclearance requirements on the State or political subdivision as the court sees fit until a future date at the court's discretion.

This means that such State or political subdivision would have to submit all future voting Rule changes for approval to either the court itself or to the Department of Justice before such Rule changes would go into effect. As set out in the Code of Federal Regulations under section 3(c) of the Voting Rights Act, a court in voting rights litigation can order as relief that a jurisdiction not sub-

ject to the preclearance requirement of section 5 preclear its voting changes by submitting them either to the court or to the Attorney General.

Again, section 3's procedures remain available today to those challenging voting rules as discriminatory. Just a couple of years ago, for example, U.S. District Judge Lee Rosenthal issued an opinion in a redistricting case that required the City of Pasadena, Texas, to be monitored by the Justice Department because it had intentionally changed its city council districts to decrease Hispanic influence.

The city, which the court had ruled had a long history of discrimination against minorities, was required to have their future voting rules changes precleared by the Department of Justice for the next 6 years, during which time the Federal judge retains jurisdiction to review before enforcement any change to the election map or plan that was in effect in Pasadena on December 1, 2013.

A change to the city election plan can be enforced without review by the judge only if it has been submitted to the U.S. Attorney General and the Justice Department and has not objected within 60 days.

Voting rights are protected in this country, including my own State of Georgia, where Latino and African-American voter turnout has soared. Between 2014 and 2018, voter turnout increased by double digits for both men and women in both communities. I would like to invite my friends on this dais, and especially the ones from the State of Georgia, to consider the data, which shows that our State is diverse and politically engaged and growing in that political involvement all the time.

Despite the claims that we have heard in this Committee from Stacey Abrams and others that she won election—in fact, she lost—and that voter suppression is endemic in Georgia, the facts disagree. So do the values of Georgians and Americans. We are committed to ensuring the ballot box is open to all eligible voters. We are committed to making sure constitutional means are used to accomplish that. We are committed to protecting the value of every American's voice by securing our elections from fraud.

These are our priorities. These are our principles. I look forward to hearing those today as we put this in proper context to look forward on how best to move forward.

With that, I yield back.

Mr. COHEN. Thank you, Mr. Collins.

We welcome our witnesses and thank them for participating in today's hearing. There is a 5-minute rule. I ask you to stay within the 5 minutes. When your light switches from green to yellow, it means you have got a minute to go. When it turns to red, it means you should be finished.

Before proceeding with testimony, I remind each witness that there is a statute, 18 U.S.C. 1001, that says if you say anything here in your written or oral statements that is false that you can be subject to penalty of fine or imprisonment up to 5 years or both. So just tell us the truth, easy enough to do.

Our first panel today is Representative Terri A. Sewell. Congressman Sewell represents Alabama's Seventh Congressional Dis-

trict. She is currently serving her fifth term in Congress. She is the first African-American woman to represent Alabama in Congress.

She sits on the House Ways and Means Committee, where she serves as vice chair; serves on the House Permanent Select Committee on Intelligence, where she is chairwoman of the Subcommittee on Defense, Intelligence, and Warfighter Support. She has also served in a number of House leadership roles, including currently as the chief deputy whip and as a member of the Democratic Steering and Policy Committee.

She is a member of the Congressional Black Caucus, where she is co-chair of the Voting Rights Task Force, and co-chair of the Congressional Voting Rights Caucus.

Congressman Sewell was the first Black valedictorian of Selma High School and is an honors graduate of Princeton University and Oxford University in England. She received her law degree from Harvard Law School.

Congressman Sewell in her 5 minutes, I am sure, will tell you why the Voting Rights Act is important, why preclearance is important, and why if it doesn't hurt, why not deal with it?

Congressman Sewell, you are recognized.

TESTIMONY OF HON. TERRI A. SEWELL

Ms. SEWELL. Thank you.

To Chairman Nadler, to Ranking Member Collins, to Subcommittee Chair Cohen, and Ranking Member Johnson, and to all the distinguished Members of this committee, thank you for inviting me to share with you why I believe we should pass H.R. 4, the Voting Rights Advancement Act.

First, I want to join my colleagues in acknowledging the passing of Congressman Elijah Cummings. Elijah was a giant among us. He loved his district, and he loved this country. His legacy will live on in all our hearts and in all the wonderful works that he has done for this Nation.

I am here today because the issue of voting rights is personal to me. Growing up in Selma, Alabama, I was surrounded from an early age by stories about the voting rights movement. These were not the stories told in the history books, but lesser-known stories of everyday people, acting with extraordinary bravery.

Knowing the bravery and courage of the people of the community that I represent provided me with the strength, the resilience, and the inspiration to pursue my own dreams. Now, as the first Black congresswoman from Alabama, I believe I have a duty to protect and advance their legacy. The Voting Rights Act of 1965 is one of the crowning achievements of their legacy.

The Supreme Court, as we have heard time and time again, gutted the Voting Rights Act of 1965 in its decision in *Shelby County v. Holder*, which struck to the heart of the VRA. It came about because of a case in Alabama, redistricting of Calera City Council seat in Shelby County, Alabama. That seat was redrawn in a way that dramatically changed the racial makeup of its electorate.

The Department of Justice vowed—or voided the new map on the basis that it was racially discriminatory, and the Supreme Court ruled for the first time that section 4 was unconstitutional and,

therefore, gutted the full protections of the Voting Rights Act by making section 5 null and void.

With this powerful deterrent gone, a wave of restrictive voting laws came into play. Just 5 years after the ruling, nearly 1,000 polling stations were closed across the country. State legislatures, like Alabama, moved to cut access to early voting, purge voter rolls, and impose strict voter ID.

In my home State, just one day after the Supreme Court's decision in *Shelby*, Alabama began to require photo identification to vote. The photo ID law was passed in 2011 but had been previously blocked by the Voting Rights Act not because it required an ID. An ID sounds valid. It was the type of ID. No longer could Alabamians present a Social Security card. I must tell my colleagues, it is a validly issued Federal ID, a Social Security card.

Instead, under the law in Alabama, now a hunting license was permissible and as well as a fishing license was permissible. Adding insult to injury, Alabama announced in 2015 the closure of 31 driver's license offices, one of the primary places that one goes to receive a photo ID. The majority of these DMV closures were in my county, a county that is majority black.

Alabama was not alone, and you will hear testimony from all these witnesses that other States also installed new voter ID laws that were pernicious in its effect. In fact, the Brennan Center for Justice said that 24 States have imposed restrictions on voting since 2010.

The bill that I have before you today, and I am honored to carry this bill, is H.R. 4, the Voting Rights Advancement Act. As has been said by Subcommittee Chair Cohen, it would be a modern-day formula. It would have a lookback year of 25 years, and it would allow 15 or more adjudicated violations of voting rights within the past 25 years to be covered in the formula.

The *Shelby* decision allowed for the enforcement of creative new barriers. My bill, in particular, would get to known practices, known practices like creating districts that are limited from at-large—being from district only to at-large districts. The Voting Rights Advancement Act, my legislation, would also seek to advance the VRA by requiring a nationwide practice-based preclearance for known discriminatory practices, including the creation of at-large districts, inadequate multilingual voting materials, restrictions on polling stations, and annexation of nearby populations to dilute voting rights. These known practices have historically been associated with voter discrimination and voter suppression.

In conclusion, I would like to say it is our job, as Members of Congress, to do what we know is right. In the face of known discriminatory practices in voting rights, a fundamental right, that one of our colleagues, John Lewis, was bludgeoned on a bridge in my hometown for, I want to quote the words of Amelia Boynton Robinson, who died at 103 and was my special guest at the State of the Union in 2015.

She said because so many people would come up to her, they would say, "We stand on your shoulders, Ms. Amelia. We stand on your shoulders." She would often say, "Get off my shoulders. Do your own work."

I say to the Subcommittee and I say to this Committee do your own work. Make sure that the full protections of the Voting Rights Act are reinstated and vote for H.R. 4, the Voting Rights Advancement Act.

Thank you, sir.

[The statement of Ms. Sewell follows:]

STATEMENT OF HON. TERRI A. SEWELL

Chairman Nadler, Ranking Member Collins, and distinguished Members of the Committee, thank you for inviting me to share with you why I believe we should pass the Voting Rights Advancement Act.

I am here today because the issue of voting rights is personal for me. Growing up in Selma, I was surrounded from an early age by stories about the Voting Rights Movement. These were not the stories told in history books, but lesser-known stories of everyday people acting with extraordinary bravery. Knowing what the people of my community were capable of provided me the strength, resilience and inspiration to pursue my own dreams. Now, as the first African American Congresswoman from Alabama, I believe I have a duty to both protect and advance their legacy. The Voting Rights Act of 1965 is one of the crowning achievements of that legacy.

The Supreme Court's *Shelby County v. Holder* case that struck the heart of the VRA was borne from the redistricting of a Calera city council seat in Shelby County, Alabama. After the 2nd district seat was redrawn in a way that drastically changed the racial makeup of its electorate, the Department of Justice voided the new map on the basis that it was racially discriminatory. Shelby County filed a lawsuit against the Justice Department that made its way to the Supreme Court after several appeals. The Supreme Court found the coverage formula in section 4b of the VRA unconstitutional, which gutted the law's preclearance provision and, therefore, its ability to protect against modern-day barriers to the ballot box.

With this powerful deterrent gone, a wave of restrictive voting laws went into place. Just five years after the ruling, nearly 1,000 polling places were closed across the country. State legislatures also moved to cut access to early voting, purge voter rolls and impose of strict voter ID laws. While these actions are not as blatant as forcing American citizens to guess how many jelly beans are in a jar before allowing them to register to vote, the effects have been equally damning.

In my home state, just one day after the Court's *Shelby decision*, Alabama began requiring photo identification to vote. The photo ID law was passed in 2011 but had previously been blocked by the Voting Rights Act, not because it required an ID in the first place, but because of the restrictions placed on the *kind* of ID needed to vote. Hunting licenses are deemed acceptable; student IDs are not. Social Security cards are no longer valid to vote, but pistol permits are accepted at the polls.

Adding insult to injury, Alabama announced in 2015 the closure of 31 driver's license offices, one of the primary places to get one of these required photo IDs. The majority of these DMV closures were in counties in my district with the highest percentages of Black voters in the state.

Alabama is not alone. State legislatures across the country moved to make voting more difficult. In North Carolina, for example, the legislature enacted a far-reaching and pernicious voter ID bill after the *Shelby* decision. The North Carolina law instituted a strict photo ID requirement, curtailed early voting, eliminated same day registration, restricted pre-registration, and eliminated the authority of county boards of elections to keep polls open for an additional hour.

As Justice Ginsburg wrote in her *Shelby County* dissent, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." In the face of ongoing discrimination, enforcement of voting rights under current laws is slow, inadequate, and costly.

To restore the full protections of the VRA, I've introduced H.R. 4, the Voting Rights Advancement Act (VRAA). My bill would address the Court's concerns and update the coverage formula to limit the lookback period to the past 25 years. That means any State with 15 or more adjudicated violations of voting rights within the past 25 years would be required to get preclearance on any changes to their voting laws and election procedures.

The *Shelby* decision allowed for the enactment of creative new barriers to voting like restrictive voter ID, inadequately publicized closures of polling places, and impeding accessibility to early voting. The VRAA would close the gaping hole left in voter protection by requiring preclearance from the Justice Department before enacting these types of changes to voting. Just as barriers to the ballot box are evol-

ing, our laws must also evolve and change to keep up with those who attempt to restrict access to the polls.

The voter suppression we saw in the 2018 midterm elections makes it clear just how urgent it is that we pass the Voting Rights Advancement Act and restore the full protections of the Voting Rights Act. During the 2018 elections, states from Georgia to North Carolina to North Dakota sought to impose new voting laws that resulted in a suppressive effect amongst mostly minority communities. Congress must Act now to stop discriminatory voter laws before they go into place and swing elections.

The Supreme Court was clear; only Congress can ratify a new formula to fully restore section 4 of the VRA. My legislation does that, but also seeks to advance the VRA by requiring a nationwide, practice-based preclearance for “known discriminatory practices,” including the creation of at-large district, inadequate multilingual voting materials, and cuts to polling places. The VRAA increases transparency by requiring reasonable public notice for voting changes. The bill also allows the Attorney General authority to request federal observers to be present anywhere in the country where a serious threat to voter access and fair elections exists.

In conclusion, the purpose of H.R. 4 is nothing less than fortifying the cornerstone of our democracy. Without the vote, Americans lose their voice in our democracy. So, I urge you to support the Voting Rights Advancement Act and restore the VRA to its full strength.

Mr. COHEN. Thank you, Representative Sewell.

Let me ask you a question. Mr. Johnson brought up some harrowing history in our country where Republicans who had African-American support were elected and threatened. These were in, I think, 1873?

Ms. SEWELL. Right. During Reconstruction.

Mr. COHEN. Yes. Do you know, in your experience as a student at Oxford and Princeton and Harvard, of instances in the last 40 years where similar incidents have occurred?

Ms. SEWELL. Yes, sir. I don’t have to use my educational background. I can use my experience growing up in Selma, Alabama, and my experience as a Member of Congress witnessing the changes that have been made in my own district.

In my own district, people were denied the opportunity to get a driver’s license after a restrictive law was passed by the State of Alabama’s legislature. That restrictive law required certain IDs. An ID, we understand, understanding being able to say who you are is not a problem. It is the type of IDs.

You know, my father, Coach Andrew A. Sewell, in his latter years had a massive stroke and was in a wheelchair. He proudly voted at every election. After the 2013 decision in SHELBY and after Alabama imposed its restrictive photo law, which no longer allowed a validly issued Federal ID, a Social Security card, to be presented to show proof of who you were in order to get your ballot, he had a hard time getting a photo ID.

Well, not because he was black, but because he was disabled. Do you know that the Dallas County courthouse doesn’t have a ramp to get people who are disabled into the courthouse to get a free photo ID from the voter registrar? That is because it was grandfathered in the ADA law.

So, sir, I have to tell you my own personal experience. Dad woke up early that morning. We were blessed to have a van that kneels down so his wheelchair could go in. We were blessed to be able to have home help to help him into that courthouse and to get that photo ID.

So many of my constituents, and I would say all our constituents who are disabled may not have that same right.

Mr. COHEN. Thank you, Ms. Sewell.

Dallas County, that is where John Lewis had his march, is it not?

Ms. SEWELL. That is right.

Mr. COHEN. Where he was beaten on the Pettis Bridge to try to get the Voting Rights Act passed.

Ms. SEWELL. That is right. Not just John Lewis, but so many known and unknown Americans, Black and white, from various religious backgrounds had the temerity—ordinary Americans—to really plead to this Government that we live up to the constitutional ideals of democracy and justice for all.

While we live in a time where people don't have to count how many marbles are in a jar, I would submit to you that we still live in times where there are modern-day barriers to voting. As long as there are modern-day barriers to voting, we, as a Congress, should be trying to institute and reinstate a coverage formula in section 4.

I would submit to you that mine in H.R. 4 is the right one. But I would also submit to you that all of us who see this injustice know that any formula that would allow preclearance where there is demonstrated history of voter discrimination in that State or subdivision would be merited.

Mr. COHEN. Can you tell us—Mr. Collins, and Mr. Johnson maybe as well, mentioned section 2 and section 3. Can you tell us why those are not sufficient?

Ms. SEWELL. Well, in the Calera case, the case, the *Shelby County v. Holder* case, which was a case brought by an African American who was a city council member. He was the only Black city council member in Calera.

When he was up for reelection, Calera—the City of Calera—voted to redistrict all the districts for elections to city council and to make it an at-large election. It is true that he could have brought a section 2 violation, but the reality is you can't un-ring the bell. He lost that reelection because the minority vote had been diluted by moving from a ward-based or district-based election to an at-large election.

So, I just have to say that while on its face, even Alabama's efforts to close down the DMVs, I talked to my Republican Governor who was a good friend, and I said what gives? 30-one of those DMVs are in my district, and we now have in place in 2014 this really more restrictive photo ID law. And he said, oh, it wasn't because of that. It was because of budgetary cuts.

Now that, on its face, is true. We, as elected officials, when faced with the fact that the effect of it was limiting the opportunity of a certain population of people to get access to the most popular form of photo ID, a driver's license, we have to do the right thing. We have to do the right thing.

Mr. COHEN. Thank you.

Mr. Johnson, would you like your time?

Thank you.

We appreciate your appearance and thank you for your sponsorship of the bill and your service as a colleague.

Ms. SEWELL. Thank you.

Mr. COHEN. Our second panel of witnesses will now come forward, and I guess you have to find chairs or bring them forward or something.

[Pause.]

Mr. COHEN. Our Subcommittee Members have arrived, and if any one of them would like to make any remarks concerning Mr. Cummings, you are recognized at this time.

Ms. Scanlon, you are recognized.

Ms. SCANLON. I actually find it hard to have words. He was such a giant and will be sorely missed. To be in this hearing today, when he was such a giant with respect to this issue, is all the more poignant.

Mr. COHEN. Well said, thank you.

[Pause.]

Mr. COHEN. Thank you, logistics.

Our first witness today is Mr. J. Morgan Kousser. Mr. Kousser is professor of history and social science at Caltech, located in the fabulous City of Pasadena, a sister school to the Polytechnic school, which I attended. His research has focused on minority voting rights and the legal and political aspects of race relations in the 19th and 20th centuries. He has been an expert witness in 35 Federal or State voting rights cases and a consultant in 10 others.

In 1981, he testified before a Subcommittee of the U.S. House of Representatives about the renewal of the Voting Rights Act and in 2008 published the first comprehensive history of section 5 of the Voting Rights Act.

He received his Ph.D. and his Master's degree from Yale University, his A.B. from Princeton, and I am sure he has been to the Pine Burger.

Professor Kousser, you are recognized for 5 minutes.

TESTIMONY OF J.M. (MORGAN) KOUSSER

Mr. KOUSSER. Thank you, Chair Cohen, Chair Nadler, Ranking Member Johnson, and distinguished Members. Thank you for inviting me to testify.

The vast majority of people who have testified before this Subcommittee in this series of hearings have been lawyers. They have informed you about the law and about evidence of very recent voting discrimination. I am a historian and social scientist. I seek to provide you with a historical perspective, and I bring you data.

Ten years ago, in the wake of the *Northwest Austin* case, I began to create a database of all voting rights actions under any Federal or State statutes or constitutional provisions—lawsuits, settlements and consent decrees, objections, and more information requests under section 5 of the Voting Rights Act. The database, now documenting 4,090 minority victories under Federal law and 389 under the California Voting Rights Act from 1957 through 2019, allows evaluations of the adequacy of past and potential coverage schemes if Congress wishes to replace section 4 of the VRA, struck down in *Shelby County v. Holder*.

Further analysis of the database may assist Congress in evaluating the evidence to determine if there is continuing—whether there is a continuing need for the protection of the Voting Rights

Act in general and for a preclearance regime in particular. This testimony draws on that database to make four principal points.

First, the original coverage scheme of section 4, as amended in 1975 and 1970, fit the pattern of proven violations of voting rights extraordinarily well. Ninety-two percent of the total actions in which minorities were successful concerned State and local jurisdictions within the area of section 4 coverage.

Second, voting rights violations did not diminish over long periods of time. There were more than 3 times as many in the 25 years after the 1982 renewal of the VRA than there were in the 25 years from 1957 to 1982, and over 90 percent continued to be concentrated in covered jurisdictions. If voting rights actions are the proper index, Congress was fully justified in 2006 in renewing section 5 and keeping the same coverage scheme.

Third, the pattern of voting rights actions is less the product of the degree of discrimination than of the opportunities of litigation and administrative action made available by congressional and especially by Supreme Court decisions. Congress should take the responsive character of the pattern of lawsuits into account in evaluating whether there is a continuing need for preclearance in section 2.

Fourth, the striking success of minorities in using the State-level California Voting Rights Act to shift from at-large elections to single member districts reinforces the third point about the pattern of voting rights actions. Discrimination in voting rights may have shifted and changed character, but it has not been obliterated. Rather, unfavorable Supreme Court decisions have taken away the means to see it.

I have attempted to distill the most important information presented at greater length in my written testimony into a map, two graphs, and a few statistics. Map 1 is a particularly striking version of the fact that the vast majority of cases and other events originated in covered jurisdictions. The skyscrapers almost all run from Virginia to Texas.

The pattern of the comparative incidence of cases in covered and noncovered jurisdictions cannot be explained by the fact that since section 5 only applied to covered jurisdictions there had to be more actions in the covered areas. If you look at section 2 cases or non-Section 5 cases, 82 percent of those came from covered jurisdictions, and they could be filed anywhere.

Nor is the pattern the result of a concentration of minorities in covered jurisdictions. If you control for the minority percentage, the covered jurisdictions were 6 to 12 times as likely to develop cases as from non-covered jurisdictions.

Figure 1 shows the number of events over time. There is an obvious explanation for the variation. It is whether there were favorable or unfavorable court decisions. Favorable decisions by the Supreme Court meant there would be more cases brought, more cases decided in which minorities won. Unfavorable decisions like *Shaw v. Reno* or *Shelby County* meant that the number of cases would go down.

Finally, look at the CVRA cases from 2007 to 2019 and compare them with the VRA cases. You will find that there have been three times as many CVRA cases as VRA cases. The amount of discrimi-

nation still continues. The Congress' responsibility is to open the lens to allow us to see again.

Thank you.

[The statement of Mr. Kousser follows:]

Testimony of
Professor J. Morgan Kousser
California Institute of Technology

Before the
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Of the U.S. House Committee on the Judiciary
Legislative Proposals to Strengthen the Voting Rights Act
October 17, 2019

Chair Cohen, Vice Chair Raskin, Ranking Member Johnson, and distinguished Members, thank you for inviting me to testify before you. For the convenience of readers, I begin these written comments with a relatively short summary.

I. Abstract

Ten years ago, in the wake of the *Northwest Austin* case,¹ I began to create a database of all voting rights “actions” under any federal or state statutes or constitutional provisions – lawsuits, settlements and consent decrees, objections and “more information requests” under Section 5 of the Voting Rights Act (VRA). The database, now documenting 4090 minority victories under federal law and 389 under the California Voting Rights Act from 1957 through 2019, allows evaluations of the adequacy of past and potential coverage schemes if Congress wishes to replace Section 4 of the VRA, which was struck down by a majority of the Supreme Court in *Shelby County v. Holder*.² Further analysis of the database may assist Congress in evaluating the evidence to determine whether there is a continuing need for the protection of the Voting Rights Act in general and for a preclearance regime in particular.

This testimony draws on that database to make four principal points: First, the original coverage scheme of Section 4, as amended in 1970 and 1975, fit the pattern of proven violations of voting rights extraordinarily well. Ninety-two percent of the total “actions” in which minorities were successful concerned state or local jurisdictions within the area of Section 4 coverage.

¹ *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193.

² 570 U.S. 529 (2013).

Second, voting rights violations did not diminish over long periods of time. The 1957 Civil Rights Act was the first federal voting rights law enacted since Reconstruction. The VRA was passed in 1965, and Section 5 was renewed in 1970, 1975, 1982, and 2006. If you split the period from 1957 to 2006 into two sub-periods, using the 1982 renewal as the mid-point, you find that there were 819 actions between 1957 and 1981, but 3059 between 1982 and 2006. That is, 25% of the proven violations of voting rights took place in the first 24 years, but 75% in the 24 years before the 2006 renewal of Section 5. “Actions” continued to be concentrated in covered jurisdictions. In the years before 1982, 97% were; in the years between 1982 and 2006, 92%. If voting rights actions are the proper index, Congress was fully justified in 2006 in renewing Section 5 and keeping its coverage scheme.

Third, the pattern of voting rights actions over time are less the product of the degree of discrimination than of the opportunities of litigation and administrative action made available by congressional and especially, by Supreme Court decisions. The Supreme Court is a uniquely powerful institution that can create its own reality, encouraging the filing and success of lawsuits by minority plaintiffs with such favorable decisions as *Thornburg v. Gingles*³ and discouraging them with such unfavorable decisions as *Shaw v. Reno*⁴ and *Shelby County*. Congress should take the responsive character of the pattern of lawsuits into account in evaluating whether there is a continuing need for preclearance and Section 2.

Fourth, the striking success of minorities in using the state-level California Voting Rights Act to shift from at-large elections to single-member districts reinforces the third point about the pattern of voting rights actions. When a law or court decision facilitates finding racial discrimination, discrimination appears. Voting rights laws and court decisions are not merely windows, through which the discrimination that is there already can be seen, without distortion. They are, instead, lenses that the decisions adjust to allow the observer to perceive discrimination or to occlude her vision. A decline in the number of successful minority voting rights actions after unfavorable decisions by the Supreme Court does not necessarily undermine the case for the continuing need of anti-discrimination laws.

II. Credentials and Brief Description of the Database

Unlike almost all of the witnesses from which this subcommittee has heard, I am not a lawyer. After winning an undergraduate degree from Princeton and graduate degrees from Yale, I have taught history and political science at the California Institute of Technology since 1969. In 1980, I became professor of history and social science there. I have also been a visiting professor at Harvard, Oxford, Claremont Graduate University,

³ 478 U.S. 30 (1986).

⁴ 509 U.S. 630 (1993).

and the Hong Kong University of Science and Technology. I have published or edited four books, including *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* and *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*. Among my 47 articles in books or scholarly journals are 5 published in law reviews, including a 108-page history of Section 5 of the VRA in the *Texas Law Review* in 2008. Among my 27 contributions to reference works are long articles on “Suffrage,” “Race and Politics, 1860-1933,” “Voting Rights,” and “Election Law.” I have also published 86 book reviews.

Since 1979, I have served as an expert witness or consultant in 52 voting rights cases, including 16 under the California Voting Rights Act. Among them have been *Hunter v. Underwood*,⁵ in which the Supreme Court threw out the Alabama criminal disfranchisement provision; *Bolden v. City of Mobile*,⁶ where a district court found intentional discrimination in the adoption of the Mobile City Commission; *U.S. v. Memphis*,⁷ in which a district court ruled the majority vote provision of the city charter intentionally discriminatory, resulting in the election of the first African-American mayor in the history of Memphis; *Garza v. Los Angeles County*,⁸ in which a district court found intentional discrimination in the redrawing of county supervisor districts, a decision which resulted in the election of the first Latinx supervisor in the County since 1874; and numerous cases on redistricting and voter ID laws in Texas, California, and North Carolina.⁹

Although I first conceived the idea of the database in 2004, in the run-up to the renewal of the VRA in 2006, I was too busy to start it before the Supreme Court’s decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*,¹⁰ or to substantially finish it until after the Supreme Court’s decision in *Shelby County v. Holder*.¹¹ Appendix A to this report lists the most important sources of the data. Published cases were read, whether they were originally found in these sources or not. Collection of data is ongoing.

⁵ 471 U.S. 222 (1985).

⁶ 542 F. Supp. 1050 (S.D. Ala. 1982).

⁷ Unpublished (W.D. Tenn. 1991), further proceeding *sub nom. Muhamad v. City of Memphis*, 1995 U.S. Dist. LEXIS 22538 (W.D. Tenn. 1995).

⁸ 756 F. Supp. 1298 (C.D. Cal. 1990).

⁹ *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994); *Cano v. Davis*, 191 F. Supp. 2d 1135 (C.D. Cal. 2002); *Sessions v. Perry*, 298 F. Supp. 2d 451 (2004); *Perez v. Perry*, 835 F. Supp. 2d 209 (W.D. Tex. 2012); *Texas v. U.S.*, 887 F. Supp. 2d 133 (D.D.C. 2012); *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); *League of Women Voters v. McCrory*, 2016 WL 1650774 (M.D.N.C., 2016).

¹⁰ 557 U.S. 193 (2008).

¹¹ 570 U.S. 529 (2013).

III. The Supreme Court's Implicit Invitation to Collect Data on Voting Rights Cases

In 1997, the Supreme Court overturned the Religious Freedom Restoration Act (RFRA) as an overextension of congressional powers on the grounds that it was not a “congruen[t] and proportiona[l]” means to combat the injury it aimed to prevent or remedy.¹² Throughout his majority opinion in *City of Boerne v. Flores*, Justice Anthony Kennedy stressed facts, fully as much as theoretical legal questions.

Justice Kennedy began his examination of whether “RFRA is a proper exercise of Congress’ remedial or preventive power” with the legislative record, extensively citing from hearings in three separate sessions of Congress.¹³ He contrasted the evidence presented to Congress at the time that it was framing RFRA with the facts before Congress when it first considered the VRA. The “record which confronted Congress and the judiciary in the voting rights cases,”¹⁴ the Justice pronounced, was a record of “widespread and persisting deprivation of constitutional rights resulting from this country’s history of racial discrimination.”¹⁵ By comparison, the evidence before Congress when it took up RFRA did not contain even a single episode of “religious bigotry in the past 40 years.”¹⁶

When Justice Kennedy turned to the scope of the remedy of RFRA, he discussed another factual question – whether “there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.” Citing the history of racial discrimination that justified the VRA, the justice gave that as an example of evidence that would lead the Court to uphold a law “as responsive to, or designed to prevent, unconstitutional behavior.”¹⁷

As Congress approached the 25-year renewal deadline of Section 5 of the VRA set by the 1982 amendments to the law, the need to satisfy the *Boerne* “congruence and proportionality” standard spurred Section 5 proponents to compile an extensive factual record.¹⁸ Justice Kennedy had cited the previous factual basis as justification of the

¹² *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹³ *Id.*, at 529-30.

¹⁴ *Id.*, at 530.

¹⁵ *Id.*, at 526.

¹⁶ *Id.*, at 530.

¹⁷ *Id.*, at 532.

¹⁸ See, e.g., Richard L. Hasen, “Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after *Tennessee v. Lane*,” 66 *Ohio St. L.J.* 177 (2005); Kristen Clarke, “The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?” 43 *Harvard CR-CL LR* 385 (2008).

constitutionality of the VRA seven times in *Boerne*. Accordingly, Congress compiled a much more extensive record in 2005-06 than it had in all four previous considerations of the Act, amounting to 15,000 pages of hearings and documents.¹⁹ As comprehensive as that record was, it was not consolidated into one report, quantified to determine how “congruent” the geographical scope of Section 4 was with the geographical incidence of voting discrimination. Instead, the plentiful evidence compiled by the American Civil Liberties Union, the Lawyers’ Committee for Civil Rights, University of Michigan Professor Ellen Katz, and many others, was presented piecemeal, mostly as discussions or listings of individual legal cases. Even though this evidence was thoroughly analyzed in congressional reports and the district and appeals court opinions in the *Shelby County* case,²⁰ it is possible that presentation of the evidence in a different form might have been more persuasive to the Supreme Court.

Before the Supreme Court put off a confrontation with Section 5 of the VRA by ruling that Northwest Austin Municipal Utility District No. 1 was eligible to bail out of Section 5 coverage, Chief Justice John Roberts asserted that “The evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. . . . Congress heard warnings from supporters of extending Section 5 that the evidence in the record did not address ‘systematic differences between the covered and the non-covered areas of the United State[,] . . . and, in fact, the evidence that is in the record suggests that there is more similarity than difference.’”²¹ Although the Chief Justice did not review that evidence in his opinion, he did note the district court’s analysis of the “sizable record” amassed by Congress, and he made facts about voting rights in the covered and non-covered areas central to his opinion.

Facts continued to be central in Chief Justice Roberts’s opinion in *Shelby County*. Congress, he said, had failed to “narrow[] the scope of the coverage formula” since 1965,²² and it had neglected to determine “how that discrimination [in covered jurisdictions] compares to discrimination in States unburdened by coverage.”²³ The 1965 coverage formula was outmoded, he continued, because “today’s statistics tell an entirely different story.”²⁴ If not in 2006, then certainly after *Northwest Austin*, the Chief Justice remarked disapprovingly, Congress should have produced an “updated statute.”²⁵ “If

¹⁹ Kousser, “Do The Facts of Voting Rights Support Chief Justice Roberts’s Opinion in *Shelby County*?” *Transatlantica*, I (2015), 2, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592829.

²⁰ H. Rept. 109-478 – Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 < <https://www.congress.gov/congressional-report/109th-congress/house-report/478/1?overview=closed>>; *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), 679 F. 3d 848 (C.A.D.C. 2012).

²¹ *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203-04.

²² *Shelby County v. Holder*, 570 U.S. 529, 549 (2013).

²³ *Id.*, at 552.

²⁴ *Id.*, at 556.

²⁵ *Id.*, at 554.

Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula,” the Chief Justice asserted, and he contended that the relationship of the coverage formula to problems of vote dilution was purely “fortuitous.”²⁶ Not faced with a simple, but comprehensive analysis of the evidence, the Chief Justice was able, by picking and choosing from misleading statistics,²⁷ to contend that the factual underpinnings that previous Supreme Court decisions had judged to satisfy treating different states and localities differently had now been fatally weakened.

²⁶ *Id.*, at 556.

²⁷ As evidence for the confluence of covered and non-covered jurisdictions, the Chief Justice cited two indices -- self-reported voter registration percentages from the U.S. Census and rejection rates for preclearance from 1965-75 and 1995-2005. *Id.*, at 548.. Both are misleading. Political scientists have shown that African-Americans, Latinos, and other disproportionately poorly educated and less wealthy citizens are particularly likely to overstate their registration rates. See, e.g., Robert Bernstein, Anita Chadha, and Robert Montjoy, “Overreporting Voting: Why It Happens and Why It Matters,” 65 *Public Opinion Quarterly* 22, at 25(2001), reporting that “both minorities and white Anglos are less likely to vote but more likely to overreport as the concentration of minorities increases.” Expressing specific skepticism about the Census Bureau’s finding that African-Americans turned out at higher rates than non-Hispanic whites in 2012 in the Deep South, figures that the Chief Justice relied upon, a study for the Pew Foundation pointed out that self-reported turnout was especially exaggerated in the Deep South states. Calculations from an associated table reveal that Census turnout in 2012 was overreported by 5.1 percentage points, on average, in the six Deep South states that were covered by Section 5 in 1965, compared to 1.8 percentage points in the country as a whole. In 2004, the figures had been 3.8 percentage points in the Deep South states and 1.7 percentage points in the nation. See Paul Taylor and Mark Hugo Lopez, “Skepticism about a landmark Census finding,” available at < [http://www.pewresearch.org/fact-tank/2013/05/15/skepticism-about-a-landmark-census-finding/May 15, 2013](http://www.pewresearch.org/fact-tank/2013/05/15/skepticism-about-a-landmark-census-finding/May%2013)>. In North Carolina, where actual turnout is available by race, I found in research that I did for *N.C.State Conf. of the NAACP v. McCrory*, 2016 WL 1650774 (M.D.N.C., Apr. 25, 2016) that the Census self-reports in 2012 overestimated non-Hispanic white turnout by 1.6 percentage points, but overestimated black turnout by 11.7 percentage points.

The comparison between the percentage of Department of Justice objections to changes in election laws that had to be precleared under Section 5 of the Voting Rights Act from 1965 to 1975 with the percentage from 1995 to 2005 is misleading for three reasons. First, very few of the numerous changes in election laws that took place in the South were submitted for preclearance in the first few years of the law’s existence. See Kousser, “The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2006,” 86 *Texas LR* 667 (2008), at 684. The Justice Department did not even draft a guideline about Section 5 until 1970. During the first four years of the existence of the Act, there were only 251 submissions to the Department of Justice and only one objection. See *Allen v. State Board of Elections* 393 U.S. 544, 550, n. 5. By 1995, approximately 20,000 submissions were made every year. So the denominators in the two comparison decades were very different. Second, as the Chief Justice noted, *Shelby County*, at 550, Section 5 itself inhibited discriminatory changes, making the comparison further evidence of the effectiveness, not the superfluity, of the legal provision. Third, experience both at the national and state and local levels had made the Section 5 process one of bureaucratic regularity by 1995. Extensive litigation and clerical experience had clarified exactly what each bureaucratic player had to do to comply with the law or to discover infractions. The chief justice’s discussion treats Section 5 as high constitutional politics when on a more practical level, it had become largely a rather simple bureaucratic routine.

IV. How Congruent Is Section 4 with the Geographical Pattern of Voting Rights Actions?

“Congruence” is a term that reminds one of plane geometry: two shapes are congruent if you can twist or flip or resize them so that one fits perfectly on top of the other. Congruence gave *City of Boerne* a mathematical flavor and invited protagonists and antagonists of renewing Section 5 of the VRA in 2006 to contend over whether the pattern of VRA actions fit the Section 4 coverage scheme. Table 1 captures this notion in the simplest fashion. It shows that by any measure, the coverage scheme was congruent with the overall number of voting rights actions, either over the whole period from 1957 through 2019 or when that period is divided into three sub-periods – 1957 through the 1982 renewal, 1982 through the 2006 renewal, and since 2006.

Table 1: The Temporal and Geographical Pattern of Successful Voting Rights Actions, 1957-2019

Topic	Years	Total # of Actions	# in Covered Jurisdictions	% in Covered Jurisdictions
Total # of actions	1957-2019	4090	3771	92.2
	1957-81	819	798	97.4
	1982-2006	3059	2825	92.4
	2007-19	187	130	69.5
	1957-65	84	83	98.8

The first row shows that 3771 of the 4090 total actions for the whole period (92.2%) concerned areas that were covered under Section 4. That is the single most important fact in this testimony, and it is overwhelming. Probably few laws or policies designed by any institution, public or private, more precisely match “the injury to be prevented or remedied and the means adopted to that end.”²⁸ If we break the 49-year period from the first modern federal voting rights law in 1957 at the 1982 renewal of the VRA, we find the same general relationship in both eras. Although the percentage of actions emanating from covered jurisdictions declines from 97.4% to 92.4%, the concentration is still extremely disproportionate, and the numbers of actions more than triples from the first to the second sub-period. Contrary to the Chief Justice’s statement

²⁸ *City of Boerne v. Flores*, 521 U.S. 507, 520.

in *Shelby County*, looking at these numbers, if Congress had started from scratch in 2006, it could hardly have developed a more accurate coverage scheme than it did.

While it is true that the number of actions declined after 1994 and especially after 2000, as I will discuss later, more than two-thirds of the actions after 2006 were still concentrated in covered jurisdictions. And the decline can be exaggerated, as the fourth and fifth rows of Table 1 make clear. If we compare the number of actions after 2006 with the number between 1957 and the passage of the VRA in 1965, a period in which, according to the Chief Justice, voting discrimination was “pervasive . . . flagrant . . . widespread . . . rampant,”²⁹ we find more cases per annum in the later than in the earlier years (15.5 cases per year for 2007-19 vs. 10.5 per year for 1957-65).

But might there be other explanations for the nearly perfect fit of the Section 4 coverage scheme? Table 2 considers two other possible explanations for the congruence. Since Section 4 defined the coverage area, any cases or objections or more information requests³⁰ that are included in the number of actions had to have originated in covered jurisdictions. What if we exclude actions relating to Section 5 or more information requests? Part A of Table 2 considers that possibility. If we include cases that were settled or were the subject of consent decrees that were favorable to minorities,³¹ we find that five out of six successful actions originated in covered jurisdictions. The first row considers only Section 2 cases; the second adds those based on other sections of the VRA or on constitutional amendments. Since litigation can be brought under those provisions against jurisdictions throughout the country, the pattern in this table makes it even clearer that voting discrimination has been centered in those areas covered under Section 4. This is especially true because some Section 2 cases in covered jurisdictions didn’t have to be filed, because Section 5 had already either deterred discrimination or been settled by objections under Section 5. The 82% concentration of Section 2 cases in covered jurisdictions therefore is no doubt an underestimate of the concentration of discrimination there.

Part B of Table 2 considers the possibility that the jurisdictional scheme merely tracked minority percentages -- that cases were filed where minorities lived. It divides counties into those in which non-Hispanic whites constituted more than 80% of the citizen voting age population (CVAP) and those in which the group was less than 80% of the CVAP. Eighty percent is chosen because a county in which minority groups

²⁹ *Shelby County v. Holder*, 570 U.S. 529, 554 (2013).

³⁰ I included only those requests by the Department of Justice for more information about preclearance submissions that resulted in a withdrawal of the submission or a substantial change to make it more favorable for minorities.

³¹ 851 of the 1291 Section 2 minority victories were the result of settlements or consent decrees. 488 of those cases were from Alabama and Texas, where local jurisdictions must have settled knowing that a trial would have been very likely to find racially polarized voting, a history of discrimination, and all of the other factors necessary for a minority plaintiff to win a Section 2 case. That is, it seems unlikely that settlements simply represented efforts by non-discriminatory jurisdictions to avoid the time and expense of defending against frivolous lawsuits. Altogether, 753 of the 851 settlements (88.5%) came from covered jurisdictions.

constituted more than 20% of the CVAP would probably contain some city or school district in the county in which a minority group could form a majority in a single-member district. These counties are then further divided into those in covered jurisdictions and those in non-covered jurisdictions.

The results are striking. In whiter counties, those in which non-Hispanic whites exceeded 80% of the CVAP, the proportion of counties with at least one successful voting rights action was six times as high in the covered counties as in the non-covered counties (36% to 6.2%). And the raw numbers of actions in the two sets of whiter counties were similarly disproportionate. 6.4 times as many actions originated in covered as in non-covered heavily white counties (283, compared to 44). The contrast is even more striking in the less-white counties, where there were 6.8 times as many successful actions in covered as in non-covered counties (80.0% vs. 11.9%), and 11.7 times as many total actions (3236 vs. 276) in covered as in non-covered jurisdictions. Obviously something besides the racial percentages in each set of counties must account for the stark difference. Perhaps the effects of the long history of discrimination in voting have persisted well past the Jim Crow era.³² This contrast sheds a different light on the Chief Justice's pronouncement in *Shelby County* that "history did not end in 1965."³³

³² For a recent work tracing current southern political attitudes to their historical roots, see Avidit Acharya, Matthew Blackwell, and Maya Sen, *Deep Roots: How Slavery Still Shapes Southern Politics* (Princeton, N.J.: Princeton University Press, 2018).

³³ *Shelby County v. Holder*, 570 U.S. 529, 552 (2013).

Table 2: Other Possible Explanations of the Congruence of the Pre-Shelby Congruence of the Coverage Scheme and Voting Rights Actions

A. Cases Not Involving Section 5

Topic	Years	Total # of Actions	# in Covered Jurisdictions	% in Covered Jurisdictions
# actions under Section 2	1965-2019	1291	1066	82.6
# actions under Section 2, Sections 203 or 208, 14th or 15th amendments	1965-2019	1605	1312	81.7

B. Counties with Different Proportions of Minorities*

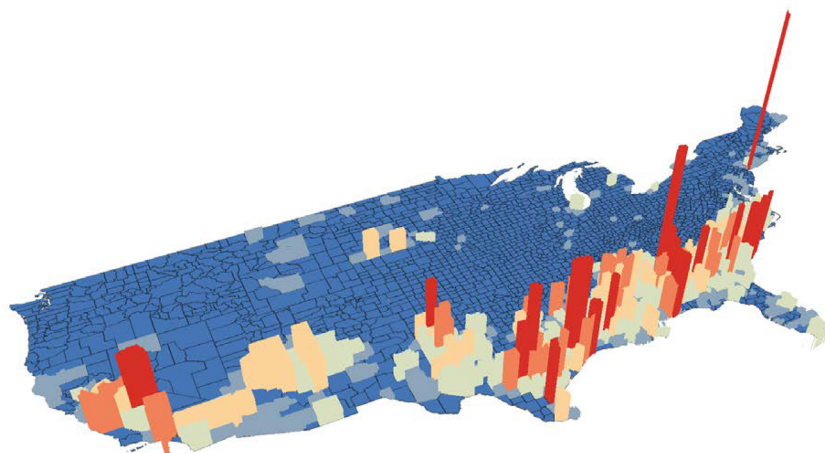
% Non-Hispanic White CVAP, 2010	Covered Counties		Non-Covered Counties	
	% Counties with Minority Successes	# Minority Successes	% Counties with Minority Successes	# Minority Successes
>80% Non-Hispanic White	36.0	283	6.2	44
<= 80% Non-Hispanic White	80.9	3236	11.9	276

- from a slightly older version of this database

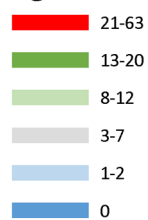
Another, more dramatic way to present the contrast between covered and non-covered counties is through maps. In another paper based on a slightly older version of this database, I included seven maps exploring various facets of the data.³⁴ Here, I limit myself to one. I have counted the number of voting rights actions in each of the 3143 counties or county-equivalents in the U.S. and arrayed the totals for each county on a quasi-three-dimensional map. The height of the projections above each county is proportional to the number of voting rights actions in each. In 2393 of them, there were no voting rights actions at all. The skyscrapers, indicating multiple actions, are almost all in covered jurisdictions – the Deep South, covered in the original 1965 Act, and Texas and Arizona, added in 1975. The map makes the same point as the earlier tables: the coverage scheme that Congress continued in 2006 fit the pattern of proven voting rights actions extraordinarily well.

³⁴ Kousser, “Do The Facts of Voting Rights Support Chief Justice Roberts’s Opinion in *Shelby County*?” *Transatlantica*, I (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592829. The map included here is taken from that paper. The only substantial differences between this map and one that would be drawn using the updated data would be that 39 more cases would be added (22 from formerly covered jurisdictions and 17 from non-covered jurisdictions) and that the map would not include cases from the California Voting Rights Act. These differences would have almost no effect on the visual appearance of the map.

Map 1: Voting Rights Events by County, 1957-2014



Legend



V. The Pattern of Cases Over Time Was Driven Less by the Amount of Discrimination than by the Decisions of the Supreme Court

Figure 1 plots the number of voting rights actions against time, with years in which there were especially significant decisions by Congress or the Supreme Court noted along the horizontal axis. Cases and other actions coming from covered jurisdictions are in blue, and the much smaller number of actions from non-covered jurisdictions are in red at the top of the graph. The graph makes the point, by now familiar, that over 90% of the actions took place in covered jurisdictions. Unlike the map, which was based only on county-level data, this graph contains state-level actions, as well. But the 354 state-level actions are vastly outnumbered by the 3736 at the county or lower level. Nearly all voting rights politics is local.

I have also inserted notations of the most significant Supreme Court decisions and congressional acts. The 1969 case of *Allen v. Board of Elections*³⁵ made two things clear – that private parties could sue to enforce Section 5 of the VRA and that changes in election structures, such as laws that switched local jurisdictions from single-member district to at-large elections, had to be precleared before they could go into effect in covered jurisdictions. That is, the VRA did not apply merely to restrictions on individual voting, such as literacy tests. Local and state elective bodies responded to *Allen* by markedly increasing the number of submissions to the Department of Justice, and the Justice Department responded by turning more of the submissions down, refusing to preclear them. The line in the graph rises dramatically.

By contrast, *Beer v. U.S.*³⁶ in 1976 made it more difficult to win a Section 5 case or for the Department of Justice to object to a submission for preclearance, because it ruled that the only illegal discriminatory effects were those that caused a retrogression in minority voting rights. If African-Americans could win only one city council seat in New Orleans, Justice Potter Stewart held, then a plan which preserved that number of seats did not violate Section 5, even though it was easy to draw a second black-majority council seat, and the almost all-white council had rejected proposals to do so. At a time when African-Americans in the Deep South were only beginning to win seats on local government boards or in state legislatures, the *Beer* retrogression standard significantly hampered progress in integrating local government. The line on the graph drops after *Beer*.

Section 2 of the VRA had rarely been used before 1980. When the Supreme Court ruled in *City of Mobile v. Bolden*³⁷ that to be considered a constitutional exercise of

³⁵ 393 U.S. 544 (1969).

³⁶ 425 U.S. 130 (1976).

³⁷ 446 U.S. 55 (1980).

congressional power under the 15th amendment, Section 2 had to require proof of a racially discriminatory intent, proponents of equal voting rights sprang into action. Because Congress had extended Section 5 for seven years in 1975, it had to consider renewing the provision by 1982. Proponents of renewal convinced an overwhelming bipartisan majority of Congress not only to renew Section 5, but also to clarify the congressional understanding that Section 2 would be violated if a state or local action had either a discriminatory intent or a discriminatory effect. Armed with a clearer congressional mandate and a checklist of “Senate factors”³⁸ that allowed them to organize evidence of discrimination into neat packages, voting rights lawyers began to file and win many more Section 2 cases. The line in Figure 1 streaked upward.

When in 1986 Justice William J. Brennan, Jr. ruled the 1982 amendments to Section 2 constitutional and seemed to simplify the proof needed to satisfy that provision,³⁹ successful voting rights actions increased again, especially after the redistricting of 1991-92. But after Justice Brennan and Justice Thurgood Marshall retired from the Court, a new majority clamped down on interpretations of the constitution that had led to the largest increase in the number of minorities elected to Congress and the state legislatures since the First Reconstruction.⁴⁰ In *Shaw v. Reno*,⁴¹ *Miller v. Johnson*,⁴² and their progeny, the conservative majority ruled that legislative districts whose boundaries or composition reflected a “predominant” racial motive needed especially persuasive justification and might be unconstitutional. Lower federal court judges, voting rights lawyers, and Department of Justice officials took the Court’s ruling as a signal that the Court had become much less sympathetic to contentions of discrimination against minority voters. The number of Section 2 cases and Section 5 objections fell as if off a steep cliff.

The wholesale redistricting required by state and federal constitutions in 2001-02 gave lots of opportunities for voting rights cases and Section 5 objections, even within the confines of the *Shaw* regime. But such decisions as *Reno v. Bossier Parish School Board*,⁴³ which ruled that the intent prong of Section 5 of the VRA required proof of “retrogressive intent,” even though the text of the law did not insert “retrogressive” before “intent,” helped to chill voting rights activity further. Notably, there was no spike in voting rights actions after the 2011 redistricting, as there had been after every other redistricting since 1965.

Figure 1 is the first of three sets of data that makes a simple point that should be apparent to lay readers, as well as to lawyers. If the Supreme Court makes it easier to

³⁸ S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), at 28-29.

³⁹ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴⁰ On the increase in the number of elected black officials in the South, see Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1999), 19.

