THE NEED TO ENHANCE THE VOTING RIGHTS ACT: PRELIMINARY INJUNCTIONS, BAIL-IN COVERAGE, ELECTION OBSERVERS, AND NOTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

TUESDAY, JUNE 29, 2021

Page

APPENDIX

QUESTIONS FOR THE RECORD

THE NEED TO ENHANCE THE VOTING RIGHTS ACT: PRELIMINARY INJUNCTIONS, BAIL-IN COVERAGE, ELECTION OBSERVERS, AND NOTICE

Tuesday, June 29, 2021

U.S. 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 10:09 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Ross, Johnson of Georgia, Garcia, Bush, Jackson Lee, Johnson of Louisiana, Jordan, McClintock, Roy, Fischbach, and Owens.

Staff Present: David Greengrass, Senior Counsel; John Doty, Senior Advisor; Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Jordan Dashow, Professional Staff Member; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian; Keenan Keller, Senior Counsel; Gabriel Barnett, Staff Assistant; Merrick Nelson, Digital Director; Kayla Hamedi, Deputy Communications Director; James Park, Chief Counsel; Will Emmons, Professional Staff Member/Legislative Aide; Matt Morgan, Counsel; Betsy Ferguson, Minority Senior Counsel; Caroline Nabity, Minority Counsel; Andrea Woodard, Minority Professional Staff Member; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. The Committee on the Judiciary, Subcommittee on Civil Liberties, Civil Rights, and the Constitution is called to order.

Without objection, the Chair will have the right to call a recess at any time.

I welcome everyone to today's hearing on the need to enhance the Voting Rights Act, particularly the areas of preliminary injunctions, bail-in coverage, election observers, and notice.

Before we continue, I would like to remind Members that we have established an email address and distribution list dedicated to circulating email exhibits, motions, and other written materials that Members might want to offer as part of today's hearing. If you would like to submit those materials, please send them to *judiciarydocs@mail.house.gov* all one word. We will distribute them to Members and staff as quickly as possible.

Finally, I ask all Members and witnesses, in-person or remotely to mute their microphones when you are not speaking. This helps prevent feedback and technical issues. You, of course, may unmute yourself anytime you seek recognition.

Now, I will recognize myself for my opening statement. Throughout his historic life, our former colleague, our former friend, my friend, my dear friend and hero, the late John Lewis, often said that the right to vote is the most powerful nonviolent tool we have in democracy.

If we are ever to actualize the true meaning of equality, effective measures, such as the Voting Rights Act, are still necessary requirements of democracy. John Lewis almost gave his life for the right to vote, as did others.

We need to make sure that, as legislators, we can do the simple things, and that is pass the Voting Rights Act and move forward.

Under my Chairship, the Subcommittee has devoted considerable time and resources to his call, the call of John Lewis to defend the right to vote. We need to act. Both parties need to act. This is a bipartisan issue.

As we approach the first anniversary of John's passing, we in Congress must rededicate ourselves to protecting this most fundamental right at a time when it is again under threat, including in his home State of Georgia.

Again, I would ask everybody—Democrat, Republican, and Independent—John Lewis almost gave his life, was there at the signing of the Voting Rights Act. We need to pass the John R. Lewis Voting Rights Act in his honor and regard for our oath and our duties as defenders of the Constitution.

Earlier this year, Georgia enacted a sweeping voter suppression law, SB 202, with little transparency or normal legislative process. SB 202 imposes unnecessary and arbitrary burdens on certain election practices that are disproportionately used by Black voters and other voters of color, including voter ID requirements for absentee ballots and criminal penalties for groups that provide voter assistance.

It is for this reason the Department of Justice filed a lawsuit last Friday to challenge that law's legality under the Constitution and under the Voting Rights Act that remains.

While much of the Subcommittee's work over the last 2 years has been geared toward revitalizing the Voting Rights Act preclearance provision, in the wake of the Supreme Court's 2013 decision in *Shelby* v. *Holder*, we will focus today on other provisions of the Act that while not a substitute for preclearance are nonetheless important supplements to it and remain viable, although may be needing of some additional strength.

One consequence of the Shelby County decision is, in the absence of preclearance, both the Justice Department and private parties have been forced to bring legal challenges to discriminatory voting laws pursuant to section 2 of the Voting Rights Act.

Section 2 prohibits any State or political subdivision from enacting any, quote, "voting qualification or prerequisite to voting standard, practice, or procedure which results in a denial or breach of right of any citizen of the United States to vote on the count of

their race or color, or on account of membership in a language minority group."

As many witnesses have told us already, section 2 litigation is expensive, time-consuming, and resource-intensive to the point that many plaintiffs with meritorious claims of voting discrimination may be dissuaded from even pursuing a lawsuit.

The greatest concern with exclusive reliance on section 2 litigation, which is all we have left after Shelby, it is difficult, if not impossible, to stop the harm to voters that a discriminatory voting measure can inflict before such a measure is implemented.

In theory, the Department of Justice can file a section 2 lawsuit, seek a preliminary injunction to prevent discriminatory voting measures from being implemented. Given the complexity and time-consuming nature of section 2 cases, it is hard for anyone seeking a preliminary injunction to obtain one under the present standard.

Compounding this difficulty is the fact that courts are reluctant to grant preliminary injunctions in the period shortly before an election based in part on the Supreme Court's admonition in *Purcell* v. *Gonzalez*. The court should be wary of enjoining electoral rules when there is inadequate time to resolve tactical disputes before the election proceeds.

The result, in many cases, the minority voters may be disenfranchised by a voting measure that a court may ultimately conclude is discriminatory but one which would be in effect in effect during one or more elections.

In short, in the absence of preliminary injunction, minority voters could be irrevocably harmed by discrimination, as would democracy, and there would be no other after-the-fact remedy for that harm.

H.R. 4, the John Lewis Voting Rights Advancement Act from the 116th Congress, would partly address the situation by amending the preliminary injunction standard applicable to voting rights cases to ensure the plaintiffs can obtain an injunction where they raise a serious question as to the merits of their claim.

While no substitute for preclearance, this proposal will help mitigate some of the risk to harm the minority voters posed by the absence of preclearance.

A less discussed consequence of the Shelby decision is that it undermines the ability of the Justice Department and the general public to get notice of any changes to voting laws, policies, and procedures.

In addition to being an effective enforcement mechanism, preclearance would function as an effective notice regime. As Professor Justin Levitt testified before the Subcommittee in 2019, without a preclearance system, it will be more difficult to learn about and draw appropriate attention to discriminatory policies so that few entities with sufficient resources and expertise know where to litigate in the first place.

I guess I slipped over the script there because I said the word "line." That is probably because I didn't sleep well last night. The lines are being redrawn as we speak, and the lines are being drawn in gerrymandered fashions throughout this country, but through a slip that I was privy to hear, being done in Tennessee and in my district in such ways as to destroy the integrity of the city of Mem-

phis, the county of Shelby, and district geographic lines, done to, in essence, take certain people out of this district. We should have notice of that and opportunity to prepare, but we won't.

The need for such notice and transparency changes to voting measures are particularly acute at the local level where such changes can be otherwise hard to detect. These include last-minute changes to election procedures, changing to polling place resources, and changes in district lines, which are going on as we speak.

H.R. 4 requires State and local jurisdictions to publicize types of changes to voting practices and provide other types of information that may be relevant to assessing potential violations of the Voting Rights Act.

This type of reporting requirement entails a relatively low burden on States and plainly bares a logical relation to facilitating Congress' ability to assure proper function of law. H.R. 4 offered other enhancements to the Voting Rights Act, including making it easier for courts to bail-in jurisdictions into preclearance on a case-by-case basis and, also, make it easier for courts and the Department of Justice to authorize Federal election observers.

These proposals, like those concerning preliminary injunctions and notice are simple commonsense fixes that we ought to support. We should think of America, we should think of democracy, and we should think of the Constitution before politics.

I thank our witnesses for their participation in today's hearing and look forward to their testimony.

It is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from Louisiana, Mr. Johnson, for his opening statement.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. This is the Subcommittee's third hearing in the last 3 months regarding the Voting Rights Act. I understand the focus of today's hearing will be on preliminary injunctions and bail-in coverage, election observers, and notice requirements.

I presume my colleagues on the other side of the aisle will focus on these provisions in the context of H.R. 4, the Voting Rights Advancement Act. Unfortunately, just like H.R. 1, the misleadingly named For the People Act, H.R. 4 seeks to federalize elections. This is about Federal control, a Federal takeover of an area that has always been within the jurisdiction of the States.

That would be contrary to the Constitution's explicit mandate that it is the State legislatures that administer our elections. H.R. 4 intends to reinstate the preclearance requirement that was struck down by the Supreme Court in 2013 as unconstitutional. It was for a good reason, and it was well explained by the Court.

This bill seeks to lower the triggering mechanism, which subjects jurisdictions to preapproval from the Department of Justice at the Federal level before they can make changes to any of their election procedures.

Additionally, the legislation puts in place so-called practice-based clearance requirements. These would require all State legislatures and political subdivisions to seek permission from the Federal Government before they can change certain laws and policies.

This is regardless of whether the jurisdiction has a history any kind of discrimination or is covered under the new formula. This

legislation is just another example of a politically motivated power grab to enable partisan Federal bureaucrats to control our State election laws.

Voting is a fundamental, constitutionally protected right in this country, and the 15th amendment requires States to ensure voting is accessible and available to every American.

States also need to administer elections that are free from fraud and administrative errors. The COVID–19 pandemic, as we all know, presented new challenges for the 2020 election, and it drastically altered how States administer their elections.

Many of these changes were unconstitutionally implemented, be it executive or court order, completely bypassing State legislatures as is required in the text of the Constitution itself.

As a result of the 2020 election and the numerous errors that resulted, many State legislatures have duly enacted or proposed changes to their State election laws. They want to clean this up and make sure that we don't have the controversies that we had in the last cycle.

These changes largely seek to enhance election integrity and increase the public's waning confident in our election processes. It is outrageous to see the Federal Government fighting back against these commonsense reforms, such as the latest lawsuit filed by the Department of Justice against Georgia over its election law.

It appears to millions of Americans that we are weaponizing the DOJ and trampling upon essential States' rights and the will of the people enacted through their duly elected Representatives.

Let me be clear. Republicans want every legally cast ballot to count, but the only way to give legal votes the weight they deserve is to close the door to fraud and illegally cast ballots.

I hope today we can have a productive conversation about voting rights and how we can best safeguard the ability of all eligible Americans to vote. I can tell you right now the answer is not to go backwards and reinstate provisions of the Voting Rights Act that have already been deemed by the Court to be unconstitutional.

Our extraordinary Republic has endured for nearly two and a half centuries based in large part on the understanding that our elections will be fair and free and secure.

Our Constitution and our institutions will endure, but only if we support and defend them. It has never been more important than it is today, and I think we can all agree on that.

I thank our witnesses for appearing today, and I look forward to your testimony, and Mr. Chair, I yield back.

Mr. COHEN. Thank you, Mr. Johnson

Mr. JOHNSON of Louisiana. I think you are on mute, Mr. Chair.

Mr. COHEN. Thank you. I was.

Does Mr. Nadler, Chair of the Full Committee—is he present to give a statement, or does he have a statement he wants to submit?

Chair NADLER. I am here.

Mr. COHEN. Thank you. The Chair of the Full Committee, Mr. Nadler, is recognized for 5 minutes.

Chair NADLER. Thank you, Mr. Chair. I appreciate you holding today's hearing to consider whether Congress might strengthen provisions of the Voting Rights Act, other than the section 5 preclearance provision.

This Subcommittee has rightfully spent much of its time since last Congress devoted to voting rights, specifically examining the proliferation of racially discriminatory voting barriers following the Supreme Court's decision in *Shelby County* v. *Holder*.

During these hearings, we have heard significant testimony urging Congress to restore to full effectiveness the VRA's preclearance provision, which was rendered effectively void after Shelby County.

Yet, while section 5 preclearance is perhaps the VRA's most important enforcement tool and revitalizing this provision is the most effective remedy to the ongoing widespread and persistent voter discrimination throughout the country, in the 8 years since preclearance was effectively gutted, we have seen the critical role that other Voting Rights Act provisions also play in remedying the plague of voter discrimination. Our experience since Shelby County has also taught us, however, that each of these provisions has shortcomings that can be improved upon.

First, among these is litigation under section 2 of the Act, which prohibits voting practices or procedures that discriminate on the basis of race, color, or Membership in certain language minority groups.

While an important pillar of the VRA, section 2 litigation is not a substitute for a working preclearance regime. One weakness of section 2 is the difficulty plaintiffs face in obtaining preliminary injunctive relief to prevent the challenged voting law procedure from going into effect while litigation is pending.

We will hear from our witnesses today that this often results in the effective disenfranchisement of minority voters because a challenged law that ultimately is found to be discriminatory remains in effect for the duration of lengthy litigation.

There are other provisions that Congress should also consider revisiting. To begin with, we should look at section 3(c), the VRA's bail-in provision. Congress understood that the VRA section 5 preclearance provision could be underinclusive, and, therefore, it included section 3(c) to address situations in which preclearance may be justified but a jurisdiction might not meet the requirements for section 5 preclearance coverage.

In such cases, section 3(c) allows courts to retain the authority to supervise further voting changes in jurisdictions where the court has found that the jurisdiction in question violated the 14th or 15th Amendments.

If a jurisdiction is bailed into preclearance, it must submit any changes to its voting procedures for approval either to the court or to DOJ. With the court determining both the scope and duration of such a preclearance requirement.

Despite its availability, however, courts have rarely invoked section 3(c) as a remedy. This is because plaintiffs face a high burden in proving a constitutional violation, which requires a showing of intentional discrimination.

Even where there is evidence that officials acted with discriminatory intent, courts have shown reluctance to find that such officials engaged in purposeful discrimination.

Moreover, since the Shelby County decision, some courts have suggested that not all violations of the 14th and 15th Amendments support section 3(c) bail-in coverage.

Bail-in coverage can be an important enforcement tool but given how reluctant Federal courts are to invoke section 3(c), Congress should consider whether the violations to which this relief are available are simply too limited to carry out this provision's purpose effectively.

Another area that we should examine is the appointment of Federal election observers. Section 8 of the VRA permits the Attorney General to assign Federal observers to jurisdictions covered by section 5 preclearance.

Likewise, section 3(a) allows Federal courts to assign Federal observers in appropriate circumstances. Federal observers can report voting irregularities, which can lead the Justice Department to negotiate with a jurisdiction to improve voting practices without resort to legal action.

Observers also help gather evidence if legal action is required, and their mere presence can help deter voter discrimination.

An oft overlooked side effect of the Shelby County decision, however, is that it significantly reduced the number of Federal observer appointments. DOJ officials have interpreted Shelby County as prohibiting it from certifying jurisdictions for Federal observer coverage because the formula used to identify such potential jurisdictions was declared unconstitutional.

As a result, the number of Federal observers assigned since Shelby County has dropped precipitously. To compensate for the lack of full-fledged observers, DOJ has relied on so-called monitors to ensure that jurisdictions with a history of discrimination conduct the election process in a fair manner.

Unfortunately, these monitors do not possess the same authority as a Federal election observer, and, as such, jurisdictions are not required to provide them the same level of access to the voting process as observers, limiting their effectiveness.

As we consider revitalizing the VRA, Congress should consider how to strengthen the ability of the Justice Department and Federal courts to send election observers whenever and wherever justified.

In the 8 years since Shelby County, we have seen how indispensable the Voting Rights Act is in ensuring that all Americans enjoy the right to vote, free from discrimination. Section 5 preclearance remains the most potent remedy for widespread and persistent voter discrimination.

No matter how much Congress strengthens other enforcement provisions of the VRA, even these enhanced provisions alone can never be a complete substitute for section 5 preclearance, yet Congress should not pass up the opportunity to consider revitalizing and improving the VRA's other provisions which operate in support of but to cover any gaps left by section 5.

I thank Chair Cohen for holding today's hearing, and I look forward to the testimony of our witnesses, and I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler.

It is my understanding that there is not a statement from the Ranking Member, who ordinarily would be provided that opportunity at this point, so we will go on to our witnesses.

We welcome our witnesses and thank them for participating in today's hearing. I will now introduce the witnesses before they testify and give their oral or written testimony.

All your written statements will be entered into the record in its entirety. I ask you to summarize your testimony to 5 minutes. To help you stay within that 5 minutes, our witnesses, there is a timing light on your table if you are there in person. Green means you are okay; it is within the first 4 minutes. Yellow means you are entering the last minute, and red means you need to wrap up or have wrapped up.

For witnesses testifying remotely, there is a timer in Zoom view. It should be visible at the bottom of your screen, or if you are in full view as I am, on the left-hand side, and it will give you how much time you have remaining.

Before proceeding with the testimony, I would like to remind all the witnesses here, you have a legal obligation to provide truthful testimony in answer to the Subcommittee, and any false statement can be subject to prosecution under section 1001 of title 18 in the United States Code.

Our first witness is Sophia Lin Lakin. Ms. Lakin is the deputy director of the American Civil Liberties Union Voting Rights Project, and assists in the planning, strategy, and supervision of the ACLU's voting rights litigation nationwide.

She has an active docket in protecting voting rights and combating voter suppression across the country—unfortunately, it is very active—and has led work on successful challenges to discriminatory voting laws in Georgia, Indiana, Kansas, Missouri, North Carolina, Pennsylvania, Texas, and Virginia.

Currently, she is the ACLU's lead counsel in Sixth District of the AME, *African Methodist Episcopal Church* v. *Kemp*, a federal lawsuit challenging multiple provisions of Georgia's sweeping new voter suppression law, SB 202.

Before joining the ACLU, Ms. Lakin clerked for the Honorable Raymond J. Lohier, Jr., of the U.S. Court of Appeals for the Second District and the Honorable Carol Bagley Amon in the U.S. District Court for the Eastern District of New York.

She received her J.D. degree from Stanford Law School, a school that has a baseball team that is part of an undergraduate group that lost to Vanderbilt in the College World Series. Vanderbilt is fighting for the championship. Stanford is not.

She received her M.S. in management, science, and engineering and her B.A. in political science from that same Stanford University. We thank you for the wild pitch that put Vanderbilt in the College World Series.

Ms. Lakin, you are now recognized for 5 minutes.

STATEMENT OF SOPHIA LIN LAKIN

Ms. LAKIN. Chair Cohen, Chair Nadler, Ranking Member Johnson, and Members of the Committee and Subcommittee, thank you for the opportunity to testify today. My name is Sophia Lakin, and I am deputy director of the ACLU's Voting Rights Project.

The VRA is one of the most successful pieces of civil rights legislation in our history, but in 2013, the Supreme Court gutted the VRA's most powerful provision, the section 5 preclearance system,

which enabled the Federal Government to block proposed discriminatory voting restrictions in places with the worst records of discrimination before they could be implemented.

As the late Justice Ruth Bader Ginsburg famously warned in her dissent in Shelby, gutting of the preclearance provision was like, "throwing away your umbrella in a rainstorm." Sure enough, the downpour came with a wave of discriminatory voting laws.

The ACLU has been on the front lines. We have opened more than 80 new voting rights investigations and cases since the decision. Some of our recent and ongoing cases include Sixth District of AME Church, which, with other civil rights groups, we are challenging SB 202, which has been referenced, Georgia's latest effort to restrict the voting rights of Black and Brown voters, and *NAACP* v. *McCrory*, where we and others successfully challenged a sweeping North Carolina bill that sought to eliminate means of participation used by more than a million voters in the 2012 Presidential election.

This kind of case-by-case litigation, while important and necessary, is simply insufficient to protect voting rights. Voting rights litigation is incredibly expensive, complex, and time-consuming. Their costs can easily run in the six figures.

These cases also take multiple years to litigate, which means many elections involving hundreds of elected officials can take place under regimes that are later found to be racially discriminatory, an irrevocable taint on our democracy that we have, unfortunately, seen play out in States like North Carolina and Texas.

I detail several other examples in my written testimony. The Supreme Court in Shelby based its ruling in part on the assumption that preliminary relief would be available before an election to guard against this problem.

The theoretical availability of such relief has also proven to be inadequate. The current standard for obtaining a preliminary injunction makes it difficult to obtain. My written testimony describes 15 cases in which voting rights plaintiffs, who ultimately succeeded, were unable to obtain preliminary relief while their cases were pending, with numerous elections taking place, millions of voters casting ballots, and hundreds of elected officials taking office under regimes courts ultimately find are discriminatory or are abandoned.

The problem has only worsened due to the expansion of the so-called Purcell principle. This is the idea that courts should be cautious changing election rules if an election is imminent.

What began as a commonsense warning to consider potential voter confusion and administrative burdens now operates effectively as a bright-line Rule against intervening as an election draws near.

The use of Purcell to stymie voting rights plaintiffs has skyrocketed in recent years from 6 in 2012 to 11 in 2016, to 58 times in 2020. All too frequently this Rule is wielded inconsistently in one direction only: To undermine efforts to ensure that discriminatory practices are blocked before they can taint an election.

The North Carolina case I mentioned is illustrative. The law we challenged eliminated 1 week of early voting, same-day, and preregistration, and the capping of ballots cast out of precinct.

The law also banned the use of many forms of government-issued voter ID to vote including student and public assistance IDs. The Fourth Circuit struck the law down as unconstitutional, targeting Black voters, "with almost surgical precision."

The case cost $5.9 million and took 34 months to litigate. In the meantime, the 2014 general election went forward under the provisions of the new law with 188 Federal and State officers elected, including 13 congressional seats.

We did everything to prevent this from happening. We litigated on an expedited timeline and sought a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted. The Supreme Court stayed that ruling because of Purcell, leaving the discriminatory regime in place for the 2014 election.

The law has since been struck down, but it is impossible now to compensate Black voters of North Carolina for that gross injustice.

That is just one example. My written testimony details several others. Racial discrimination in voting continues to threaten the health of our democracy, and we lack adequate tools to combat that threat. Stronger voting rights protections are absolutely critical. Thank you.

[The statement of Ms. Lakin follows:]

WRITTEN STATEMENT OF
SOPHIA LIN LAKIN
DEPUTY DIRECTOR, VOTING RIGHTS PROJECT
AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice.

Submitted to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary

Hearing on June 29, 2021

Submitted on June 27, 2021

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to testify before you.

The ACLU Voting Rights Project was established in 1965—the same year that the historic Voting Rights Act ("VRA") was enacted—and has litigated more than 300 cases since that time. Its mission is to build and defend an accessible, inclusive, and equitable democracy free from racial discrimination. The Voting Rights Project's recent docket has included more than 30 lawsuits last year alone to protect voters during the 2020 election; a pair of recent cases in the Supreme Court challenging the last administration's discriminatory census policies: *Department of Commerce v. New York*[1] (successfully challenging an attempt to add a citizenship question to the 2020 Census), and *Trump v. New York*[2] (challenging the exclusion of undocumented immigrants from the population count used to apportion the House of Representatives); challenges to voter purges and documentary proof of citizenship laws; and challenges to other new legislation restricting voting rights in states like Georgia.

In my capacity as Deputy Directory of the ACLU Voting Rights Project, I assist in the planning, strategy, and supervision of the ACLU's voting rights litigation nationwide, which focuses on ensuring that all Americans have access to the franchise, and that everyone is equally represented in our political processes. I am currently litigating or have litigated numerous cases challenging racially discriminatory laws under Section 2 of the Voting Rights Act, including *Sixth District of the African Methodist Episcopal Church v. Kemp*,[3] a challenge to Georgia's sweeping voter suppression law enacted in the wake of the 2020 elections; *Thomas v. Andino*,[4] a challenge to South Carolina's absentee ballot witness requirement and required "excuse" for absentee voting during the COVID-19 pandemic; *MOVE Texas v. Whitley*,[5] a challenge to a discriminatory purge program in Texas; *Missouri State Conference of the NAACP v. Ferguson-Florissant School District*,[6] a challenge to the discriminatory at-large method of electing school board members; *Frank v. Walker*,[7] a challenge to Wisconsin's voter ID law; and *North Carolina State Conference of the NAACP v. McCrory*,[8] a challenge to North Carolina's monster voter suppression law passed in the immediate aftermath of *Shelby County v. Holder*.

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others.[9] As Chief Justice John Roberts has explained, "[t]here is no right more basic in our democracy than the right to participate in electing our political

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[1] 139 S. Ct. 2551 (2019).

[2] 141 S. Ct. 530 (2020).

[3] No. 1:21-cv-01284-JPB (N.D. Ga. filed Mar. 29, 2021).

[4] No. 3:20-cv-01522-JMC (D.S.C. filed Apr. 22, 2020).

[5] No. 5:19-cv-00171 (W.D. Tex. filed Feb. 22, 2019).

[6] 894 F.3d 924 (8th Cir. 2018).

[7] 768 F.3d 744 (7th Cir. 2014).

[8] 831 F.3d 204 (4th Cir. 2016) ("*N.C. NAACP v. McCrory*").

[9] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

leaders."[10] We are not truly free without self-government, which requires a vibrant participatory democracy, in which everyone is treated fairly in the process and equally represented. Unfortunately, our nation has a long and well-documented record of fencing out certain voters—Black voters and other voters of color, in particular—and today that racial discrimination in voting remains a persistent and widespread problem.

My written statement will describe some of the reasons that post-enactment relief in the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder*[11] is insufficient to protect voting rights and then turn to how the federal courts' growing use and the expanding scope of the so-called *Purcell* principle has worsened the problem. The *Shelby County* decision changed the landscape of voting rights in the United States.[12] Under the Voting Rights Act of 1965 ("VRA") prior to *Shelby County*, states and counties with the worst histories and recent records of voting discrimination had to obtain federal "preclearance"—that is, approval from the Department of Justice or a federal court—before implementing any changes to voting laws and practices, in order to ensure they did not curtail the right to vote. *Shelby County* struck down the formula used to identify which states were required to do so, gutting the heart of the Act. In her dissent in that case, the late Justice Ruth Bader Ginsburg warned that the Court's decision was "like throwing away your umbrella in a rainstorm."[13] And here we are today, drenched in the downpour. *Shelby County* unleashed a wave of voter suppression and other discriminatory voting laws unlike anything the country had seen in a generation.[14]

After *Shelby County*, the main protection afforded by the VRA is Section 2. Section 2 bans the use of any "voting qualification or prerequisite to voting … which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color."[15] Section 2 applies nationwide, to all jurisdictions. Unfortunately, while Section 2 is an important and necessary tool to protect voting rights, it does not offer adequate protection on its own. Section 2 litigation is expensive, complex, and time-consuming, even compared to the baseline

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[10] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

[11] 570 U.S. 529 (2013).

[12] This written statement incorporates the written testimony of Dale Ho, Director, Voting Rights Project, American Civil Liberties Union, before the House Judiciary Committee, Constitution, Civil Rights, and Civil Liberties Subcommittee on September 10, 2019. I am also indebted to my ACLU Voting Rights Project colleagues who contributed to the preparation of this statement, in particular William Hughes, who provided invaluable support, as well as Brett Schratz, Madison Perez, and Alton Wang.

[13] 570 U.S. at 590 (Ginsberg, J., dissenting).

[14] *See* Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 Yale L.J. Forum 799 (2018); *Block the Vote: Voter Suppression in 2020*, ACLU (Feb. 3, 2020), https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/; And this wave has not receded: According to the Brennan Center for Justice's analysis as of May 14, 2021, state lawmakers introduced at least 389 restrictive voting bills in 48 states—more than 4 times, the number of restrictive bills introduced two years ago—and at least 14 states enacted 22 new laws that restrict access to the vote—putting this legislative cycle on track to far exceed the current record. *Voting Laws Roundup: May 2021*, Brennan Center for Justice (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.work/research-reports/voting-laws-roundup-may-2021.

[15] 52 U.S.C. § 10301.

expenses and time of litigation. And because a Section 2 challenge can only be brought *after* a law has been passed or a policy implemented, multiple elections involving hundreds of elected officials can take place while the case is being litigated under regimes that are later found to be racially discriminatory—an irrevocable taint on our democracy that we have, unfortunately, seen play out in vivid terms in formerly covered states like North Carolina and Texas, thanks to the *Shelby County* decision.

The Supreme Court in *Shelby County* based its ruling in part on the assumption that voting rights plaintiffs would still be able to obtain preliminary or emergency relief in voting rights cases before an imminent election. But the theoretical availability of preliminary relief has also proven to be inadequate. The current standard for obtaining a preliminary injunction makes it difficult for plaintiffs to win preliminary relief in Section 2 cases. And the problem has only worsened due to the expansion of the so-called "*Purcell* principle," *i.e.*, the idea that courts should be cautious in issuing orders which change election rules in the period right before an election.[16] This so-called principle emerged out of *Purcell v. Gonzalez*, a short, unsigned 2006 decision, where the Court reversed the issuance of an injunction by an appeals court, due to its lack of deference to the district court it was reviewing. In passing, the Court gave a commonsense warning to consider the potential voter confusion and administrative burdens that may ensue if a court intervenes close to an election. Over time, this has morphed into the *Purcell* principle of today, effectively operating as bright-line rule against intervening in elections close to Election Day—even where the relief sought would neither confuse voters nor impose burdens on election officials and even where plaintiffs move as quickly as they can. And all too frequently, this rule is wielded inconsistently, in one direction only: to stymie voting rights advocates' efforts to ensure that voters are protected and discriminatory laws and practices are blocked *before* they can taint an election. In some instances, too, appeals courts acting to stay relief granted by a district court on the basis of *Purcell* (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid. Making matters worse, orders applying *Purcell* are increasingly issued without full opinions that explain the reasoning behind the order, making it harder for state officials and voters alike understand why the court has ruled in a particular way given the specific facts in the case before it, and fueling the perception that it is used more frequently against voting rights advocates.

The framers of the VRA understood that Section 2, a nationwide tool to bring cases one-by-one, could not bear the weight that is now placed on it following *Shelby County*. That is why the preclearance regime was enacted and remained in place (with bipartisan support) for decades—and that is why the stronger voting rights protections in the John Lewis Voting Rights Advancement Act ("VRAA"),[17] including a new preclearance regime, are absolutely critical. Congress has the power under the Fourteenth and Fifteenth Amendments to adopt strong enforcement legislation to prevent racial discrimination in the voting process at the federal, state, and local levels. Indeed, when Congress acts to address racial discrimination in voting—protecting both the fundamental right to vote and the right to be free from racial discrimination, two rights at the center of the Reconstruction Amendments—Congress acts at the height of its

[16] *See* Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2017).

[17] John Lewis Voting Rights Advancement Act, S.4263, 116th Cong. (2020).

power.[18] In light of current conditions, this body has not only the authority but the duty to ensure that all Americans are free to exercise the franchise in elections without the taint of racial discrimination.

I. Post-Enactment Relief is Inadequate to Protect Voting Rights

Following *Shelby County*, Section 2 of the Voting Rights Act ("VRA") is the heart of federal protections for the right to vote. It applies nationwide, to every state and local jurisdiction, and it has no expiration date. However, unlike the preclearance regime under Section 5, which applies *before* a law goes into effect, a Section 2 claim can only be brought *after* a law is already enacted or a policy announced. Plaintiffs must go to court and litigate their claims—a process that costs hundreds of thousands, if not millions, of dollars and often takes years—before a judge will strike down the law or order the practice stopped. In the interim, the law or practice remains in effect, which means that multiple elections involving hundreds of elected officials may be irrevocably tainted by taking place under a discriminatory regime. And unlike other civil rights, voters cannot be compensated once they have lost their right to vote in an election or voted under unlawful or discriminatory rules; instead, voters must simply wait for the next election.

A. Section 2 cases are expensive, resource intensive, and time-consuming

To begin, Section 2 cases are very costly to bring, both in terms of money and in terms of time. By its very nature, bringing a Section 2 case requires a significant investment at the outset, with no promise of eventual success or recouping any costs. This makes it harder for plaintiffs to bring Section 2 cases at all, and even for those cases that succeed, the burdens of litigation make Section 2 an insufficient tool to substitute fully for preclearance.

1. Section 2 cases are expensive and resource intensive.

Section 2 litigation is incredibly fact intensive. Plaintiffs must assemble local election data and hire quantitative experts to provide expensive and complex statistical testimony. Historians and other social scientists are often required to describe the past and ongoing discrimination in the jurisdiction, and candidates, elected officials, and community leaders are frequently needed to testify about their personal experiences with bloc voting, the responsiveness of elected officials, racial appeals in campaigns, and the like.[19] As a result, the cost of these

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[18] *See Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) ("Broad interpretation [of Congress' power] [i]s particularly appropriate with regard to racial discrimination, since that was the principal evil against which the Equal Protection Clause was directed, … ."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). ("Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.").

[19] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 Colum. L. Rev. 2143 (2015).

voting rights cases regularly falls in the six- and seven-figure range.[20]

A few examples from the ACLU's recent Section 2 litigation experience reflects the considerable monetary costs of these cases:

- In *North Carolina State Conference of NAACP v. North Carolina ("N.C. NAACP v. McCrory")*,[21] which successfully challenged North Carolina's omnibus bill limiting early voting and same-day registration, requiring certain forms of photo identification, and banning out-of-precinct voting, plaintiffs were awarded $5,922,165.28 for the costs and fees associated with the litigation, including multiple unsuccessful appeals.[22]

- In *National Association for the Advancement of Colored People v. East Ramapo Central School District* ("*NAACP v. East Ramapo*"),[23] a Section 2 case that successfully challenged the at-large method of election for the East Ramapo, New York school board, the plaintiffs were awarded $5,446,139.99 in costs and fees.[24]

- In *Montes v. City of Yakima*,[25] which successfully challenged the at-large voting system for the City Council of Yakima, Washington under Section 2, the plaintiffs were awarded $1,521,911.59 in costs and fees.[26]

- In *Wright v. Sumter County Board of Elections and Registration*,[27] a Section 2 case brought by the ACLU and partners that successfully challenged the at-large method of electing the Sumter County, Georgia school board members,[28] plaintiffs were awarded $786,929.98 for the costs and fees incurred to litigate the case.[29]

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[20] H.R. Rep No. 116-317, at 60 (2019) (noting testimony that "costs for a Section 2 case can range from hundreds of thousands of dollars to $10 million."); Br. of Joaquin Avila et al. as Amici Curiae in Support of Resp'ts at 24, *Shelby Cnty.*, 570 U.S., No. 12–96 ("Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs.") (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005)), *available at* https://www.brennancenter.org/sites/default/files/legal-work/2013.2.1%20Brief%20of%20Joaquin%20Avila%20et%20al.%20in%20Support%20of%20Respondents.pdf.

[21] 831 F. 3d. 204.

[22] Mem. Order, *McCrory*, 831 F.3d (No. 1:13-cv-00861-TDS-JEP), ECF No. 508.

[23] 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd sub nom.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

[24] *NAACP v. E. Ramapo*, 462 F.Supp.3d (No. 7:17-CV-08943), ECF. No. 694.

[25] 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

[26] Order, *Montes*, 40 F.Supp.3d (No. 2:12-CV-03108-TOR), ECF No. 186.

[27] 979 F.3d 1282 (11th Cir. 2020) (affirming finding of a Section 2 violation).

[28] *See* Nicholas Casey, *A Voting Rights Battle in a School Board 'Coup'*, N.Y. Times (Nov. 3, 2020), https://www.nytimes.com/2020/10/25/us/politics/voting-rights-georgia.html.

[29] Order, *Wright*, 979 F.3d (No. 1:14-CV-00042-WLS), ECF No. 322.