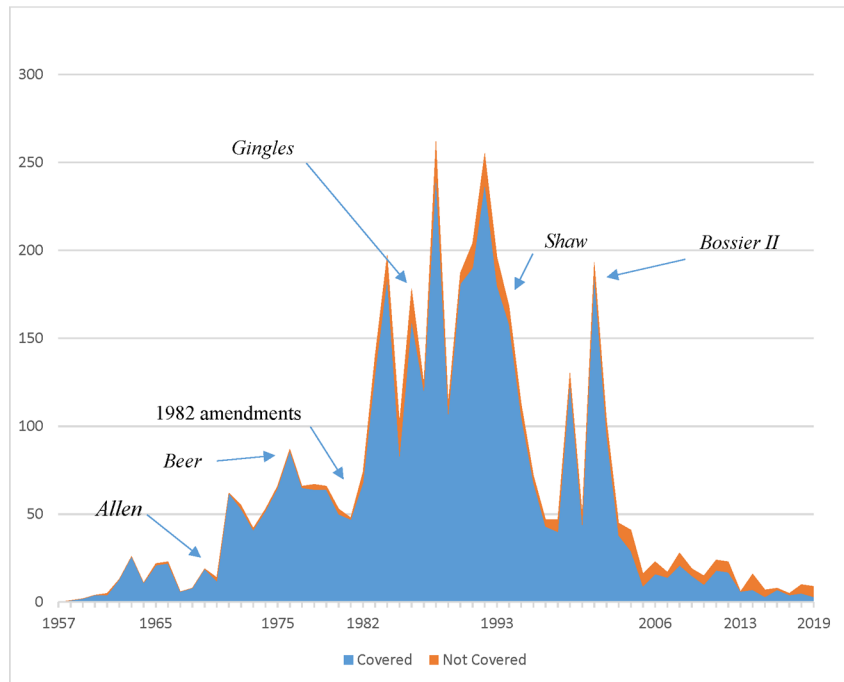
⁴¹ 509 U.S. 630 (1993).

⁴² 515 U.S. 900 (1995).

⁴³ 528 U.S. 320 (2000).

win voting rights cases or for the Department of Justice to find voting discrimination and offer objections under Section 5, the observed number of instances of discrimination against minority voters will rise. If, on the other hand, the Supreme Court makes it more difficult to uncover discrimination, the number of cases and objections will fall. In considering any revisions of the VRA, Congress should take this simple truism into account. The data that I have gathered raises the truism from the realm of theory or speculation to that of firmly demonstrated fact.

Figure 1: Successful Voting Rights Actions by Year



A second set of data to demonstrate the power of Supreme Court decisions to shape outcomes in voting rights actions is contained in Table 3. Suppose that *Allen* had been decided differently, that the Court had ruled that only changes in laws or actions that hampered individual voting, not changes in election structures, were subject to preclearance. Then unless Congress had changed the law or the Court had reconsidered its decision, no vote “dilution” measures would have been objected to, and no lawsuits requiring dilution measures to be submitted would have been won. How many fewer voting rights actions would there have been? Table 3 answers the question. There were 1483 Section 5 actions between 1965 and 2013 (when *Shelby County* effectively neutered Section 5) in which minorities were victorious. If *Allen* had not ruled as it did, none of the 999 Section 5 objections or cases that involved vote dilution would have been won, and there would have been only 484 Section 5 objections or cases. *Allen* therefore resulted in a 206.4% (999/484) increase in the number of Section 5 actions.

Similarly, if Congress had not overturned *Bolden*, there would have been no Section 2 cases filed after 1982, because there would have been no incentive to do so. One would have had to prove intent under the fifteenth or perhaps the fourteenth amendment anyway, so there would have been no benefit in filing under Section 2 of the VRA. There were 1143 successful Section 2 cases from 1982 to 2006, the date of the next scheduled renewal of Section 5, so under these assumptions, there would have been 61.3% fewer total actions under all provisions during that period (1143/1865) if *Bolden* had remained in force.

These two hypotheticals, given plausibility by the extensive data, provide further evidence of the shaping force of Supreme Court decisions. They offer further reason for Congress not to conclude that declines in the number of voting rights actions prove that there is no further need for federal laws against minority voting discrimination.

Table 3: Other Evidence of the Influence of Supreme Court Decisions on the Number of Voting Rights Actions

Topic		Years	Total Number of Actions	% Increased Actions Due to Decisions
Section 5		1965-2013	1483	
	If <i>Allen</i> had not been decided	1965-2013	484	206.4
All Events		1982-2006	3008	
	If <i>Bolden</i> had not been overturned	1982-2006	1865	61.3

VI. The California Voting Rights Act Offers Even More Evidence that There Is a Continuing Need for Federal Protection of Minority Voting Rights

Because California has an extremely diverse population, a single non-white ethnic group sometimes cannot comprise a majority of the CVAP in any potential sub-district in a particular local jurisdiction. This sometimes made it difficult to attack discrimination using Section 2, especially after a decision by the Ninth Circuit Court of Appeals in *Romero v. City of Pomona*.⁴⁴ To make it possible to integrate the Latinx and Asian-American populations, as well as African-Americans, into leadership positions in local jurisdictions that were then mostly elected in at-large contests, voting rights lawyer Joaquin Avila drafted the California Voting Rights Act (CVRA). This law, the first state voting rights law, was adopted by the state legislature in 2002. Applying only to at-large elections, it waives the “first *Gingles* prong” by not requiring plaintiffs to prove that they can draw a compact district in which a single minority comprises a majority of the CVAP

⁴⁴ 883 F. 2d 1418 (9th Cir. 1989). *Romero* ruled that federal courts could not entertain a Section 2 case against an at-large election scheme unless plaintiffs could first show that a sub-district containing a majority of the CVAP of a single minority could be drawn in that jurisdiction.

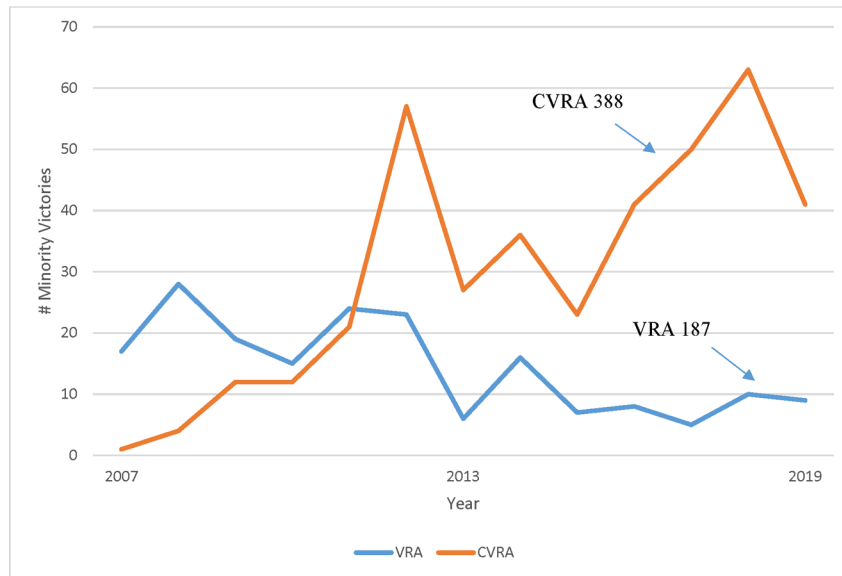
before beginning a case. Even though intent and the “Senate factors” are probative under the CVRA, they are not necessary. All that must be shown is that voting is racially polarized and that minorities usually lose. A challenge to the constitutionality of the law took several years to resolve, finally being denied a writ of certiorari by the U.S. Supreme Court in 2007.⁴⁵ In 2016, the law was amended to allow local jurisdictions to minimize the costs of litigation by resolving to shift away from at-large elections through a mandated procedure of votes by the government body, public meetings, and transparent adoption of particular districting or other plans.⁴⁶ Only four cases have gone to full trials, and in all, the plaintiffs have won. Yet the law has revolutionized local government structure in the nation’s largest state. At least 389 local school boards, city councils, community college boards, hospital or water districts have at least begun the process of ending at-large elections. Evidence gathered for cases which have not gone to trial, as well as those which have gone to trial, has shown that a great many very recent elections in California have been racially polarized.

Figure 2 demonstrates that the CVRA has made it possible to find and remedy discrimination in voting rights just as the VRA has withered as a tool for combatting voting discrimination. During the period from 2007 through the present, more than twice as many jurisdictions have changed election structures or laws as a result of the CVRA than as a result of the VRA. This third major strand of evidence suggests that Congress should not be dissuaded from passing a new, amended VRA by the recent decline in the number of successful VRA cases. The VRA has been hobbled by adverse Supreme Court decisions, just as it was earlier strengthened by favorable ones. And the experience of the CVRA suggests that reopening the lens through appropriate revisions of the VRA would allow existing, continuing voting discrimination to come into focus once again.

⁴⁵ *Sanchez v. City of Modesto*, 145 Cal.App.4th 660 (2006), cert. denied 552 U.S. 974 (2007).

⁴⁶ AB 350, which amended Section 10010 of the Elections Code, is available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB350>.

**Figure 2: The CVRA Proves That You Can See
Discrimination If You Have the Proper Lens:
CVRA and VRA Actions, 2007-2019**



Appendix A: Sources of Voting Rights “Events”

I. Cases Brought by the United States Department of Justice

Brief of the United States in *South Carolina v. Katzenbach*, pp. 44-45, n. 33 (cases, 1957-65).

Voting Rights Act, House Hearings, 1965, Tables B2(a), B3(a), B4(a).

Voting Rights Act, House Hearings, 1975, Serial No. 1, Part 1, pp. 198-216 (cases, 1965-75).

Voting Rights Act, Senate Hearings, 1982, Vol. I, pp. 1803-05, 1828-29, 1837-41, 1849 (1975- 82 cases).

“Attachments to the Statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Before the Subcommittee on the Constitution of the Senate Judiciary Committee on Amending the Voting Rights Act, March 1, 1982. Unpublished 12-page memo.

“Voting Section Cases in Which the United States’ Participation Began Since October 1, 1976” (unpublished 27-page memo in Department of Justice, dated Jan. 17, 2008.

“Section 5 Declaratory Judgment Actions” (unpublished 12-page memo in Department of Justice, dated Oct. 18, 2005).

“All Section 4 Bailout Cases Filed under the Current Bailout Standard through October 17, 2005. Unpublished, undated 2-page memo.

“Table 1: Voting Rights Cases Brought on Behalf of American Indians and/or Interpreting the Voting Rights Act re Indian Interests” (unpublished, undated, 8-page memo in Department of Justice)

II. Cases Brought by Public Interest Groups and Individuals or Settlements Brought About by Such Cases

ACLU, "Voting Rights in the South: Ten Years of Litigation Challenging Continuing Discrimination Against Minorities." (1982)

"Vote: The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union." available at. <<http://www.aclu.org/voting-rights/case-extending-and-amending-voting-rights-act/>>.

ACLU "Promises to Keep: The Impact of the Voting Rights Act in 2006." "ACLU Voting Rights Project Litigation Docket: Sept. 2006-Sept. 2007."

"ACLU Voting Rights Project Litigation Docket: Jan. 2007-Dec. 2007," available at: <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2007>.

"ACLU Voting Rights Project Annual Report: January 1, 2008-December 31, 2008," available at: <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2008>.

"ACLU Voting Rights Project Annual Report, January 1, 2009-December 31, 2009," available at: < <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2009>>.

"ACLU Voting Rights Project Annual Report: January 1, 2010-December 31, 2010," available at: <https://www.aclu.org/voting-rights/aclu-voting-rights-project-annual-report-2010>.

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“MALDEF Master List 2008, Political Access Program” (unpublished 4-page memo), courtesy of Nancy Ramirez.

“Cases Litigated by Rolando L. Rios & Associates, PLLC” (unpublished, undated 17–page memo), courtesy of Rolando L. Rios.

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U.S. Department of Justice, Section 5 Objection List, 1965-2009, available at
http://www.justice.gov/crt/voting/sec_5/obj_activ.php.

Computer file on “more information requests” from Luis Fraga, which served as the

basis for Luis Ricardo Fraga and Maria Lizet Ocampo, “More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act,” in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power* (Berkeley, CA: Berkeley Public Policy Press, 2007), 47-82. The more information requests that are included here are those that Fraga and Ocampo considered “MIR-Induced Outcomes,” i.e., those that were withdrawn, superseded, or to which the jurisdiction did not respond. See Fraga and Ocampo, Table 3.2, pp. 59-62.

U.S. Dep’t of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, As Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php>; U.S. Dep’t of Justice, Archive of Notices of preclearance activity under the Voting Rights Act of 1965, as amended, <http://www.justice.gov/crt/about/vot/notices/votarch.php>. Only those more information requests that resulted in withdrawn submissions, 2006-13, are included. Courtesy of Justin Levitt.

IV. California Voting Rights Act Lawsuits and Changes Brought About by Threats of Lawsuits or Preemptive Action to Avoid Lawsuits

California Board of Education Website

<http://www.cde.ca.gov/search/searchresults.asp?cx=001779225245372747843:gpfwm5rhxiw&output=xml_no_dtd&filter=1&num=20&start=0&q=at-large%20elections. (Search for waivers under CVRA).

California State Community College Board Website

<http://californiacommunitycolleges.cccco.edu/ChancellorsOffice/BoardofGovernors.aspx>. (Search for waivers under CVRA).

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National Center for Education Statistics, Dataset ACS 2007-2011 Profile, California, All Districts (for demographic data on California school districts).

Nielsen Merksamer Website

https://nmgovlaw.com/articles/02_-_NMPGL_Voting_Rights_Act_Resume_2013.pdf.

Appendix B: How the Dataset Was Compiled

Since of the case lists, only Prof. Ellen Katz's was in the form of a database file, my first undergraduate research assistant, Adam Adler, and I created a new Excel form which eventually grew to contain a much larger number and range of categories than Prof. Katz had coded. It began with Katz's dataset and was expanded to include the lists from the Department of Justice and from the American Civil Liberties Union and Leadership Conference of Civil Rights lists and reports. Gradually, cases drawn from the other lists in Appendix A were added, as well as the Section 5 objections from the Department of Justice website and the list of "More Information Requests" from a dataset kindly provided by Prof. Luis Fraga and Maria L. Ocampo.

Each case or other event was traced to a specific county, and all counties in the U.S. were entered into the dataset, whether they contained events or not, and given a standard GIS indicator so that they could be coordinated with maps. Information on the ethnic composition of the population, voting age population, and, when available, citizen voting-age population, both for 2000, 2010 and for the date at which a case was concluded or an objection or MIR was made, were matched with each event.

Since there were so many diverse lists, many overlapping, a considerable effort was made to avoid duplication by identifying each event with a specific name, civil action number, and/or case citation. This was often very difficult, since some lists gave only case names, others only case numbers, and others, only published case citations, and since many case names were the same (for example, *U.S. v. Texas*). Sometimes, it was a matter of judgment whether two cases with the same name should be represented as one case or two. Where citations to published cases were available, an effort was made to read them so that any more information that was available in them could be extracted. For example, attorneys in some of the cases on Prof. Katz's list had raised constitutional issues, in addition to Section 2 issues, but she had not coded the constitutional issues, because she was focused only on Section 2.

An effort was made to categorize the issues involved in each case and objection (if there was more than one issue, the event was NOT counted more than once), as well as the legal bases for each case. Cases below the state level were categorized by the form of the local jurisdiction (city government, county government, education agency). Attempts were made to identify the attorneys involved in each case by the organization that they represented (U.S. government, ACLU, Mexican American Legal Defense and Education Fund, etc.). Where possible, the ethnicity of the challenging or defending minority plaintiff was noted. Sometimes, this was referred to in the text of cases; sometimes, it was apparent from the case location (if Mr. Jones sued a school board in

Mississippi, there was a very low likelihood that he was Latino, Asian-American, or Native American), or from the plaintiff's last name. Where there were multiple plaintiffs with names of apparently different ethnicity, all of the relevant ethnicities were coded.

Especially for the period before 1982 and after 2006, the footnotes and textual citations to cases were searched for and linked to in order to expand the number of cases at times when the available lists were inadequate. Footnotes and tables in monographs and articles on the VRA were scoured for more case names and descriptions. For CVRA cases, lists from the state board of education and state community college board were supplemented by evidence from newspaper articles and such irregular sources as the websites of consultants who specialize in advising school districts on CVRA matters.

Finally, a rather fruitless effort was made to discover other cases that resulted in consent decrees or other settlements by examining subject categories in PACER and reading the case files of cases linked to "voting" and similar topics.

Mr. COHEN. Thank you, Professor Kousser.

Our next witness is Mr. Thomas Saenz, President and general counsel of the Mexican American Legal Defense and Education Fund, better known as MALDEF. He has been in that position since 2009. Prior to that time, he served as counsel for the Los Angeles mayor. Prior to that, he was a litigator for MALDEF for 12 years and lead counsel in two court challenges to Prop 227, California English-Only Education Initiative.

For 8 years, he taught civil rights litigation as an adjunct lecturer at USC and has been widely published. He received his J.D. with honors from Yale, his undergraduate degree summa cum laude from Yale. He later served as a law clerk for Judge Harry Hupp of the U.S. District Court for the Central District of California and the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit.

Yu are recognized for 5 minutes, sir.

TESTIMONY OF THOMAS A. SAENZ

Mr. SAENZ. Thank you, Mr. Chair and Members of the subcommittee.

I am the President and general counsel of MALDEF, and I am very proud to report that MALDEF is the litigating organization that brought the lawsuit against Pasadena, Texas, mentioned by Mr. Collins. It did result in what we believe to be the only contested bail-in order requiring a jurisdiction to be subject to preclearance.

It is important to note that that is the only occasion since Shelby County was decided in 2013 where a contested order of judicial bail-in was provided. It was after a lengthy and costly trial.

In addition, we have the experience of more recently seeking a bail-in order against the State of Texas following not just one, but two trials on Texas redistricting following the 2010 Census. Despite findings by that three-judge panel of intentional discrimination, they declined in their discretion to order that the State of Texas be subject to preclearance. I hope this provides some illustration of how section 3 is not an adequate substitute for a coverage formula that would subject jurisdictions on a regular basis for known practices and for histories of discrimination to preclearance by the Department of Justice or the district court here in Washington, DC.

Both the redistricting challenge in Texas and the Pasadena case were extremely costly to litigate. Most of those costs were ultimately borne or will ultimately be borne by the defendant jurisdictions. That is to say preclearance is actually, in addition to being a most effective civil rights provision, perhaps the earliest, one of the earliest and most effective alternative dispute resolution mechanisms in Federal law.

Like good ADR, it provides a mechanism outside of the court system to adjudicate potential disputes. Like good ADR, it arrives at an efficient, meaning quick, as well as less costly decision about those potential disputes.

Recognizing that most of those benefits, particularly the savings in cost, are to the benefit of the covered jurisdictions themselves means that we should look at expanding the coverage formula to apply that efficient ADR mechanism as broadly as possible, con-

sistent with constitutional power to address potential voting rights violations.

With that said, I want to comment on the known practices' coverage. It is a supplemental coverage formula in H.R. 4 to specifically target not jurisdictions, but all jurisdictions where there is sufficient racial diversity to suggest that these known practices with a long history of being used to suppress minority voting rights may be being used in those circumstances to suppress minority voting rights.

The practices identified, including those already articulated by the chair and others, include annexing additional territory and population in a way to dilute a growing minority population, include converting in part or in whole from districted elections to at-large, as occurred in Pasadena, Texas, a change that the major himself attributed to possibilities created by the *Shelby County* decision, recognizing that that shift to at-large seats would not have been permitted under the preexisting preclearance regime.

They include diminution in multilingual voting materials. They include access restrictions, such as voter ID. They include redistricting in a context of a growing minority population. It is MALDEF's experience in 51 years of promoting the civil rights of all Latinos living in the United States that these identified practices have been used repeated to target the Latino community and others.

This is because the Latino community, given its growth as the largest minority group in the country for over a decade and soon to be the largest minority voting community in the Nation, is often perceived as a threat to those who currently are in power. They then take steps such as converting, as in Pasadena, Texas, some of the seats on a council to, at-large, to ensure that those who are in power can continue to remain power.

We need to be able to use preclearance, an efficient and effective mechanism, to address these potential voting rights violations. If the Congress, as it should, is interested in stopping vote suppression, it should target both the serial vote suppressors as the main coverage formula would do, as well as the copycat vote suppressors as known practices coverage would do. It specifically targets those who use mechanisms used in the past by those with records of discrimination and used in the past and then adjudicated to violate the voting rights of minority groups to ensure that we can stop those changes before they occur and that we can stop them without the expense, tremendous expense of section 2 litigation that, as I mentioned, often ends up being borne by the taxpayers themselves of the covered jurisdictions.

Thank you.

[The statement of Mr. Saenz follows:]

STATEMENT OF THOMAS A. SAENZ Good morning. I am President and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which has, for over 51 years now, worked to promote the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where we were founded; and Washington, DC.

Since its founding, MALDEF has focused on securing equal voting rights for Latinos, and promoting increased civic engagement and participation within the Latino community, as among its top priorities. MALDEF played a significant role in securing the full protection of the federal Voting Rights Act (VRA) for the Latino community through the 1975 congressional reauthorization of the 1965 VRA. MALDEF has over the years litigated numerous cases under section 2, section 5, and section 203 of the VRA, challenging at-large systems, discriminatory redistricting, ballot access barriers, undue voter registration restrictions, and failure to provide bilingual ballot materials. We have litigated significant cases challenging statewide redistricting in Arizona, California, Illinois, and Texas, and we have engaged in pre-litigation advocacy efforts, as well as litigation related to ballot access and local violations, in those states, as well as in Colorado, Georgia, Nevada, and New Mexico. As the growth of the Latino population expands, our work in voting rights increases as well.

Before the divided Supreme Court decision in *Shelby County v. Holder*, MALDEF relied heavily upon the application of the section 5 pre-clearance requirements—particularly in Arizona, Texas, and portions of California—to deter violations of Latino voting rights and to block any discriminatory proposals that were submitted for pre-clearance. These beneficial effects of pre-clearance—and others, including even the basic tracking of electoral changes with potential impacts on the right to vote—have been absent following *Shelby County* because of the failure to enact a new coverage formula after the 2013 Court decision.

This has affected MALDEF's ability to respond to the many challenges faced by the growing Latino voting community. For example, while MALDEF played a significant role in litigation before the *Shelby County* decision when the State of Texas sought to pre-clear its newly restrictive voter identification law, we decided to forego participating as counsel in the section 2 litigation challenging the same law after *Shelby County*. While we have great confidence in our colleagues who litigated that challenge, we were unable to provide our perspective as the longstanding legal representative of the Texas Latino community in voting rights issues. Our efforts were instead channeled to a successful, though costly, challenge to a change in the city council electoral system in Pasadena, Texas—a change linked directly by the then-mayor to the lifting of the pre-clearance obligation by the *Shelby County* decision.

As both a rapidly growing population and the nation's largest minority population, Latinos are regularly and increasingly seen as a threat to those currently in political power. As a result of this perceived threat to incumbents, the Latino community regularly faces violations of the VRA in several election-related areas. Those in power, whether at State or local level, think about the perceived threat from the growing Latino voter pool in racial terms, even if that perspective is not explicitly acknowledged, and the violations of the VRA take conspicuously racialized forms even if justified in other terms—of seniority protection for incumbent legislators, of competitiveness, or of continuity of representation, for example.

In the post-*Shelby County* absence of the protections of pre-clearance, the dual nature of the pre-clearance provision in section 5 of the VRA has become apparent—and much missed. Section 5 has accurately been characterized as perhaps the most effective civil rights provision ever written into federal law. It has prevented the implementation of many, many electoral changes that would have dealt significant harm to minority voting rights. From discriminatory precinct changes to dilutive redistricting, section 5 likely deterred substantially more proposed or conceived electoral changes than the many hundreds it blocked or modified through a determination made in pre-clearance review. The civil rights effectiveness of section 5 is acknowledged by all, even those who wrongly believe it is no longer needed.

Yet, apart from its success as a civil rights protection, section 5 should also be celebrated as perhaps one of the first and most effective alternative dispute resolution (ADR) provisions ever written into federal law. Like more typical ADR mechanisms, pre-clearance permits a faster, less costly resolution of disputes that would otherwise be resolved in more cumbersome and resource-intensive court litigation. Like other ADR mechanisms, pre-clearance involves streamlined review by a non-judicial officer who considers the contentions of both sides on the matter at issue.

Of course, unlike mandatory ADR in other contexts, section 5 allows jurisdictions to opt out and go directly to court proceedings, in the D.C. federal court, with in-court expedited review that bypasses the intermediate appellate court.

Like the most effective ADR, pre-clearance saved lots of money when it was broadly in effect, most of it for taxpayers in covered jurisdictions. VRA litigation generally involves fee awards for prevailing plaintiffs. Thus, covered jurisdictions under pre-clearance received quick decisions without having to pay their own attorneys—ordinarily outside counsel who charge a premium for their VRA expertise—and expert witnesses, and without also having to pay a prevailing plaintiffs fees and costs. It is no exaggeration to assert that pre-clearance saved taxpayers in covered jurisdictions billions of dollars through avoiding costly litigation.

It is one of the unexplained ironies of modern policymaking that those who champion mandatory ADR in consumer and employment contexts are often among those who most vehemently oppose the revivification of section 5 of the VRA through enactment of a new coverage formula following the *Shelby County* decision. Nonetheless, the Nation plainly continues to need the protections and efficiencies of pre-clearance in voting rights, and so Congress must enact a vigorous, fair, and efficient coverage formula as a substitute for the one in section 4 that the Supreme Court narrowly struck down in *Shelby County*.

To meet the needs of the growing Latino voting community—and not incidentally to continue to save State and local defendants from the high and rising costs of defending against litigation under section 2 of the VRA and under other provisions of federal law—the best coverage formula would again include rolling measures of recent historical experience to ensure that recent voting rights violators with significant voter participation differentials among racial groups are required to avail themselves of pre-clearance ADR before implementing any electoral changes.

In addition, however, the new coverage formula must also address the Latino community's experience of facing tried and true obstacles to equal electoral participation just as the Latino voter population approaches critical mass to threaten the future prospects of those currently in power. In these circumstances—a fast-growing, but only recently significant, minority population—a history-based coverage formula alone would not suffice to prevent and deter, or to evaluate quickly and cost-effectively, changes that could seriously harm minority voting rights. Jurisdictions seeking to disenfranchise an insurgent political threat posed by a fast-growing minority group should also be required to pre-clear certain, but not all, electoral changes.

Here, pre-clearance would focus on suspect practices and dangerous situations arising in the context of rapid growth of a minority group, rather than on the specific history of a single jurisdiction. “Known practices coverage” (KPC) would single out for pre-clearance specific practices in circumstances that pose a significant potential, demonstrated by broad historical experience, for violations of voting rights. Creation of at-large seats, annexations of suburban populations, reductions in multilingual voting materials, changes in voter qualifications, reductions in voting places, and redistricting completed by incumbents all raise concerns when they occur in a jurisdiction that has experienced recent, significant growth of a specific minority population. Utilizing pre-clearance ADR rather than costly and time-consuming litigation in these and other situations would save taxpayers from paying significant sums to defend entrenched, powerful incumbents.

“Known practices coverage” (KPC) is a supplemental coverage formula incorporated in the proposed Voting Rights Advancement Act. It would ensure that the efficiencies of pre-clearance are enjoyed with respect to specific changes that have historically been employed to restrict the rights of minority voters, including Members of growing minority communities that have reached a size to be perceived as a threat by current government officials. Unlike the main coverage formula that it is designed to supplement, “known practices coverage” would not be limited to jurisdictions with troubling and consistent histories of voting rights suppression. In addition, KPC would not subject every elections-related change to pre-clearance, only the specific changes identified in the legislation.

Thus, as the name suggests, KPC focuses on practices rather than jurisdictions. Still, KPC would not apply universally, but only to jurisdictions that satisfy thresholds of demographic diversity and growth. The thresholds ensure that pre-clearance would only apply where the identified change may have the intent or effect of suppressing minority voting rights, including the ability to elect well-qualified candidates of choice. The limitation to specific practices also means that the Department of Justice would rapidly regain its expertise in evaluating the statutorily identified electoral changes, thus further enhancing the efficiency of pre-clearance as an ADR mechanism.

The overarching goal of pre-clearance is to efficiently and effectively prevent the implementation of changes that would result in minority vote suppression. The pre-

clearance mechanism recognizes that once an election occurs with a change that suppresses minority votes, it is extremely difficult, if not impossible, to remedy the voting rights violation satisfactorily. In light of the overarching goal, the Congress should address both serial voting rights suppressors—those jurisdictions whose histories demonstrate a propensity for using electoral changes that result in significant suppression of minority voting rights—as well as copycat voting rights suppressors—those jurisdictions that adopt changes used in the past by other jurisdictions to suppress minority voting rights.

The two proposed pre-clearance coverage formulas are complementary; the history/geography formula reaches serial voting rights violators, while KPC reaches copycat voting rights violators. Applying pre-clearance in both contexts ensures that significant voting rights violations can be prevented before irreparable harm is done, and that resolution of voting rights concerns can occur in a more timely and less costly manner than otherwise.

Again, the identified practices that would potentially be subject to pre-clearance under the proposed KPC are practices with a significant history of being reviewed and held to cause minority vote suppression. Many of the practices are widely recognized as troubling practices, particularly when undertaken in a context of significant demographic change such that a minority group is newly perceived as a threat to the continued dominance of the officeholders who are effectively elected solely by the long-dominant racial group in a jurisdiction.

Because the growth of the Latino community is too often today—and this will surely only increase in the future—assumed to be a threat to those currently holding political power in a jurisdiction, the enactment of KPC as a part of the new coverage formulas for pre-clearance under section 5 of the Voting Rights Act is critical. MALDEF urges the enactment of H.R. 4, the Voting Rights Advancement Act, with “known practices coverage” incorporated.

Mr. COHEN. Thank you, Mr. Saenz.

Mr. Bryan Tyson is a partner at Taylor English Duma in Atlanta, Georgia. He primarily represents governments, candidates, and companies in election and campaign finance matters.

He previously advised the Georgia General Assembly during its 2011 redistricting process and appointed as special assistant attorney general to assist in securing Federal approval of all three redistricting plans adopted by the legislature during a special session. He previously served as a policy aide to former Congressman Lynn Westmoreland of Georgia.

He received his J.D. from Oak Brook College of Law.

Mr. Tyson, you are recognized for 5 minutes.

TESTIMONY OF BRYAN TYSON

Mr. TYSON. Thank you, Chairman Cohen, Ranking Member Johnson, Members of the committee, Chairman Nadler. I appreciate the opportunity to talk to you today about H.R. 4 specifically, the Voting Rights Advancement Act.

I have worked as an expert and litigator in the redistricting and voting rights field for close to 20 years and want to share with you today a practitioner’s perspective on both litigating and working with a preclearance regime as it was in place prior to *Shelby County*. Although my law firm and I represent a number of governmental clients, I want to be clear that I am speaking today in my personal capacity and not on behalf of any client.

I think we have all recognized and I think it is widely agreed that the Voting Rights Act of 1965 was one of the most important pieces of legislation this Congress passed to secure voting rights for minority citizens. In fact, it is doubtful that the minority voters would have had voting protections put in place if not for the Voting Rights Act.

The VRAA, as we are talking about today, seeks to reimpose the preclearance portion of the Voting Rights Act with a new formula, and I have some concerns about that formula that I would like to share with you.

My first concern is the makeup of the formula that allows counties and other political subdivisions to basically bind a State in terms of preclearance coverage. Georgia has 159 counties, and as I discussed in my prepared testimony, the State exercises very little operational control over a number of voting-related decisions made by those counties.

And under the VRAA's proposed formula, if fewer than 10 percent of the counties in Georgia over a 25-year period had 1 voting rights case they settled, the entire State would be placed under preclearance, whether the State had actually engaged in any problematic behavior during that time.

The second concern I have is the VRAA's inclusion of consent decrees and settlements as a voting rights violation trigger for purposes of preclearance coverage. Many local jurisdictions lack the political and financial resources to fight a voting rights lawsuit even if they have a reasonable defense and often will settle those cases quickly.

When they are sued, local officials want to know what the trajectory of the lawsuit, and one of my first things I advise them is the possibility of them paying both the attorney's fees and the expert fees of the plaintiffs if they are successful in the case. For a small county that has a lawsuit filed against it, even if it has very valid and reasonable defenses to a section 2 case, the financial burden and the risk of paying the other side's fees is often too great to pursue a defense, and they settle.

All the election officials that I have ever worked with in Georgia have worked very hard to make sure they are doing the right thing. They are not interested, and we don't have the pattern of behavior we had in the 1950s and '60s and '70s of intentional discrimination against minority voters.

My biggest concern with the proposed formula is that the broad definition of Voting Rights Act violations will lead to a potential partisan abuse of preclearance and the Voting Rights Act going forward. A lot of voting litigation today is often highly organized along partisan lines with a strong incentive of plaintiff fee recovery. There is an incentive for organizations to bring voting rights lawsuits.

These types of political efforts to obtain Federal court and, ultimately, Federal Government oversight of State election processes will be heightened by the proposed formula in the VRAA. The incentives will no longer be aligned to really address problems. Political parties or other interested groups could strategically file litigation to bring entire States back under preclearance. States and counties are less likely to settle even meritorious voting rights cases if it is going to be considered a strike against them in terms of preclearance coverage going forward.

Many times, in the election litigation space, the narrative can get ahead of the data. Georgia, for example, was accused of massive voter suppression in the 2018 elections, but the data show a dramatically different picture.

In 2018, Georgia had a record number of registered voters. Our voter turnout for the midterm elections was 3.9 million voters, almost exactly matching our turnout in the Presidential election of 2016. Our voting eligible population turnout rate was 55 percent, significantly higher than prior midterms. African-American, Latino, and Asian-American voter turnout increased dramatically over prior midterm elections in the 2018 election.

Georgia offers automated voter registration, no excuse absentee voting, and at least 3 weeks of in-person advance voting, and all those practices were in place for both 2016 and 2018. Far from moving backwards since *Shelby County*, the data shows that Georgia has continued to move forward in expanding opportunities for all individuals to register to vote and making it easier for all eligible individuals to vote.

Thank you for the opportunity today. I refer to my prepared testimony, and I am ready to answer your questions.

Thank you.

[The statement of Mr. Tyson follows:]

STATEMENT OF BRYAN TYSON

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for inviting me to testify today about H.R. 4, the Voting Rights Advancement Act of 2019 (VRAA), one of the legislative proposals to update the Voting Rights Act being considered by the Subcommittee. My name is Bryan Tyson. I am a partner at Taylor English Duma LLP and have worked as an expert and litigator in redistricting and Voting Rights Act litigation for nearly twenty years. My goal today is to share a practitioner's perspective on the proposed VRAA and identify several issues for your consideration.

Although my law firm and I represent a number of governmental clients in Voting Rights Act and election litigation, I am speaking today in my individual, personal capacity based on my own perspective and experience. I am not speaking on behalf of the State of Georgia or any other client.

I. The Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is one of the most significant pieces of legislation enacted by Congress to secure the voting rights of minorities across the country. Without the VRA, our Nation might not have ever effectively protected the right to vote—our most foundational right—for minority voters.

From 1965 through the Supreme Court's *Shelby County*¹ decision in 2013, section 5 required covered jurisdictions to submit any changes in election practices to either the Attorney General or the U.S. District Court for the District of Columbia for preclearance prior to their implementation.² Covered jurisdictions under the VRA included all or part of 16 states. Preclearance was necessary for decades following the enactment of the VRA because of the intentional racial discrimination in which governments of covered jurisdictions were engaging. That intentional conduct was the foundation for a dramatic statute requiring advance federal approval of a state's actions,³ especially in light of the Constitution's Elections Clause that gives primary responsibility for elections to the states.⁴

Even after *Shelby County*, the VRA retains significant force. Jurisdictions that engage in intentional racial discrimination can be bailed in under section 3.⁵ Jurisdic-

¹ *Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013).

² 52 U.S.C. 10304.

³ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 334, 86 S. Ct. 803, 822 (1966) ("exceptional conditions" justified VRA); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 211, 129 S. Ct. 2504, 2516 (2009) (recognizing "extraordinary" nature of preclearance).

⁴ U.S. CONST., art. I, § 4, cl. 1.

⁵ 52 U.S.C. 10302(c).

tions that dilute minority voting strength in violation of section 2 face litigation with a strong incentive for plaintiffs: The full recovery of attorney and expert fees.⁶

Given this history, the question for this Committee regarding the VRAA is whether the burdens it seeks to impose will benefit minority voting rights and whether the proposed coverage formula will not be over- or under-inclusive given the types of triggering events contained in it. Answering those questions requires weighing a number of considerations that involve looking back and looking forward.

A. Burden of Preclearance

I'll begin with the nature of preclearance submissions. Contrary to what some may believe, preclearance submissions are not simple documents. They are complicated and difficult to prepare. The Department of Justice required the following information for each submission:

1. A copy of the document embodying the proposed change affecting voting.
2. A copy of the document showing the State of the law, regulation, or practice prior to the proposed change.
3. A statement of the difference between existing law and the proposed change.
4. The contact information for the individual making the submission.
5. The name of the jurisdiction responsible for the change.
6. The identification of the body or person responsible for the change.
7. The statutory or other authority that allows the jurisdiction to decide to undertake the change, along with a description of the procedures required.
8. The date of the adoption of the change.
9. The date the change is to take effect.
10. An affirmation that the change has not yet been enforced or administered.
11. An explanation of the scope of the change.
12. A statement of the reasons for the change.
13. A statement of the anticipated effect of the change on minority groups.
14. A statement of any past or pending litigation involving the change.
15. A statement that the prior practice has been precleared or explaining why it is not subject to preclearance.
16. Any other information required by the Attorney General.⁷

The Department of Justice also includes a list of suggested supplemental information that jurisdictions would be wise to submit with preclearance submissions:

1. Demographic information, including:
 - a. Total and voting-age population of the affected area.
 - b. Registered voters for the affected area by race and language group.
 - c. Estimates of population by race and language group made in connection with the change.
2. Maps showing:
 - a. The prior and new boundaries of the voting unit or units.
 - b. The prior and new boundaries of voting precincts.
 - c. The location of racial and language minority groups.
 - d. Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.
 - e. The location of prior and new polling places.
 - f. The location of prior and new voter registration sites.
3. Election returns showing:
 - a. The name of each candidate.
 - b. The race or language group of each candidate, if known.
 - c. The position sought by each candidate.
 - d. The number of votes received by each candidate, by voting precinct.
 - e. The outcome of each contest.
 - f. The number of registered voters for the last 10 years, by race and language group, for each voting precinct for which election returns are furnished.
4. Public notices that show the public had an opportunity to participate including:
 - a. Copies of newspaper articles discussing the proposed change.
 - b. Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).
 - c. Minutes or accounts of public hearings concerning the proposed change.
 - d. Statements, speeches, and other public communications concerning the proposed change.

⁶ 52 U.S.C. 10301; 10310(e).

⁷ 28 C.F.R. 51.27.

- e. Copies of comments from the general public.
- f. Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

5. For annexations:

a. The present and expected future use of the annexed land (e.g., garden apartments, industrial park).

b. An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.

c. A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations subject to the preclearance requirement that have not been submitted for review.⁸

And all of the required and suggested information is just for a single preclearance submission—which included every change in a “voting practice,” meaning everything from moving a polling location from one public building to another public building nearby to statewide redistricting plans.

As an example of these challenges, one county in Georgia had used a school building as a polling place for years. The school was undergoing renovations over the summer, but school officials had assured the election officials that the renovations would be complete in time for the next election. But shortly before the election, the school officials notified the election staff that the school would not be ready in time. We prepared an emergency preclearance submission to move the polling place from the school undergoing renovations to another school that was right next door and had to include all of the above information.

Failing to obtain preclearance ahead of the election would have meant the jurisdiction was subject to an enforcement action (including payment of the plaintiffs’ attorney fees)⁹ and was ineligible for bailout because it enforced a voting change that had not been precleared.¹⁰

The burden on jurisdictions is significant because not only must the jurisdiction provide all of this information, it must do so to prove a negative. Each submission had to show that the change would *not* cause a retrogression in the position of minority voters in order to receive preclearance. Failure to submit sufficient information would lead to a “More Information Request” or a rejection of the request for preclearance. This burden was necessary for a State or a political subdivision to obtain advance *federal* approval of a proposed voting change adopted by local policymakers.

B. Past Concerns Regarding Partisan Administration

While necessary in the 1960s and through the 1980s, concerns about partisan Administration of the Voting Rights Act in Georgia began to grow in the 1990s. Georgia Democrats in the 1990s were concerned about the “Bush Justice Department” and its rejection of Democratic maps. Georgia Republicans in the 2011 cycle were equally concerned about the “Obama Justice Department.”

The men and women of the Voting section are professionals who are deeply committed to their work. But concerns about partisan Administration influenced how jurisdictions approached preclearance in 2011 cycle. For example, Georgia sought preclearance of its 2011 redistricting maps on both statutory tracks simultaneously: Filing a declaratory judgment action seeking preclearance in the D.C. District Court and filing for administrative preclearance with the Attorney General.¹¹ The lawsuit included an alternative claim: If preclearance was not granted, then the formula imposing preclearance on Georgia was unconstitutional.¹² Texas used a similar strategy when seeking preclearance of its photo identification requirement for voting.¹³

II. H.R. 4 Overview

The Committee is considering the VRAA, which would create a new formula to determine preclearance coverage, replacing the formula that was struck down in *Shelby County*. The proposed formula would cover any State (entirely) in which:

- 15 or more voting rights violations occurred in the State during the previous 25 calendar years; or

⁸ 28 C.F.R. 51.28.

⁹ 52 U.S.C. 10303.

¹⁰ 52 U.S.C. 10303(a)(1)(D).

¹¹ *Georgia v. Holder*, Case No. 1:11–CV–01788 (D. D.C.).

¹² *Id.*, Complaint at pp. 19–25 (October 6, 2011) available at <http://redistricting.ils.edu/files/GA%20preclear%2020111006%20complaint.pdf>.

¹³ *Texas v. Holder*, 888 F. Supp. 2d 113, 117 (D.D.C. 2012) vacated 570 U.S. 928 (2013).

- 10 or more voting rights violations occurred in the State during the previous 25 calendar years, at least one of which was committed by the State itself (as opposed to a political subdivision within the State).¹⁴

The formula likewise covers any political subdivision where three or more “voting rights violations” occur in a 25-year period.¹⁵

The VRAA’s definition of “voting rights violation” includes five distinct types of events:

1. A final judgment by a court determining that there has been “a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or Membership in a language minority group, in violation of the 14th or 15th Amendment” anywhere within the State or one of its subdivisions.

2. A final judgment by a court determining that “a voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting was imposed or applied or would have been imposed or applied anywhere within the State or subdivision in a manner that resulted or would have resulted in a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or Membership in a language minority group, in violation of subsection (e) or (f), or section 2 or 203” of the Act.

3. A final judgment of a court denying a request for preclearance of a voting change in the State or any political subdivision.

4. An objection by the Attorney General to any voting change within the State or any political subdivision.

5. A consent decree or settlement that resulted in the alternation or abandonment of a voting practice that was challenged as a denial or abridgment of the right to vote on account of race, color, or Membership in a language minority group anywhere in the State.

My testimony will focus primarily on the coverage formula proposed in the VRAA and its likely unintended consequences from the standpoint of someone who has prepared preclearance submissions and litigated voting cases. There are significant constitutional and practical problems with the provisions of Sec. 4A of the VRAA that would apply preclearance to all States and political subdivisions for designated categories of voting changes, but those problems are not the focus of my testimony today.

III. Concerns About Formula To Determine Preclearance

The proposed formula raises several immediate concerns for me as a litigator involving its application, especially because the proposed formula opens the door to partisan Administration of the VRA. The Subcommittee should ensure that any version of the VRAA does not create opportunities for the political abuse of the VRA to the detriment of its protections for minority voters.

A. Georgia Lacks Control Over Counties and Other Political Subdivisions

The first concern with the proposed formula is the ability of counties and political subdivisions in a State to force the State into preclearance coverage without any affirmative action on the State’s part. Georgia has 159 counties. The proposed formula would make the State of Georgia accountable for the actions of all of its counties—in fact, if fewer than 10% of counties in the State of Georgia settled a single voting-rights case over 25 years, the entire State would be covered even if the State itself had no “voting rights violations” at all during the period in question.

While the Georgia Secretary of State is identified as the chief elections official for purposes of the Help America Vote Act (HAVA), his responsibilities do not encompass the entire Administration of elections. O.C.G.A. § 21–2–50 enumerates the statutory authority of the Secretary, and none of the 15 enumerated duties gives the Secretary control over counties and election superintendents. The Secretary must provide training to county elections officials (O.C.G.A. § 21–2–50(11)), but he does not watch them process voter registration applications, count ballots, administer provisional ballots, or control how local officials undertake those activities. The Secretary must maintain the official list of registered voters (O.C.G.A. § 21–2–50(a)(14)), but he does not enter information into the voter registration system; local voter registrars do. Similarly, the State Election Board’s statutory duties are set forth in O.C.G.A. § 21–2–31, which also does not give it control over county officials. The Georgia Election Code is equally clear that the duties of administering and con-

¹⁴ VRAA, Sec. 3(b)(1)(A).

¹⁵ VRAA, Sec. 3(b)(1)(B).

ducting elections fall onto local superintendents who “instruct poll officers and others in their duties” and “select and equip polling places.” O.C.G.A. § 21–2–70.

As a result of the current State of Georgia law, the Secretary of State and State Election Board do not control and cannot directly prevent a local official(s) from (1) closing polling places; (2) not distributing provisional ballots; (3) not allocating sufficient resources to polling places; (4) processing absentee ballots; or (5) improperly entering information for voter registration. All of these are county functions as a matter of law—not the responsibility of the State. O.C.G.A. §§ 21–2–31, 21–250.

But despite these statutory limitations, under the proposed VRAA formula, Georgia counties and political subdivisions can engage in behaviors that may garner objections from the Attorney General or result in litigation that will later bind the entire State, even if the State has absolutely nothing to do with a problematic voting practice. This is a far cry from the intentional discrimination that triggered the preclearance concept in 1965. Stated differently, the State could be punished for the bad behavior of one or more of its counties and political subdivisions over which the State has no control.

The lack of control over jurisdictions also eliminates the effectiveness of the bailout provisions of section 4 of the VRA¹⁶ as a check on the coverage formula. To be entitled to bailout, a jurisdiction must demonstrate that “all governmental units within its territory” have perfectly complied with the preclearance requirements during the previous ten years.¹⁷ Given the lack of operational control, that is a nearly impossible standard to meet.

Prior to Shelby County, a small county with little minority population asked our firm about seeking a bailout from preclearance under section 4. Like the relationship of the State and counties, counties in Georgia do not control the cities within their boundaries. The county had several cities within it and we served open-records requests on the cities for their last ten years of preclearance records to attempt to meet the statutory requirements. The struggle to obtain those records and affirmatively demonstrate that every voting change had been precleared ultimately led the county to abandon its efforts to seek bailout.

Similar problems will remain with the new proposed formula. A jurisdiction seeking bailout because it was improperly covered by the proposed coverage formula has to make an affirmative showing of compliance that will be nearly impossible if it does not control the “governmental units within its territory.” The proposed formula should not pull entire states under preclearance due to the actions of jurisdictions over whom they exercise no control.

B. Local Jurisdictions Tend To Be More Likely to Settle Voting Cases Than Fight Them Due To Budget Constraints

The VRAA’s inclusion of consent decrees and settlements as a “voting rights violation” will also create significant problems. Many local jurisdictions lack the political will and financial resources to fight a voting-rights lawsuit, even if they have a reasonable defense. We are far from the days of Mississippi Governor Ross Barnett, who could triumphantly proclaim his resistance to integrating Ole Miss and garner a political benefit from that stand. Today, a jurisdiction being sued for voting discrimination is viewed as a very negative event.

When they are sued, local-government officials want to know the trajectory of the lawsuit and their potential exposure. As a practitioner, I have to immediately advise them of the potential attorney and expert fees they will have to pay if unsuccessful in their defense of the lawsuit. For a small county (even if they have a strong argument against the allegations in the lawsuit), the risk of paying the other side’s fees is often too great to pursue a defense. That is especially true when voting cases could take several years to reach a favorable result for a jurisdiction.

Local governments tend to be on one of two extremes when it comes to voting litigation. First, many local governments will quickly settle voting lawsuits because of the potential cost and the negative publicity. For example, in 2006, the U.S. Department of Justice sued Long County, Georgia over challenges to Latino citizens’ right to vote.¹⁸ Two days later, the parties agreed to a consent decree that would govern

¹⁶ 52 U.S.C. 10303(a).

¹⁷ *Id.* at (a)(1)(D).

¹⁸ Complaint, *U.S. v. Long County, Ga.*, Case No. 2:06-cv-00040-AAA (S.D. Ga. February 8, 2006) available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/long_comp.pdf.

Long County's practices related to voters whose eligibility was challenged.¹⁹ The quick agreement is a dramatic contrast to the sustained resistance of local officials that led to the adoption of the original preclearance provisions in 1965. An immediate settlement within two days of a Voting Rights Act lawsuit in 2006 demonstrates a readiness to comply with the law, not resistance to it. Despite this fact and the cooperation of local officials, the Long County settlement would be considered a "voting rights violation" counted against the State of Georgia until the year 2031, 66 years after the VRA was first adopted.

Second, local governments with a budget to advance reasonable defenses against Voting Rights Act lawsuits may fight the lawsuit but ultimately still find the costs to be too much. For example, Fayette County (a relatively wealthy county close to the City of Atlanta) was sued in 2011 regarding its long-time at-large system of electing county commissioners.²⁰ The key question of that case involved the interaction of the constitutional limitations against racial gerrymandering versus the requirements of section 2 of the Voting Rights Act to create new majority-minority districts because of African-American population growth.²¹ That suit dragged on for more than five years (including a trip to the Eleventh Circuit)²² before finally settling with the payment to the plaintiffs of hundreds of thousands of dollars in attorney fees.²³ The settlement ultimately left one at-large district in place but—despite the carefully negotiated solution agreeable to all sides—would still be considered by the VRAA as a "voting rights violation" attributable to the State of Georgia for purposes of preclearance coverage.

In both examples, local officials were trying their best to do what was right. Current voting cases are nothing like the resistance encountered by federal officials seeking to enforce voting rights in the 1960s and 1970s. It is a rare case today where officials systematically work to injure minority voting rights. All local election officials with whom I have worked are motivated to run elections properly and in accordance with the law. They take extremely personally any allegation that they are working to disenfranchise any voter.

There will be further unintended effects of making settlements a trigger for preclearance coverage. Groups interested in voting access issues are incentivized to sue rather than work with local officials to correct what they see as problems, because they now have a method to force jurisdictions under preclearance. Making settlements a trigger for coverage also removes incentives for local officials to settle meritorious litigation involving voting because of the long-term effect of those settlements. And the fact that those settlements may bind the State *for the next 25 years* creates additional incentives for states to step in to defend local governments, potentially creating a significant burden on the courts with continued litigation of cases that could otherwise be easily settled.

I would urge the Subcommittee to remove the language about settlements from the VRAA, or at the very least, modify the language to take into account the nature and extent of the settlement versus the fact of the settlement itself.

C. The Coverage Formula in the VRAA Raises the Distinct Possibility of Politicized Enforcement of Preclearance

The prior preclearance regime focused on the evil still used in section 3(c)'s bail-in provisions: Intentional discrimination. The targeted efforts of election officials to stop minorities from registering and voting, driven by racial animus, was the basis for the "extraordinary circumstances" that made the preclearance process constitutionally valid for decades.

That focus on intentional discrimination is completely upended by the VRAA. The revised bail-in provisions would give federal courts the authority to bring a jurisdiction under preclearance under any violation of section 2's vote dilution provisions, which can often be unintentional or the result of changing population demo-

¹⁹Consent Decree, *U.S. v. Long County, Ga.*, Case No. 2:06-cv-00040-AAA (S.D. Ga. February 10, 2006) available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/long_cd.pdf.

²⁰Complaint, *Ga. State Conf. of the NAACP v. Fayette County Bd. of Commissioners*, Case No. 3:11-cv-123-TCB (N.D. Ga. August 9, 2011).

²¹See discussion in preliminary-injunction order, *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1304–1308 (N.D. Ga. 2013).

²²*Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336 (11th Cir. 2015).

²³Consent Order (Doc. 289), *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, Case No. 3:11-cv-123-TCB (N.D. Ga. January 28, 2016) (settling Board of Education claims); Consent Motion (Doc. 305), *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, Case No. 3:11-cv-123-TCB (N.D. Ga. September 2, 2016) (settling Board of Commissioner claims).

graphics.²⁴ That is a dramatic change in federal law and significantly raises the stake for every jurisdiction litigating a section 2 case.

Moreover, because the VRAA defines a “voting rights violation” as an unsuccessful application for preclearance to the Attorney General or a federal court,²⁵ jurisdictions that simply do not provide sufficient data can find themselves on the hook for preclearance.

Because jurisdictions must prove the lack of discrimination in their preclearance submission, allowing a rejection for any reason to constitute a voting rights violation grants significant latitude to the Attorney General to force jurisdictions under preclearance by rejecting applications for preclearance. At the very least, the VRAA should only include objections by the Attorney General for grounds other than a lack of information as a triggering event.

But the inclusion of settlements as a “voting rights violation” is the most dangerous provision that opens the door to political application of the VRA. Plaintiff groups or an Attorney General can strategically file lawsuits against small political subdivisions to force settlements that count against a jurisdiction for purposes of preclearance, especially as the 25-year window is approaching. As discussed above, the pressures on elected officials to settle VRA cases is often significant and groups can target particular political subdivisions within states, sue them, and force settlements that then could place jurisdictions under preclearance for the next 25 years. If the Subcommittee is going to proceed with the VRAA, it should at the very least require a finding of intentional discrimination or other changes that would avoid the high likelihood that politics could become a key driver in litigation under the VRAA.

D. The Continued Politicization of Voting Litigation Adds to Concerns About the Political Use of the VRAA

The broad definition of “voting rights violations” also raises significant concerns about future political abuse of the VRA because of the current partisan use of litigation and arguments about voting practices. Ignoring the oft-quoted saying, “the plural of anecdote is not data,” today’s voting litigation is often highly organized along partisan lines, frequently combining a variety of scattered events in an attempt to utilize the federal courts to control elections in states. These types of political efforts to obtain federal-court (and Federal Government) oversight of State election processes will be heightened by the VRAA. Because settlements of any case involving voting are included as “voting rights violations,” political parties or other interested groups can strategically use litigation—such as the litigation filed in Georgia following the 2018 elections—to bring entire states back under preclearance.

Many election cases are often settled before reaching the merits stage of the litigation. The settlement then becomes the basis for further partisan attacks on the electoral system of a State as “voter suppression” that makes a compelling political story regardless of whether the facts are true. Unlike the crisis situation across the covered states in 1965, complaints about election Administration today tend to involve the collection of scattered stories woven into a partisan narrative that is contrary to the data on the election as a whole.

Georgia was accused of massive voter suppression during the 2018 elections. Claims alleged that Georgia election officials held up over 50,000 voter registration applications, closed polling places, and targeted minority voters with overly restrictive database-matching processes. But the data show a dramatically different picture. In 2018:

- Georgia had a record number of registered voters.²⁶
- Georgia had record voter turnout for a midterm election with 3.9 million voters in 2018 that almost matched the total number of voters who voted in the 2016 presidential election (4 million). The last midterm election in 2014 had approximately 2.5 million voters.²⁷
- The voting eligible population turnout rate for 2018 was 55%, significantly higher than the 2014 midterm (38.6%) and the 2010 midterm (40.6%).²⁸
- In 2018, African-American voter turnout increased 32.5% compared to the 2014 midterm.²⁹

²⁴ VRAA, Sec. 2(a)–(b).

²⁵ VRAA, Sec. 4(b)(3)(C)–(D).

²⁶ See http://sos.ga.gov/index.php/Elections/current_and_past_3elections_results (last visited October 14, 2019).

²⁷ *Id.*

²⁸ See <http://www.electproject.org/2018g> (last visited October 14, 2019).

²⁹ See http://sos.ga.gov/index.php/Elections/voter_turn_out_by_demographics (last visited October 14, 2019).

- Hispanic voter turnout increased 97.7% over the 2014 midterm.³⁰
- Asian-American voter turnout increased 98.2% over the 2014 midterm.³¹

Georgia offers automated voter registration, no-excuse absentee voting, and at least three weeks of in-person advance voting—and all of those practices were in place for the 2016 and 2018 elections.³² The Brennan Center for Justice identified Georgia’s automated voter registration program as the most successful in the country, almost doubling the rate of voter registration.³³

According to the *Election Administration and Voting Survey 2018 Comprehensive Report* (the “EAVS Report”), Georgia is the top State in the country for voter registration through its driver services department and the sixth in overall voter registration.³⁴ In 2018, significantly fewer absentee ballots were rejected than in previous years (7,512 in 2018 vs. 18,266 and 13,677 in 2016 and 2014, respectively).³⁵ Further, comparing the number of rejected absentee ballots to the overall ballots cast, the measure preferred by the Massachusetts Institute for Technology Election Lab, Georgia’s absentee ballot rejection rate decreased by 40% from 2016 to 2018, from 0.33% to 0.199%.³⁶

The EAVS report also showed that, in 2018, Georgia counted a higher percentage of provisional ballots compared to previous elections: 55% of provisional ballots were ultimately counted, compared with 45% in the 2016 election.³⁷ Voters cast more provisional ballots in 2018 than in 2016 (21,600 total provisional ballots cast in 2018 vs. 16,739 in 2016),³⁸ but almost all of the increase in provisional ballots (4,793 of the 4,861 increase from 2016) was due to registered voters voting in the wrong precinct in their county.³⁹

While some organizations claim a dramatic contraction of voting rights in Georgia after Shelby County, Georgia has actually expanded early in-person voting after that decision. Most Georgia counties provide Sunday voting and add additional weekend voting days beyond what is required by statute.

Georgia has continued to innovate and expand its election laws as recently as earlier this year. During an update of election laws passed in the 2019 legislative session, Georgia took its existing, precleared HAVA database-matching process for new voters and ensured that all voters would be immediately placed into “active” status even if they do not match the database check so long as they produce one of the forms of identification required by HAVA for first-time registrants.⁴⁰ Georgia’s precleared voter-list maintenance process that previously allowed voters to be removed from the voting rolls after six years was changed to a more expansive law, not allowing removal until almost 10 years—matching the renewal period for State driver’s licenses to ensure that updates would be included in the automated-voter-registration process.⁴¹ Georgia also restricted counties from changing polling places within 30–60 days prior to an election.⁴²

³⁰ *Id.*

³¹ *Id.*

³² See History of AVR & Implementation Dates, Brennan Center for Justice, <https://www.brennancenter.org/analysis/history-avr-implementation-dates> (last visited October 14, 2019). See also State Laws Governing Early Voting, National Conference of State Legislatures, <http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> (last visited October 14, 2019) and Absentee and Early Voting, National Conference of State Legislatures, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited October 14, 2019).

³³ Morris, Kevin and Peter Dunphy, *AVR Impact on State Voter Registration*, Brennan Center for Justice (April 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_AVR_Impact_State_Voter_Registration.pdf (last visited October 14, 2019).

³⁴ U.S. Election Assistance Commission, *Election Administration and Voting Survey 2018 Comprehensive Report* at 56, 64 (June 2019) available at https://www.eac.gov/assets/1/6/2018_EAVS_Report.pdf. These findings are also consistent with an analysis by FiveThirtyEight, which found Georgia registered and updated more voters than any other State using automated voter registration. Nathaniel Rakich, *What Happened When 2.2 Million People Were Automatically Registered to Vote*, *FiveThirtyEight.com* (October 10, 2019), <https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/>.

³⁵ See the 2018, 2016, and 2014 EAVS reports.

³⁶ See 2018 EAVS Report. See also MIT Election Lab Election Performance Index, <https://elections.mit.edu/#state-GA> (last visited on October 14, 2019).

³⁷ 2018 EAVS Report at 33; 2016 EAVS Report.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ O.C.G.A. § 21–2–220.1 as amended by 2019 Ga. Laws Act 24 (H.B. 316); O.C.G.A. § 21–12–417(c).

⁴¹ O.C.G.A. § 21–2–234 as amended by 2019 Ga. Laws Act 24 (H.B. 316).

⁴² O.C.G.A. § 21–2–265(f) as amended by 2019 Ga. Laws Act 24 (H.B. 316).

The data tell a different story from the political narrative. To avoid the partisan usage of the VRA, the Subcommittee should recognize government officials' willingness and urgency to settle cases involving voting rights so that it can make changes. The decisions regarding enforcement of the VRA should be driven by data, not by partisan considerations.

IV. Conclusion

Protecting voting rights is critically important. But the VRAA will ultimately undermine the purposes of the VRA. It includes a number of provisions that will adversely affect the ability of states and local jurisdiction to effectively operate elections and opens the door to the partisan use of legislation designed to protect voting rights.

The Subcommittee should strongly consider amending the legislation to address intentional discrimination, but at the very least remove settlements as a triggering event, recognizing that extraordinary circumstances must be required to justify the massive federal intervention of preclearance.

Mr. COHEN. Thank you, sir. Appreciate your testimony.

Mr. Bryan Sells is a civil rights lawyer from Atlanta, Georgia. He specializes in voting rights, election law, and redistricting. He previously served as special litigation counsel in the Voting section of the Civil Rights Division of the Department of Justice from 2010 to 2015.

As part of the Voting Section's management team, he led teams of trial laws, analysts, and social scientists investigating and prosecuting violations of Federal voting statutes, including the Voting Rights Act.

Prior to that time, he served as a senior staff attorney in the Voting Rights Project of the American Civil Liberties Union in Atlanta.

He received his law degree from Columbia and his undergraduate degree from Harvard. He served as law clerk to the Honorable Myron Thompson of the U.S. District Court for the Middle District of Alabama.

Mr. Sells, you are recognized for 5 minutes.

TESTIMONY OF BRYAN SELLS

Mr. SELLS. Chairman Cohen, Ranking Member Johnson, and Members of the subcommittee, thank you for the opportunity to testify at this important hearing.

The Subcommittee heard in prior hearings from two of my fellow Members of the Native American Voting Rights Coalition, Dr. James Tucker and Natalie Landreth, who testified that first-generation voting barriers remain a problem in Indian country. First-generation barriers are those that limit a voter's access to registration opportunities, to casting a ballot, and to having that ballot counted.

The Supreme Court's opinion in Shelby County suggested that first-generation barriers are largely a thing of the past. That hasn't been my experience as a litigator in Indian country, and I will give one example.

In September 2008, officials in sparsely populated Mellette County, South Dakota, voted to close all but one of the county's four polling places. Mellette County lies within the historical boundaries of the Rosebud Indian Reservation, and Native Americans make up about half of the county's population.

The move was touted as a cost-saving measure designed to save about \$1,000, but it meant that some voters would have to drive

as many as 40 miles each way to cast a vote at the polls. To make matters worse, South Dakota had one of the restrictive absentee ballot laws in the country, requiring voters to have their absentee ballot applications notarized or witnessed by county officials.

When I analyzed the impact of the closures on Native Americans, I found that a higher percentage of Indians than non-Indians would have to travel significant distances to vote or to cast an absentee ballot. Native Americans were also much less likely than whites to have access to a vehicle or the money to pay for gas.

To add insult to injury, the all-white county commission moved the county's only remaining polling place next door to the sheriff's office, a place that would further deter Indians from voting because of a history of friction between Native Americans and law enforcement in the county.

Thankfully, the county reversed course when my colleagues and I raised the possibility of a lawsuit. I think this matter illustrates the continued need to protect Indian voters against first-generation barriers, and I applaud the Subcommittee for including first-generation practices like poll closures in the known practice preclearance provisions of H.R. 4.

Most of my litigation in Indian country, however, has focused on second-generation barriers, electoral mechanisms that affect the weight of minority votes like at-large elections and redistricting. Second-generation barriers are a major issue in Indian country because the voting rights revolution that swept through the South in the 1970s and '80s largely bypassed Indian country, but that is no longer the case.

In the 7 years between 1999 and 2006, for example, there were eight second-generation voting rights cases brought by or on behalf of Native Americans in South Dakota alone. I will give one quick example.

The case is *Blackmoon v. Charles Mix County*. Charles Mix has historically been a county divided. Members of the Yankton Sioux Tribe, who make up approximately 30 percent of the county's population, live mainly in the southern part of the county, and the non-Indian population is concentrated in the northern and eastern parts of the county.

There is a plaque in the main hall of the county courthouse recognizing county residents who served in the Vietnam War, and it lists not a single Indian name, even though many served. The county is governed by a three-member county commission with each commissioner elected from a single member district. No Native American had ever been elected to the commission.

Despite a State law requiring the county to redraw its districts in February 2002, the county commission decided to leave its existing districts intact. Four tribal Members then sued the county, alleging that the districts were malapportioned and had the purpose and effect of diluting Indian voting strength. Eventually, the district court ruled in the plaintiffs' favor on their malapportionment claim and ordered the defendants to redraw the districts.

The county commission then tried to push through a redistricting plan that would have continued to dilute Native American voting strength, but it changed course after Indian voters got wind of the commission's plan and strongly opposed it in public hearings. The

county then capitulated and adopted a plan with one majority Indian district that the Yankton Sioux Tribe had proposed before the litigation even began.

The story does not end there because soon after the county adopted that plan, White residents circulated two initiative petitions. One petition to have the northern part of the county secede from the southern part, and a second petition to increase the size of the commission from three to five Members.

The first petition fizzled, but the second petition passed with strong White support. Not long thereafter, we negotiated a consent decree that, among other things, activated the pocket trigger in section 3(c) of the Voting Rights Act, and it requires the county to preclear its voting changes until 2024. The county subsequently submitted its plan to increase the size of the county commission to the Department of Justice, which objected to the change on the ground that the county had not met its burden of proving that the increase lacked a discriminatory purpose.

Mr. COHEN. Wrap up.

Mr. SELLS. Yes, Chairman. As a result, the new three-member plan remained in place, and Sharon Drapeau was elected to be the first woman and the first Native American to serve on the commission.

I will end there. Thank you.

[The statement of Mr. Sells follows:]

STATEMENT OF BRYAN L. SELLS¹

Chairman Nadler, Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee, I thank you for your invitation to testify at this hearing on legislative proposals to strengthen the Voting Rights Act. My testimony this morning will focus on the need for additional protection for the right to vote in Indian Country.

I am a civil rights lawyer currently in private practice in Atlanta. Over the course of my more than 20-year legal career, I have litigated voting-rights cases on behalf of tribal Members in Montana, South Dakota, and Wyoming. I was the lead attorney in *Quiver v. Nelson*, one of the largest voting-rights cases in history, and in *Bone Shirt v. Hazeltine*, a landmark case challenging South Dakota's statewide redistricting plan on behalf of Native American² voters. I also serve as an adjunct professor of law at Georgia State University College of Law, where I teach election law, and I am a member of the Native American Voting Rights Coalition, an association of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.³

I will begin with a brief historical overview of the Native vote from our nation's founding to the present day. I will then describe some of the voting cases and controversies in Indian Country on which I have been involved over the course of my career as a litigator. Those cases, and the volumes of evidence they generated, offer a compelling demonstration of the need for a strengthened Voting Rights Act.

¹J.D., Columbia University; A.B., *magna cum laude*, Harvard University. Attorney and managing member at The Law Office of Bryan L. Sells, LLC. Adjunct professor of law, Georgia State University.

²I use the terms "Native American," "Indian," and "American Indian" interchangeably throughout this testimony because there is no consensus in the law or culture on a single term to describe the indigenous peoples of the United States. I recognize, however, that there are often very significant differences between tribal groups.

³For more information about the Native American Voting Rights Coalition, see Native American Rights Fund, About the Native American Voting Rights Coalition, available at <https://www.narf.org/native-american-voting-rights-coalition/>.

A Brief History of Native-American Enfranchisement From 1789 to the Present

Throughout the American West, Native Americans have faced voting discrimination ranging in form from outright vote denial to more subtle restrictions on political participation similar to those used to disenfranchise African Americans in the American South.⁴ The original Constitution excluded “Indians not taxed” from the population basis for apportioning congressional seats among the states,⁵ and Indians generally had neither the rights of citizenship nor of suffrage in the early days of the republic.

In 1866, when Congress adopted the Fourteenth amendment after the Civil War, it granted citizenship to “[a]ll persons born or naturalized in the United States” except those not “subject to the jurisdiction thereof”—a provision specifically intended to exclude Native Americans from the franchise.⁶ During debate on the amendment, Senators expressed dual concerns that Indians were an inferior race and therefore not worthy of citizenship and that, if granted citizenship and the right to vote, their numbers could overwhelm the votes of White citizens in the western territories.⁷ For example, Senator Jacob Howard of Michigan declared: “I am not yet prepared to pass a sweeping Act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me . . .”⁸

Notwithstanding the jurisdictional carve-out, the text of the Fourteenth amendment appeared to leave open the question of whether Native Americans could gain citizenship, and therefore the right to vote, by voluntarily subjecting themselves to federal jurisdiction in some way. But the Supreme Court answered that question in 1884.⁹ John Elk, a Winnebago Indian, was born on a reservation but later moved to non-reservation land in Omaha, Nebraska, where he renounced his tribal allegiance and claimed U.S. citizenship by virtue of the citizenship clause of the Fourteenth Amendment.¹⁰ He then sought to register and vote but was refused. In *Elk v. Wilkins*, the Supreme Court held that the citizenship clause did not apply to Elk because he was not subject to the jurisdiction of the United States when he was born.¹¹ He could only obtain citizenship, and therefore the right to vote, through some affirmative Act of Congress.¹²

Congress had begun selectively naturalizing certain Indians, often conditioned on renouncing tribal affiliation and culture, in the middle of the 1800s.¹³ That effort accelerated with the Treaty of Fort Laramie in 1868, which offered citizenship to the Lakota Sioux and the Arapahoe,¹⁴ and it continued through the early 1900s. By the early 1920s, about two-thirds of the Indian people in the United States were citizens,¹⁵ and Congress conferred citizenship on the remainder when it passed the Indian Citizenship Act of 1924.¹⁶

Unfortunately, citizenship did not automatically confer suffrage. The right to vote in both federal and State (or territorial) elections is determined by State (or territorial law).¹⁷ And even though the Fifteenth amendment provides that states may not deny a citizen’s right to vote on the basis of “race, color, or previous condition of servitude,”¹⁸ states found other ways to continue denying the right to vote to Native American citizens. In 1936, for example, the attorney general of Colorado opined that Indians had no right to vote because they were not citizens of the

⁴ See generally Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167 (1990); Orlan Svingen, *Jim Crow, Indian Style*, 11 AM. INDIAN QUARTERLY 275 (1987); Daniel McCool, *Indian Voting, in American Indian Policy in the Twentieth Century* (Vine Deloria, Jr. ed. 1985).

⁵ U.S. Const. art. I, § 2, cl. 3.

⁶ U.S. Const. amend. XIV, § 1.

⁷ See Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote*, at 3 (2007).

⁸ Cong. Globe, 39th Cong., 1st Sess. 2895 (1866).

⁹ *Elk v. Wilkins*, 112 U.S. 94 (1884).

¹⁰ *Id.* at 98–99.

¹¹ *Id.* at 102.

¹² *Id.* at 103.

¹³ See, e.g., Act of Mar. 3, 1843, ch. 101, § 7, 5 Stat. 645, 647 (offering conditional citizenship to the Stockbridge-Munsee tribe).

¹⁴ 1868 Fort Laramie Treaty, 15 Stat. 635, reprinted in II Charles J. Kappler, *Indian Affairs: Laws and Treaties* 998 (1904). article VI of the treaty offered citizenship to any member of a signatory tribe who could occupy a plot of land for three years and make at least two hundred dollars’ worth of improvements.

¹⁵ McCool *et al.*, *supra* note 7, at 7.

¹⁶ 43 Stat. 253 (1924).

¹⁷ See U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII, § 1.

¹⁸ U.S. Const. amend. XV.

state.¹⁹ Other grounds used by states to deny Native American citizens the right to vote included residency on Indian reservations, continued tribal enrollment, taxation, and guardianship status.²⁰ Gradually, all of the formal restrictions denying Native American citizens the right to vote were either struck down by the courts or repealed by State legislatures. But Native Americans were not fully eligible to vote in every State until 1957, when Utah finally repealed its residency statute.²¹ Indian suffrage, however, did not immediately translate into full political participation.

State and local officials in Indian Country used a variety of facially neutral tactics, such as onerous registration requirements, poll taxes, literacy tests, and a host of other election rules, to make it difficult for Native Americans to participate in the political process and to elect candidates of their choice.²² These tactics had been used in the South to prevent African Americans from exerting electoral power, and they could be used against Native Americans to the same effect.

With the passage of the Voting Rights Act of 1965, Native Americans gained a new tool in the struggle for full political participation. All of Indian Country was covered by the nationwide and permanent provisions of the Act. Among other things, those provisions prohibit voting discrimination on the basis of “race or color” and the use of any “test or device,” such as a literacy test, as a prerequisite for registering or voting in any federal, State or local election.²³ The permanent provisions of the Act were aimed primarily at voting discrimination against African Americans in the South, but Native Americans were also covered as a cognizable racial group.²⁴ Native Americans were also expressly covered when Congress amended the Act in 1975 to address discrimination against Members of language minorities, and to require certain jurisdictions to provide language assistance to voters with limited English proficiency.²⁵

Enforcement of the Act’s permanent provisions was somewhat lacking in the early years. The extensive voting-rights litigation campaign that swept through the South in the 1970s, ‘80s, and ‘90s largely bypassed Indian Country. At least one scholar has attributed this lack of enforcement to a combination of factors, including a lack of resources and access to legal assistance among Native Americans, lax enforcement of the Voting Rights Act by the Department of Justice, the geographic isolation of Indian reservations, and the debilitating legacy of discrimination by the State and Federal Government.²⁶

Over time, however, litigation activity increased. In the seven years between 1999 and 2006, for example, there were eight voting-rights cases brought by or on behalf of Native Americans in South Dakota alone. Recent years have also seen a number of Indian voting cases in Alaska, Arizona, Montana, Nevada, North Dakota, South Dakota, Utah, and Wyoming. I had the privilege of working on some of those cases, and it is to those matters that I turn next.

Cases Involving At-Large Elections or Multi-Member Districts

Emery v. Hunt

In 1991, the South Dakota legislature adopted a new legislative redistricting plan using data from the 1990 Census.²⁷ The plan divided the State into 35 districts and provided, with one exception, that each district would be entitled to one senate member and two house Members elected at-large from within the district.

The exception was the new District 28. The 1991 legislation provided that “in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts.”²⁸ House District 28A consisted of Dewey and Ziebach counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. House District

¹⁹ McCool *et al.*, *supra* note 7, at 9.

²⁰ *Id.* at 11–19.

²¹ Act of Feb. 14, 1957, ch. 38, 1957 Utah Laws 89–90; see *Rothfels v. Southworth*, 356 P.2d 612, 613 (Utah 1960).²

²² McCool *et al.*, *supra* note 7, at 20.

²³ 52 U.S.C. 1A10301, 10303.

²⁴ See *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 76 (1955) (acknowledging that Native Americans are protected by laws that prohibit discrimination on the basis of race or color).

²⁵ See, An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94–73, 89 Stat. 400 (1975).

²⁶ Laughlin McDonald, *Voting Rights Act in Indian Country: A Case Study*, 29 Am. Indian L. Rev. 43, 53 (2004–2005).

²⁷ An Act to Redistrict the Legislature, ch. 1, 1991 S.D. Laws 1st Spec. Sess. 1.

²⁸ *Id.* at 5.

28B consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60% of the voting-age population of House District 28A, and less than 4% of the voting age population of House District 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for the house to run at large in District 28.²⁹ The repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.³⁰ The reconstituted House District 28 had an Indian voting-age population of only 29%. Given the prevailing patterns of racially polarized voting, of which Members of the legislature were surely aware, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

Steven Emery, Rocky Le Compte, and James Picotte—all residents of the Cheyenne River Sioux Reservation—challenged the repeal in early 2000. They claimed that the changes in District 28 violated section 2 of the Voting Rights Act, as well as article III, section 5 of the South Dakota constitution, which mandated reapportionment once every tenth year, but prohibited all reapportionment at other times. The South Dakota Supreme Court had expressly held “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration.”³¹

The plaintiffs’ experts analyzed the six legislative contests between 1992–1994 involving Indian and non-Indian candidates in District 28 held under the 1991 plan to determine the existence, and the extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81%, while whites voted for the White candidates at an average rate of 93%. In all six of the contests the candidate preferred by Indians was defeated.³²

White cohesion also fluctuated widely depending on whether an Indian was a candidate.

In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of White cohesion was 68%. In the Indian-white legislative contests, the average level of White cohesion jumped to 94%.³³ This phenomenon of increased White cohesion to defeat minority candidates has been called “targeting.”³⁴

Before deciding the plaintiffs’ section 2 claim, the district court certified the State law question to the South Dakota Supreme Court. That court accepted certification and held that, in enacting the 1996 redistricting plan, “the Legislature acted beyond its constitutional limits.”³⁵ It declared the 1996 plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Native American in history to be elected to the State house from the Cheyenne River Sioux Indian Reservation.

Weddell v. Wagner Community School District

The City of Wagner is a border town in Charles Mix County, South Dakota. The county, in the southeastern part of the State along the Missouri River, is home to the disestablished Yankton Sioux Reservation.

The local school district in Wagner was run by a seven-member school board elected at large to staggered three-year terms. Although Indians were 42% of the district’s total population and 36% of the district’s voting-age population, Indian voters had not been able to elect a candidate of their choice to the school board for many years.

In March 2002, three Members of the Yankton Sioux Tribe filed suit against the school district, alleging that its at-large elections diluted Indian voting strength in

²⁹ An Act to Eliminate the Single-member House Districts in District 28, ch. 21, 1996 S.D. Laws 45.

³⁰ Minutes of House State Affairs Committee, January 29, 1996, p. 5.

³¹ *In re Legislative Reapportionment*, 246 N.W. 295, 297 (S.D. 1933).

³² *Emery v. Hunt*, Civ. No. 00–3008 (D.S.D.), Report of Steven P. Cole, Tables 1 & 2.

³³ *Id.*, Tables 1 & 3.

³⁴ See *Clarke v. City of Cincinnati*, 40 F.3d 807, 457 (6th Cir. 1994) (“[w]hen White bloc voting is ‘targeted’ against Black candidates, Black voters are denied an opportunity enjoyed by White voters, namely, the opportunity to elect a candidate of their own race”).

³⁵ *In re Certification of a Question of Law*, 615 N.W.2d 590, 597 (S.D. 2000).

violation of section 2 of the Voting Rights Act.³⁶ The plaintiffs demonstrated that Native American voters could control at least two seats if the seven board Members were elected from single-member districts.

The parties eventually agreed to settle the case by replacing the at-large elections with cumulative voting. The district court approved a consent decree containing the settlement agreement on March 18, 2003.³⁷

The very first election under the new system resulted in a tie between an Indian candidate and a non-Indian candidate. Under South Dakota law, the tie was to be settled with a deck of cards, and the Indian candidate prevailed by drawing a queen.

Large v. Fremont County

In 2005, Members of the Eastern Shoshone and Northern Arapaho Tribes residing on the Wind River Indian Reservation filed suit against Fremont County, Wyoming. The plaintiffs alleged that at-large elections for the county's Board of Commissioners diluted Native American voting strength in violation of the Constitution and section 2 of the Voting Rights Act. At the time the suit was filed no Native American had ever been elected to the county commission despite the fact that Native Americans were 20 percent of the county's population and had frequently run for office with the overwhelming support of Native American voters.

Following extensive discovery and a lengthy trial, the district court issued a detailed, 102-page opinion on April 29, 2010, holding the at-large system diluted Indian voting strength. The court made extensive findings about past and continuing discrimination against Indians, racially polarized voting, the isolation of the Indian community, and the lack of responsiveness by the County Commission to the special needs of Indians. The court concluded: "The evidence presented to this Court reveals that discrimination is ongoing, and that the effects of historical discrimination remain palpable."³⁸

As a remedy, the court adopted a plan containing five single-member districts, one of which was majority-Indian, giving Native Americans the opportunity to elect candidates of their choice. The county did not appeal the decision on the merits but did appeal the remedy provided by the district court. The court of appeals, however, affirmed the decision of the district court in 2012.³⁹

Cases Involving Redistricting Bone

Shirt v. Hazeltine

The State of South Dakota enacted a new redistricting plan for its 105-member State legislature in November 2001.⁴⁰ The plan divided the State into thirty-five districts, each of which elected one member of the State senate and two Members of the State house of representatives.

Voters elected their two house Members at large in each district except District 28, which the plan subdivided into two single-member house districts, Districts 28A and 28B. The plan contained two majority-Indian districts: District 27 and District 28A. District 27 encompassed part of the Pine Ridge Indian Reservation and all of the Rosebud Indian Reservation in the southern part of the state. Native Americans comprised approximately 90% of District 27's total population and 86% of its voting-age population. In majority-white District 26, which bordered District 27 to the north and east and encompassed the remainder of the Pine Ridge Indian Reservation, Native Americans comprised approximately 30% of the total population and 23% of its voting-age population. In the State as a whole, Native Americans were approximately 9% of the total population and 7% of the voting-age population.

Shortly after the 2001 plan became law, Alfred Bone Shirt and three other Native American voters sued in federal court, alleging that the plan violated Sections 2 of the Voting Rights Act.⁴¹ Among other things, the plaintiffs contended that the plan diluted Native American voting strength in violation of section 2 by "packing" Native Americans into District 27 with the result that Indian voters in the neighboring District 26 were unable to elect representatives of their choice.

³⁶ *Weddell v. Wagner Community School District*, Civ. No. 02-4056 (D.S.D. March 22, 2002).

³⁷ *Weddell v. Wagner Community School District*, Civ. No. 02-4056 (D.S.D. March 18, 2003).

³⁸ *Large v. Fremont County*, Wyo., 709 F. Supp. 2d 1176, 1184 (D. Wyo. 2010).

³⁹ *Large v. Fremont County*, Wyo., 670 F.3d 1133 (10th Cir. 2012).

⁴⁰ 2001 S.D. Laws ch. 2.

⁴¹ *Bone Shirt v. Hazeltine*, Civ. No. 01-3032 (D.S.D. Dec. 26, 2001).

After extensive discovery and a bench trial held over nine days in April 2004, the district court ruled in a 144-page opinion that the State's plan violated section 2.⁴² The court first considered whether the evidence established the three factors that the Supreme Court identified in *Thornburg v. Gingles*⁴³ as generally necessary to prove a violation of section 2. The court then analyzed whether the totality of the evidence had also shown that Indian voters had less opportunity than White voters to participate in the political process and to elect candidates of their choice. In conducting this analysis, the district court examined twelve additional factors, and the district court made extensive findings of fact on each factor.

With respect to the first Gingles factor, the district court found that Native Americans in South Dakota are sufficiently numerous and geographically compact that they could constitute a majority in at least one more legislative district than existed in the state's plan.⁴⁴ The court based its finding on the report and testimony of William S. Cooper, the plaintiffs' expert demographer, as well as several redistricting plans drafted by State legislative staffers during the 2001 redistricting process.

The district court rejected the defendants' argument that the required threshold for the first Gingles factor should be well above 65% of the voting-age population. The court noted that the defendants had failed to identify any cases in which a court had ever required such an elevated threshold. The district court also rejected the defendants' contention that the plaintiffs' illustrative plans were based on racial considerations above all else. To the contrary, the court found that the plans did not subordinate traditional race-neutral districting principles to racial considerations and did not consider race any more than reasonably necessary to determine whether an additional majority-Indian district was possible. After considering all of the evidence, the district court concluded that the plaintiffs had satisfied the first Gingles factor "as a matter of law."⁴⁵

With respect to the second Gingles factor, the district court found that Native Americans in Districts 26 and 27 were politically cohesive. Turning first to the parties' statistical evidence, the court found that, despite a difference in methodology, experts for both parties produced reliable results which "demonstrate[d] significant cohesion among Indian voters."⁴⁶ The district court also surveyed the parties' non-statistical evidence of cohesion at some length. Relying on the testimony of numerous witnesses, both expert and lay, and literally dozens of documentary exhibits, the court concluded that the nonstatistical evidence, like the statistical evidence, established Indian cohesion.⁴⁷

The district court rejected the defendants' contention that Democratic partisanship, not race, was the reason that Native Americans tended to vote the same way at the polls.⁴⁸ Relying on statistical and nonstatistical evidence, including two of the defendants' own lay witnesses, the court found that the balance of the evidence did not support the defendants' claim. The district court also rejected the defendants' partisanship claim as a matter of law, reasoning that section 2 protects a minority voter's right to elect candidates of choice even if the voter chooses candidates solely because they belong to a particular political party. After considering all of the evidence, the district court found that the plaintiffs had satisfied the second Gingles factor.⁴⁹

With respect to the third *Gingles* factor, the court found that both parties' experts had produced results that "show[ed] that non-Indian voters in District 26 vote sufficiently as a bloc to enable them, particularly in the most probative elections and in the absence of special circumstances, usually to defeat the Indian-preferred candidate."⁵⁰ Across all of the many elections on which the district court relied, the plaintiffs' expert had shown that White voters in District 26 voted sufficiently as a bloc to defeat 21 out of 21 (100%) Indian-preferred candidates. And the defendants' expert had shown that White voters defeated 17 out of 25 (68%) Indian-preferred candidates. Considering all of this evidence in the aggregate, the district court concluded that the plaintiffs had satisfied the third *Gingles* factor.⁵¹

Turning to the "totality of the circumstances," the court found that eleven of the twelve totality factors weighed in the plaintiffs' favor, and it rejected the defendants' claim on the twelfth factor that Indian voter apathy alone accounted for the dif-

⁴² See, *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1053 (D.S.D. 2004).

⁴³ 478 U.S. 30, 50–51 (1986).

⁴⁴ *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d at 995.

⁴⁵ *Id.* at 995.

⁴⁶ *Id.* at 1004.

⁴⁷ *Id.* at 1004–08.

⁴⁸ *Id.* at 1008–10.

⁴⁹ *Id.* at 1010.

⁵⁰ *Id.* at 1016.

⁵¹ *Id.* at 1017.

difficulty Indian voters had experienced in electing candidates of their choice in District 26.⁵²

According to the Supreme Court, the two “most important” totality factors are: (1) The extent to which minorities have been elected under the challenged plan; and (2) the extent to which voting is racially polarized.⁵³ The district court found that both factors weighed in the plaintiffs’ favor. The defendants admitted, and the district court found, that not a single Native American candidate was elected to the State legislature from the area in District 26 between 1982 and 2002.⁵⁴ The district court also found that “substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians in Districts 26 and 27.”⁵⁵ It described that polarization as “extensive” and at a “high level.”⁵⁶ It also found that White crossover voting dropped precipitously when the Indian-preferred candidate was an Indian.⁵⁷

The district court’s analysis of the totality factors is also noteworthy because of its extensive findings on South Dakota’s history of discrimination against Native Americans. The court’s review of that history of discrimination covers more than forty pages in its slip opinion.⁵⁸ The review synthesizes innumerable documents, many of which were pulled directly from the state’s own session laws.

The review also highlights the testimony of Native American witnesses who offered their own experiences of discrimination at trial. For example, Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, told about her first exposure to the non-Indian world and the fact “that there might be some people who didn’t think well of people from the reservation.”⁵⁹ When she and her sister enrolled in a predominantly White school in Fall River County and were riding the bus, “somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me.”⁶⁰ Meeks said that there is a “disconnect between Indians and non-Indians” in the state.⁶¹ “[W]hat most people don’t realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community . . . [T]hen their . . . reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don’t like them and don’t trust them.”⁶²

Lyla Young, a Rosebud tribal member, said that the first contact she had with whites was when she went to high school in Todd County.⁶³ The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bused again to the high school for the afternoon session.⁶⁴ The White students referred to the Indians as “GI’s,” which stood for “government issue.”⁶⁵ Young said that “I just withdrew. I had no friends at school. Most of the girls that I dormed with didn’t finish high school . . . I didn’t associate with anybody.”⁶⁶ Even as an adult, Young has had little contact with the White community. “I don’t want to. I have no desire to open up my life or my children’s life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more.”⁶⁷ Testifying in court was particularly difficult for her. “This was a big job for me to come here today . . . I’m the only Indian woman in here, and I’m nervous. I’m very uncomfortable.”⁶⁸

Arlene Brandis, a Rosebud tribal member, recalled walking to and from school in Tripp County: “[C]lars would drive by and they would holler at us and call us names . . . like dirty Indian, drunken Indian, and say why don’t you go back to the reservation.”⁶⁹ Although that was years ago, Brandis does not see much difference between then and now. White families in Winner, where she lives now, do not sit near

⁵² *Id.* at 1017–52.

⁵³ *Gingles*, 478 U.S. at 48–49 n.15; accord *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc).

⁵⁴ *Bone Shirt*, 336 F. Supp. 2d at 1043.

⁵⁵ *Id.* at 1036.

⁵⁶ *Id.* at 1035.

⁵⁷ *Id.* at 1035.

⁵⁸ *Id.* at 1018–34.

⁵⁹ *Id.* at 1032.

⁶⁰ *Id.* at 1032.

⁶¹ *Id.* at 1032.

⁶² *Id.* at 1032.

⁶³ *Id.* at 1032.

⁶⁴ *Id.* at 1032.

⁶⁵ *Id.* at 1033.

⁶⁶ *Id.* at 1033.

⁶⁷ *Id.* at 1033.

⁶⁸ *Id.* at 1033.

⁶⁹ *Id.* at 1033.

her family at high school football and basketball games. She believes that this is because she and her husband are Native American.

Almost without exception, the tribal Members who testified at trial could recount incidents of being mistreated, embarrassed, or humiliated by whites. Based on “the wealth of evidence and testimony” before it, the court concluded that “there is a long and extensive history of discrimination against Indians in South Dakota that touches upon the right to register and to vote, and affects their ability to participate in the political process on an equal basis with other citizens.”⁷⁰

Lastly, the district court returned to the defendants’ attempt to attribute the lack of Indian electoral success to voter apathy and low voter turnout. In particular, the defendants claimed that the lack of success was due to a lack of Indian interest in State politics, internal divisions among the tribes, and a fear among Indian voters that voting in State and county elections would erode tribal sovereignty.

The district court found, however, that the record refuted those claims.⁷¹ “Throughout South Dakota’s history, Native Americans have made repeated and persistent efforts to participate in the political process at all levels of government despite facing outright discrimination and informal barriers in exercising their right to vote.”⁷² The court based its conclusion in part on more than two dozen documentary exhibits and the testimony of several Native American lay witnesses who underscored the value of participating in State and federal elections. Even the defendants own expert historian, Dr. Michael Lawson, conceded that Native Americans in South Dakota are not disinterested in State politics. He added: “I think there’s a growing number of tribal Members who see the importance of political participation at every level.”⁷³

After reviewing each of the factors in its analysis, the district court found, based on the totality of circumstances, that South Dakota’s 2001 legislative redistricting plan “results in unequal electoral opportunity for Indian voters.”⁷⁴ Accordingly, the court concluded that the plan “impermissibly dilutes the Indian vote and violates § 2 of the Voting Rights Act.”⁷⁵

After finding a violation of section 2, the district court gave the defendants two separate opportunities to propose a remedy. Each time they declined to do so. The court then issued an order adopting one of the plaintiffs’ proposed remedial plans and enjoining the defendants from using the unlawful plan in future elections.⁷⁶

The State appealed, but the Eight Circuit affirmed the decision of the district court.⁷⁷ The State did not ask the Supreme Court to hear the case, and the redrawn districts were used for the remainder of the decade, resulting in Indian-voter control over one additional seat in the South Dakota House of Representatives.

Kirkie v. Buffalo County

In March 2003, three Members of the Crow Creek Sioux Tribe filed suit challenging to the county commission districts in Buffalo County, South Dakota.⁷⁸ The plaintiffs alleged that the districts were malapportioned in violation of the one-person-one-vote principle and were adopted or maintained for the purpose of discriminating against Native American voters.

Buffalo County, which according to the 2000 Census was the poorest county in the United States, had a population of approximately 2000 people. Approximately 85% of the county’s population was Native American.

The county was governed by a three-member county commission elected from three single-member districts. Those districts, which had been in use for decades, contained populations of approximately 1,550, 350, and 100 people, respectively. Virtually all of the 1,550 people in commissioner district 1 were Native American, while not a single Indian lived in the underpopulated district 3. The system not only violated the “one person, one vote” standard of the Equal Protection Clause but had also been clearly implemented and maintained to dilute the Indian vote and ensure White control of county government.

The malapportionment persisted, moreover, despite a state-law made for decennial redistricting. South Dakota law required a board of county commissioners to re-

⁷⁰*Id.* at 1034.

⁷¹*Id.* at 1050–52.

⁷²*Id.* at 1052.

⁷³*Id.* at 1052.

⁷⁴*Id.* at 1052.

⁷⁵*Id.* at 1052.

⁷⁶*Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1044 (D.S.D. 2005).

⁷⁷*Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

⁷⁸Complaint, *Kirkie v. Buffalo County*, Civ. No. 03–5024 (D.S.D. Mar. 20, 2003).

district “at its regular meeting in February of each year ending in the numeral 2 . . . if such change is necessary in order that each district shall be as regular and compact in form as practicable and it shall so divide and redistrict its county that each district may contain as near as possible an equal number of residents, as determined by the last preceding federal decennial census.”⁷⁹ Minutes of the county commission meeting held in February 2002 reveal that the commissioners considered the issue and decided—despite the overwhelming inequality among the districts—that the existing districts “required no change.”⁸⁰ The commissioners were, in effect, thumbing their noses at State and federal redistricting requirements in order to prevent Native Americans from having a full voice on the commission.

The parties settled the case in early 2004. In a consent decree approved by the court, the county was required to redraw its commissioner districts and to hold a special election for two of the three seats.⁸¹ The county also admitted that its plan was discriminatory and agreed to relief under section 3 of the Voting Rights Act. That relief included the authorization of federal observers to monitor elections and the activation of the “pocket-trigger” in section 3(c), which effectively made Buffalo County subject to the preclearance requirements of section 5 of the Voting Rights Act through 2013.

Blackmoon v. Charles Mix County

The litigation against Charles Mix County may be the best example of the continuing need for further protections under the Voting Rights Act. Charles Mix has historically been a county divided. Members of the Yankton Sioux Tribe, who make up approximately 30 percent of the county’s population, live mainly in the southern part of the county, along the banks of the Missouri River, and in the small towns of Lake Andes, Marty, and Wagner. Farmers make up the bulk of the county’s non-Indian population, and they are concentrated in the northern and eastern parts of the county. Social life remains largely, though informally, segregated. There is a plaque in the main hall of the county courthouse recognizing county residents who served in the Vietnam War, and it lists not a single Indian name even though many served.

The county is governed by a three-member county commission, with each commissioner elected from a single-member district. Before the litigation, no Native American had ever been elected to the commission.

The county’s commissioner districts were decades old and badly malapportioned. The total deviation of the districts from equality was greater than 19 percent, and White voters were a majority in all three districts.

In anticipation of redistricting following the 2000 Census, the Yankton Sioux Tribe sent a letter to the commission in November 2001 pointing out the malapportionment and proposing a new plan with one majority-Indian district. State law required the commission to redraw its districts at its regular meeting in February 2002 and then prohibited further redistricting for the rest of the decade.⁸² The February meeting came and went, however, and the commission decided to leave its existing districts intact.

Four tribal Members then sued the county, alleging that the three commissioner districts were malapportioned in violation of the one-person-one-vote standard of the Fourteenth amendment and had been drawn or maintained to dilute Indian voting strength in violation of section 2 of the Voting Rights Act.⁸³ In response to the suit, the county commission took the position that its districts were not unlawful, but it also asked the State legislature to pass legislation establishing a process for emergency redistricting. The purpose of the bill, according to its proponents, was to allow the defendants in the Blackmoon case to render the plaintiffs’ claims moot by modifying the challenged redistricting plan and thereby to avoid liability in the suit. Because of the urgency of that goal, the bill’s sponsors brought the bill directly to the House floor, where the House suspended its rules, dispensed with a hearing, and passed the bill on the same day without the usual public notice. In the South Dakota Senate, the defendants’ attorneys lobbied aggressively in favor of the bill and testified in support of it. Although many Native Americans, including several from Charles Mix County, testified in opposition to the bill, the Senate passed it shortly thereafter. Because it contained an emergency clause, the law went into effect immediately upon the governor’s signature. The new law allowed a county to redistrict

⁷⁹ S.D.C.L. § 7–8–10.

⁸⁰ See Answer, *Kirkie v. Buffalo County*, Civ. No. 03–5025 (D.S.D. Apr. 28, 2003), at 10.

⁸¹ Consent Decree, *Kirkie v. Buffalo County*, Civ. No. 03–5024 (D.S.D. Feb. 12, 2004).

⁸² S.D.C.L. § 7–8–10.

⁸³ Complaint, *Blackmoon v. Charles Mix County*, Civ. No. 05–4017 (D.S.D. Jan. 27, 2005).

any time it became aware of facts that called into question whether its districts complied with State or federal law, and the county commission immediately began the process of redrawing its districts to avoid court-ordered redistricting.⁸⁴

Before the county could complete the redistricting process, however, the Native American plaintiffs in the Quiver litigation obtained a temporary restraining order and preliminary injunction prohibiting the State from enforcing the new law unless and until it obtained preclearance under section 5 of the Voting Rights Act.⁸⁵ In a strongly worded opinion granting the injunction, the three-judge district court noted that State officials in South Dakota “for over 25 years . . . have intended to violate and have violated the preclearance requirements,” and that the emergency clause in the new law “gives the appearance of a rushed attempt to circumvent the VRA.”⁸⁶ The injunction effectively put the new law on hold while the litigation against Charles Mix County proceeded.

While the new law was on hold, the district court in Blackmoon granted the plaintiffs’ motion for partial summary judgment on their malapportionment claim and ordered the defendants to submit a remedial proposal for court approval.⁸⁷ The county commission then tried to push through a redistricting plan that would have continued to dilute Native American voting strength. Using noncontiguous districts, the plan included recently developed land along the Missouri River in the district that, according to the 2000 Census, contained mostly Native Americans. Because the developments didn’t exist at the time of the 2000 Census, the impact of those voters was not apparent on the county’s proposed plan. Residents of the county knew full well, however, that most of the voters in the newly developed area were non-Indian. The county commission held a hearing on its dilutive plan, and Native Americans strongly opposed it. In light of that opposition, the county adopted the plan that had been proposed by the Yankton Sioux Tribe in 2001, and that remedied both the malapportionment and the dilution of Indian voting strength.

Reaction to new districts was swift. Less than a month after the county adopted a redistricting plan with a majority Indian district, a White resident of the northeast part of the county began circulating a petition to split Charles Mix into two counties, one part of which would be almost all white. The petition received significant news coverage, and it was widely seen as directly related to the Indian victory in the Blackmoon case.⁸⁸

The secession movement fizzled after the media coverage, and the petitions to divide the county were never turned in. Instead, a new petitioning effort sprung up—this time seeking to increase the number of county commissioners from three to five. In a thinly veiled reference to an Indian candidate who was running for commissioner in the new majority-Indian district, the circulator of the petition told the media that the purpose of increasing the size of the county commission was to “take[] power away from one strong commissioner.”⁸⁹

Native Americans opposed the increase, but it passed in November 2006 with strong White support. In an effort to stop the increase from being implemented, tribal Members successfully circulated a petition to refer the county’s five-member plan to the voters. In a special election on the referendum, however, the matter failed, and the increase was scheduled to take effect in 2008.

In early 2007, the district court ruled that the plaintiffs’ remaining claims could go forward and set them for trial in March 2008.⁹⁰ The primary issue was the plaintiffs’ request for relief under the “pocket trigger” provisions in section 3 of the Voting Rights Act, which would require the county to comply with the preclearance provisions of section 5.

Rather than go to trial, the county requested mediation. In December 2007, the parties negotiated a consent decree that, among other things, activated the “pocket trigger” in section 3(c) of the Voting Rights Act and requires the county to preclear its voting changes until 2024. The county subsequently submitted for preclearance its plan to increase the size of the county commission from three to five. The Department of Justice objected to the change on the ground that the county had not met its burden of proving that the increase was not motivated by a discriminatory purpose. As a result of the objection, the three-member plan with one majority-Indian district remained in place.

⁸⁴ 2005 S.D. Laws., ch. 43.

⁸⁵ *Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005) (three-judge district court).

⁸⁶ *Id.* at 1034.

⁸⁷ *Blackmoon v. Charles Mix County*, 2005 WL 2738954 (D.S.D. 2005).

⁸⁸ See Kimberly Kolden, Residents in Charles Mix consider plan to split county, *Mitchell Daily Republic* (Feb. 14, 2006).

⁸⁹ Monica Wepking, Petition to Change County Commission Numbers, *Lake Andes Wave* (June 14, 2006).

⁹⁰ *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585 (D.S.D. 2007).

The first election under the new districts was held in November 2006, and Sharon Drapeau was elected to be the first woman and the first Native American to serve on the commission.

Cases Involving Documentation or Qualifications To Vote

Janis v. Nelson

Eileen Janis and Kim Colhoff, both residents of Pine Ridge, South Dakota, were registered voters until early 2008, after they were each convicted of a felony offense and sentenced to five years of probation but no jail time. Despite the fact that South Dakota law expressly provided that the right to vote is denied only while persons convicted of felonies are imprisoned in the State penitentiary, Colhoff and Janis were removed from the voter rolls without any notice and denied the right to vote at their polling places when they attempted to vote in the 2008 presidential election. In front of several other voters, election officials refused to allow Janis to cast either a regular or provisional ballot.