Although in the cases above, the ACLU was successful and eventually recovered its costs, litigation requires that plaintiffs pay such expenses up front, without any promise of success. Given their cost and complexity, it should be no surprise that many plaintiffs and their lawyers (frequently nonprofit legal organizations and local civil rights attorneys with limited resources) simply decline to bring Section 2 cases in the first place.

2. Section 2 cases are time-consuming.

Even when cases are brought, it typically takes years to litigate a Section 2 claim to completion.[30] That may reflect the simple fact that voting rights litigation tends to be quite complex. As the former Director of the ACLU Voting Rights Project, Laughlin McDonald, explained in testimony before the Senate fifteen years ago:

> [Section 2 cases] are among the most difficult cases tried in federal court. According to a study published by the Federal Judicial Center, voting rights cases impose almost four times the judicial workload of the average case. Indeed, voting cases are more work intensive than all but five of the sixty-three types of cases that come before the federal district courts.[31]

The ACLU's Section 2 litigation experience bears this out. The following table summarizes the ACLU's Section 2 litigation since *Shelby County*, including the length of time it has taken to litigate the case from filing to resolution[32]:

ACLU Section 2 Cases Litigated to Judgment/Settlement since *Shelby County*						
Case name	**Citation**	**Practice Challenged**	**Date Filed**	**Date Resolved**	**Days**	**Success?**
Bethea v. Deal	No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016)	Failure to extend voter registration deadline after hurricane	10/17/16	10/19/16	2	N
Frank v. Walker	768 F.3d 744 (7th Cir. 2014)	Voter ID	12/13/11	3/23/15	1197[33]	N

[30] *See Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits).

[31] *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).

[32] "Date Resolved" reflects the date upon which a case was fully resolved on the merits either through a court decision and exhaustion of any appeals, through a consent decree, or through a settlement between the parties.

[33] Litigation on plaintiffs' as-applied constitutional claims is ongoing—and heading into its eleventh year—but the Seventh Circuit rejected our Section 2 claims in 2014, and the Supreme Court denied a petition for review of that decision in March 2015.

Florida Dem. Party v. Scott	No. 4:16CV626-MW/CAS, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)	Failure to extend voter registration deadline after hurricane	10/9/16	10/12/16	3	Y
Jackson v. Bd. of Trustees of Wolf Point	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), *R. & R. adopted as modified sub nom.* 2014 WL 1791229 (D. Mont. May 6, 2014)	School redistricting	8/7/13	4/14/14[34]	250	Y
Rangel-Lopez v. Cox	344 F. Supp. 3d 1285 (D. Kan. 2018)	County polling place closure	10/26/18	1/30/19	96	Y[35]
Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.	894 F.3d 924 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 826 (2019)	School Board At-Large Elections	12/18/14	1/7/19	1482	Y
Montes v. City of Yakima	No. 12-CV-3108-TOR, 2015 WL 11120964 (E.D. Wash. Feb. 17, 2015)	City At-Large Elections	8/22/12	2/17/15[36]	910	Y
MOVE Texas Civic Fund v. Whitley	No. 5:19-cv-00171 (W.D. Tex. Feb 22, 2019)[37]	Statewide voter purge	2/4/19	4/29/19	85	Y
NAACP v. East Ramapo	462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd* 984 F.3d 213 (2d Cir. 2021)	School Board At-Large Elections	11/16/17	1/6/21	1147	Y
N.C. NAACP v. McCrory	831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same-day registration; Out-of-Precinct Ballots; Pre-Registration	8/30/13	5/15/17	1355	Y
Navajo Nation Human Rts. Comm'n v. San Juan Cnty.	No. 2:16-cv-00154 (D. Utah 2016)	All-mail voting, elimination of polling places	2/26/16	2/21/18[38]	727	Y

[34] This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney's fees and costs.

[35] Although the court denied the plaintiffs' Motion for a Temporary Restraining Order, the plaintiffs voluntarily moved to dismiss the case after the defendants announced the opening of new polling locations. *See ACLU of Kansas Declares Victory; Files Voluntary Motion to Dismiss Dodge City Voting Access Suit*, ACLU of Kansas (Jan. 25, 2019), https://www.aclukansas.org/en/press-releases/aclu-kansas-declares-victory-files-voluntary-motion-dismiss-dodge-city-voting-access.

[36] This is the date the court adopted a remedial plan, later proceedings focused on attorney's fees and costs.

[37] Parties on both sides filed a joint motion to dismiss because of a reached settlement.

[38] This date reflects when the settlement from the parties was reached and announced. *See Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county.

Ohio State Conf. of the NAACP v. Husted	No. 2:14-CV-00404 (S.D. Ohio 2014)	Early Voting	5/1/14	4/17/15[39]	352	Y
People First Alabama v. Merrill	491 F. Supp. 3d 1076 (N.D. Ala. 2020)	Absentee Ballot Excuse Requirement (COVID-19)	5/1/20	11/16/20	200	N[40]
Wright v. Sumter Cnty. Bd. of Elections & Registration	301 F. Supp. 3d 1297 (M.D. Ga. 2018), *aff'd* 979 F.3d 1282 (11th Cir. 2020)	County Redistricting	3/7/14	10/27/20	2427	Y

The average length of time that the ACLU's Section 2 cases have taken to litigate is 731 days or over two years. When emergency cases, such as those brought after natural disasters to extend an election-related deadline or those brought to accommodate voters in the COVID-19 pandemic, are excluded, this average jumps to 911 days or approximately thirty months, over two and a half years. In short, voting rights cases start with the baseline pace of litigation, which can be frustratingly slow for all parties, and add an additional layer of complexity, causing cases to drag on for years.

B. Elections can take place under discriminatory regimes while Section 2 litigation is pending.

Given the length of time it takes to litigate a Section 2 case, many elections can take place, hundreds of government officials elected, and millions of votes cast while the litigation is pending. Preliminary relief is in theory available to prevent elections from proceeding under the challenged regimes while a case is being litigated. But preliminary injunctions are difficult to win in Section 2 cases under the current standards. In fact, two leading civil rights lawyers estimated that preliminary injunctions were granted in fewer than 5% of Section 2 cases.[41] This means that even when the law is on the plaintiffs' side, multiple elections take place under practices later found to be discriminatory—and there is no way to adequately compensate the victims of voting discrimination after-the-fact.

Our experience litigating a vote dilution challenge to the at-large method of elections for the Ferguson-Florissant School Board in Missouri is illustrative. The Ferguson-Florissant school district was created pursuant to a 1975 desegregation order.[42] In 2014, the student body of the

[39] This date reflects when the parties reached a settlement and moved to dismiss the case.

[40] In this case, the trial court judge found a violation of Section 2 and entered an injunction barring the application of the excuse requirement to vote absentee; on appeal, the Eleventh Circuit granted a stay of the injunction without explaining its reasoning, *see* Op., *People First Alabama v. Merrill*, 491 F. Supp. 3d 1076 (No. 20-13695-B), 2020 WL 6074333 (likely relying on *Purcell v. Gonzalez*, see *infra*.)

[41] *See* Elmendorf & Spencer, *supra* note 19, at 2145 (citing Gerald Hebert & Armand Derfner, *More Observations on Shelby County, Alabama, and the Supreme Court*, Campaign Legal Ctr. (Mar. 1, 2013), http://www.campaign legalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court ("The actual number of preliminary injunctions that have been granted in the hundreds of Section 2 cases that have been filed over the years is quite small, likely putting the percentage at less than 5%, and possibly quite lower.").

[42] *Missouri State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 930 (8th Cir. 2018).

district was approximately 80% Black, but Black residents were a minority of the district's voting-age population. Due to racially polarized voting, as recently as 2014, there was not a single Black board member on the seven-member school board. Our lawsuit was ultimately successful, with the Eighth Circuit affirming in a unanimous opinion that the Board's at-large method of elections violated Section 2.[43] But the case took four years to litigate—and the 2015, 2016, 2017, and 2018 elections were held while proceedings were ongoing. In that time, nine members of the school board were elected.[44]

The following table summarizes Section 2 cases decided since *Shelby County* that have been reported in Westlaw[45] where plaintiffs sought a preliminary injunction, unsuccessfully, and later went on to win relief.[46]

Section 2 Cases – Preliminary Relief Denied, but Ultimately Successful					
Case Name	**Citation**	**Challenged Practice**	**Prelim. Inj. Sought**	**Relief Granted**[47]	**Days to Relief**
Wandering Medicine v. McCulloch	No. CV 12-135-BLG-DWM, 2014 WL 12588302 (D. Mont. 2014)	Polling Places; Registration Deadline	10/10/12[48]	6/13/14[49]	611

[43] *See id.*

[44] *See Election Results Archive,* Saint Louis County, Missouri, https://stlouiscountymo.gov/st-louis-county-government/board-of-elections/election-results-archive/ (last visited June 25, 2021) (collecting election results from April 7, 2015, April 5, 2016, April 4, 2017, and April 3, 2018 elections).

[45] While we have attempted to be systematic in this research, we do not purport to present a complete picture of all Section 2 litigation. Because this analysis is limited only to cases reported on Westlaw that specifically cite to Section 2's codification in the U.S. Code, it is likely under-inclusive. For example, if a Section 2 case settles without a judicial opinion, it may not appear in such a database.

[46] This includes cases where relief was obtained by winning a final decision on the merits or favorable settlement. This largely borrows from Professor Ellen Katz's definition of a "successful" Section 2 case. *See* Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 653-54 n.35 (2006) ("Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success," including decisions where a court "granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys' fees after a prior unpublished determination of a Section 2 violation.").

[47] The date in the "Relief Granted" column reflects the date of whatever court decision on the merits, consent decree, or settlement between the parties, first began to provide relief for the plaintiffs.

[48] 906 F. Supp. 2d 1083 (D. Mont. 2012) (preliminary injunction denied), *aff'd* 544 F. App'x 699 (9th Cir. 2013).

[49] Relief was granted through a settlement between the parties. *See Wandering Medicine v. Montana Secretary of State*, ACLU of Montana, https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state (last visited June 25, 2021).

Jackson v. Bd. of Trustees of Wolf Point	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), *R. & R. adopted as modified sub nom.* 2014 WL 1791229 (D. Mont. May 6, 2014)	School Redistricting	8/7/13	4/14/14[50]	250
Favors v. Cuomo	39 F. Supp. 3d 276 (E.D.N.Y. 2014)	State Legislative Redistricting	3/27/12	11/5/13	588
Benavidez v. Irving Indep. Sch. Dist.	No. 3:13-CV-0087-D, 2014 WL 4055366 (N.D. Tex. Aug. 15, 2014)	At-Large Elections	1/8/13	8/15/14	584
Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.	894 F.3d 924 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 826 (2019)	At-Large Elections	12/2/15[51]	7/3/18	944
N.C. NAACP v. McCrory	831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same Day Registration	5/19/14	7/29/16	1092
Pope v. Cnty. of Albany	94 F. Supp. 3d 302 (N.D.N.Y. 2015)	County Redistricting	7/15/11[52]	3/24/15	1348
Veasey v. Abbott	830 F.3d 216 (5th Cir. 2016)	Voter ID	9/1/13	8/10/16	1074
Navajo Nation v. San Juan Cnty.	162 F. Supp. 3d 1162 (D. Utah 2016), 266 F. Supp. 3d 1341 (D. Utah 2017), *aff'd*, 929 F.3d 1270 (10th Cir. 2019)	Districting	1/12/12	7/16/19	2742
Navajo Nation Human Rts. Comm. v. San Juan Cnty	No. 2:16-cv-00154 (D. Utah 2016)	Vote by Mail	2/25/16	2/22/18[53]	728
Ala. State Conf. of the NAACP v. City of Pleasant Grove	372 F. Supp. 3d 1333 (N.D. Ala. 2019) (denying MTD); No. 2:18-CV-02056-LSC, 2019 WL 5172371 (N.D. Ala. Oct. 11, 2019)	At-Large Elections	12/13/18	10/11/19	302
Flores v. Town of Islip	No. 18-CV-3549-GRB-ST, 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020)	At-Large Districts	3/1/19	10/14/20	592

[50] This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney's fees and costs.

[51] In this case, we moved for summary judgment (which was denied) and then for interim relief in the event that liability was established at trial, rather than a preliminary injunction. In Section 2 cases challenging at-large elections, if liability is established, there frequently can be a substantial delay before relief is ordered, given the complexities of crafting a remedial election plan. *See* Mem. in Support of Pls.' Mot. for Interim Relief, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924 (8th Cir. 2018) (No. 16-4511), 2015 WL 13249955 (Dec. 2, 2015) (describing requested relief).

[52] No. 1:11-CV-00736 LEK/DRH, 2011 WL 3651114 (N.D.N.Y. Aug. 18, 2011), *aff'd*, 687 F.3d 565 (2d Cir. 2012) (denying motion for preliminary injunction).

[53] This date reflects when the parties reached and announced a settlement. *See Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county.

Blackfeet Nation v. Stapleton	No. 4:20-CV-00095-DLC (D. Mont. 2020)	Failure to open Satellite election office	10/9/20	10/12/20	3
NAACP v. East Ramapo	462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd* 984 F.3d 213 (2d Cir. 2021)	School Districting	12/8/17	5/26/20	900
Spirit Lake Tribe v. Jaeger	No. 1:18-CV-222, 2018 WL 5722665 (D.N.D. 2018)	Voter ID	10/30/18	4/24/20	542

The average length of time that it has taken to obtain relief in these Section 2 cases is 820 days (or approximately 27 months)—more than the two-year standard federal election cycle—during which hundreds of state and federal government officials have been elected under regimes that were later found to be discriminatory or were abandoned. For example, prior to eventual success in *NC NAACP v. McCrory*, voters in North Carolina chose 188 federal and state elected officials under election rules that would be subsequently struck down.[54] Thus, even where plaintiffs have moved quickly and sought preliminary relief, Section 2 litigation is an inadequate tool to prevent a discriminatory law from tainting elections.

C. Voting rights cases are different than other civil rights litigation.

The deficiencies of post-enactment litigation, such as the Section 2 cases described above, are particularly acute because voting is different than other civil rights litigation. Think of a case of employment or housing discrimination based on membership in a protected class. At least in theory, going through the legal process can restore that person's job or apartment, or make them whole through backpay or money damages.

Elections are different: once an election transpires under a discriminatory regime, it is impossible to compensate the victims of voting discrimination. Their voting rights have been compromised irrevocably, because the election has already happened and cannot be re-run. While those voters may be able to freely vote in future elections, winners of the elections run under unlawful practices gain the benefits of incumbency, making it harder to dislodge them from office. Those elected officials will make policy while in office, and courts cannot (and should not) dislodge those decisions, even if the mechanism under which they took office is later found to be unconstitutional or in violation of the VRA.

In short, voting rights are different. Litigating after the fact is an important tool, but reauthorizing a preclearance regime which stops these discriminatory changes from going into effect in the first place is necessary to ensure all citizens have the right to vote.

[54] *NC SBE Contest Results*, North Carolina State Board of Elections, https://er.ncsbe.gov (accessing 2014 election results through the filters on the dashboard).

II. The development of the so-called *Purcell* principle has further constrained the effectiveness of Section 2 and other voting rights protections.

As noted above, the availability of preliminary relief blocking a challenged practice while a case is being litigated was supposed to solve the problem of elections going forward under schemes later found to be unconstitutional or illegal. Indeed, the Supreme Court in *Shelby County* based its ruling that preclearance was no longer necessary in part on the assumption that voting rights plaintiffs would still be able to obtain preliminary or emergency relief in voting rights cases.[55]

But the theoretical availability of preliminary relief has too often proven to be inadequate. The current standard for obtaining a preliminary injunction makes it difficult enough for plaintiffs to win preliminary relief in Section 2 cases, given their complexity and fact-intensive nature. And the problem has only worsened due to the expansion of the so-called "*Purcell* principle," *i.e.*, the idea that courts should be cautious in issuing orders which change election rules in the period right before an election.[56] Since the brief, unsigned namesake decision, *Purcell v. Gonzalez*,[57] that spawned it, the *Purcell* principle has hijacked the case-specific analysis for obtaining preliminary relief. The instruction to consider the potential voter confusion and administrative burdens that may ensue if a court intervenes close to an election now operates as effectively a bright-line rule against intervening in elections close to Election Day—even where the relief sought would neither confuse voters nor impose burdens on election officials. At the same time, courts have applied the rule inconsistently, frequently with little explanation, making it harder for state officials and voters alike to understand why courts have blocked relief for voters in a specific case. This fuels the perception that the principle is being use in one direction only: to stymie voting rights advocates' efforts to ensure that voters are protected and discriminatory laws and practices are blocked *before* they can taint an election. In some instances, too, appeals courts acting to stay relief granted by a district court on the basis of *Purcell* (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid.

A. *Purcell v. Gonzalez*: A narrow, fact-specific decision.

The *Purcell* decision itself—which has now grown into a near-impossible hurdle for voting rights lawsuits to clear—is a narrow, fact-specific decision which bears little resemblance to the so-called "*Purcell* principle" that controls election cases today:

In 2006, residents of Arizona, Indian tribes, and community organizations brought a legal challenge to voter identification requirements adopted by ballot proposition in 2004. Plaintiffs moved for a preliminary injunction, barring the state from implementing the ID requirement, which the district court denied, but the Ninth Circuit granted in a short, three-line order entered

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[55] 570 U.S. at 537 ("Both the Federal Government and individuals have sued to enforce § 2, … and injunctive relief is available in appropriate cases to block voting laws from going into effect[.]") (citations omitted); *see also* Oral Arg. Tr., *Shelby Cnty.*, No. 12-96, 2013 WL 6908203, at *25 (Justice Kennedy: "Is [a Section 2 suit] an effective remedy?" Pls. Counsel: "It is – number one, it is effective. There are preliminary injunctions.").

[56] *See* Hasen, *supra* note 16, at 428.

[57] 549 U.S. 1 (2006).

directly on the docket (as opposed to a published opinion).[58] The defendants—the State of Arizona and county election officials—appealed to the Supreme Court, which dissolved the Court of Appeals' injunction. In doing so, the Court warned that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," and that "[a]s an election draws closer, that risk will increase."[59] Ultimately, however, the Court concluded that "[t]hese considerations . . . cannot be controlling here," because the Court of Appeals erred "as a procedural matter" in failing "to give deference to the discretion of the District Court," and failing to provide any factual findings or reasoning of its own.[60] Considering itself the imminence of the November 6 and the need for clarity, together with this procedural error, the Supreme Court vacated the Ninth Circuit's injunction and allowed the election to proceed under the new voter ID rules.[61]

The crux of the decision was procedural error and the relationship between trial and appellate courts. Notably, nothing in the decision purports to assert a hard-and-fast rule that courts should never intervene in elections as they draw near. As discussed below, however, the Court's very brief discussion of "considerations specific to election cases"[62] in this unsigned opinion has become the foundation for an increasing number of court orders shutting the door to preliminary relief that would protect the right to vote during the course of multi-year voting rights litigation. Courts now cite *Purcell*—a narrow decision that described commonsense factors that a court should consider when an election is imminent—as an inviolable bar on granting any relief in the period before an election.

B. The *Purcell* principle has left unlawful and unconstitutional voting laws in place for years.

Of principal concern when it comes to the aggressive application of the *Purcell* principle is that voting laws ultimately found to be unlawful are permitted to remain in place for years—simply because the necessary court action that would have blocked that unlawful practice *before* it tainted an election would have occurred in the period close to that election. As a result, many elections take place, and candidates assume office, under discriminatory or otherwise unlawful regimes. This concern is magnified in the wake of *Shelby County* and the loss of the preclearance regime that would have prevented many of these laws from being enacted—or even proposed in the first instance.

The following cases illustrate this concern in vivid terms:

North Carolina State Conference of the NAACP v. McCrory[63] **(Statewide Voter Suppression Bill)**. In 2013, along with the Southern Coalition for Social Justice, we filed a lawsuit representing the League of Women Voters of North Carolina and individual North

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[58] *See* Filed Order, *Gonzalez v. Arizona*, No. 06-16702 (9th Cir. Sept. 18, 2006), Dkt. 16.

[59] *Purcell*, 549 U.S. at 4-5.

[60] *Id.* at 5.

[61] *Id.*

[62] 549 U.S. at 4.

[63] *McCrory*, 831 F. 3d. 204.

Carolina voters, in consolidated litigation challenging a sweeping voter suppression bill in North Carolina. Among other things, the bill imposed a strict voter identification requirement, slashed a week of early voting, eliminated same-day registration and pre-registration, and required the invalidation of ballots cast out-of-precinct. The law was announced just hours after the Supreme Court's decision in *Shelby County*—which released North Carolina from the preclearance regime—and enacted a few short weeks later.[64]

These changes had a tremendous impact on voter access in the state. In the 2012 presidential election alone, approximately 900,000 voters had voted during the eliminated week of early voting; nearly 100,000 voters had registered using same day registration; approximately 50,000 had pre-registered; and 7,500 had cast ballots out of precinct.[65] Not only did the 2013 law eliminate these widely-used forms of participation, it also banned the use of many commonly-held forms of government-issued photo ID for voting purposes, including North Carolina student IDs, public assistance IDs, and even municipal employee ID cards. In all, every form of registration or voting curtailed or eliminated by the bill had been disproportionately used by Black voters; the only form of voting exempted from the ID requirement—absentee voting—was disproportionately used by white voters.[66]

Ultimately, the Fourth Circuit found in a unanimous opinion that the law had been enacted with racially discriminatory intent and struck down the challenged provisions of North Carolina's law as unconstitutional, finding that, in enacting these provisions, the North Carolina legislature "target[ed] African Americans with almost surgical precision."[67] But this case took 34 months to litigate—almost three years—from filing the complaint to the Fourth Circuit's ruling. In the interim, the 2014 general election took place under the provisions of the new law, with 188 federal and state offices elected—including a U.S. Senator, 13 congressional representatives, four state supreme court justices, and 170 state legislative seats.[68]

We did everything we could to prevent this from happening. We initially litigated this very complex matter on an expedited timeline, and sought a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted.[69] Unfortunately, the Supreme Court stayed that ruling,[70] likely on the basis of the *Purcell* principle[71]—effectively leaving the discriminatory

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[64] *See* William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, Wash. Post (Sept. 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 ("[W]ithin hours of the court ruling, [a state representative] told local reporters, 'Now we can go with the full bill.' With the 'legal headache' of Section 5 out of the way, he said, a more extensive 'omnibus' bill would soon be introduced in the Senate.").

[65] *See* Appellants' Br. at 26, *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (Nos. 16-1468, 16-1469, 16-1474, 16-1529), 2016 WL 3355830, at *26.

[66] *N.C. NAACP v. McCrory*, 831 F.3d at 230.

[67] *Id.* at 214.

[68] *See 11/04/2014 Official General Election Results – Statewide*, N.C. State Bd. of Elections, https://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0 (last visited June 24, 2021).

[69] *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

[70] *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.).

[71] Hasen, *supra* note 16, at 449.

regime in place for the 2014 election. The Supreme Court subsequently permitted that preliminary ruling to go into effect,[72] and we ultimately prevailed on the final merits of the case. But even though we did everything in our power to prevent this discriminatory law from tainting the 2014 election, thanks to the demise of preclearance and the expansion of the *Purcell* principle, we lacked adequate tools to do so. And while the law has since been struck down, there is no way to now compensate the Black voters of North Carolina—or our democracy itself—for that gross injustice.

Veasey v. Abbott[73] **(Statewide Voter ID Bill).** In 2013, civil rights groups filed a lawsuit challenging what was then the nation's harshest voter identification law, leaving more than 600,000 eligible voters without the required form of ID.[74] The law was originally signed into law in 2011. However, when Texas sought to have the law precleared, as was required under Section 5, it was blocked on the grounds that Texas was unable to prove that the law would not discriminate against Black and Latinx voters.[75] Within hours of the *Shelby County* decision, however, Texas, now no longer bound to the preclearance process, immediately implemented the requirement.

On October 9, 2014, after a full nine-day trial, the district court issued a 143-page opinion that concluded that the voter ID law was passed with discriminatory intent and had discriminatory results, and permanently enjoined the state from enforcing the ID requirement. The full complement of judges on the Fifth Circuit eventually affirmed the district court's finding that the voter ID law violated the Voting Rights Act in July 2016.[76] But as in North Carolina, the case took over three years to litigate from the filing of the complaint to the Fifth Circuit's ruling. In the interim the 2014 general elections went forward with the voter ID requirement in place. In those elections, Texas voters filled an open governor's seat, as well as voted for six other statewide officeholders, all 36 members of the state's congressional delegation, all 150 members of the state house, and half of the state senate.[77] Moreover, the voter ID requirement was still in place for primary elections in 2016, including a contested presidential primary in both major parties,[78] as well a 2015 election to approve seven proposed constitutional

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[72] That is, despite temporarily staying that preliminary ruling, the Supreme Court declined to hear the case on appeal, leaving the preliminary injunction in place for subsequent local elections. *See North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (2015) (mem.). This suggests that the Supreme Court's stay of the preliminary injunction was issued due primarily to the proximity of the Fourth Circuit's ruling to the 2014 general election. *See* Hasen, *supra* note 16.

[73] 830 F.3d 216 (5th Cir. 2016) (en banc).

[74] *The Effects of Shelby County v. Holder*, Brennan Ctr. (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder ("Experts estimated that over 600,000 registered Texas voters did not have an acceptable ID under the new law.").

[75] Letter from Assistant Att'y Gen. Thomas E. Perez to Tex. Dir. of Elections Keith Ingram (Mar. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120312.pdf.

[76] *Veasey*, 830 F.3d. Texas would subsequently pass a new law to ameliorate the defects found in the voter ID bill, rendering the case moot (and sparking a new set of legal challenges).

[77] *Race Summary Report: 2014 General Election*, Off. of the Tex. Sec'y of State, https://elections.sos.state.tx.us/elchist175_state.htm (last visited June 24, 2021).

[78] *See Race Summary Report: 2016 Democratic Party Primary Election*, Off. of the Tex. Sec'y of State, https://elections.sos.state.tx.us/elchist233_state.htm (last visited June 24, 2021); *see also Race Summary Report:*

amendments.[79] All in all, more than eleven million ballots were cast under a discriminatory election regime.[80]

As in North Carolina, the plaintiffs did everything they could. They filed suit the day after the Governor announced that the law would be implemented and moved expeditiously to fully resolve the complex matter on the merits. In contrast to many of the applications for preliminary relief discussed here, this case featured the opportunity for a full hearing of the claims and the submission of evidence, with dozens of witnesses testifying—and, because trial dates are set well in advance, more than adequate notice to state officials that a ruling would come down close in time to the election. Nevertheless, the Fifth Circuit stayed the injunction, "based primarily on the extremely fast-approaching election date," *i.e.*, because of *Purcell*.[81] When the plaintiffs asked the Supreme Court to vacate the stay, it declined to do so—presumably also on the basis of *Purcell*.[82]

Notably, nothing in the Fifth Circuit's stay order in any way contradicted the district court's finding that the law was passed with discriminatory intent and had discriminatory results. In other words, the appeals court concluded that proper application of the *Purcell* doctrine required it to allow a law found to be "motivated, at the very least in part, *because of* and not merely *in spite of* ... detrimental effects on the African-American and Hispanic electorate"[83] to govern the conduct of federal elections. The Texas plaintiffs did everything they could to prevent this discriminatory law from tainting the 2014 election, but thanks once again to the demise of preclearance and the expansion of the *Purcell* principle, over 200 federal and state officials in Texas were elected under a regime the full Fifth Circuit would affirm as "impos[ing] significant and disparate burdens on the right to vote" and as "ha[ving] a discriminatory effect on minorities' voting rights in violation of Section 2 of the [VRA]."[84]

***Husted v. Ohio State Conference of the NAACP*[85] (Cuts to Early Voting).** In May 2014, we filed a lawsuit representing the Ohio chapters of the NAACP, the League of Women Voters, the A. Philip Randolph Institute, and various churches and other organizations, challenging an Ohio law that sharply cut the availability of early voting passed in the wake of the surge in turnout in the 2012 presidential election. The cuts disproportionately impacted Black

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2016 Republican Party Primary Election, Off. of the Sec'y of State, https://elections.sos.state.tx.us/elchist273_state.htm (last visited June 24, 2021).

[79] *Race Summary Report: 2015 Constitutional Amendment Election*, Off. of the Tex. Sec'y of State, https://elections.sos.state.tx.us/elchist190_state.htm (last visited Jun 24, 2021).

[80] *Turnout and Voter Registration Figures (1970–Current)*, Tex. Sec'y of State, https://www.sos.state.tx.us/elections/historical/70-92.shtml (last visited June 24, 2021).

[81] *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014).

[82] *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.); *id.* at 9 (Ginsburg, J., dissenting) (noting that while, "in *Purcell* and in recent rulings on applications involving voting procedures, this Court declined to upset a State's electoral apparatus close to an election," it should not do so in the instant case).

[83] *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014).

[84] *Veasey*, 830 F.3d at 256, 265.

[85] 573 U.S. 988 (2014).

Ohio voters, who not only relied more heavily on early voting than white voters but also relied more heavily on Sunday voting, which was eliminated by the law.[86]

As discussed, proving a Section 2 claim is difficult and resource intensive. Nevertheless, in June, just one month after we filed suit and three and a half months after the law was enacted, we moved for a preliminary injunction, submitting voluminous documents to support our claims, including several expert reports, extensive briefing, and hundreds of pages of exhibits. In a thorough opinion, weighing the competing evidence proffered by the state to defend the practice, the district court found that we had shown that the law was substantially likely to violate the Constitution and Section 2, and on September 4, 2014 (weeks in advance of the early voting period) issued a preliminary injunction mandating that early voting go forward without the state's cuts. The state appealed, and after emergency briefing, on September 24, the Sixth Circuit affirmed the injunction, finding, in a similarly thorough opinion, that the plaintiffs were likely to succeed on their VRA and constitutional arguments.[87]

Despite these findings on the merits, the Supreme Court stayed the injunction in a five to four vote—presumably on the basis of *Purcell*—just sixteen hours before early voting was to begin.[88] In contrast to the opinions of the lower courts, setting out detailed findings of fact and conclusions of law, the Supreme Court's stay was three sentences long, giving no clarity on what, precisely, it disagreed with or how the courts below had erred. The case ultimately settled, with the state agreeing to restore some of the reduced early voting opportunities.[89]

In the meantime, however, the 2014 general election went forward with the early voting cuts in place, with religious and community organizations scrambling to communicate the changes and to arrange transportation for their members. As Reverend Todd Davidson, of the Antioch Baptist Church in Cleveland noted, "[b]ecause of the last minute decision by the [Supreme C]ourt, [his church] was forced to hold off on their advertising because they did not want to give incorrect information."[90] The settlement, moreover, did not take effect until after primary elections in 2015. All told, over one hundred federal and state officials, including the state's governor, lieutenant governor, and secretary of state, were elected and over three million ballots were cast under a regime that two levels of the federal court system had concluded would

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[86] *Ohio State Conf. of NAACP v. Husted*, 43 F. Supp. 3d 808, 828–29 (S.D. Ohio 2014).

[87] *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated as moot* 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

[88] *Husted*, 573 U.S. 988. Although the Court provided no explanation for its reasons for staying the order, its order in *Husted* was one of four emergency orders issued relating to the 2014 elections, and opinions of individual Justices in two of those cases indicate that the Court was relying on *Purcell*. *See Frank v. Walker*, 574 U.S. 929, 929 (2014) (mem.) (Alito, J., dissenting) (discussing the "proximity of the upcoming general election"); *Veasey v. Perry*, 135 S. Ct. 9, 10–11 (2014) (mem.) (Ginsburg, J., dissenting) (arguing against application of *Purcell* to stay district court order); *see also* Hasen, *supra* note 16, at 428 ("[T]he apparent common thread [in the 2014 election cases] … was the Supreme Court's application of 'the *Purcell* principle.'").

[89] Settlement Agreement Among Pls. and Defs. Sec'y of State Jon Husted, *Ohio State Conf. of NAACP v. Husted*, (S.D. Ohio 2014) (No. 2:14-cv-00404-PCE-NMK), ECF No. 111-1, *available at* https://www.aclu.org/legal-document/naacp-v-husted-settlement-agreement-among-plaintiffs-and-defendant-secretary-state.

[90] DeNora Getachew, *Voting 2014: Stories from Ohio*, Brennan Ctr. (Dec. 5, 2014), https://www.brennancenter.org/our-work/research-reports/voting-2014-stories-ohio.

likely violate the U.S. Constitution and the Voting Rights Act—based solely on the *Purcell* principle.[91]

C. The *Purcell* principle has grown dramatically as a doctrine.

Since the Supreme Court's decision in *Purcell*, federal courts have increasingly cited the decision to preclude or stay court action on election rules where the impending election is imminent.[92] The following tables show the number of times courts denied or stayed injunctive relief on the basis of *Purcell*.[93]

Applications of *Purcell* – Presidential Elections		Applications of *Purcell* – Midterm Elections	
2008	2	2006	2
2012	6	2010	0
2016	11	2014	5
2020	58	2018	10

As the tables show, the number of times courts used *Purcell* to deny or stay injunctive relief almost doubled from just six in the 2012 elections to eleven cases in 2016. In 2020, this figure skyrocketed to fifty-eight—more than five times as many voting rights cases stopped due to *Purcell* in 2016. This trend is not limited to presidential elections; in the 2014 midterms, courts applied *Purcell* to deny or stay injunctive relief only five times, while in the 2018 midterms, this grew to ten instances.

But the explosion in *Purcell*-based denials or stays of injunction does not simply reflect courts relying on *Purcell* in an increasing number of cases. A closer look at these cases reveals an even more concerning trend: courts are now applying the *Purcell* principle almost

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[91] *2014 Elections Results*, Ohio Sec'y of State, https://www.ohiosos.gov/elections/election-results-and-data/2014-elections-results/ (last visited June 24, 2021); *2015 Elections Results*, Ohio Sec'y of State, https://www.ohiosos.gov/elections/election-results-and-data/2015-official-elections-results/ (last visited June 24, 2021)..

[92] *See* Hasen, *supra* note 16 at 429 (describing how the Supreme Court has "ma[de] the *Purcell* principle paramount" in election-related litigation); Adam Liptak, *Missing From Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. Times (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html?searchResultPosition=2 (characterizing *Purcell*'s development into "a near-categorical bar on late-breaking adjustments to state election procedures"); Andrew Vasquez, Note, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 Fordham Urb. L.J. 967, 996 (2021) (describing how the Supreme Court in April 2020 "significantly strengthened the *Purcell* principle, allowing lower courts to cite it as doctrine throughout the 2020 election.").

[93] Appendix A lists cases where relief was denied or a stay was granted by an appeals court, presumably on the basis of *Purcell*. As discussed further *infra*, these cases often arise without full briefing or argument, and courts frequently issue orders denying relief or staying a lower court's grant of relief without clarifying their reasoning. Therefore, courts may be applying *Purcell*, even if they do not make that explicit, meaning the list is likely underinclusive.

automatically to block preliminary relief in the period before an election. The Supreme Court has encouraged this development, articulating the *Purcell* principle as a rule that "lower federal courts should ordinarily not alter the election rules on the eve of an election."[94]

This trend is concerning because courts have a duty to litigants to conduct an individualized analysis, especially in the context of an application for preliminary relief. The current standard for whether or not a court should issue an injunction instructs courts to consider, among other things, whether the plaintiffs will suffer irreparable harm, whether "the balance of equities" counsel in favor of relief and whether the "injunction is in the public interest."[95] These factors are by definition specific to each case and each requested injunction. If anything, *Purcell* itself is a reminder to conduct this case-specific analysis: there, the lower court "was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases."[96] *Purcell* (the case) reminds courts to take a closer look at the issue before them, while *Purcell* (the principle) in its current form gives courts an excuse not to. Too often, courts have relied on the *Purcell* principle to avoid their responsibility to make the fact-specific inquiries and to weigh the relevant equities that are particular in each case. Instead, they apply a bright-line rule that too frequently works against voters.