In 2009, Janis and Colhoff filed a class-action lawsuit against State and local election officials, alleging that the illegal disfranchisement of individuals with felony convictions has had a disproportionate and negative impact on American Indian voters who are overly represented in South Dakota's criminal justice system. The lawsuit also contended that the removal of individuals' names from the State and county voter registration lists based on felony convictions for which they were sentenced only to probation violates their rights to equal protection and due process under the federal and State constitutions, the Help America Vote Act, the National Voter Registration Act and Sections 2 and 5 of the Voting Rights Act.

The defendants moved to dismiss the case on various grounds, but the district court allowed the suit to proceed.⁹¹ Following a period of discovery and mediation, the parties reach a settlement. The agreement restored Janis and Colhoff to the rolls and established procedures to prevent unlawful disfranchisement from happening in the future, including increased training for election officials and public education.

Drivers' Licensing Offices in Todd and Charles Mix Counties

In September 2009, South Dakota announced plans to close 17 of its drivers' licensing offices around the state. Among the offices to be closed were those in Todd and Charles Mix counties, both of which were covered jurisdictions subject to the Act's preclearance mandates. (Todd by section 5 and Charles Mix by section 3(c)). Residents of those counties would in many instances have to drive long distances to get a driver's license or photo ID. Several residents of those counties complained, and the ACLU began an investigation.

The closure would affect both voter registration and voting. Under the National Voter Registration Act, drivers' license offices in South Dakota conduct voter registration, and the closure of drivers' licensing offices would mean that residents of Todd and Charles Mix counties would have less access to motor-voter registration. Access to drivers' licenses would also affect voting because South Dakota is one of several states that require each voter to show identification before voting in person or by absentee ballot.⁹² The closure would likely mean that some voters would not be able to meet the identification requirements because they would not have an up-to-date driver's license or state-issued photo identification card. Census data showed that Native Americans in Todd and Charles Mix counties had a lower socioeconomic status and less access to cars than their White counterparts, which would mean less access to gas money and the ability to travel long distances to obtain or renew the necessary identification.

The ACLU asked the Department of Justice to send the State a "please submit" letter asking the State to submit its closure plan to the Attorney General for preclearance. It is unclear whether the Department did, in fact, send such a letter or make an oral request for a submission, but the State announced three weeks later that it was reversing the decision to close the offices in Todd and Charles Mix counties. The state's Department of Public Safety, which oversees the licensing program, issued a statement specifically citing the preclearance provisions of the Voting Rights Act and the state's desire to avoid potential litigation as a reason for its decision.

⁹¹*Janis v. Nelson*, Civ. No. 09-cv-05019 (D.S.D. Dec. 30, 2009).

⁹²See S.D.C.L. §§ 12-18-6.1, 12-19-2.

Cases Involving Voting Locations

Polling Places in Mellette County

In September 2008, officials in sparsely-populated Mellette County, South Dakota, voted to close all but one of the county's four polling places. The move was touted as a cost-saving measure designed to save the cash-strapped county about \$1,000. But it meant that some voters would have to drive as many as 40 miles each way to the county seat in order to cast a vote. And, to make matters worse, South Dakota had one of the most restrictive absentee ballot laws in the country, requiring voters to have their absentee ballot applications notarized or witnessed by county officials.

Soon after the county's decision to close the polls, the Rosebud Sioux Tribe contacted the ACLU's Voting Rights Project for help. Mellette County is within the historical boundaries of the Rosebud Indian Reservation, and Native Americans still make up about half of the county's population.

The ACLU analyzed the impact of the county's decision and concluded that the poll closure would have a severe and disparate impact on Native American voters. Not only would a higher percentage of Indians than non-Indians have to travel significant distances to vote or cast an absentee ballot, but Native Americans were also much less likely than whites to have access to a vehicle or the money to pay for gas. And, to add insult to injury, the all-white county commission moved the county's only remaining polling place next door to the sheriff's office, a place that would further deter Indians from voting because of a history of friction between Native Americans and law enforcement in the county. The ACLU prepared a lawsuit alleging violations of section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments to the United States Constitution.

One of the largest television stations in the State ran a story on the poll closure, and word of the ACLU's investigation got out. Less than 24 hours before the ACLU was prepared to file suit against the county on behalf of Native American voters, county officials called a hastily arranged meeting and rescinded the poll closing ordinance to avoid the possibility of litigation.

Spirit Lake Tribe v. Benson County

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county's polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court that closing the precincts on the Reservation would make it difficult or impossible for many Indians to vote in violation of the federal and State constitutions and section 2 of the Voting Rights Act.

The tribe moved for a preliminary injunction, and, following an expedited hearing, the district granted the motion on October 21, 2010.⁹³ The order required the county to maintain the two polling places on the Reservation, concluding that closing the precincts would have a disparate impact on Indian voters who lacked access to transportation or to voting by mail.

In 2012, the parties settled the case, with the county agreeing to keep the reservation polling places open in future general elections. The settlement also called for a series of meetings between county and tribal officials to foster communication between the two entities.

Wandering Medicine v. McCulloch

In 2012, tribal Members living on the Crow, Northern Cheyenne, and Fort Belknap reservations in Montana filed suit against State and local election officials seeking equal access to in-person late registration and absentee voting opportunities.⁹⁴ Montana law permits late registration and early voting at the county seat, but also permits counties to create satellite locations for these purposes. The plaintiffs moved for a preliminary injunction ordering the counties to open satellite offices accessible to voters on the reservations.

The Department of Justice filed a Statement of Interest in the case, arguing that the plaintiffs were likely to succeed on their claim that the location of the late-reg-

⁹³ *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010).

⁹⁴ *Wandering Medicine v. McCulloch*, No. 1:12-cv-0135 (D. Mont.).

istration and early voting sites violated section 2.⁹⁵ The Department's brief also contained expert analysis showing that, in order to access the lone site in the county seat, Native Americans were forced to travel 189 percent further than White voters in Big Horn County, 322 percent further in Blaine County, and 267 percent further in Rosebud County.

The district court denied the motion, but the plaintiffs appealed. In 2014, following the Ninth Circuit's dismissal of the plaintiffs' appeal as moot,⁹⁶ the parties conducted further discovery and filed cross motions for summary judgment. The defendants argued that the plaintiffs' claims were not cognizable under section of the Voting Rights Act, and the Department of Justice again filed a Statement of Interest supporting the plaintiffs' claims.⁹⁷

In June 2014, the parties agreed to settle the case by establishing satellite offices on the reservations twice a week through Election Day.⁹⁸

Poor Bear v. Jackson County

In September 2014, four Members of the Oglala Sioux Tribe filed suit against Jackson County, South Dakota, alleging that the county's refusal to open a satellite office for in-person absentee voting and registration on the Pine Ridge Reservation violates section 2 of the Voting Rights Act of 1965 and the Fourteenth amendment of the United States Constitution.

Under South Dakota law, residents can register and vote in one stop starting 46 days before an election at locations designated by each county.⁹⁹ Nothing in South Dakota law prohibits a county from creating satellite election offices so that one-stop in-person voter registration and in-person absentee voting can take place in more than one location. Nor does South Dakota law require that there be a one-stop site in the county seat. Yet the only location for one-stop in-person voter registration and in-person absentee voting in Jackson County was the election office in Kadoka, the county seat—a town that is more than 90% white.

Jackson County is geographically large and sparsely populated. It also has a substantial Native American population, most of which lives on or near the Pine Ridge Indian Reservation at a great distance from Kadoka. On average, Indian citizens in Jackson County have to travel almost two hours round-trip to reach Kadoka, and that is twice as long as the average round-trip travel time required for White citizens. The time and resources required for a trip to Kadoka, combined with the depressed socioeconomic status of Indians in Jackson County, made in-person absentee voting and therefore one-stop voting effectively unavailable for many Indians in Jackson County.

The plaintiffs filed a motion for a preliminary injunction in October 2014, but that became moot after the county reversed course and agreed to open a satellite office that would be more accessible to Native American voters. That office provided in-person absentee voting from October 20 until the November 4 election.

The defendants then filed a motion to dismiss, arguing that the plaintiffs' claims are not cognizable under section 2 of the Voting Rights Act. The Department of Justice filed a Statement of Interest supporting the plaintiffs' claims,¹⁰⁰ and the district court denied the motion.¹⁰¹

Jackson County thereafter entered into an agreement with the State of South Dakota under which the County committed to opening a satellite office accessible to Indian voters during all federal primary and general elections through January 1, 2023.¹⁰²

⁹⁵ *Statement of Interest of the United States, Wandering Medicine v. McCulloch*, No. 1:12-CV-135-RFC (D. Mont. Oct. 23, 2012), <https://www.justice.gov/crt/case-document/si-wandering-medicine-v-mcculloch-2012>.

⁹⁶ *Wandering Medicine v. McCulloch*, 544 Fed. App'x 699 (9th Cir. 2013).

⁹⁷ *Statement of Interest of the United States, Wandering Medicine v. McCulloch*, No. 1:12-CV-135-RFC (D. Mont. Apr. 25, 2014), <https://www.justice.gov/crt/case-document/si-wandering-medicine-v-mccullough>.

⁹⁸ John S. Adams, *Montana Indian Voting Lawsuit Settled*, Great Falls Tribune, June 12, 2014, available at <https://www.greatfallstribune.com/story/news/politics/2014/06/12/montana-indian-voting-lawsuit-settled/10389781/>.

⁹⁹ See generally S.D.C.L. chs. 12–4, 12–19.

¹⁰⁰ *Statement of Interest of the United States, Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. Dec. 23, 2014), <https://www.justice.gov/crt/case-document/si-poor-bear-v-jackson>.

¹⁰¹ *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. May 1, 2015).

¹⁰² *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. June 17, 2016).

Cases Involving the Denial of Attorneys' Fees

The Poor Bear case, discussed immediately above, is also noteworthy because it illustrates the need to strengthen the attorneys' fees provisions of the Voting Rights Act.

Most voting-rights litigation is brought on behalf of private plaintiffs who generally lack the means to pay for their own attorneys. Like most civil-rights statutes, the Voting Rights Act contains a fee-provision that changes the so-called "American rule" for attorney fees by allowing victorious citizen plaintiffs to recover their attorney fees from the losing party.¹⁰³

It is well established that plaintiffs who win a judgment in their favor qualify for the benefits of fee-shifting. What used to be less clear, however, was whether those parties whose successes come outside the courtroom could also recover fees. In the past, the so-called "catalyst theory" answered this question affirmatively. Parties were entitled to fees by demonstrating that their litigation was the catalyst for obtaining the relief sought, even though the relief was obtained through the defendant's voluntary change in conduct or through a private, non-judicial settlement agreement.

In 2001, however, the Supreme Court rejected the "catalyst theory" in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.¹⁰⁴ In *Buckhannon*, the Supreme Court construed the term "prevailing party" in the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act. The

Buckhannon majority adopted a narrow view of the term "prevailing party," ruling that, for those two statutes at least, "the 'catalyst theory' is not a permissible basis for the award of attorney's fees."¹⁰⁵ The Court required some "judicially sanctioned" victory as a prerequisite to a fee award.¹⁰⁶

The Supreme Court's rejection of the catalyst theory has had "a profoundly negative impact on civil rights litigation."¹⁰⁷ *Buckhannon* reduces plaintiffs' leverage in settlement negotiations because defendants are aware that they can often avoid a fee award by capitulating, and it also makes settlement more difficult by taking away the potential for face-saving out-of-court settlements in which the defendants do not admit liability.¹⁰⁸

So it was in *Poor Bear*. The parties litigated the case for more than two years. The district court had rejected the counties primary defenses, and the plaintiffs had filed a motion for summary judgment on the merits. Rather than defend their position on the merits or engage in settlement discussions with the plaintiffs, the County entered into a temporary agreement with the State to offer a satellite voting location for four election cycles. The County then immediately sought to dismiss the case on ripeness grounds, and the district court granted the motion.¹⁰⁹

The plaintiffs still moved for an award of fees, but the district court rejected the motion under *Buckhannon*.¹¹⁰ There was no dispute that the plaintiffs had been the catalyst for the defendants' capitulation, that was no longer enough to qualify for fees as a prevailing party.

The plaintiffs in *Poor Bear* were represented by a non-profit civil rights organization and private counsel that had undoubtedly devoted hundreds of hours to the case. Although they obtained excellent results for their clients, they recovered nothing. The district court's decision denying fees risks creating a chilling effect on future voting-rights litigation in Indian Country, with attorneys less likely to take a risk on uncompensated cases.

Congress should therefore fix the Voting Rights Act to restore a plaintiff's ability to recover fees under the catalyst theory as it existed prior to *Buckhannon*.

Conclusion

The cases that I have discussed today are just the tip of the proverbial iceberg. They are only some of the cases in Indian Country that one attorney has partici-

¹⁰³ 52 U.S.C. § 10310(e).

¹⁰⁴ 532 U.S. 598 (2001).

¹⁰⁵ *Id.* at 610.

¹⁰⁶ *Id.*

¹⁰⁷ Rebecca Glenberg, *Attorney's Fees and Buckhannon*, J. Va. Tr. Lawyers' Assoc., Vol. 20, No. 4, at 13 (2009).

¹⁰⁸ See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. Rev. 1087 (2007).

¹⁰⁹ *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. June 17, 2016).

¹¹⁰ *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. Jan. 4, 2017).

pated in over the course of a twenty-year career. There are many more such cases brought in Indian Country by other attorneys, including my colleagues in the Native American Voting Rights Coalition. But these cases and the volumes of evidence they generated show that voting discrimination continues to be a significant problem in Indian Country. This problem justifies strong congressional action to ensure that Native Americans, like all Americans, can be free to participate fully in our democracy.

I thank you for the opportunity to testify here today, and I look forward to answering any questions that you might have.

Mr. COHEN. Thank you, sir.

Mr. John Eastman, a Henry Salvatori Professor of Law and Community Service at Chapman University Fowler School of Law, served as the school's dean from June 2007 to January 2010. He teaches courses in common law and legal history, among others.

He previously worked in private practice, served as law clerk for Judge Clarence Thomas of the Supreme Court and for Judge J. Michael Luttig of the United States Court of Appeals for the Fourth District.

He received his J.D. with high honors from the University of Chicago Law School, where he served on the Law Review; Ph.D. and M.A. from Claremont Graduate School; and a B.A. in politics and economics from the University of Dallas.

Professor Eastman, you are recognized for 5 minutes.

TESTIMONY OF JOHN EASTMAN

Mr. EASTMAN. Good morning, Chairman Cohen, Ranking Member Johnson, Chairman Nadler. Thank you very much for inviting me to aid in your deliberations on how both to strengthen and preserve the Voting Rights Act.

That act, as originally adopted in 1965, as everybody has acknowledged, is one of the signature accomplishments of the civil rights era, and it has been rightly credited with greatly reducing and, in many cases, outright eliminating rank discrimination in voting rights that have persisted in parts of our country for a century after the conclusion of the Civil War.

One provision of that act, section 5, was an extraordinary and drastic departure from the normal Rule that law must have general applicability even to warrant the name "law," an idea that has been a mainstay of legal systems since at least Roman times and certainly here in the United States since the very founding.

That section's targeting of only certain jurisdictions was upheld by the Supreme Court at the time only because Congress had determined, and the Court agreed, that such strong medicine was needed to address entrenched racial discrimination voting. As the Court put it in that case, *South Carolina v. Katzenbach*, "exceptional conditions can justify legislative measures not otherwise appropriate."

That last phrase, "not otherwise appropriate," was a strong signal from the Court that at some point, the extraordinary remedy of targeting only certain States with the drastic remedy of preclearance—of seeking permission from either the Attorney General or Federal court for every change in voting law, practice, or procedures—must come to an end.

The States are, after all, separate sovereigns in our Federal system, and they are not to be treated as children with a "Mother,

may I?” advance preclearance supervision of the Federal Government. That is why from the very beginning, Members of the Court have expressed concerns about the constitutionality of section 5, and my prepared written testimony identifies a number of examples.

That is also why several times over the last two decades, the Supreme Court itself more broadly has warned Congress that provisions of the Voting Rights Act have become constitutionally problematic. In *Reno v. Bossier Parish School Board*, for example, the Court warned that a broadening interpretation of section 5 coverage to read laws that merely prevented the favoring of racial minority groups would exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about section 5’s constitutionality. Despite that warning, Congress codified that very requirement just 6 years later in the 2006 amendments to the act.

In the 2003 case of *Georgia v. Ashcroft*, Justice Kennedy identified a key anomaly in the law, namely, that conduct which would be unconstitutional under the Fourteenth amendment was being required to obtain preclearance under section 5 of the Voting Rights Act. He added that this fundamental flaw should be confronted in a case in which the issue was squarely presented. Quite frankly, his advice there is not just applicable to the Court, but to Congress as well.

Similarly, in *Northwest Austin Municipal Utility District v. Holder*, the Supreme Court noted that the plaintiff had raised a big question about the constitutionality of section 5 but did not reach that question because a preliminary issue of statutory construction allowed it to avoid the question at the time.

The decision was, nevertheless, a broadside criticism of both section 5 and the triggering formula found in section 4, criticisms that would come to the forefront in *Shelby County*. Although the Shelby County Court invalidated only section 4’s triggering formula, it continued to identify significant constitutional problems with section 5, problems that, as Justice Thomas noted in his concurrence, led to the inevitable conclusion that section 5 is, under modern circumstances, unconstitutional.

Yet instead of addressing those increasingly manifest constitutional problems, the Voting Rights Advancement Act, H.R. 4, doubles down on them. Granted, it proposes a new triggering formula that is not based on 50-year-old data, the principal problem identified in *Shelby County*. That was not the only problem identified in *Shelby County*. The very notion that preclearance requirements apply only in some parts of the country and not others is itself constitutionally problematic. Section 5 continues to violate that general rule.

The constitutional problems of the Voting Rights Act, as have been amended over the years, have run even deeper than that. I was a law clerk at the Supreme Court when the *City of Boerne* case was decided, and that says that the—reminds us that the power that Congress has under section 5 of the Fourteenth Amendment, and the identical provisions in a number of other amendments, is to enforce the provisions of that amendment, not add to them.

So, when the Congress adds to those requirements, they can only do so if their remedy is proportional and congruent to the constitutional violations. Converting the Voting Rights Act, as happened in 1982, from one focusing on intentional discrimination to one focusing merely on disparate impact is, itself, constitutionally problematic under the City of Boerne.

I would encourage this body to look at those kinds of constitutional infirmities that the Court has repeatedly brought to your attention in order to save the Voting Rights Act rather than ensuring that the entire Act ends up being held to be unconstitutional if we don't Act now to save it.

Thanks so much.

[The statement of Mr. Eastman follows:]

STATEMENT OF JOHN EASTMAN

*Henry Salvatori Professor of Law & Community Service Chapman University's Dale E. Fowler School of Law*¹

Good afternoon, Chairman Cohen, Ranking Member Johnson, and the other Members of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Thank you for inviting me to aid in your deliberations on how to strengthen and preserve the Voting Rights Act. That Act, as originally adopted in 1965, was one of the signature accomplishments of the civil rights era of the late 1950s and 1960s. It has rightly been credited with greatly reducing and in many cases outright eliminating rank discrimination in voting rights that had persisted in parts of our country for a century after the conclusion of the Civil War.

One provision of the Act, section 5, was an extraordinary and drastic departure from the normal Rule that law must have general applicability even to warrant the name "law"—an idea that has been a mainstay of legal systems since at least Roman times, and certainly here in the United States since the very founding of our Republic. That Section's targeting of only certain jurisdictions was upheld by the Supreme Court at the time only because Congress had determined, and the Court agreed, that such "strong medicine . . . was needed to address entrenched racial discrimination in voting."² As the Court put it in *South Carolina v. Katzenbach*: "exceptional conditions can justify legislative measures not otherwise appropriate."³

That last phrase, "not otherwise appropriate," was a strong signal from the Court that, at some point, the "extraordinary remedy" of targeting only certain states with the drastic remedy of requiring permission from either the Attorney General or a federal court for every change in its voting laws, practices, and procedures must come to an end. The States are, after all, separation sovereigns in our federal system, and they are not to be treated as children under the constant "mother may I" advance preclearance supervision of the Federal Government.

That is why from the very beginning Members of the Court have expressed concerns about the constitutionality of section 5. *See, e.g., Katzenbach*, 383 U.S., at 358–62 (Black, J., concurring and dissenting); *Allen v. State Board of Elections*, 393 U.S. 544, 586, n. 4 (1969) (Harlan, J., concurring in part and dissenting in part); *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); *City of Rome v. United States*, 446 U.S. 156, 209–21 (1980) (Rehnquist, J., dissenting); *Id.*, at 200–06 (Powell, J., dissenting); *Lopez v. Monterey County*, 525 U.S. 266, 293–98 (1999) (Thomas, J., dissenting); *Id.*, at 288 (Kennedy, J., concurring in judgment).

That is also why, on several occasions over the past two decades, the Supreme Court itself has warned Congress that provisions of the Voting Rights Act have become constitutionally problematic. In *Reno v. Bossier Parish School Board*, for example, the Court warned that a broadening interpretation of section 5 coverage to reach laws that merely prevented the favoring of racial minority groups would "exacerbate the substantial federalism costs that the preclearance procedure already

¹ Institutional affiliation listed for identification purposes only. The views presented by Dr. Eastman are his own, and do not necessarily reflect the views of the Institutions with which he is affiliated.

² *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 535 (2013) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

³ 383 U.S. at 334 (emphasis added).

exacts, perhaps to the extent of raising concerns about § 5's constitutionality."⁴ Despite that warning, Congress codified that very requirement just six years later in the 2006 amendment of the Act.

In the 2003 case of *Georgia v. Ashcroft*, Justice Kennedy identified a key anomaly in the law, namely, that conduct which would be unconstitutional under the Fourteenth amendment was being required in order to obtain preclearance under section 5 of the Voting Rights Act. He added that this "fundamental flaw" "should be confronted" in a case in which the issue was squarely presented, but, quite frankly, that advice is equally applicable to Congress. Similarly, in *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193 (2009), the Supreme Court noted that the plaintiff had raised a "big question" about the constitutionality of section 5, but did not need to reach the question because a preliminary issue of statutory construction allowed it to avoid reaching the constitutional question at that time. The decision itself was nevertheless a broadside criticism of both section 5 and the triggering formula found in section 4, criticisms that would come to the forefront just four years later in *Shelby County v. Holder*, 570 U.S. 529 (2013). Although in *Shelby County* the Court invalidated only section 4's triggering formula, it continued to identify significant constitutional problems with section 5—problems that, as Justice Thomas noted in his concurrent, lead to the "inevitable conclusion" that section 5 is, under current circumstances, unconstitutional.

Yet instead of addressing those increasingly manifest constitutional problems, the Voting Rights Advancement Act of 2019, H.R. 4, doubles down on them. Granted, it proposes a new triggering formula that is not based on 50-year-old data, the principal problem with the old formula identified in *Shelby County*. But that was not the only problem identified in *Shelby County*. The very notion that preclearance requirements apply only to some jurisdictions and not others is a significant departure from the long-standing norm that law must be generally applicable, not imposing duties only on some. The general rule, in other words, is that federal laws must, absent extraordinary circumstances, treat all states as the equal sovereigns that our

Constitution recognizes. section 5 continues to violate that general rule, and the proposed new triggering formula contained in H.R. 4 is a far cry from the pervasive violations that warranted Congress's resort to that extraordinary remedy back in 1965, and that led the Court to uphold what was initially a temporary measure in 1966.

But the constitutional problems with the Voting Rights Act, as it has been amended over the years, run even deeper than that. I was a law clerk at the Supreme Court during the October 1996 term, when *City of Boerne v. Flores* was decided. That case reminded us of the importance of critical text in section 5 of the Fourteenth Amendment, that Congress's power is "to enforce" the requirements of the Fourteenth amendment against the States, not to add to them. The identical language is found in section 2 of the Fifteenth amendment (which prohibits denial and abridgement of voting rights on the basis of race), the Nineteenth amendment (which prohibits denial and abridgement of voting rights on the basis of sex), section 2 of the Twenty-Fourth amendment (which prohibits denial and abridgement of voting rights by reason of failure to pay a poll tax), and section 2 of the Twenty-Sixth amendment (which prohibits denial and abridgement of voting rights on the basis of age for anyone eighteen years or older).

The Supreme Court has held in numerous cases that both the Fourteenth Amendment's Equal Protection Clause and the Fifteenth amendment are violated only by a discriminatory purpose or intent, not merely a disparate effect.⁵ Laws that do more than "enforce" the prohibition on purposeful discrimination are permissible remedial legislation only if they are "congruent and proportional" to the constitutional violation, as the Court held in *City of Boerne*. Two amendments to the original Voting Rights Act that were added over the years run afoul of that proposition, and

⁴ 528 U.S. 320, 336 (2000).

⁵ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229 (1976); *Wisconsin v. City of New York*, 517 U.S. 1, 19 n.8 (1996) ("Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government"); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) ("[A]ction by a State that is racially neutral on its face violates the Fifteenth amendment only if motivated by a discriminatory purpose [R]acially discriminatory motivation is a necessary ingredient of a Fifteenth amendment violation"); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (holding that a plaintiff bringing a vote dilution claim under either the Fourteenth or Fifteenth Amendments must "establish that the State or political subdivision acted with a discriminatory purpose").

this Committee should be considering ways to rectify those constitutional violations rather than expanding them.

One such constitutionally problematic amendment occurred in 1982, following the Supreme Court's decision in *Mobile v. Bolden*. In that case, the Court held that the original language of section 2, like the Fourteenth and Fifteenth Amendments themselves, reached only intentional discrimination. Without benefit of the Court's subsequent analysis in *City of Boerne* confirming that Congress's section 5 enforcement power did not allow Congress to impose additional *substantive* requirements on the states, Congress added language to section 2 that reached disparate impact rather than merely intentional discrimination. Section 2 of the Act as originally adopted provided that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. 89-110, 79 Stat. 437 (Aug. 6, 1965) (emphasis added). The amended section provides that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b)." Pub. L. 97-205, 96 Stat. 131 (June 29, 1982), now codified at 52 U.S.C. 10301(a) (emphasis added). That alteration in the language to "in a manner which results in" changed the statute from one prohibiting purposeful discrimination to one prohibiting law that have merely a disparate impact, which is to say, changed the statute from one "enforcing" the provisions of the Fifteenth amendment to one adding to the substantive requirements of the Fifteenth Amendment. Constitutionally problematic at the time, the constitutional infirmity is even more clear after *City of Boerne*.

Another amendment to the Act, adopted in 1975, suffers from a similar infirmity. Purportedly relying on its Fourteenth amendment section 5 authority, Congress prohibited states and local governments from conducting elections only in English. Pub. L. 94-73 (H.R. 6219), 89 Stat. 400 (Aug. 6, 1975), now codified at 52 U.S.C. 10303(f)(1). Specifically, section 203 of the 1975 Amendments, now codified at 52 U.S.C. 10303(f)(2), provides that: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." But "language minority" is not a suspect classification,⁶ so under the Fourteenth's Equal Protection analysis, classifications based on language are subject only to highly deferential rational basis review.

That means that nearly all State laws that implicate "language minorities" would be upheld against an Equal Protection challenge, as long as it might have been viewed as furthering a conceivable legitimate government purpose. The additional cost of printing ballots and other election materials in multiple languages is alone sufficient to pass rational basis review. As a result, the 1975 amendment was not designed to "enforce" the provisions of the Fourteenth amendment against States that were violating it, but rather to impose additional burdens on the States.

The Supreme Court's holding in *Nevada v. Hibbs*, 538 U.S. 721 (2003), is instructive here. In that case, the Court upheld the abrogation of State sovereign immunity in a remedial statute addressing discrimination on the basis of sex (a suspect class), but distinguished two cases⁷ in which the Court had struck down an abrogation provision in remedial statutes addressing discrimination on the basis of age or disability (non-suspect classes). The difference between the scrutiny applied to suspect classifications and non-suspect qualifications was outcome determinative on the issue whether Congress was enforcing the Fourteenth Amendment, or adding to it.

Instead of addressing and curing these existing constitutional infirmities, H.R. 4 actually exacerbates them. The proposed amendment to section 3(c) of the Voting Rights Act adds in enforcement of federal statutes, not just the Fourteenth Amendment, in a context where Congress's authority is based solely on its Fourteenth amendment section 5 enforcement authority. Second, the proposed amendment to section 203(f) expands the existing language dealing with purposeful discrimination against language minorities, already constitutionally suspect under *City of Boerne*

⁶"National origin" is a suspect classification, of course, but almost by definition, the expansion of the Voting Rights Act to "language minorities" reaches a different class of people than those who have migrated to the United States from different nations and become naturalized citizens. A precondition of naturalization in most cases is proficiency in English. 8 U.S.C. 1423.

⁷*Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000).

and Hibbs, to disparate impact discrimination, making it even more constitutionally suspect.

Finally, the proposed change to section 4—the preclearance trigger formula—fails the “congruence and proportionality” test the Supreme Court set out in *City of Boerne*. Instead of targeting the extraordinary preclearance remedy afforded by section 5 to those jurisdictions currently engaged in pervasive and entrenched discrimination in voting, as was the case with the original triggering formula upheld in 1966, the new formula would extend the extraordinary preclearance remedy to any State in which as few as 10 voting rights violations had occurred in the prior quarter century—an extremely low threshold that is far from the massive, pervasive history of voting rights violations that led to the adoption of section 5 of the original Voting Rights Act by Congress and upholding of that provision by the Supreme Court in *Katzenbach*.

Mr. COHEN. Thank you, Mr. Eastman.

Our next witness is Mr. Arturo Vargas. He is chief executive Officer of the National Association of Latino Elected and Appointed Officials, a position he has held since 1994. Prior to joining NALEO Educational Fund, he held various positions at MALDEF, and before there, he was senior education policy analyst at the National Council of La Raza in DC.

He is a nationally recognized expert in Latino demographic trends, electoral participation, voting rights, the Census, and redistricting. Master’s degree in education, a Bachelor’s degree in history and Spanish from Stanford University.

Mr. Vargas, you are recognized for 5 minutes.

TESTIMONY OF ARTURO VARGAS Thank you very much, Mr. Chairman. Chairman Nadler, Ranking Chairman Johnson, and Members of the Judiciary Committee, thank you for the opportunity to testify before you today.

I also serve as CEO of the National Association of Latino Elected and Appointed Officials, a national Membership organization of Latino public servants from all levels of government—Democrats, Republicans, and Independents—and very proud that one of our past national presidents is Representative Sylvia Garcia.

We are acutely concerned that the Supreme Court’s decision in *Shelby County v. Holder* has left newly mobilized communities of historically underrepresented voters of color vulnerable to efforts to limit their voting participation. Latino voters and candidates have an increasing presence in elections and elected office everywhere in the United States.

NALEO Educational Fund’s first compilation of the number of Latinos in elected office revealed that they were present in 33 States. By 2016, the number of States with Latino elected leaders had grown to more than 40, with Latinos being elected in locations like urban Northern Virginia, rural corners of Oklahoma and Iowa, and Western frontier towns, including Wilder, Idaho, and Casper, Wyoming.

This rapid, visible growth of Latino communities and other racial and ethnic populations, however, has fostered perceptions of threat in long and extensive patterns, a manipulation of election laws and response to minorities’ potential and growing political influence.

In hundreds of instances within the past 35 years, jurisdictions throughout the country have employed the same favored tactics repeatedly to suppress the political voice of a growing mobilizing minority community. The changes that most merit scrutiny based on

their history of misuse include transitions to at-large or multi-member districts, redistricting plans devised in the wake of significant demographic change, annexations and de-annexations, restrictive identification requirements, wholly placed consolidations, and withdrawals of language assistance.

I would like to point out three examples of how these tactics have suppressed, have been designed to suppress Latino voter participation. One of these has already been mentioned, the Pasadena, Texas, case that was litigated by MALDEF.

I just would like to lift up the words of the Federal judge in that case that the intent of the effort to move from single member districts to at-large seats. The judge said that the intent was to delay the day when Latinos would make up enough of Pasadena's voters to have an equal opportunity to elect Latino-preferred candidates to a majority of the city council seats.

Population shifts and growth in Latino citizen voting age and Spanish surname registered voter population made it clear that this power shift was about to occur. In that trial, it was revealed that, among other activity, advocates of the ballot measure that would have converted these districts had instructed a vendor to remove Latino names from the mailing list for a document urging support for at-large elections.

In 2006 in Ohio, the State enacted legislation to require election judges processing voter challenges to distinguish between native, foreign, and naturalized citizens and singled out naturalized Americans for extra scrutiny. Only those challenged voters who were naturalized citizens will be required to immediately produce proof of citizenship or to vote a provisional ballot that would only be counted if the voter displayed proof of citizenship to an election official within 10 days.

As of 2006, the African Americans, Latino, and Asian Americans constituted just 14.3 percent of the State's total electorate, but nearly 48 percent of the naturalized Ohioans eligible to cast ballots. In light of its potential significantly increased racial and ethnic profiling of Ohio voters, a Federal court granted a permanent injunction invalidating this law in October 2006.

In Pennsylvania, some high-profile negative responses to the change of demographics included events in 2001 and 2002 where poll workers were overheard saying things such as, "This is the USA. Hispanics should not be allowed to have two last names. They should learn to speak the language, and we should make them take only one last name." And they were overheard saying, "They can't speak, they can't read, and they come to vote."

Poll workers also demanded of Latino voter's photo identification not required by law and selectively required only Latino voters to confirm their addresses. A Federal judge granted a preliminary injunction against the county and required it to negotiate a plan of remedial action with community advocates.

We need to prevent these foreseeable harms of these types of discriminatory election practices, and we urge Congress to restore the Voting Rights Act to its full strength by enacting the Voting Rights Advancement Act and its practice-based preclearance formula.

Thank you for the opportunity to testify.

[The statement of Mr. Vargas follows:]



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OFFICER**

Mr. Arturo Vargas

¹ deceased

Written Testimony

Of

Arturo Vargas, Chief Executive Officer
National Association of Latino Elected and Appointed
Officials (NALEO) Educational Fund

Before the U.S. House of Representatives
Committee on the Judiciary

Legislative Proposals to Strengthen the Voting Rights Act

Washington, DC
October 17, 2019

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Chair Nadler, Ranking Member Collins, and Members of the Judiciary Committee: thank you for the opportunity to present testimony to you today regarding the need to strengthen the Voting Rights Act to ensure that it protects emerging communities of Latino voters who face discriminatory barriers to the ballot.

I am Arturo Vargas, Chief Executive Officer of NALEO Educational Fund, the leading non-profit, non-partisan organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency encompasses the more than 6,700 Latino elected and appointed officials nationwide, and includes Republicans, Democrats, and Independents.

For several decades, NALEO Educational Fund has been at the forefront of efforts to advance policies that protect Latino voting rights, and ensure that Latinos are fully engaged as voters and enjoy fair opportunities to choose their elected leaders. We have advocated passage of state and federal voting rights legislation including the reauthorization of key provisions of the Voting Rights Act of 1965 (VRA). We have also provided direct assistance to voters encountering barriers to casting ballots through our year-round, bilingual hotline, 888-VE-Y-VOTA, and through nationwide dissemination of bilingual voting rights public service announcements, palm cards, and other materials. In 2018 alone, the 888-VE-Y-VOTA hotline received over 9,100 voting calls.

On the basis of what we have learned from calls to our hotline and other reports from Latino voters, as well as our partnerships with peer organizations and elected and appointed officials, we have identified, and seek to redress, barriers that continue to impede Latino political participation. We have also observed and documented the success of the VRA in eliminating discriminatory laws and limiting their harmful effects. NALEO Educational Fund is acutely concerned that the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), has impeded VRA enforcement, removing the Department of Justice's (DOJ) ability to timely and efficiently halt discriminatory laws and overburdening DOJ and private litigants with the effort and expense of bringing protracted, complicated litigation to remedy each instance of discrimination. We strongly urge Congress to restore the VRA to full strength to ensure that our nation continues to make progress toward full and equal participation in elections by all Americans, regardless of their race, ethnicity, or linguistic ability.

Emerging Latino and Other Minority Communities Are Geographically Dispersed and Poised to Exercise Political Influence

In the 54 years since the VRA entered into force, the growth rates of populations of voters of color have significantly outpaced the rate at which the population of non-Hispanic white voters has grown.¹ As their overall numbers have increased,

¹ E.g., Associated Press, "Census: Every Ethnic, Racial Group Grew, but Whites Slowest" (June 23, 2017), <https://www.nbcnews.com/news/nbcblk/census-every-ethnic-racial-group-grew-whites-slowest-n775591>; Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, Census Bureau, *Overview of Race and Hispanic Origin: 2010*, Doc. C2010BR-02 (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>

historically underrepresented voters have become more numerous and visible in new and different states and cities than was previously the case. For example, it has long been the case that Asian American voters were concentrated in jurisdictions in the western United States including Hawaii and California, but between 2000 and 2010, Georgia and North Carolina were two of the three states with the fastest-growing Asian American populations in the United States, and today, almost one in four Asian Americans lives in the South.² Georgia has also seen its Latino population more than double during this period.³ Between 2007 and 2014, five of the ten U.S. counties whose Latino populations grew most rapidly were in North or South Dakota⁴, two states whose overall Latino populations still account for less than ten percent of their residents, and are dwarfed by Latino communities in states like New Mexico, Texas, and California.

Latino voters and candidates are an increasingly visible presence in elections and elected office everywhere in the United States. Puerto Rican migration from the island to the mainland in the aftermath of Hurricane Maria is one of the most recent contributors to this trend: indicators including cell phone geolocation data and records of Facebook users' locations show concentrations of Puerto Rican residents settling both in longstanding population centers in central and south Florida and the New York City region, as well as in states and metropolitan areas like Atlanta, Georgia; southeastern Pennsylvania; northern Ohio; and along parts of New York's northern border with Canada.⁵

Elsewhere around the country, Latino families have moved in search of work opportunities and to join expanding communities of people with similarly diverse national origins, as evidenced by the growing reach of coverage under Section 203 of the VRA. Between 2011 and 2016, the number of counties and cities required to provide voting materials and assistance in multiple languages increased by 15, and

² E.g., Asian Americans Advancing Justice, *A Community of Contrasts: Asian Americans, Native Hawaiians and Pacific Islanders in the South* (2014), https://www.advancingjustice-aajc.org/sites/default/files/2016-09/2014_Community%20of%20Contrasts.pdf; Terry Ao Minnis, "Asian Americans Advancing Justice - AAJC, Section 5 of the Voting Rights Act and Asian American Voters" (June 20, 2016), <https://www.advancingjustice-aajc.org/sites/default/files/2016-09/Section%205%20of%20the%20VRA%20and%20Asian%20Americans.pdf>; Gutavo Lopez, Neil G. Ruiz, and Eileen Patten, Pew Research Center, "Key facts about Asian Americans, a diverse and growing population" (September 8, 2017), <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>

³ Antonio Flores, Pew Research Center, "How the U.S. Hispanic population is changing" (September 18, 2017), <https://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing/>

⁴ Renee Stepler and Mark Hugo Lopez, Pew Research Center, "Fast-growing and slow-growing Hispanic counties" (September 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/08/2-fast-growing-and-slow-growing-hispanic-counties/> [Hereinafter "Fast-growing Hispanic counties"]

⁵ Center for Puerto Rican Studies, Hunter College, CUNY, *Puerto Rico One Year After Hurricane Maria* 17, 20-22 (October 2018), https://centropu.hunter.cuny.edu/sites/default/files/data_briefs/Hurricane_maria_1YR.pdf; Sujata Gupta, "Facebook data show how many people left Puerto Rico after Hurricane Maria," SCIENCE NEWS (May 3, 2019), <https://www.sciencenews.org/article/facebook-data-show-how-many-people-left-puerto-rico-after-hurricane-maria>

Spanish-language coverage extended to four new states: Idaho, Oklahoma, Iowa, and Georgia.⁶

When NALEO Educational Fund compiled statistics about Latino elected officials in 1996, we counted Latinos in office in 33 of the 50 states, and in the District of Columbia. By 2016, the map had expanded significantly for Latino elected leaders to more than 40 of the states; by then, Latino officials had made advances by winning elections in locations like West Virginia; urban northern Virginia; rural corners of Midwestern states such as Oklahoma and Iowa; and in western frontier towns including Wilder, Idaho and Casper, Wyoming.

Policymakers Have Frequently Responded to Underrepresented Voters' Exercise of Political Influence by Restricting Voting and Manipulating Election Outcomes

There are strong indications that this rapid, visible growth of Latino communities and other newly emerging racial or ethnic populations has fostered the perception that communities of color may pose a threat to existing political power structures. A pattern of manipulation of election laws in response to minorities' potential political influence stretches back to the founding of our democracy. From America's inception, lawmakers denied enslaved African Americans the right to vote, and free African Americans were either formally excluded or barred in practice from voting by property ownership requirements and other stringent voter qualifications. Although the growth of America's abolitionist movement, the Union's victory in the Civil War, and Reconstruction in the South eliminated many voting impediments, concerns about the political power of the African American vote dominated America's political discourse, and inspired backlash in the form of "black codes" and organized efforts to incarcerate, intimidate, and prevent African Americans from voting. The collapse of Reconstruction in 1877 further normalized these voter suppression tactics, and they became the ideological foundation of Jim Crow:

"Even before Reconstruction came to a quasi-formal end in 1877, black voting rights were under attack. Elections were hotly contested, and white Southerners ... engaged in both legal and extralegal efforts to limit the political influence of freedmen. In the early 1870s, both in the South and in the border states, districts were gerrymandered (i.e., reshaped for partisan reasons), precincts reorganized, and polling places closed to hinder black political participation."⁷

Immigrant communities have frequently attracted similar hostility when they grew large enough to potentially exercise political influence. In the late nineteenth century, a strong sentiment against universal suffrage began to increase as "opponents of universal suffrage consistently couched their opinions in language redolent with class, ethnic, and racial hostility."⁸ Public antipathy extended to people

⁶ Asian Americans Advancing Justice-AAJC, NALEO Educational Fund, and Native American Rights Fund, *Voting Rights Act Coverage Update 1-2* (December 2016), <https://advancingjustice-aajc.org/sites/default/files/2016-12/Section%20203%20Coverage%20Update.pdf>

⁷ Alexander Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 84 (Basic Books: 2009).

⁸ *Id.* at 98.

with disfavored European national origins, such as the Irish, and intensified in the form of anti-immigrant attitudes about Latinos and Asian Americans. For example, “in Texas, Mexican immigrants were described as a ‘political menace,’ as ‘foreigners who claim American citizenship but who are as ignorant of things American as the mule.’”⁹ At the end of the nineteenth century, most Americans supported both excluding people of Chinese origin from voting and from entering the country.¹⁰ Provisions in state constitutions included language like the following, from California: “no native of China shall ever exercise the privileges of an elector in this State.”¹¹ California’s constitution also prohibited from voting any “person who shall not be able to read the Constitution in the English language and write his name,” in response to the perception that foreign-born residents and Mexican Americans were immigrating in waves and forming a potential “ignorant foreign vote”.¹²

Within the past two decades, these same patterns of restrictive lawmaking in response to political presence and mobilization have repeated in many parts of the country. In North Carolina, African American voter turnout surged during the Presidential elections of 2008 and 2012: in 2000 the non-Hispanic white turnout rate was more than ten points higher than the African American participation rate, whereas in 2008, non-Hispanic white and African American voting rates were identical.¹³ Legislators wrote a wide-ranging package of restrictions on voting, famously deemed by a panel of federal judges to have targeted black voters “with almost surgical precision”¹⁴, in the wake of the *Shelby County* decision and with the mobilization of the state’s black voting community fresh in their memory.¹⁵

Latino and Asian American voters have been stereotyped as foreigners¹⁶, regardless of their citizenship status, and throughout the country, where Latino and Asian American communities have grown most dramatically, anti-immigrant measures have followed to mitigate the perceived socio-political threat to historical white majorities.¹⁷

⁹ *Id.* at 99.

¹⁰ *Id.* at 113.

¹¹ *Id.* at 114.

¹² *Id.* at 117.

¹³ Census Bureau, Current Population Survey, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race, and Hispanic Origin, for States: November 2000 (Table 4a), <https://www.census.gov/data/tables/2000/demo/voting-and-registration/p20-542.html>; Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008 (Table 4b), <https://www.census.gov/data/tables/2008/demo/voting-and-registration/p20-562-rv.html>

¹⁴ *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

¹⁵ Sarah Childress, “Court: North Carolina Voter ID Law Targeted Black Voters,” FRONTLINE (July 29, 2016), <https://www.pbs.org/wgbh/frontline/article/court-north-carolina-voter-id-law-targeted-black-voters/>

¹⁶ For example, a Latino Decisions poll conducted for the National Hispanic Media Coalition found that non-Hispanic whites overestimated the percentages of U.S. Latinos who are immigrants, and who are undocumented. National Hispanic Media Coalition and Latino Decisions, *The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos 2* (September 2012), <http://www.nhmc.org/sites/default/files/LD%20NHMC%20Poll%20Results%20Sept.2012.pdf>

¹⁷ Audrey Singer, Jill H. Wilson, and Brooke DeRenzis, Metropolitan Policy Program at Brookings, *Immigrants, Politics, and Local Response in Suburban Washington* (February 2009), https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf

For example, Prince William County, Virginia, made headlines when its Board of County Supervisors adopted a resolution in 2007 to ensure local officials' active participation in immigration enforcement activities and to exclude people with immigrant origins from accessing public services and benefits. Lawmakers hoped to discourage at least some immigration generally; then-Board chair Corey Stewart commented, "We are ground zero in this debate on immigration. We've got a responsibility to do it right."¹⁸ At this time, Latino and Asian American populations in the county were increasing rapidly; according to Census data, the County's Latino population grew 229.7 percent and its Asian population 201.9 percent between 2000 and 2012, while the non-Hispanic white population increased by 41.2 percent.¹⁹ These residents were either citizens or potential future voters, and in spite of officials' efforts to make the jurisdiction less welcoming and attractive to families from underrepresented communities, they have already changed the face of politics in Prince William County. In November 2017 the County's voters elected two of the first Latinas ever to serve in the Virginia House of Delegates, Elizabeth Guzman and Hala Ayala.

State and federal officials that represent rapidly growing Latino and Asian American constituencies have advocated similar legislation just as emerging communities in their jurisdictions have gained visibility and political attention. Between the 2000 and 2010 Censuses, Alabama's Latino population increased by more than 144 percent²⁰, and in 2011, the state enacted H.B. 56, considered one of the harshest immigration enforcement laws in the country at the time. The law would have required immigration status checks during property rental and other commercial transactions, involved schools in investigating students and their families, and explicitly created a new barrier to voting by mandating that newly registering voters present documentation of their citizenship. That same year, Alabama also adopted a strict voter identification requirement.

In other states that experienced similar dramatic demographic change, including Georgia and South Carolina, legislative efforts to deny U.S. citizenship to American-born children of undocumented immigrants arose in lockstep with the increasing presence of Latino and Asian American communities²¹; South Carolina's Latino population was the fastest-growing in the nation between 2000 and 2010, while by

¹⁸ Ian Urbina and Maria Newman, "Virginia County Votes to Deny Services to Illegal Immigrants," N.Y. TIMES (October 17, 2007), <https://www.nytimes.com/2007/10/17/us/17prison-cnd.html>

¹⁹ Prince William County, "The Prince William Report: Prince William County Demographic and Economic Newsletter" (January – March 2014), <https://www.pwcgov.org/government/dept/doit/gis/Documents/demographics/Prince%20William%20Report%202014%201st%20Q.pdf>

²⁰ Sharon R. Ennis, Merarys Rios-Vargas, and Nora G. Albert, Census Bureau, *The Hispanic Population: 2010*, Doc. C2010BR-04 (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> [hereinafter "The Hispanic Population"].

²¹ See Shankar Vedantam, "State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship," WASHINGTON POST (Jan. 5, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html>; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (*holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents*).

2010, Georgia's Latino population was the tenth-largest in the country.²² Members of Congress from many of these same states have championed federal legislation to enact this restriction; in the 116th Congress, the Birthright Citizenship Act of 2019, H.R. 140, has multiple co-sponsors from the Georgia, North Carolina, Texas, Florida, and South Carolina Congressional delegations.

The VRA Must Reach and Protect Emerging Communities of Underrepresented Voters

From its enactment until the *Shelby County* decision, the VRA protected voters from elections tainted by discriminatory policies by requiring pre-implementation review of election law changes in the jurisdictions with the most entrenched histories of manipulating rules to exclude underrepresented voters. In many places, unfortunately, lawmakers' track records provide an extremely strong indication of the future likelihood of adopting changes that exclude communities historically discriminated against in elections. In other places, however, where demographic changes and extraordinary political mobilization have occurred relatively recently, there may not yet be a documented lengthy history of discriminatory changes, because implementing these practices has not yet become popular or a priority. To complement a preclearance coverage formula that targets those jurisdictions that have proven to routinely engage in voter discrimination over time, a legislative fix to the *Shelby County* decision must include a mechanism that addresses the experience of emerging communities of color that face obstacles to equal electoral participation just as they approach a critical mass.

Our nation's most rapidly growing racial, ethnic, and language minority communities are present today in cities and states in which they did not have a significant presence in the past. If preclearance reaches only places where discrimination has been observed and sanctioned in the past, this invaluable tool will neglect the needs of emerging populations that are only just beginning to experience discrimination inspired by their growing visibility.

To mitigate the insurgent political threat posed by fast-growing or fast-mobilizing minority groups, jurisdictions favor use of certain practices which have proven to be effective for this purpose. Practice-based preclearance narrowly focuses administrative (or judicial) review on these suspect practices that are most likely to be tainted by discriminatory intent or to have discriminatory effects, as demonstrated by broad historical experience, including more than fifty years of history of VRA-based litigation. For example, known discriminatory practices involving methods of election, redistricting, annexations, polling place relocations, and interference with language assistance accounted for less than half of practices for which preclearance was sought between 1990 and 2012, but nearly two-thirds of preclearance denials between 1990 and 2013.

²² Pew Research Center Fact Sheet, "Latinos in the 2010 Elections: Georgia" (October 15, 2010), <https://www.pewresearch.org/hispanic/2010/10/15/latinos-in-the-2010-elections-georgia/>; The Hispanic Population, *supra* n. 20.

The practice-based preclearance coverage formula would require review (performed by either the DOJ or the federal District Court in Washington, DC) prior to implementation of a designated known practice in a jurisdiction with a racially, ethnically, and/or linguistically diverse population. Practice-based preclearance would only apply to practices designated in advance as likely to be discriminatory in nature.

Diverse jurisdictions covered by the Voting Rights Advancement Act of 2019's practice-based preclearance provisions are states and political subdivisions in which two or more racial, ethnic, or language minority groups each represent 20 percent or more of the voting-age population or in which a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. These jurisdictions that have achieved visible diversity are the most likely locus of discriminatory election lawmaking; for example, more than 85 percent of all objections to preclearance lodged between 1990 and 2013 found discriminatory intent or effects in a jurisdiction in which practice-based preclearance would apply today.

According to Census Bureau data from the 2013-2017 American Community Survey 5-year estimates, 15 states, the District of Columbia, and 801 counties or county equivalents (making up 25.9% of all counties in the country) currently satisfy this threshold qualification for practice-based coverage. These jurisdictions would not preclear all their voting changes. They would preclear only the practices identified in law as the most frequently and fundamentally discriminatory on the basis of their historical use to silence the political voices of communities of color.²³

Known, Restrictive Voting Practices Discriminatorily Impede Latino Voters in Increasingly Diverse Jurisdictions

The Voting Rights Advancement Act of 2019, H.R. 4, would require preclearance of six kinds of changes most likely to discriminatorily inhibit access to the vote in diverse jurisdictions whose minority populations are attaining visibility and influence. We briefly describe the history and effects of those known practices below.

Methods of Election That Entrench Majority Influence

Lawmakers have a long, established history of manipulating methods of election to dilute the voting power of disfavored minority populations. "Method of election" refers to the system for electing members of a body and may include features affecting the size and composition of the electorate that votes for a given seat, the timing of election for certain seats, and the number or percentage of votes required to win election. By manipulating these features, policymakers can ensure that even where voters of color are able to cast their ballots, the strength of their votes is

²³ For example, five of the six types of laws for which H.R. 4 would require preclearance are known to have played an outsized role in covered jurisdictions' most effective attempts at limiting minority voters' participation during the pre-*Shelby County* era. Proposed annexations, redistricting plans, changes in method of election, polling place consolidations, and language assistance failures accounted for fewer than half of all submissions for preclearance review to the DOJ between 1990 and 2013, but 71 percent of all proposed changes determined to be discriminatory in intent or effects.

diminished. Discriminatory methods of election artificially construct seats, districts, or staggered elections in which white voters are likely to outvote voters of color, in jurisdictions in which voters of color and white voters generally vote for opposing candidates.

Discriminatory Intent and Effect

Jurisdictions have frequently adopted at-large and multi-member districts to dilute minority votes. In an at-large election system, multiple seats on an electoral body are up for election simultaneously, and all of the jurisdiction's voters cast ballots for each of the open seats. In a multi-member election, a jurisdiction is divided into districts, and in each, resident voters all vote for each of multiple seats representing the district. In either system, where communities of color and white majorities consistently support different candidates and vote as racial blocs, white majorities can regularly outvote minorities and sustain political control. This is especially true when at-large elections are coupled with majority vote requirements which seat only candidates who receive at least 50 percent of the vote.

At-large and multi-member elections for local office gained popularity just as the successes of Reconstruction moved white majorities to seek more creative barriers to voters of color. After the Civil War, municipalities in the South began to adopt at-large election systems to ensure that even if and where voters of color overcame hurdles to registering and voting, the effect of their votes could be diminished and limited. One such system, of five city council seats elected at-large, became known as the "Galveston plan" after its adoption in the 1890s in Galveston, Texas, and the subsequent election of an all-white city council to represent a town that was then 22 percent African American.²⁴ Even after the advent of the VRA, at-large elections remained disproportionately popular in jurisdictions whose discriminatory inclinations were well-established. As of 1968, all but six of Texas's 185 home-rule cities elected city councilmembers at-large.²⁵ By the 1976 publication of a study of African American presence in office, 75 percent of southern cities with a population of at least 25,000 were still conducting at-large city council elections, compared to just 47 percent of cities elsewhere around the country.²⁶

The discriminatory history of use of method of election changes is extensive²⁷, and endures into the present. As recently as September 2019, citizens challenged

²⁴ Chandler Davidson and George Korbel, "At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence," 43 *The Journal of Politics* 982, 989-990 (November 1981).

²⁵ Philip W. Barnes, "Alternative Methods of Electing City Council in Texas Home Rule Cities," 16 *Public Affairs Comment* 1 (May 1970).

²⁶ Albert K. Karnig, "Black Representation on City Councils," 12 *Urban Affairs Quarterly* 235 (December 1976).

²⁷ E.g., J. Morgan Kousser, "Protecting the Right to Vote," *LOS ANGELES TIMES* (September 28, 2012), <https://www.latimes.com/opinion/la-xpm-2012-sep-28-la-oe-kousser-voter-id-20120928-story.html>; cf. Ellen Katz with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt, Voting Rights Initiative of the University of Michigan Law School, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (December 2005), https://www.law.berkeley.edu/files/katz_discrimination_in_voting.pdf; Philip P. Frickey, "Majority Rule,

Mississippi's two-tiered system for winning statewide office, which requires candidates to win both the popular vote and a majority of the state's 122 House districts.²⁸ Under this scheme, no African American has held statewide office in Mississippi since Reconstruction.

Discriminatory Method of Election Changes in Action

The mayor and city council of Pasadena, Texas had long advocated, and argued unsuccessfully, to move toward use of an at-large system for electing local officials. However, it was not until the Supreme Court announced its decision in *Shelby County* that Pasadena officials placed a proposal on the November 2013 ballot to eliminate two of the city's eight single-member districts in favor of two at-large seats. Under the pure single-member district scheme, the city's voters - about one-third of whom were Latino - elected two Latino representatives on the city council. The shift to a hybrid system with two at-large seats would indefinitely defer the Latino community's ability to exercise majority power even as its numbers continued to increase relative to those of the town's historical white majority. The timing of this proposal concerned many, because the city's Latino population has been increasing noticeably.²⁹ In spite of significant public concern and opposition, voters adopted the proposal, and plaintiffs challenged it under the VRA.

In a ruling on the merits for plaintiffs, a federal judge ultimately found that the change would have unlawfully diluted the Latino vote, and also was adopted intentionally to accomplish that aim. The decision stated, "The intent was to delay the day when Latinos would make up enough of Pasadena's voters to have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats. Recent population shifts and growth in Latino citizen voting-age and Spanish-surnamed registered voter population made it clear that this power shift was about to occur."³⁰ Among pertinent facts that surfaced at trial, it emerged that advocates had instructed a vendor developing a targeted mailing list for a mailer urging support for the switch to the at-large plan to "pull out the Hispanic names" from that list. The district court issued a "bail-in" order, requiring Pasadena to preclear future electoral changes.

Before *Shelby County*, this change would have undergone preclearance under Section 5 of the VRA, and would have faced long odds: DOJ frequently denied preclearance for similar conversions from single member districts to at-large seats because they would have had a retrogressive effect on minority voters. Under the

Minority Rights, and the Right to Vote: Reflections upon a Reading of Minority Vote Dilution," 3 Law & Inequality: A Journal of Theory and Practice 209, 228-230 (1985).

²⁸ *McLemore v. Hosemann*, No. 3:19-cv-00383-DPJ-FKB (filed 5/30/19),

<https://www.documentcloud.org/documents/6102478-Mississippi-Elections-Lawsuit.html>

²⁹ Ana Campoy and Nathan Koppel, "Voting Rights Fights Crop Up," WALL STREET JOURNAL (November 1, 2013), <http://online.wsj.com/news/articles/SB10001424052702303843104579169900109920052>;

Editorial, "Plans to Redistrict Pasadena City Council," HOUSTON CHRONICLE (August 15, 2013),

<http://www.chron.com/opinion/editorials/article/Plans-to-redistrict-Pasadena-City-Council-4736602.php>; Press Release, State Senator Sylvia Garcia, "Senator Sylvia R. Garcia Disappointed by Pasadena City Council Approval of a Discriminatory Mid-Decade Redistricting Proposal," (August 21, 2013).

³⁰ *Patino v. Pasadena*, 230 F. Supp.3d 667, 725 (S.D. Tex. 2017).

negative influence of *Shelby County*, this intentionally discriminatory manipulation of elections went into immediate effect. Pasadena only settled the case, dropped its appeal of the district court's findings, and agreed to submit election changes for preclearance until 2023 after costly and protracted private litigation.³¹

The Known Practice of Discriminatory Method of Election Changes

The Voting Rights Advancement Act would require jurisdictions with diverse electorates to obtain preclearance of any proposal to add or replace one or more single-member districts with one or more at-large or multi-member seats on a governing body. The law would focus scrutiny on changes to methods of election that lawmakers and administrators propose for jurisdictions with sizable minority populations. In these locations, racial bloc voting often occurs, and electoral schemes that favor majorities are likely to negatively affect cohesive minority communities. We find that at least 329 laws or proposals that would have changed the method of a jurisdiction's election system have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.

Redistricting After Significant Demographic Change

Like changes to methods of election, redistricting changes can alter the practical effect of participation by voters of color without directly preventing those voters from active involvement in elections. Legislators and their advisors have often created redistricting plans with relatively little public involvement or engagement. For most residents in jurisdictions, the details and effects of district plans are not easy to decode. Their indirect and obscure nature enhances the attractiveness of the redistricting process as a potential tool for limiting emerging communities' political influence. In addition, the practical necessity of regular redistricting to ensure representation based on population change has contributed to the rise of a long and prolific history of intentional design of electoral districts to reduce underrepresented communities' opportunities to elect candidates of choice.

Discriminatory Intent and Effect

Discrimination in redistricting commonly occurs when minority communities that are connected geographically, linguistically, and by culture and interest are prevented from electing the candidates of their choice through two different methods. In some cases, these populations are dispersed between multiple districts to prevent the presence of a large enough population in any single district for the minority community to determine or influence the outcome of elections. In other cases, minority communities are concentrated in a single or small number of districts in a way that artificially limits their impact on election outcomes.

³¹ Ernest I. Herrera, Mexican American Legal Defense and Educational Fund, Written Testimony Submitted in Connection with Oversight Hearing of the House Judiciary Committee on Enforcement of the Voting Rights Act in Texas 5-6, May 3, 2019, <https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-Wstate-HerreraE-20190503.pdf>

Redistricting plans that dilute the votes of underrepresented communities are most likely to have discriminatory effects in diverse jurisdictions with sizable minority populations, and are most likely to be adopted where those minority populations reach critical mass or mobilize effectively to exercise their potential political influence. For example, 86 percent of DOJ's objections to intentionally discriminatory redistricting plans lodged between 1982 and 2013 concerned jurisdictions in which at least two racial or ethnic groups each made up at least 20 percent of voting-age population, according to our original analysis of a list of objections compiled by the Lawyers Committee for Civil Rights Under Law.

Policymakers have designed and adopted redistricting plans with explicit reference to and implicit understanding of their potential negative effects on historically underrepresented communities. As former Member of the U.S. Commission on Civil Rights Abigail Thernstrom once wrote, "[Southern politicians] realized that while it had become nearly impossible to limit black voters' access to the ballot box, it was still possible to limit the power of the votes they cast. And in the years immediately following the enactment of the Voting Rights Act, a growing number of southern jurisdictions...reconfigured state legislative districts...in an effort to reduce the effect of the newly surging black vote and to maintain white supremacy."³² Within the most recent decade, redistricting for racial ends has continued, with Americans recently learning that deceased redistricting expert Thomas Hofeller advised state legislatures in North Carolina, Texas, Missouri, Virginia, and elsewhere and used race as a primary factor to design maps that would limit the influence of minority communities.³³ In another contemporary incident, former Member of Congress Mel Watt testified in a lawsuit concerning post-2011 redistricting in North Carolina that a mapmaker had told him that he was drawing boundaries to create a district with a designated percentage of its electorate from a minority community; Congressman Watt's testimony helped the Supreme Court conclude that the resulting plan was unconstitutional.³⁴

When lawmakers have adopted redistricting plans to limit minority voters' influence as they are poised to exercise it, they have frequently failed to justify their decisionmaking in race-neutral terms. Boundaries that reviewing courts found proponents could not explain except as attempts to empower particular racial groups have been described as bearing "uncomfortable resemblance to political apartheid"³⁵ and "extreme and bizarre"³⁶. Discriminatory redistricting plans that restrain emerging communities' political influence create obvious mismatches

³² Abigail Thernstrom, "Redistricting, Race, and the Voting Rights Act," NATIONAL AFFAIRS (Spring 2010),

<https://www.nationalaffairs.com/publications/detail/redistricting-race-and-the-voting-rights-act>
³³ E.g., David Daley, "GOP Racial Gerrymandering Mastermind Participated in Redistricting in More States Than Previously Known, Files Reveal," THE INTERCEPT (September 23, 2019),

<https://theintercept.com/2019/09/23/gerrymandering-gop-west-virginia-florida-alabama/>

³⁴ Daniel Tokaji, "Restricting Race-Conscious Redistricting," THE REGULATORY REVIEW (July 31, 2017), <https://www.theregreview.org/2017/07/31/tokaji-restricting-race-conscious-redistricting/>; *Cooper v. Harris*, 581 U.S. ____ (2017).

³⁵ Nina Totenberg, "Questions of Race and Redistricting Return to the Supreme Court," NPR MORNING EDITION (December 5, 2016), <https://www.npr.org/2016/12/05/504188630/questions-of-race-and-redistricting-return-to-the-supreme-court>

³⁶ *Bush v. Vera*, 517 U.S. 952, 971 (1996).

between the preferences of the electorate and the officials who represent them, where minority community members' preferences depart from those expressed by white majorities.

Discriminatory Redistricting in Action

In 2011, as Texas undertook redistricting for Congressional and state legislative seats, the state's rapid Latino population growth had resulted in gain of four additional seats in Congress. Yet the new district map ultimately approved by the Texas Legislature failed to create even one new district in which Hispanic or other minority voters were likely to have the opportunity to elect the candidate of their choice. A federal district court reviewing the plan found clear evidence that the maps had been enacted with intent to discriminate against Latinos and African Americans, pointing to email messages between legislative staff that revealed plotting to move important landmarks and actively voting minority communities from districts in which minority voters were previously able to exert notable influence.³⁷ About 60 percent of Dallas County districts for the Texas House would have contained white majorities even though white voters only constituted about one-third of the County's electorate; districts themselves appeared "jagged [and] bizarrely shaped."³⁸ "The only explanation Texas offers for this pattern is 'coincidence', but if this was coincidence, it was a striking one indeed," U.S. Circuit Judge Thomas B Griffith noted.³⁹

Under the weight of pre-*Shelby County* administrative and court decisions invalidating its 2011 redistricting plans because of their discriminatory purpose, the Texas legislature eventually adopted a court-originated interim map in 2013. Further litigation and more findings that these subsequent maps repeated discriminatory features of the original maps ensued. The matter was not concluded until the Supreme Court issued a final decision in 2018 which had the effect of approving many of the districts adopted in 2013, and some that courts had ordered in intervening years to ensure fair opportunity to elect representatives in communities of Latino voters. The Supreme Court could not find discriminatory purpose in the legislature's adoption of the 2013 map, but did not disturb or dispute the determination that 2011 maps were infected with discriminatory intent to limit the influence of voters of color.

The Known Practice of Discriminatory District Design

The Voting Rights Advancement Act would require preclearance of redistricting plans that are adopted in diverse jurisdictions in the wake of significant demographic

³⁷ Memorandum Opinion, *Texas v. United States*, No. 11-1303 (TBG-RMC-BAH) (D. D.C. 2012), <http://electionlawblog.org/wp-content/uploads/texas-redistricting-district-court.pdf>

³⁸ Jose Garza, Mexican American Legislative Caucus, Texas House of Representatives, Written Testimony Submitted in Connection with Oversight Hearing of the House Judiciary Committee on Enforcement of the Voting Rights Act in Texas 10, May 3, 2019, <https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-Wstate-Garza-J-20190503.pdf>

³⁹ Robert Barnes, "Texas redistricting discriminates against minorities, federal court says," WASHINGTON Post (August 28, 2012), https://www.washingtonpost.com/politics/texas-redistricting-discriminates-against-minorities-federal-court-says/2012/08/28/f6e6a2e0-f156-11e1-892d-bc92fee603a7_story.html

change. In these conditions, the process of redesigning electoral boundaries inherently features greatest likelihood of discriminatory effect, and circumstances closely resemble those that have inspired lawmaking with discriminatory purpose over the course of the VRA's history. Preclearance coverage would ensure that an electoral change whose discriminatory history is tied to its secretive nature is subjected to greater public scrutiny.

According to our research, at least 389 attempts to adopt discriminatory redistricting plans that would have diluted underrepresented voters' voices have been invalidated by a court or DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.

Annexations and Deannexations that Change the Composition of the Electorate

Annexations and deannexations change the composition of the electorate eligible to vote in a given jurisdiction, and like redistricting and changes in method of election, they can diminish the political influence of racial and ethnic communities without explicitly declaring those intentions. When policymakers have altered municipal boundaries to selectively include or exclude certain populations, their efforts have had significant social impacts beyond their effect of excluding people living outside a town or district from elections. Communities of color intentionally excluded from a given jurisdiction lose access to infrastructure and services like trash collection and fire department protection, in addition to their voice in political affairs. Their home values may decrease and exposure to health risk increase incidental to their political exclusion. Racial and ethnic patterns in annexation decisions also reinforce social notions of the value and character of neighborhoods that have hurt underrepresented Americans and cemented disparities in access to employment, education, and other important opportunities for social and economic mobility.

Discriminatory Intent and Effect

Civil rights laws' early successes inspired the use of second-generation tactics to covertly suppress the political voice of emerging communities, while enduring residential racial segregation and racially polarized voting have made it possible for annexations and deannexations to become a recurring method of vote dilution. The dissimilarity index, a measure of how many people would need to move to achieve perfect integration, has improved for American cities between 1970 and 2010, but it is still true that in the typical urban area, well more than half of black residents would have to move residences to undo unnatural racial segregation.⁴⁰ Patterns of similar voting by groups of people who share minority racial and ethnic backgrounds also persist nationally⁴¹ and in discrete jurisdictions⁴². As a result of these phenomena,

⁴⁰ THE ECONOMIST, "Segregation in America," (April 4, 2018), <https://www.economist.com/graphic-detail/2018/04/04/segregation-in-america>

⁴¹ E.g., Zack Beauchamp, "The midterm elections revealed that America is in a cold civil war," Vox (November 7, 2018), <https://www.vox.com/midterm-elections/2018/11/7/18068486/midterm-election-2018-results-race-surburb>

⁴² Philip Bump, "Mississippi's special election is taking place in one of the most racially polarized states in the country," THE WASHINGTON POST (November 23, 2018),

officials who perceive political threat from cohesive populations of color can isolate those disfavored groups using geographic criteria, and design interventions with precision to achieve desired political results.

Lawmakers pursuing discriminatory ends through annexation and deannexation have circumvented places with significant minority populations and gone to extraordinary lengths to add white neighborhoods to their numbers. For example, in 1972, Lake Providence, Louisiana's population was evenly divided between white and African American communities. Two nearby areas requested annexation by Lake Providence; one had a largely African American population while the other was majority white. Lake Providence incorporated the white area and rejected the request from the African American area, and its decisions left the town with an electorate featuring a secure white majority.⁴³ Similarly, officials in Augusta, Georgia adopted a policy of rejecting annexations that would alter its racial makeup, and in furtherance of it, conducted community surveys in an effort to identify majority white areas for potential annexation.⁴⁴

Discriminatory annexation plans defy logic, or are adopted by proponents who obscure their true intent. For example, in the landmark case of an Alabama state law redrawing electoral boundaries in the city of Tuskegee, lack of a believable rationale led the court to conclude that a proposed plan violated the 15th Amendment. A deannexation in that case would have transformed a square-shaped boundary into a 28-sided figure that would have excluded much of the city's African American community from its outer limits. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In McClellanville, South Carolina, white officials discouraged minority community leaders from requesting annexation, foreshadowing rejection of any proposal that would have altered the town's demographic makeup. However, the same officials lied about those leaders' interest in annexation in submissions to the DOJ, in apparent hope of concealing the officials' racial motivations for resisting annexation.⁴⁵

Annexations and deannexations in diverse jurisdictions tend to disadvantage communities that have historically been targets of discrimination in voting. Sophisticated study of residential files and Census data revealed that over a broad geographic area and multiple individual transactions, communities with African American majority populations were the least likely to be annexed by a larger jurisdiction. Moreover, majority white towns were "much less likely to annex black

<https://www.washingtonpost.com/politics/2018/11/23/mississippi-special-election-is-taking-place-one-most-racially-polarized-states-country/>

⁴³ Department of Justice, Letter to Town of Lake Providence, Louisiana, December 1, 1972,

<https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1280.pdf>

⁴⁴ Department of Justice, Letter to Hon. Charles A. DeVane, Mayor, Augusta, Georgia, July 27, 1987, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2170.pdf>

⁴⁵ Department of Justice, Letter to Philip A. Middleton, Attorney at Law, re: the Town of McClellanville, South Carolina, May 6, 1974, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1090.pdf>

populations” even where a potential annexation would not have created a new black majority.⁴⁶

Discriminatory Annexation in Action

The City of Hanford in Kings County, California sits in the San Joaquin Valley, a rich agricultural region whose population has diversified significantly in recent decades with ebbs and flows of farmworker migration. Its Asian and Latino populations have been growing relative to populations of other races and ethnicities. Against this backdrop, Hanford submitted 73 proposed annexations for preclearance in 1992. Some of these had been adopted and implemented without being precleared, despite their significant impact on the Hanford electorate: the DOJ noted disapprovingly that “nearly half of the city’s...population reside[d] in these unprecleared annexed areas.”⁴⁷

In a letter objecting to their implementation, DOJ raised acute concerns with the series of annexations that Hanford seemingly had sought to hide. In aggregate, the addition of designated areas reduced the Latino proportion of city’s population by 6.5 percentage points. At the time, the city held at-large elections with staggered terms, and Latino voters had failed under that system to elect candidates of their choice because voting was racially polarized and dominated by the white majority that the annexations had reinforced.⁴⁸ Annexations to the city went forward after it adopted a system of single-member district elections that extended electoral opportunities to underrepresented components of the city’s population; today, two Latino members sit on the Hanford City Council.

The Known Practice of Annexing or Deannexing Neighborhoods to Diminish Minority Voters’ Influence

The Voting Rights Advancement Act would require preclearance of proposed annexations and deannexations only where a proposed change would significantly alter the racial or ethnic composition of the electorate in a diverse jurisdiction. The law would cover changes that would decrease by at least 3 percent a racial, ethnic, or language minority group’s share of a jurisdiction’s voting-age population, in a jurisdiction in which multiple racial or ethnic groups each constitute at least 20 percent of voting-age residents, or a single language minority group accounts for at least 20 percent of voting-age residents on Indian land. This formula focuses tightly on boundary changes that have an established pattern of discriminatory purpose and effect based in their context. According to our research, at least 62 proposals to annex or deannex specified territory that would have diluted underrepresented voters’ voices have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.

⁴⁶ E.g., Daniel T. Lichter, Domenico Parisi, Steven Michael Grice, and Michael Taquino, “Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns,” 72 *Rural Sociology* 47 (March 2007), <https://eric.ed.gov/?id=EJ806506>

⁴⁷ Department of Justice, Letter to Michael J. Noland, Esq. re: the City of Hanford, California, April 5, 1993, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/CA-1040.pdf>

⁴⁸ *Id.*

Restrictive Identification and Proof of Citizenship Requirements

At the outset of the VRA era, lawmakers often imposed prerequisites to registering or voting that went above and beyond the legal minimum qualifications of adulthood and U.S. citizenship. By design, these laws demanded actions that underrepresented voters were disproportionately unable to take, such as payment of poll taxes, and demonstration of English literacy. After federal protections of the equal right to vote evolved to specifically prohibit prerequisites like these, some states and localities responded by accelerating adoption of a similar alternate: strict documentary identification requirements to register or vote. The nation's first statewide proof of citizenship mandate for registering voters became law in Arizona in 2004, and the first statewide strict voter ID requirements appeared in 2005 in Indiana and Georgia, on the heels of the Help America Vote Act of 2002's codification of non-photo identification requirements for certain newly-registered voters.

Discriminatory Intent and Effect

A growing body of evidence demonstrates the discriminatory intent and effects of voter ID laws. Observers have inferred discriminatory intent from the lack of reasonable justification for imposition of ID requirements. No proponent of strict ID has ever produced credible evidence of widespread impersonation fraud in the registration or voting processes that identification checks would prevent. It is unlikely that individuals pretending to be either qualified unregistered citizens or actual registered voters could alter the outcome of an election without extraordinary effort. At the same time, voter participation rates have declined from the 1950s to the 2010s.⁴⁹ American democracy has not suffered because too many citizens have voted, but because too few have. Fraud fails as justification for imposing additional administrative burden and cost on the voting process.⁵⁰

Insiders' comments strongly suggest that strict identification requirements' goal is to impede voter participation. For example, North Carolina political consultant Carter

⁴⁹ Census Bureau, Current Population Survey, Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2018 (Table A-1), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html>

⁵⁰ The National Conference of State Legislatures (NCSL) counseled its members in a June 2014 memorandum that states implementing more exacting voter ID rules must expect to have to spend on providing free voter ID cards, enhanced voter education and public outreach, creation of election materials, and increased poll worker training time and wages. In addition, NCSL noted that many states had found it necessary to spend potentially significant sums on litigation, expanding access to IDs, and other administrative requirements embedded in enacting legislation, such as a New Hampshire mandate that election officials send postcards to voters completing affidavits in lieu of showing ID. Actual expenditures on these items have been and may be significant: the State of Indiana reported spending \$10,023,221 between 2007 and 2010 merely to provide free ID cards to qualified voters. The State of South Carolina spent more than \$3.5 million to defend its voter ID law against challenges lodged by the DOJ and aggrieved citizens. The Kansas Secretary of State's office spent \$310,000 on just one component of its public outreach campaign, the creation of a website to explain new voter ID laws. Karen Shanton and Wendy Underhill, National Conference of State Legislatures, *Costs of Voter Identification* (June 2014), http://www.ncsl.org/documents/legismgt/elect/Voter_ID_Costs_June2014.pdf

Wrenn said of related developments in his state, “Of course [voter ID laws are] political. Why else would you do it?”⁵¹ Former Wisconsin legislative staffer Todd Allbaugh revealed that he “was in the closed Senate Republican Caucus when the final round of multiple Voter ID bills were being discussed. A handful of the GOP Senators were giddy about the ramifications and literally singled out the prospects of suppressing minority and college voters.”⁵² Former Florida political operative and state Republican Party chair Jim Greer told *The Palm Beach Post* in 2012 that advocates he had worked with hoped to suppress voter turnout rather than solve any legitimate weakness in election administration by pushing for restrictions on voting, stating, “They never came in to see me and tell me we had a fraud issue. It’s all a marketing ploy.”⁵³ Then-Texas State Representative Todd Smith once acknowledged, “If the question is are the people that do not have photo IDs more likely to be minority than those that are not, I think it’s a matter of common sense that they would be.”⁵⁴

Unfortunately, restrictive identification requirements are an effective surgical method of making voting more difficult for disfavored voters. A long line of surveys and studies has consistently shown that potential African American, Latino, Native American, and other underrepresented voters disproportionately lack the identification documents they may need to register and to vote in person, and disproportionately face barriers to obtaining required identification.⁵⁵ Voters of color disproportionately experience the discouraging effects of ID requirements in polling places: for example, exit surveys of Texan, Pennsylvanian, and Virginian voters conducted after adoption of stricter voter ID requirements revealed that black voters were 4.5 times more likely than non-black voters to have been unable to vote because of an ID-related problem; in the Dallas area, the individuals who reported inability to vote because of ID issues were exclusively black and Latino voters.⁵⁶

Tests have found that voters of color are more likely to be asked for identification than white voters, and even that election administrators were relatively less likely to respond to requests for information about identification requirements when they came from Latino aliases.⁵⁷ It is therefore regrettably unsurprising that polls and

⁵¹ William Wan, “Inside the Republican creation of the North Carolina voting bill dubbed the ‘monster’ law,” *WASHINGTON POST* (September 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html

⁵² Michael Wines, “Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain,” *N.Y. TIMES* (September 16, 2016), <https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html>

⁵³ *Id.*

⁵⁴ *Veasey v. Perry*, 71 F. Supp.3d 627, 657 (S.D. Tex. 2014).

⁵⁵ *E.g.*, S. GOV’T ACCOUNTABILITY OFF., ISSUES RELATED TO STATE VOTER IDENTIFICATION LAWS 34-43, GAO-14-634, Sep. 2014, <http://www.gao.gov/assets/670/665966.pdf> (citing previous published studies and original research).

⁵⁶ Kelly S. McConville, Lynne Stokes, and Mary Gray, “Accumulating Evidence of the Impact of Voter ID Laws: Student Engagement in the Political Process,” 5 *Statistics and Public Policy* 1 (January 15, 2018).

⁵⁷ *E.g.*, R. Michael Alvarez, Stephen Ansolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III, Thad Hall, 2008 *Survey of the Performance of American Elections: Final Report* 3, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; Lonna Rae Atkeson, Yann P. Kerevel, R. Michael Alvarez, and Thad E. Hall, “Who Asks For Voter Identification? Explaining Poll-Worker Discretion,” 76 *J.*

surveys conducted after the 2014 and 2016 elections consistently indicated that strict voter ID requirements disproportionately lowered minority turnout. For example, post-election surveys conducted in Texas by Professors Jim Granato and Renée Cross of the University of Houston and Mark P. Jones of Rice University revealed that in the state's 23rd Congressional District and in Harris County, Latino non-voters were substantially more likely than white non-voters to cite lack of a qualifying ID as a principal reason for their non-participation, even though strong majorities of people queried actually had a qualifying ID.⁵⁸

Discriminatory Identification Requirements in Action

In 2006, Ohio enacted legislation that directed poll workers to require certain naturalized voters to present proof of U.S. citizenship before providing them with ballots or approving their provisional votes to be counted. The law would have applied to any voter challenged on the basis of his or her citizenship, and would have required election judges processing challenges to distinguish between native-born and naturalized citizens, and to single out naturalized Americans for extra scrutiny. Whereas native-born Americans would not have been subject to demands for documentation, any challenged voter who professed to be a naturalized citizen would have been asked to immediately produce proof of citizenship, or in the alternative, to vote a provisional ballot that would only be counted if she or he displayed proof of citizenship to an election official within ten days of attempting to vote. Prior to adoption of this legislation, Ohio law allowed any challenged naturalized voter to swear an oath affirming his or her citizenship in lieu of producing original documentation.

Ohio's voter challenge provision had a long history of being used discriminatorily, and demographic realities ensured that 2006 amendments to it would have had a disparate negative impact on voters of color. For example, as plaintiffs explained in their argument for an injunction, the state legislature had amended the same statute in 1868 to create a specialized mechanism for challenging voters with a "distinct and visible admixture of African blood," on the explicit basis of their race. In 2004, several Ohio voters pre-emptively filed suit to block an impending campaign to challenge voters at selected precincts serving populations of largely African American voters. As of 2006, naturalized Ohioans were far more likely than all eligible voters to be historically underrepresented people of color: according to the Census Bureau's American Community Survey 1-year data, whereas African Americans, Latinos, and Asian Americans constituted just 14.3 percent of the state's eligible electorate that year, they accounted for 47.8 percent of naturalized Ohioans eligible to cast ballots, who were potentially subject to additional restrictions on the franchise.

OF POLITICS 944 (October 2014); Ariel R. White, Noah L. Nathan, and Julie K. Faller, "What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials," 109 AM. POL. SCI. REV. 129 (February 2015).

⁵⁸ Mark P. Jones, Jim Granato, and Renée Cross, *The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District 23* (April 2017), <http://www.uh.edu/hobby/voterid2016/voterid2016.pdf>; Mark P. Jones, Jim Granato, and Renée Cross, *The Texas Voter ID Law and the 2014 Election: A Study of Texas's 23rd Congressional District* (Aug. 2015), <https://www.bakerinstitute.org/media/files/files/e0029eb8/Politics-VoterID-Jones-080615.pdf>.

In light of its potential to significantly increase racial and ethnic profiling of Ohio voters, and its likely discriminatory effects, a federal court granted a permanent injunction invalidating this law in October of 2006. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006). Despite its confirmed unconstitutionality, the statute remains on the books and even underwent minor amendments in 2012. Ohio Rev. Code Ann. § 3505.20(A).

The Known Practice of Imposing Unjustified, Unnecessary Identification Requirements on Intending Voters

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of any proposed restrictive identification prerequisites to registration that are more exacting than those in effect on the bill's effective date. The preclearance requirement would also apply to any proposed identification prerequisites to obtaining a ballot that are more restrictive than the Help America Vote Act's (HAVA) requirements for first-time voters who have not yet conveyed to officials either their state identification card number or last four digits of their Social Security number.

The recent wide proliferation of such discriminatory laws mitigates in favor of subjecting them to advance scrutiny. According to the National Conference of State Legislatures, prior to 1965 only one state – South Carolina – had a law in effect requiring any particular documentation of intending voters. This law was not yet a strict requirement in 1965, as it merely mandated requests for documents bearing voters' names. As of 1980, just five states had some form of an identification requirement for voters on their books; thereafter, however, the adoption of restrictive voter identification mandates began to spread noticeably. During the VRA's modern era, between 1982 and 2019, more than half of all states, and a number of political sub-jurisdictions, adopted stronger identification prerequisites for voters that threatened to deprive qualified American voters of the franchise.⁵⁹ According to our research, at least 26 laws that would have toughened voter ID requirements have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.

Polling Place Closures and Realignment

In 2019, in-person voting at temporary polling places is the primary way many citizens cast ballots in American elections. Many members of the electorate derive unique and enduring benefit from the experience of in-person voting. Voters at polling places generally are confident that their ballots have been received and counted because they have observed the process and equipment. These voters enjoy camaraderie with fellow voters, as well as the opportunity to demonstrate their civic responsibility before assembled members of their communities. In-person voters can take advantage of interpretation services offered on location, which can be crucial to casting an informed vote for Americans not yet fully fluent in English.

⁵⁹ National Conference of State Legislatures, Voter ID History (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>

For many voters in jurisdictions that restrict absentee voting, the ability to access polling places still determines whether or not participation in elections is a possibility.

In sum, consistently large numbers of eligible voters cast ballots in-person, and depend entirely upon the ability to find and physically access polling places in order to do so. Percentages of all voters who have voted in person have remained consistent or risen in recent years: according to the Election Assistance Commission, 71.1 percent of 2014 voters and 73.1 percent of 2018 voters visited a polling place.⁶⁰ In recognition of this reality, people intent on limiting the electoral influence of underrepresented communities have used manipulation of the number and location of polling places as a tool of discrimination.

Discriminatory Intent and Effect

Demand for polling resources is trending upward. Our nation's population continues to increase: in 2005, the first year for collection of annual American Community Survey data, there were just over 197 million adult U.S. citizens eligible to vote. By 2017, there were more than 231 million adults eligible to vote.⁶¹ The number of potential naturalized voters alone increased by about 50 percent during this 12-year window. Over the course of the past 54 years, with the VRA in effect, voter participation rates among members of historically excluded communities have increased exponentially, although disparities persist in voter participation rates between people of varying races and ethnicities.

At a time when our electorate is larger and more diverse than ever before, and given that so many voters need, or prefer, to vote in-person at a polling place, it is difficult to rationalize the extremely disturbing trend among a significant number of jurisdictions to reduce the number of polling places available to voters. For example, in just 757 counties formerly covered under Section 5 of the VRA, there were 1,688 fewer polling places in 2018 than in 2012.⁶²

Unfortunately, in addition to neglecting indicators of significant need for accessible in-person voting, polling place relocation plans frequently move voting further from communities of color, even though members of those communities have less access to transportation⁶³ and less flexibility to set aside work and family-related obligations⁶⁴ to travel to and wait at polling locations. Potential voters remain likely

⁶⁰ U.S. Election Assistance Commission, *Election Administration and Voting Survey: 2018*

Comprehensive Report 20 (June 2019), https://www.eac.gov/assets/1/6/2018_EAVS_Report.pdf

⁶¹ Census Bureau, American Community Survey, Sex by Age by Citizenship Status, 2005 and 2017 American Community Surveys, 1-year data (Table B05003).

⁶² Leadership Conference Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* 10 (September 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>

⁶³ As of 2015, just 6.5 percent of non-Hispanic white households, but 19.7 percent of African American households, 12 percent of Latino households, 11.3 percent of Asian/Pacific Islander households, and 13.6 percent of Native American households lacked access to a private vehicle. National Equity Atlas, Policylink, USC Program for Environmental and Regional Equity, "Indicators: Car Access" (2015), https://nationalequityatlas.org/indicators/Car_access

⁶⁴ Terence M. McMenamin, "A time to work: recent trends in shift work and flexible schedules," *Monthly Labor Review* 8 (Dec. 2007), <https://goo.gl/g1aPsR>; Census Bureau, Current Population Survey 2018 Annual Social and Economic Supplement, Average Number of People per Family Household With Own

to experience negative effects of polling place closures that vary in likelihood and severity according to their race and ethnicity, because, as a 2018 Washington Post headline stated, “America is more diverse than ever – but still segregated.”⁶⁵ Americans are more likely than not to live near others who predominantly share the same race and ethnicity.⁶⁶ The geographic concentration of communities of color makes it more likely that many minority voters suffer when a polling place closes, and more likely that decisionmakers purposefully or incidentally put minority voters at disadvantage by withdrawing resources from their communities.

For example, in 2014, county boards of election across the state of North Carolina changed the locations of about one-third of early voting polling places. Researchers who calculated registered voters’ resulting distance to travel to a new location found that the average white voter’s distance from the nearest early voting site had increased by just 26 feet, while the average black voter’s distance from the nearest early voting site had increased by a quarter of a mile.⁶⁷

In Alaska, numerous Native American voters live in rural, geographically isolated locations, and have found themselves at risk of being effectively barred from voting by proposed polling place closures and consolidations such as a series of changes proposed in 2008 that would have assigned some voters to sites they could only reach by plane.⁶⁸ These proposals were the latest in a string of similar practices that left 24 Alaska Native villages without any polling place in 2004; they were withdrawn only after the DOJ refused to preclear the closures and demanded more information about their effects on isolated voters.⁶⁹

Discriminatory Polling Place Closures in Action

In 2006, authorities moved to adopt a series of significant changes to the election of governors of the North Harris Montgomery Community College District near Houston. Among them were dramatic proposed changes to polling place locations: authorities sought to move the election for seats on the Board of Trustees to a new date, and to open just 12 polling places for that election, instead of the total for the previous Board election of 84 polling places.

Children Under 18, by Race and Hispanic Origin, Marital Status, Age, and Education of Householder (Table AVG3); Family Caregiver Alliance, *Caregiver Statistics: Demographics* (2016),

<https://www.caregiver.org/caregiver-statistics-demographics>

⁶⁵ Aaron Williams and Armand Emamdjomeh, “America is more diverse than ever – but still segregated,” THE WASHINGTON POST (May 10, 2018),

<https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/>

⁶⁶ Solomon Greene, Margery Austin Turner and Ruth Gourevitch, “Racial Residential Segregation and Neighborhood Disparities,” (August 29, 2017), <https://www.mobilitypartnership.org/publications/racial-residential-segregation-and-neighborhood-disparities>

⁶⁷ William Busa, insightus, *North Carolina’s Shell Game of Electoral Apartheid: How the Board of Elections Shoved Black Voters Away From the Ballot Box in 2014* (November 23, 2015), https://insight-us.org/fair_places.html

⁶⁸ Amici Curiae Brief of the Alaska Federation of Natives, Alaska Native Voters and Tribes in Support of Respondents 21-23 (filed February 1, 2013), *Shelby County v. Holder*, No. 12-96,

https://www.narf.org/bloglinks/shelby_county_brief.pdf

⁶⁹ *Id.*

Details of the plan for locating the smaller number of polling sites created additional constitutional concern. At the time that changes were proposed, there were more than 540,000 registered voters eligible to cast ballots for seats on the Board of Trustees; therefore, 12 polling sites would have each served a staggering average of 45,000 potential voters each, residing in a geographic area covering more than 1,000 square miles. Worse yet, the polling place locations chosen reflected severe racial and ethnic disparity. While the proposed location to which the smallest proportion of voters of color were assigned would have served about 6,500 voters, the proposed location that was assigned the largest proportion of people of color would have served more than 67,000 voters.

The DOJ concluded that the proposed consolidation of polling places for District elections was intentionally discriminatory.⁷⁰ In the following years, advocates also successfully challenged the use of at-large elections for seats on the District's Board of Trustees. Because of the protections afforded by the VRA, the Board today includes two Latino members and two African American members.

The Known Practice of Closing and Relocating Polling Places to Increase the Distance Between Ballot Boxes and Communities of Color

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of proposed reductions and relocations of polling places that would affect Census tracts with diverse populations, as well as reservations and land trust areas in which at least 20 percent of adult residents are members of a language minority group. The bill targets for scrutiny changes that would lessen the number of locations serving geographic concentrations of historically underrepresented voters. At their worst, actual proposals to relocate polling places that have arisen during the VRA era would have made it virtually impossible for voters of color to exercise the franchise, and our democratic system cannot tolerate elections that incorporate such impenetrable barriers to the ballot, particularly those that discriminatorily affect voters from language and racial minority communities.

According to our research, at least 33 attempts to move or consolidate polling locations have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.

Withdrawals of Multilingual Materials and Assistance

Throughout the United States' history, authorities have overtly and implicitly conditioned access to the polls on linguistic ability and literacy as a proxy for characteristics including race and national origin. Connecticut adopted the nation's first statewide voter literacy test in 1855, and went on to apply its restriction on voter access to people disfavored both because they were relatively less-educated and because of their minority race, ethnicity, and national origin, including a group of farmworkers of Puerto Rican origin who were ruled ineligible to vote in Windsor,

⁷⁰ Department of Justice, Letter to North Harris Montgomery Community College District, May 5, 2006, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2960.pdf>

Connecticut in 1956.⁷¹ South Carolina adopted an “eight box law” in 1882 that mandated use of different ballot boxes for different races, such that ballots were not counted unless voters matched the correct ballot to the correct receptacle by reading signage.⁷² The state of New York adopted a targeted English literacy requirement for voters in 1921, in the midst of accelerated Puerto Rican migration into the state.⁷³

Although federal law now prohibits literacy tests and outright prohibitions on voting based on linguistic ability, voters who are not yet fully fluent in English remain numerous, and vulnerable to disenfranchisement grounded in inability to navigate English-only election procedures. As of 2018, Census data indicate that more than 37 million American adults speak a language other than English, and more than 11.4 million of them are not yet fully fluent in English. Someone who cannot access a ballot or voting instructions in a language she or he can read is unlikely to attempt to vote, and experience confirms that voters who are perceived as members of language minority communities, or who are not fluent in English, are less likely to vote and more likely to encounter hostility at the polls than voters comfortable in English.

Discriminatory Intent and Effect

Denials of and other barriers to language assistance in elections arose at a time when elected officials and election administrators were less likely to obscure their discriminatory intent than they are today, and their history reveals their modern-day purpose. For example, Civil War-era debate of voting qualifications and procedures featured explicit substitution of the concept of literacy for race, as where U.S. Senator Lot Morrill proposed to replace the word “white” with “literate” in a clause that would have limited exercise of the franchise in the District of Columbia to select adult male residents.⁷⁴

A pair of 1905 editorials in support of Arizona’s English literacy requirement stated, first, that “There is a foreign element in our voting population which is both illiterate and ignorant of our institutions,” and, eleven days later, that, “We are referring, or course, to the ignorant Mexican vote.”⁷⁵ One of the delegates who debated what became New York’s constitutional English literacy requirement for voters stated, in 1915, “More precious even than the forms of government are the mental qualities of

⁷¹ Connecticut Humanities, Literacy Tests and the Right To Vote (November 5, 2018),

<https://connecticuthistory.org/literacy-tests-and-the-right-to-vote/>

⁷² Merrill Fabry, A Brief History of Voting Problems on Election Day, TIME (November 8, 2016),

<https://time.com/4531415/history-voting-problems-election-day/>

⁷³ E.g., Juan Cartagena, “Puerto Ricans and the 50th Anniversary of the Voting Rights Act,” Centro Voices e-Magazine, Center for Puerto Rican Studies, Hunter College, CUNY (August 2015), <https://centropr.hunter.cuny.edu/centrovoices/current-affairs/puerto-ricans-and-50th-anniversary-voting-rights-act>

⁷⁴ Kirk Branch, “‘A Mockery in the Name of a Barrier’: Literacy Test Debates in the Reconstruction-Era Congress, 1864-1869,” 3 Literacy in Composition Studies (2015), <http://licsjournal.org/OJS/index.php/LICS/article/view/82/114>

⁷⁵ Antonia Noori Farzan, “Racist History 101: When Arizona Blocked Spanish Speakers From Voting,” PHOENIX NEW TIMES (March 19, 2018), <https://www.phoenixnewtimes.com/news/arizonas-racist-history-blocking-spanish-speakers-from-voting-10239647>

our race. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale but necessary and valuable infusion of Southern and Eastern European races, whose traditions and inheritances are wholly different from our own, without education, we shall imperil the structure we have so laboriously struggled to maintain. The danger has begun...We should check it."⁷⁶

More recently, inference and observation have affirmed the racially and ethnically discriminatory purpose of restrictions on language access. Poll watchers working in south Phoenix, Arizona during the 1964 Presidential election observed white activists – including future Supreme Court Chief Justice Rehnquist – carrying out a systemic effort to selectively challenge black voters and people not yet fully fluent in English to confirm their residences and to read and interpret Constitutional passages to demonstrate sufficient literacy to vote.⁷⁷

As of 1970 – before Congress extended the VRA to protect language minority citizens – Texas had in effect both a law that forbid election administrators from using any language other than English except in limited circumstances, and a law that forbid assistance to any voter except those physically unable to mark ballots. The Court that invalidated the state's prohibition on assistance to illiterate voters noted that evidence showed that "the majority of illiterate voters in Texas are members of the Mexican-American and Negro ethnic groups," and that "the effect of the statute may be to exclude many Mexican-Americans and Negroes from assistance." *Garza v. Smith*, 320 F. Supp. 131, 135 (W.D. Tex. 1970).

Efforts to obstruct language assistance and eliminate materials and services in languages other than English have proven in practice to negatively affect voters of color. According to 2017 American Community Survey data, more than half of the adult U.S. citizens most likely to need linguistic assistance with voting are Latino; in total, more than 85 percent of eligible voters who may not be able to cast an informed ballot in English are people of color. People who are not fully confident in their ability in English, and people who speak little or no English, are likely to struggle throughout the duration of the voting process where forced to navigate it without in-language materials or assistance. Successful voting demands voters' awareness of numerous items of personalized information that can be impossible to obtain across a language barrier, including registration deadline, voting location and hours, and sophisticated understanding of ballot measures and candidates' policy positions.

The effects of language assistance denials on voters of color are as would be expected, and as described by Richard Salame writing in 2018 for *The Nation*, "[Limited English proficient] voters who aren't accommodated...often have a difficult time exercising their right to vote. LEP voters have much lower participation rates than non-LEP voters, and studies have shown their participation rate is significantly

⁷⁶ 3 RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1915, BEGUN AND HELD AT THE CAPITOL IN THE CITY OF ALBANY ON TUESDAY THE SIXTH DAY OF APRIL 29 12-13 (1915).

⁷⁷ Dennis Roddy, "Just our Bill," PITTSBURGH POST-GAZETTE (December 2, 2000), <http://old.post-gazette.com/columnists/20001202roddy.asp>

higher where there are language accommodations.”⁷⁸ Numerous researchers concur that where the VRA’s provisions that expand linguistic access to elections apply, they correspond with a positive impact on language minority voting communities’ rates of participation in elections and governance. For example, Latinos who live in jurisdictions that provide Spanish-language election information and assistance are more likely to be registered to vote than Latinos who live in jurisdictions that operate monolingual elections⁷⁹, and more likely to vote as well⁸⁰. Moreover, over the course of the VRA’s language assistance provisions’ existence, language minority community members’ registration and voter turnout rates, and presence in office, have all increased in the aggregate.⁸¹

Discriminatory Denials of Language Assistance in Action

Although its overall population growth has slowed in recent decades, Pennsylvania’s Latino population has grown particularly rapidly. Latino communities have a visible presence in Philadelphia and other urban centers in the state, but also in cities and counties with smaller populations that offer a high quality of life and attractive work opportunities. For instance, the Pew Hispanic Center noted that Luzerne County was one of the ten sub-jurisdictions in the nation with the fastest-growing Latino community between 2007 and 2014.⁸² Over the course of the past three decades, the town of Hazleton in Luzerne County has acquired a majority-Latino population from a start of near-zero.⁸³

The rapid pace of demographic change in some places in Pennsylvania presaged some high-profile negative responses, such as the events of the 2001 and 2002 general elections in Berks County, Pennsylvania. Federal election monitors present during those elections documented a litany of egregious behaviors and obstructions of language assistance which became the basis of a successful VRA lawsuit against the County.

A federal judge overseeing the case found that pollworkers had made audible hostile statements about Latino voters, including, “This is the U.S.A. – Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name,” “No Hispanics wake up before 9:30 a.m.,” and, “They can’t speak, they can’t read, and they come into vote.” Pollworkers

⁷⁸ Richard Salame, “Across the Country, Limited-English-Proficiency Voters Faced Obstacles,” THE NATION (November 12, 2018), <https://www.thenation.com/article/limited-english-proficiency-voters-midterms/>

⁷⁹ E.g., Michael Parkin and Frances Zlotnick, “The Voting Rights Act and Latino Voter Registration: Symbolic Assistance for English-Speaking Latinos,” 36 *Hispanic Journal of Behavioral Sciences* 48 (2014).

⁸⁰ E.g., Michael Jones-Correa, “Language Provisions Under the Voting Rights Act: Effectiveness and Implementation” (testimony presented to a public meeting of the Presidential Commission on Election Administration, Philadelphia, PA, September 4, 2013); Michael Jones-Correa, “Language Provisions Under the Voting Rights Act: How Effective Are They?” 86 *Social Science Quarterly* 549 (2005).

⁸¹ E.g., James T. Tucker, “Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act,” 10 *NYU Journal of Legislation and Public Policy* 206 (2006).

⁸² Fast-growing Hispanic counties, *supra* n. 4.

⁸³ Charles F. McElwee, “Chain Migration Comes to Hazleton,” CITY JOURNAL MAGAZINE (Spring 2018), <https://www.city-journal.org/html/chain-migration-comes-hazleton-15832.html>

also demanded photo identification not required by law from Latino voters, and selectively required Latino voters only to confirm their addresses because these individuals were presumed to “move a lot within the housing project.”⁸⁴

Several people reported that pollworkers prevented them from assisting voters not fluent in English, including community activist Luis Pazmino, who was physically pushed by an election judge who told him, “You’re not supposed to be here.”⁸⁵ DOJ officials and community activists had brought these issues to the attention of local authorities and seen them persist, so the Court charged County officials with knowledge that there were problems, and refusal to remedy them.