Nominally, the *Purcell* principle addresses several concerns: it counsels against granting an injunction when there is a risk of voter confusion or administrative burden on elections officials in complying. It also encourages plaintiffs to move quickly, rather than asserting their rights at the last minute. And finally, it sets clear rules in advance of an election, so all parties will know what will and will not be subject to its instructions. This is not, however, how the *Purcell* principle has operated in practice.

1. The Purcell *principle has been applied even where there is no risk of voter confusion.*

Perhaps the principal reason animating the Supreme Court's concern about court intervention close to an election is the risk that changing election rules will create "voter confusion," a risk which increases "[a]s an election draws closer."[97] But individualized analysis as to whether the relief requested or ordered would in fact cause voter confusion has over time seemingly become optional. In fact, courts have stayed relief in cases where a court found that a practice or procedure was likely unconstitutional or a VRA violation and ordered relief *with no voter-facing implications, i.e.*, where there was no plausible risk that voters could have been confused, let alone disenfranchised, by the court-ordered relief.

An illustrative example is *Republican National Committee v. Democratic National Committee*.[98] In March 2020, as the deadly COVID-19 pandemic spread across the country and

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[94] *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

[95] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

[96] 549 U.S. at 4 (per curiam).

[97] *Id.* at 4–5.

[98] 140 S. Ct. 1205 (2020).

the world, the Democratic Party challenged various provisions of Wisconsin's election administration rules and procedures, arguing that existing rules would, in the unique context of the pandemic, unconstitutionally burden Wisconsin voters' fundamental right to vote in the April 7 Democratic presidential primary. Describing "the severe burdens that voters are sure to face in the upcoming election" and finding that the plaintiffs had shown that the absentee ballot receipt deadline was likely unconstitutional, the court granted a preliminary injunction.[99] Among other things, the injunction extended the deadline for the receipt of absentee ballots by six days, requiring the state to count ballots so long as they were received by April 13th (even if postmarked after Election Day).[100] Under the court's order, voters did not have to know anything new or do anything different to have their ballots counted—the order impacted only what elections officials would do with certain ballots on the back-end *after* voters had already mailed in their ballots, and reflected the novel public health threat and changed circumstances. Moreover, state elections officials specifically did not oppose extending the deadline, and represented to the court that the April 13th receipt deadline "would not impact the ability to complete the canvass in a timely manner."[101]

After a flurry of emergency appeals, the case reached the Supreme Court, which stayed the injunction the day before the election.[102] The Court's opinion relied on *Purcell*, not for the idea that there are considerations specific to election-related cases that weighed (in combination with the other equities) in favor of a stay in the case before it, but for the much broader idea that "lower federal courts should ordinarily not alter the election rules on the eve of an election." Missing from any of its discussion was the fact that last-minute changes were unavoidable, due to the spread of COVID-19. Also absent was the surge in absentee ballot requests made by Wisconsin voters as COVID-19 spread which elections officials were struggling to process in time. The preliminary relief made the best of a bad situation, by giving voters a few extra days for elections officials to deal with the last-minute surge of absentee ballot applications. There was no risk of voter confusion—absentee voters were merely waiting to *receive their ballot*, and the preliminary injunction would have allowed them to cast their ballot and have it counted. Instead, due to the Supreme Court's action, voters were forced to choose: risk exposure to a deadly virus which scientists were very early in understanding, or lose their right to vote. Wisconsin election officials would later acknowledge that 71 voters or poll-workers contracted COVID-19 as a result of the April 7 primary.[103]

An additional example is *Middleton v. Andino*,[104] another COVID-19-related challenge. There, plaintiffs challenged two aspects of South Carolina's absentee ballot process, the requirement that people who vote absentee must have a third-party witness sign their ballot and the requirement that voters have a qualifying "excuse" to vote absentee. The district court denied

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[99] *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 972, 976 (W.D. Wis. 2020).

[100] *Id.* at 976.

[101] *Id.* (quotations omitted).

[102] *Republican Nat'l Comm.*, 140 S. Ct. at 1206.

[103] Common Dreams, *Study Shows Wisconsin's April 7 In-Person Election Resulted in Explosion of New COVID-19 Infections*, Milwaukee Indep. (May 23, 2020), http://www.milwaukeeindependent.com/syndicated/study-shows-wisconsins-april-7-person-election-resulted-explosion-new-covid-19-infections/.

[104] 488 F. Supp. 3d 261 (D.S.C. 2020).

preliminary relief as to the excuse requirement, citing *Purcell*, though it did enjoin the operation of the witness requirement.[105] As with the absentee ballot receipt deadline, this injunction did not require voters to do anything differently in order to have their ballots counted. Instead, it *removed* a step that would have otherwise caused a voter's ballot to be rejected on the back end—a step that had already been suspended for the prior election.[106] Because of this prior suspension, *Purcell*'s concerns about courts changing the status quo were not present, as "a new status quo [was] set in South Carolina for voting requirements," meaning that *failing* to issue the injunction would have created the change in voting practices and any subsequent confusion.[107] Insofar as any confusion might have existed, moreover, it would have been resolved in favor of *enfranchisement*—either the voter obtained a witness signature or they didn't; their ballot would count either way.

However, the state appealed—and when the case came before it, the Supreme Court stayed the injunction, in a short, unsigned order.[108] Although the Court as a whole did not explain its action, Justice Brett Kavanaugh wrote a short concurring opinion (speaking only for himself) explaining that *Purcell* compelled the result.[109]

2. *The* Purcell *principle has applied even where there is no administrative burden for election officials.*

Another factor animating the *Purcell* logic of disfavoring court-ordered election changes too close to an election is that late-breaking changes can impose significant administrative burdens on elections officials. But as with voter confusion, individualized analysis as to administrative burden has likewise seemingly become optional over time.

The *Middleton* case described above is a case in point. In addition to demonstrating that the injunction suspending the witness requirement would not cause any voter confusion (and certainly not any that would result in disenfranchisement), the evidence presented made clear that there would be little to no administrative burden to implement it. Particularly relevant was Marci Andino, the director of the state election commission, representing to the court "her support for suspending the Witness Requirement and [her] belie[f] it will not be difficult or costly."[110] Elections workers would have to open and process the absentee ballots whether or not the witness signature was being enforced—if anything, not having to confirm that the witness requirement had been satisfied removed a processing step.[111] In fact, Andino wrote to the state legislature in July 2020 recommending many voter changes, including "[r]emov[ing] the witness

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[105] *Id.* at 294 n.29 ("[T]he court decline[s] to enjoin the Election Day Cutoff due to concerns raised in *Purcell* ... ").

[106] *Id.* at 289.

[107] *Id.* at 288.

[108] *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.).

[109] *See id.* at 10 (Kavanaugh, J., concurring in grant of application for stay).

[110] *Middleton*, 488 F. Supp. 3d at 289, *stayed pending appeal*, 141 S. Ct. 9 (2020).

[111] In fact, Dir. Andino stated regarding the witness requirement, "[w]hile election officials check the voter's signature, the witness signature offers no benefit to election officials as they have no ability to verify the witness signature." *Id.* at 301 n.36.

requirement for absentee return envelopes"— the exact relief plaintiffs requested.[112] As discussed above, however, the injunction was stayed prospectively, likely on the basis of *Purcell.*

In fact, far from avoiding an administrative burden, applying *Purcell* can impose one. In the *Republican National Committee* case described above, Wisconsin elections officials attempted to react quickly to the enormous influx of absentee ballot requests in the early days of the COVID-19 pandemic. Although the district court's injunction directed them to accept ballots received after the statutory deadline, they notably did not appeal the decision. Instead, political actors who intervened in the lawsuit pursued the appeal, winning stays of portions of the injunction at the Seventh Circuit (requiring enforcement of the witness signature on absentee ballots) and the Supreme Court (requiring ballots to be postmarked by election day, rather than received six days later). Both courts cited *Purcell* in doing so,[113] without mentioning that their orders imposed additional, time-consuming tasks on elections officials, to verify witness signatures and review postmarks on absentee ballots, at a time when elections officials were already "heavily burdened."[114] Absent from these decisions was any acknowledgement of this administrative effort, though those same courts will cite such burdens to deny relief in other cases.[115]

3. The Purcell *principle has been applied even when plaintiffs move quickly.*

The problems that the aggressive and overly broad version of the *Purcell* principle have created are exacerbated by the fact that courts are applying the principle to bar relief even where plaintiffs are moving as quickly as they can and litigate the case expeditiously. In the sprawling North Carolina litigation discussed above, for example, we filed our lawsuit the day the bill was signed into law by then-Governor McCrory. There was simply no way to bring our challenge earlier. The Supreme Court still stayed preliminary relief for the 2014 election, presumably on the basis of *Purcell.*

The same was true in *Rangel-Lopez v. Cox*,[116] another ACLU case. Ford County, Kansas, offered only one voting site for nearly twenty years, at the Dodge City civic center.[117] On

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[112] Letter from Marci Andino (July 17, 2020), *Middleton*, 488 Supp. 3d (No. 3:20-cv-01730), ECF No. 78-1 at 3.

[113] *See Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538 & 20-1546, 20-1539 & 20-1545, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205, 1207 (2020).

[114] *See Republican Nat'l Comm.*, 140 S. Ct. at 1209 (Ginsburg, J., dissenting) ("Accommodating the surge of absentee ballot requests has heavily burdened election officials, resulting in a severe backlog of ballots requested but not promptly mailed to voters.").

[115] *Little v. Reclaim Idaho,* 140 S. Ct. 2616, 2617 (2020) (mem.) (Roberts, C.J., concurring) (joined by three other Justices) (citing "the present strain imposed by this structural injunction on the time and resources of state and local officials, and the costs to the State will continue to add up over the coming weeks" as a reason to issue a stay); *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (arguing against assuming decision-making over "tasks that belong to politically responsible officials").

[116] 344 F. Supp. 3d 1285 (D. Kan. 2018).

[117] Elections officials claimed that the Americans with Disabilities Act compelled it to close all other polling sites, as they were not accessible. For more on the factual background of this case, *see* ACLU of Kan., *KS LULAC and Rangel-Lopez v. Cox*, https://www.aclukansas.org/en/cases/ks-lulac-and-rangel-lopez-v-cox (last updated Jan. 25, 2019).

September 11, 2018, fewer than two months before the 2018 elections, the county clerk unilaterally decided to move the polling location—again, the sole voting site in the county—to another location four miles away. The new location was outside Dodge City limits (and more than 80% of the county's residents live in Dodge City), and 1.2 miles away from the nearest public transportation stop. Even worse, after making this decision, the county only began publicizing the change on September 28, 39 days before the election.

The ACLU of Kansas acted promptly, attempting to meet with the county clerk to coordinate non-partisan voter assistance, but the clerk cancelled the scheduled meeting and subsequently stopped responding to ACLU communications. After being stonewalled, the ACLU finally sued on October 26, less than one month after the change was made public. The application for preliminary relief was denied, due to *Purcell*; in the court's eyes, *Purcell* meant that the public interest would not be served by ordering the opening of an additional election site, due to the risk of confusion from competing notices.[118] In doing so, this case provides just one of many examples of how the principles that purportedly animate the *Purcell* doctrine have largely worked only in one direction: against voting rights plaintiffs. The clerk's decision to move a long-standing polling site shortly before an election meant that confusion was inevitable, but the court's rigid understanding of *Purcell* (*i.e.*, that *Purcell* warns only against the confusion that may arise if a *court* "insert[s] itself into this process"[119]) meant that it did not consider whether court action here was in fact necessary to mitigate voter confusion created by the government's last-minute changes. Such an approach is divorced from reality and has allowed courts to avoid their responsibility to make the fact-specific inquires and to weigh the relevant equities that are particular in each case in favor of a bright-line rule that too frequently works against voters.

4. The Purcell *principle is frequently described as a bright-line rule against courts intervening in upcoming elections – but it is not applied consistently or with real clarity on what it requires.*

Academic and legal commentors frequently describe the *Purcell* principle as a bright-line rule.[120] However, whether courts will actually apply *Purcell*—even in situations that seem to present the paradigm circumstances that counsel against intervention—remains deeply unpredictable.

For example, in the *Brakebill v. Jaeger*[121] litigation concerning North Dakota's Voter ID law, the district court issued an injunction prior to the 2018 primary elections. Months later, and one week before absentee voting began, the Eighth Circuit granted a stay of the injunction, allowing the state to require ID with a residential (rather than mailing) address, with severe

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[118] *Rangel-Lopez*, 344 F. Supp. 3d at 1290.

[119] *Id.*

[120] *Article III - Equitable Relief - Election Administration - Republican National Committee v. Democratic National Committee*, 134 Harv. L. Rev. 450, 457 (2020) ("Despite *Purcell*'s opaqueness, however, some courts, including the Supreme Court, have since treated it as establishing a bright-line rule against judicial intervention close to Election Day."), *see also* Erwin Chemerinsky, *Keynote Address Alaskan Election Law in 2020*, 37 Alaska L. Rev. 139, 141 (2020) ("But as... lower court judges have interpreted *Purcell*, it has become a bright-line rule.").

[121] *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

consequences on Native Americans living on reservations, who commonly use P.O. boxes. Here, the concerns that putatively counsel in favor of *Purcell* existed: voters had been told for months they could use IDs that were now unacceptable, so the stay would be deeply confusing and impose a substantial risk that some voters would show up at the polls to vote without a qualifying ID (or, as explicitly warned against in the *Purcell* decision itself, be "incentiv[ized] to remain away from the polls" altogether); the stay would also require North Dakota to revisit training for elections officials, despite the Secretary of State representing that revising materials would take several months; and voting would begin less than a week after the Eighth Circuit issued the stay. Unperturbed, the panel refused to apply *Purcell* and refrain from intervening and changing the rules already in place. Of course, when the plaintiffs brought subsequent litigation shortly afterward, taking at face value the Eighth Circuit's statement "the courthouse doors remain open" for residents without formal addresses affected by the stay,[122] their efforts were blocked by *Purcell*.[123] Eventually—eighteen months later—the plaintiffs settled with the state defendants, and now those without a street address may cast a ballot and voters with tribal IDs may use those as a permissible form of identification.[124]

Nor is the time period where the *Purcell* principle applies to bar relief clearly defined. Some courts take an expansive view: In *Richardson v. Texas Secretary of State*,[125] for example, the court denied preliminary relief that would have blocked enforcement of signature matching for absentee ballots and established a cure process on the basis of *Purcell* 56 days before the next election. In *Thompson v. DeWine*, the Sixth Circuit stayed a preliminary injunction preventing enforcement of certain requirements for ballot initiative signatures 161 days before the election, warning that while "the November election itself may be months away but important, interim deadlines … are imminent."[126] Given the context of qualifying ballot initiatives, this may be fair enough, but the court continued: "[M]oving or changing a deadline or procedure now will have inevitable, other consequences."[127] This logic—that the existence of any consequences of changing election procedures counsels against relief—expands the relevant *Purcell* window months in advance of elections, and given the frequency of primary and general elections, leaves little (if any) time for plaintiffs to challenge unlawful voting practices and obtain relief before those practices taint elections.

At the same time, however, courts have ignored or declined to apply the *Purcell* principle within much smaller windows. In *Carson v. Simon*, for example, the Eighth Circuit declined to apply *Purcell* in a decision issued *five days* before the 2020 general election.[128] There, voting

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[122] *Id.* at 561.

[123] *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018) (denying preliminary relief).

[124] *See* Campaign Legal Ctr., *Secretary of State and North Dakota Tribes Agree to Settle Voter ID Lawsuit*, https://campaignlegal.org/press-releases/secretary-state-and-north-dakota-tribes-agree-settle-voter-id-lawsuit (last visited June 25, 2021).

[125] No. SA-19-cv-00963-OLG, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020).

[126] 959 F.3d 804, 813 (6th Cir. 2020) (granting stay of preliminary injunction), *mot. to vacate stay denied*, No. 19A1054, 2020 WL 3456705 (U.S. June 25, 2020) (mem.).

[127] *Thompson*, 959 F.3d at 813.

[128] 978 F.3d 1051, 1061-61 (8th Cir. 2020).

rights plaintiffs and state officials entered into a consent decree, approved by a state court, extending the deadline for the receipt of absentee ballots to August 3, 2020, and state officials promptly began working with local elections officials to prepare. Then, a second set of plaintiffs brought a new lawsuit challenging the consent decree, moving for a preliminary injunction on September 24, which was denied on October 12. On appeal the Eighth Circuit enjoined the state court order, which had the effect of *moving up* the absentee ballot deadline, again just days before the election. It is hard to imagine a situation where *Purcell* is more applicable: here, the requested order came at the eleventh hour, risked a great deal of voter confusion, and imposed serious administrative burdens as state officials subsequently struggled to comply with the new ballot receipt deadline.[129]

D. When courts apply the *Purcell* principle on appeal, they exacerbate all of the problems of *Purcell*— and introduce new ones.

In theory, *Purcell* applies equally to district courts and courts of appeals, instructing them both to consider the risk of voter confusion and administrative burden in complying with a court order. However, in practice, the growing number of stays (where an appeals court prevents a lower court's order from taking effect) by courts of appeals and the Supreme Court, and the expansion of the doctrine into a bright-line rule creates the exact whipsaw effect that the *Purcell* principle theoretically aims to avoid.[130] The ways in which appeals courts have applied the *Purcell* principle, moreover, has introduced new problems.

***First,* voters may be disenfranchised if they act in reliance on a lower court order that is subsequently stayed by an appellate court on the basis of *Purcell*.** If, say, a district court enjoins enforcement of a witness requirement, a voter may mail in an absentee ballot without such a witness signature. If an appeals court then applies the bright-line version of *Purcell* that exists today to stay the injunction, that voter's ballot will be thrown out, merely because the voter relied in good faith on the court order. Appeals courts increasingly apply *Purcell* in this way: without consideration of whether the stay itself would cause the very confusion and attendant disenfranchisement that the Supreme Court was concerned with in the original decision.

In Wisconsin in 2014, for example, the district court in *Frank v. Walker* preliminarily blocked enforcement of the state's voter ID requirement,[131] the Seventh Circuit subsequently stayed that injunction.[132] But before the stay was issued, nearly 12,000 absentee voters' ballots were mailed *without* the ID instructions, and hundreds of absentee ballots had already been cast

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[129] Amy Forliti, *Court: Late Minnesota Absentee Ballots Must Be Separated*, MPR News (Oct. 29, 2020), https://www.mprnews.org/story/2020/10/29/court-late-minnesota-absentee-ballots-must-be-separated ("The court's decision is a tremendous and unnecessary disruption to Minnesota's election, just days before Election Day. This last-minute change could disenfranchise Minnesotans who were relying on settled rules for the 2020 election … ." (quoting the Secretary of State)).

[130] *Purcell,* 549 U.S. at 4-5 ("Court orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls.") (emphasis added).

[131] 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

[132] *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014) (mem.).

without a photocopy of accepted ID. In our petition for rehearing en banc on the stay, we pointed this out, and argued that by staying the injunction and bringing the ID requirement back, the court would effectively disenfranchise voters who did nothing more than follow the instructions that they were given by the state, in conformity with the law as it then stood.[133] But the en banc court deadlocked.[134] Fortunately, the Supreme Court lifted the stay.[135]

Although the Seventh Circuit did not rely on *Purcell* in issuing the stay in *Frank v. Walker*, the expansion of the *Purcell* doctrine into a hard-and-fast rule coupled with appeals courts' willingness to use *Purcell* to stay injunctions point to a world in which voters' reliance interests are disregarded solely because the injunction was ordered during some undefined period of time before an election.

This is not a far-fetched concern. In the 2020 *Middleton* case out of South Carolina discussed above, for example, the Fourth Circuit affirmed an injunction against the enforcement of the state's requirement that absentee ballots contain a signature of a witness. Absentee voters in South Carolina were then told as a result that they did not need a witness signature on their ballots, and some voted.[136] The Supreme Court then stayed the injunction prospectively—*i.e.*, permitting the counting of ballots without witness signatures that were cast while the injunction was in effect.[137] But Justices Gorsuch, Alito, and Thomas would have stayed the injunction altogether[138]—disenfranchising voters who did nothing more than rely on an injunction while it was in effect.

If appeals courts think of the *Purcell* doctrine as a bright-line rule—despite all of the inconsistencies in its application as discussed—they are more likely to stay an injunction. As this whipsaw litigation has become more and more common, reaching new heights in 2020, the effects spread beyond those voters covered by specific rulings. The fact that whipsaw orders and Supreme Court intervention has become so common itself casts doubt and creates uncertainty about (and ultimately limits the effectiveness of) any relief granted near an election. This in turn feeds the exact voter confusion that the *Purcell* principle is in theory used to avoid.

***Second*, the application of *Purcell* by appeals courts and the Supreme Court has been plagued by a lack of transparency, to the point where the emergency orders, including election-related orders, are referred to as "the shadow docket."**[139] Generally, a case in a federal court of appeals is decided after full briefing, oral argument (as need be), and judicial

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[133] *See* Emergency Mot. for Reh'g En Banc at 8–9, *Frank v. Walker*, 766 F.3d 755 (7th Cir. 2014) (No. 14-02058), ECF No. 66-1 at 13–14.

[134] *Frank v. Walker*, 769 F.3d 494 (7th Cir. 2014) (per curiam).

[135] *Frank v. Walker*, 574 U.S. 929 (2014) (mem.).

[136] Zak Koeske, *SC Absentee Voters Need a Witness. What Happens When Election Mailers Say Otherwise?*, The State (Oct. 14, 2020), https://www.thestate.com/news/politics-government/election/article246398885.html.

[137] *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.).

[138] *Id.* at 10.

[139] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of L. & Liberty 1, 1 (2015) (coining the term); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 125 (2019).

research and drafting, a process that can often take months. The product of this effort is a reasoned opinion that the parties can read and understand, one that assures the parties that their arguments got a fair hearing and provides guidance as to the rules of the road for litigants going forward.

Purcell and its applications depart sharply from this practice. In fact, the Supreme Court's development of the *Purcell* principle has occurred almost exclusively as a series of unsigned orders that lack such an explanation. In 2014, the first federal election cycle following *Shelby County*, the Supreme Court issued four rulings in election cases, all of which were unsigned and lacking in any explanation of the reasoning underlying the decisions.[140] In *Ohio NAACP v. Husted*, discussed above, the district court and Sixth Circuit both issued extremely thorough opinions discussing the merits of the case and explanation of why, despite the impending election, those courts were issuing or affirming preliminary relief.[141] In contrast, the Supreme Court's opinion staying the injunction was three sentences.[142] By 2020, the Court would issue more than a dozen emergency orders regarding applications for injunctive relief, and only one featured an opinion from the Court.[143] In these cases and others with silent orders, it falls upon practicing lawyers and academics to infer what was happening, based on the facts of the cases as well as individual statements by Justices concurring or dissenting from the order.[144] In turn, lower courts tasked with making sense of these brief, hastily-decided orders have begun citing them for the idea that *Purcell* is in fact the bright-line rule that it has turned into.[145] In other words, the Supreme Court has changed the law of emergency election through these orders, without acknowledging that is what it is doing.

Of course, elections impose external deadlines, so election-related litigation frequently comes before the higher courts as emergency applications for stays or relief as a matter of practical necessity. While there are limits to what courts can reasonably be expected to produce in the time frame that elections allow for, there are still ways to lessen the costs of the shadow docket. For example, courts regularly issue orders disposing of a case (such as an order granting

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[140] *North Carolina.*, 574 U.S. 926; *Husted*, 573 U.S. 988; *Veasey*, 135 S. Ct. 9; *Frank*, 574 U.S. 929.

[141] *Ohio State Conf. of NAACP*, 43 F. Supp., *aff'd*, 768 F.3d 524 (6th Cir. 2014).

[142] *Husted*, 573 U.S. 988.

[143] *Compare Merrill v. People First of Ala.*, 141 S. Ct. 190 (2020) (mem.); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.); *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020) (mem.); *Republican Nat'l Comm. v. Common Cause RI*, 141 S. Ct. 206 (mem.); *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (mem.); *Thompson v. DeWine*, 207 L. Ed. 2d 1094 (June 25, 2020) (mem.); *Moore v. Circosta*, 141 S. Ct. 46 (2020) (mem.); *Democratic Nat'l Comm. v. Wis. State Legisl.*, 141 S. Ct. 28 (2020) (mem.), *with Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

[144] Of course, that applications of *Purcell* frequently draw concurrences or dissents explaining how the (unenumerated) majority is erring in one way or the other implies that there is in fact sufficient time for the Justices to draft something explaining what their reasoning is.

[145] *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (reasoning that two months is presumptively inside the window where *Purcell* applies to block relief because while, "*Frank* [*v. Walker*] did not give reasons, but *Republican National Committee* [*v. Democratic National Committee*] treated *Frank* as an example of a change made too late."); *see also* Vasquez, *supra* note 92, at 980 ("Despite the Court not providing reasoning and issuing [its four 2014 election orders] close to Election Day, lower courts have subsequently cited these cases as applying *Purcell*.") (citations omitted).

or denying an application for a stay) and then afterwards, release opinions explaining how the court arrived at that conclusion. However, the Supreme Court has declined to do this in its election cases applying *Purcell*, leaving the actual contours of the principle unclear.

The use of the shadow docket imposes real costs. As discussed, voting rights is one of the most complex areas of law that federal judges deal with, and cases are time-consuming and expensive to litigate. One reason a court may deny or stay relief is they view those claiming it as unlikely to succeed on the merits; another might be that though they feel plaintiffs have a strong likelihood of success, they are compelled by *Purcell* to deny relief. It would be better for all involved, including state defendants, if courts explained their reasoning so litigation could proceed more efficiently through the system.

Moreover, without written opinions, there's no guidance for litigants as to how they are supposed to seek relief without running into a *Purcell* problem. The lack of written opinions also means that there is no way to ensure that courts are applying the *Purcell* principle consistently. This detracts from the core persuasive force of judicial opinions, namely the idea that they are reasoned, neutral applications of legal principles. Instead, unsigned emergency orders with no stated reasons lend credence to criticism that judges are playing politics, rather than applying the law.

Conclusion

The inadequacies of post-enforcement relief indicate the need for a revival of preclearance. While Section 2 is an important tool, cases brought under it by definition are reacting to changes that have already been implemented. Such cases are time and resource-intensive to litigate, often requiring experts and extensive briefing. In contrast, the preclearance regime under the Voting Rights Act—which operated for decades—allowed the federal government to be nimbler in protecting the right to vote, blocking discriminatory changes to election rules before they went into effect and became much more difficult to undo. Importantly, state actors subject to preclearance also benefit from the process: case-by-case, after-the-fact voting rights litigation is expensive for defendants, just as it is for civil rights plaintiffs.

For states not subject to preclearance, lowering the standard to win a preliminary injunction would strengthen the protections of Section 2. The John Lewis Voting Rights Act that was introduced in July 2020, following Rep. Lewis' death, would lower the standard that plaintiffs need to meet to win a preliminary injunction, requiring them to "raise[] a serious question" as to the merits of their claim, as opposed to proving they are "likely to succeed on the merits."[146] One way to think of this is as a precaution: because voting rights are so crucial and violations cannot be remedied after the fact, making it easier to win preliminary relief merely errs on the side of caution in protecting these civil rights. Nor would this standard encourage frivolous litigation: Section 2 claims remain resource-intensive to litigate and prove, meaning that this would only allow courts to block changes that are legally questionable while the case is fully litigated.

[146] John Lewis Voting Rights Advancement Act, S.4263, 116th Cong. § 8(b)(4) (2020); *Winter*, 555 U.S. at 20.

The *Purcell* principle represents a concerning development in the federal courts' treatment of voting issues. The original decision, a narrow order dealing with the relationship between district and appeals courts, has metastasized into a per-se ban on federal courts issuing any injunction in the weeks before an election. While there are situations where forbearing is appropriate due to the potential for confusion, this represents an abdication of responsibility that courts have to protect our most sacred rights. Moreover, the development of this so-called principle in a series of unsigned and unexplained orders, resolving some of the most closely-watched and politically-charged cases that come before the federal court system, damages the stature of the courts in the eyes of the parties and citizens. When law is made in this fashion, there is no way to know whether courts are applying the principle consistently and no guidance for litigants on how to successfully seek relief.

One final note, although much of what is discussed here concerns the workings of the federal courts and the manner in which they issue injunctions, Congress has the power to act and the responsibility, under the Constitution, to ensure that the right to vote is not abridged. It is clear, settled law that Congress has the power to set standards for the issuance of injunctions,[147] which the Supreme Court reaffirmed as recently as 2000.[148] In the context of voting rights, and the long struggle to expand access to the ballot, Congress has an even clearer role. The Fourteenth and Fifteenth Amendments to the U.S. Constitution guarantee citizens the right to due process and equal protection under law, and the right to vote free from disenfranchisement on the basis of race, respectively.[149] Both of these amendments also state, unambiguously, that Congress shall have the power to enforce their guarantees.[150] If other institutions tasked with protecting constitutional rights, such as the court system and state governments, are failing to live up to their duties, this body has the responsibility to intervene.

I thank you again for the opportunity to testify in front of this subcommittee on these important issues.

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[147] *Yakus v. United States*, 321 U.S. 414, 441 (1944).

[148] *Miller v. French*, 530 U.S. 327, 350 (2000) ("Congress clearly intended to … preclud[e] courts from exercising their equitable powers to enjoin the stay. And we conclude that this provision does not violate separation of powers principles.").

[149] U.S. Const. amends. XIV, XV.

[150] U.S. Const. amends. XIV § 5, XV § 2.

Appendix A

Case Name	Jurisdiction	Highest Court to Rule	Election Year	Inj. Issued?	Dist. Ct. Decision Date	Dist. Ct. Citation	Appeal?	CoA Action	CoA Decision Date	COA Citation	Emergency SCOTUS Appeal?	SCOTUS Decision	SCOTUS Decision Date	SCOTUS Cite	Election Date
NEOCH v. Blackwell	Ohio	6th Cir.	2006	Y	10/26/06	2006 WL 8424056	Y	Granting Stay	10/31/06	467 F.3d 999	N				11/7/06
US v. Philadelphia	Philadelphia	E.D. Pa.	2006	N	11/3/06	2006 WL 3922115	N								11/7/06
State ex rel. Applegate	County	S.D. Oh.	2008	N	2/6/08	2008 WL 341300	N								3/4/08
Kelly v. Johnson	Montana	D. Mont.	2008	N	10/9/08	2008 WL 11394337	N								11/4/08
Boustani v. Husted	Ohio	N.D. Oh.	2012	N	11/6/12	2012 WL 5414454	N								11/6/12
SEIU v. Husted	Ohio	6th Cir.	2012	Y	10/26/12	906 F.Supp.2d 745	Y	Granting Stay	10/31/12	698 F.3d 341	N				11/6/12
Lair v. Bullock	Montana	9th Cir.	2012	Y	10/3/12	903 F.Supp.2d 1077	Y	Granting Stay	10/16/12	697 F.3d 1200	N				11/6/12
NJ Press Ass'n v. Guadagno	NJ	D. N.J.	2012	N	10/23/12	2012 WL 5498019	N								11/6/12
Dem-Repub. Org'n of NJ v. Guadagno	NJ	D. N.J.	2012	N	10/11/12	900 F.Supp.2d 447	N								11/6/12
Colon-Marrero v. Conty-Perez	Puerto Rico	1st Cir.	2012	N	9/18/12	2012 WI 8134091	Y	Affirming	10/18/12	703 F.3d 134	N				11/6/12
Veasey v. Perry (2014)	Texas	U.S.	2014	Y	10/11/14	71 F.Supp.3d 627	Y	Granting Stay	10/14/14	769 F.3d 890	Y	Denying Vacatur	10/18/14	135 S. Ct. 9	11/4/14
Husted v. Ohio State Confernce of the NAACP	US	U.S.	2014	Y	9/4/14	43 F.Supp.3d 808	Y	Affirming	9/24/14	768 F.3d 524	Y	Granting Stay	9/29/14	135 S.Ct. 42	11/4/14
Frank v. Walker (2014)	Wisconsin	U.S.	2014	Y	4/29/14	17 F.Supp.3d 837	Y	Granting Stay	9/12/14	766 F.3d 755	Y	Vacating Stay	10/9/14	574 U.S. 929	11/4/14
Davis v. Commonwealth Elec. Comm'n	NMI	D. N.M.I.	2014	N	10/27/14	2014 WL 12767673	N								11/4/14
League of Women Voters of N. Carolina v. North Carolina (2014)	North Carolina	U.S.	2014	N	8/8/14	997 F.Supp.2d 322	Y	Reversing, Issue Injunction	10/1/14	769 F.3d 224	Y	Granting Stay	10/8/14	574 U.S. 927	11/4/14
Stop Hillary PAC v. FEC	US	E.D. Va.	2015	N	12/21/15	166 F.Supp.3d 643	N								11/8/16
Greater Birmingham Ministries v. Alabama	Alabama	N.D. Ala.	2016	N	2/17/16	161 F.Supp.3d 1104	N								3/1/16
Crookston v. Johnson	Michigan	6th Cir.	2016	Y	10/24/16	2016 WL 9281943	Y	Granting Stay	10/28/16	841 F.3d 396	N				11/8/16
Pa. Democratic Party v. Republican Party of Pa.	Pennsylvania	E.D. Pa.	2016	N	11/7/16	2016 WL 6582659	N								11/8/16
Frank v. Walker (2016)	Wisconsin	7th Cir.	2016	Y	7/19/16	196 F.Supp.3d 893	Y	Granting Stay	8/10/16	2016 WL 4224616	N				11/8/16
Ariz. Democratic Party v. Reagan	Arizona	D. Ariz.	2016	N	11/3/16	2016 WL 6523427	N								11/8/16

Appendix A

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Republican Party of Pa. v. Cortes	Pennsylvania	E.D. Pa.	2016	N	11/3/16	218 F.Supp.3d 396	N								11/8/16
Silberberg v. Bd. of Elections of NY	New York	S.D.N.Y.	2016	N	11/3/16	216 F.Supp.3d 411	N								11/8/16
Manship v. Va. Bd. of Elections	Virginia	E.D. Va.	2016	N	11/3/16	2016 WL 6542842	N								11/8/16
Feldman v. Ariz. Secretary of State Office	Arizona	U.S.	2016	N	10/11/16	2016 WL 5900127	Y	Reversing, Issue Injunction	11/4/16	843 F.3d 366	Y	Granting Stay	11/5/16	137 S.Ct. 446	11/8/16
League of Women Voters of US v. Newby	KS, GA, AL	D.C. Cir.	2016	N	6/29/16	195 F.Supp.3d 80	Y	Issue stay	9/9/16	671 F. App'x 820	N				11/8/16
N. Carolina State Conference of the NAACP v. McCrory (2016)	North Carolina	U.S.	2016	N	4/25/16	182 F.Supp.3d 320	Y	Reversing, Issue Injunction	7/29/16	831 F.3d 204	Y	Denying Stay	8/31/16	137 S.Ct. 27	11/8/16
Patino v. Pasadena	Pasadena, Texas	5th Cir.	2017	Y	1/6/17	230 F.Supp.3d 667	Y	Denying stay	2/3/17	677 F.App'x 950	N				4/24/17
Thompson v. Alabama	Alabama	M.D. Ala.	2017	N	7/28/17	2017 WL 3223915	N								7/31/17
Brakebill v. Jaeger	North Dakota	U.S.	2018	Y	4/3/18	2018 WL 1612190	Y	Granting Stay	9/10/18	905 F.3d 553	Y	Denying Vacatur	10/9/18	139 S. Ct. 10	11/6/18
Michigan A. Philip Randolph Institute v. Johnson	Michigan	U.S.	2018	Y	8/1/18	326 F.Supp.3d 532	Y	Granting Stay	9/5/18	749 F.App'x 342	Y	Denying Vacatur	9/7/18	139 S. Ct. 50	11/6/18
Spirit Lake Tribe v. Jaeger	North Dakota	D.N.D.	2018	N	11/1/18	2018 WL 5722665	N								11/6/18
Rangel-Lopez v. Cox	Ford Cty, KS	D. Kan.	2018	N	11/1/18	344 F.Supp.3d 1285	N								11/6/18
Higginson v. Becerra	Poway, CA	S.D. Cal.	2018	N	10/2/18	2018 WL 4759204	N								11/6/18
League of Women Voters of Ariz. v. Reagan	Arizona	D. Ariz.	2018	N	9/18/18	2018 WL 4467891	N								11/6/18
Curling v. Kemp	Georgia	N.D. Ga.	2018	N	9/17/18	334 F.Supp.3d 1303	N								11/6/18
Short v. Brown	California	9th Cir.	2018	N	4/25/18	2018 WL 1941762	Y	Denying Stay	6/22/18	893 F.3d 671	N				11/6/18
Benisek v. Lamone	Maryland	U.S.	2018	N	8/24/17	266 F.Supp.3d 799	*Three judge panel*				Y	Affirming Denial	6/18/17	138 S.Ct. 1942	11/6/18
League of United Latin American Citizens of Ariz. v. Reagan	Arizona	D. Ariz.	2018	N	11/14/18	2018 WL 5983009	N								11/16/18
Miracle v. Hobbs	Arizona	9th Cir.	2019	N	12/16/19	427 F.Supp.3d 1150	Y	Affirming Denial	5/1/20	808 F.App'x 470	N				11/3/20

Appendix A

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Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Reg'n & Elecs.	Gwinnett Cty.	N.D. Ga.	2020	N	3/2/20	446 F.Supp.3d 1111	N								3/2/20
Republican Nat'l Comm. v. Democratic Nat'l Comm.	Wisconsin	U.S.	2020	Y	4/2/20	451 F.Supp.3d 952	Y	Granting Stay	4/3/20	2020 WL 3619499	Y	Granting Stay	4/6/20	140 S.Ct. 1205	4/7/20
Taylor v. Milwaukee Elec'n Comm'n	Milwaukee, WI	E.D. Wis.	2020	N	4/6/20	452 F.Supp.3d 818	N								4/7/20
League of Women Voters of Ohio v. LaRose (2020 Primary)	Ohio	S.D. Oh.	2020	N	4/3/20	2020 WL 6115006	N								4/28/20
Garcia v. Griswold	Colorado	D. Colo.	2020	N	5/7/20	2020 WL 4003648	N								5/7/20
Paher v. Cegavske	Nevada	D. Nev.	2020	N	5/27/20	2020 WL 2748301	N								6/9/20
Libertarian Party of Ill. v. Cadigan	Illinois	7th Cir.	2020	Y	4/23/20	455 F.Supp.3d 738	Y	Denying Stay	8/20/20	824 F.App'x 415	N				6/22/20
Curtin v. Va. State Bd. of Elecs.	Virginia	E.D. Va.	2020	N	5/29/20	463 F.Supp.3d 653	N								6/23/20
Merrill v. People First of Ala. (pre-trial)	Alabama	U.S.	2020	Y	6/15/20	467 F.Supp.3d 1179	Y	Denying Stay	6/25/20	815 F.App'x 505	Y	Granting Stay	7/2/20	141 S.Ct. 190	7/14/20
Detroit Unity Fund v. Whitmer	Michigan	6th Cir.	2020	N	8/17/20	2020 WL 6580458	Y	Affirming	9/2/20	819 F.App'x 421	N				7/28/20
Memphis A. Philip Randolph Institute v. Hargett (2020 Primary)	Tennessee	M.D. Tenn.	2020	N	7/21/20	473 F.Supp.3d 789	N								8/6/20
Common Cause Rhode Island v. Gorbea	Rhode Island	U.S.	2020	Y	7/30/20	2020 WL 4365608	Y	Denying Stay	8/7/20	970 F.3d 11	Y	Denying Vacatur	8/13/20	141 S.Ct. 206	9/8/20
S. Carolina Progressive Network Educ. Fund v. Andino	South Carolina	D. S.C.	2020	N	10/9/20	2020 WL 5995325	N								10/4/20
Namphy v. Desantis	Florida	N.D. Fla.	2020	N	10/9/20	2020 WL 5994268	N								10/6/20
Trump v. Wisc. Elec. Comm'n	Wisconsin	7th Cir.	2020	N	12/12/20	2020 WL 7318940	Y	Affirming	12/24/20	983 F.3d 919	Y				11/3/20
Wood v. Raffensperger	Georgia	11th Cir.	2020	N	11/20/20	2020 WL 6817513	Y	Affirming	12/5/20	981 F.3d 1307	Y				11/3/20
Mi Familia Vota v. Abbott	Texas	5th Cir.	2020	Y	10/27/20	2020 WL 6304991	Y	Granting Stay	10/30/20	2020 WL 6498958	N				11/3/20
Org'n for Black Struggle v. Ashcroft	Missouri	8th Cir.	2020	Y	10/9/20	2020 WL 6325722	Y	Granting Stay	10/23/20	978 F.3d 603	N				11/3/20
Common Cause Ind. v. Lawson (poll hours)	Indiana	7th Cir.	2020	Y	9/22/20	2020 WL 5671506	Y	Granting Stay	10/23/20	978 F.3d 1036	N				11/3/20

Appendix A

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Memphis A. Philip Randolph Institute v. Hargett (2020 General)	Tennessee	6th Cir.	2020	Y	9/9/20	2020 WL 5412126	Y	Denying Stay	10/19/20	977 F.3d 566	N				11/3/20
Richardson v. Texas Sec'y of State	Texas	5th Cir.	2020	Y	9/8/20	2020 WL 5367216	Y	Granting Stay	10/19/20	978 F.3d 220	N				11/3/20
Arkansas United v. Thurston	Arkansas	W.D. Ark.	2020	N	11/3/20	2020 WL 6472651	N								11/3/20
Mi Familia Vota v. Hobbs	Arizona	9th Cir.	2020	Y	10/5/20	2020 WL 5904952	Y	Granting Stay	10/13/20	977 F.3d 948					11/3/20
People First of Ala. v. Merrill (post-trial)	Alabama	U.S.	2020	Y	9/30/20	2020 WL 5814455	Y	Granting Stay	10/13/20	2020 WL 6074333	Y	Granting Stay	10/21/20	141 S.Ct. 25	11/3/20
Common Cause Ind. v. Lawson (ballot receipt)	Indiana	7th Cir.	2020	Y	9/29/20	2020 WL 5798148	Y	Granting Stay	10/13/20	977 F.3d 663	N				11/3/20
Tex. League of United Latin American Citizens v. Hughs	Texas	5th Cir.	2020	Y	10/9/20	2020 WL 5995969	Y	Granting Stay	10/12/20	978 F.3d 136	N				11/3/20
A. Philip Randolph Institute of Ohio v. LaRose	Ohio	6th Cir.	2020	Y	10/6/20	2020 WL 5909804	Y	Granting Stay	10/9/20	831 F. App'x 188	N				11/3/20
Democratic Nat'l Comm. v. Bostelmann	Wisconsin	U.S.	2020	Y	9/21/20	2020 WL 5627186	Y	Granting Stay	10/8/20	977 F.3d 639	Y	Denying Vacatur	10/26/20	141 S. Ct. 28	11/3/20
Ariz. Democratic Party v. Hobbs	Arizona	9th Cir.	2020	Y	9/10/20	2020 WL 5423898	Y	Granting Stay	10/6/20	976 F.3d 1081	N				11/3/20
New Ga. Proj. v. Raffensperger	Georgia	11th Cir.	2020	Y	8/31/20	2020 WL 5200930	Y	Granting Stay	10/2/20	976 F.3d 1278	N				11/3/20
TARA v. Hughs	Texas	5th Cir.	2020	Y	9/25/20	2020 WL 5747088	Y	Granting Stay	9/30/20	976 F.3d 564					11/3/20
Andino v. Middleton	South Carolina	U.S.	2020	Y	9/18/20	2020 WL 5591590	Y	Denying Stay	9/25/20	976 F.3d 403	Y	Granting Stay	10/5/20	141 S. Ct. 9	11/3/20
Jones v. Desantis	Florida	U.S.	2020	Y	5/24/20	462 F.Supp.3d 1196	Y	Granting Stay	7/1/20	2020 WL 4012843	Y	Denying Vacatur	7/16/20	140 S.Ct. 2600	11/3/20
Thompson v. Dewine	Ohio	U.S.	2020	Y	5/19/20	461 F.Supp.3d 712	Y	Granting Stay	5/26/20	959 F.3d 804	Y	Denying Vacatur	6/25/20	2020 WL 3456705	11/3/20
Bognet v. Sec'y Commonwealth of Pa.	Pennsylvania	3rd Cir.	2020	N	10/28/20	2020 WL 6323121	Y	Affirming	11/13/20	980 F.3d 336	Y				11/3/20
Wince v. Thurston	Arkansas	E.D. Ark.	2020	N	10/28/20	2020 WL 6324743	N								11/3/20
League of Women Voters of Ark. v. Thurston	Arkansas	W.D. Ark.	2020	N	10/26/20	2020 WL 6269598	N								11/3/20
Hoffard v. Cnty. of Cochise	Cochise Cty., AZ	D. Ariz.	2020	N	10/22/20	2020 WL 6555235	N								11/3/20
Pascua Yaqui Tribe v. Rodriguez	Arizona	D. Ariz.	2020	N	10/22/20	2020 WL 6203523	N								11/3/20

Appendix A

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Public Interst Law Found. v. Boockvar	Pennsylvania	M.D. Pa.	2020	N	10/20/20	2020 WL 6144618	N								11/3/20
Texas Voters Alliance v. Dallas Cnty.	Texas	E.D. Tex.	2020	N	10/20/20	2020 WL 6146248	N								11/3/20
Moore v. Circosta	North Carolina	U.S.	2020	N	10/14/20	2020 WL 6063332	Y	Affirming Denial	10/20/20	978 F.3d 93	Y	Denying Stay	10/28/20	141 S.Ct. 46	11/3/20
Carson v. Simon	Minnesota	8th Cir.	2020	N	10/12/20	2020 WL 6018957	Y	Reversing and	10/29/20	978 F.3d 1051	N				11/3/20
Donald Trump for President v. Way	New Jersey	D. N.J.	2020	N	10/6/20	2020 WI 5912561	N								11/3/20
Democracy N. Carolina v. N. Carolina Bd. of Elections	North Carolina	M.D. N.C.	2020	N	10/2/20	2020 WL 6589362	N								11/3/20
League of Women Voters of Ohio v. LaRose (2020 General)	Ohio	S.D. Oh.	2020	N	9/27/20	2020 WL 5757453	N								11/3/20
Yazzie v. Hobbs	Arizona	9th Cir.	2020	N	9/25/20	2020 WI 5834757	Y	Affirming Denial	10/15/20	977 F.3d 964	N				11/3/20
Common Cause v. Thomsen	Wisconsin	W.D. Wis.	2020	N	9/23/20	2020 WL 5665475	N								11/3/20
Minn. RFL Caucus v. Freeman	Minnesota	D. Minn.	2020	N	9/14/20	2020 WL 5512509	Y	*Pending Appeal*							11/3/20
Eason v. Whitmer	Michigan	E.D. Mich.	2020	N	9/9/20	2020 WL 5405878	N								11/3/20
Tully v. Okeson	Indiana	7th Cir.	2020	N	8/21/20	2020 WL 4926439	Y	Affirming Denial	10/6/20	977 F.3d 608	N				11/3/20
Kishore v. Whitmer	Michigan	6th Cir.	2020	N	7/8/20	2020 WL 3819125	Y	Affirming	8/24/20	972 F.3d 745	N				11/3/20
McCarter v. Brown	Oregon	D. Ore.	2020	N	6/20/20	2020 WL 4059698	N								11/3/20
Fair Maps Nevada v. Cegavske	Nevada	D. Nev.	2020	N	5/29/20	463 F.Supp.3d 1123	N								11/3/20
Arizonans for Fair Elecs v. Hobbs	Arizona	9th Cir.	2020	N	4/17/20	454 F.Supp.3d 910	Y	Denying Stay	5/5/20	CoA Dkt. 37	N				11/3/20
Little v. Reclaim Idaho	Idaho	U.S.	2020	Y	6/26/20	469 F.Supp.3d 988	Y	Denying Stay	7/9/20	CoA Dkt. 14-1	Y	Granting Stay	7/30/20	140 S.Ct. 2616	9/7/20
Clarno v. People Not Politicians	Oregon	U.S.	2020	Y	7/13/20	472 F.Supp.3d 890	*Appeal directly to S.Ct.*				Y	Granting Stay	8/11/20	141 S.Ct. 206	7/2/20
Tex. Democratic Party v. Abbott	Texas	U.S.	2020	Y	5/19/20	461 F.Supp.3d 406	Y	Granting Stay	6/4/20	961 F.3d 389	Y	Denying Vacatur	6/26/20	140 S. Ct. 2015	7/14/20
Black Voters Matter Fund v. Raffensperger	Georgia	N.D. Ga.	2021	N	12/16/20	2020 WL 7394457	N								1/5/21

Mr. COHEN. Thank you, Ms. Lakin, for your work and your testimony, and I hope you are not a die-hard baseball fan.

Next, I would like to recognize Ms. Helen Butler. Ms. Butler is executive director of the Georgia coalition for The People's Agenda. In that role, she leads an advocacy organization founded by the late great reverend, Dr. Joseph E. Lowery and compromised with representatives from human rights, civil rights, environmental, labor, women, young professionals, youth, elected officials, and peace and justice groups throughout Georgia and other southeastern States.

She leads initiatives that increase citizen participation in the governance of their communities in areas including education, criminal, and juvenile justice reform, protecting the right to vote, and economic development.

Ms. Butler, you are recognized for 5 minutes.

STATEMENT OF HELEN BUTLER

Ms. BUTLER. Good morning, Chair Nadler, Chair Cohen, and Members of the subcommittee. My name, of course, I am Helen Butler, and The People's Agenda is a nonpartisan, nonprofit organization founded by Dr. Lowery.

It has always been dedicated to fighting for the voting rights of Georgia's citizens, through public education, training, advocacy, and litigation.

In the wake of the Supreme Court's 2013 decision in *Shelby County* v. *Holder* and due to the lack of a preclearance process, we have been forced to spend even more time and resources fighting discriminatory voting laws, policies, and practices at the State and local levels.

Today, I will provide you with some examples of barriers to the ballot faced by voters of color in Georgia since that decision and the loss of section 5 preclearance, how my organization and others have been forced to divert significant time and resources to monitoring and responding to voting changes, and why we need to restore the full protections of the Voting Rights Act, including the preclearance and notice provisions by enacting the John Lewis Voting Rights Advancement Act.

I have submitted a full written statement to the Subcommittee for your consideration.

In the last two decades, the Georgia electorate has undergone significant demographic changes with the percentage of Black voters and other voters of color increasing. Instead of welcoming the increasing diversity of Georgia's electorate and respecting the votes cast by Black voters and other voters of color, Georgia's conservative legislators' immediate response to the political changes has been the introduction of a host of voter suppression bills in both the Georgia House and Senate, especially during the 2021 legislative session.

The bills were rushed through committees in the House and Senate often with little or no time for Ranking Members on the committees, much less the general public, to have an opportunity to review the draft or final versions of the bills before they were voted upon.

This process, led by the majority party with virtually no transparency, culminated in the passage of an omnibus voter suppression bill, Senate Bill 202.

With almost surgical precision, SB 202 targets the methods of voting increasingly being used by Georgia's Black voters and voters of color with arbitrary and unnecessarily burdensome requirements that will disenfranchise voters and potentially expose nonprofit civic engagement organizations such as The People's Agenda to fines and criminal penalties.

The majority party also led the passage of legislation reconstitution a number of Georgia's county boards of elections, including Morgan County where I lived and served on that board since 2010 as well as in Troup County and Spalding County and others.

I believe that the legislature targeted these boards of election because of our opposition to efforts to suppress the Black vote by Conservatives on our boards. Since Shelby County decision, Conservatives in the Georgia legislature introduced two mid-decade redistricting bills, which sought to reduce the percentage of the Black population in Republican-held districts that were starting to become more competitive.

Given the history of unconstitutional racial gerrymandering by the Georgia General Assembly, The People's Agenda is concerned about the potential for a repeat of these tactics during our current redistricting cycle in Georgia, particularly in the absence of preclearance of the plans by the Department of Justice.

In the aftermath of the Shelby County decision, many of Georgia's county boards of election also proposed or took actions to close, consolidate, or move polling locations, oftentimes in areas primarily serving voters of color and underrepresented communities.

Just, in fact, the Dougherty County Board of Elections recently is considering closing 10 of its 28 polling locations allegedly due to low turnout in the 2020 election cycle despite the pandemic.

In the wake of these new attacks on voting rights of Black voters and other voters of color in Georgia, The People's Agenda is extremely concerned about this landscape, and we believe that Congress must pass legislation to restore full protections of the Voting Rights Act, including the John Lewis Voting Rights Advancement Act.

Thank you for your time and your consideration.

[The statement of Ms. Butler follows:]

TESTIMONY OF HELEN BUTLER

EXECUTIVE DIRECTOR, GEORGIA COALITION FOR THE PEOPLE'S AGENDA

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

HEARING ON

"THE NEED TO ENHANCE THE VOTING RIGHTS ACT: PRELIMINARY INJUNCTIONS, BAIL-IN COVERAGE, ELECTION OBSERVERS, AND NOTICE"

JUNE 29, 2021

I. Introduction

Subcommittee Chairman Cohen, Vice Chair Ross, Ranking Member Johnson, and Members of the Subcommittee, my name is Helen Butler and I am the Executive Director of the Georgia Coalition for the People's Agenda ("PEOPLE'S AGENDA").

The PEOPLE'S AGENDA is a non-partisan, non-profit organization founded by the late Reverend Dr. Joseph E. Lowery and it is comprised of a coalition of representatives from civil rights, human rights, peace and justice organizations, and concerned citizens of the State of Georgia. The PEOPLE'S AGENDA is based in the greater Atlanta metro area, but we have members located throughout the entire State of Georgia who help to advance our mission and achieve our organizational goals. Our mission seeks to improve the quality of governance in Georgia, create a more informed and active electorate, and ensure responsive and accountable elected officials. A significant focus of our work is on voter empowerment and ensuring equal access to the ballot for eligible Georgians of color and under-represented communities. Our voter empowerment work includes providing voter registration assistance with a focus on education and mobilization, at Historically Black Colleges and Universities (HBCUs), high schools, naturalization ceremonies, and community events, conducting town hall meetings and candidate forums to provide opportunities to learn about candidate positions and engage in dialogues, operating a "Get Out the Vote" campaign in central locations throughout the state to encourage voter turnout, running our Election Protection Project which informs voters of their rights and provides immediate relief for problems encountered on or before Election Day, and managing our "Vote Connection Center" which provides training and technical assistance to nonprofit organizations and individuals through effective issue campaign organizing and civic engagement.

The PEOPLE'S AGENDA has always been dedicated to fighting for the voting rights of Georgia's citizens through public education, training, advocacy, and litigation. We have been forced to spend even more time and resources fighting discriminatory voting laws, policies, and practices at the state and local levels in the wake of the Supreme Court's 2013 decision in *Shelby County v. Holder* due to the lack of the preclearance process and consequent loss of advance notice of voting changes that discriminate against Black voters and other voters of color.

Today, I will provide you with some examples of barriers to the ballot faced by voters of color in Georgia since the Shelby County decision and the loss of Section 5 preclearance, demonstrate how my organization and others have been forced to divert significant time and resources to monitoring and responding to voting changes which deny Black Georgians and other Georgians of color an equal opportunity to participate in the political process, and explain why we need to restore the full protections of the Voting Rights Act, including its preclearance provisions, by enacting the John Lewis Voting Rights Advancement Act.

II. Georgia Senate Bill 202 (Enacted on March 25, 2021)

In the last two decades, the Georgia electorate has undergone significant demographic changes, with the percentage of Black voters and other voters of color increasing. As demonstrated by election analyses, Black voters and voters of color usually provide strong support to Democratic candidates in Georgia. These demographic changes and voting patterns

have resulted in corresponding political changes in the state, including during the 2020 election cycle when Georgia elected its first Democratic presidential candidate since 1996, Joseph R. Biden, and its first Black United States Senator, Reverend Raphael Warnock.

Instead of welcoming the increasing diversity of Georgia's electorate and respecting the votes cast by Black voters and other voters of color, Georgia's conservative legislators' immediate response was to introduce of a host of voter suppression bills in both the Georgia House and Senate during the 2021 legislative session.

The bills were rushed through committees, often with little or no time for members of the committees - much less the general public - to review the final versions of the bills before they were voted upon. In fact, in some of the committee hearings, the chair would announce proposed revisions to bills without circulating the amendments in writing for the public and other legislators to be able to evaluate how proposed changes modified the existing language of the bills. This process, with virtually no real transparency nor bipartisan support, culminated in the passage of an omnibus voter suppression bill, Senate Bill 202, the "Election Integrity Act of 2021" ("SB 202"), on March 25, 2021.[1]

This bill started out in the Senate Ethics Committee as a two-page stand-alone bill placing restrictions on the sending of absentee ballot applications to voters which blew up to 98 pages after it crossed over to the House. The very same day the General Assembly passed SB 202, Governor Brian Kemp swiftly signed the bill into law in the presence of six White men[2] in front of a painting of the Callaway Plantation - the site of a former cotton plantation where over one hundred enslaved Black people served its owners.[3] Park Cannon, a Black member of the Georgia House of Representatives, was arrested, handcuffed, and removed from the Capitol by police after knocking on the door to the room where Governor Kemp signed SB 202 into law, in an effort to witness the bill signing. Although she was initially charged with two felonies, the Fulton County District Attorney later declined to prosecute Representative Cannon for any alleged crimes.[4]

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[1] Georgia SB 202 as passed on March 25, 2021 (online at https://www.legis.ga.gov/api/legislation/document/20212022/201498).

[2] Stephen Fowler, *Kemp Signs 98-Page Omnibus Elections Bill,* Georgia Public Broadcasting, March 25, 2021. (online at https://www.gpb.org/news/2021/03/25/kemp-signs-98-page-omnibus-elections-bill).

[3] Will Bunch, *Georgia governor signed a voter suppression law under a painting of a slave plantation*, Philadelphia Inquirer, March 26, 2021. (online at https://www.inquirer.com/opinion/georgia-governor-brian-kemp-painting-slave-plantation-20210326.html).

[4] Blayne Alexander and Darch Gregorian, *Ga. lawmaker Cannon won't face prosecution for knocking on gov's door during bill signing*, NBC News, April 7, 2021. (online at https://www.nbcnews.com/politics/elections/ga-lawmaker-cannon-won-t-face-prosecution-knocking-gov-s-n1263338).

In an apparent nod to the efforts of former President Trump and his allies to falsely claim the presidential election was "stolen" from him in Georgia as a result of massive voter fraud, the preamble to SB 202 asserts, among other things, that the overhaul of Georgia's election procedures was necessary due to a significant lack of confidence in Georgia's election systems, with many electors concerned about allegations of rampant voter suppression and allegations of "rampant voter fraud."[5] The preamble also asserts the law was designed to "address the lack of elector confidence in the election system," reduce the burden on election officials, and streamline the process of conducting elections by promoting uniformity in voting.[6] The law does nothing of the kind.

Instead, with almost surgical precision, SB 202 targets the methods of voting increasingly being used by Black voters and voters of color with arbitrary and unnecessarily burdensome requirements that will disenfranchise voters and potentially expose non-profit civic engagement organizations, such as the PEOPLE'S AGENDA, to large fines and criminal penalties for providing assistance to voters who will now need to navigate the law's complicated procedures. SB 202's discriminatory changes include:

> (1) Onerous and arbitrary absentee ballot application and ballot ID requirements that weigh more heavily on Black voters, other votes of color, and lower income voters who do not have a Georgia driver's license or state ID number. If a voter does not have a Georgia driver's license or state ID number to put onto their absentee ballot applications, they must include a copy of another form of acceptable ID with the absentee ballot application and, if they do not have a Social Security number, they must include a copy of the ID when returning the voted ballot.[7] T must be done for each election in an election cycle, including each primary, general, special, and runoff election.

Since voters cannot use an identification number from the so-called "free" voter ID card that Georgia voters may apply for if they do not have a Georgia driver's license or state ID card when applying for an absentee ballot or returning the ballot under the new law, voters would need to submit copies of the "free" voter ID under the law when applying for an absentee ballot or when returning their voted ballot.

Black voters and other voters of color are proportionately less likely to have computers in their homes and suffer from significantly higher rates of poverty than White voters. Without the technology to scan, print, fax, or email these multiple copies of ID documents in the home, these voters will face undue and disparate burdens on their ability to vote by mail. This burden is amplified because the law also criminalizes the "handling" of absentee ballot applications by third parties with few exceptions for those who assist voters in navigating these new requirements, including if they help the voter scan or copy the completed application and ID

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[5] SB 202, Section 2.

[6] *Id.*

[7] *See* SB 202, Sections 25, 27 and 28.

documents or try to help them fax or email the application and ID documents to election officials.[8]

If voters without a Georgia driver's license or state ID card do not include copies of alternative ID documents with their absentee ballot applications, the applications will be rejected. If voters fail to provide the copies of the ID documents when they return the voted ballot, they will be required to produce a form of acceptable ID to the county registrar within three days of the election in order for their absentee ballot to count.[9]

> (2) Prohibiting public agencies and public employees from sending unsolicited absentee ballot applications to voters - something that the Georgia Secretary of State did when he sent unsolicited absentee ballot applications to all of Georgia's active voters ahead of the June 2020 primary elections - and which a number of County Registrars offices did in previous election cycles to encourage absentee voting and voter turnout.[10]
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> (3) Criminalizing the "handling" of any completed absentee ballot application by anyone other than the voter (with a few exceptions), which would even prevent a voter who does not have access to a fax machine or scanner from receiving help from the PEOPLE'S AGENDA or other non-profit civic engagement groups in faxing or scanning the completed application so that it can be submitted electronically to election officials unless we are providing assistance to a disabled voter.[11]
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> (4) Subjecting private individuals and non-public entities, including the PEOPLE'S AGENDA and other non-profit civic engagement organizations attempting to assist voters with absentee voting, to potentially large fines for sending absentee ballot applications to voters unless we check the Secretary of State's data files in advance to determine whether a voter has already requested an absentee ballot application, returned the application or voted an absentee ballot.[12]

Even if the voter requested an absentee ballot application from their county registrar and it was never received or the voter submitted an application and never received their ballot, PEOPLE'S AGENDA and other non-profit civic engagement organizations would run the risk of being fined if we sent another application to that voter. The law also requires the PEOPLE'S AGENDA and other groups and individuals to use the official absentee ballot applications from the Secretary of State's office when sending ballot applications to voters, but we must provide a

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[8] *Id.*

[9] *Id.*

[10] *See* SB 202, Section 25.

[11] *Id.*

[12] *Id.*

confusing disclaimer that the application was not being sent by a public entity or public official.[13]

> (5) Prohibiting persons other than the voter from touching or handling a completed absentee ballot applications unless the voter is disabled, which would even preclude a voter asking the PEOPLE'S AGENDA, a friend, neighbor or other non-profit civic engagement organizations to fax their application to the registrar's office because they do not have access to a fax machine and limits the return of ballot applications, as well as absentee ballots, to close relatives, housemates or, in the case of disabled voters, a caretaker.[14]
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> (6) Delaying and compressing the time during which a voter can request or submit an absentee ballot and shortening the time when a runoff election takes place to 28 days after the original election which will consequently and substantially shorten the voter registration period and early voting period for runoff elections.[15]
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> (7) Giving county registrars unfettered discretion to limit early voting hours from 9 a.m. to 5 p.m. and to entirely eliminate Sunday early voting,[16] thereby making is difficult for voters who work, go to school or have other obligations during the work day to be able to access early voting and leading to the elimination of Sunday early voting in some counties despite its popularity with Black voters and other voters of color who conduct "Souls to the Polls" get out the vote campaigns involving Black Churches and other faith organizations following Sunday services.[17]
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> (8) Severely restricting the number of, and access to, absentee ballot drop boxes, which were heavily used by Georgians in the 2020 election cycle and were a more secure and reliable method of returning absentee by mail ballots than through the U.S.P.S mail boxes. Under the new law, drop boxes must be inside early voting locations and will be available only during the days and hours when early voting is taking place, thereby making them unavailable to voters who cannot vote during early voting hours due to work, school, or other obligations during the day. Additionally, counties are limited to having one drop box per 100,000 registered, voters, which substantially limits the total number of drop boxes for each county.[18]

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[13] *Id.*

[14] *Id.*

[15] *See* SB 202, Section 42.

[16] *See* SB 202, Section 28.

[17] In 2018, conservatives in the legislature attempted to eliminate Sunday early voting in House Bill 363. However HB 363 died in the wake of negative media attention and advocacy by the PEOPLE'S AGENDA and other civic engagement and civil rights organizations. *See* Kira Lerner, UPDATED: Georgia bill that would eliminate Sunday voting and suppress black turnout fails, Think Progress, March 16, 2018. (online at https://thinkprogress.org/georgia-sunday-voting-cut-9c1c2ffafd18/).

[18] *See* SB 202, Section 26.

(9) Disenfranchising out-of-precinct voters by arbitrarily prohibiting any out-of-precinct voting before 5:00 p.m. on Election Day and allowing only limited out-of-precinct voting after 5:00 p.m. for voters who go to the incorrect polling place in the county where they are registered to vote and swear out an affidavit that they cannot get to their correct polling location before the close of the polls at 7:00 p.m.[19] This change penalizes voters who do not receive timely or adequate notification of their polling locations and ignores the fact that Black voters and other voters of color have been disproportionately impacted by polling place closures and change in the wake of the Shelby County decision that often result in voters going to the wrong polling place on Election Day.[20]

(10) Targeting jurisdictions with large populations of Black voters and other voters of color by stripping the Secretary of State of his vote on the State Election Board, replacing the Secretary of State with a voting member appointed by the General Assembly, and granting the State Election Board the power to effectively take over county Boards of Election.[21]

(11) Encouraging "unlimited" voter challenges on the eve of elections by other electors in the same county as the challenged voters.[22] True the Vote, along with Republican party operatives, led a campaign in numerous Georgia counties to challenge more than 364,000 registered Georgia voters for alleged address changes ahead of the January 2021 U.S. Senate runoff elections with little to no evidence showing the voters were not eligible to vote, substantially burdening election officials who were in the midst of preparing for and administering the elections.[23] SB 202 now codifies these types of mass voter challenges into Georgia law, regardless if there is any evidence supporting them and forces elections officials to conduct hearings within ten days of every challenge, with only three days' notice by mail of the hearings to challenged voters.

(12) Criminalizing the act of providing water and food to persons within 150 feet of a polling place or within 25 feet of any voters waiting in line waiting in line to vote,[24] despite Georgia's history of forcing voters to wait in hours' long lines at polling locations

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[19] *See* SB 202, Section 34.

[20] Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places,* Georgia Public Broadcasting, October 17, 2020. (online at https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl).

[21] *See* SB 202, Sections 3, 5-7, 12.

[22] *See* SB 202, Section 15.

[23] Mark Niesse, *Eligibility of 364,000 Georgia voters challenged before Senate runoff,* Atlanta Journal-Constitution, December 22, 2020. (online at https://www.ajc.com/politics/eligibility-of-364000-georgia-voters-challenged-before-senate-runoff/3UIMDOVRFVERXOJ3IBHYWZBWYI/).

[24] *See* SB 202, Section 33.

- particularly in areas serving Black voters and voters of color which have been disproportionately impacted by polling place closures.[25]

(13) Prohibiting the use of mobile voting units,[26] such as the two mobile units purchased by Fulton County for $750,000 and deployed to alleviate overcrowded polling places and long lines, unless the Governor declares an emergency and they are used to supplement the capacity of the polling place where the emergency circumstance occurred.[27]

This massive voter suppression law fully goes into effect on July 1, 2021. The first elections scheduled to take place under the new law occur on July 13, 2021. As of June 25, 2021, the Georgia State Election Board has not notified the public about the start of any official rulemaking process to adopt rules necessary for the implementation of all these voting changes. There have also been no scheduled Election Board meetings on the calendar since April 28, 2021.

This law is a prime example of why we need to restore the full protections of the Voting Rights Act, including the John Lewis Voting Rights Advancement Act, to ensure voters of color are not subjected to discriminatory, arbitrary and unreasonably burdensome barriers to the ballot box before these laws go into effect.

III. Legislative Reconstitution of County Boards of Election and the Removal of Black Board Members

During the 2021 legislative session, conservative members of the General Assembly also waged war against selected counties' Boards of Elections in an effort to purge Black board members. Morgan County, where I served as a member of the Board of Elections since 2010 and was a staunch advocate for voting rights and fair elections, is one of the Boards of Election that conservatives reconstituted by giving control over all appointments to the Republican controlled Board of County Commissioners. This resulted in my recent removal as a Board Member, along with a second Black Board Member, Avery Jackson.[28] See HB 162.[29]

The General Assembly also targeted the Troup County Board of Elections, which was reconstituted with the enactment of HB 684.[30] As a result of this bill, long-time Black Board

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[25] Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places,* Georgia Public Broadcasting, *supra.*

[26] *See* SB 202, Section 20.

[27] Ben Brasch, *Want to vote in Fulton's fancy new mobile voting bus? See the schedule,* (online at https://www.ajc.com/news/atlanta-news/want-to-vote-in-fultons-fancy-new-mobile-voting-bus-see-the-schedule/OXPVK4Y3ENAIRKOMYA43673ZLM/), Atlanta Journal-Constitution, October 19, 2020.

[28] Nick Corasaniti and Reid J. Epstein, *How Republican States Are Expanding Their Power Over Elections,* New York Times, June 19, 2021. (online at https://www.nytimes.com/2021/06/19/us/politics/republican-states.html).

[29] Georgia House Bill 165. (online at https://www.legis.ga.gov/api/legislation/document/20212022/197812).

[30] Georgia House Bill 684 (2021). (online at https://www.legis.ga.gov/api/legislation/document/20212022/200601).

Member, Lonnie Hollis will be ousted. Ms. Hollis advocated for Sunday voting as well as a new precinct location at a Black church in a nearby town.[31]

The Spalding County Board of Elections was also targeted in the 2021 legislative session. The Board was reconstituting with the enactment of HB 769.[32] The fifth member of the Board of Elections will be replaced with a candidate chosen by a majority of the Spalding County Superior Court Judges.[33] Formerly, the fifth member was chosen in a bipartisan manner by the two Republican and two Democratic members of the Board of Elections.[34] Currently, all of the Spalding County Superior Court Judges are White males. It is likely that at least one of the two Black Spalding County Board Members will lose their seat and that the new Board will terminate the County's Black election supervisor, Marcia Ridley.