Concluding that this pattern of hostile treatment had discriminatory effects, the Court granted plaintiffs a preliminary injunction and mandated further negotiation of a specific plan of action to ensure fair treatment of Berks County’s language minority voting population. Thanks to VRA protections, the County today provides extensive information about and assistance with elections in Spanish, and community organizers have declared voter mobilization efforts in 2016 and 2018 successful. “The numbers are unbelievable and show the community came out and voted” in 2018, according to Michael Toledo, CEO of the Daniel Torres Hispanic Center in Reading, Pennsylvania.⁸⁶

The Known Practice of Withdrawing In-Language Materials and Assistance That Are Available in English

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance before discontinuing provision of in-language materials or assistance, and before selectively altering the provision or distribution of materials and assistance in languages other than English. The bill would focus scrutiny on instances in which laws and policy decisions single language minority voters out for less favorable treatment than English-speaking majorities, such as those occasions on which pollworkers purport to apply restrictions against people who offer to interpret for voters with limited proficiency, but do not treat people assisting voters with physical or mental challenges similarly.

According to our research, courts and lawmakers have taken remedial action to combat discriminatory effects or intent in at least 23 instances of obstruction, withdrawal, or severe neglect of language assistance services since 1982. This count of matters litigated excludes charges brought against recalcitrant jurisdictions solely on the basis of Section 4(e), 203, or 208 of the VRA, or any combination thereof, because such matters are commonly resolved absent allegations or findings of retrogression, discriminatory effects, or discriminatory intent.

⁸⁴ *U.S. v. Berks Co.*, 250 F. Supp. 2d 525, 529 (E.D. Pa. 2003).

⁸⁵ *Id.* at 530-31.

⁸⁶ Anthony Orozco, “Latinos encouraged by election turnout in Reading,” *READING EAGLE* (November 10, 2018), <https://www.readingeagle.com/news/article/latinos-encouraged-by-election-turnout-in-reading>

Conclusion

Congress achieved what no other political, social, or moral authority could or had done when it enacted the VRA in 1965, and enhanced its protections in subsequent decades. The VRA has brought about historic progress toward equal participation in elections, and it cemented in place a national consensus in opposition to measures that declared their discriminatory purpose to disenfranchise an American because of her or his race, ethnicity, or linguistic preference. However, the disparities that inspired extraordinary legislative action have not yet disappeared, and the tactics that sustain them are in use in a wider cross-section of our communities than ever before, as voters of color are increasingly present and mobilizing in places that were previously homogeneous. The VRA's tools must be employed as responsively and creatively as are the changes to election policies that some lawmakers employ to silence emerging communities. We urge Congress to enact the Voting Rights Advancement Act and its practice-based preclearance formula to ensure ongoing progress toward democracy that reflects the full diversity of our nation.⁸⁷

⁸⁷ The foregoing testimony is based upon and draws from NALEO Educational Fund's forthcoming report produced in conjunction with Asian Americans Advancing Justice - AAJC and the Mexican American Legal Defense and Educational Fund, "Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Voices." We extend our grateful thanks to our partners for permitting us to republish portions of the report.

Mr. COHEN. Thank you, Mr. Vargas.

Mr. John Yang is president, chief executive director of Asian Americans Advancing Justice. He leads the organization's efforts to fight for civil rights and empower Asian Americans to create a more just America for all through public policy, advocacy, education, and litigation.

He previously served in the Obama Administration as senior adviser for trade and strategic initiatives at the U.S. Department of Commerce. Before that, partner at a major law firm in DC. He graduated with honors from G.W. Law School here in DC and served on the George Washington Law Review and moot court team.

Mr. Yang, welcome, and you are recognized for 5 minutes.

TESTIMONY OF JOHN YANG

Mr. YANG. Thank you, Chairman Cohen. And thank you, Chair Nadler, and thank you to Ranking Member Johnson and the other Members of Congress.

Let me first start by offering my condolences as well for your loss of Representative Cummings. As a civil rights organization that advances the civil and human rights of Asian Americans and to promote a fair and just society for all, Representative Cummings was certainly a beacon for us and a hero for us on many of the issues that we worked on every day.

I really appreciate the opportunity to testify here today about known practices coverage and the need to have practice-based preclearance provisions in the Voting Rights Advancement Act. In conjunction with the restored coverage formula, it is critical for Asian Americans to have known practices coverage and let me tell you a little bit about why this is important for Asian Americans.

Asian Americans are the fastest-growing community in the United States. Between the 2000 Decennial Census and the 2010 Decennial Census, we grew by 46 percent. Today, we represent about 22.6 million Americans in the United States, which is a little bit over 6 percent. We have grown in the voter rolls tremendously in the last several election cycles.

Between 2012 and 2016, we have grown by over 1 million voters. Now that growth is not monolithic. In fact, our fastest areas of growth are in Nevada, Arizona, North Carolina, and Georgia. So, it is not only in the major urban centers that oftentimes people think about with respect to Asian Americans.

Notwithstanding this growth of Asian Americans and the fact that our community has been here for centuries, whether as workers for the Transcontinental Railroad, whether as the Japanese-American soldiers that served in the most decorated combat regiment during World War II, Asian Americans are often still seen as outsiders, as foreigners, as aliens. We have been denied rights entitled to other American citizens, including the right to vote, the right to be in the United States.

It is only recently in the last 50 years or so that many of these laws have changed. So, this is not only a problem with the present, but it is also a problem of the past. It is also a problem of the present.

Asian Americans are becoming more politically visible, and our numbers are showing that. So, with that addition in numbers, with that addition in the electorate, that growth also creates an increase in racial appeals against Asian-American candidates and efforts to erect barriers to the ballot for Asian-American voters.

For example, in 2004, the primary elections in Bayou La Batre, Alabama, supporters of a White incumbent facing a Vietnamese-American opponent during the primaries challenged the eligibility of only Asian-American voters at the polls and falsely accusing them of not being American citizens or not being city residents. The losing incumbent's rationale was, "If they couldn't speak English good enough, then they probably aren't American citizens." That year, Bayou La Batre did elect its first Asian-American city council member.

One Texas lawmaker suggested that Asian-American voters should adopt names that are easier for Americans to deal with to avoid difficulties resulting from voter identification laws. The statement made clear that the Asian-American community was not welcome in American politics and notably cast Asian Americans apart from other Americans.

So, as you have heard from my colleagues and other witnesses today, these practice-based preclearance programs focus on these practices that have been shown to be used against the political voice of a growing emerging community of voices.

The U.S. Census Bureau forecasts that while the number of Asian Americans will grow between now and 2040, the proportion of Asian Americans who are immigrants will decrease, with high naturalization rates and an increase in U.S.-born Asian Americans in the upcoming years. What that also means is that voter participation rates among the Asian-American community will continue to increase in rapid numbers, and indeed, its political visibility will only increase as well.

It is precisely for these reasons that restoring and strengthening the Voting Rights Act is a top priority for our organization.

Thank you very much.

[The statement of Mr. Yang follows:]

STATEMENT OF JOHN C. YANG

Introduction

The Voting Rights Act of 1965 (VRA) has been vital to the prevention of actual and threatened discrimination aimed at Asian Americans in national and local elections, and for increasing the community's access to the ballot. And while the VRA continues to protect the voting rights of Asian Americans, its efficacy has been curtailed by the harmful and short-sighted decision by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 2 (2013) (*Shelby County*). This testimony will detail the Asian American electorate and the discrimination Asian Americans face in the Post-Shelby County world as well as the need to restore and strengthen the VRA through modernizing how to determine coverage for section 5 preclearance. While Asian Americans are the nation's fastest growing racial group and are quickly becoming a significant electoral force, the community will not be able to maximize its political power without the full protection of their voting rights.

Based on the perception of Asian Americans as "outsiders," "aliens," and "perpetual foreigners," Asian Americans were denied rights held by U.S. citizens, including the ability to vote for most of the country's existence. Racist laws barring Asian Americans from entering the country, staying in the country or voting in the country, among other exclusionary laws, were often driven by fear of the "other" and the potential threat to the political livelihood of those in power. This is not only a prob-

lem of the past but one that rears its ugly head in present day and one that is poised to become even bigger due to the demographic shifts in America. As the fastest growing racial or ethnic group for almost the last two decades, Asian Americans are becoming more politically visible and viable in new jurisdictions across the country, including the South. With this growth is an increase in racial appeals against Asian American candidates and efforts to erect barriers to the ballot for Asian American voters. The practice-based preclearance provision in the Voting Rights Advancement Act, in conjunction with a restored coverage formula, is critical to protecting the emerging political voice of Asian American voters. In targeting those practices that have been used through history to silence the political voice of minority communities just when they begin to reach critical mass and when they could begin to impact the outcome of elections, practice-based preclearance will ensure that these practices are reviewed in areas where Asian Americans and other communities of color are reaching the point where they are perceived as threats to ensure that the practice being proposed is not discriminatory or harmful to the minority community.

Organizational Information

Asian Americans Advancing Justice—AAJC (Advancing Justice—AAJC) is a member of Asian Americans Advancing Justice (Advancing Justice), a national affiliation of five civil rights nonprofit organizations that joined together in 2013 to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. The Advancing Justice affiliation is comprised of our nation's oldest Asian American legal advocacy center located in San Francisco (Advancing Justice—ALC), our nation's largest Asian American advocacy service organization located in Los Angeles (Advancing Justice—LA), the largest national Asian American policy advocacy organization located in Washington DC (Advancing Justice—AAJC), the leading Midwest Asian American advocacy organization (Advancing Justice—Chicago), and the Atlanta-based Asian American advocacy organization that serves one of the largest and most rapidly growing Asian American communities in the South (Advancing Justice—Atlanta). Additionally, over 160 local organizations are involved in Advancing Justice—AAJC's Community Partners Network, serving communities in 33 states and the District of Columbia. Advancing Justice—AAJC was a key player in collaboration with other civil rights groups regarding the reauthorization of the Voting Rights Act in 2006. In the 2012 election, Advancing Justice conducted poll monitoring and voter protection efforts across the country, including in California, Florida, Georgia, Illinois, Texas, and Virginia. And since the 2012 election, Advancing Justice—AAJC, in partnership with APIAVote, has run a multilingual Asian election protection hotline, 888-API-VOTE that provides in-language assistance to voters who have questions about the election process or are experiencing problems while trying to vote.

Asian American Electorate

Since the passage of the 1965 Immigration Act and the end of race-based immigration quotas, Asian American communities in the United States have grown dramatically. According to Census 2010, Asian Americans are the nation's fastest growing racial group, with a growth rate of 46% between 2000 and 2010, growing to over 17.3 million Asian Americans and making up 6 percent of the total population.¹ Today there are over 22.6 million Asian Americans living in the United States.²

Often viewed as a monolithic group, Asian Americans are exceedingly diverse with different needs. The country's fastest growing Asian American ethnic groups were South Asian, with the Bangladeshi and Pakistani American populations doubling in size between 2000 and 2010.³ Chinese Americans continue to be the largest Asian American ethnic group, numbering nearly 3.8 million nationwide in 2010, followed in size by Filipino, Indian, Vietnamese, and Korean Americans.⁴

Asian Americans are also geographically diverse and are growing fastest in non-traditional gateway communities. Asian American populations in Nevada, Arizona,

¹ Asian Pac. Am. Legal Ctr. & Asian Am. Justice Ctr., *A Community of Contrasts: Asian Americans in the United States: 2011*, 6, 16, http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf [hereinafter *Community of Contrasts*].

² U.S. Census Bureau, 2018 Population Estimates, Table PEPALL5N: Annual Estimates of the Resident Population by Sex, Single Year of Age, Race Alone or in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2018 (July 1, 2018).

³ *Community of Contrasts* at 9.

⁴ *Id.*

North Carolina, and Georgia were the fastest growing nationwide between 2000 and 2010.⁵ California's Asian American population remained by far the country's largest, with New York, Texas, New Jersey, and Hawai'i following in size.⁶ Of the 19 states home to more than 225,000 Asian Americans, six are in the South (Texas, Florida, Virginia, Maryland, Georgia, and North Carolina) and four are in the Midwest (Illinois, Michigan, Minnesota, and Ohio).⁷ The South was the fastest growing region for the Asian American population during the last decade.⁸

At the same time, we saw a parallel increase among Asian American voters. The number of eligible Asian Americans grew by over 2 million between 2012 and 2016, with almost an additional 1.14 million added to the electorate. This nearly doubles the average increase of 620,000 new voters in the prior three presidential cycles.⁹ 2018 showed a continuation of these record increases, with an increase of over 1.6 million eligible Asian Americans in 2018, and an even higher increase in Asian Americans who actually registered and voted.¹⁰ This represented a 24.4% increase in registered Asian Americans and 29.2% increase in Asian Americans who voted between the 2012 and 2016 presidential elections and a 21.3% increase and 43% increase respectively between the 2014 and 2018 midterm elections (see table below).¹¹ This growth will continue, with Asian American and Pacific Islander (AAPI) voters making up five percent of the national electorate by 2025 and 10 percent of the national electorate by 2044.¹²

Table: Asian American Electorate: 2012–2018

Presidential Elections			
Year	Asian CVAP	Registered Asian	Asians Voted
2016	10,283,000	115,785,000	15,043,000
2012	8,254,000	4,649,000	3,904,000
Growth in numbers	2,029,000	1,136,000	1,139,000
Growth by percent (%)	24.6	24.4	29.2

Midterm Elections			
Year	Asian CVAP	Registered Asian	Asians Voted
2018	11,128,000	15,898,000	14,519,000
2014	19,504,000	4,642,000	2,575,000
Growth in numbers	1,624,000	1,256,000	1,944,000
Growth by percent (%)	14.6	21.3	43.0

The growing Asian American electorate is also starting to influence election outcomes. Of the 27 congressional districts in 11 states where Asian American and Pacific Islander voters could have maximum impact (as identified leading into the 2018 elections), 19 districts had an AAPI electorate that was larger than the margin of victory.¹³ The 2018 elections also saw 18 additional races where the AAPI electorate

⁵ *Id.* at 8.

⁶ *Id.*

⁷ *Id.*

⁸ Asian Americans Advancing Justice, *A Community of Contrasts: Asian Americans, Native Hawaiians and Pacific Islander in the South: 2014*, 6, https://www.advancingjustice-aaajc.org/sites/default/files/2016-09/2014_Community%20of%20Contrasts.pdf.

⁹ See U.S. Census Bureau, Current Population Survey, Table 2. Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2012, https://www2.census.gov/programs-surveys/cps/tables/p20/568/table02_5.xls. See also U.S. Census Bureau, Current Population Survey, Table 2. Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2016, U.S. Census Bureau, https://www2.census.gov/programs-surveys/cps/tables/p20/580/table02_5.xls.

¹⁰ Author's calculations of U.S. Census Bureau data available on voter participation in presidential and midterm elections through its Current Population Survey.

¹¹ *Id.*

¹² Center for American Progress and AAPI Data, "State of Asian Americans and Pacific Islanders" (2014), <http://ampr.gs/AAPIreports2014>.

¹³ These were districts where AAPIs represent at least 5 percent of eligible voters, and where the Cook Political Report had declared the race to be competitive. Sono Shah, *AAPI Voters in 2018 Congressional Elections: Bigger Impact than Anticipated*, AAPIData, Nov. 20, 2018, <http://aapidata.com/blog/aapi-voters-post18-cd/>.

was greater than the margin of victory.¹⁴ This meant that “[i]n total, AAPI voters represented a significant portion of the electorate in 37 congressional races across 17 different states.”¹⁵ As our communities continue to grow and expand in new areas, they will have even more relevance as it relates to electoral outcomes.

Discrimination Against the Asian American Electorate

Discrimination against Asian American populations is rooted in the perception of Asian Americans as “outsiders,” “aliens,” and “perpetual foreigners.”¹⁶ Based on this perception, Asian Americans were denied rights held by U.S. citizens, including the ability to vote for most of the country’s existence. 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.¹⁷ 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.¹⁸

Legally identified as aliens “ineligible for citizenship,” Asian immigrants were prohibited from voting and owning land.¹⁹ Both immigrant and native-born Asian Americans also experienced pervasive discrimination in everyday life.²⁰ Perhaps the most egregious example of discrimination was the incarceration of 120,000 Americans of Japanese ancestry during World War II without due process.²¹ White immigrant groups whose home countries were also at war with the United

States during that time were not similarly detained and no assumptions were similarly made regarding their loyalty, trustworthiness and character.²²

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 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). Racial stereotyping of Asian Americans reinforces an image of Asian Americans as “different,” “foreign,” and the “enemy,” leading to stigmatization of Asian Americans, heightened racial tension, and increased discrimination. Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 UCLA Asian Pac. Am. L.J. 72, 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); Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women’s L.J. 165, 181 (1995); Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930–32 (1993); see also 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”).

¹⁷ 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).

¹⁸ 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).

¹⁹ See, *Ozawa v. United States*, 260 U.S. 178, 198 (1922); see, 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”).

²⁰ *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); see also *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren).

²¹ See, Exec. Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the internment); see also *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment under strict scrutiny review).

²² 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. & 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”).

Racist sentiment towards Asian Americans is not a passing fad but a continuing reality, fueled in recent years by a growing xenophobic and racist backlash against immigrants.²³ Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.²⁴ Between 2004 and 2015, crimes targeting Asian-Americans tripled in Los Angeles county.²⁵ Nationally, FBI data anti-Asian bias crimes increased by around 20 percent, from 137 in 2016 to 165 in 2017.²⁶

Discriminatory attitudes towards Asian Americans also manifest themselves in the political process as well. For example, during a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters adopt names that are “easier for Americans to deal with” in order to avoid difficulties resulting from voter identification laws.²⁷ This statement made clear that the Asian American community was unwelcome in American politics and notably cast Asian Americans apart from other “Americans.” At a campaign rally during the 2004 U.S. Senate race in Virginia, incumbent George Allen repeatedly called a South Asian volunteer for his opponent a “macaca”—a racial epithet used to describe Arabs or North Africans that literally means “monkey”—and simultaneously talked about the “war on terror.”²⁸

We have also seen efforts to undermine the community’s political voice, such as what happened during the 2004 primary elections in Bayou La Batre, Alabama. Supporters of a White incumbent, facing a Vietnamese American opponent during the primaries, challenged the eligibility of only Asian Americans at the polls by falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions.²⁹ The losing incumbent’s rationale was “if they couldn’t speak good English, they possibly weren’t American citizens.”³⁰ DOJ’s investigation found the challenges racially motivated and prohibited interference from the challengers during the general election.³¹ That year, Bayou La Batre elected its first Asian American to the City Council.³² Similarly, in Harris County (Houston), Texas, during the 2004 Texas House of Representatives race, accusations of non-citizen voting were implied in the request for an investigation by the losing incumbent into the election resulting in the victory of Hubert Vo, a Vietnamese American.³³ While both recounts affirmed Vo’s victory, making him the first Vietnamese American State representative in Texas history, his campaign voiced concern that such an investigation could intimidate Asian Americans from political participation altogether in future elections.³⁴

²³ See U.S. Dep’t of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities 10 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), http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf.

²⁴ See, e.g., *Id.*, at 7–9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ).

²⁵ Jenny J. Chen, *First-Ever Tracker Of Hate Crimes Against Asian-Americans Launched*, NPR CodeSwitch, Feb. 17, 2017, <https://www.npr.org/sections/codeswitch/2017/02/17/515824196/first-ever-tracker-of-hate-crimes-against-asian-americans-launched> (referencing a Los Angeles County Commission on Human Relations report on hate crimes).

²⁶ This number likely under-represents the number of hate crimes and incidents due to under-reporting of existing hate crimes and incidents. Chris Fuchs, *Hate Crimes Spiked in 2017, Community Advocates Think There’s Even More*, NBC News, Nov. 21, 2018, <https://www.nbcnews.com/news/asian-america/hate-crimes-spiked-2017-community-advocates-think-there-s-even-n938551>.

²⁷ G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chron., Apr. 8, 2009, <http://www.chron.com/news/houston-texas/article/Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php>.

²⁸ See Tim Craig & Michael D. Shear, *Allen Quip Provokes Outrage, Apology; Name Insults Webb Volunteer*, Wash. Post, Aug. 15, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/14/AR2006081400589.html>.

²⁹ See H.R. Rep. No. 109–478, at 45 (2006); *Challenged Asian Ballots in Council Race Stir Discrimination Concerns*, Associated Press, Aug. 30, 2004, at 2B.

³⁰ See DeWayne Wickham, *Why Renew Voting Rights Act? Ala. Town Provides Answer*, USA Today, Feb. 22, 2006, http://usatoday30.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-act_x.htm (quoting defeated City Council incumbent Jackie Ladnier).

³¹ See *Id.*

³² See Press Release, U.S. Dep’t of Justice, *Justice Department to Monitor Elections in New York, Washington, and Alabama* (Sept. 13, 2004), http://www.justice.gov/opa/pr/2004/September/04_crt_615.htm (“In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters.”).

³³ See *Decided Victory: Heflin’s Camp Swelled Store of Disinformation*, Houston Chronicle, Feb. 9, 2005, <http://www.chron.com/opinion/editorials/article/Decided-victory-Heflin-s-camp-swelled-store-of-1640120.php>.

³⁴ See *Id.*; Thao L. Ha, *The Vietnamese Texans*, in *Asian Texans: Our Histories and Our Lives*, 263, 284–85 (Irwin A. Tang ed., 2007).

Need for Restoring and Strengthening Section 5 To Protect Asian American Voters

Section 5 of the Voting Rights Act prohibits the implementation by covered jurisdictions of “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” without first receiving approval, or “preclearance,” from DOJ or the U.S. District Court for the District of Columbia.³⁵ Section 5 applies to all voting changes in covered jurisdictions, including redistricting, annexation of other territories or political subdivisions, and polling place changes. Voting changes with a discriminatory purpose or with a retrogressive effect (*i.e.*, where the change puts minorities in a worse position than if the change did not occur) will not be pre-cleared and the submitting jurisdiction would be prohibited from adopting the voting change.

In enacting the VRA in 1965, Congress recognized that previous efforts to litigate discriminatory voting practices were limited in their effectiveness as particularly recalcitrant jurisdictions would simply replace the struck-down discriminatory practice with another, newer discriminatory practice. Responding to the persistent nature of discriminatory schemes in voting, Congress developed a mechanism in the VRA to provide a “check” on whether proposed voting changes by particularly bad actors would be problematic for minority voters—section 5 preclearance. This infrastructure (preclearance) has been critical to (a) prevent discriminatory voting practices from going into effect, (b) provide notice to the community about potential discriminatory changes and (c) provide a cost-effective and swift mechanism to determine whether a proposed voting change should be approved. As a result, voting became more accessible to all communities.

Because of the changing demographics of this country, section 5 is needed more than ever. Racial tensions often occur when groups of minorities grow rapidly in an area and where there is an increase in political relevance of that minority community, such as Asian American communities across the country.³⁶ This can lead to fear of and resentment toward Asian Americans by those in power, which can then result in hampering the Asian American community’s exercising of their right to vote free of harassment and discrimination.

This has been seen throughout our country’s history. Concerns about the political impact of new immigrants to American ran rampant and drove many policy decisions around the contours of suffrage.³⁷ However, “[i]ntense as apprehensions about poor European immigrants may have been, they paled in comparison to American attitudes toward the Chinese and other east Asians: By the final quarter of the nineteenth century, most Americans—and especially those on the West Coast—wanted not only to keep the Chinese from voting but to halt Chinese immigration

³⁵ 52 U.S.C. 1A10304. *The following States are covered by section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Only certain counties or towns in the following states are covered under section 5: California, Florida, Michigan, New York, North Carolina, and South Dakota. It must be noted, however, that even if only a part of a jurisdiction is covered by section 5, congressional and State legislative redistricting plans for the entire State must be submitted for review. For a detailed listing of counties and towns covered, please visit http://www.justice.gov/crt/about/vot/sec_5/covered.php.*

³⁶ See generally Toni Monkovic, *Why Donald Trump Has Done Worse in Mostly White States*, New York Times, Mar. 8, 2016, http://www.nytimes.com/2016/03/09/upshot/why-donald-trump-has-done-worse-in-mostly-white-states.html?_r=0 (“Political scientists have written about the importance of tipping points in ethnic strife or resentment around the globe. It occurs when one group grows big enough to potentially alter the power hierarchy.”); see also Audrey Singer, Jill H. Wilson & Brooke DeRenzis, *Metropolitan Policy Program at Brookings, Immigrants, Politics, and Local Response in Suburban Washington* (2009), https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf (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*, New York Times, Feb. 20, 2009, http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing); Ramona E. Romero & Cristo-lbal Joshua Alex, *Immigrants Becoming Targets of Attacks, National Campaign to Restore Civil Rights*, Jan. 26, 2009, <http://rollback.typepad.com/campaign/2009/01/it-has-happened-again-in-early-december-less-than-a-month-after-seven-teenagers-brutally-attacked-and-killed-marcelo-luc.html> (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*, Los Angeles Times, Apr. 12, 2007, <http://articles.latimes.com/2007/apr/12/local/me-chinohills12> (describing protest of Chino Hills residents to Asian market opening in their community where 39% of residents were Asian).

³⁷ Alexander Keyssar, *Right to vote: The contested history of democracy in the United States* (2008) (“Right to Vote”).

and even deport those who were already here.”³⁸ But the federal bar on Chinese (and eventually all Asian) immigration was not enough for some in the states. For example, in California in the late 1870s, an anti-Chinese political party promoted a “a slew of measures designed to remove the Chinese from the state’s economic and political life. One proposal even called for disfranchising anyone who hired a Chinese worker.”³⁹ Their efforts resulted in “the California Constitutional Convention of 1878–1879 . . . pass[ing] almost without objection a series of anti-Chinese articles. One delegate claimed that without such laws, California would become ‘the mercenary Mecca of the scum of Asia—a loathsome Chinese province.’ Although many of these measures were thrown out by the courts, the suffrage provision of the 1879 constitution remained in force until 1926. It specified that “no native of China” (the wording was aimed at circumventing the Fifteenth Amendment’s ban on racial barriers) ‘shall ever exercise the privileges of an elector in this State.’”⁴⁰

Today, the Asian American population is growing rapidly in previously covered section 5 jurisdictions. Georgia and North Carolina are among the three fastest-growing Asian American populations during the last decade.⁴¹ Five of the states covered in their entirety and another four states covered partially by section 5 are among the top 20 states with the fastest-growing Asian American populations. The remaining covered states all experienced a growth in their Asian American populations.⁴² As Asian American communities continue to grow and move to nontraditional cities and areas of the country, we have seen an increase in racial appeals and racial discrimination in elections. The aforementioned “perpetual foreigner” stereotype is embedded in the political process. Insidious manifestations of the stereotype can be found in the verbal attacks levied against Asian American candidates and voters, negative political ads that use the misconception of “Asia” as an enemy to the U.S., and manipulation of images of candidates to trigger negative stereotypes of minority candidates. As reported in previous testimony by Asian Americans Advancing Justice—AAJC, the following excerpt provides some incidents occurring in the South against Asian American candidates and voters:

In November 2005, a candidate of South Asian descent, Tom Abraham, running for City Council Seat 4 in Orange City, Florida was mocked by his opponent for his accent at a community forum. His opponent, Dan Sherrill, claimed that he could not understand him and was quoted by the Orlando Sentinel as saying, “I’m usually not prejudiced, but I don’t want an Indian in my government. As far as I know, he could be a nice guy, but these kind of people get embedded over here. You remember 9/11.” The St. Petersburg Times further reported that Sherrill said that voters wouldn’t support Abraham if they saw and heard him

...

In May 2010, Americans for Job Security ran a television ad set in Bangalore, India with traditional South Asian music playing in the background. The ad utilized dark-skinned and accented actors dressed in traditional South Asian dress facetiously thanking U.S. Senate candidate and Arkansas Lieutenant Governor Bill Halter for outsourcing Arkansan jobs abroad

In June 2010, State Senator Jake Knotts described South Carolina State Representative Nikki Haley, an Indian American who was running in the state’s gubernatorial race, as “[a] f___ing raghead . . . [w]e got a raghead in Washington; we don’t need one in South Carolina . . . [s]he’s a raghead that’s ashamed of her religion trying to hide it behind being Methodist for political reasons.” Knotts further stated he believed Haley had been set up by a network of Sikhs and was programmed to run for governor of South Carolina by outside influences in foreign countries. . . .

...

In September 2010, State Senator Nancy King targeted an opponent in the Maryland primary race for State Senate, Maryland State Delegate Saqib Ali, by sending mailers in which Ali’s photograph was altered with darker skin tone and hair. Despite the King campaign’s denial, the difference was

³⁸*Id.* at 113.

³⁹*Id.* at 114.

⁴⁰*Id.* Similar provisions appeared in the constitutions of Oregon and Idaho.

⁴¹Terry M. Ao, Alyson Hong, & Sophia Lai, *Census 2000: Asian Population Demographic Data*, 10 (2002), http://www.advancingequality.org/files/census_handbook.pdf.

⁴²*Id.*

clear when comparing the mailer to the original photo (that was also included in the mailer).⁴³

We have continued to see these racist attitudes and stereotypes permeate our political process over the last several election cycles:

- During the 2017 local and statewide elections in New Jersey, Asian American candidates were targets of racist propaganda. First, in Edison, New Jersey, two school board candidates, Jerry Shi and Falguni Patel were targeted with anti-immigrant mailers that said “Make Edison Great Again” and calling for their deportation.⁴⁴ The mailers said that “[t]he Chinese and Indians are taking over our town,” and “Chinese school! Indian school! Cricket fields! Enough is enough.”⁴⁵ Next, in Hoboken, New Jersey, Sikh mayoral candidate, Ravi Bhalla was targeted with racist flyers placed on car windshields in Hoboken with the message “Don’t let **TERRORISM** take over our town!” above his picture.⁴⁶ Ultimately, despite these xenophobic attacks, all three Asian Americans won their elections.
- At a Congressional hearing on March 15, 2018, Japanese-American Congresswoman Hanabusa questioned Interior Secretary Ryan Zinke about why the Trump Administration “cancelled funding for a program to preserve the history of internment camps that held people of Japanese ancestry—most of them Japanese-Americans—during World War II.”⁴⁷ As part of her questioning, Representative Hanabusa began by detailing her own family’s experiences during this atrocious time in American history. In response, Secretary Zinke, began his response with an insensitive “Oh, Konnichiwa.”⁴⁸ “Konnichiwa is a Japanese expression that roughly translates to ‘good afternoon.’ This prompted Hanabusa to shoot back that it was still morning, which meant ‘ohayo gozaimasu’ would actually be the more appropriate greeting.”⁴⁹ Secretary Zinke’s remarks demonstrate the ongoing “perpetual foreigner” problem faced by Asian Americans; although she is a fourth-generation American-born member of Congress, Secretary Zinke somehow thought it appropriate to greet the Congresswoman in Japanese.

The community’s population growth will also likely lead to increased efforts to undermine the political voice of Asian Americans similar to the recent and ongoing efforts to restrict access to the polls.⁵⁰ Asian Americans are potential swing voters⁵¹ and are becoming numerous enough to make the difference in certain races, and they will be facing new, more aggressive tactics to minimize their political impact.

⁴³ *Testimony for the Senate Judicial Hearing on the Voting Rights amendment Act of 2014*, S.1945, (June 25, 2014) (statement of Asian Americans Advancing Justice—AAJC) (footnotes omitted), <http://vrafortoday.org/wp-content/uploads/2014/07/AAJC-Testimony-for-6-25-14-Senate-Judiciary-Hearing-on-VRAA.pdf>.

⁴⁴ Amy B. Wang, “DEPORT”: Racist Campaign Mailers Target Asian School Board Candidates, *Washington Post*, Nov. 2, 2017, https://www.washingtonpost.com/news/education/wp/2017/11/02/deport-racist-campaign-mailers-target-asian-school-board-candidates/?utm_term=.c84f7d1ab7a2.

⁴⁵ *Id.*

⁴⁶ Alyana Alfaro, *Racist Campaign Literature Surfaces in New Jersey*, *Observer*, Nov. 6, 2017, <http://observer.com/2017/11/racist-campaign-literature-surfaces-in-new-jersey/>.

⁴⁷ Interior Secretary Ryan Zinke criticized for internment camp remarks, *CBS News*, March 16, 2018, <https://www.cbsnews.com/news/interior-secretary-ryan-zinke-criticized-for-internment-camp-remarks-colleen-hanabusa/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Ari Berman, *Texas Voter ID Law Discriminates Against Women, Students and Minorities*, *The Nation*, Oct. 23, 2013, <http://www.thenation.com/blog/176792/texas-voter-id-law-discriminates-against-women-students-and-minorities#> (noting that Texas’ voter ID law likely would have an extremely disproportionate impact on Hispanic voters); Emily Deruy, *Could New Voter ID Laws Really Disenfranchise 10 Million Latinos?*, *Fusion*, Sep. 24, 2012, <http://fusion.net/jstice/story/voter-id-laws-hinder-10-million-eligible-latinos-11471> (arguing that recent proof of citizenship and photo identification requirements and voter roll purges had the potential to disenfranchise millions of Latino voters); and Christopher Ingraham, *Study Finds Strong Evidence for Discriminatory Intent Behind Voter ID Laws*, *Washington Post*, Jun. 3, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/03/study-finds-strong-evidence-for-discriminatory-intent-behind-voter-id-laws/> (finding that State legislators who had supported voter ID laws were less likely to respond to emails sent from voters with Hispanic-sounding names).

⁵¹ See Caitlin Yoshiko Kandil, *Asian Americans’ numbers and political influence are growing*, *Los Angeles Times*, Sept. 22, 2016, <http://www.latimes.com/socal/daily-pilot/entertainment/tn-wknd-et-0925-asian-american-voting-20160903-story.html>; Seung Min Kim, *The one big Senate race that Asian-Americans could decide*, *Politico*, Aug. 25, 2016, <https://www.politico.com/story/2016/08/senate-nevada-asian-american-voters-227366>.

Unfortunately, the U.S. Supreme Court weakened the VRA in *Shelby County*. The Court ruled 5–4 that the formula used to determine section 5 jurisdictions was based on “decades-old data and eradicated practices,” despite the extensive record confirming that these areas continued to commit acts of voting discrimination.⁵² Thus, while the Court did not invalidate section 5, it rendered it useless by invalidating the formula that determined what jurisdictions were required to submit voting changes for preclearance. But at the same time, the Court recognized that “no one doubts” that voting discrimination still exists and invited Congress to pass legislation with a modernized formula.⁵³

Since the Court invalidated the key enforcement provision of the Act in 2013, voting discrimination has become harder to stop. In states, counties, and cities across the country, legislators pushed through laws designed to make it harder for minorities to vote. For example, in 2013, mere months after the *Shelby County* decision, North Carolina—where the Asian American population increased by 85 percent between 2000 and 2010—passed H.B. 589. The legislation restricted voting through a ban on paid voter registration drives; eliminated same-day voter registration; allowed voters to be challenged by any registered voter of the county in which they vote, rather than just their precinct; reduced early voting by a week; authorized vigilante poll observers with expanded range of interference; expanded the scope of who may examine registration records and challenge voters; repealed out-of-precinct voting; eliminated the flexibility in opening early voting sites at different hours within a county; and curtailed satellite polling sites for the elderly or voters with disabilities. In striking down the law, the Fourth Circuit found that the legislature purposefully and selectively decided to attack specific election laws that benefit African American voters in order to impede their political participation. In fact, the court noted that “the new provisions target African Americans with almost surgical precision” and “impose cures for problems that did not exist.”⁵⁴ This litigation would not be necessary if section 5 were still in full force. Indeed, one State senator noted that it was because of the Court’s decision in *Shelby County* that the legislature was free to “go with the full bill,” indicating his full awareness that they would never have received approval for the bill under the full protections of the VRA. In 2016, 14 states, including Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia, which were previously covered in full or in part by section 5, had new voting restrictions that include strict photo ID requirements and registration restrictions in place for the first time in a presidential election.⁵⁵

As noted in our forthcoming joint report with the Mexican American Legal Defense and Education Fund (MALDEF) and the National Association of Latino Elected and Appointed Officials (NALEO), a legislative fix to the *Shelby County* decision must include both a substitute coverage formula and a mechanism that also addresses the needs of emerging communities of color that face discrimination aimed to silence their political influence by those currently in power. A history-based coverage formula alone is not enough to protect the voting rights of emerging minority populations. The practice-based preclearance mechanism in HR 4 focuses on suspect practices that have historically been utilized to silence the political voice of communities of color and would require preclearance review (performed by either the Department of Justice or the federal District Court in Washington, DC) prior to implementation of the known practice.⁵⁶ The coverage for Practice-Based Preclearance as contemplated by HR 4 would apply to diverse jurisdictions throughout the country, generally defined as those states and political subdivisions in which two or more racial, ethnic, or language minority groups each represent 20 percent or more of the citizen voting-age population or in which a single language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. These jurisdictions would only be required to seek preclearance if they are making one of the covered changes and not

⁵² *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2627 (2013).

⁵³ *Id.* at 2619.

⁵⁴ Robert Barnes and Ann E. Marimow, *Appeals Court Strikes Down North Carolina’s Voter-ID Law*, Washington Post, July 29, 2016, https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html?utm_term=.8e86e5a8273c. See also Complaint, *North Carolina State Conference of the NAACP et al. v. McCrory et al.*, No. 1:13-cv-658 (M.D.N.C. Aug. 12, 2013), Complaint, *League of Women Voters et al. v. North Carolina et al.*, No. 1:13-cv-00660 (M.D.N.C. Aug. 12, 2013), and, Complaint, *U.S. v. The State of North Carolina*, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

⁵⁵ Brennan Center for Justice, *Webpage on New Voting Restrictions in America*, https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf.

⁵⁶ See the forthcoming joint report from Advancing Justice—AAJC, MALDEF and NALEO on practice-based preclearance for a deeper analysis of the specific practices.

all voting changes. This is important for Asian American communities that are growing exponentially in new cities and counties, where they are beginning to emerge as a potential political power. Preclearance has been proven to protect the voting rights of Asian Americans and is needed today.

Section 5 has helped address discriminatory redistricting plans that continue to be drafted in states with large Asian American communities. As shown in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas Legislature drafted a redistricting plan, Plan H283, that would have had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote. Since 2004, the Asian American community in Texas State House District 149 has voted as a bloc. With Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their State representative. District 149 has a combined minority citizen voting-age population of 62 percent.⁵⁷ Texas is home to the third-largest Asian American community in the United States, growing 72 percent between 2000 and 2010.⁵⁸ 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.⁵⁹ Plan H283 would have thus abridged the Asian American community's right to vote in Texas by diluting the large Asian American populations across the state.⁶⁰

In addition to discrimination in redistricting, Asian American voters have also endured voting system changes that impair their ability to elect candidates of choice. For example, before 2001 in New York City, the only electoral success for Asian Americans was on local community school boards. In each election—in 1993, 1996, and 1999—Asian American candidates ran for the school board and won.⁶¹ These victories were due, in part, to the alternative voting system known as “single transferable voting” or “preference voting.” Instead of selecting one representative from single-member districts, voters ranked candidates in order of preference, from “1” to “9.”⁶² In 1998, New York attempted to switch from a “preference voting” system, where voters ranked their choices, to a “limited voting” system, where voters could select only four candidates for the nine-member board, and the nine candidates with the highest number of votes were elected.⁶³ This change would have put Asian American voters in a worse position to elect candidates of their choice.⁶⁴

⁵⁷ See United States and Defendant-Interveners Identification of Issues 6, *Texas v. United States*, C.A. No. 11–1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

⁵⁸ See Community of Contrasts, Appendix B.

⁵⁹ 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 <http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf>.

⁶⁰ In fact, it was only due to section 5 that the Texas Legislature was not able to dilute the Asian American community's right to vote. Advancing Justice—AAJC's partner, the Texas Asian-American Redistricting Initiative (TAARI), working with a coalition of Asian American and other civil rights organizations, participated in the Texas redistricting process and advocated on the District 149 issue. Despite the community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and Plan H283 was ultimately rejected as not complying with section 5. See *Texas v. United States*, C.A. No. 11–1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3. Indeed, AALDEF submitted an amicus brief to the D.C. District Court illustrating how the Texas plan retrogressed the ability of Asian Americans to elect a candidate of their choice and violated section 5. However, the U.S. Supreme Court vacated the District Court of the District of Columbia's ruling suspending Texas' redistricting map as moot in light of their decision in *Shelby*.

⁶¹ See Lynette Holloway, *This Just In: May 18 School Board Election Results*, New York Times, June 13, 1999, <http://www.nytimes.com/1999/06/13/nyregion/making-it-work-this-just-in-may-18-school-board-election-results.html>; Jacques Steinberg, *School Board Election Results*, New York Times, June 23, 1996, <http://www.nytimes.com/1996/06/23/nyregion/neighborhood-report-new-york-up-close-school-board-election-results.html>; Sam Dillon, *Ethnic Shifts Are Revealed in Voting for Schools*, New York Times, May 20, 1993, <http://www.nytimes.com/1993/05/20/nyregion/ethnic-shifts-are-revealed-in-voting-for-schools.html>.

⁶² See Thomas T. Mackie & Richard Rose, *The International Almanac of Electoral History*, 508 (3d ed. 1991).

⁶³ See 1998 N. Y. Sess. Laws 569–70 (McKinney).

⁶⁴ See Letter from M. Fung, AALDEF Exec. Dir., and T. Sinha, AALDEF Staff Attorney, to E. Johnson, U.S. Dep't of Justice (Oct. 8, 1998) (submitted to Congress and on file with counsel). See also, Voting Rights Act: section 5 of the Act—History, Scope, and Purpose, Hearing Before the H. Subcomm. on the Const., H. Judiciary Comm., 109th Cong. 1664–66 (2005) (appendix to statement of the Honorable Bradley J. Schlozman, U.S. Dep't. of Justice) (providing section 5 objection letter to Board and summarizing changes made to the voting methods, along with overall objections to the changes).

Furthermore, the ability of Asian Americans to vote is also frustrated by sudden changes to poll sites without informing voters. For example, in 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, AALDEF discovered that a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks. The Board chose to close down the poll site and no notice was given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under section 203.⁶⁵ With section 5 no longer applicable in most jurisdictions, disruptive changes to polling sites, voting systems, and redistricting plans can now occur unfettered, wreaking havoc on Asian American voters' ability to cast an effective ballot.

Conclusion

Despite the gains that have been made since the enactment of the VRA, more is left to be done. Voting discrimination, as Chief Justice Roberts acknowledged in his opinion, is still very real and very current. The U.S. Census Bureau forecasts that while the number of Asian immigrants will grow between now and 2040, the proportion of Asian Americans who are immigrants will decrease, with high naturalization rate and in increase of U.S.-born Asian Americans in the coming years. It is likely that voter participation rates among the Asian American community, and indeed its political visibility, will only increase. It is precisely for these reasons that restoring and strengthening the Voting Rights Act is a top priority for our organization.

Mr. COHEN. Thank you, sir, Mr. Yang. I appreciate it very much.

Our next witness is Ms. Janai Nelson, associate director-counsel for the NAACP Legal Defense Fund. A member of the LDF's litigation and policy team, she was one of the lead counsels of *Veasey v. Abbott*, the Federal challenge to Texas' voter ID law. Prior to joining the LDF, in 2014 she was associate dean for faculty scholarship and associate director of Ronald H. Brown Center for Civil Rights and Economic Development at St. John's University School of Law, where she was a full professor of law.

J.D. from UCLA, articles editor at the UCLA Law Review, consulting editor of the National Black Law Journal, and associate editor of the UCLA Women's Law Journal. She has a B.A. from NYU in Mr. Nadler's district. She has served as a law clerk for the Honorable Theodore McMillian on the U.S. District Court of Appeals for the Eighth Circuit and the Honorable David Coar of the U.S. District Court for the Northern District of Illinois.

Ms. Nelson, you are recognized for 5 minutes. Thank you.

TESTIMONY OF JANAI NELSON

Ms. NELSON. Chairman Cohen, Ranking Member Johnson, Chairman Nadler, and Members of the subcommittee, my name is Janai Nelson, and I am the associate director-counsel of the NAACP Legal Defense and Educational Fund.

⁶⁵ The voters were only protected from this sudden change that would have caused significant confusion and lost votes because DOJ issued an objection under section 5 and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. See Asian American Legal Defense and Education Fund, *Asian Americans and the Voting Rights Act: The Case for Reauthorization*, 41 (2006), <http://www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf>.

On behalf of the Legal Defense Fund, I extend our deepest condolences for the loss of the Honorable Elijah Cummings. He was a dear friend of our institution, and we regret his death immeasurably.

Thank you for the opportunity to testify this morning on the might of Congress' enforcement power in the area of voting and the critical need to exercise that power by passing the Voting Rights Advancement Act. LDF has fought to secure, protect, and advance voting rights for Black voters and other voters of color since its founding in 1940 by Thurgood Marshall.

From our early victory in 1944 eliminating all-white primaries in Texas to our victory a full 70 years later in 2014 proving the racially discriminatory intent and effect of Texas' voter ID law, LDF has challenged both blatant racially exclusionary voting barriers and their modern-day corollaries. As a result, we can attest to the exigent need for Congress to restore and strengthen the Voting Rights Act of 1965. Indeed, Congress has the explicit constitutional duty to ensure the equally protected vote of every eligible voter regardless of race.

Racial discrimination in voting is so antithetical to our democratic ideals that we amended the Constitution to expressly prohibit it and to expressly delegate to Congress the ability to enforce its protections, and it is that power that we ask Congress to exercise today.

Since the Supreme Court's decision in *Shelby County v. Holder*, gutting the VRA's preclearance provision in 2013, there has been a proliferation of discriminatory voting practices across the country. More than 16 States have passed laws that made it more difficult for African Americans and other voters of color to vote. LDF recently published a report summarizing some of the barriers Black voters faced in seven States in the 2018 midterm elections—Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas—where voters experienced poll closures, malfunctioning machines, inaccurate voter rolls, and long lines up to 4 hours.

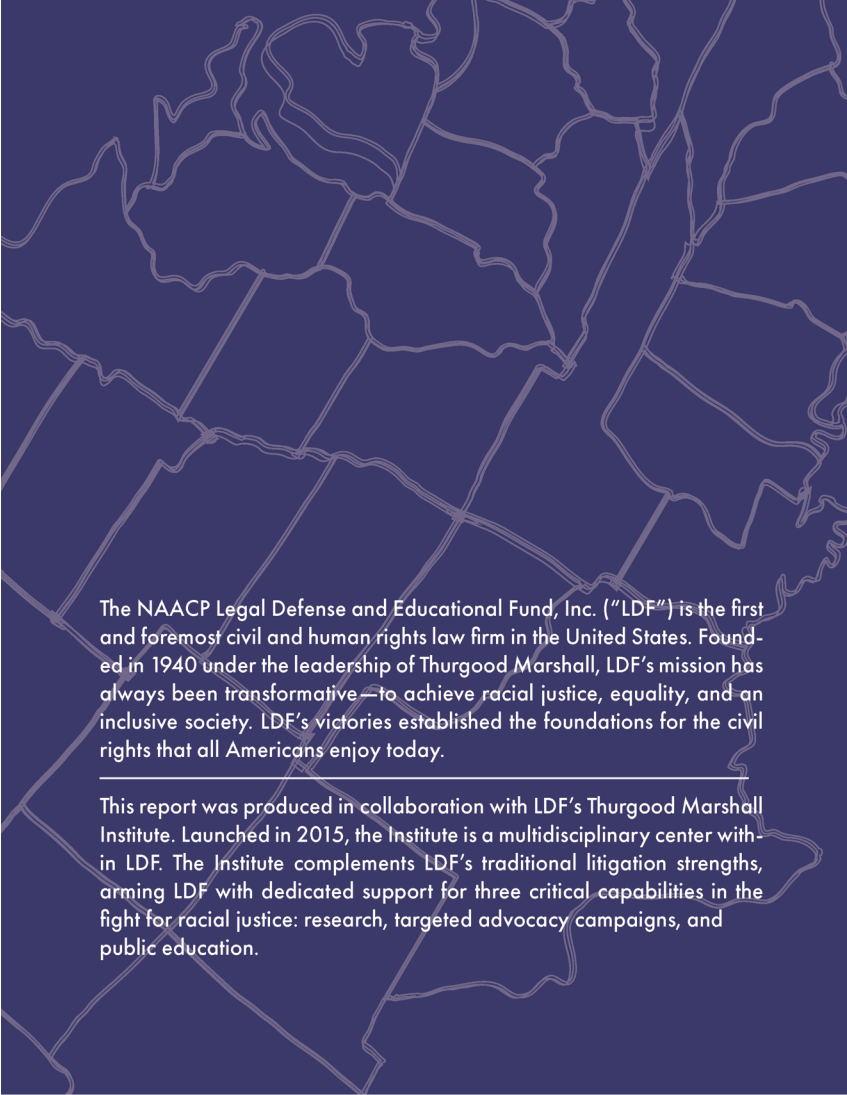
With your permission, I would like to enter our report, "Democracy Defended: Analysis of Barriers to Voting in the 2018 Midterm Elections," into the record.

Mr. COHEN. Without objection, that will be done.

[The information follows:]

JANAI NELSON FOR THE RECORD





The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the first and foremost civil and human rights law firm in the United States. Founded in 1940 under the leadership of Thurgood Marshall, LDF's mission has always been transformative—to achieve racial justice, equality, and an inclusive society. LDF's victories established the foundations for the civil rights that all Americans enjoy today.

This report was produced in collaboration with LDF's Thurgood Marshall Institute. Launched in 2015, the Institute is a multidisciplinary center within LDF. The Institute complements LDF's traditional litigation strengths, arming LDF with dedicated support for three critical capabilities in the fight for racial justice: research, targeted advocacy campaigns, and public education.

DEMOCRACY DEFENDED

ANALYSIS OF BARRIERS TO VOTING IN
THE 2018 MIDTERM ELECTIONS

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INTRODUCTION

"You get to vote in what might be the most important election of my lifetime, maybe more important than 2008."

—Former President Barack Obama, rally in Illinois November 2018¹

"Our democracy rests on the ability of all individuals, regardless of race, income, or status, to exercise their right to vote."

—U.S. Supreme Court Justice Sonia Sotomayor, dissenting in a 2018 voting rights case²

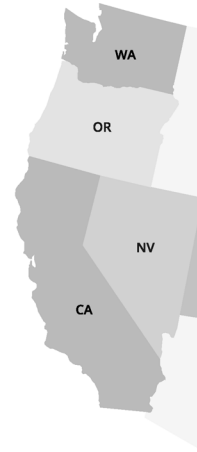
The 2018 elections proved to be record-breaking: 39 million early ballots cast (an increase from the 20 million early ballots in the 2014 midterm elections), \$5.2 billion spent (an increase from the previous \$4.4 billion record in 2016), and the highest voter turnout percentage (49.2) in a midterm election since 1914.³ The election sent an unprecedented number of women to Congress—more than 100 in total, including the first Native American woman, the first Muslim American woman, and the first openly bisexual woman ever to serve in that body.