The PEOPLE'S AGENDA is continuing to investigation the reasons why several other Boards of Elections were reconstituted in the past legislative session, including Carroll, Lincoln, Pickens, and Stephens and whether these changes were racially motivated.

IV. Redistricting

The 2021 redistricting cycle in Georgia will be the first redistricting cycle after the release of decennial Census data in the state in many years that will take place without the full protections of Section 5 of the Voting Rights Act.

The PEOPLE'S AGENDA fully expects that conservatives in the Georgia legislature will continue engaging in a secretive, backdoor map drawing process that provides little to no transparency. While the Joint Committee on Legislative and Congressional Reapportionment scheduled a series of Town Hall meetings for the public to submit comments prior to the release of the legacy and final Census data, the Joint Committee does not intend to respond to any questions from the public and there are no current plans to provide any meaningful opportunities for the public to participate in the fair drawing of districts after the release of the legacy and final Census data.

In fact, Representative Bonnie Rich, one of the Co-Chairs of the Committee, said during a June 15th Town Hall that the Committee was not sure whether they would even continue to hold public meetings after the final Census data is released,[35] which will prevent members of the

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[31] *How Republican States Are Expanding Their Power Over Elections, supra.*

[32] Georgia House Bill 769 (2021) (online at https://www.legis.ga.gov/api/legislation/document/20212022/201683).

[33] *Id.*

[34] *See* Code of Spalding County, Section 5.102, Georgia House Bill 657, § 1, 2-28-03) (online at https://library.municode.com/ga/spalding_county/codes/code_of_ordinances?nodeId=DIVILALOAP_PTVBOCOAU_CH6BOEL_S5.102ME).

[35] YouTube Video Recording of the June 15, 2021 Joint Committee on Legislative and Congressional Redistricting. (online at https://www.youtube.com/watch?v=Pk-fJxgYeUk).

public and their advocates, including the PEOPLE'S AGENDA, from reviewing and commenting on the legislature's proposed maps before they are adopted and signed into law. This is unacceptable and raises serious concerns that the delays in the release of the Census data will be used as a pretext to deny members of the public an opportunity to advocate against racially gerrymandered maps and plans that dilute the voting strength of Black voters and other voters of color.

Following the Shelby County decision, conservatives in the Georgia legislature introduced two mid-decade redistricting bills which sought to reduce the percentage of the Black population in Republican held districts that were starting to become more competitive. For example, during the 2015 legislative session, the conservative-led General Assembly passed House Bill 566, which included redistricting plans for House Districts 105 and 111, when the racial demographics of those districts were changing with increasing percentages of minority population. Governor Deal signed the redistricting plans into law on May 12, 2015.[36] The Georgia State Conference of the NAACP, along with individual voters in Districts 105 and 111, filed a lawsuit challenging those redistricting plans as unconstitutional racial gerrymanders.[37] The Plaintiffs filed a motion for preliminary injunction to enjoin elections under the gerrymandered plans.

Although the three-judge panel assigned to the case denied the Plaintiffs' motion, finding that it fell short of meeting the high threshold for obtaining preliminary injunctive relief, the majority of the three-judge District Court panel found the Plaintiffs' evidence that race predominated the redistricting process to be "compelling" and noted that the whole idea of redistricting House Districts 105 and 111 arose amidst talk about the changing demographics in Gwinnett and Henry Counties.[38] The District Court's majority panel decision also highlighted an email noting that the redistricting plan reduced the percentage of Black population in House District 105 by two percentage points, which the stakeholders considered to mean they had accomplished their goal.[39]

Only two years later, and in the wake of Hillary Clinton winning eight of ten counties in the Metro Atlanta area in the 2016 presidential contest, conservative members of the Georgia House of Representatives introduced HB 515[40] during the 2017 legislative session which sought to strengthen two Republican Metro Atlanta districts, including House District 105 which had already been subject to mid-decade redistricting in 2015. The proposed plans involved decreasing the Black population in those districts to make them more competitive for Republicans. After this effort to racially gerrymander these House districts received significant

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[36] See, legislative history of Georgia HB 566 (2015) on the Georgia General Assembly's website. (online at https://www.legis.ga.gov/legislation/44463).

[37] See, *Georgia State Conf. of NAACP v. Georgia*, 312 F. Supp. 3d 1357 (N.D. Ga. 2018).

[38] *Georgia State Conf. of NAACP, supra at* 312 F. Supp. 3d 1364-65.

[39] Id. at 312 F. Supp. 3d 1365.

[40] Georgia House Bill 515 (2017) (online at https://www.legis.ga.gov/api/legislation/document/20172018/169340).

negative local and national media attention[41] and staunch opposition from individual voters, the PEOPLE'S AGENDA, other civic engagement groups and voting rights experts, the proposed redistricting of the two House districts in HB 515 was eventually withdrawn.

Given the history of unconstitutional racial gerrymandering and efforts to dilute the voting strength of Black voters and other voters of color by white conservatives in the Georgia General Assembly, the PEOPLE'S AGENDA is very concerned about the potential for a repeat of these tactics during the 2021-2022 redistricting cycle in Georgia - particularly in the absence of preclearance of the redistricting plans by the Department of Justice.

V. Voter Purges at the State and Local Levels in Georgia

Georgia Secretary of State, Brad Raffensperger, recently announced that his office identified over 100,000 Georgia registered voters who have been targeted for removal from the official voter registration list because of alleged address changes, mail returned to election offices and inactivity on the part of the voter.[42]

In a 2018 report, the Brennan Center for Justice found that states previously covered by Section 5 of the Voting Rights Act had shown significant increases in the numbers of voters purged from the voter registration rolls post-Shelby. In fact, the report found that Georgia purged approximately twice as many voters (1.5 million) between 2012 and 2016 than the state purged between 2008 and 2012. While many of these purges are attributable to the state's "use it or lose it" law that targets voters for removal after a period of inactivity, local county boards of election have also played an active, and sometimes unlawful and discriminatory role, in the purging of voters of color from the from the registration rolls to suppress the vote.

One of the most notorious post-Shelby purge cases at the local level in Georgia involved the removal of Black voters from the voter registration rolls by the majority white Hancock County Board of Elections and Registration during the summer and fall of 2015 before a hotly contested municipal election in the City of Sparta in which white candidates challenged long-term Black incumbents. All but two of the challenged voters were Black. The challenge proceedings resulted in the removal of 53 voters from the voter registration list. Many more eligible voters were threatened with removal from the rolls even though they were properly registered to vote in the county.

After time-consuming and expensive litigation, the parties eventually agreed to resolve the case with a consent order in which illegally purged voters were restored to the registration rolls, the board agreed to implement reforms to its purge processes, an independent "examiner"

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[41] See, e.g., Mark Joseph Stern, *Georgia Republicans Pass Racial Gerrymander to Kick Black Voters Out of GOP Districts*, Slate, March 7, 2017; Kristina Torres, *House Republicans back off redrawing some district lines in Georgia*, Atlanta Journal Constitution, March 24, 2017. (online at https://www.ajc.com/news/state--regional-govt--politics/house-republicans-back-off-redrawing-some-district-lines-georgia/v0mnaGrqeudZIhOt0WZXIN/).

[42] Brad Raffensperger, *Secretary Raffensperger Takes Action To Uphold Ballot Integrity With Major List Maintenance Effort*, Georgia Secretary of State's website. (online at https://sos.ga.gov/index.php/elections/secretary_raffensperger_takes_action_to_uphold_ballot_integrity_with_major_list_maintenance_effort).

was appointed by the Court to monitor the board's compliance with the consent order, and the Court retained jurisdiction over the matter for a period of five years.

Since the Hancock County matter, the PEOPLE'S AGENDA has learned about other efforts made to purge voters improperly from the voter registration rolls in Laurens and DeKalb Counties. The PEOPLE'S AGENDA has been forced to divert time and resources to the investigation of these purges and the DeKalb County matter is currently in litigation.[43]

VI. Polling Place Closures and Changes

In the aftermath of the Shelby County decision in 2013, many of Georgia's county boards of election proposed or took action to close, consolidate or move polling locations—oftentimes in areas primarily serving voters of color and in underrepresented communities.

In fact, while Georgia added almost 2 million voters to its voter registration rolls since 2013, the total amount of polling places statewide decreased by 10 percent according to a joint report by Georgia Public Broadcasting, National Public Radio and ProPublica.[44] By June 2020, the report found "Georgia voters had 331 fewer polling places than in November 2012, a 13% reduction."[45] This report also found stark racial disparities in the decrease in polling locations in Black neighborhoods which have translated into long lines and delays at the polls. The report found that approximately two-thirds of the polls that had to stay open past the 7:00 p.m. poll closing time in the June 9, 2020 primary were in majority Black neighborhoods.[46]

The PEOPLE'S AGENDA anticipates that the efforts to close and change polling locations is likely to continue, especially in light of the campaign by the legislature in 2021 to reconstitute county Boards of Election and remove Black Board members.

In fact, a recent Albany Herald article reported that as early as June 28, 2021, the Dougherty County Board of Elections could consider a proposal to close 10 of the county's 28 polling locations, purportedly due to low turnout in last November's general election[47] - ignoring the impact of the COVID-19 pandemic on in-person voting, with many voters choosing to vote by mail in the 2020 election cycle, and the likely increase in long lines and delays at the polls due to the burdensome changes to absentee by mail and early voting as a result of the enactment of SB 202.

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[43] Georgia State Conf. of Natl. Assn. for Advancement of Colored People v. DeKalb County Bd. of Registration and Elections, 484 F. Supp. 3d 1308 (N.D. Ga. 2020).

[44] *Why Do Nonwhite Georgia Voters Have to Wait in Line for Hours? Too Few Polling Places,* Georgia Public Broadcasting, *supra.*

[45] *Id.*

[46] *Id.*

[47] Tim Wesselman, *Local precinct closings considered*, Albany Herald, June 19, 2021. (online at https://www.albanyherald.com/opinion/tim-wesselman-local-precinct-closings-considered/article_32ebe7c4-d121-11eb-ac14-33aa22a50d98.html).

The Albany Herald article states that:

> The 10 precincts Stubbs said the board could consider closing received 60 percent of the Dougherty County votes cast for then-Democratic presidential challenger Joe Biden (who later thanked African Americans for their strong support) in 2020, according to elections records. There are 12 precincts that had more than 500 election-day voters that should not be consolidated, Stubbs said. Records show these 12 stations received more than 75 percent of the county's votes for then incumbent Republican President Trump in 2020.[48]

Since the Shelby County decision, PEOPLE'S AGENDA and other civic engagement organizations have been forced to devote a significant amount of time and resources to monitoring proposals to close, consolidate or move polling locations across the state's 159 counties. Our work dealing with these polling place changes has included issuing public records requests for county boards of election minutes and agendas, sending staff and coalition members to observe and make comments at boards of election meetings, submitting written objections to proposals to close or change polling locations, and organizing rapid response actions with community members who are impacted by these changes.

In the aftermath of the Shelby County decision and in the absence of preclearance, we often have little or no reasonable advance notice of these polling place changes, there has been a lack of transparency in the stated rationales for these changes in minority communities, and we are often forced to turn our attention toward organizing a rapid response in an attempt to stop or ameliorate these changes while juggling our other important organizational initiatives and priorities.

The PEOPLE'S AGENDA discovered the proposed plan to close 10 of 28 polling locations through the aforementioned Albany Herald article. Notably, the Dougherty County Board of Elections does not publish its minutes or agendas on its website, making it difficult for the public to learn about plans to close polls or other changes in advance of the changes becoming final.

Prior to the Shelby County decision, county boards of election were required to submit polling place and voting precinct changes to the Department of Justice ("DOJ") for preclearance to ensure that the changes did not retrogress the ability of minority voters to elect candidates of their choice. The preclearance process prevented many of these changes from taking effect and acted as a deterrent to the adoption of such changes.

While the PEOPLE'S AGENDA and our state partners have achieved some success in stopping or ameliorating the scope of some polling place changes post-Shelby, we have been unable to prevent them all from taking effect. Some of the additional post-Shelby efforts to close, consolidate or move poll locations by county boards of elections in Georgia have included, but are not limited to:

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[48] *Id.*

- A proposal to close all but two polling places in Randolph County, which would have disproportionately impacted voters of color and suppressed the minority vote in this economically challenged, rural county, was tabled after the PEOPLE'S AGENDA and other advocacy groups organized community opposition to the plan;

- A proposal to eliminate all but one of the City of Fairburn polling places, even though the number of polling places had been increased in recent years because of long lines on Election Day, was rescinded following advocacy efforts by the PEOPLE'S AGENDA and other groups;

- A proposal to eliminate all but one of Elbert County precincts and polling locations to the detriment of voters of color in a rural county with no robust public transit service was rescinded after opposition by advocacy groups and voters;

- The PEOPLE'S AGENDA and other groups have led advocacy efforts to oppose polling place and precinct changes in Fulton County in the wake of Shelby with some success;

- A proposal to close 2 of 7 precincts and polling places in Morgan County after the county previously reduced the number of polling locations from 11 to 7 in 2012, was rejected after the board considered opposition to the plan by the PEOPLE'S AGENDA.

- A proposal to reduce the number of precincts and polling locations from 36 to 19 in Fayette County was tabled in the face of opposition by the PEOPLE'S AGENDA, other civic engagement groups and voters;

- A proposal to consolidate all polling locations to a single location in Hancock County, a majority-Black, economically challenged, rural county with no regularly scheduled public transit, was tabled after the PEOPLE'S AGENDA, other civic engagement groups and voters organized against the proposal;

- A proposal to eliminate 20 of 40 precincts and polling locations in majority-Black and economically challenged neighborhoods in Macon-Bibb County was scaled back as a result of advocacy efforts by the PEOPLE'S AGENDA and other civic engagement groups; and,

- A proposal by the Macon-Bibb County Board of Elections to move a polling location in a majority-Black precinct from a public gymnasium to a Sheriff's Office was defeated only after 20% of the registered voters in the precinct signed a petition opposing the move.

Consequently, we often have to devote even more time and resources to assist voters impacted by these changes. Since polling place closures and relocations are not always widely publicized by county boards of election, voters often show up to vote on Election Day at their

former polling place and are surprised to learn that the poll has moved. In light of the changes made to out-of-precinct voting by SB 202, voters who show up to the incorrect polling location on Election Day before 5 p.m. will be disenfranchised if they cannot vote at their correct polling location before it closes. Voters who arrive after 5 p.m. will have to sign a sworn statement that they cannot get to their correct poll by close of the poll or will be required to go to their correct poll to cast their ballot.

Voters who are used to walking to their polling place and learn on Election Day that the poll has been moved several miles away may be unable to travel to the new poll that day, especially if there is no accessible public transit. Some voters may have other commitments with their jobs, childcare or other responsibilities which prevent them from spending more time traveling to the new polling location and, as a result, it is foreseeable that eligible voters will be disenfranchised by poll closures, such as those being proposed by the Dougherty County Board of Elections.

Therefore, it is critically important that Congress restore the preclearance provisions of the Voting Rights Act to ensure that the increasingly partisan Boards of Election are not allowed to close and change polling locations to disenfranchise votes in order to achieve a partisan result.

VII. Georgia's Flawed Voter Registration Citizenship Match

The PEOPLE'S AGENDA, voters and advocates were forced to litigate multiple lawsuits over the past eleven years challenging various iterations of the state's "exact match" voter registration process that was demonstrated to prevent Georgia's eligible people of color from completing the voter registration process.[49] In fact, just prior to the 2018 mid-term election, the Associated Press reported that there were more than 53,000 voter registration applications on hold because of Georgia's "exact match" process—the vast majority of which had been submitted by Georgians of color.[50]

While the legislature and Governor Kemp finally abandoned the exact identity match requirement, which prevented applicants from completing the registration process unless there was an exact match of their name, date of birth, Georgia driver's license or Social Security number listed on their voter registration form with the state's Department of Driver's Services or Social Security records, they have done nothing to remedy the routine flagging of Georgia's United States citizens as potential non-citizens because of the state's continued use of outdated citizenship records in the voter registration process. The PEOPLE'S AGENDA and other civic engagement organizations believe that the state's refusal to reform the deficient citizenship match process has more to do with the current anti-immigrant mood within certain segments of Georgia's state government and legislature than with any legitimate rationale that this process is

[49] See *Morales v. Handel*, Civil Action No. 1:08–CV–3172, 2008 WL 9401054 (N.D.Ga. 2008); *Georgia State Conference of the NAACP v. Kemp*, Civil Action No. 2:16-cv-00219-WCO (N.D.Ga. 2016); *Georgia Coalition for the People's Agenda v. Kemp*, 1:18-CV-04727-ELR (N.D. Ga. 2018).

[50] Ben Nadler, Voting rights become a flashpoint in Georgia governor's race, AP, October 9, 2018. (online at https://www.apnews.com/fb011f39af3b40518b572c8cce6e906c.)

warranted to prevent non-citizens from registering to vote—particularly when the process relies on outdated citizenship data that does not reflect current information about the citizenship of the applicants.

As a result, the deficient and discriminatory citizenship match process has been allowed to continue, delaying or preventing Georgians who are United States citizens from completing the voter registration process. The PEOPLE'S AGENDA will be forced to continue to divert time and resources to the litigation challenging this process for the foreseeable future in the absence of preclearance.

VIII. Conclusion

Despite the assault on minority voting rights in Georgia by conservatives in the Georgia General Assembly and by statewide office holders, the PEOPLE'S AGENDA and our sister organizations will continue our important work to protect the vote, eliminate barriers to the ballot box, and to ensure equal participation in the political process for Georgians of color and underrepresented communities. However, we are extremely concerned about the voting landscape in Georgia following the enactment of the omnibus voter suppression law, SB 202, the ongoing efforts to politicize Georgia's County Boards of Election, efforts to close polling locations serving majority minority communities and the upcoming redistricting cycle without the full protection of the Voting Rights Act and hope that Congress will pass legislation to ensure that all eligible Georgia citizens who wish to cast a ballot will be able to do so and that their ballots will be counted.

APPENDX I

Biography of Helen Butler

Helen serves as Executive Director of the Georgia Coalition for the Peoples' Agenda, a non-profit, non-partisan organization comprised of representatives from the human rights, civil rights, environmental, labor, women, young professionals, youth, elected officials, peace and justice groups throughout the State of Georgia and other southeastern states, founded by the late Dr. Joseph E. Lowery, that advocates for voting rights and justice issues. She was recruited to join the Coalition for the Peoples' Agenda in 2003 as the State Director by Rev. James Orange (Leader) and was able to increase the membership of the organization to over sixty statewide and local organizations as well as, promote collaborative issue campaign organizing activities throughout Georgia, nationally and in the southeastern region. In keeping with the People's Agenda commitment to quality education, criminal and juvenile justice reform, protecting the right to vote, economic justice and development, and other social justice issues, she has formed strategic alliances to improve quality of life for communities of color.

She serves as the Convener of the Black Women's Roundtable of Georgia as an affiliate of the National Coalition on Black Civic Participation to promote health and wellness, economic security, education and global empowerment of Black women.

Prior to joining the non-profit world, she served as Vice President of Human Resources for retail and wholesale grocery businesses for over 20 years, as well as, an Accountant for General Motors Corporation in Doraville and the Central Office in Warren, Michigan. While in the Graduate Public Administration studies at the University of Georgia, she served as Administrative Assistant for Athens-Clarke County Community Coordinated Child Care (4-C) where she developed and implemented a functional budgeting system.

She serves on the Morgan County Board of Elections since 2010 and served as a past member of the State of Georgia Help America Vote Act Advisory Committee (HAVA). In 2013, she was appointed to serve on the U. S. Commission on Civil Rights as a member of the Georgia Advisory Committee. She serves on the Board of Directors for ProGeorgia, the State Voices Civic Engagement Table. She has served on the Board of Directors for Women's Actions for New Directions (WAND), Board of Directors for Colonial Stores' Employees' Credit Union, Board of Directors for YES! Atlanta (Youth Program), Charter member of the Zeta Psi Chapter of Delta Sigma Theta Sorority at the University of Georgia, Advisory Board of Big Brothers/Big Sisters, Center Manager for Junior Achievement, Life Member of the

NAACP, Vice President of Metro Atlanta Personnel Society, Society for Human Resources Management, and Industrial Relations Research Association.

She served on the Fulton County Complete Count Committee and the Georgia Complete Count Committee for the 2010 Census that targeted the African, African American, Afro-Latino and Caribbean communities. The "I Matter I Count – Count Me Black" theme for the 2010 Census highlighted the need to get immigrant communities to check the box "Black" on the questionnaire so that counts for their neighborhoods would be accurate and would impact funding and representation. She served on the City of Atlanta's 2020 Complete Count Committee and the State Civic Engagement Table's Complete Count Committee.

Her most recent recognition has been from the State of Georgia's Martin Luther King Jr Advisory Council where she received the Joseph E. Lowery Civil Rights Award and the AFL-CIO's Dr. Martin Luther King Jr. Defender of the Dream Award, January 2021; the Love Award from the Voter Empowerment Collaborative; She has received recognition by the Atlanta Business League as one of Atlanta's Top 100 Black Women of Influence 2018, 2019, 2020; for the2019 Community Engagement Award from National Action Network, 2019 Dr. C.T. Vivian Courage Award by Let Us Make Man; Georgia Gem of the Year 2018 by Women of Distinction; 2016 Frank R. Parker Client Award by Lawyer's Committee for Civil Rights Under Law; Activism from the Apex Museum (2016); Delta Sigma Theta Sorority Southern Region 2016 Public Policy Change Agent; the 2015 Chairman's Award of the Democratic Party of Georgia; 2015 Terrell County Branch NAACP Social Justice Award; the highest recognition for community member of the City of Atlanta -- 2014 Phoenix Award; 2013 Community Service Champion for Civic Engagement by the Urban League of Greater Atlanta, 2013 Epic Women Leadership in Government, National Coalition on Black Civic Participation's Black Women's Roundtable Voting Rights and Social Justice Leadership Award (2013), recognition by the City Council of the City of Atlanta, The President of Atlanta City Council's Community Service Award (2012), Gospel Hip Hop Woman Warrior Award (2012), 2009 Outstanding Georgia Citizen by Secretary of State, 2009 Unsung Shero Award by Concerned Black Clergy of Atlanta, 2010 Rainbow/PUSH Fannie Lou Hammer Award, Delta Sigma Theta's Atlanta Alumnae Chapter (2008), 2008 Douglass-Debs Award, Georgia Stand Up 2006 Policy Institute for Civic Leadership, Georgia Human Rights Union, Who's Who Among African Americans, 1976; Outstanding Young Women of America, 1983; and 2002 National Association of Secretaries of State Award for Voter Education.

Helen is a native of Morgan County, Georgia. Graduated with honors from Pearl High School in Madison, GA in 1966 as Salutatorian and National Merit Scholar. As one of the first 50 African American students to attend the University of Georgia after the integration of the school by Charlene Hunter - Gault and Hamilton Holmes, she received a Bachelor of Business Administration from the University of Georgia with a major in Accounting. She also studied and served as a Recruiter for the Masters of Public Administration program at the University of Georgia. She was certified as an Issue Campaign Organizer by the Midwest Training Academy in 2000. She is a member of the Mt. Zion Missionary Baptist Church.

Mr. COHEN. Thank you Ms. Butler.

Chair NADLER. You are on mute.

Mr. COHEN. Thank you, sir.

Our third witness is Maureen Riordan. Ms. Riordan is a litigation counsel for Public Interest Legal Foundation, which she joined in 2021. Previously, she spent 20 years as an attorney in the voting section of the Civil Rights Division of the U.S. Department of Justice, where she worked on hundreds of elections, voting, and redistricting matters.

During the Trump Administration, she served as senior counsel to the Assistant Attorney General for Civil Rights, where she was responsible for the voting section. Ms. Riordan received her J.D. from St. Mary's University School of Law and her B.S. in criminal justice from Seton Hall University.

Ms. Riordan, you are recognized for 5 minutes.

STATEMENT OF MAUREEN RIORDAN

Ms. RIORDAN. Good morning, Mr. Chair, Ranking Member—

Mr. JOHNSON of Louisiana. Put your microphone on.

Ms. RIORDAN. Good morning, Mr. Chair, Ranking Member, and Members of the Subcommittee. Thank you for your invitation to speak with you today. As indicated, I am an attorney with the Public Interest Legal Foundation, a nonpartisan charity devoted to promoting election integrity and preserving the constitutional mandate that allows States to administer their own elections.

I have been an attorney for approximately 35 years, 20 of which I served in the Voting section—I am sorry—20 years at DOJ, approximately 18 in the Voting Section, in addition to being senior counsel to the associate AG for civil rights.

From August of 2000 until the Supreme Court's decision in *Shelby County* v. *Holder*, my primary responsibility was to review changes submitted for preclearance under section 5. I have also conducted election monitoring throughout the United States, both with and without Federal observers.

I began my employment approximately 3 months prior to the 2000 election, and when the Florida recount occurred, I was shocked when I personally observed Voting section staff discussing strategies, faxing, and receiving information from DNC operatives in Florida.

I have also witnessed twisted racialism. When George Bush appointed Ralph Boyd, an African American to head the Civil Rights Division, I often heard from career Voting section attorneys that he is not really Black and that no self-respecting Black man would be a Republican.

These statements and beliefs were many. I would urge every member here to read the DOJ Inspector General on the Voting Section, and it provides instance after instance of bad behavior, often racially motivated, among staff.

It also includes abuse of an African-American paralegal deemed not Black enough by voting staff.

The Voting section has a long record of abuse by its attorneys for improper collaboration in reviewing section 5 submissions. It has been sanctioned by courts. Between 1993 and 2000, the Voting section has been sanctioned over $2 million.

For example, in *Johnson* v. *Miller*, U.S. District Court sanctioned the Voting section $594,000 for collusive misconduct by DOJ attorneys with the ACLU. A Federal court pronounced that the communications between those two groups, the DOJ and ACLU, were disturbing and that the dynamics were not those of an advocate reporting to a higher authority, but rather peers working together against the jurisdiction that made the submission.

After a Voting section lawyer professed that she could not remember details of the relationship, the court found her professed amnesia to be less than credible.

Abuse of power in the section 5 process is not confined to *Johnson* v. *Miller*, and my written testimony provides additional instances.

Section 5 was a temporary provision for a reason that no longer exists. The Supreme Court made clear in Shelby County that only certain conditions would ever justify any formula for section 5, including blatant discrimination on a pervasive and rampant scale. Triggers that are built around political, partisan goals will not withstand constitutional scrutiny.

The permanent provisions of the Voting Rights Act, such as section 2, still prohibit discrimination and provide ample tools to challenge election procedures. Up until this past Friday when DOJ announced that it is suing the State of Georgia, the Department of Justice has only blocked five section 2 cases since Shelby County was decided. Where is the rampant discrimination?

Section 3 also allows a judge to have a jurisdiction to submit to the preclearance provisions if it finds that the jurisdiction intentionally discriminated against minority voters. That is consistent with the Shelby mandate, that Federal oversight of State and local elections be closely matched to need.

H.R. 4, however, would allow a jurisdiction to be subjected to the rigors of section 3 for violations that are not premised on intentional discrimination.

Also, the new evidentiary stand for obtaining a preliminary injunction proposed in H.R. 4 sets Federal law on its head. The Supreme Court has held that plaintiffs seeking a preliminary injunction must establish that they are likely to cede on the merits and also that the injunction should not be granted when it is against the public interest.

The new standard in H.R. 4 not only disregards the public interest, but it actually prohibits the court from considering any interest of the State in application for a preliminary injunction.

I would like to thank you for your time and your attention.

[The statement of Ms. Riordan follows:]

Testimony Before the House of Representatives
Judiciary Committee's
Subcommittee on the Constitution, Civil Rights,
and Civil Liberties

Hearing on "The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice"

June 29, 2021

Maureen S. Riordan
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Good morning Mr. Chairman, Ranking Members, and Members of the Subcommittee. Thank you for your invitation to speak with you today.

I am an attorney with the Public Interest Legal Foundation, a non-partisan charity devoted to promoting election integrity and preserving the constitutional decentralization of power so that states may administer their own elections

I have been an attorney for approximately 35 years. For over twenty years, I served in the Civil Rights Division of the Department of Justice. Eighteen of those years were spent both as a Voting Section attorney as well as Senior Counsel to the Attorney General for Civil Rights. From August 2000 until the Supreme Court's decision in *Shelby v Holder*, my sole responsibility was to review changes in voting submitted for preclearance under Section 5. During my tenure at the Department, I have been the recipient of numerous awards.

If passed H.R. 4 will give tremendous power over the election procedures of every state and local election to partisan bureaucrats within the Voting Section. I watched this power abused firsthand. I would like share with you my experiences working in the Voting Section.

I began my employment in the Voting Section approximately 3 months prior to the 2000 election. When the Florida recount occurred, I personally observed Voting

Section staff discussing strategies to assist DNC in Florida and receiving and sending faxes to Democratic National Committee and campaign operatives.

I also witnessed twisted racialism. When George W. Bush appointed Ralph Boyd, an African American, to head the Civil Rights Division, attorneys I often heard from career Voting Section attorneys "he's not really black", adding that "no self-respecting Black man would be a Republican. These statements were accepted beliefs by many staff.

I would urge every member here to read an DOJ Inspector General Report entitled "A Review of the Operation of the Voting Section of the Civil Rights Division." It provides instance after instance of bad behavior – often racially motivated – among section staff. It includes abuse of an African-American paralegal deemed not black enough. When you finish reading the report, you will rightfully wonder if it is such a good idea to give this office so much power over every election.[1]

But don't just take the word of the DOJ Inspector General on this point, listen to what the Justice Department itself has said about the abuse of power. The Office of Legislative Affairs detailed in a letter to Representative Sensenbrenner the millions of dollars in sanctions the Voting Section has incurred for bad behavior in Section 5 reviews and other court cases. I have attached the letter to my testimony.

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[1] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwib5dKmlbrxAhVBG80KHRquAv4QFjABegQIBRAD&url=https%3A%2F%2Foig.justice.gov%2Freports%2F2013%2Fs1303.pdf&usg=AOvVaw09dTbH3E3cEhHWZFml48bw

When the Voting Section brought an action against an African American named Ike Brown, in Noxubee County Mississippi, for violating the Voting Rights Act, these partisan bureaucrats disagreed with the filing of the case and were hostile to it throughout the prosecution of the case. They have disdain for the equal application of civil rights laws to all Americans.

Past Abuse of Section 5 Powers

The Voting Section has a long record of abuse by its lawyers, for improper collaboration in reviewing Section 5 submissions, and has been sanctioned by courts.

Between 1993 and 2000, the Voting Section has been sanctioned $2,358,687.31 For example, in *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section $594,000 for collusive misconduct by DOJ Voting Section lawyers. A federal court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the

court found her "professed amnesia" to be "less than credible." Abuse of power in the Section 5 process is not confined to *Johnson v. Miller*.

Yet even after the imposition of these sanctions, on more than one occasion after receiving a submission to review for preclearance, I was instructed to strategize with these very same advocacy groups. Such unethical behavior has cost federal taxpayers too.

As recently as this May 2013, the Justice Department Voting Section used the Section 5 process to extract legally indefensible concessions from states that a federal court would never impose. In places like Rock Hill, South Carolina, the Voting Section permitted blatantly unconstitutional district lines to survive in order to prop up the electoral success of multiple election officials based on their race.

A 2009 objection in Kinston, North Carolina, shows the outrageous, abusive and legally indefensible positions the Voting Section will adopt using Section 5. Kinston, a majority black jurisdiction, in a referendum decided to dump partisan elections for town office and move to nonpartisan elections. The Voting Section, required that Kinston prove that this change, supported by African American elected officials was not adopted with a discriminatory purpose or that it had a discriminatory effect. The logic of the Section 5 objection was that if black voters did not have the word Democrat next to candidate names, they would not know for whom to vote. (Objection letter attached as EXH. B)

The Town of North, South Carolina, submitted an annexation of two white homeowners to the city limits for preclearance. The white homeowners had requested annexation to the Town to obtain water and sewer. The Department objected to the annexation, because the Town could not show that any African Americans had been annexed, despite their never having submitted a qualifying request for annexation. Furthermore, Congress actually relied on some of these meritless objections when it reauthorized Section 5 in 2006. These abusive and meritless objections polluted the record in 2006, but no plaintiff ever challenged them, and Congress took no testimony regarding their merits. Additionally, these and other cases brought by the Voting Section have resulted in the Department of Justice paying 2, 358, 687.31 in sanctions for improper actions. (Please letter dated 2006 to Sen. Sensenbrenner letter detailing Voting Section abuses attached as Exhibit C)

Every change no matter how small

H.R 4's practice-based preclearance triggers will require most electoral change to be submitted for preclearance, no matter how inconsequential the change may be. For example, a polling place change does not just include a change in physical address. It includes ANY change to the polling place. If a polling place moved from the school gym to the school cafeteria, the lawyers in the Voting Section would have to review and approve or reject the change. Voter registration changes include office hour openings

from 8:30 to 8:25 would have to be approved. Any change in a polling place *signage font* would have to be approved. Any change in location of Registrar from old city hall to new city hall literally across the street, changes in the numbering of precinct numbers that do not affect location, all of these would have to be approved.

Additionally, every local town annexation must be submitted and approved. These types of changes represent the majority of those reviewed. The Attorney General does not have the burden of establishing a discriminatory purpose or effect to issue an Objection under Section 5. The burden is on the jurisdiction submitting the change to prove that the proposed change does not have a discriminatory purpose or discriminatory effect.

Preclearance is not necessary in 2021

Section 5 was a temporary provision for a reason that no longer exists. The Supreme Court made clear in *Shelby* that only certain conditions would justify any formula for Section 5 coverage today. Among the touchstones listed by the Court are "blatantly discriminatory evasions of federal decrees," lack of minority office holding, tests and devices, "voting discrimination 'on a pervasive scale," "flagrant" voting discrimination, or "rampant" voting discrimination. Such discrimination does not exist today. Indeed, this Committee could look long and hard and not find a single evasion of a federal decree – the central assumption of why preclearance was needed in 1965. As

the Supreme Court stated "Federal intrusion into the powers reserved by the Constitution to the States must relate to these empirical circumstances. Triggers that are built around political or partisan goals will not withstand Constitutional scrutiny.

According to information received from the DOJ through a FOIA request, from 2000 through 2013, the Voting Section received and reviewed 222,132 submissions and issued 81 objections. That means that only .036 of 1 percent of the submissions reviewed resulted in an objection. Do you think that number represents massive, blatant discrimination?

Tools Exist to Stop Discrimination

Permanent provisions of the Voting Rights Act such as Section 2 still prohibit discrimination and provide the Justice Department with the ability to challenge election procedures. Up until this past Friday when DOJ announced was suing the State of Georgia, the Department has only brought 5 Section 2 cases since the Shelby decision in 2013. If there is rampant discrimination in voting actually exists why has DOJ not brought cases challenging these ills?

Language minority provisions such as Section 203 and Section 4(3) were not affected by the Shelby decision.

Section 3(c) the "bail in provision", allows a judge to order a state or subdivision to submit to the preclearance provisions, if it finds that the jurisdiction intentionally discriminated against minority voters. It is also consistent with the *Shelby* mandate that

federal oversight of state or local elections be closely matched by need. However, H.R. 4 would also allow a jurisdiction to be subjected to the rigors of Section 3 © for violations of H.R. 4, violations of Section 5, or when a jurisdiction has agreed to settle a case through a consent decree. None of the new allowable triggers require a showing of intentional discrimination, and are inconsistent with permissible federal as outlined in the *Shelby* decision.

Lastly, but of great importance is Section 11(b), which prohibits intimidation, threats, or coercion directed towards voters or those aiding voters. This section is also available post Shelby, yet there has not been a case brought by the Department through 11(b) since the case against the New Black Panther Party in 2009.

Twisted Injunction Standards

The new "evidentiary standard" for obtaining a preliminary injunction proposed in H.R. 4 sets federal law on its head. This is an intrusion into the exclusive province of the courts. The Supreme Court has held that a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, (2008). The Court further noted that because a preliminary injunction is such an extraordinary remedy, it is NEVER awarded as a right.,

and that courts should pay particular regard for the public interest. *Winter* at 24. The new standard contained in H.R. 4 not only disregards the public interest held by the State, H.R. 4 actually prohibits the court from considering the interest of the State in any application for the preliminary injunction.

Thank you for your time and attention.

Mr. COHEN. Thank you, Ms. Riordan.

Our next witness Mr. James Tucker—or Dr. Tucker. He is an attorney with the law firm of Wilson Elser Moskowitz Edelman & Dicker in Las Vegas, Nevada. He is one of the founding Members in the Native American Voting Rights Coalition.

He is Chair of the Census Bureau's National Advisory Committee on Racial, Ethnic, and Other Populations. He served as a trial lawyer, senior trial lawyer in fact, on the Voting section of the Civil Rights Division of the U.S. Department of Justice.

He is an adjunct professor at the Barrett College William S. Boyd School of Law at UNLV. Dr. Tucker holds a Doctor in the Science of Laws and Master of Laws Degrees from the University of Pennsylvania, a J.D., Order of the Coif, from the University of Florida, a Master of Public Administration degree from the University of Oklahoma, and a Bachelor of Arts Degree in History from the Barrett Honors College at Arizona State University.

Dr. Tucker, you are now recognized for 5 minutes.

STATEMENT OF JAMES T. TUCKER

Mr. TUCKER. Thank you, Mr. Chair. Chair Nadler, Chair Cohen, Ranking Member Johnson, and Committee Members, thank you for your invitation to testify on the need to enhance the Voting Rights Act.

This hearing comes just 4 days after the 8-year anniversary of *Shelby County* v. *Holder*. On June 25th, 2013, in a narrow 5–4 decision, the United States Supreme Court struck down the coverage formula for section 5, the heart of the Voting Rights Act.

Shelby County's assault on the Voting Rights Act has come at a high price. In the absence of section 5 preclearance, previously covered States and political subdivisions have turned back the clock to make the most basic, first-generation barriers. Obstacles that impede the ability to register to vote, to cast a ballot, and to have a ballot counted are a reality for an even greater number of Americans.

Many governing bodies have increased their exploitation of racially polarized voting at the expense of existing and emerging groups of minority voters, seeking equal opportunities to participate in the political process.

Against this backdrop, it is appropriate that the Committee has answered the clarion call to renew and restore the Voting Rights Act. H.R. 4, the John Lewis Voting Rights Advancement Act is named in honor of one of the great champions of American democracy.

Preserving the fundamental right to vote for all Americans is what brings us together in this hearing. Today, as a result of Shelby County, there is no longer any coverage under section 4 of the VRA.

Section 3(c) bail-in currently is the only way that a State or political subdivision can be required to submit covered voting changes for preclearance. However, the bail-in provision is sparingly used. Before Shelby County, only 18 jurisdictions bailed in under section 3(c), two States—Arkansas and New Mexico—12 counties, two municipalities, and two school districts.

Over half of those jurisdictions, 10, were bailed in for discrimination against American Indians. All but two were bailed in by consent judgments. Since 2013, only a few more political subdivisions have bailed in.

Shelby County's legacy and the uncomfortable burden of finding discriminatory purpose have contributed to a reluctance by Federal judges to rely upon section 3(c) as a remedy to cure voting rights violations in the face of judicial findings of egregious wrongs.

H.R. 4 makes two changes that directly impact bail-in. First, using a modernized formula, it restores section 5 coverage in States and political subdivisions where it is needed most.

Second, it gives Federal judges the power to use the remedial authority in section 3(c), where any voting discrimination against racial, ethnic, or language minority voters is established.

Consonant with that discretion of their broad remedial powers, judges will continue to have discretion to set the timeframe and the scope of voting changes to which bail-in applies under section 3(c).

Federal observers, likewise, are an important part of the Act's comprehensive framework. They prevent voting discrimination, assist the Attorney General in enforcing Federal voting protections, and they measure progress with court-ordered remedies in voting rights cases.

Shelby County has had a devastating impact on Federal observer coverage. Prior to the Shelby County decision in 2013, a total of 153 counties and parishes in 11 States were certified by the Attorney General for Federal observers.

By 2020, just five political subdivisions in three States were covered for Federal observers under section 3(a) of the Act—one county in Alabama, three Census areas in Alaska as a result of NARF's litigation there, and one parish in Louisiana.

In the November 3rd, 2020 election, not a single Federal observer was dispatched by the Justice Department and the Office of Personnel Management, which is unprecedented for coverage of Presidential elections in recent decades.

H.R. 4 will renew and restore vitality in the Federal observer provisions in three ways. It provides a new coverage formula for section 5, which would make the covered jurisdictions eligible for certification by the Attorney General for Federal observers under section 8 of the Act.

It would amendment sections 3(a) and 8 of the Act to allow courts and the Attorney General to certify Federal observers where there has been voting discrimination on the basis of race, color, or language minority status in violation of Federal law.

NARF looks forward to working with Members of the Subcommittee in restoring the vitality of the Voting Rights Act.

Thank you very much for your attention. I welcome the opportunity to answer any questions you may have.

[The statement of Mr. Tucker follows:]

TESTIMONY OF DR. JAMES THOMAS TUCKER

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary

"The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice."

June 29, 2021

Testimony of Dr. James Thomas Tucker[1]

Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary

"The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice."

June 29, 2021

Chairman Nadler, Chairman Cohen and Ranking Member Johnson, and Committee Members, thank you for your invitation to testify at the hearing on the need to enhance the Voting Rights Act through preliminary injunctions, bail-in coverage, election observers, and notice. The Native American Rights Fund (NARF) and the Native American Voting Rights Coalition (NAVRC) applaud the Subcommittee for examining this important topic.

I am one of the founding members of NAVRC, which is a coalition of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.[2] In addition, I serve as the Pro Bono Voting Rights Counsel to NARF. We are united in our support for this legislation, which is critical to overcoming barriers to voting rights to secure equal access to the political process for all Americans, regardless of their tribal relations, race, ethnicity, or language minority status.

I want to begin by noting that today's hearing comes just four days after the eight year anniversary of *Shelby County v. Holder*.[3] On June 25, 2013, the United States Supreme Court struck down the coverage formula for Section 5, "the heart of the Voting Rights Act" (VRA).[4] In that decision, a narrow 5-4 majority explained its decision by arguing that "things have changed dramatically," with "voter turnout and registration rates now approach[ing] parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[5]

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[1] S.J.D. and LL.M., University of Pennsylvania; J.D., University of Florida; M.P.A., University of Oklahoma; B.A., Arizona State University, Barrett Honors College. Attorney at Wilson Elser Moskowitz Edelman & Dicker LLP; Pro Bono Voting Rights Counsel to the Native American Rights Fund; Chair, Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations (NAC).

[2] For more information about the NAVRC, *see* NARF, About the Native American Voting Rights Coalition <https://www.narf.org/native-american-voting-rights-coalition/>.

[3] 570 U.S. 529 (2013).

[4] U.S. COMM'N ON CIVIL RTS., THE VOTING RIGHTS ACT: TEN YEARS AFTER ("TEN YEARS AFTER") 5 (Jan. 1975).

[5] *Id.* at 547.

Our Nation's experience over the past eight years has shown how wrong *Shelby County* was. Its assault on the Voting Rights Act, the crown jewel of America's civil rights laws, has come at a high price. In the absence of Section 5 preclearance, previously covered states and political subdivisions have turned back the clock to make the most basic first generation barriers – obstacles that impede the ability to register to vote, to cast a ballot and to have that ballot counted – a reality for an even greater number of Americans.[6] Many governing bodies have increased their exploitation of racially polarized voting to preserve their waning political power at the expense of existing and emerging groups of minority voters seeking to secure fair and equal representation. In the past eight years, things indeed have changed dramatically.

Against this backdrop, it is appropriate that the Committee has answered the clarion call to renew and restore the Voting Rights Act. H.R. 4, the John Lewis Voting Rights Advancement Act, is named in honor of one of the great champions of American democracy and the civil rights movement. As Congressman Lewis explained in 2019, "The vote is precious. It is almost sacred. It is the most powerful non-violent tool we have in a democracy." Preserving that fundamental right is what brings us together today.

My testimony today focuses on two provisions in Section 3 of the Voting Rights Act that are little known, but essential to preserving and protecting equal access to the ballot and representation.

I will begin by discussing Section 3(c) of the Act, which allows federal courts to order that jurisdictions that are not covered by Section 5 are "bailed-in" to preclearance to remedy voting rights violations and prevent further discrimination. Today, as a result of *Shelby County*, there is no longer any coverage under Section 4 of the VRA. Section 3(c) bail-in currently is the only way that a State or political subdivision can be required to submit covered voting changes for preclearance. However, the bail-in provision is sparingly used, with *Shelby County*'s legacy and the uncomfortable burden of finding discriminatory purpose leaving a cloud over federal judges reluctant to rely upon Section 3(c) as a remedy to cure voting rights violations.

H.R. 4 makes two changes that directly impact bail-in. First, and most importantly, the John Lewis bill will restore Section 5 coverage under a modernized formula. Second, it will give federal judges the discretion to use the remedial authority in Section 3(c) where any voting discrimination against racial, ethnic or language minority voters is established. Consonant with that discretion and their broad remedial powers, judges will continue to have the authority to set the time frame and the scope of voting changes to which bail-in applies.

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[6] For a comprehensive discussion of first generation barriers to American Indian and Alaska Native voters, *see* James Thomas Tucker, Jacqueline De Léon & Dan McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* (NARF June 2020) <https://vote.narf.org/obstacles-at-every-turn/>.

I will next address federal observer coverage under Sections 3 and 8 of the VRA. Federal observers are an important part of the Act's comprehensive framework to prevent and remedy voting discrimination. Although observers are limited to observing and documenting discriminatory conduct, their role is key to eliminating disenfranchisement. Often, their mere presence deters discrimination. Where it does not, "observations and reports of observers ... most often provide the factual basis on which the Department of Justice proceeds to prosecute acts of harassment, intimidation, and discrimination."[7] In places where voting discrimination is more entrenched, observers help document the progress towards remedying that discrimination. The power of observation can be substantial, benefiting all Americans.

The 2006 reauthorization of the VRA made some modest changes to the requirements for certifying jurisdictions for observer coverage. *Shelby County* had an even greater impact, reducing that coverage to only a small fraction of what it was prior to the decision. In the 2020 Presidential Election, for the first time in decades, the Justice Department was unable to deploy a single federal observer. H.R. 4 will renew and restore the vitality of the federal observer provisions in several ways that I will discuss.

I. The Need for a More Flexible "Bail-in" under Section 3(c) of the VRA.

A. The limited use of the bail-in provision before *Shelby County*

When Congress enacted the Voting Rights Act in 1965, it was aware that the coverage formula would be both over-inclusive and under-inclusive. It resolved these issues by including the Act's "bailout"[8] and "bail-in" provisions, respectively.[9] The bail-in provision addresses the under-inclusiveness of the coverage determinations under Section 4(b) of the Act by applying preclearance to the "so-called 'pockets of discrimination ... outside the States and political subdivisions as to which the prohibitions of [the Act] were in effect."[10] A permanent provision of the VRA, the Section 3(c) bail-in mechanism applies nationwide to reach "denials and abridgements of the right to vote on account of race or color [or language minority status][11] wherever they may occur throughout the United States."[12]

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[7] H. REP. NO. 109-478, at 62.

[8] Bailout is codified in Section 4(a) of the VRA. *See* 52 U.S.C. § 10303(a) (transferred from 42 U.S.C. § 1973b(a)).

[9] Bail-in is codified in Section 3(c) of the VRA. *See* 52 U.S.C. § 10302(c) (transferred from 42 U.S.C. § 1973a(c)).

[10] H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2454. For that reason, Section 3(c) often is referred to as "the pocket trigger" for Section 5 preclearance coverage.

[11] The current language of Section 3(c) applies not just to discrimination "on account of race or color," but also includes "or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title." 52 U.S.C. § 10302(c). The latter language was added in the 1975 amendments to the VRA, in which Congress expressed its intent to apply the Act's protections to language minority voters. *See* Pub. L. 94–73, § 206, 89 Stat. 402 (Aug. 6, 1975). The bracketed addition reflects the current statutory language.

[12] H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2454.

Section 3(c) describes the circumstances under which a jurisdiction may be covered under the bail-in provision:

> If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 4(f)(2)....[13]

Federal courts interpreting the bail-in provision's language have concluded that it requires the reviewing court to "determine (1) whether violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred within the State or any of its political subdivisions; and (2) whether, if so, the remedy of preclearance should be imposed."[14] Stated another way, Section 3(c) "requires that (a) violations of the Fourteenth or Fifteenth Amendments (b) justifying equitable relief (c) have occurred (d) within the State or its political subdivisions."[15] Therefore, the bail-in provision applies relief, including the determination of which voting changes are to be subject to preclearance, using the "traditional case-by-case approach."[16]

For much of the VRA's history, Section 3(c) was used sparingly. During the first decade after the VRA was enacted in 1965, no jurisdiction was bailed-in under the provision.[17] By 2013, approximately eighteen jurisdictions had bailed-in under Section

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[13] 52 U.S.C. § 10302(c).

[14] Jeffers v. Clinton, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (three-judge panel); *see also* Perez v. Abbott, 390 F. Supp.3d 803, 813 (W.D. Tex. 2019) (recognizing that *Jeffers* provides the "most thorough analysis and discussion in the case law of § 3(c) and its requirements" and applying "this same general framework.").

[15] *Id.*

[16] H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2475.

[17] *See generally* TEN YEARS AFTER, *supra* note 4, at 11 n.3 ("No court has yet used the authority of section 3, however, to impose the special coverage remedies on jurisdictions not covered by the act.").

3(c): two states, Arkansas[18] and New Mexico[19]; twelve counties[20]; two municipalities[21]; and two school districts.[22] Over half of those jurisdictions, ten, were bailed in for discrimination against American Indians, for whom there was little coverage under Section 4(b) and Section 4(f)(4) of the VRA.[23] All but two of the jurisdictions, the State of Arkansas and the Gadsden County School District in Florida, were bailed in as a result of consent decrees.[24]

The lack of more widespread Section 3(c) coverage can be explained in at least three ways. First, and most obviously, many of the States and political subdivisions that engaged in voting discrimination were covered by Section 5 already.[25] Second, non-covered jurisdictions that engaged in voting rights violations often were under one or more court orders that remedied that discrimination.[26] Third, the legal standards for securing bail-in can be inordinately difficult for jurisdictions that do not voluntarily consent to the remedy.[27]

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[18] *Jeffers*, 740 F. Supp. at 585.

[19] Sanchez v. Anaya, No. 82-0067M (D.N.M. Dec. 17, 1984) (consent decree).

[20] United States v. Thurston Cty., No. 78-0-380 (D. Neb. May 9, 1979) (consent decree); McMillan v. Escambia Cty., No.77-0432 (N.D. Fla. Dec. 3, 1979) (consent decree); Woodring v. Clarke, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983) (Alexander County, Illinois) (consent decree); United States v. McKinley Cty., No. 86-0029-C (D.N.M. Jan. 13, 1986) (consent decree); United States v. Sandoval Cty., No. 88-1457-SC (D.N.M. May 17, 1990) (consent decree); United States v. Los Angeles Cty., Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991) (consent decree); United States v. Cibola Cty., No. 1:93-1134-LH/LFG (D.N.M. Apr. 21, 1994) (consent decree), ECF No. 72; United States v. Socorro Cnty., No. 1:93-1244-JP (D.N.M. Apr. 13, 1994) (consent decree), ECF No. 46; United States v. Alameda Cty., No. 3:95-cv-1266 (SAW) (N.D. Cal. Jan. 27, 1996) (consent decree), ECF No. 13; United States v. Bernalillo Cty., No. 1:98-0156-BB/LCS (D.N.M. Apr. 27, 1998) (consent decree), ECF No. 6; Kirkie v. Buffalo Cty., No. 3:03-cv-3011 (D.S.D. Feb. 12, 2004) (consent decree), ECF No. 23; Blackmoon v. Charles Mix Cty., No. 4:05-cv-4017 (D.S.D. Dec. 4, 2007) (consent decree), ECF No. 144.

[21] Brown v. Bd. of Comm'rs of Chattanooga, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (consent decree); United States v. Vill. of Port Chester, No. 1:06-cv-15173 (S.D.N.Y. Dec. 22, 2009) (consent decree), ECF No. 119.

[22] N.A.A.C.P. v. Gadsden City Sch. Bd., 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984) (Gadsden Cty. Sch. Dist.); Cuthair v. Montezuma-Cortez Sch. Dist. No. RE-1, No. 1:89-cv-0964 (D. Col. Apr. 9, 1990) (consent decree).

[23] The ten jurisdictions covered for American Indians include the State of New Mexico; Thurston County, Nebraska; Bernalillo, Cibola, McKinley, Sandoval, Socorro Counties in New Mexico; Buffalo and Charles Mix Counties in South Dakota; and the Montezuma-Cortez School District RE01 in Colorado.

[24] *See supra* notes 18-22 and accompanying text.

[25] *See* U.S. Dep't of Just., *Jurisdictions previously covered by Section 5 at the time of the Shelby County decision* <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (updated Sept. 11, 2020).

[26] For examples of voting rights violations that were remedied already and therefore were found a federal court not to be the proper subject of preclearance, *see generally Jeffers*, 740 F. Supp. at 601 (ordering a limited bail-in for Arkansas for any majority-vote requirements and the state's 1990 redistricting plans because the remaining "constitutional violations found … have already been remedied by judicial action.").

[27] *See infra* notes 38-66 and accompanying text.

B. The difficulty securing bail-in after *Shelby County*

Some commentators have suggested that the Section 3(c) bail-in mechanism can provide a viable alternative in a post-*Shelby* world. Actual experience has proven a much different reality. Since *Shelby County* was decided in June 2013, only a handful of jurisdictions have been bailed in through the Section 3(c) remedy. The two examples I will provide both involve jurisdictions formerly covered by Section 5.

In *Allen v. City of Evergreen, Alabama*, after the plaintiffs successfully challenged a redistricting plan for the city council and the system for determining voter eligibility, they moved for remedies including the appointment of federal observers and bail-in.[28] The City agreed to the relief, which "would restore a preclearance requirement which is limited in scope."[29] The federal court ordered preclearance to be in place until December 31, 2020, limiting it to two voting changes: any change in the redistricting plan or method of election for members of the city council and any change in the standards for determining voter eligibility.[30] In granting the stipulated relief, the court retained jurisdiction through the end of 2020.[31]

In *Patiño v. City of Pasadena, Texas*, the court found that the city adopted a plan for electing members of its council that intentionally diluted the votes of Latino citizens in violation of Section 2 of the VRA and the Fourteenth Amendment.[32] As a result of the finding of intentional discrimination, the court granted the plaintiffs' request to require the city to submit future changes to its redistricting plan to the Attorney General for preclearance.[33] In addition, the court retained jurisdiction to review any other voting change different from what was in force in the 2013 election.[34] The court referred to the six year preclearance period in the *Evergreen* consent order, suggesting that "five years, or through the 2021 election, might be appropriate" for Section 3(c) coverage "because it is likely enough time for demographic trends to overcome concerns about dilution from redistricting."[35] Subsequently, the court adopted a six year preclearance period through June 30, 2023.[36] The court explained that would encompass four election cycles and redistricting following the 2020 Census.[37]

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[28] Civ. Act. No. 13-0107-CG-M, 2014 U.S. Dist. LEXIS 191739, at **1-2 (S.D. Ala. Jan. 13, 2014).

[29] *Id.* at *4.

[30] *Id.*

[31] *Id.* at **4-6.

[32] 230 F. Supp. 3d 667 (S.D. Tex. 2017).

[33] *Id.* at 729.

[34] *Id.* at 729.

[35] *Id.* at 730.

[36] Patiño v. City of Pasadena, No. H-14-3241, 2017 U.S. Dist. LEXIS 229191, at **5-6 (S.D. Tex. Jan. 16, 2017).

[37] *Id.* at *5 n.4.

Requests for Section 3(c) relief have not been granted in other cases for a variety of reasons. One cause is the difficulty in obtaining a finding of discriminatory intent. In *Jeffers*, the court held that to establish a violation of the Fourteenth or Fifteenth Amendment necessary to support bail-in, it required "proof of conscious racial discrimination."[38] *Perez* agreed, concluding that "triggering violations for bail-in relief must be violations of Fourteenth and Fifteenth Amendment protections against racial discrimination in voting."[39]

In *Toyukak v. Treadwell*, the plaintiffs developed a strong record supporting a finding of discriminatory intent, including: Alaska's contention that the Fifteenth Amendment did not apply to Alaska Natives; its position that Alaska Natives were entitled to less voting information than other voters because they were Alaska Natives; purposeful failure to translate ballots into covered languages and dialects; and what state officials euphemistically referred to as "policy decisions" not to provide voting materials and assistance to Alaska Native voters in areas covered by Section 203 of the Act.[40] The federal court held that the plaintiffs established a Section 203 violation, while also suggesting it was the product of discriminatory intent. The court explained that Alaska's voting program was "*not designed* to transmit substantially equivalent information in the applicable minority... languages."[41]

Nevertheless, the court declined to reach the question of whether the plaintiffs established that Alaska intentionally discriminated against Native voters, taking under advisement the constitutional claim that served as the basis for the Section 3(c) request to focus on other remedies.[42] Later, the court directed the parties to mediation to try to resolve the litigation.[43] The *Toyukak* court's reluctance to make a finding of discriminatory intent sufficient to support Section 3(c) relief is consistent with what occurred following the *City of Mobile v. Bolden* decision in 1980.[44] It is inherently difficult for a federal judge to find that officials in the community in which he or she resides have engaged in purposeful discrimination, regardless of a voting procedure's discriminatory impact.[45] The *Toyukak* plaintiffs settled and obtained court oversight over

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[38] 740 F. Supp. at 589.

[39] 390 F. Supp. 3d at 813-14.

[40] *See* James Thomas Tucker, Natalie Landreth & Erin Dougherty Lynch, *"Why Should I Go Vote Without Understanding What I am Going to Vote For?": The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327, 358-72 (2017). A copy of the article is provided as Attachment A to this testimony.

[41] *Id.* at 372 (emphasis added).

[42] *Id.* at 374.

[43] *Id.* at 375-76.

[44] 446 U.S. 55 (1980).

[45] The Senate reached a similar conclusion in its report accompanying the 1982 amendments to the VRA, noting that because of the reluctance among federal judges to make a finding of intentional discrimination after *Bolden*, "litigators virtually stopped filing new vote dilution cases." S. REP. NO. 417, at 26 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 203.

Alaska's language program for three census areas through the end of 2020, in lieu of pressing their Section 3(c) claim.[46]

Perez added another wrinkle to the difficulty in establishing discriminatory purpose to secure bail-in: it found that not all violations of the Fourteenth and Fifteenth Amendments meet the burden under Section 3(c).[47] For example, it concluded that "a *Shaw*-type Fourteenth Amendment claim, without a finding of racially discriminatory purpose, is not a finding that supports bail-in relief."[48] The court explained, "[u]nlike an intentional vote dilution claim, a *Shaw*-type racial gerrymandering claim is not focused on abridging the right to vote, but on an improper use of race regardless of discriminatory purpose…"[49] Similarly, *Perez* rejected "a conclusion that malapportionment and/or one person, one vote ("*Larios*-type claims") under the Fourteenth Amendment may trigger bail-in relief, absent any finding of purposeful racial discrimination underlying the population deviations."[50] Likewise, *Perez* decided that the only Section 5 objections that could support bail-in were those based upon discriminatory intent, reasoning that a "mere finding of discriminatory effect or 'retrogression' does not amount to a constitutional violation…"[51]

Perez also interpreted the broad language of Section 3(c) narrowly to further limit the constitutional violations that may be considered. The statute provides that the relevant violations are those that "have occurred within the territory of such State or political subdivision."[52] In *Jeffers*, the court construed Section 3(c) as meaning what it says:

> We agree with plaintiffs that both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account. The statute does not say that the State or its officials must be guilty of the violations, but only that the violations must "have occurred *within the territory*" of the State… And besides, as we have already held, officials of local governments are State

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[46] *See* Tucker, Landreth & Dougherty Lynch, *supra* note 40, at 376.

[47] *See generally* 390 F. Supp. 3d at 813 ("The Court first considers what types of violations of the Fourteenth or Fifteenth Amendments may act as a trigger to impose bail-in relief…").

[48] *Id.* at 814.

[49] *Id.*

[50] *Id.* (citing *Blackmoon*, 505 F. Supp. 2d at 592). *Blackmoon* subsequently settled and Charles Mix County agreed to a consent decree that included bail-in. *See supra* note 20 and accompanying text.

[51] *Id.* at 817-18.

[52] 52 U.S.C. § 10302(c).

> officials for present purposes; local governments are arms of the State and only exist at its sufferance.[53]

In contrast, *Perez* found that "these violations should at most provide relevant context" to whether a court should grant equitable relief, "and not be used as a trigger for bail-in relief."[54] It read the statute differently than *Jeffers*, explaining "it simply makes clear that political subdivisions such as cities may be subjected to § 3(c) relief based on their own violations, and does not mean that a State may be subjected to bail-in based on violations by its political subdivisions."[55]

Moreover, even where intentional discrimination has been established in violation of the Fourteenth or Fifteenth Amendment, that may be insufficient to result in bail-in. In *Jeffers*, the court emphasized that Section 3(c) requires "violations *justifying equitable relief*."[56] Like any other form of equitable relief, a court has considerable discretion, taking into consideration the public interest codified in the VRA. The court suggested several factors to weigh in making that determination:

> Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kind of violations that would likely be prevented in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments independent of this litigation, make recurrence more or less likely?[57]

Those factors are to be balanced between "the interest of the plaintiffs in vindication of their constitutional right to vote" against "the interest of the defendants in maintaining the sovereignty of the State."[58]

Perez cited the *Jeffers* factors with approval, applying them to reach its holding that Section 3(c) bail-in should not be imposed on Texas.[59] The court made that determination despite its conclusion that there were "recent, statewide violations of the Fourteenth Amendment by the State" that were "the type to appropriately trigger the bail-in remedy against the State, and the bail-in remedy sought by Plaintiffs would

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[53] 740 F. Supp. at 600 (emphasis in original). *Jeffers* qualified its construction by concluding, "We also think that more than one violation must be shown. The statute uses the plural ('violations'), and it would be strange if a single infringement could subject a State to such strong medicine." *Id.*

[54] 390 F. Supp. 3d at 817.

[55] *Id.*

[56] 740 F. Supp. at 601 (emphasis in original).

[57] *Id.*

[58] *Id.*

[59] 390 F. Supp. 3d at 818-21.

appropriately redress the violation."[60] In particular, the court described the case as involving

> findings of intentionally discriminatory behavior affecting minority voters statewide... Numerous counties were drawn with the purpose to dilute minority voting strength in the Texas House plan, as well as CD23 and numerous congressional districts in the Dallas-Fort Worth metroplex in the Congressional plan.[61]

Compounding those violations, the court concluded that although "it could and should also consider the intentional discrimination findings made in the underlying voter ID litigation, it does little to bolster the foundation for bail-in."[62] The court explained that the purposeful discrimination "affected only a small portion of minority voters (indigent minority voters)," with "no indication that its effects had not been fully remedied."[63]

Remarkably, *Perez* noted its "grave concerns about Texas's past conduct," but nevertheless concluded "that ordering preclearance on the current record would be inappropriate..."[64] The court attempted to justify its holding by explaining, "Even without being subject to preclearance, Texas must still comply with the requirements of the Fourteenth Amendment and § 2 of the VRA in the upcoming redistricting cycle, and undoubtedly its plans will be subject to judicial scrutiny."[65] That conclusion is certainly true, but it severely undermines the legislative purpose of Section 3(c): to prevent discriminatory voting changes that are enacted by knowing bad actors like Texas *before* they go into effect.

The reluctance of federal courts to order bail-in to remedy even an exceptionally strong record of discrimination such as the one in *Perez* goes far to explain why Section 3(c) relief rarely has been granted where it is contested.[66] It may be laudable that many jurisdictions agree to bail-in to cure their intentional discrimination against minority voters. But conditioning coverage for preclearance on a jurisdiction's consent does little to provide redress from the worst offenders, who, like Texas officials, are recidivists engaging in repeated acts of intentional discrimination designed to suppress the votes of

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[60] *Id.* at 816.

[61] *Id.*

[62] *Id.* at 820.

[63] *Id.*

[64] *Id.* at 820-21.

[65] *Id.* at 821.

[66] *See supra* note 24 and accompanying text; *see also* North Carolina State Conf. of the NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016) ("As to the other requested relief, we decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements... Such remedies '[are] rarely used' and are not necessary here in light of our injunction.") (quoting Conway Sch. Dist. v. Wilhoit, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

racial, ethnic and language minorities. It goes far to explain why Section 3(c) is an inadequate remedy for the broader Section 5 coverage proposed by H.R. 4 under a new geographic formula. It also highlights the need for the modest, yet crucial, amendment that the bill makes to the violations that qualify for bail-in under Section 3(c).

C. H.R. 4 clarifies Congressional intent on bail-in

Section 2(a) of H.R. 4 makes a simple, but essential, change to Section 3(c). Currently, bail-in only is available where the United States or a private litigant establishes discriminatory intent in violation of the Fourteenth or Fifteenth Amendment. That requirement has imposed an insurmountable burden on many plaintiffs, even in the face of a strong record of purposeful discrimination. H.R. 4 corrects that deficiency by striking ''violations of the Fourteenth and Fifteenth amendment'' and inserting ''violations of the Fourteenth or Fifteenth Amendments, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group.''

By amending Section 3(c) to include other forms of voting discrimination against racial, ethnic and language minorities, H.R. 4 gives federal courts greater flexibility to provide bail-in relief where it is warranted. Remedial orders may be adapted to the circumstances present in the jurisdiction, consistent with the case-by-case approach that has been a hallmark of the pocket trigger. It further empowers courts to broadly require preclearance of all voting changes, where a demonstrated history of continued violations of the Constitution or federal law warrants it. At the same time, courts retain the authority to adopt a more targeted approach by limiting the time period during which preclearance remains in effect or the types of voting changes to which it applies.

II. The Devastating Impact of *Shelby County* on Federal Observer Coverage.

On June 25, 2013, the United States Supreme Court issued its decision in *Shelby County v. Holder*, which struck down as unconstitutional the preclearance coverage formula in Section 4(b) of the VRA. Although *Shelby County* did not directly address the separate formula in Section 4(f)(4) of the Act for jurisdictions covered for minority languages, the Justice Department concluded that section also was affected because it was "dependent on a part of the Section 4(b) formula."[67] As a result, "[i]n light of *Shelby County*, the department is not enforcing this provision."[68]

Shelby County has had a devastating impact on federal observer coverage. "Prior to the *Shelby County* decision in 2013, a total of 153 counties and parishes in 11 states were certified by the Attorney General for federal observers: Alabama (22 counties), Alaska (1) Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3),

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[67] U.S. Dep't of Just., Fact Sheet on Justice Department's Enforcement Efforts Following *Shelby County* Decision ("*Shelby* Impact") at 2 <https://www.justice.gov/crt/file/876246/download (last visited June 20, 2021)>.

[68] *Id.*

North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18)."[69] Following *Shelby County*, the Justice Department made the following determination:

> In light of the *Shelby County* decision, the department is not relying on the Section 4(b) coverage formula as a way to identify jurisdictions for election monitoring. The department will continue to engage OPM observers where there is a relevant court order and will continue to conduct our own monitoring around the country, without relying on the Section 4(b) formula.[70]

In other words, post-*Shelby County*, the only jurisdictions that will be covered for federal observers are those certified for coverage by a federal court under Section 3(a) of the VRA. The Department concluded, "This means that the department will be able to send fewer people than in similar past elections to watch the voting process in real-time."[71]

Recent federal observer coverage confirms that impact. By 2020, just five jurisdictions were covered for federal observers under Section 3(a) of the Act: Evergreen (Conecuh County), in Alabama;[72] the Dillingham, Kusilvak and Yukon-Koyukuk Census Areas in Alaska, as a result of the NARF litigation;[73] and St. Landry Parish in Louisiana.[74] Despite its continued coverage under Section 3(a), it does not appear that the Justice Department has been as active in sending federal observers to St. Landry Parish after the vote-buying issues that precipitated the litigation in the 1970s were resolved.[75] Consequently, by the end of 2020, federal observers were available in only a handful of jurisdictions covered under Section 3(a) of the VRA.

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[69] *See* U.S. Dep't of Just., Civ. Rts. Div., Voting Sec., *About Federal Observers and Election Monitoring* ("*About Federal Observers*") (last modified Sept. 11, 2020) <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>.

[70] *Shelby* Impact, *supra* note 67, at 2.

[71] *Id.*

[72] *See* Allen v. City of Evergreen, 2014 U.S. Dist. LEXIS 191739, at *4 (S.D. Ala. Jan. 13, 2014) (authorizing the "appointment of federal observers to monitor elections of the City of Evergreen" through December 21, 2020).

[73] *See* Toyukak v. Mallott, Case No. 3:13-cv-00137-SLG, Dkt. 282, Stip. and Order at 7-8 (D. Alaska Sept. 30, 2015) ("Pursuant to Section 3(a) of the VRA, 52 U.S.C. § 10302(a) … Election Observers are appointed and are authorized to attend and observe elections and election activities that federal law authorizes, including training" for the three census areas through December 31, 2020).

[74] *See* United States v. St. Landry Parish Sch. Bd., Case No. 76-1062 (W.D. La. Dec. 5, 1979) (authorizing federal observers "until further order of this Court"); *see also* U.S. COMM'N ON CIVIL RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 37 (Sept. 1981) (describing the vote-buying scheme that led to the Justice Department's litigation against the county).

[75] *See generally* GAO, *Department of Justice's Activities to Address Past Election-Related Voting Irregularities*, GAO-04-1041R, at 69 (Sept. 14, 2004) ("Data from the Voting Section shows that as of August 23, 2003, the court order was still in effect and that no elections were monitored at this parish during calendar years 2000 through 2003.").

In the November 3, 2020 election, not a single federal observer was dispatched by the Justice Department and the United States Office of Personnel Management (OPM), which is unprecedented for coverage of Presidential Elections in recent decades. The City of Evergreen, Alabama held its municipal elections earlier in the year, on August 25, 2020.[76] Most of the Alaska Native villages encompassed by Section 3(a) coverage under the *Toyukak* order were closed because of the COVID-19 pandemic; consequently, it was not possible to have federal observers sent to the three covered regions of Alaska. This is a truly incredible sea-change from the hundreds of federal observers dispatched for elections before *Shelby County*.