Journalists and pundits, politicians and voters, pollsters and organizers all characterized the highly anticipated midterm elections as one of the most critical in recent history. The first midterm under the Trump Administration, these elections were about more than just the individual gubernatorial, Senate, House, or other races. It was about more than the amendments and referendum on the ballot. Questions surrounding our national ethos were also at stake.

One of these questions was the extent to which our democracy is compromised by the increasing intensity of voter suppression tactics across the country. Following the Supreme Court's 2013 decision in

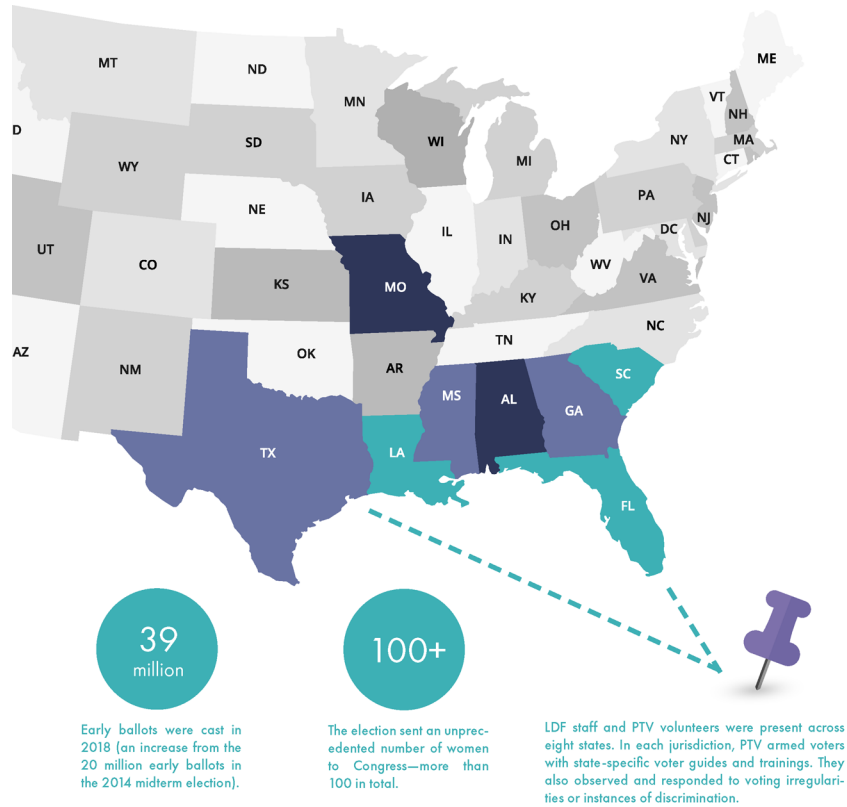
Shelby County v. Holder,⁴ which gutted key enforcement provisions of the Voting Rights Act of 1965 (VRA), "states and local jurisdictions have been free to implement changes in voting without the preclearance process to determine whether those changes are racially discriminatory or hurtful to language minorities."⁵ Despite high turnout at the 2018 midterm elections, far too many voters faced significant burdens in exercising the right to vote, including malfunctioning machines leading to mis-marked ballots, untrained poll workers, out-of-date poll lists, changed polling sites, and long lines, including instances where it took more than four hours to cast a ballot.⁶

For years, the NAACP Legal Defense and Educational Fund, Inc.'s (LDF) Prepared to Vote (PTV) campaign has marshalled staff and local volunteers on Election Day to protect the ability of voters—particularly voters of color—to cast ballots and participate in the political process. LDF staff and LDF-trained PTV volunteers are on the ground every year to monitor polling sites in both primary and general elections in targeted jurisdictions. For the 2018 midterm elections, LDF staff and PTV volunteers were present in eight states: **Alabama, Florida, Georgia, Louisiana, Mississippi** (for the Senate special election), **Missouri,**



49.2%

The 2018 election had the highest voter turnout percentage (49.2) in a midterm election since 1914.



South Carolina, and Texas. In each jurisdiction, PTV armed voters with state-specific voter guides and trainings, containing important information about their state's election laws and how to prepare to vote. Staff and volunteers also observed and responded to voting irregularities or instances of discrimination. This report provides county-level citizen voting age population data by race and ethnicity and a compilation of the voting issues our team observed on the ground. It is our hope that this report will highlight some of the ways we worked to defend our democracy on Election Day 2018 and what remains to be done.



RACES:
Gubernatorial
House

ALABAMA



OVERVIEW OF PRE-ELECTION VOTING ISSUES

Alabama is a state known as the birthplace of voting rights. Its history includes the 1965 “Bloody Sunday” march over the Edmund Pettus Bridge where armed police beat civil rights demonstrators protesting for the right to vote. For a state with this history, the post-Shelby County level of voter suppression is dismaying.

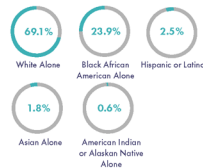
In 2011, the Alabama legislature passed a strict photo ID law, requiring in-person and absentee voters to produce one of seven forms of “valid” photo ID.⁷ A prospective in-person voter without the required photo ID cannot cast a regular ballot unless two election officials present at the polling place choose to “positively identify” that person.⁸ Although it was passed in 2011, Alabama postponed implementing the law to avoid the preclearance requirements of Section 5 of the VRA, which at the time required the state to prove to a federal court or to the U.S. Department of Justice (DOJ) that voting laws were non-discriminatory before they could go into effect.⁹ The day after the Supreme Court’s 2013 decision in *Shelby County*, which invalidated the VRA’s preclearance requirement, Alabama announced that it would enforce the law in the 2014 election cycle.¹⁰ In 2015, LDF filed a federal lawsuit, *Greater Birmingham Ministries et al. v. Alabama et al.*,¹¹ challenging the photo ID law as racially discriminatory in violation of the U.S. Constitution and the VRA. That lawsuit is currently on appeal in the U.S. Court of Appeals for the Eleventh Circuit.

Alabama’s voter suppression tactics extend even further. In 2015, the state announced that it would close 31 driver’s license offices, situated predominately in rural areas of Alabama’s Black Belt, even though driver’s licenses are one of the few forms of acceptable photo ID to vote in elections. LDF and other advocates voiced opposition to these proposed closures because of their likely impact on Black voters.¹² As a result, rather than permanently close the offices, Alabama decided to keep them open one day a month for the 2018 midterms, which still severely restricted access to photo ID for many individuals.¹³

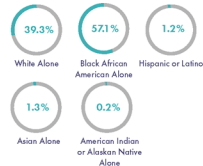
Additionally, although not currently in effect due to ongoing litigation, Alabama law requires residents to produce proof of citizenship when registering to vote.¹⁴ Specifically, Alabama has requested that the federal Election Administration Commission modify the federal voter registration form to require proof of citizenship to vote in state and local elections. Such a requirement potentially sets up a dual system for voting for federal and state/local elections.¹⁵

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:¹⁶

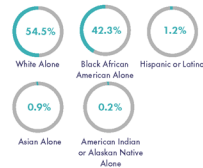
MADISON COUNTY



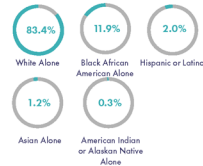
MONTGOMERY COUNTY



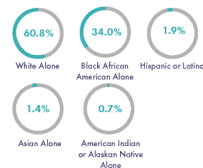
JEFFERSON COUNTY



SHELBY COUNTY



MOBILE COUNTY



SNAPSHOT OF 2018 VOTING ISSUES

MADISON COUNTY

- At Alabama Agricultural and Mechanical University (AAMU), a historically Black university, PTV volunteers encountered a number of students at the polling site who discovered that they were not registered by the Madison County Board of Registrars, although they submitted registration forms during campus registration drives. The completed forms were delivered to the Madison County Registrar, but none of the students were notified of any deficiencies in their registrations. Other students registered online but also were not on the rolls. Some students received a voter card but still did not appear on the voter rolls on Election Day. As a result, over 175 students were forced to vote by provisional ballot. The line to cast a provisional ballot was longer than the line to cast a regular ballot, and the polling location ran out of provisional ballots multiple times, causing students to wait over 90 minutes to cast a provisional ballot. The Madison County probate judge, in the days prior to Election Day, noted that the county Board of Registrars appeared to be engaged in voter suppression because of their hostility to organizers' attempts to register students at AAMU and another historically Black college, Oakwood University. As a result of this election monitoring, LDF filed a lawsuit against Madison County's Board of Registrars and Alabama's Secretary of State John H. Merrill on behalf of four Black students,¹⁷ and talks have begun between AAMU, the Madison County Board of Registrars, and local stakeholders about how to address these issues in future elections.

MONTGOMERY COUNTY

- At the polling site located at Trenholm State Community College, a school with a majority-Black enrollment, instead of directing voters to the correct polling site, poll workers provided provisional ballots to voters who were registered in other precincts and those whose polling places had changed. These voters were told to cast provisional ballots that, ultimately, would not be counted. This precinct also ran out of provisional ballots during the day, and voters who needed these ballots had to wait for over an hour or return at a later time. PTV volunteers intervened and contacted the county probate judge to correct this issue. At Peter Crump Elementary School, a man who had permanently moved to the area was turned away at the precinct and told to vote at his old polling location. PTV volunteers explained the change of address procedure that would have allowed the man to cast a regular ballot at the precinct, but the chief poll inspector insisted the man cast a provisional ballot or return to his prior precinct. After encountering another woman with the same issue, volunteers escalated the issue to LDF staff to address.
- There were a variety of election administration issues at other polling sites across Montgomery County. For example, at Vaughn Park Church of Christ, the wait time reached 90 minutes almost as soon as the polling place opened. There were machine and ballot issues and a lack of forms elsewhere in Montgomery County. At Wares Ferry Road Elementary School, voting did not start on time because the wrong

machines were delivered, and workers did not allow voters to use paper ballots. At Fitzpatrick Elementary School, poll workers ran out of voter registration update forms for inactive voters and resorted to using the address portion of provisional ballots.

- There was also evidence of intimidation at Whitfield United Methodist Church. Volunteers encountered a police vehicle parked directly outside the location entrance and a sheriff's deputy monitoring the polling place registration table. The deputy later exited the polling place and shadowed a PTV volunteer as she waited to speak with voters leaving the location. At Peter Crump Elementary School, a sheriff's deputy arrived and stood next to the chief poll inspector as volunteers were speaking with her.

JEFFERSON COUNTY

- At the Hillview Fire Station precinct, poll workers misinformed voters by telling them that voting a straight-ticket ballot and then selecting an individual sheriff candidate, also known as a "double bubble," would be read by election officials as overvoting and cause the ballot to be rejected. PTV volunteers confirmed that previous guidance allowing the practice still applied in the 2018 midterms; they then reached out to poll workers and the county probate judge to correct this misinformation.
- Prior to the election, the state removed thousands of voters from the active voter list and declared them "inactive" during a required update of voting rolls. In response to local and national advocacy to restore voters to the active voter list, Alabama's Secretary of State Merrill stated that inactive voters would be permitted to cast a regular ballot if they first updated their registration information. However, on Election Day, poll workers gave these inactive voters provisional ballots rather than allowing them to update their registration at the polling site and cast a regular ballot. PTV volunteers on site were able to intervene in some instances by calling the county probate judge. County election officials told PTV volunteers they would issue corrective guidance to poll workers at Homewood Public Library, where one of the first reports originated. Since the issue appeared to be widespread and the same issue had occurred in the 2017 Senate Election, LDF sent a letter on Election Day to Secretary Merrill, explaining that poll workers were unaware that inactive voters must be permitted to cast a regular ballot after updating their information. In response, Secretary Merrill insisted that poll workers were adequately trained on how to deal with inactive voters. LDF's experience on the ground shows otherwise.

SHELBY COUNTY

- At Pelham Civic Complex, poll workers did not give voters without ID provisional ballots, which is required by law.
- At Vincent Revival Center and Helena Community Center, volunteers reported seeing police officers and police vehicles near the polling site, although they did not observe any officers attempting to interact with voters nor did they observe the officers engaging in any official activity.
- Machine malfunctions were reported at Montevallo University's Stewart Student Retreat Center, leading poll workers to collect and store ballots to tally later.

MOBILE COUNTY

- As in prior election years, there were reports of Mobile County poll workers rejecting voters' photo ID if the address on the ID did not match the one on the voter rolls, even though Alabama law does not require the address on a voter's ID to match their voter registration address. In such instances, poll workers were required to allow voters with eligible ID, regardless of the address on the ID, to cast a regular ballot.





FLORIDA



OVERVIEW OF PRE-ELECTION VOTING ISSUES



RACES:

Gubernatorial
Senate
House

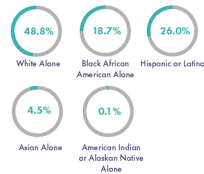
A 2018 report found that Florida has purged more than seven percent of voters from the state rolls since 2016.¹⁸ The following counties had the highest rates of purges, eliminating 10 percent of their voters from the rolls: Hardee, Hendry, Palm Beach, and Okaloosa. Indeed, the state has a history of attempted voter roll purges. In 2012, Florida election officials were blocked from using an error-prone list to remove purported non-citizens from the election rolls.¹⁹ In 2013, following the *Shelby County* decision, the Governor attempted to remove voters from the rolls but was unsuccessful due to efforts of county election supervisors.²⁰ In 2014, the Governor again sought to eliminate alleged non-citizens from the state voter database.²¹

In 2017, thousands of Puerto Rican voters were displaced by Hurricane Maria and resettled in Florida. On the night before Election Day, a federal judge issued an emergency order, reinforcing a September order obtained by *LatinoJustice* to compel over 30 counties in Florida to provide Spanish-language ballots to voters in accordance with the requirements of the VRA.²² Nevertheless, *LatinoJustice* reported noncompliance or partial compliance with this order in a number of counties.²³

In 2018, a federal court ordered Florida to provide early voting sites on several college campuses, following a lawsuit brought by pro-democracy groups.²⁴ Several counties, however, like Tallahassee's Leon County (home of Florida State University and Florida A&M University, a historically Black university) and Miami-Dade County (home of Florida International University, which serves large populations of students of color, and Miami-Dade College, which has more than 160,000 students), decided not to provide early voting sites on college campuses in 2018.²⁵ In July 2018, advocates complained about issues with Florida's voter registration website, including intermittent access, after organizers tried registering 17 voters in low-income, predominantly Black Orlando neighborhoods but only could successfully register two.²⁶

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:²⁷

ORANGE COUNTY



SNAPSHOT OF 2018 VOTING ISSUES

ORANGE COUNTY

- Washington Park Branch Library previously had been a regular voting location. Unfortunately, it was not a voting location on Election Day, but many voters in the surrounding area were under the impression that it was and had not received any notice that it was no longer a polling site. PTV volunteers were unable to clarify the issue because of the steady stream of voters asking poll workers throughout the day for help identifying their correct polling place. Some of our volunteers had to drive voters to their polling place before the polls closed. In total, PTV volunteers interacted with over 100 people at this site.

POST-ELECTION AMENDMENT 4 UPDATE

On Election Day in November 2018, Florida voters approved ballot initiative Amendment 4, which restored the voting rights of people with a felony conviction, excluding murder or felony sex offenses.

Within months of that historic voter enfranchisement, the Florida Legislature passed SB 7066. LDF, in partnership with the Florida NAACP, joined leading groups like the ACLU, ACLU of Florida, and the Brennan Center for Justice to submit multiple letters to both legislative houses in opposition to certain provisions of the bill.²⁸

The adopted bill, SB 7066, restricts the ability of returning citizens to register to vote by requiring them to pay all legal financial obligations, including restitution converted to a civil judgment, fines, fees, and costs. The restrictions will have a disproportionate adverse impact on Florida's Black and Latinx citizens. Florida's Governor Ron DeSantis signed the bill into law on June 28, 2019. LDF, the ACLU, ACLU of Florida, and the Brennan Center for Justice immediately filed a federal lawsuit challenging the new law because it "creates wealth-based hurdles to voting and undermines Floridians' overwhelming support for Amendment 4."²⁹



GEORGIA



OVERVIEW OF PRE-ELECTION VOTING ISSUES

With one of the most hotly contested gubernatorial races in the country, the midterm election in Georgia epitomized the severity of voter disenfranchisement and suppression for the country. Between 2012 and 2016, then-Secretary of State Brian Kemp purged 1.5 million registered voters from the rolls.³⁰ In 2018, 670,000 voters were purged.³¹ The state has further burdened voters, particularly voters of color, by closing 214 voting precincts since 2012.³² This came to national attention when Randolph County attempted to close seven of nine polling places, which would have impacted the county's under-resourced Black community.³³

In addition, despite rising calls for his recusal, including from LDF, 2018 gubernatorial candidate Brian Kemp continued to oversee the very election in which he was a candidate.³⁴ During the 2018 election, former Secretary Kemp was in charge of enforcing Georgia's strict voter laws passed by state legislators, particularly the "exact match" policy that holds voter registration applications if the information provided is not an exact match to the information in Social Security or state driver records. Voter registrations were not processed if they included inconsistencies such as misspelled names, not fully writing out a middle name, a missing hyphen, or signature mismatch on absentee ballots. Out of the 53,000 registrations that were held by former Secretary Kemp's office shortly before the election, 70 percent of the applicants were Black.³⁵ In fact, CityLab's Brentin Mock reported that "many of these blocked voter registrations [came] from urban areas with high black populations. In areas with smaller black populations, the percentage of pending registrations from black voters often [exceeded] the percentage of black residents living in the area."³⁶ This abdication of responsibility by the former Secretary of State and now Governor forced advocates to call into question his commitment to election integrity.

Moreover, in October 2018, local officials removed 40 Black senior citizens from a bus heading to the polls for early voting because the Jefferson County Administrator argued that the bus had not been authorized to take the seniors to the polls and the action constituted "political activity" at a county-run senior center.³⁷



RACES:
Gubernatorial
House

CITIZEN VOTING AGE POPULATION PERCENTAGES BY RACE AND ETHNICITY:³⁸

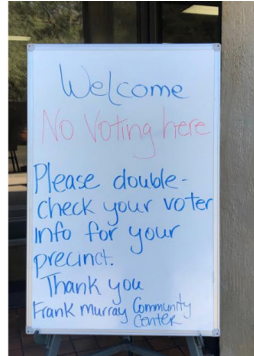
SNAPSHOT OF 2018 VOTING ISSUES

DOUGHERTY COUNTY

- Two vote-switching incidents were reported in Dougherty County. On each occasion, voters attempted to vote Democratic straight down the ticket, and the voting machine switched the vote to Republican. The voters noticed the error and reported these incidents. Poll workers were able to fix the error and register the votes correctly.
- At approximately 6:00 pm on Election Day, about 1,000 votes had been cast at the Greenbriar Church polling site. The location manager explained that one of the express voting machines had been down for a few hours, and during that time, the line grew long. By the time voters advanced to the front of the line, some were told that they were in the wrong location. Many voters were unable to continue to wait and opted to cast provisional ballots instead of going to their correct polling place.

CHATHAM COUNTY

- The Georgia Secretary of State's website, "My Voter Page," had the incorrect address listed for the Frank Murray Community Center polling location. The address the website listed was: 169 Whitmarsh Island Road, Savannah, GA 31410, when the correct address for this location was: 125 Wilmington Island Road, Savannah, GA 31410. When potential voters arrived at the Frank Murray Community Center, they found this sign, which caused several people to leave without voting.

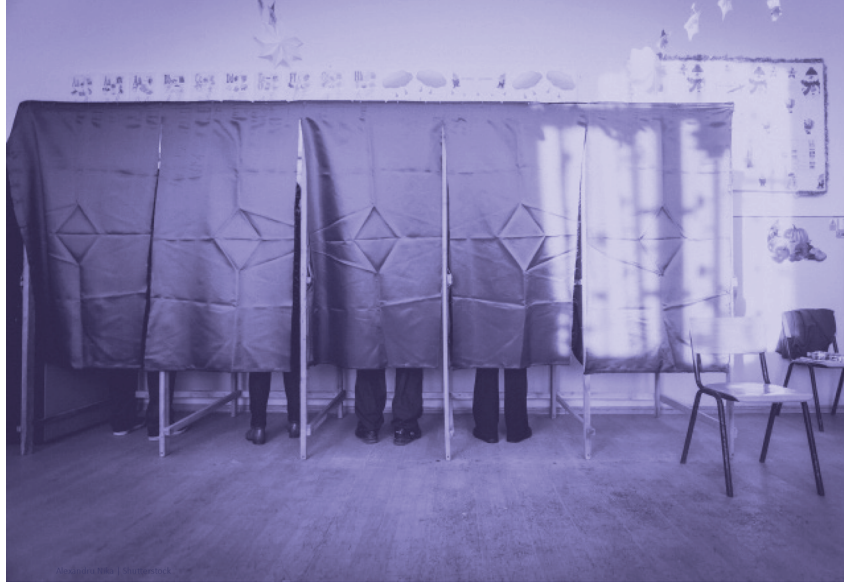


GWINNETT COUNTY

- Five precincts in Gwinnett County were reported to have significant delays, with one experiencing delays of up to five hours, caused by technical problems including malfunctioning electronic poll books, dead batteries, and missing power cords. These issues were made worse by a lack of access to paper ballots and other means of voting as required by law.
- Given these delays, Gwinnett County announced that the polls would remain open for an extra 25 minutes. LDF immediately sent a letter to the Georgia Secretary of State stating that the 25-minute extension was insufficient and requesting an extension of at least two hours at the precincts affected by voting machine problems. LDF also submitted a request under Georgia's open records law seeking documents related to the causes of the delays and technical problems in Gwinnett County. Ultimately, a Gwinnett County judge ordered three precincts—Annistown Elementary School, Anderson-Livsey Elementary, and Harbins Elementary—to remain open for an additional two hours and 25 minutes, 30 minutes, and 14 minutes, respectively.³⁹

FULTON, DEKALB, and COBB COUNTIES

- Fulton, DeKalb, and Cobb Counties had significant delays and long lines because of a shortage of voting machines, while hundreds of unused voting machines were sequestered in warehouses. The alleged rationale for this was that doing so was in response to a federal lawsuit claiming that the voting machines were susceptible to hacking. However, it appears that the court did not actually order that all these machines be sequestered, and no party ever made such a request.⁴⁰ Dan Abrams's blog, *Law & Crime*, analyzed the court filings and orders in the case and concluded that no county was ordered to set aside more machines than they could spare.⁴¹ First Presbyterian Church in Fulton County only had four voting machines available on Election Day in 2018, while it had up to 15 available for the 2016 election. Altogether, 550 voting machines went unused in Cobb County, 700 in Fulton, and 585 in DeKalb. LDF submitted requests to each of these counties under Georgia's open records law seeking records related to the causes of the delays and the shortage of voting machines. In March 2019, Congressman Elijah Cummings, Chair of the House Committee on Oversight and Reform, sent letters to Governor Brian Kemp and Secretary of State Brad Raffensperger requesting details on the voting machines in the three counties.⁴²



GRADY COUNTY

- LDF sent a letter⁴³ to Grady County officials documenting inadequate notice to voters in a heavily Black precinct of a change in the location of their polling place. In the past, the Agricenter was used as a polling place but was closed for the 2018 midterm election because it was being used by the Federal Emergency Management Agency for emergency response purposes. The county moved voting for this precinct to the First Baptist Church. Residents reported that they did not receive new precinct cards and did not know about the change in polling place. Moreover, the single sign placed at the Agricenter was inconspicuous, and because there were no county officials stationed at the Agricenter directing would-be voters to the correct polling place, community members volunteered to do it. LDF's letter urged that these problems be rectified before the state's runoff elections on December 4, 2018. The state returned the precinct to its original location for the December election.



LOUISIANA



OVERVIEW OF PRE-ELECTION VOTING ISSUES



RACES:

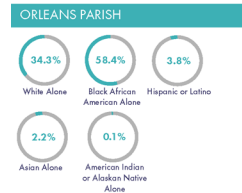
House

In November 2016, a civil rights organization released a report that studied polling place closures in Louisiana since the *Shelby County* decision and found that “61 percent of Louisiana parishes have closed a total of 103 polling places since 2012,”⁴⁴ including in Jefferson and Terrebonne parishes. Although the state gave the justification that cost considerations were a determining factor in the consolidation of precincts (approximately \$1,300 per precinct), “the reduction in the number of polling locations handicaps voter participation.”⁴⁵ Moreover, according to a 2018 paper, Louisiana eliminated more than 300 precincts by consolidating them with others.⁴⁶ These consolidations “had a racially discriminatory effect, in that as the proportion of African-Americans in a precinct increased, so did their likelihood of being consolidated,” which made precincts larger and made it harder for voters to get to the polls.⁴⁷ In fact, a report from 2018 found that “although the law dictates that only the number of registered voters should be related to the number of polling locations . . . statistical analysis of the data from Louisiana shows that the racial make-up of an area is a predictor of the number of polling locations in that area.”⁴⁸

In May 2018, Louisiana passed a law to restore voting rights to persons on probation or parole with the caveat that they cannot have been incarcerated within the five years prior to Election Day.⁴⁹ The law had minimal impact, restoring voting rights only to approximately “2,200, or 3 percent of the 70,000 people currently on probation or parole in the state.”⁵⁰ Further, the legislation did not go into effect until 2019, which meant that the small percentage of those eligible for re-enfranchisement were unable to participate in the 2018 midterm election.

In terms of voter registration, Louisiana provides an array of acceptable voter ID options. However, local organizations, such as the League of Women Voters, reported that they “received a number of complaints that voters were being turned away when they did not present a photo identification.”⁵¹ This discretionary action by election officials and poll workers was troubling because a Louisiana law, which was pre-cleared by DOJ in 1997, states that a voter lacking proper identification can “complete and sign an affidavit, which is supplied by the Secretary of State,”⁵² as an acceptable alternative to a photo ID.

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:⁵³



SNAPSHOT OF 2018 VOTING ISSUES

ORLEANS PARISH

- Several students at the polling site at Dillard University, a historically Black university, reported that although they had completed voter registration forms, they found they were not registered to vote when they checked the Secretary of State's website.
- The precinct at 830 Jackson Avenue did not have ramps or a handicapped-accessible entrance despite the precinct being close to a senior housing community.
- The precinct at 2733 Esplanade Avenue was not easily accessible for those with mobility issues. While there was a parking lot in the back near the accessible entrance, it was locked on Election Day. Although the lot was eventually unlocked, it did not stay unlocked for the remainder of the voting hours. Two voters with mobility issues stated it was quite difficult to get inside. The lighting in the area was also inadequate. In fact, it was so dark that a poll worker had to use her cell phone as a flashlight to direct voters; even then, visibility remained poor.
- The precinct at 4861 Rosalia Drive had pro-life signs and candidate signs within 600 feet of the polling place, and the Clerk of Court had to have the signs removed. Additionally, the A-frame "Vote Here" sign was not visible from the road. Poll workers said that, from what they understood, the authorities had ordered more "Vote Here" A-frame signs, but the manufacturer had not produced them in time for the election, causing a shortage of signs. Poll workers placed the sign on the curb until voters told them that they were not sure which door of the building was unlocked, then moved the sign next to the unlocked door to help guide voters.



RACES:

Senate
House

MISSISSIPPI



OVERVIEW OF PRE-ELECTION VOTING ISSUES

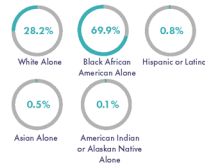
The Mississippi Senate 2018 special election between Cindy Hyde-Smith and Mike Espy became one of the most closely watched races in the nation given its context. Senator Hyde-Smith was appointed to the Senate due to former Senator Thad Cochran retiring earlier in 2018 for health reasons. Her challenger was Mike Espy, a Black former congressman and Agriculture Secretary in the Clinton Administration. The race garnered national headlines after images emerged of Senator Hyde-Smith posing in Confederate paraphernalia and invoking the notion of lynching Mr. Espy.⁵⁴ This type of conduct, unfortunately, was not unusual for Mississippi, which has a deep history of racial discrimination against Black voters.⁵⁵

In 2012, the Mississippi legislature passed a voter ID law, but did not implement it prior to the *Shelby County* decision, given that the state was subject to the VRA's preclearance requirements.⁵⁶ Following the Supreme Court's 2013 decision, Mississippi's Lieutenant Governor said that preclearance "unfairly applied to certain states [and] should be eliminated in recognition of the progress Mississippi [had] made over the past 48 years."⁵⁷ At that time, Mississippi's Secretary of State said he would move forward immediately to implement the state's voter ID law for the June 2014 primaries. Reportedly, hundreds of voters could not vote in the 2014 midterm election because of the photo ID law.⁵⁸

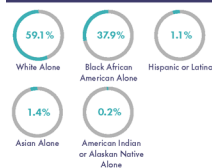
In 2016, researchers at Northern Illinois University conducted a study to rank every state based upon the difficulty of voting.⁵⁹ The study created a "Cost of Voting Index" to help interpret the results. The index compiles the "largest assemblage of state election laws" to rank each state based upon the "time and effort it took to vote in each presidential election year from 1996 through 2016."⁶⁰ The researchers also used 33 different variables related to registration and voting laws, "with differences in registration deadlines carrying the most weight." The results showed that Mississippi, which is the state with the highest percentage of black residents,⁶¹ is the hardest state to vote in of all 50 states.⁶²

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:⁶³

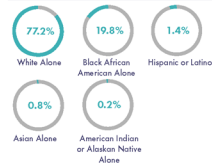
HINDS PARISH



MADISON PARISH



RANKIN PARISH



SNAPSHOT OF 2018 VOTING ISSUES

(November 27 Special Election Only)

HINDS COUNTY

- At the Byram City Hall polling place, volunteers encountered voter confusion about whether they were at the correct location. Byram City Hall is used as a polling place in local elections. However, because the precinct and district lines used for the Senate Election were different from those the districts used for other local elections, some voters who were registered elsewhere mistakenly came to vote at Byram City Hall. Poll workers redirected voters to their correct polling place with printed directions. Poll workers also reported 12 affidavit provisional ballots cast.
- Hinds Community College had dismal student registration and turnout. It had essentially no visible or prominent signs directing students and others to the polling place on the central campus and most voters observed at the location appeared to be community residents rather than students. When trying to locate the polling place, PTV volunteers encountered multiple students who did not know where to vote on campus.

MADISON COUNTY

- At Pleasant Green Memorial Baptist Church, a poll worker stated that eight people had been turned away because their names did not appear on the voter rolls. It was not clear whether the polling place only had access to the voter list for that specific precinct, as some of the eight voters were able to determine their correct polling place. Other voters, however, could not determine their correct polling place, even though a poll manager recognized some of them as having voted at the precinct in 2016. The same poll worker also reported a total of 10 affidavit provisional ballots cast.
- Registration issues at Ridgeland Recreation Center revealed problems with poll worker training and possibly the registration lookup system. Early in the day, volunteers encountered a Black woman on her phone in the parking lot. She stated that she had called the circuit clerk to confirm her registration after the workers could not locate her in the electronic pollbook, even though she had voted there in 2016. The circuit clerk informed the voter that she was registered and that the poll workers should check the supplemental paper list if her name did not appear in the electronic list. The poll workers located the woman's name on the paper list, and she was able to cast a regular ballot. Notably, the poll workers were not aware of this process, and it was the voter's own initiative that ensured that she was able to vote.

- Near the end of the day at Ridgeland Recreation Center, 75 affidavit provisional ballots had been cast. Approximately five were provisional because of a change of address. Most of the affidavit provisional ballots were cast by people whose names did not appear in the pollbook after checking the paper list. Volunteers became concerned after speaking with a Black woman who cast an affidavit provisional ballot near the end of the day when they learned that poll workers were not providing written information about how to follow-up on affidavit provisional ballots. Other polling locations had printed handouts detailing how to check the status of the affidavit provisional ballots.
- Following the election, LDF, One Voice, and the Mississippi Center for Justice filed a public records request with the Madison County Election Commission inquiring about the voter roll purges that took place prior to the election.

RANKIN COUNTY

- At the polling site located at Monterey Fire Dept. #2, volunteers encountered a poll worker who was standing close to the ballot scanning machines and reportedly made a voter uncomfortable. A Black male voter expressed discomfort because he was under the impression that the ballots had to be fed in facing up, and the poll worker was hovering over voters as they were feeding their ballots into the machine. The voter was concerned that this made his ballot selection visible to the poll worker, compromising the privacy of his vote. PTV volunteers discussed the issue with the poll commissioner, who stated that the worker was instructing voters that they could scan their ballot face up or face down. However, no other polling places had a worker offering unsolicited help to voters scanning their ballots. In fact, other sites, including McLaurin High School, had a privacy screen attached to the scanner.





MISSOURI



OVERVIEW OF PRE-ELECTION VOTING ISSUES



RACES:

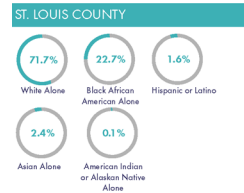
Gubernatorial
Senate
House

In the wake of the *Shelby County* decision, Missouri voters passed Amendment 6 to the state constitution to require a state-issued photo ID in order to vote.⁶⁴ The measure impacted over 200,000 Missouri voters, mostly young people, poor people, and people of color, who lacked DMV-issued photo identification.⁶⁵ An estimated 130,000 additional individuals had photo ID that was expired and could not be used under the new law.⁶⁶ The Amendment also required voters without a photo ID, but who had another form of ID, to sign a statement confirming their identity under penalty of perjury.⁶⁷ Priorities USA, a national progressive organization, filed a lawsuit challenging the voter ID law. In October 2018, about four weeks before Election Day, a Missouri judge barred the state from requiring voters lacking a photo ID from signing a statement.⁶⁸ Given the change in law so close to Election Day, the Commission scrambled to retrain precinct workers.

In addition to the voter ID law, Missouri also aggressively enforced inactive voter designations. If a voter did not vote in the last election and failed to respond to a mailing asking them to confirm their voter registration, they were listed as “inactive.”⁶⁹ Many voters who moved or did not realize they needed to return the mailing were unable to confirm their status. If a voter arrived at their precinct to vote and was labeled as “inactive,” a precinct worker had to call the Commission and verify that the person was registered to vote. This additional verification step caused numerous delays.⁷⁰ Lastly, the 2018 ballot was one of the longest and most complicated in recent history.

Voter turnout was at an all-time high for a midterm election, but unfortunately, Missouri did not offer in-person early voting.⁷¹ Missouri is one of only a dozen states that does not offer no-excuse absentee voting or any other form of early balloting. Voters can only vote absentee with one of six state-recognized excuses: (1) the voter is absent from area where registered, (2) religious belief or practice, (3) employment as an election authority at a location other than polling place, (4) incarceration, (5) participation in the state’s address confidentiality program, or (6) physical disability, illness, or work as the primary caregiver for someone disabled or ill.⁷² As of January 2019, state lawmakers filed two proposals in the Missouri General Assembly that would expand absentee voting.⁷³

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:⁷⁴



SNAPSHOT OF 2018 VOTING ISSUES

ST. LOUIS COUNTY

- At the Clay Community Center in Ward 3, a Black voter furnished an expired state driver's license and the poll worker turned him away without offering a provisional ballot. He returned to the poll with appropriate identification and was able to cast a regular ballot.
- A PTV volunteer at the Clay Community Center observed a woman wearing a yellow Election Protection⁷⁵ vest informing people that if they did not have the "right" ID they could not vote, effectively turning people away from the precinct. Our volunteer also heard the woman make comments about the large number of Black people at the precinct relative to her usual voting precinct. PTV volunteers notified Election Protection and she was removed from poll monitoring.
- In Ward 2 at the Nance School, PTV volunteers observed a touchscreen machine that was repeatedly switching multiple votes and/or recording incorrect votes; when voters transitioned to paper ballots, the paper ballot feeder jammed. After three attempted calls to contact the directors of the Election Commission, LDF was able to file a complaint and requested a return call, but never received one. Election Protection and an alderwoman also called the Election Commission multiple times, without success. In the meantime, Election Protection volunteers recommended that people fill out paper ballots. The poll workers eventually figured out how to properly feed the ballots into the machines.
- Depending on the population concentration of non-English speaking voters, Missouri provides ballots in non-English. No precinct population in St. Louis triggers the availability of non-English speaking ballots. However, Ward 9 has a large population of Spanish-speaking voters. A Spanish-speaking PTV volunteer was able to assist a voter with her ballot.
- At the Dunn-Marquette Recreation Center in Ward 9, a voter had trouble presenting the appropriate ID. After being advised that he could use his Medicaid card because it was government issued and had his name and current address on it, he was able to cast a ballot.



SOUTH CAROLINA



RACES:

Gubernatorial
House

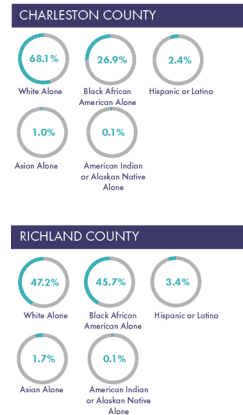
OVERVIEW OF PRE-ELECTION VOTING ISSUES

In 2012, South Carolina adopted a restrictive photo ID law, which DOJ and LDF, among other organizations, challenged in *South Carolina v. United States*.⁷⁶ In response to that litigation, South Carolina adopted a “reasonable impediment” exception that acknowledges the many reasons a qualified South Carolina voter may be unable to procure acceptable photo identification and establishes a process to enable voters without identification to vote in-person.⁷⁷

Following the *Shelby County* decision in 2013, South Carolina’s Attorney General stated: “[t]his is a victory for all voters, as all states can now act equally, without some having to ask for permission or being required to jump through the extraordinary hoops demanded by federal bureaucracy.”⁷⁸ Nevertheless, the Attorney General reaffirmed the state’s 2012 commitment to broadly interpret the reasonable impediment exception to the photo ID law.⁷⁹

Despite this assurance, a 2014 study revealed the burdens South Carolinians face to obtain compliant state ID.⁸⁰ Further, there are indicators that the law disproportionately impacts Black South Carolinians. The State estimated that, as of 2016, the approximately 178,000 South Carolinians who lack an acceptable photo ID under the law are disproportionately people of color.⁸¹ Additionally, an analysis of the 2016 elections found that “African-American voters made up 27.6 percent of registered South Carolina voters in 2016, but 38.5 percent of the voters impacted by the ID requirement were African-American,” and that “35 percent of voters citing an impediment to getting an ID were Black, and 42 percent of the voters who forgot their ID were Black.”⁸² Although South Carolina adopted the “reasonable impediment” exception, poll workers typically do not mention the reasonable impediment requirement when someone indicates they do not have a photo ID. Even with the appropriate photo ID, at least one eligible voter was told that he was “dead” when presenting himself at the polls with a valid photo ID.⁸³

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:⁶⁴



SNAPSHOT OF 2018 VOTING ISSUES

CHARLESTON COUNTY

- Some voters at St. John's High School waited three to four hours to vote. Volunteers contacted the County Board of Elections to request more voter registration list laptops and voting machines, but the bottlenecks continued throughout the day. At Ladson Elementary School, a poll worker shortage caused some voters to have to wait up to two-and-a-half-hours to cast a ballot. A.C. Corcoran Elementary School also had lines with up to a two-and-a-half-hour wait time. At all of these locations, voters stood in line well past 7:00 pm, when the polls closed. Although the long lines may be attributed in part to increased voter enthusiasm and turnout, PTV volunteers saw varying degrees of efficiency and competency at each polling location. Voters shared positive experiences at locations where technical issues were promptly addressed, staff were generally competent, and workers had enough functioning equipment like voting machines and registration laptops. However, locations that lacked any one of these elements quickly devolved into sites with excessive wait times.
- At St. Andrews Middle School, electrical problems delayed the set-up of the voting machines, and three out of the four voter registration laptops were not working properly when poll workers arrived. These technical issues were resolved when a technician from the county arrived, but voters remained in long, unmoving lines while waiting for the precinct to open. Voting machine and laptop malfunctions were also observed at Haunt Gap Middle School, W.L. Stephens Aquatic Center, and James Island Charter High School. A shortage of laptops to check in voters created bottlenecks in many precincts, leading to issues like the four-hour wait time at St. Johns High School.
- At St. James Church, poorly-trained poll workers with resource limitations and troublesome equipment led to very slow processing of voter IDs and a two-and-a-half-hour wait time. Despite having 13 voting machines at St. James Church, only seven or so were in use until about 6:00 pm because workers were slowly checking in voters on the three laptops.
- At James Island Elementary School, curbside voting, which is required by law in the state, was not set up until half an hour after the polls opened. There, two of the three poll workers trained to operate the electronic voter registration laptops left to work on curbside voting, which left only one poll worker to check voter IDs and registrations. At other locations, like St. Andrews School of Math and Science, poll workers instructed voters who wanted to vote curbside to exit their vehicles and bring their IDs inside the polling site to be checked, despite their disability or age. When those disabled voters got inside the precinct, they were told to stand and wait in another line for a poll worker to check them in before they could return to their vehicles.
- At St. James Church, one woman who was nine months pregnant and could not stand for two hours in the heat had trouble obtaining curbside help. These issues were reported to the County Election Board and volunteers requested more workers.

- James Island Charter High School had proactive poll workers who sought out older and disabled voters to provide them seats, shelter them from the heat, and offer curbside voting. Yet even apparently well-run polling locations still had issues with inadequate signage for curbside voting. Ashley River Creative Arts Elementary School was an example of this. Volunteers saw the most complete set of signage educating voters, including a flow chart of options showing voters when they would be able to vote a regular ballot versus a failsafe or provisional ballot, but the site still lacked adequate information about curbside voting.
- Volunteers encountered poll workers refusing to provide provisional ballots at St. John Catholic Church, St. Andrews School of Math and Science, and W.L. Stephens Aquatic Center.
- At St. Andrews School of Math and Science, where lines stretched to over two hours, at least 10 voters waiting outside appeared to be listed as inactive despite reporting that they voted in the 2016 general election.
- At St. John Catholic Church, one older voter, who insisted that she voted at the precinct in 2008 and 2012, was told that there was no record of her voter registration anywhere in the state. Poll workers refused to give her a provisional or challenge ballot and instructed her to go to the county election headquarters.
- An hour before the polls closed, volunteers at St. Andrews Middle School reported that one woman with a small child was sent to two other locations with long lines before finally being sent to the correct polling site. No poll worker informed her she could vote at the county election headquarters.
- Another woman at St. Andrews Middle School asked PTV volunteers to confirm that she was in the correct location. She had attempted to vote at the same location as the other voters living in her townhouse but was told that her address was in another precinct. She was able to vote, but the voter and poll manager confirmed that she was not voting on races that affected where she lived.

RICHLAND COUNTY

- Throughout Richland County, voters reported voting machines mismarking their votes or switching their selection to another name. The county offered the rationale that aging touch-screen machines caused calibration problems, which led to the issues the voters experienced. Following reports on the matter, Richland County Election Director Rokey Suleman advised all voters to review their ballots before casting their final vote. Although the director confirmed that “no one had their vote switched” and “the issues were another symptom of aging voting equipment,” his hope is for a “new voting infrastructure [to be] in place before the next general election in 2020.”⁸⁵
- Voters who had moved, updated their driver’s license address, and reportedly checked the “register to vote” box on their DMV change of address form found that their registration had not been updated to the new address. Voters who moved from a different county in South Carolina more than 30 days before the election were prohibited from voting. Voters who moved within the same county were told to return to their old polling place or head to the County Board of Elections headquarters to cast a ballot that would count. This failure to update voter registrations is troubling enough on its own, but voters with unchanged registrations sometimes only learned of the problem after waiting in line at some precincts for an hour or more. One woman at North Star Church learned, after waiting in line for an hour, that the DMV had not sent her voter registration and she would be unable to cast a ballot this election.
- A mother of a newborn baby, who had already spent her day trying to vote, found that she had supposedly been sent an absentee ballot for the general election after requesting an absentee ballot for the primary in June. When she tried to vote on November 6, she was told that she could not cast a regular ballot because they could not be certain that she had not already voted absentee in the general election. Despite not receiving the absentee ballot or voting absentee for the general election, the Board of Election told the voter over the phone that she could cast a provisional ballot and attend the Friday hearing or visit the headquarters in person that day to resolve the issue.
- At Precincts Ridge View 1 and 2, a precinct had been split up and it was unclear if or when voters had been given notice of the change.





TEXAS



OVERVIEW OF PRE-ELECTION VOTING ISSUES



RACES:

Gubernatorial
Senate
House

Immediately after the *Shelby County* decision, the Texas Attorney General and Secretary of State announced that the state's photo ID law would go into effect immediately.⁸⁶ The law had been rejected previously by a federal court as the most discriminatory measure of its kind in the country following litigation under Section 5 of the VRA by LDF,⁸⁷ DOJ, and others.⁸⁸ In response, LDF, DOJ, and other groups filed suit against Texas under Section 2 of the VRA and a federal court ultimately struck down the voter ID law. The U.S. Court of Appeals for the Fifth Circuit, however, allowed Texas to implement a different version of the photo ID law, even though the lower court had determined that it perpetuated the discriminatory intent of the original law.⁸⁹

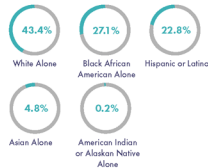
In September 2018, LDF, along with the Texas Civil Rights Project, Texas State Conference of the NAACP and the Anti-Defamation League of South Texas, Texoma, and Austin, sent a letter to the Texas Secretary of State Rolando Pablo, urging his office to provide notice to voter registrars and other relevant election officials throughout the state outlining and explaining the procedures for challenging a person's eligibility to vote.⁹⁰ In August 2018, the *Houston Chronicle* reported that approximately 4,000 registered voters in Harris County were challenged by True the Vote, an organization that has been accused of voter intimidation in the past.⁹¹

For the 2018 elections, Waller County election commissioners failed to provide polling sites on the Prairie View A&M University (PVAMU) campus, a historically Black college in Waller County, and in the surrounding city of Prairie View during the first week of early voting. In the second week of early voting, the city provided five early voting days, but two of the polling sites were off-campus at locations that were not accessible to many PVAMU students who lacked transportation.⁹² In the majority-White city of Waller, by contrast, voters had two locations to vote during the first week and 11 days of early voting in total.⁹³ In response to public pressure and a lawsuit filed by LDF, election commissioners in Waller County took a modest but important step forward to provide equal opportunities to vote through early voting at PVAMU.⁹⁴

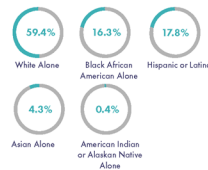
LDF also sent a letter to the Texas Secretary of State in October 2018 expressing serious concern about reports of irregularities caused by Hart eSlate electronic voting machines and sent a letter to officials in McLennan County, Texas asking that they relieve an election worker from her duties for failing to comply with state election law.⁹⁵

CITIZEN VOTING AGE
POPULATION PERCENTAGES BY
RACE AND ETHNICITY:⁹⁶

DALLAS COUNTY



TARRANT COUNTY



SNAPSHOT OF 2018 VOTING ISSUES

DALLAS COUNTY

- About half of the voters who arrived at Lakeside Activity Center were turned away because they were at the wrong polling location. A tally kept by a volunteer at the site totaled 390 voters turned away in the course of the day. Most of the voters who were turned away were people of color, particularly Black voters. All voters informed PTV volunteers that this was their regular polling location, and they had not received notice of the location change. One voter had a particularly complex story. He reported that he voted at Lakeside in the 2016 election, as he had in every election since moving to the county and updating his registration in 2008. This Election Day, the workers told him he was not listed as a Dallas County voter at all. He discovered by calling the Secretary of State's office that he was still registered at his former address, in a county from which he moved in 2008. The Secretary of State tried to claim that he was not registered in Dallas County, even though his 2016 voting history was visible to the Secretary of State (by that office's own report). Eventually, the poll workers told him to vote at a nearby polling location.
- At Precincts 3802 and 3803, officials gave incorrect information about acceptable photo IDs to voters and failed to inform voters about alternatives.
- At Precinct 3056, a complaint was lodged with the precinct chair stating that campaign workers were electioneering within 100 feet of the entrance to the building. The sheriff's office showed up to the polling location with lights and sirens activated. The sheriff was accompanied by an election official and followed by two deputies in unmarked cars. The election official stated they had received a report of a fight or argument over the polling line dispute. However, PTV volunteers present did not witness any fight or argument.
- At Atwell Academy, a sheriff car parked outside the polling location and refused to leave.
- Precincts 1040 and 1041 used a fire station as a polling location. Voters used the garage area, which posed a risk to their safety because fire trucks come and go during voting hours.

TARRANT COUNTY

- In Fort Worth, there was a similar pattern of voters who had voted in the same place for years being removed from the rolls of those polling locations for this election. A voter at Grace Temple Seventh-day Adventist was told he was not on the list, then discovered that his voting status was "suspended." The Secretary of State's website indicated he could vote at a polling site in Tarrant County by completing a residence form. The voter asked the PTV volunteer to accompany him inside to assist, but the election worker told the volunteer she had to leave. When the voter came out, he stated he was told he had to return to his prior address in Arlington to fill out the form and vote.
- At the polling place for Precinct 1005, a voter reported that there was no bell available for disabled voters to notify clerks that they needed assistance for curbside voting. This was a particular problem because many older and disabled people live in this precinct. Further, the voter complained of inadequate signage outside the location.
- At Precinct 1278, officials gave incorrect information about acceptable photo IDs to voters and failed to inform voters about alternatives.



CONCLUSION

This report highlights some of the means by which the eight states that are covered in the report acted to suppress voting and numerous instances of voter suppression observed by our PTV volunteers in those states. It is in no way an exhaustive account of all the challenges voters, especially Black voters in these states, encountered in the 2018 midterm elections. This report along with others shows that it is imperative that Congress acts swiftly to remedy the myriad failures of our election administration that undermine the integrity of our democracy. Access to fair elections is a right guaranteed by citizenship. The year 2020 will mark the 150th anniversary of the passage of the 15th Amendment to the U.S. Constitution, yet, it is clear that the full rights and protections of that Amendment still operate as an unfulfilled promise. The next national election cycle is upon us, and it is our collective duty to ensure that it is free of racial discrimination and other unlawful barriers to voting and that the right to vote is honored and protected for all.

ENDNOTES

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NOTES

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Ms. NELSON. Thank you.

In addition, leading up to the 2018 elections, there were widely reported mass purges of Black and Latinx voters in Georgia and Ohio, fraud on Black voters using absentee ballots in North Carolina, and new onerous ID requirements imposed on Native American communities in North Dakota. In short, there is no shortage of discriminatory voting practices presently infecting our electoral process.

The VRAA is a measured, flexible, and forward-looking effort to update the VRA with a new prescription for preclearance that is directly tied to current voting rights violations. It is precisely what Shelby County asked and commands of Congress, to “draft another formula based on current conditions.” A formula that demonstrates that exceptional conditions justify Federal oversight of an extraordinary tool to confront racial discrimination in elections. That was an invitation to this body to enact new legislation.