The absence of federal observer coverage limited the Department of Justice to dispatching "election monitors" to 44 jurisdictions in 18 states.[77] As the Department explains:

> The [Civil Rights] Division also monitors elections in the field for compliance with the federal voting rights laws in jurisdictions not currently eligible for assignment of federal observers. Under these circumstances, one or more attorneys and staff members from the Division may be assigned to monitor the election in the field on election day and maintain contact with state and local officials.[78]

Election monitors are an inadequate substitute for federal observers. Monitors are attorneys and staff employees of the Justice Department, not the non-attorney OPM employees authorized by the VRA.[79] That limits the Department's monitors in their activities. Unlike federal observers, they are not statutorily authorized to be present in voting and tabulation locations.[80] Instead, monitors first must obtain permission from local election officials to enter polling places and ballot counting centers. While that permission often is given, it may be lacking in the places where it is most needed – especially in jurisdictions where election officials reportedly have engaged in actions that limit access for minority voters. The absence of cooperation by election officials may relegate Justice Department monitors to areas outside of polling places, leaving them unable to engage in crucial first-hand observations of many actions that may establish a violation of one or more provisions of federal voting rights laws.

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[76] *See* Bama Politics, 2020 Evergreen, Alabama Mayoral Election, August 25, 2020 <https://www.bamapolitics.com/alabama/alabama-elections/2020-alabama-elections/2020-evergreen-al-mayor-election/>.

[77] *See* U.S. Dep't of Just., *Justice Department Again to Monitor Compliance with the Federal Voting Rights Laws on Election Day* (Nov. 2, 2020) <https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day>.

[78] *About Federal Observers*, *supra* note 69.

[79] *See* 52 U.S.C. § 10305(d).

[80] *See id.*

Monitors also lack the statutory imprimatur provided by Section 8 of the VRA to prepare investigative reports that are transmitted to a federal court.[81] While Department attorneys remain free to communicate with federal courts about voting and tabulation problems they observe, their communications are constrained by their capacity as legal counsel and support staff for the United States. Unlike observers, the monitors are less likely to be available as witnesses. Any reports that are prepared by monitors generally are not admissible into evidence. Their reports typically cannot be compelled because they are covered under several exemptions to the Freedom of Information Act.[82] While the Department's election monitors broaden observations of elections to jurisdictions not certified for observer coverage, they remain a complimentary option that cannot replicate the critical role performed by federal observers under the VRA.

III. The Continuing Need for Federal Observers under the Voting Rights Act.

The Voting Rights Act of 1965 authorizes federal courts[83] and the Attorney General of the United States[84] to send federal observers to certified jurisdictions "to secure equal voting rights of all citizens."[85] Observers serve as the eyes and ears for the federal government and the public it protects to ensure compliance with the Act. Their presence at polling and ballot counting locations makes it less likely voting discrimination occurs on Election Day without it being documented and addressed.[86] In the course of doing so, they help preserve the fundamental right of all voters to participate in the democratic process.

A. The role and function of the federal observer provisions

The indispensable function of federal observers in the comprehensive protection of voting rights cannot be appreciated without understanding how the provisions that authorize them operate. Federal observers have a unique role in preventing voting discrimination, enforcing the VRA, and measuring progress to remedy violations of the VRA and the Fourteenth and Fifteenth Amendments.[87]

After a jurisdiction is certified for coverage, the Attorney General has to make an administrative determination whether to deploy observers for a particular election. Once

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[81] *See* 52 U.S.C. § 10305(e).

[82] *See* U.S. Dep't of Just., *Department of Justice Guide to the Freedom of Information Act* (updated June 3, 2021) <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

[83] *See* 52 U.S.C. § 10302(a) (transferred from 42 U.S.C. § 1973a(a)).

[84] *See* 52 U.S.C. § 10305 (transferred from 42 U.S.C. § 1973f).

[85] H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2460.

[86] *See* 52 U.S.C. § 10305.

[87] *See generally Shelby* Impact, *supra* note 67, at 1 ("In general, when trained individuals travel to different locations to watch the election process and collect evidence about how elections are being conducted, they have a unique ability to help deter wrongdoing, defuse tension, promote compliance with the law and bolster public confidence in the electoral process.").

that decision is made, Justice Department staff must map out a comprehensive strategy to deploy the federal observers in the areas where they are most likely to fulfill their statutory function. The creation of the federal observer report and training of observers on how to use it is key to those efforts. I will briefly describe these important components of the federal observer program.

The role of federal observers is straight-forward: they are non-lawyer employees of OPM authorized to observe "whether persons who are entitled to vote are being permitted to vote" and "whether votes cast by persons entitled to vote are being properly tabulated."[88] They are "trained by OPM and the Justice Department to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way."[89] In jurisdictions with significant numbers of language minorities, bilingual observers are preferable because they are able to not only observe the manner in which language minority voters are treated, but also can assess the quality of any written language materials and oral language assistance offered to voters in their native language.[90] When a voter requires assistance to cast a ballot, the observer may accompany that voter behind the curtain of the voting booth if the observer first obtains the voter's permission.[91]

Federal observers are not sent to every certified jurisdiction for every election. Instead, they typically are only dispatched to certified jurisdictions in which it has "been determined that there is 'a substantial prospect of Election Day problems.'"[92] The role of federal observers should be viewed in terms of the acronym "PEP": Prevent, Enforce, and Progress.[93]

1. Prevention of Vote Denial.

Federal observers "Prevent" vote denial in several respects. According to the 1975 Senate Report, "the role of Federal observers can be critical in that they provide a calming and objective presence which can serve to deter any abuse which might occur.

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[88] *See* 52 U.S.C. § 10305(d).

[89] U.S. Dep't of Just., Civ. Rts. Div., Voting Sec., Frequently Asked Questions (Feb. 25, 2002); *see also* U.S. OFFICE OF PERSONNEL MGT., MINORITY LANGUAGE CAPTAIN/CO-CAPTAIN MANUAL, app. E (Mar. 1998) (summarizing the training federal observers receive concerning their election-day responsibilities).

[90] *See generally* COMPTROLLER GENERAL OF THE UNITED STATES, VOTING RIGHTS ACT: ENFORCEMENT NEEDS STRENGTHENING 24-25 (Feb. 1978) ("COMPTROLLER REPORT") (summarizing complaints received from minority contacts about the absence of minorities serving as federal observers).

[91] *See* United States v. Executive Committee of Democratic Party of Greene County, 254 F. Supp. 543 (N.D. Ala. 1966); United States v. Louisiana, 265 F. Supp. 703, 715 (E.D. La. 1966). There has been at least one case in which, notwithstanding the statutory authority observers have to enter a polling booth with a voter's permission, the Justice Department has represented that it would not exercise that authority. *See United States v. City of Philadelphia*, 2006 U.S. Dist. LEXIS 85557, at *3 n.1 (E.D. Pa. Nov. 8, 2006).

[92] UNITED STATES COMMISSION ON CIVIL RIGHTS, A CITIZEN'S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 12 (Oct. 1984) ("CITIZEN'S GUIDE").

[93] *See supra* note 87.

Federal observers can also still serve to prevent or diminish the intimidation frequently experienced by minority voters at the polls."[94] In many cases, the mere assignment of federal observers to an election makes people less likely to engage in discrimination because neutral outsiders are watching and documenting their actions.[95] As one witness has explained, "Few officials discriminate when they are under the microscope."[96] Like Section 5 preclearance,[97] federal observers can stop discrimination before it happens. This element of protection is paramount to furthering the VRA's underlying purposes. Observers discourage problems by both voters and election officials – they help prevent voter discrimination while making officials more likely to properly comply with the law, thereby facilitating the smooth conduct of elections.[98] In the process, voters "feel empowered" because they have "a vehicle through which to directly report Election Day problems at their polling place."[99]

Even when the presence of federal observers does not deter discrimination from happening, the information gathered by observers can be used by the Justice Department to stop it almost immediately. Often, a phone call from a Department attorney to local election officials is sufficient to end the discriminatory conduct; where it is not, the Department may seek to enjoin the conduct on Election Day or in the future.[100] A GAO report explained this process:

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[94] S. REP. NO. 94-295 at 21, *reprinted in* 1975 U.S.C.C.A.N. 787.

[95] *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006*, H.R. REP. NO. 109-478, 109th Cong. 2d Sess., at 24-25 (2006); Testimony of Alfred Yazzie, S. HRG. 109-669, at 503; Testimony of Constance Slaughter-Harvey, S. HRG. 109-669, at 390-94, 451, 458-59. 462.

[96] Slaughter-Harvey Testimony, S. HRG. 109-669, at 391.

[97] For an overview of Section 5 of the VRA, *see generally* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 218-23 (2007).

[98] Barry Weinberg, who administered federal observer coverage from the 1960s until his retirement, previously described the type of discriminatory treatment that federal observers deter:

> The discriminatory treatment of racial and minority language voters witnessed by federal observers... runs the gamut from actions that make those voters feel uncomfortable by talking rudely to them, or ridiculing their need for assistance in casting their ballot, to actions that bar them from voting, such as failing to find their names on the lists of registered voters and refusing to allow them to vote on provisional ballots, or misdirecting them to other polling places.

Testimony of Barry H. Weinberg, *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 24 (2005) [hereinafter *House Observer Hearings*].

[99] Yazzie Testimony, S. HRG. 109-669, at 500.

[100] *See* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 23; GENERAL ACCOUNTABILITY OFFICE, DEPARTMENT OF JUSTICE'S ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES 46-47 (Sept. 14, 2004).

> When Voting Section staff monitor elections and receive allegations of or information about voting irregularities while on site, they make efforts to resolve allegations by contacting local election officials immediately. Further investigation of such irregularities is conducted after an election if the allegation was not resolved on Election Day or if it is deemed otherwise necessary to prevent such problems from arising in the future.[101]

The GAO reported that between 2000 and 2003, the Justice Department closed at least a dozen meritorious cases relating to Election Day voting discrimination, with an additional eight pending cases.[102]

Federal observers likewise can prevent vote denial through their role in documenting training provided to election officials and poll workers. Poll workers are only as good as the training they receive and their willingness to follow that training. Typically, Justice Department employees attend poll worker training sessions, although in some cases officials from the Office of Personnel Management also may do so.[103] On Election Day, federal observers often ask poll workers about the training they received and observe the election procedures being used and their impact on minority voters. Justice Department employees can communicate that information to local election officials to improve training and facilitate implementation of non-discriminatory practices. If a poll worker refuses to follow their training, then that information can be passed on to allow election officials to refrain from using that poll worker in future elections. As one witness noted, "When federal oversight does not occur, the quality of these training is often insufficient and superficial," particularly where language assistance must be provided.[104]

Federal observers also document evidence of seemingly innocent Election Day practices that have the effect of disenfranchising minority voters. For instance, Hispanic men and women commonly have more than one surname, using their mother's, father's, or sometimes both. Federal observers documented numerous instances in which Hispanic voters were denied the right to vote because their name purportedly was not in the voter registration book. In the course of interviewing those voters, federal observers learned that they had registered under a different surname, which was on the voter registration list. The Justice Department used this information to recommend to local election

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[101] *Id.* at 45.

[102] *Id.* at 48. The twelve meritorious cases were closed as follows: five because the jurisdiction took actions to resolve the issues; four because DOJ provided post-election feedback regarding the discrimination; two because jurisdictions agreed to implement changes for future elections, and one because a state court issued an order addressing the conduct. *Id.* The eight cases that remained open included six pending fulfillment of consent decrees for violations of federal law and two closed because jurisdictions fulfilled the requirements of consent decrees requiring them to remedy violations of federal law. *Id.*

[103] *See* Yazzie Testimony, S. HRG. 109-669, at 497-99.

[104] *See* Yazzie Testimony, S. HRG. 109-669, at 498.

officials that they train poll workers to ask any voter whose name did not appear to be in the voter registration list, "Have you registered under another name?" That simple training suggestion eliminated many instances of vote denial.

2. Enforcement of the Voting Rights Act.

In addition to their prophylactic effect, federal observers help "Enforce" compliance with the Voting Rights Act. Observers do not engage in civil enforcement themselves. Instead, they serve as the eyes and ears of the Justice Department and federal courts.[105] Federal observers are a key component of efforts to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments because they prepare reports that can be used in subsequent litigation and the observers can testify as witnesses.[106] Observers also conduct their jobs in a neutral and non-partisan manner thus ensuring the integrity of the accounts provided in their reports.[107] Since the reports are prepared contemporaneously to the observed actions by impartial observers, the reports provide evidence that is generally unassailable in court proceedings.[108]

There are other uses for information collected in observer reports. Federal observers document the identity of election officials and others engaging in discriminatory conduct. If the person engaging in discrimination is an election official, a Justice Department attorney can communicate that information to local officials to get the person removed from the polling place immediately and for future elections. If the discrimination is a violation of the criminal provisions of the VRA[109] or other federal laws, the evidence gathered by federal observers can be communicated to either the Civil Right's Division's Criminal Section or the Criminal Division's Public Integrity Section to work with local United States Attorneys to prosecute the perpetrators.[110] Effective

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[105] *See generally See* H. REP. NO. 109-478, at 25 ("Observers have played a critical role preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory conduct for further investigation.").

[106] *See generally* 52 U.S.C. § 10305(e) (providing that persons assigned as observers "shall investigate and to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 10302(a) of this title, to the court"); *see also* S. REP. NO. 94-295 at 21, *reprinted in* 1975 U.S.C.C.A.N. 787 (noting that "observer reports have served as important records relating to the conduct of particular elections in subsequent voting rights litigation"); *accord Frequently Asked Questions* (observers "prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises"). The reports are admissible into evidence under Federal Rule of Evidence 803(8), as a matter observed by the observers "while under a legal duty to report" as provided by Section 8 of the VRA.

[107] Testimony of Ms. Kay Cole James, Hearing Before the Committee on the Judiciary of the United States Senate, *The Continuing Need for Federal Examiners and Observers to Ensure Election Integrity*, S. HRG. 109-669, at 434, 435 (July 10, 2006); Yazzie Testimony, S. HRG. 109-669, at 495.

[108] *See infra* note 106 and accompanying text.

[109] *See, e.g.*, 52 U.S.C. § 10307 (transferred from 42 U.S.C. § 1973i); 52 U.S.C. § 10308 (transferred from 42 U.S.C. § 1973j); 52 U.S.C. § 10505 (transferred from 42 U.S.C. § 1973aa-3); 52 U.S.C. § 10701(b) (transferred from 42 U.S.C. § 1973bb(b)).

[110] *See* Yazzie Testimony, S. HRG. 109-669, at 495-96; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 24.

enforcement of the Act and the guarantees of the Fourteenth and Fifteenth Amendments would not be possible without federal observers.

Berks County, Pennsylvania illustrates how observer reports are used to enforce the Voting Rights Act. In 2003, a federal court found "there is substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials" in the county.[111] The intentional discrimination was compounded by the county's failure to recruit bilingual poll workers despite their ready availability, discriminatory poll worker application process, lack of Spanish election materials for Puerto Rican voters, and the county's denial of assistance to Hispanic voters even when they brought someone with them to render assistance.[112] These examples of discriminatory treatment were documented through federal observer reports. As a direct result of that evidence, the federal court concluded that Berks County violated the Voting Rights Act. The court authorized the continued use of federal observers to assess the County's compliance with orders requiring the elimination of voting discrimination.[113]

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[111] *See* United States v. Berks County, 277 F. Supp.2d 570, 575 (E.D. Pa. 2003). The court summarized many of these discriminatory practices by poll officials in the City of Reading:

> [They] turned away Hispanic voters because they could not understand their names, or refused to "deal" with Hispanic surnames.
>
> [They] made hostile statements about Hispanic voters attempting to exercise their right to vote in the presence of other voters, such as "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," and "Dumb Spanish-speaking people ... I don't know why they're given the right to vote."
>
> [They] placed burdens on Hispanic voters that were not imposed on white voters, such as demanding photo identification or a voter registration card from Hispanic voters, even though it is not required under Pennsylvania law.
>
> [They] required only Hispanic voters to verify their address and told Department staff that they did so because Hispanics "move a lot within the housing project."
>
> [They] boasted of outright exclusion of Hispanic voters to Voting Section staff during the May 15, 2001 municipal primary election.
>
> Hispanic voters stated that this hostile attitude and rude treatment makes them uncomfortable and intimidated in the polling place, and discourages them from voting.

Id. at 575-76.

[112] *Id.* at 575-77.

[113] *Id.* at 585. For additional examples of how federal observer reports facilitate enforcement of the VRA, *see generally* NAT'L COMM'N ON THE VOTING RTS. ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 31, 60-65 (Feb. 2006).

3. Measuring Progress in Curing Voting Rights Violations.

Observers also measure "Progress" that jurisdictions are making in curing voting rights violations.[114] Federal observers often are sent to monitor a jurisdiction's compliance with the constitutional and statutory protections of the right to vote, as well as court orders enforcing those protections. Systemic violations and deeply ingrained discriminatory practices do not disappear over night. Frequently, federal observers need to be present in jurisdictions for several years to measure what incremental progress, if any, is being made.[115] Once the progress is sufficient to demonstrate substantial compliance with all requirements protecting the right to vote, reports from federal observers facilitate determinations by federal courts or the Attorney General to terminate coverage.[116]

The Native American Rights Fund's recent experience in three regions of Alaska, the Dillingham, Kusilvak, and Yukon-Koyukuk Census Areas, illustrates how federal observers measure progress. In September 2014, a federal court entered a bench order finding that the plaintiffs established a violation of Section 203, the minority language assistance provisions of the VRA, in the three census areas. The court granted the plaintiff's request for federal observers under Section 3(a) of the Act, which subsequently was extended when the parties settled in 2015.[117]

Although the preparation of Alaska's Division of Elections for the 2016 elections reflected significant progress, reports filed by federal observers suggest its efforts still fell short of fully remedying the Section 203 violations. Some two years after the court's bench ruling for the Plaintiffs and entry of its interim remedial order, bilingual poll worker training was spotty or lacking for several villages. Federal observers were present for both the August 2016 Primary and November 2016 General Election in villages located in the three census areas. Out of the 120 poll workers interviewed by the federal observers for those elections, only 46 percent (55 poll workers) reported that they had been trained in 2016. In contrast, four percent (5 poll workers) reported receiving training in 2015, ten percent (12 poll workers) reported being trained two or more years earlier, 39 percent (47 poll workers) reported they had never been trained, and one percent declined to answer. Some of the poll workers who did receive training indicated that it was "conducted in English by a non-Native instructor from the Election Office." Bilingual poll workers or interpreters were not trained on "how to translate the contents

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[114] *See generally See* H. REP. NO. 109-478, at 44 (finding that observers "have served a critical oversight function, monitoring and reporting on the actions of voters and poll workers inside the polling locations").

[115] *See* Yazzie Testimony, S. HRG. 109-669, at 503.

[116] *See generally The Power of Observation: The Role of Federal Observers under the Voting Rights Act*, 13 MICH. J. RACE & LAW 227, 254-75 (2008) (explaining how federal observers were used to measure progress in Passaic County, New Jersey).

[117] *See* Tucker, Landreth & Dougherty Lynch, *supra* note 40, at 372-77. The description that follows regarding the observer reports is drawn from that article, which includes all of the citations for the quotes in the description.

of the ballot or how to provide procedural instructions" in the covered Alaska Native languages.

In a marked improvement, most, but not all, of the villages had a bilingual poll worker available. In the August 2016 Primary Election, federal observers reported there was no bilingual poll worker available in three out of the nineteen Native villages they observed. In Koliganek, a bilingual poll worker was only available "on call" and was "not present at the polling place." No bilingual assistance was available at polling places located in Dillingham, Kotlik, and Marshall during a portion of the time federal observers were there when the observers documented the only bilingual worker took a break or left the polling place. In the November 2016 General Election, federal observers reported there was no bilingual poll worker available in just one of the twelve Native villages they observed. While federal observers were present, they reported that no bilingual assistance was available at Fort Yukon for an hour and twenty minutes when the interpreter left the polling place. In Venetie, one of the Plaintiff villages, the only Gwich'in-speaking poll worker left three and one-half hours before the polling place closed, and did not return.

For both elections in 2016, many voting materials were unavailable in the applicable Alaska Native language and dialect. Almost all signage was in English only. Among the nineteen villages in which federal observers were present for the August 2016 primary election, they observed that no voting materials were available in Alaska Native languages in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie. The "I voted" sticker was the only material in an Alaska Native language in Marshall and Mountain Village. Only the Yup'ik glossary was observed in Emmonak. Ten villages had a sample ballot written in Yup'ik, but only two – Koliganek and Manokotak – had written translations of the candidate lists. Only one village, Aleknagik, had a written translation of the OEP available for Yup'ik-speaking voters.

In the November 2016 General Election, federal observers documented that half of the twelve polling places they observed did not have a translated sample ballot available for voters. Five villages – New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie – had no translated sample ballot at all, while the Gwich'in sample ballot in Fort Yukon was "kept at the poll workers' table" and was not provided by the voting machine where voters could use it. The absence of written voting materials had its greatest impact in villages where a trained bilingual poll worker was not present at all times during the election. The observer reports showed that although Alaska had made significant improvements and committed to changing to better serve its voters, it still fell short because nearly 40 years of violating the VRA cannot be changed overnight.

B. The administrative process to deploy federal observers

The Department of Justice has not issued regulations governing how certified jurisdictions are selected for coverage by federal observers.[118] However, the Department

[118] CITIZEN'S GUIDE, *supra* note 92, at 12.

has informally stated that the following procedure typically is used: Department employees initially conduct telephone surveys of covered jurisdictions with significant minority populations to determine whether any minority candidates are running; a second telephone survey then is conducted of minority contacts in jurisdictions in which there are minority candidates or where there is information suggesting there may be Election Day problems; if there is sufficient evidence of potential problems, a Department attorney is dispatched to the jurisdiction to conduct an investigation and recommends whether observers should be dispatched; and the decision then is made whether to send observers.[119]

It is not always possible to send federal observers to areas where coverage may be needed. The Justice Department previously explained, "Sometimes the Department learns of election-related problems that may appear to warrant the assignment of federal observers but there is insufficient time to either arrange for the assignment to or to develop the factual predicate necessary for the certification of the political subdivision."[120] Some jurisdictions may not be eligible for federal observers because they have not been certified for coverage. Where this occurs, the Department may assign attorneys to monitor elections either in person or by telephone.[121]

Since 1965, more than 30,000 federal observers have monitored elections in certified jurisdictions. Between 1982 and 2006, five of the six states originally covered in their entirety by Section 5 of the VRA accounted for approximately two-thirds of all federal observer coverage,[122] with Mississippi accounting for the greatest percentage.[123] In the years leading up to the 2006 reauthorization, the number of observers increased dramatically as part of the Justice Department's enforcement activities in jurisdictions covered by the language assistance provisions of the VRA. According to the Justice Department, in 2004 "a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 105 jurisdictions in 29 states."[124] In 2005, an off-election year, the Department deployed 640 federal observers and 191 Department

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[119] CITIZEN'S GUIDE, *supra* note 92, at 12; COMPTROLLER REPORT, *supra* note 90, at 22-23; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 36-39.

[120] U.S. Dep't of Just., Civ. Rts. Div., Voting Sec., *Federal Examiners and Federal Observers* (modified Feb. 28, 2006).

[121] *See id.*

[122] *See* H. REP. NO. 109-478, at 44.

[123] *See generally* Slaughter-Harvey Testimony, S. HRG. 109-669, at 448-49
("Since 1982, federal observers have been deployed to 48 of the state's 82 counties. In total, federal observers have monitored elections in Mississippi on more than 250 occasions since the 1982 renewal – the highest number of deployments of all covered states. Indeed, Mississippi accounts for 40 percent of all federal observer deployments since 1982. Moreover, many of those jurisdictions have been the subject of multiple observer deployments during that period.... Multiple observer deployments may provide an indication that a jurisdiction is somewhat hostile to the protections afforded by the Voting Rights Act or illustrate the degree of racial tension and intimidation experienced by voters in an area.").

[124] United States Department of Justice press release (June 5, 2006).

personnel to monitor 47 elections in 36 jurisdictions in 14 states.[125] In June 2006, the Justice Department sent federal observers to eighteen counties in five states, primarily to monitor compliance with federal court orders in language assistance cases.[126] Between 2001 and 2006, much of the observer coverage was for violations of the VRA's language assistance provisions.[127]

C. Mapping out a deployment plan for a federal observer exercise

The Justice Department tailors federal observer coverage on a case-by-case basis by making calculated determinations about the problems and issues that exist within a particular jurisdiction. Whenever feasible, Department attorneys meet with local election officials to establish lines of communication and describe the role that the federal observers play during the course of the election. Federal observers do not interfere with the local conduct of the election and are prohibited from offering assessments to election officials or others present in the polls.[128] Rather, observers merely observe and document activity inside the polling place, and communicate this information to a DOJ attorney.[129]

Where necessary, Justice Department attorneys will share information about voting discrimination identified by federal observers to election officials, especially if there is a possibility that a voter may be denied the right to cast a ballot.[130] Local election officials frequently welcomed federal observers, particularly if they helped establish compliance with the VRA.[131] However, observers remain an enforcement arm of the Justice Department and are not there to interfere with or perform the work of local election officials.[132]

Federal observer exercises require substantial planning. The planning begins early on, when Department of Justice attorneys and other employees begin documenting evidence that justifies the selection of jurisdictions for coverage.[133] Often, this documentation includes summarizing written complaints from voters or community

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[125] *Id.*

[126] *Id.*

[127] *See* H. REP. NO. 109-478, at 44-45; *see also* James Testimony, S. HRG. 109-669, at 436 (describing increased observer coverage to protect language minority voters in Arizona, New Mexico, New Jersey, California, Michigan, Pennsylvania, and New York); Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 23 (attributing the increase in observer coverage since 1982 to growing coverage to protect the voting rights of language minority citizens).

[128] *See* Yazzie Testimony, S. HRG. 109-669, at 495; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 22.

[129] *See* Yazzie Testimony, S. HRG. 109-669, at 495-96.

[130] *See* Yazzie Testimony, S. HRG. 109-669, at 495-96; Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 39-40; Testimony of Penny Pew, *House Observer Hearing*, *supra* note 98, at 14.

[131] *See* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 24.

[132] *See id.*

[133] *See id.* at 37-39.

groups of suspected Election Day problems.[134] Department attorneys call local contacts to determine whether there is evidence of racial tensions, racial appeals, or efforts to directly or indirectly suppress the voting rights of racial or ethnic minority citizens.[135] Local press accounts often provide evidence of tense conditions. The presence of racially heated white/black, white/Asian, Anglo/Latino and Native American/non-Native American races is also a significant factor that is considered.[136] Similarly, elections in which minority voters are in a position to elect candidates of choice for the first time or possibly to gain a majority of seats on in elected body are a strong basis for sending observers.[137]

After the preliminary investigation is completed, the Department may then send an attorney to the jurisdiction to gather supplemental information and assess the situation on the ground. Based upon meetings with local officials and other evidence gathered, the Chief of the Voting Section may forward a written recommendation requesting deployment of federal observers to the Attorney General or his or her designee, who makes the final decision. The entire investigation and recommendation process typically takes at least three weeks, although expedited authorizations can be secured if circumstances dictate. Typically, an investigation is not conducted for jurisdictions being monitored under a federal court order because the evidence already supports continued observer coverage.

D. Creation and use of the federal observer report

When a jurisdiction is approved for federal observer coverage, the responsible Department attorney works with OPM to develop the form report and plan the exercise.[138] Federal observer reports require documenting information for each covered voting precinct including: the opening and closing times for the polling place; how many poll workers are present at opening and closing; any problems opening or closing the polling place or with poll worker staffing; voters waiting in line at opening or closing; signage and publicity showing the location of the polling place; the number, race, ethnicity, language abilities, position, and training of each poll worker; how the polling place is configured; where all of the poll workers and voting materials are located; polling place accessibility, particularly for handicapped and elderly voters; voter assistance compliance under both Sections 203 and 208 of the Act; and compliance with provisions of HAVA. Reports are "designed to address the relevant issues and specific problems" in the jurisdiction where observers are being deployed.[139]

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[134] *See* Slaughter-Harvey Testimony, S. HRG. 109-669, at 450.

[135] *See id.* at 450-57.

[136] *See id.*

[137] *See id.*

[138] *See* Yazzie Testimony, S. HRG. 109-669, at 495.

[139] Yazzie Testimony, S. HRG. 109-669, at 495.

In jurisdictions required to provide language assistance, observers also document whether all written materials are provided in the covered language (unless it is an unwritten language), the availability of language assistance, and whether that assistance is available at every stage of the election process. The report also allows observers to report how voters are treated inside and outside of the polling place, whether they are offered provisional ballots if their names are not on the voter registration list, and the availability of voting instructions and assistance using the voting machine or casting a paper ballot. Observers are provided with special forms to complete in the report if a voter is turned away without being allowed to vote, without receiving assistance, or any other action taken against the voter.

Reports are written in objective terms so the observer merely documents what he or she sees, without drawing any conclusions of whether those observations are discriminatory or violations of any constitutional or statutory protections.[140] In places where federal observer coverage has been conducted previously, the report is typically updated to reflect any changes in local election laws or expected Election Day activities from the previous coverage.

Federal observer training includes going over the observer's role, reviewing the report, role-playing to demonstrate proper and improper methods of observation, and driving through the jurisdiction to familiarize each observer team with their polling place location(s).[141] Observers are instructed to request a voter's permission before accompanying them into the voting booth, including the least intrusive way of making that request. Although many OPM employees have participated in observer coverage for several years, they are required to complete the daylong training like all of the other observers to ensure uniformity and consistency during the exercise.

Usually, two observers are paired together as a team. If the observers are in a jurisdiction to document language assistance compliance, efforts will be made to ensure that at least one of the observers is fluent and can read and write in the language they are there to observe. Bilingual observers are important for several reasons. They can observe and document the language abilities of poll workers, usually by engaging the poll workers in a short conversation when voters are not present. In addition, they are able to observe communications between poll workers and voters in the covered language.

Observers do not make any judgments on the quality of language assistance that is offered, but merely document their observations. Occasionally, OPM must hire contract employees if it does not have sufficient employees proficient in the covered languages for an observer exercise, particularly for American Indian languages. Observers are selected because of their communication skills, attention to detail, and writing abilities.

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[140] Yazzie Testimony, S. HRG. 109-669, at 495.

[141] *See* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 40.

A Department attorney and OPM captain establish a command center to receive reports from co-captains and observer teams as activities develop in the field.[142] Election coverage usually commences at least one hour before the polls open and ends after all of the polls close. Sometimes, federal observers will be present during the counting and final tabulation of ballots, including absentee and provisional ballots and any other ballots or voter challenges addressed during the canvassing process.

Immediately after coverage of the polling places and/or ballot-counting ends, observers work with Department attorneys and OPM managers to finalize their reports while the information is still fresh in their minds. In most cases, the original versions of the reports are maintained either by OPM or the Department of Justice. Copies of the reports are usually submitted to a supervising federal court, redacting any information necessary to protect voter identity. The Department of Justice provides local elections officials with a summary of information gathered by the observers.[143]

Training and reports highlight that observer coverage is not one-sided. Reports from observer coverage may vindicate a jurisdiction by documenting the absence of voting discrimination. For example, observer reports aided a federal court in determining that election irregularities in Humphreys County, Mississippi, were insufficient to warrant setting aside the election results.[144] The court described the important evidentiary role that the reports played in weighing contradictory evidence:

> It is impossible for the court to satisfactorily resolve many irreconcilable evidentiary disputes without resort to the federal observers' reports. These reports... were compiled by disinterested persons almost immediately following the election; they were submitted in the regular course of official duty and are regarded as highly credible.[145]

Contrary to what the plaintiffs alleged, federal observers documented that ballots "were rejected without overtones of racial discrimination" because unclear ballots for both white and black candidates were disregarded.[146] The court reasoned, "Any contrary conclusion, which contradicts the basic findings of the federal observers, is without credible support and must be rejected as inconsistent with the plainly established facts."[147] Therefore, the court held that "white officials, while rendering assistance at the polls, did not mislead, intimidate or coerce black assisted voters contrary to their

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[142] *See* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 22-23.

[143] *See* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 23.

[144] James v. Humphreys County Bd. of Election Comm'rs, 384 F. Supp. 114 (N.D. Miss. 1974).

[145] *Id.* at 125.

[146] *Id.* at 122.

[147] *Id.* at 125.

wishes."[148] On the other hand, federal observers also provide an important tool to identify and stop voting discrimination where it occurs.[149]

IV. Certification for Federal Observers up to the 2006 VRA Reauthorization.

The federal observer and examiner provisions originally were codified as Sections 3, 6-9, and 13 of the VRA. Under that statutory framework, a jurisdiction first had to be certified for federal examiners before federal observers could be dispatched to cover its elections. Certification occurred through two different mechanisms.

If a jurisdiction was covered under either Section 4(f)(4) or Section 5 of the Act, then certification occurred under Section 6. That Section provided that the Attorney General could certify the jurisdiction for federal examiners if he or she either had received twenty meritorious written complaints from residents in the jurisdiction alleging voting discrimination or if their appointment was necessary to enforce voting rights protected under the Fourteenth and Fifteenth Amendments to the U.S. Constitution.[150] Nearly all of the certifications were based upon the Attorney General's determination that certification was necessary to cure a constitutional violation.[151]

If a jurisdiction was not covered by Sections 4(f)(4) or 5, then certification occurred under Section 3(a). That Section permits a federal court to certify a jurisdiction for federal observers "for such period of time ... as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment."[152] Federal courts were authorized to certify a jurisdiction for coverage as part of any "interlocutory order"[153] or "as part of any final judgment," as long as "the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred" in the jurisdiction being covered.[154] Like the "pocket trigger" for Section 5 coverage,[155] this pocket trigger for observer coverage allows private parties, as well as

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[148] *Id.* at 129.

[149] *See infra* notes 94-117 and accompanying text.

[150] *See* 42 U.S.C. § 1973d, *repealed by* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

[151] *See About Federal Observers*, *supra* note 69.

[152] 52 U.S.C. § 10302(a).

[153] An interlocutory order encompasses any preliminary relief awarded before a full hearing on the merits.