Consistent with that mandate, the VRAA’s practice-based preclearance applies equally to all States and political subdivisions and is triggered only in jurisdictions that have a significant racial or language minority citizen voting age population and that seek to employ any of six categories of voting practices that are known to correlate with racial and language-based discrimination. It does not impose a ban on specific voting practices. It does not require continuing or permanent coverage. It doesn’t have a targeted geographic scope, nor are there prescribed jurisdictions.

Indeed, practice-based preclearance is constitutional precisely because it targets specific practices and their known impact on targeted populations and not the jurisdictional actor. Even though the Supreme Court has held that distinctions can be justified in some cases, practice-based preclearance does not offend the principle of equal sovereignty embraced by the majority in *Shelby* because it applies to each State equally based on current data.

Finally, the Congressional Record contains ample evidence of and justification for practice-based preclearance based on persistent and ingenious methods of racially motivated voter suppression. Preclearance is long established as a valid exercise of power under *South Carolina v. Katzenbach*, which was decided a year after the Voting Rights Act. The Supreme Court has upheld the constitutionality of the Voting Rights Act, as well as Congress’ power to ban facially neutral practices like literacy tests. I can cite to *Oregon v. Mitchell* and a plethora of other cases that uphold that principle, and I will end by saying that violations of the fundamental right to vote are not ordinary harms. They require extraordinary remedies.

Practice-based preclearance is a direct, measured, and constitutionally sound response to the current conditions of an increasingly racial diverse and multilingual electoral that are fraught with voter suppression. The VRAA is desperately needed to curb discriminatory incursions on the right to vote that compromise our elections and diminish the integrity of our democracy.

Thank you.

[The statement of Ms. Nelson follows:]

STATEMENT OF JANAI NELSON

I. Introduction

Good morning, Chairman Cohen, Ranking Member Johnson, Chairman Nadler and Members of the Subcommittee. My name is Janai Nelson, and I am Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to testify this morning on the constitutionality of Congressional oversight of voting rights legislation and the specific and urgent need for the strong provisions outlined in the Voting Rights Advancement Act (“VRAA”).

Since its founding in 1940 by Thurgood Marshall, LDF has fought to protect and expand voting rights for Black voters and other communities of color. Through litigation, public policy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality in every area of life. Our mission has always remained focused on racial justice and equality. In advancing that mission, protecting the right to vote for African Americans has been the epicenter of our work since our inception. Beginning with *Smith v. Allwright*, our successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active participation of Black voters.¹

LDF has consistently been a leader in the struggle to secure, protect, and advance voting rights for Black voters and has repeatedly defended the gains and protections won over the course of our nearly 80-year history. For these reasons, we are particularly well-positioned and qualified to definitively state that there is a critical need for Congress to restore and strengthen the Voting Rights Act of 1965 (“VRA”). In each reauthorization of the VRA, LDF has played a critical role: providing testimony at congressional hearings, publishing research detailing places with persistent racial discrimination in voting and defending the right to vote through litigation. Threats to our electoral system are threats to the very foundation of our democracy and require comprehensive remedies. Congress has the explicit constitutional duty to protect the right of every eligible person to vote, and to ensure that each vote counts. Indeed, racial discrimination in voting is so pernicious, so antithetical to our democratic ideals, that we amended the U.S. Constitution to expressly prohibit it and to expressly delegate power to Congress to enforce its protections.²

Since the Supreme Court’s 2013 decision in *Shelby County v. Holder* there has been a proliferation of discriminatory voting practices across the country.³ By gutting the VRA’s preclearance provision in *Shelby*, the Supreme Court allowed jurisdictions with a history and ongoing record of voting discrimination to change their laws without scrutiny or oversight from any federal authority. Predictably, within hours of the decision, states and jurisdictions formerly covered by section 5, adopted voter suppression practices that were formerly prevented by preclearance.⁴ Section 5 preclearance was an efficient and effective mechanism for detecting and redressing the many forms of discrimination before elections take place—without preclearance, these discriminatory practices now undermine our democratic process. The immense record of discriminatory voting practices enacted since the 2013 *Shelby* decision demands Congress fulfill its constitutional obligation to protect voters from an onslaught of new and “ingenious methods” of voter discrimination.⁵

It is past time for Congress to act. The VRA is universally acknowledged as the most successful and most transformative piece of legislation to emerge from the Civil Rights Movement. It enshrined our most fundamental values ensuring dignity and equality for all citizens by guaranteeing the right to vote, which the Supreme Court has called “preservative of all rights.”⁶ For decades, the VRA authorized Congress to enforce the Fourteenth and Fifteenth Amendments when federal and State governments ignored and circumvented their directives. Congress reauthorized the

¹ 321 U.S. 629 (1994).

² U.S. Const. amend. XV.

³ *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013).

⁴ 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-ids-supreme-court-decision>.

⁵ U.S. Congress, House, *Committee on the Judiciary Voting Rights*, 89th Cong., 1st sess., 1965, Mar. 18–19, 23–25, 29–Apr. 1, 1965.

⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

VRA on four separate occasions—in 1970, 1975, 1982, and most recently in 2006—each time on a bipartisan basis, with overwhelming support.

It is not only imperative that Congress restore the Voting Rights Act, but that it authorizes an Act that addresses the modern needs and political climate of the nation. The Voting Rights Advancement Act does precisely that: It establishes a new coverage formula for preclearance that is tied to recent voting rights violations and strengthens other aspects of the VRA to better address the ingenious methods that are, and will be, used to suppress the full voting strength of African Americans and people of color.

II. The Proposed Known Practices Coverage Provision Is Constitutional on its Face and Consistent with Longstanding Supreme Court Precedent

Congress has a critical opportunity to pass the Voting Rights Advancement Act, a measured, flexible and forward-looking effort to update the VRA. Faced with an extensive record of racial discrimination in voting practices, Congress must act

swiftly, deliberately and boldly to restore the now-defunct preclearance provision. In *Shelby*, the Supreme Court provided instructions for Congress to Act in this very instance. The Court did not overrule the constitutionality of a measured and properly tailored preclearance provision—nor did it render other remedies inherently unconstitutional. Indeed, the Supreme Court found preclearance a “stringent” and “potent” measure, fully available to Congress to deploy as an “extraordinary” tool to confront racial discrimination in elections and voting systems.⁷ Racial and ethnic discrimination is an extraordinary harm that necessitates the extraordinary remedy of preclearance. We urge Congress to employ the full force of its authority in order to protect the American people from such a malicious and extraordinary harm.⁸ The Known Practices Coverage (KPC) provision of the VRAA is a necessary tool to that end.

The KPC provision of the VRAA would require federal preclearance of voting practices that are known to correlate with racial or language-based discrimination only in jurisdictions that have a significant racial or language minority citizen voting age population. Indeed, while the formula applies equally nationwide to all jurisdictions, it is only triggered if a State actor chooses to adopt or pursue one of five categories of voting practices with a known disproportionate, discriminatory impact.⁹ Coverage, therefore, is not based on geography but rather combines a demographic threshold with the prevalence of specific, known practices of voting rights discrimination. Accordingly, KPC is constitutional specifically because its emphasis is decidedly on the practices themselves and not the jurisdictional actor. In this regard, states remain “equal in power, dignity and authority” per the *Shelby County* mandate.¹⁰

Importantly, KPC also does not impose a strict ban on any specific voting practices. Instead, the identified practices are subject to federal preclearance to ensure against potential discrimination based on race or language minority status thereby ensuring compliance with Supreme Court precedent. It is a valid exercise of Congress’s constitutional power to require that practices known to most likely result in racial or language discrimination—practices with entrenched and virulent histories of voting discrimination—can be subject to preclearance.

KPC is a reasonable, flexible response to the very standards articulated by the Supreme Court. It does not arbitrarily subject states or political subdivisions to disparate treatment. Rather, it singles out specifically tailored discriminatory practices for federal oversight. It has no specific geographic scope and does not require continuing or permanent coverage. It does not offend the principle of equal sovereignty embraced by the majority in the *Shelby* decision. Moreover, as the Court noted in *NAMUDNO v. Holder*, where it first introduced the principle of equal sovereignty as a constraint on congressional power in connection with the VRA, “distinctions can be justified in some cases.”¹¹ The congressional record contains ample evidence and justification for KPC on the basis of persistent and ingenious methods of racially motivated voter suppression.

Furthermore, Congress’s authority to outlaw practices that are not per se unconstitutional but are known to perpetuate racial discrimination stands on ample precedent. The Supreme Court has repeatedly found that Congress’s enforcement powers have broad reach. In *South Carolina v. Katzenbach*, the Supreme Court upheld the

⁷ *Shelby County*, 133 S. Ct. 2612, slip op. at 11–12.

⁸ *Shelby County*, 133 S. Ct. 2612, slip op. at 11–12.

⁹ Proposed Sec. 4(c)(2).

¹⁰ *Shelby County*, 133 S.Ct. at 2623 (citing *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

¹¹ 557 U.S. 193 (2009).

constitutionality of the VRA and Congress's power to ban certain discriminatory voting practices as a rational exercise of authority.¹² While the Court recognized that voting practices like literacy tests were presumptively lawful and facially neutral, it held that such practices could still be employed to diminish minority voting power and impede equal political participation. Furthermore, such practices were recognized by judicial and legislative bodies to serve no legitimate purpose other than to perpetuate the exclusion of African Americans from the political process.¹³ The court therefore found that Congress "may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," including a nationwide ban of this known discriminatory practice.¹⁴

In *Oregon v. Mitchell*, the Court again affirmed Congress's authority to overturn State laws governing elections if necessary.¹⁵ The Court found article 1 section 4 of the Constitution and the Necessary and Proper Clause gave the States the power to make laws that govern elections and, according to a "long line of decisions in th[e] Court," gave Congress the "ultimate supervisory power over congressional elections."¹⁶ Importantly, the Court recognized that the legislative record surrounding the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments also supported the finding that Congress has the authority to prevent racial discrimination in the electorate without infringing on states' rights.

In *City of Rome v. United States*, the Court found it permissible for Congress to identify and overturn changes to the voting process that had racially discriminatory effects—whether intentional or not.¹⁷ Indeed, while the City of Rome proved it had not pursued electoral changes with any racially discriminatory purpose, its proposed changes were denied by the Department of Justice as they prevented African Americans from securing local representation. The Court recognized that Congress's power to repeal changes to voting practices, even in the absence of intentional racial discrimination, was derived from the Fifteenth amendment and ruled in favor of the Department of Justice.

The Supreme Court has continued to affirm the proposition that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."¹⁸ In both *Tennessee v. Lane* and *Nevada Dept. of Human Resources v. Hibbs*, the Supreme Court found that Congress may enact "prophylactic legislation" to prohibit practices that are facially constitutional but discriminatory in effect.¹⁹ In *Kimel v. Florida Bd. of Regents*, the Court further elaborated that Congress's "power 'to enforce' the [Fourteenth] amendment includes the authority both to remedy and to deter violation of rights guaranteed."²⁰

Indeed, even after the *Shelby* decision, the Circuit Courts have reaffirmed Congress's power to enact prophylactic legislation under the Thirteenth, Fourteenth and Fifteenth amendments.²¹ It is well documented and well established in both the legislative record and caselaw that Congress has the authority to identify and prohibit manipulations of the voting process that could be used to disenfranchise minority voters.

In banning these practices, Congress relied heavily on the extensive record of evidence showing depressed voter turnout and registration in jurisdictions in which these measures were used.²² By holding congressional hearings, field hearings and engaging in a detailed fact-finding process, while considering the KPC provision of the VRAA, Congress today operates with the same care and caution.

¹² *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹³ See *Lassiter v. Northampton County Board of Elections* 360 U.S. 45 (1959).

¹⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

¹⁵ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹⁶ *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970).

¹⁷ *City of Rome v. United States*, 446 U.S. 156, 177–78 (1980).

¹⁸ *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

¹⁹ See *Tennessee v. Lane*, 541 U.S. 509, 518–20 (2004); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 727–28 (2003).

²⁰ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).

²¹ See, e.g., *U.S. v. Metcalf*, 881 F. 3d 641, 644–45 (8th Cir. 2018); *Veasey v. Abbott*, 830 F. 3d 216, 253 n.47 (5th Cir. 2016) (en banc); *U.S. v. Cannon*, 750 F. 3d 492, 503–505 (5th Cir. 2014); *U.S. v. Hatch*, 722 F.3d 1193, 1201 (10th Cir. 2013).

²² *South Carolina*, 383 U.S. at 309–313.

III. Full Restoration of the Voting Rights Act Is Critical to the Integrity of Our Democracy

Evidence of widespread discrimination against Black voters is overwhelming and growing, and the need for legislative action to protect the integrity of our democracy is urgent. The 2013 *Shelby* decision has undermined the Voting Rights Act, made our democracy vulnerable and allowed for voter suppression to go unchecked. Even one election in which the right to vote is restricted, threatened, or violated, is one election too many.

Violations of our electoral system are not ordinary harms and must therefore be met with extraordinary remedies. An election with conditions later found to be racially discriminatory, has consequences that existing methods of defense cannot combat. Officials elected under unlawful conditions influence and create policy that affects all constituents in their jurisdiction. They may write and implement legislation that allows them to maintain power or that targets communities with viable claims of discrimination. Even if future elections are not tainted by discriminatory practices, those elected to office under unlawful conditions have already accessed and used powers intended only for candidates who constituents fairly and democratically elected. The inability of the courts to retroactively correct these wrongs further disenfranchises and threatens to disengage voters who may understandably believe that their vote does not matter if discriminatory voting practices are left unchecked. Racially discriminatory practices in the electoral system have consequences that preclearance can prevent and correct. Preclearance was designed as a unique and powerful intervention to stop discrimination *before* elections take place.

While section 2 of the VRA authorizes plaintiffs to challenge racial discrimination in voting after a discriminatory voting practice is implemented and is a vital tool of enforcement, it cannot redress some of the most egregious voting harms. And, while civil rights groups like LDF continue to actively pursue litigation to protect voting rights under section 2 of the VRA, we know that litigation alone is insufficient to stymie the innumerable assaults on the right to vote. We know that justice has been delayed and denied for millions of eligible voters across the country.

Even when we prevail in section 2 cases, irreparable damage is already done. In Texas, during the three years we spent challenging the state's voter ID law, elections continued to take place. In that time, and under conditions the court later found impermissible, voters elected a U.S. senator, all 36 Members of the Texas delegation to the U.S. House of Representatives, a Governor, a Lieutenant governor, an Attorney General, a Controller, various statewide Commissioners, four Justices of the Texas Supreme Court, candidates for special election in the State Senate, State boards of education, 16 State senators, all 150 Members of the State House, over 175 State court trial judges, and over 75 district attorneys. We proved at trial that more than half a million eligible voters were disenfranchised by the ID law but there was no retroactive solution available. As a result, the voices and votes of thousands were successfully suppressed.

Voters should not have to wait years to ensure that their constitutional right to vote is vindicated. Voters should not have to spend an exorbitant amount of money to litigate a section 2 case, to ensure their vote has been counted.²³ Litigation is time consuming and expensive.

In addition to KPC, a full restoration of the VRA should include provisions that address other modern challenges to our democracy: The disenfranchisement of formerly incarcerated people and cyber threats to our election systems. We strongly urge Congress to adopt the democracy restoration provisions included in HR 1, For the People Act, along with KPC to further strengthen its impact.²⁴

People of color, specifically African Americans, are disproportionately represented in the prison population. Restoring federal voting rights to returning citizens would roll back unduly restrictive disenfranchisement laws that bar formerly incarcerated people from participating in democracy and fully returning to society. LDF has been instrumental in challenging these restrictive laws across the country. Recently, we filed suit challenging the implementation of a thinly-veiled poll tax designed invalidate the express intent of amendment 4 to the Florida Constitution, the Voting Restoration Amendment.²⁵ Congress must do its part to remove obstacles to voting for

²³ NAACP LDF, *The Cost (in Time, Money, and Burden) of section 2 of the Voting Rights Act Litigation* (Feb. 14, 2019), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf>.

²⁴ See For the People Act, H.R. 1, 116th Cong. Sub. E, title I, § 1402.

²⁵ *Gruver, et al. v. Barton, et al.*, No. 1:19-cv-121 (N.D. Fla. 2019).

the nearly 4.7 million disenfranchised citizens who have been released from incarceration and are still denied the right to vote in federal elections.²⁶

Congress must also address how digital platforms are increasingly used to influence elections.²⁷ As our democracy faces new and pervasive threats, we encourage Congress to confront these digital threats within the historic context of race in the public space. HR 1 includes provisions to prevent deceptive cyber-practices and to require the Director of National Intelligence to conduct regular checks on foreign threats.²⁸ It is critical that Congress Act to investigate and legislate these activities that threaten to severely compromise the integrity of our elections.

IV. Conclusion

The mounting record of discriminatory voting changes since the Shelby decision requires decisive, comprehensive and restorative Congressional action. Congress has the ultimate and distinguished authority to enforce the anti-discrimination principle articulated in the Fourteenth and Fifteenth Amendments, to protect the vote of every eligible citizen and ensure that their vote counts.

There have been approximately 10 federal court decisions finding that states or localities intentionally discriminated against voters of color since 2013. There is no doubt that racial discrimination in voting continues to be relentlessly pursued. We will continue to fight racial discrimination in electoral systems wherever it may arise, and we will continue to use all the tools provided to us by Congress. But it is imperative that Congress use its authority to strengthen the Voting Rights Act by implementing a new preclearance provision. The Known Practices Coverage provision deftly responds to the Supreme Court's express invitation to Congress to "draft another formula based on current conditions" that demonstrates that "exceptional conditions" to justify federal oversight of State election law practices.²⁹ KPC is a direct, measured, and constitutionally sound response to the current political conditions of an increasingly racially diverse and multi-lingual electorate in a context fraught with voter suppression. This hearing and fact-gathering process are critical to laying the foundation to fully restore the VRA and enable Congress to exercise its vital enforcement powers to protect the right to vote. Thank you.

Mr. COHEN. Thank you very much.

We will now start our questioning, and I will start and first ask Ms. Nelson a question. Professor Eastman stated in his written testimony that section 2's prohibition on voting measures that have a discriminatory impact, as opposed to ones that are intentionally discriminatory, is constitutionally suspect. What is your response to that, Ms. Nelson?

Ms. NELSON. Well, my first response is that that is not the focus of this hearing, although I believe we owe a response to an inquiry that intends to lead us in a different direction.

The Voting Rights Act has been upheld on multiple occasions by the Supreme Court, both section 5 and section 2. Section 5 was most recently clearly rubberstamped by this current Court in 2013 in the Shelby County decision that all of us lament. The one thing that came out of that that we can rely on for some assurance is that the Court had an opportunity to say that it was unconstitutional and did not.

Instead, it extended an invitation to this body to come back with a new preclearance formula, and that is exactly what this body has done, and I hope we will adopt that measure.

²⁶ Morgan McLeod, *The Sentencing Project, Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, (Oct. 2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/>.

²⁷ NAACP LDF, *LDF Responds to Facebook's New Policy on False Voter Information Ahead of Election* (Oct. 16, 2018) <https://www.naacpldf.org/press-release/ldf-responds-facebooks-new-policy-false-voter-information-ahead-election/>; https://www.washingtonpost.com/opinions/its-time-to-face-the-facts-racism-is-a-national-security-issue/2018/12/18/f974646-02e8-11e9-b5df-5d3874f1ac36_story.html?utm_term=.8a1252669166.

²⁸ See For the People Act, H.R. 1, 116th Cong. Sub. D, title I, § 1302.

²⁹ 570 U.S., 133 S.Ct. at 2631.

In terms of the Voting Rights Act as a whole, the Supreme Court has never applied the congruence and proportionality test that Mr. Eastman suggests that came out of the *City of Boerne v. Flores* to legislation under the Fifteenth Amendment. Congress draws heavily upon the enforcement powers of the Fifteenth amendment in its exercise of enforcement powers in enacting the Voting Rights Act and enforcing its provisions.

Congress has only—the Court, sorry, has only applied that in connection with the Fourteenth Amendment, and in that context, the Voting Rights Act has actually been used as a beacon of what congruence and proportionality looks like, and I can cite to several cases that establish that.

Mr. COHEN. Let me ask you one other thing. In his written testimony, he also said preclearance formula fails the congruence and proportionality test, which you were talking about, with respect to Congress' authority under the Fourteenth Amendment, implicitly importing a testless limitation on our Fifteenth amendment authority. Do you find that to be without basis?

Ms. NELSON. Without merit, absolutely. Just to say one word about the congruence and proportionality test, what it seeks to do is ensure that when Congress enacts legislation, it is seeking to remedy and deter congressional violations and not create new constitutional rights. That is precisely what the Voting Rights Act does. It is seeking to remedy violations that many of us here on this panel have identified and that have already put into the record.

It seeks so deter those constitutional violations by ensuring that there is preclearance and Federal oversight of voting changes. It does not in any way alter the fundamental right to vote that the Supreme Court established back in 1886 as preservative of all rights.

Mr. COHEN. Do you happen to know the history in the 1965 Act when section 5 was first passed, what the history was on that and why they felt that was necessary?

Ms. NELSON. Well, the history in 1965 came on the heels of a bloody and violent protest for the right to vote. Congresswoman Sewell mentioned earlier the very tragic events in her hometown of Selma that gave rise to the Voting Rights Act, and that was really just the culmination of decades of violence visited upon African Americans who dared to exercise their citizenship through the political process.

Mr. COHEN. Most of those States that were in that formula were in the Old South. You mentioned some States in your testimony where you had had litigation, and they were Texas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, and there might have been another one, but I think that has got it?

Ms. NELSON. Missouri and—yes, that was not covered by section 5.

Mr. COHEN. Well, yes, but then they joined the SEC. So, in essence, they admitted they probably should have been there. It is a sports thing.

[Laughter.]

Mr. COHEN. Did not the States that were chosen pretty much mirror the problems that have existed in our Nation with civil rights laws that have tried to inhibit people's right to vote?

Ms. NELSON. So back in 1965, the States that were covered under section 5 were States with some of the most virulent histories of racial discrimination in voting. There were others that ultimately came to be covered under section 5, including my home State of New York and New York City, portions of the city that engaged in racial discrimination.

Mr. COHEN. They did a pretty good job. We have limited time. So, I want to ask Professor Kousser, who is the statistics pro, pretty much you showed where most of the cases have been brought were in those jurisdictions which were covered by the preclearance requirement. Give us a little flesh on the bones of that.

Mr. KOUSSER. Yes, that is true. Also, the '70 and '75 laws were important. About 20 percent of the instances come from Texas, which wasn't covered in the original '65 act.

Mr. COHEN. They were in the Southwest Conference.

Mr. KOUSSER. That is true. It is interesting, if you look at cases from '57 to '65, there were States that were covered by the '65, by section 4 under '65 that were—that had no cases from '57 to '65. Both Carolinas, Virginia, no cases during that period of time. Congress knew where the voting restrictions were, but they weren't necessarily exactly where cases had been brought.

Now we have got a lot more experience. We have got all this experience from 1957 through 2019 in my tables and database, which will be available for the Committee to look at if they want to figure out what practices and where they are. We know much more fully than people did in 1965 exactly where voting practices, which have been adjudicated to be illegal or were parts of settlements or parts of objections, we know exactly where they were. So, if Congress wants to base something on that, it has a much fuller legislative record than they had in '65.

Mr. COHEN. Thank you, Professor.

I recognize Mr. Johnson for questions.

Mr. JOHNSON of Louisiana. I want to thank you all for being here. Don't interpret the empty chairs on either side as lack of interest. This is an extraordinary day on Capitol Hill for about 15 reasons that I don't need to recount to you, and there are multiple events and Committee hearings going on simultaneously.

We have had some of the Republican Members come in and out of the back. We are all watching you on a big screen in that room right on the other side of the wall. So, what you say here is important for the record. You know how this works.

I am watching all of you and your faces, as there has been testimony and questioning. Let me just start first with Professor Eastman. Is there anything that has been said so far that you would just want to respond to that you haven't had a chance to already?

Mr. EASTMAN. Two things. I agree with Ms. Nelson that the Supreme Court has not yet applied its ruling in *City of Boerne* to Fifteenth Amendment, but the enforcement language of section 2 of the Fifteenth amendment is identical to the enforcement language of section 5 of the Fourteenth Amendment. The notion that they

would read that language differently is, therefore, not something I would anticipate this Court doing.

The second thing, I would really like to explore with Professor Kousser, and I know he is not an attorney, but if I could have him in deposition, I would like to explore the question because he divided his dataset pre and post 1982. Well, a dramatic change in the Voting Rights Act occurred in 1982. We changed section 2 from an intentional discrimination statute to a disparate impact statute.

So, I would like to ask whether his dataset controlled for that? If there was an increase in section 2 intentional discrimination cases, there might be evidence of an ongoing problem. If what you have got is new cases that could not have been brought prior to '82, that is no indication of a problem with the existing section 2, it is that we have now got a new cause of action that didn't exist before, and I strongly suspect it is the latter.

Mr. JOHNSON of Louisiana. Let me stop you, and I will go to Professor Kousser. Would you want to respond to that answer?

Mr. KOUSSER. I will be happy to. What I was trying to show was that things didn't get better suddenly, as you move on in the years, that after '82, there were three times as many violations after '82 as there were before '82. There was a considerable disagreement as to whether the amendments in 1982, which I testified on in 1981, were clarification of the law or a change in the law.

The section 2 had almost never been used before 1980 before the Bolden case, and so most of the litigation and the events from pre '82 don't consider, didn't concern section 2. Section 2 was invigorated simply by the discussion and by the fact that you had specific—a specific checklist in the Senate report for exactly what you had to do to litigate and win a section 2 case.

So, there were changes to be sure that more attention was devoted. I don't think that there was a change in congressional intention. I think Congress had the intent of having an effect provision in section 2 beforehand.

Mr. JOHNSON of Louisiana. Let me put the volley back to Professor Eastman. So, do you want to respond to that?

Mr. EASTMAN. Yes. Look, the Supreme Court held in—I am drawing a blank on the case name in 1980 that section 2 only reached intentional discrimination, in fact, all it can reach under the *City of Boerne* ruling. Because to add to that, to impose a disparate impact cause of action where there is not a constitutional violation would be adding to the burdens on the States, not enforcing the burdens on the States contained in the Fourteenth and Fifteenth Amendment.

So, Congress deliberately changed 1982 in reaction to that case to make clear that it would allow for disparate impact claims that had not been the case before, and that is a huge distinction because any single procedure that you change, whether you move a polling place down a block, you can make the case it is going to have a disparate impact. There is no question that leads to increase in litigation over those things, increased claims of preclearance, increased grounds for denial of preclearance. All these things when you go from intentional discrimination, as prohibited by the Fourteenth and Fifteenth Amendment, to disparate impact is going to

necessarily drastically increase the potential opportunities for litigation and challenges.

So, it is not a surprise after those changes. It is also a change, as I note in my written testimony, makes that provision more constitutionally problematic after the *City of Boerne*. The Court has never confronted that issue, but it has been lurking out there ever since *City of Boerne* came in. Lots of scholarship written about raising that, trying to defend Voting Rights Act after *City of Boerne* raising the challenges.

I think eventually this Court is going to confront that issue, and they have hinted several times in recent opinions that they are going to do that.

Mr. JOHNSON of Louisiana. Unfortunately, I am out of time. I had a whole long list of questions, and we may submit them to you all after the hearing, if you wouldn't mind—

Mr. COHEN. If you would like to choose the best one, I will let you do it.

Mr. JOHNSON of Louisiana. Well, all right. Since you did that, I am going to pitch it out to Mr. Tyson. Anything you would want to add that hasn't been said yet. I will do that.

Mr. TYSON. I will be brief, Mr. Chairman. There is one thing I thought that would be worth clarifying.

The question related to a lot of the terminology that is thrown around, such as the term “voter purges” that are used. A lot of times what is being referred to as “voter list maintenance.” Under the Help America Vote Act, under the NVRA, there is a need of jurisdictions to conduct list maintenance, and the failure to conduct that kind of maintenance to keep the voter roles updated will lead to further litigation against a State.

So, in looking at what a State has or has not done in terms of their list maintenance, I think it is important to look at not only the numbers of individuals and the people who were canceled or moved to a different status, but also what the State has done.

For example, in Georgia, there was a period of time where there were no removals because of concerns about the data quality that led to a higher number at one point. Then, since 2018, this year Georgia has significantly updated the “no contact” portion of our voter list maintenance to where people have a much longer time period.

Mr. COHEN. Thank you. That is about the same time as I went over.

Mr. Nadler?

Chairman NADLER. Thank you, Mr. Chairman.

Let me first say that the conclusion that Congress rejected on disparate impact was decided by the Supreme Court in the *Mobile v. Bolden* case in 1980, but that was a statutory, not a constitutional interpretation. Congress clarified that the Act applied to disparate impact as well as to intentional discrimination.

Also, I should say that as one of the authors of the Religious Freedom Restoration Act passed in 1993, I was certainly no fan and I am no fan of the *City of Boerne* decision and which limited that act, and I certainly hope it is not extended to the Fifteenth Amendment. It is bad enough on the Fourteenth.

Professor Kousser, in your analysis of voting rights litigation, you concluded that the pattern of overall cases was driven less by the amount of discrimination than by the nature of Supreme Court rulings, essentially that the Court creates its own lens through which to shape findings of discrimination.

How should Congress respond to the Court's influence in evaluating the continuing need for section 5 preclearance and the structure of section 2 litigation? How should we take account of that?

Mr. KOUSSER. What you shouldn't do is say that the number of cases has gone down, and therefore, that proves there is no need. You should take into account over a longer period of time—before *Shelby County*, before Bossier, too, even perhaps before *Shaw v. Reno*—the number of cases that came about and that were filed and won.

You should take into account the experience under the California Voting Rights Act, which has different sorts of standards. That is an indication that there are still problems to be addressed. If you look over the whole period of time and you looked farther into the database than I was able to go into in 5 minutes or even in my written testimony, you can see the different practices that have been used over the period of time that have had a discriminatory effect on minorities and have been judged to.

Chairman NADLER. Thank you. Mr. Saenz, I have three questions for you.

First, what is the strongest constitutional basis for H.R. 4's practice-based preclearance provision?

Mr. SAENZ. I think that it satisfies your constitutional powers, however analyzed, whether that is under the *Shelby County* decision, whereas Ms. Nelson pointed out it does not focus on specific jurisdictions. It does not single out specific jurisdictions.

Again, I have your concerns as well—the Boerne test were to apply, that it would satisfy that measure of your congressional authority as well. These are practices that historically have correlated with attempts to restrict that rights of growing minority communities, and I think the record shows that.

Indeed, all of our experience after *Shelby County* suggests it as well, where the Pasadena, Texas case, for example, involved a mayor who asserted I couldn't do this before *Shelby County*. Now, I am going to do it. I want to shift from eight-member districts to six-member districts and two at-large seats.

Chairman NADLER. Thank you. Now, inherent in what you are saying is the answer to my next question, which is how is H.R. 4's practice-based preclearance provision responsive to the federalism concerns raised by the Supreme Court in *Shelby County*?

Mr. SAENZ. Yes. I think that it responds to those concerns by not focusing on any specific jurisdictions, but treating all jurisdictions, as long as they meet a threshold of diversity and the size of minority populations and subjects' practices rather than jurisdictions to the very efficient preclearance mechanism.

Chairman NADLER. In the same vein, how do you reconcile support for practice-based preclearance with the push to re-establish the more traditional geographic-based preclearance regime?

Mr. SAENZ. I think that they serve different needs. The geographic-based preclearance formula recognizes that there are cre-

ative efforts in certain jurisdictions with long histories, demonstrated, adjudicated histories of voting rights suppression where you ought to look at all the electoral changes that are being considered, no matter what they may be. While known practices coverage focuses only on specific identified practices, but with respect to those where there is a long history of violations, appropriate to look at all the potential electoral changes being considered.

Chairman NADLER. That would be well within Congress' power under the section 2 of the Fifteenth Amendment?

Mr. SAENZ. Absolutely. I believe that it would meet any test that could be applied to those coverage formulas because the record supports very strongly that the jurisdictions that would come under the geographic formula do have that recent demonstrated adjudicated history. The practices and known practices coverage have a similar history across jurisdictions of being used to suppress minority voting rights.

Chairman NADLER. Thank you very much. My time has expired. I yield back.

Mr. COHEN. Thank you, Mr. Nadler.

I recognize Ms. Scanlon for 5 minutes of questioning.

Ms. SCANLON. Thank you.

Ms. Nelson, we have appropriated a substantial budget for the Department of Justice to enforce voting rights based on the statutes we already have. Why do we need other statutory tools to combat discrimination based on race or ethnicity in our elections?

Ms. NELSON. I will respond I think there are two reasons. One is that the tools that we have are important and robust. They are necessary, but not sufficient. We have seen since 2013 a flood of voter suppression tactics that would never have passed preclearance had section 5 been enforced.

In fact, as my colleague Tom Saenz has already said, from the moment the decision was issued, you had attorney generals, mayors, and had election officials across the country acknowledging that they were going to enact laws that had previously been held to be racially discriminatory, that they were then going to enact them despite that clear evidence.

The other answer I would give is that we need laws that will protect voters, no matter the Administration, no matter the will of any particular Department of Justice to enforce the laws that we have. Preclearance does just that. It allows for transparency in electoral processes. It allows for the Government or, in fact, forces the Government to have to opine on voting changes in jurisdictions that meet the criteria of preclearance—I am sorry, practice-based preclearance.

Ms. SCANLON. Okay. Back in February, we had the Acting Attorney General, Mr. Whitaker, in here, and at that time, we established through his testimony or refusal to testify that the Department of Justice under the current Administration had not brought any actions to enforce the Voting Rights Act. Is that still true?

Ms. NELSON. I believe that is still true. I don't know of any action that is currently pending, despite what is widely reported as an epidemic of voter suppression, particularly leading up to an election that we already know has—is threatened by not only domestic voter suppression tactics, but foreign interference that is

also rooted in racial discrimination, particularly against African Americans.

Ms. SCANLON. So, the acts that we are looking at here today would provide mechanisms that would supplement Department of Justice enforcement where the Department of Justice isn't doing that job?

Ms. NELSON. That is right. It would certainly force that. I think the VRA, we are focusing on practice-based preclearance, but it has many other critical provisions, including the transparency provisions, which I think are the most obvious and innocuous ones that we could have. We should at least know when there are changes that might affect minority populations and other targeted populations in the country so that we can be ready to combat them if necessary, and if certain triggers are met, that they will have to go through some Federal oversight.

Ms. SCANLON. I was struck a couple of times. People have mentioned the language of persistent or unrelenting and ingenious efforts to suppress the vote. It certainly feels as though we have seen some of that ingenuity on display since the Shelby decision. So, can you just speak a little bit more to how the known practices coverage is responsive to the Supreme Court's concerns in *Shelby*?

Ms. NELSON. Sure. You know, the Supreme Court said that the section 4 coverage provision was outdated, that it relied on the data that we opened the hearing with, was largely based on Southern States, targeted a particular geographic area of the country, and seemingly unfair.

So, whether we agree with that notion or not, this practice-based preclearance addresses that issue by making this a preclearance provision that is national in scope. Any State, any political jurisdiction might fall under this preclearance provision, but only if it reaches a certain threshold in terms of minority or language-based population and if it is engaging in one of six potential voting practices that we know are known to correlate with racial and language-based discrimination.

So, we are not guessing. These are already practices that have a history of discrimination, and we have a large number of people who might be subject to that discrimination within that jurisdiction. That is a recipe for potential suppression, and all we are asking is that the Federal Government look at that law and determine whether it will, in fact, suppress the minority vote.

Ms. SCANLON. That is because it is pretty hard to remedy a suppression of the vote after the fact, isn't it?

Ms. NELSON. That is right. Once a violation of the right to vote has occurred, we can use other tools to challenge it. But if it involves an election, that election is already passed. As someone said earlier, the bell cannot be un-rung, and those rights to vote cannot be vindicated.

This can't be a democracy in which we treat the right to vote so cavalierly.

Ms. SCANLON. Thank you very much for your testimony. I yield back.

Mr. COHEN. Ms. Garcia, you are recognized for 5 minutes.

Ms. GARCIA. Thank you, Mr. Chairman, and thank you for bringing this hearing to fruition. It is a very important issue for so many of us across this country.

I want to thank also all the witnesses who are here today. By 2020, Latinos are expected to become the largest nonwhite voter population in the United States. The Pew Research Center estimates that 32 million Latinos could cast a ballot in the next national election.

Some of us agree that the increase in anti-immigrant policies, in political speech and rhetoric is part of what is driving many Latinos to the poll, as well as was the case in my district and in Harris County during the 2018 elections. Franchising our minority voters will have widespread benefits for all Americans and will strengthen our democracy, already the strongest democracy in the world.

To protect our voting rights of eligible voters, today I introduced PASA, the Polling Access Safety Act, a bill that will prohibit interior immigration enforcement around polling places. We need stronger laws to ensure that Presidents—and as you stated, Ms. Nelson, not just this one, but for the future—can't use their extraordinary powers, including using the tools of ICE, to manipulate our elections in other ways. For example, to try to scare registered voters away from the polls.

PASA aims to ensure that the Latino vote is fully protected, eliminating the chilling effect that immigration enforcement could have on voter turnout on U.S. Citizens.

So, I would like to start with you, Mr. Vargas, and thank you for the kind words in your opening statement. Would you agree that interior immigration enforcement around polling places would chill a voter turnout for Latino U.S. citizens in mixed status families?

Mr. VARGAS. Thank you, Congresswoman, for that question.

Absolutely. H.R. 4 identifies only six known practices that have been used to suppress Latino voting, but there are many other tactics that have been used, including the placement of law enforcement officials at or near polling locations. So certainly, the placement of immigration enforcement officials at or near polling locations would be designed to suppress the Latino vote.

We have seen this already happen in other jurisdictions around the country where the placement of law enforcement, specifically in Latino-heavy polling locations, were designed to scare away Latinos from voting.

Ms. GARCIA. Well, thank you for that because I agree with you. I personally have experienced receiving a purging letter. I have experienced getting to the poll and being told that my name was on the list. I have experienced going to a poll and machines not being ready.

I mean, there are so many tools, and I was glad to see that Mr. Tyson brought up purging because I think there is more and more of that going on, particularly in my home State, regrettably, of Texas.

So, Mr. Saenz, a question for you. What is the latest status of the issue with the last purging scandal in Texas, where it was alleged that all these voters were quote, unquote—and I hate the word, never use it, except I am quoting this—“illegal aliens.” I

mean, we knew it was false. We knew it was bogus. But what is the status of the current litigation?

Mr. SAENZ. So, fortunately, that litigation was resolved with the secretary of State withdrawing and being required to withdraw his letter seeking to cause counties to question whether naturalized citizens who had naturalized after going to the DMV to obtain a license had legitimate places on their voter rolls. It was a purge that targeted, as you know, naturalized citizens.

The State knew that DMV records were not an accurate reflection of current citizenship status, but despite knowing that, it moved forward with challenging and asking county registrars to challenge the legitimacy of every person who had gone to the DMV when they were not yet a citizen.

The latest, though, is that this Administration is currently attempting to access DMVs around the country in different States to use that data, faulty for the same reason the data was faulty in Texas for the purpose of voter purge, use that data to determine the current citizenship of the population around the country. It is again knowing that the data isn't accurate but using it to target naturalized citizens.

Ms. GARCIA. Thank you.

Finally, and I only have about 30 seconds, Mr. Kousser, your Table 2 of your testimony highlights several important conclusions about patterns of discrimination. In whiter counties, those in which non-Hispanic whites exceeded 80 percent of the CVAP, the proportion of counties with at least one successful voting rights action was six times as high in the covered counties as the noncovered counties.

Can you explain how a focus on litigation findings can target areas where there is a concentration of discrimination?

Mr. KOUSSER. Well, obviously, using the congruent and proportional language of *Boerne*, it can find exactly where that discrimination has been and provide a more accurate record and a concentrated record, a coordinated record that Congress—on which Congress can base further designs of a new coverage scheme that the Supreme Court has asked for.

Ms. GARCIA. Thank you. Thank you, Mr. Chairman. Like others, I have other questions that I may submit for the record later.

Mr. COHEN. You are welcome. Thank you, Ms. Garcia.

Ms. GARCIA. Thank you.

Mr. COHEN. Ms. Sheila Jackson Lee of Texas is recognized.

Ms. JACKSON LEE. Mr. Chairman, thank you very much.

To the multiple witnesses, let me thank you for your testimony. We are overlapping in Committee assignments, and as well, many of us are mourning the loss of my friend and colleague, the Honorable Elijah Cummings, and so we were addressing his passing in a public setting.

I would offer to say that he would want us to be in this room because there were many occasions that we worked together that he worked with the leaders of this committee, including Chairman Cohen, on trying to address these questions.

Let me just for an editorial moment indicate how simple it was in 1965 to just write a simple voting rights bill that carried us forward and created the opportunity for my predecessor, the Honor-

able Barbara Jordan, to serve for the first time in any public setting.

Barbara Jordan had run in the scheme that was structured in Texas, which was an at-large scheme, if you will. So, if you lived in a community of color, you had to run county wide. She lost every single time. It was only when the voting rights and the underpinnings of the Voting Rights Act came that it was one vote, one person, but you had the right to select the person of your choosing that she went for the first time to the State senate.

Many people think she went to Congress. She went to the State senate in a district that she was able to win in. Then ultimately came to her opportunity to serve in the United States Congress out of a district, becoming one of two African Americans to serve in the United States Congress since Reconstruction.

So, I am disturbed that we are even at this place. In the last reauthorization of the Voting Rights Act that had all the bells and whistles that we think were appropriate, 15,000 pages of testimony that we had the same construct, signed by a Republican President. Suddenly, a skewed Supreme Court that didn't understand that even if you think you don't have polio, according to Justice Ginsburg, you don't need to get rid of the vaccination, and here we are today.

So, I would like to those who want to answer the question of why do we believe that we are here today when we had a perfectly good structure, and I know that we are focusing on legislation. Then I am going to give two questions, and I hope in the course of that time, you will be able to answer it.

I know that we are looking at some very outstanding legislation by Members of this Congress, Mr. Sensenbrenner and Ms. Sewell, who testified today. We thank them so very much.

It is a complicated process, one that we know that we have had the input of many civil rights organizations, but it is still going to tie our hands of looking for 15 or 25 and how many communities and then a lookback period. I want to hear from someone is there any other mode that we should add that may provide—and don't be fearful that you are undermining the present legislation. That is not the case.

I would be interested in that. I would be interested in, Mr. Kousser, on your observing. You observed that in the Shelby County opinion, Justice Roberts was able to pick and choose, pick and choosing from misleading statistics to contend that the factual underpinnings that previous Supreme Court decisions had judged that satisfied treating different States and localities differently had now been fatally weakened. Can you explain where Justice Roberts was wrong? That is a specific question.

Then to Mr. Yang, what are some examples of how known practices coverage would have impacted emerging Asian-American communities outside formerly covered in section 5. Let me put my first question, that overall question to Ms. Nelson, and add in there the work the NAACP did on felons that intimidates African Americans, Hispanics, and others that this whole thing if you are felon that you can't vote, and it discourages people from going.

Just the overall problem of having to get into the weeds of all these complicated layers that is going to be so complicated in order

to protect people's right to vote. So, I ask Chairman's indulgence. Mr. Kousser am I pronouncing your name correctly, sir?

Mr. KOUSSER. That is correct.

Ms. JACKSON LEE. All right. Then Mr. Yang, the two specific questions. Ms. Nelson? Thank all the other witnesses.

Ms. NELSON. Thank you for that question. I will try to be brief.

I think it was Mr. Tyson who mentioned earlier the issue of voter purging. That is something that we know, and we have recent proof of, a process that can be manipulated to remove minority voters from the voting rolls. In fact, this Administration attempted to create an entire commission aimed at list maintenance that ultimately intended to purge minority voters, and it was shut down by the lawsuits brought not only by the NAACP Legal Defense Fund, but many of our allies, and it was ultimately an abandoned effort.

That does not mean, though, that State and local actors can't engage in the same sort of mischief and target minority voters. So, if I had to choose an additional way to strengthen this legislation, that would certainly be one.

Then, of course, you raised the issue of the disenfranchisement of persons with criminal convictions. The Legal Defense Fund has long advocated for the elimination of any restriction that is tied to a criminal conviction, whether the individual is incarcerated or not. The right to vote is something that should stand alone and apart from any criminal sentence, and we are currently litigating that issue in Florida and have been doing that for a few decades now.

If we could make that mandatory, the elimination of any felon disenfranchisement laws in Federal elections, that would be an enormous step forward in re-enfranchising millions of African Americans and Latinos who have been deprived of their right to vote, and the community contagion that is similar to what happens when you have mixed status families who are intimidated by people at the polls, when you have certain Members of your family who cannot vote because of a criminal conviction, it actually spreads throughout the community in terms of depressing civic engagement and creating voter apathy.

So that is something that we would certainly press for if we had to expand this legislation in any way.

Mr. COHEN. Thank you very much, and thank—

Ms. JACKSON LEE. Can Yang and Kousser just quickly? They—

Mr. COHEN. Well, to be honest, I have got to be somewhere, and we are 2 minutes over.

Ms. JACKSON LEE. Can they be 2 minutes answering?

Mr. COHEN. No, they can't. I am going to have to call time.

Ms. JACKSON LEE. All right, Mr. Chairman.

Mr. COHEN. Thank you, thank you.

This concludes today's hearing. I want to thank all our witnesses for appearing today.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 12:21 p.m., the Subcommittee was adjourned.]

APPENDIX



Voting Rights Advancement Act Statement from the Friends Committee on National Legislation

Like so many other persecuted religious groups, members of the Religious Society of Friends (Quakers) came to the land that would become the United States seeking liberty for themselves and for their descendants. In his lecture *Quakerism and Politics* the Quaker Historian Frederick Tolles said of those early Quaker settlers, “They had created in the American wilderness a commonwealth in which civil and religious liberty, social and political equality, domestic and external peace had reigned to a degree and for a length of time unexampled in the history of the Western world.”¹ The Friends Committee on National Legislation (FCNL) is guided by the example of equality set by those early Quakers and calls on Congress to pass the Voting Rights Advancement Act (H.R. 4). FCNL is a Quaker lobby in the public interest that focuses on peacebuilding, economic justice, election integrity, climate change, and other social justice issues.

FCNL’s Statement of Legislative Policy, crafted by Quakers, lays out that “Our democracy can live up to its potential only if it ensures open access to public office and electoral processes, curbs the influence of money and corporate power, safeguards the integrity of the voting process without raising unnecessary barriers and provides full participation for disenfranchised people.”² The Voting Rights Advancement Act (VRAA) will help to ensure that the votes of all Americans are counted by restoring modified preclearance provisions as well as other provisions designed to protect people of color and communities regularly targeted for voter suppression.

When the Supreme Court struck down the pre-clearance provisions of the Voting Rights Act (VRA) in *Shelby County v. Holder*, it removed the most potent voter protections our nation had. Since the removal of this provision the rates of voter suppression have increased drastically. According to a report by the Brennan Center for Justice 16 million voters were purged between the federal elections of 2014 and 2016. This was almost 4 million more names purged from the rolls than between 2006 and 2008, elections that occurred while the preclearance provision was in effect.³ This report also found that the states that had been subject to the preclearance standard of the VRA purged voters at a significantly higher rate than states that had not been covered under the preclearance regions.⁴ This lack of protection has led to certain, particularly egregious instances of racially motivated voter suppression such as a voter I.D. law in North Carolina that

¹ <http://quaker.org/legacy/pamphlets/ward1956p.html>

² <https://www.fcnl.org/updates/the-world-we-see-25>

³ <https://www.brennancenter.org/blog/voter-purge-rates-remain-high-analysis-finds>

⁴ <https://www.brennancenter.org/blog/voter-purge-rates-remain-high-analysis-finds>

was struck down by the 4th Circuit Court.⁵ That law was able to “target African Americans with almost surgical precision.”⁶

Voter suppression has also targeted Native American communities. Natalie Landreth, a staff attorney for the Native American Rights Fund, testified before the House Judiciary Committee on September 10, 2019 that: “There have been approximately 94 voting cases about Indian voting rights, and the Indians have prevailed in 87 of those – for a 92.5 percent success rate.”⁷ Without the preclearance provision of the VRA, millions of Americans have had their votes suppressed and have had their voices go unheard.

The lack of preclearance provisions has shifted the responsibility and the cost of combating voter suppression from the federal government to already-vulnerable communities. According to Dale Ho, Director of the Voting Rights Project for the American Civil Liberties Union, the voter I.D. case in North Carolina took 34 months to litigate and cost \$5.9 million in fees.⁸ Voters should not have to spend millions of dollars and years of their time fighting for the most fundamental of rights, the right to vote. The federal government should ensure voter suppression does not occur in the first place.

The VRAA restores the preclearance provisions of the original VRA but with modifications to be more responsive to modern voter suppression. Previously the VRA covered states and smaller municipalities based on historical voter suppression. The new preclearance provisions are based on more recent acts of voter suppression and federal preclearance is time limited. The VRAA also has specific provisions designed to protect Native American groups such as requiring ballots be translated into indigenous languages in communities with large Native American populations and ensuring that polling stations are accessible for native populations.

It is not enough for legal remedies to come after voter suppression has already occurred. Without preclearance it is possible for multiple election cycles to occur while a case is being adjudicated. This leads to millions of Americans going unrepresented in local, state, and federal governments due to unjust laws. Though the court can restore the voting rights to those affected in the future, the races these voters missed cannot be rerun and the actions taken by officials selected by these faulty elections in many cases cannot be undone. Preclearance is important because it ensures that voter suppression does not occur because once it has happened the damage is done and cannot be reversed.

Equality of individuals in all forms of Quaker worship is a core practice of the Religious Society of Friends. FCNL holds that equal participation of those affected by decisions in the governing process extends to the ballot box and the halls of government. Our Statement of Legislative Policy affirms this principle and we call on Congress to pass the Voting Rights Advancement Act (H.R. 4/S.561) to ensure that full participation by every American is guaranteed.

⁵ <https://pdfserver.amlaw.com/nli/7-29-16%204th%20Circuit%20NAACP%20v%20NC.pdf>

⁶ <https://pdfserver.amlaw.com/nli/7-29-16%204th%20Circuit%20NAACP%20v%20NC.pdf> Page 11

⁷ <https://docs.house.gov/meetings/JU/JU10/20190910/109895/HHRG-116-JU10-Wstate-LandrethN-20190910.pdf>

⁸ <https://docs.house.gov/meetings/JU/JU10/20190910/109895/HHRG-116-JU10-Wstate-HoD-20190910.pdf>

Sincerely,
Diane Randall
Executive Secretary
Friends Committee on National Legislation