[154] *See* 52 U.S.C. § 10302(a). Appointment of observers did not have to be authorized if the violations of the right to vote: "(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future." *Id.*

[155] The "pocket trigger" for Section 5 coverage allows a court to require that a jurisdiction not subject to Section 5 to submit future voting changes to the Attorney General for an "appropriate time" until violations of the fourteenth and fifteenth amendments have been eliminated. *See* 52 U.S.C. § 10302(c). More detailed discussion of this bail-in mechanism is provided in Part I.

the Attorney General, to request certification of a jurisdiction not otherwise subject to the VRA's special provisions (including the observer provisions).[156]

Certified jurisdictions could petition for termination of federal examiner coverage. Section 13 provided that a jurisdiction certified under Section 6 could petition the Attorney General to request the Director of the Census to take a census or survey of voter participation. The Attorney General could terminate the certification if: (1) the Director of the Census determined more than 50% of the nonwhite persons of voting age are registered to vote; (2) all persons listed by an examiner had been placed on the voter registration lists; and (3) there was no longer reasonable cause to believe that persons would be denied the right to vote on account of race or color or on the basis of their language.[157] In the alternative, a certified jurisdiction could file a declaratory judgment action seeking termination in the District Court of the District of Columbia.[158] A jurisdiction certified under Section 3(a) could petition the court that issued the order to terminate certification.[159]

Under the framework of the original 1965 Act, federal examiners were authorized to examine voter registration applicants concerning their qualifications for voting, to create lists of eligible voters to forward to the local registrar, and to issue voter registration certificates to eligible voters.[160] The provision originally was included in the 1965 Act because at that time, eligible minority voting age citizens in the South, primarily African-American citizens, were subjected to widespread discriminatory registration procedures. Those procedures included literacy tests, "moral character" requirements, denial of voter registration materials, limited registration hours, slow registration processing,[161] voter purges, threats, intimidation, violence, and social pressure against applicants including loss of employment, eviction, and even denial of food and water in a particularly egregious example from Mississippi.[162] Federal

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[156] *See* 52 U.S.C. § 10302(a); *see also* Blackmoon v. Charles Mix County, 505 F. Supp. 2d 585, 590 (D.S.D. 2007) ("Section 3 of the Voting Rights Act was amended in 1975 to allow private parties the same remedies under Section 3 that were previously afforded only to the Attorney General" and noting that the "legislative history defines the term 'aggrieved person' as 'any person injured by an act of discrimination.'").

[157] *See* 52 U.S.C. § 10309 (transferred from 42 U.S.C. § 1973k).

[158] *See id.*

[159] *See* 52 U.S.C. § 10302(a).

[160] *See* 42 U.S.C. § 1973e, *repealed by* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

[161] For example, in many southern counties, voter registration sites were only open for a few hours each month or deliberately slowed down the pace of registration of African-American voting age citizens. *See generally* H.R. Rep. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2447 (summarizing evidence of discrimination in voter registration in Alabama and Louisiana).

[162] *See* James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOW. L.J. 343 (2000); *see also* Slaughter-Harvey Testimony, S. HRG. 109-669, at 442-45 (summarizing the history of voting discrimination in Mississippi that led to the passage of the federal observer provisions).

examiners were authorized under the VRA to "examine applicants concerning their qualifications to vote" and to register them if they met the qualifications "prescribed by State law not inconsistent with the Constitution and the laws of the United States."[163]

The federal examiners provision proved to be extraordinarily successful in achieving its goal of allowing eligible minority citizens to register to vote.[164] Although federal examiners initially accounted for a large percentage of black voters registered in the South after passage of the VRA in 1965, they were "used sparingly in recent years" and no new voters had been added since 1983.[165] The additions of other federal statutes, including the National Voter Registration Act (NVRA),[166] the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA),[167] and the Help American Vote Act (HAVA),[168] likewise have contributed to the tremendous increase in voter registration. By 2006, the federal examiner provision was used only as a mechanism to certify a jurisdiction as eligible for federal observers, and not for its original purpose of registering voters. Therefore, the provision was no longer needed.

The Voting Rights Act Reauthorization Act of 2006 (VRARA)[169] made several changes to the existing framework of the federal examiner and observer provisions to update the certification process to contemporary needs and usage.[170] Section 3(c) of the VRARA repealed the federal examiner provisions in Sections 6, 7, and 9 in their entirety because those provisions had outlived their utility.[171] Section 3(d) of the VRARA substituted references to "observers" for references to "examiners" in the remaining Sections of the Act.[172] Section 3(a) of the VRARA used the two existing certification methods, with some slight modifications, but applied them to federal observers in Section 8 of the Act.[173] Section 3(d) of the VRARA updated the process for terminating

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[163] 42 U.S.C. §§ 1973e(a)-(b), *repealed by* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

[164] *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson ed., 1994) (summarizing the dramatic increases in minority voter registration under the provisions). For a good summary of the impact the federal examiner program had on black voter registration in the South, *see* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 21-22.

[165] S. REP. NO. 94-295 at 20, *reprinted in* 1975 U.S.C.C.A.N. 786. As of December 31, 2005, there were only 112,078 federally registered voters remaining in five southern states: Alabama (50,566), Georgia (2,253), Louisiana (12,289), Mississippi (42,388), and South Carolina (4,582).

[166] 52 U.S.C. §§ 20501 to 20511 (transferred from 42 U.S.C. §§ 1973gg to 1973gg-10).

[167] 52 U.S.C. §§ 20301 to 20311 (transferred from 42 U.S.C. §§ 1973ff to 1973ff-6).

[168] 52 U.S.C. §§ 20901 to 20906 (transferred from 42 U.S.C. §§ 15301 to 15545).

[169] Pub L. No. 109-246, 120 Stat. 577 (2006).

[170] For a discussion of the 2006 amendments to the VRA, *see generally*, *The Politics of Persuasion*, *supra* note 97.

[171] *See* VRARA § 3(c), *enacted as* Pub L. No. 109-246 § 3(c), 120 Stat. 580.

[172] *See* VRARA § 3(d), *enacted as* Pub L. No. 109-246 § 3(d), 120 Stat. 580.

[173] *See* VRARA § 3(a), *enacted as* Pub L. No. 109-246 § 3(a), 120 Stat. 578-79. For one of the certification methods, the VRARA substitutes a requirement of "written meritorious complaints" from "residents,

certifications by the Attorney General based solely upon evidence that "there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color."[174] A federal court continues to retain the authority to terminate certifications made under the pocket trigger for observer coverage.[175] The VRARA's elimination of the federal examiner provisions enhanced opportunities for observer coverage in jurisdictions by streamlining the certification process to focus on those places where it is needed. In the process, Congress made clear that the "traditional functions of the federal observers remain unchanged."[176]

V. Restoration of Robust Federal Observer Coverage under H.R. 4.

The Justice Department has noted that following *Shelby County*, "the department is still committed to using all of the tools at our disposal to enforce the federal voting rights laws – including working with Congress in ways that may increase our capacity." H.R. 4 would accomplish that goal in three ways.

First, H.R. 4 would renew and restore Section 5 of the VRA by enacting a new coverage formula. The effect of that new formula would make the covered states and political subdivisions subject to the preclearance requirements. Once subject to preclearance, a jurisdiction would be eligible for certification by the Attorney General under Section 8 of the VRA. This fix, by itself, would lead to the restoration of much of the federal observer coverage lost from *Shelby County* because the vast majority of that coverage was due to the Attorney General's certifications.[177]

Second, H.R. 4 would make a modest, but important, conforming amendment to observer coverage by federal courts under Section 3(a) of the Act. Currently, that section authorizes federal observer coverage "for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment..."[178] Section 2(a) of H.R. 4 would amend Section 3(a) by striking ''violations of the fourteenth or fifteenth amendment'' and inserting ''violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,''.

That change would make it easier for federal courts to authorize observers because it would relieve the Attorney General or private litigant from having to establish

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elected officials, or civic participation organizations" in place of the current requirement of 20 such complaints from "residents" of the jurisdiction. The other method of certification under Section 6 is identical, except for the substitution of "observer" for "examiner." *Cf. id.* with 42 U.S.C. § 1973d.

[174] *See* VRARA § 3(d), *enacted as* Pub L. No. 109-246 § 3(d), 120 Stat. 580.

[175] *See id.*

[176] H. REP. NO. 109-478, at 63.

[177] *See supra* notes 69-71 and accompanying text.

[178] 52 U.S.C. § 10302(a).

the likelihood of a constitutional violation, which implicates a higher burden of proof.[179] Under the modified language, a violation of the VRA or any federal law prohibiting voting discrimination on the basis of race, color or language minority status would suffice. This would eliminate the need for litigants to bring a separate constitutional claim. As long as a litigant establishes the requisite voting rights violation, including those under federal laws such as the VRA, they would be entitled to the appointment of federal observers unless the jurisdiction establishes that voting rights violations "(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."[180]

Third, Section 6 of H.R. 4 would amend Section 8 of the VRA[181] to expand the Attorney General's discretion to assign federal observers in jurisdictions covered by the Act's preclearance provisions. Currently, Section 8(a) of the VRA provides:

> Whenever –
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> (1) a court has authorized the appointment of observers under section 10302(a) of this title for a political subdivision; or
>
> (2) the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 10303(b) of this title, unless a declaratory judgment has been rendered under section 10303(a) of this title, that—
>
> (A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title are likely to occur; or
>
> (B) in the Attorney General's judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to the Attorney General to be reasonably attributable to violations of the 14th or 15th amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the

[179] *See supra* notes 13-66 and accompanying text (describing the burden for establishing a constitutional violation to secure bail-in under Section 3(a) of the VRA).

[180] 52 U.S.C. § 10302(a).

[181] 52 U.S.C. § 10305.

> 14th or 15th amendment), the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment;
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> the Director of the Office of Personnel Management shall assign as many observers for such subdivision as the Director may deem appropriate.[182]

H.R. 4 would leave Section 8(a)(1) intact. It would amend Section 8(a)(2)(B) to parallel the change in Section 3(a) of the Act to include not only circumstances necessary to enforce the guarantees of the 14th or 15th Amendment, but also "any provision of this Act or any other Federal law protecting the right of citizens of the United States to vote; or". Furthermore, it would add a new subparagraph 8(a)(3) to duplicate the process for certification by the Attorney General to also include instances in which "in the Attorney General's judgment, the assignment of federal observers is necessary to enforce the guarantees of section 203" of the VRA.

Taken together, H.R. 4 makes these much-needed changes to the VRA to restore and renew the federal observer protections, which were severely undermined by the *Shelby County* decision.

VI. Constitutionality of the Federal Observer Provisions.

In *City of Boerne v. Flores*, the United States Supreme Court set the parameters for congressional exercise of its remedial powers under the Fourteenth and Fifteenth Amendments.[183] According to the Court, "While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved" considered "in light of the evil presented."[184] *Boerne* cited the evidence of racial discrimination supporting the VRA as the type of record necessary to meet the congruence standard.[185]

Where that record is established, Congress has "wide latitude" in determining appropriate deterrent or remedial legislation,[186] "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.'"[187] This is particularly true for legislation such as the VRA in which "the possibility of overbreadth" is reduced by limiting its applications "to those cases in which constitutional violations were most likely" and

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[182] 52 U.S.C. § 10305(a).

[183] *See generally* 521 U.S. 507, 517-19 (1997) (noting that the "positive grant of legislative power" given to Congress under the Enforcement Clause of the Fourteenth Amendment was "remedial" in nature).

[184] *Id.* at 530.

[185] *See id.* at 530, 532-33.

[186] *Id.* at 519-20.

[187] *Id.* at 518 (citing several examples from the VRA that are constitutional).

terminating it when the danger subsided.[188] Following *Boerne*, the Court confirmed that congressional power is at its apex for legislation protecting fundamental rights afforded heightened constitutional scrutiny.[189]

The federal observer provisions fall squarely within Congress's powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments.[190] Federal courts have found the provisions are constitutional, even where they appear to conflict with state ballot secrecy laws. As explained above, there is substantial evidence demonstrating that effective enforcement of the VRA requires use of federal observers. Consequently, in the 2006 reauthorization, the federal observer provisions were extended without any objections from any members of Congress.

A. Preservation of ballot secrecy

In *South Carolina v. Katzenbach*, the United States Supreme Court declined to rule on the constitutionality of the federal observer provisions in Section 8 of the VRA, noting that judicial review would have to wait for subsequent litigation.[191] It did not take long for federal courts to accept *Katzenbach*'s invitation.

Shortly following that decision, three Alabama counties challenged Section 8 as an unconstitutional exercise of federal power.[192] The counties had prohibited federal observers from entering polling places because they claimed that the federal observer provisions were contrary to state law protecting the right of voters to cast a secret ballot.[193] The federal court rejected the counties' argument. The court explained:

> The purpose of federal observers, as stated by one of the sponsors of that portion of the act, is "to observe and report back any corrupt practices which prevent persons certified as eligible voters from casting a ballot and having their votes counted." In this context, the function of a federal observer appears to be a constitutional exercise of Congress's authority to enforce the Fifteenth Amendment

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[188] *Id.* at 533 (citing several examples from the VRA).

[189] *See generally* Tennessee v. Lane, 541 U.S. 509 (2004) (upholding congressional abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act because it protected the fundamental right of access to the courts); Nevada Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding the congressional abrogation of state sovereign immunity under the Family Medical Leave Act because the Act prevented sex discrimination).

[190] U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[191] 383 U.S. 301, 316 (1966).

[192] United States v. Executive Committee of Democratic Party of Greene County, 254 F. Supp. 543 (N.D. Ala. 1966). Marengo County, one of the three counties challenging Section 8, had a lengthy history of discriminating against Black voters, detailed in Clark v. Marengo County, 469 F. Supp. 1150, 1172-74 (S.D. Ala. 1979).

[193] *Greene County*, 254 F. Supp. at 544, 546.

> within the standards set by *State of South Carolina v. Katzenbach*.[194]

The court acknowledged that Alabama had an important state interest in preserving the secrecy of the ballot, but balanced that against the substantial federal interest in using observer coverage to ensure compliance with the Fifteenth Amendment. The court reasoned that the state's concern was adequately addressed if a voter consented to having a federal observer present while casting a ballot.[195] Therefore, the court concluded that the "Supremacy Clause of the United States Constitution requires that this procedure of Alabama law give way to enforcement of the Voting Rights Act of 1965."[196]

Other federal courts agreed with this reasoning. In *United States v. Louisiana*, the court enjoined the state and local defendants from interfering with federal observers in the performance of their duties under Sections 8 and 14 of the VRA.[197] The court explained, "Contrary to the understanding of some persons, the federal observers observe; they do not render assistance to illiterates."[198] Upon the consent of the voter, observers were even permitted to go into the voting booth with the voter to observe the process.[199] Ballot secrecy would be maintained by placing the observer "under the same duty to preserve the secrecy of the ballot" as election officials authorized to render assistance to illiterate voters.[200] Equally important, the *Louisiana* court held that federal courts have no authority to enjoin the use of federal observers in properly certified jurisdictions.[201] Instead, Section 8 expressly provides that "the appointment of observers is a matter of executive discretion and is not subject to judicial review."[202]

B. The continuing need for federal observers

Federal observer coverage is key to ensuring that jurisdictions comply with the VRA and the Fourteenth and Fifteenth Amendments.[203] It allows the Justice Department and federal courts to observe discrimination that might otherwise go undetected on Election Day. Federal observers are able to monitor every aspect of an election, from the

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[194] *Id.* at 546.

[195] *Id.* at 546-47.

[196] *Id.* at 547.

[197] 265 F. Supp. 703, 713 (E.D. La. 1966).

[198] *Id.* at 715.

[199] *Id.*

[200] *Id.*

[201] Sections 3 and 13 of the VRA, as amended by the VRARA, provide for judicial review of the process of certifying and terminating observer coverage.

[202] *United States v. Louisiana*, 265 F. Supp. at 715.

[203] For an extended discussion of some of the evidence establishing the constitutionality of the federal observer provisions under the VRA, both as initially enacted in 1965 and as reauthorized in 2006, *see generally* Weinberg Testimony, *House Observer Hearing*, *supra* note 98, at 27-37.

time the voter enters the polling place to the moment that he or she casts her ballot, and even thereafter when the ballots are tabulated. In the process, federal observers can document voter treatment by election officials and others both outside and inside polling places; the availability of voting materials and assistance (particularly for language minority, first time, elderly, illiterate, and handicapped voters); and the extent to which all voters have an equal opportunity to participate in the electoral process.

In 2005 and 2006, Congress developed a "substantial volume of evidence" of racial discrimination to demonstrate the continued need for federal observers.[204] That evidence, summarized in Section 2 of the VRARA, included "vestiges of discrimination" such as "second generation barriers" to minority voting.[205] It also encompassed "continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions" that made racial and language minorities "politically vulnerable."[206] The evidence showed that in jurisdictions covered by the temporary provisions, there was substantial non-compliance with Section 5, many had been denied bailout, minorities continued to file Section 2 cases, and the Department of Justice had to actively enforce the language assistance provisions.[207] Similarly, there had been widespread use of federal observers in certified jurisdictions to document and prevent voting discrimination.[208]

Despite substantial progress under the Act, forty years was insufficient "to eliminate the vestiges of discrimination following nearly 100 years of disregard" for the Constitution.[209] The findings from the 2006 reauthorization and the hearings in support of H.R. 4 demonstrate the continuing need for federal observers and present a compelling basis for the amended provisions under the *Boerne* line of cases.[210]

VII. The Importance of Keeping Federal Observers Neutral and Impartial.

Recently, there have been reports about increasing efforts to expand the access that partisan poll watchers have to the voting process.[211] It is well established that there is no First Amendment right for candidates, campaigns or political parties to have partisan poll watchers inside the polling places absent authorization.[212] Far too often,

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[204] H. REP. No. 109-478, at 64.

[205] VRARA § 2(b)(2), *enacted as* Pub L. No. 109-246 § 2(b)(2), 120 Stat. 577.

[206] VRARA § 2(b)(3), *enacted as* Pub L. No. 109-246 § 2(b)(3), 120 Stat. 577.

[207] VRARA § 2(b)(4), *enacted as* Pub L. No. 109-246 § 2(b)(4), 120 Stat. 577.

[208] VRARA § 2(b)(5), *enacted as* Pub L. No. 109-246 § 2(b)(5), 120 Stat. 577.

[209] VRARA § 2(b)(7), *enacted as* Pub L. No. 109-246 § 2(b)(7), 120 Stat. 577.

[210] *See* H. REP. No. 109-478, at 57-58.

[211] *See* Nick Corasaniti, *G.O.P. Seeks to Empower Poll Watchers, Raising Intimidation Worries*, N.Y. TIMES (May 1, 2021) <https://www.nytimes.com/2021/05/01/us/politics/republican-pollwatchers.html>.

[212] *See generally* Burson v. Freeman, 504 U.S. 191, 214, 216 (1992) (Scalia, J., concurring) (finding that polling locations are not public fora for speech outside of casting a ballot, observing that statutes restricting

when state and local governments have given their approval, poll watchers are "used to intimidate voters and harass election workers" in a manner that can target "communities of color and stoke fears that have the overall effect of voter suppression."[213]

Nevertheless, during the 2006 reauthorization debate on the VRA, there was at least one modest effort to amend the Act to provide for partisan poll watchers in place of or in addition federal observers.[214] It would have injected federal observers squarely into partisan pitched battles for the first time. Contrary to such an ill-advised proposal, partisan poll watchers are not interchangeable with federal observers authorized under the VRA. Therefore any proposals that may be made to amend H.R. 4 to provide for partisan poll watchers should be rejected. The reason is best explained through the many differences between federal observers and partisan poll watchers.

First, partisan poll watchers are precisely that: partisan. They work for a particular political party, candidate, or organization with a vested interest in the outcome of the election. The manner in which they approach their activities inside and outside polling places is influenced by the partisan objectives that they bring to the table. On the other hand, federal observers are neutral outsiders who have no stake in the election.[215] Except in extremely rare cases, a federal observer is not even deployed to observe elections in the jurisdiction where they reside.[216] Every effort is made to ensure that federal observers maintain their objectivity and are not associated with a particular candidate or election outcome. Instead, federal observers work as an extension of the United States Department of Justice or federal courts supervising implementation and compliance with the VRA.[217]

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campaigning during polling hours have a long history and "the streets and sidewalks around polling places have traditionally not been devoted to assembly and debate"); *see id.* at 220 n.4 (Stevens, J., dissenting) ("[T]here is no disagreement that the restrictions on campaigning within the polling place are constitutional; the issue is not whether the State may limit access to the 'area around the voter' but whether the State may limit speech in the area around the polling place."). Therefore, federal courts applying *Burson* have concluded "the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter's communication of his own elective choice..." *E.g.*, Marlin v. District of Columbia Bd. of Elections and Ethics, 236 F.3d 716, 719 (D.C. Cir. 2001).

[213] Corasaniti, *supra* note 211.

[214] *See* Testimony of Mark F. (Thor) Hearne, II, Hearing Before the Committee on the Judiciary of the United States Senate, *The Continuing Need for Federal Examiners and Observers to Ensure Election Integrity*, S. HRG. 109-669, at 417, 431 (July 10, 2006).

[215] *See supra* notes 88-91 and accompanying text.

[216] In some cases involving language minority voters for which there may be a particularly small pool of available federal observers, an exception might be made. However, these exceptions are extremely rare. For example, for Navajo language coverage in Arizona, New Mexico, and Utah, Navajo federal observers are deployed to communities other than those where they reside despite the more limited pool of persons available to serve as observers.

[217] *See supra* notes 83-86 and accompanying text.

Second, partisan poll watchers not only are trained to inject themselves into the election process, they may be expected and encouraged to do so. Many state laws specifically provide for partisan poll watchers to challenge voters about their qualifications to vote.[218] Partisan poll watchers often take advantage of those laws by aggressively challenging any voter who is not on a pre-printed list of registered voters supporting their party, candidate, or issue. Partisan poll watchers regularly engage poll workers with comments or criticisms about the voters they are allowing to cast ballots and how the poll workers are conducting the election. In sharp contrast, federal observers are specifically trained to refrain from participating in the election process, including providing any feedback to poll workers.[219]

Third, partisan poll watchers routinely make value judgments such as whether, in their opinion, particular voters should be allowed to cast a ballot or whether poll workers are complying with federal, state, or local law. Conversely, federal observers are trained to not make any value judgments at all.[220] Federal observers dispassionately document their observations without rendering any conclusions about whether those observations demonstrate compliance with the law. Federal observers scrupulously record their observations in comprehensive reports that allow them to recreate what transpired in the polling place or ballot counting location.

Therefore, any proposal to make federal observers partisan is severely flawed, would undermine Justice Department enforcement, and might facilitate voter intimidation and discrimination. For example, it has been argued by some that observers "should be trained in the requirements of federal election law and the relevant state's election law and procedure."[221] On the surface, that suggestion seems alluring. However, it overlooks the fact that federal observers, unlike partisan watchers, are not there to make value judgments. Instead, they are simply there to observe "whether persons who are entitled to vote are being permitted to vote" and "whether votes cast by persons entitled to vote are being properly tabulated."[222] It is not the role of federal observers to evaluate whether election officials are complying with the law.

Another proposal that observers "should be free to communicate with the press and others outside of the election facility" is even more problematic.[223] Under the VRA, federal observers are present at polling sites and ballot tabulation centers to perform a law enforcement function. They are extensions of the United States Attorney General or the

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[218] Common bases for challenging voters include failure to register to vote, failing to update voter registration records to reflect changes of address, no longer residing in the jurisdiction, age, citizenship, status as a convicted felon whose civil rights have not been restored, the voter is deceased, or the voter has already cast an absentee ballot or otherwise voted previously.

[219] *See supra* notes 89-91 and accompanying text.

[220] *See supra* notes 128-32 and accompanying text.

[221] Hearne Testimony, S. HRG. 109-669, at 431.

[222] *See* 52 U.S.C. § 10305.

[223] Hearne Testimony, S. HRG. 109-669, at 431.

federal courts in places that are certified under Section 3(a) of the VRA.[224] Authorizing federal observers to communicate with persons outside of the Justice Department and the Office of Personnel Management would undermine the evidence they are gathering to measure compliance with the VRA and destroy the "highly credible" reports they produce.[225] It would open up the objectivity of their observations to attack from statements taken out of context, or even worse, mischaracterized or misquoted by the press. Federal observers would become distracted by outside influences instead of focusing on documenting what they are observing. It also would make it more likely that voter confidentiality and ballot secrecy would be compromised and in the process render the federal observer program unconstitutional.[226] In short, all of the qualities that make federal observer reports unassailable and the role of the observer constitutional would be eliminated.

For similar reasons, a suggestion that federal observers "should have the means to provide a timely objection to election misconduct by communication with senior election officials or law enforcement authorities" also is erroneous.[227] Federal observers do not work for local election officials or state officials. They work for the Office of Personnel Management as an extension of the United States Attorney General.[228] Vesting discretion in federal observers to report their observations to state or local officials ignores their unique role and would encourage them to engage in value judgments that they are supposed to avoid.[229] Moreover, such an action could impair their ability to observe and receive candid information from voters because they could be perceived as merely an extension of election officials who may be engaging in discriminatory conduct. It also is completely unnecessary. Justice Department attorneys already may communicate observations to local election officials in a real-time manner, particularly if there is a possibility of vote denial. By doing so, it keeps federal observers free to perform their sole function: to observe.

Some of the strongest evidence against any proposal to federalize partisan poll watchers comes from how poll watchers have functioned in practice. For example, in 2006, the Department of Justice successfully sued Long County, Georgia for permitting partisan poll watchers to discriminatorily challenge only Latino voters in an effort to discourage them from voting.[230] Law enforcement officials and others serving as partisan

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[224] *See* 52 U.S.C. § 10302(a); 52 U.S.C. § 10305.

[225] *Humphreys County*, 384 F. Supp. at 125.

[226] *See Greene County*, 254 F. Supp. at 546-47; *United States v. Louisiana*, 265 F. Supp. at 715. In both cases, federal courts specifically upheld the federal observer provisions because of the substantial steps that had been taken to preserve the First Amendment right of voters to cast a secret ballot. *See supra* notes 191-202 and accompanying text.

[227] Hearne Testimony, S. HRG. 109-669, at 431.

[228] *See* 52 U.S.C. § 10305.

[229] *See supra* notes 128-32 and accompanying text.

[230] *See* United States v. Long County, Georgia, Case No. CV206-040 (S.D. Ga. Feb. 8, 2006).

challengers in Passaic County, New Jersey engaged in similar discriminatory conduct.[231] In elections Sunflower, Mississippi, white poll watchers "were encouraged to aggressively challenge Black voters," contributing to "lackluster voter turnout."[232]

In November 1999, Arabic U.S. citizens in Hamtramck, Michigan were targeted for disenfranchisement by partisan workers after an Arab-American announced his candidacy for mayor.[233] A group of non-Arab voters formed an organization called "Citizens for Better Hamtramck" to register individuals to be present in polling places to challenge the citizenship of voters who "looked" Arab, had dark skin such as Bengali voters, or who had distinctly Arab or Muslim names.[234] The intimidating and harassing actions of these partisan workers resulted in substantially depressed voter participation by members of the Arab and Bengali community, leading to lengthy federal oversight assisted by non-partisan federal observers.[235]

In summary, it is commonplace for partisan poll watchers to threaten, intimidate, and to otherwise discourage minority voters from registering or casting a ballot. Regardless of their party, the presence of partisan poll watchers is far more likely to lead to VRA violations than to prevent them. For that reason, Congress should ensure the continuing impartiality of federal observers to be free of the value judgments and bias implicit in any proposal to make federal observers partisan. As the former director of OPM testified, the federal observer program needs to be kept "free from political interference."[236] Federalizing partisan poll watching would turn the VRA on its head and promote, rather than prevent, voting discrimination.

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[231] *See* Robert Ratish & Josh Gohlke, *Violence Mars Election*, NORTH JERSEY HERALD & NEWS, Nov. 3, 1999, at A8; Maia Davis, *FBI Probing Election Day Attacks, Reviewing Incidents for Civil Rights Violations*, BERGEN RECORD, Feb. 5, 2000.

[232] Slaughter-Harvey Testimony, S. HRG. 109-669, at 394-95.

[233] *See* http://www.usdoj.gov/opa/pr/2000/August/456cr.htm.

[234] *See id.* In many cases, Arab or Bengali voters were pulled out of voting lines before even submitting their names or any other identifying information. *See id.* Even when Arab or Bengali voters were able to produce United States passports as proof of citizenship, they were asked to take citizenship oaths; no non-Arab voters were challenged or asked to take an oath. *See id.*

[235] In August 2000, Hamtramck entered into a consent decree with the Justice Department that designated the City for federal observer coverage to monitor the City's efforts to remedy the discrimination. *See id.* Federal observers were sent to Hamtramck eight times by the end of 2003 to monitor the City's progress under the court order. The State of Michigan also "issued a memorandum to all election clerks in the state instructing them that discriminatory challenges should not be allowed to proceed, and reminding clerks that they have the power to expel challengers who abuse the challenge process." *Id.* In 2005, the City settled a discrimination suit brought by fifteen of the Arab-American voters by paying them $150,000 in damages. *See* http://hamtramckstar.com/index.php/2005/05/11/hamtramck_settles_voter_discrimination_suit.

[236] James Testimony, S. HRG. 109-669, at 436.

VIII. Conclusion.

NARF and the NAVRC look forward to working with the House Judiciary Committee and the Subcommittee on the Constitution, Civil Rights and Civil Liberties to overcome the barriers to voting rights in *Shelby County*'s wake. There can be no greater tribute to the legacy of Congressman Lewis than passage of H.R. to renew and restore the vitality of the Voting Rights Act, including the bail-in and federal observer provisions.

Thank you very much for your attention and your commitment to making voting fully accessible for all Americans. I welcome any questions you may have.

Mr. COHEN. Thank you. Thank you, Dr. Tucker.

I will now go on to our witness questioning phase, and I will proceed with the first questions for 5 minutes.

First, Dr. Tucker, you mentioned how there was no observers during this past election and some changes. Was the Voting Rights section of the Justice Department absent without a cause during the Trump Administration?

Mr. TUCKER. I think it is fair to say that those of us who were on the outside looking in are disappointed in terms of what the enforcement activities were under the Trump Administration. One of the things that I know, that Ms. Lakin alluded to and it is certainly something, an issue that we have also seen with the Native American Rights Fund, is that the heft of that burden has fallen on private attorneys general, which are the civil rights organizations and private individuals and groups that have had to bring the litigation on their own. It is very expensive.

Just by way of example, in Alaska, it costs us $2 million in approximately 18 months to be able to stop some language assistance—the absence of language assistance through a section 203 case. It is very, very time-consuming and expensive and unfortunately DOJ—

Mr. COHEN. I am frozen. I am going to go on with my questioning if that is all right because we are frozen.

Ms. Lakin, let me ask you this, as the lead attorney with the ACLU, was there any particular reason why there were so few actions under section 2 in the years that Ms. Riordan pointed out? Was it because everything had gotten better and all these States stopped doing their voodoo that they have been doing for so many years, or was it absence of actions on the government?

Ms. LAKIN. Thank you for your question. As Dr. Tucker has pointed out, the civil rights organizations that have been working to protect voting rights have been incredibly engaged in voting rights litigation under section 2, under the Constitution, under other Federal laws, like the NVRA as well, so to the extent that the Justice Department itself was not bringing actions, I would say that that doesn't characterize the State of litigation in the post-Shelby world.

I think in previous testimony, Dale Ho of the ACLU has testified to the number of cases that the ACLU itself has brought under section 2 alone, and then that is certainly quite a number in the wake.

As Dr. Tucker mentioned, these cases are incredibly costly. They are complex. They are time-consuming. We have shouldered our fair share, along with other civil rights organizations, and really attempted to keep voting rights protected during this period of time, but it is simply insufficient to protect voters from losing the right to vote or being forced to vote under discriminatory regimes. There is no way to compensate voters after the fact.

Mr. COHEN. Ms. Lakin, you brought up in your testimony *Purcell* v. *Gonzalez*, the case that said, go real easy on injunctive relief, probably well intentioned, I presume it was, just as *Shelby* v. *Holder* was probably well intentioned but a disaster. Both were disasters for voting rights and the opportunity for people to vote.

What should Congress do to address the problems that the judiciary's application of the Purcell principle has created?

Ms. LAKIN. Well, there are a number of things, like the restoration or reinvigoration of the preclearance regime would certainly help in many ways because, as I have testified and many others have testified, the post-enactment relief is not sufficient, and Purcell is just one example of how that problem has gotten even worse.

The preliminary injunction standard that is being applied, this likelihood of success on the merits, which plaintiffs have to show in order to obtain preliminary relief, courts have become even more reluctant, I would say, without a very substantial showing of likelihood of success on the merits, in part because of the growth and explosion of the use of this Purcell principle as a way to almost abstain from weighing in on the merits of the case.

So, you have cases where courts have found a likely violation, a likely constitutional violation or discrimination, and yet, because it is close to the election, simply throw up their hands and say, "I am just going to let this lie for now." That is certainly a problem, and Congress has many different ways to get involved.

One would be, of course, lowering the standard for winning preliminary injunction relief. The second would also be, of course, restoring the preclearance regime and perhaps then other means for asking for certain fixes to the Purcell doctrine itself.

Mr. COHEN. Like it.

Ms. Butler, Georgia, most free, fair election in history, and yet the legislature came back and took Mr. Raffensperger's powers away from him after his heroic actions. What were some of the actions in Senate Bill 202 which will hurt minority voting? Briefly explain those barriers to the ballot box that have been brought about by that law.

Ms. BUTLER. Well, first, it reduces the time to request absentee ballots from 90 days–180 days, down to 78 days. You now must provide an ID, a Georgia driver's license, or Georgia State-issued ID, and if you don't have one of those IDs, you have to provide copies.

We have a lot of rural people, a lot of elderly people that don't have access to copiers, that will now have to provide copying services to get their IDs if they want to vote by absentee or vote by mail.

The early voting period between the runoff, they reduced the time down to 4 weeks. That will not give you a time for a lot of early voting during that runoff period at all.

So, those are some of the kinds of barriers that we have, that voters of color will be subjected to.

There is broadband. A lot of people in rural areas don't have broadband access. So, to get these documents to the boards of election, they will have to do it through other means.

So, it is really important that we put preclearance back into process for these laws because they are just putting barriers there. There was nothing about the election process—we had three—two audits and a recount. So, it really was not fraud. So, it was a fair election, but they did implement these laws as well.

Mr. COHEN. Thank you very much, Ms. Butler. I appreciate your response.

Next, I recognize Mr. Johnson from Louisiana for 5 minutes.

Mr. JOHNSON of Louisiana. I thank you for that, Mr. Chair.

This is an exercise in advancing a political narrative. I mentioned at the outset here this is our third hearing on the Voting Rights Act in 3 months because apparently the majority party thinks that this is politically advantageous. I love what at least one of the witnesses has said here today, bringing common sense into the equation.

I want to ask Ms. Riordan—am I pronouncing that right? What is the right pronunciation?

Ms. RIORDAN. It is Riordan.

Mr. JOHNSON of Louisiana. Thank you. One recent analyst said about H.R. 4—I am going to quote them, they said that it would update the coverage formula by making it, quote, "more onerous and almost impossible for States to defend against lawsuits against them."

Likewise, opponents of the legislation believe the real aim of the Act is to reverse the decision in Shelby County, which has been illustrated here today, and allow political allies at the DOJ and left-wing organizations to control State election rules in violation of the principles of Federalism.

I want to thank you for expertise today, your clarity on this subject this morning. A quarter century at the DOJ in this arena is quite impressive. You pointed out that H.R. 4 is hugely problematic.

You testified the Voting Rights Act is still working today without the preclearance requirement, which is a dated requirement, as you pointed out. It still clearly prohibits discrimination, but you noted—and I am very interested this—the DOJ has only brought five section 2 cases since Shelby County was handed down 8 years ago? Are they ignoring rampant acts of discrimination out there? What do you think?

Ms. RIORDAN. I think that the rampant acts of discrimination do not exist. I can tell you that there was a comment about whether or not there were cases brought during the Trump Administration. During my time period at the front office as a senior counsel, I am unaware of any request by the Voting section to bring a section 2 action that was denied by leadership.

Mr. JOHNSON of Louisiana. If I am correct, if my math is right, 8 years ago, Shelby County was handed down. Wasn't Eric Holder in charge of the DOJ during part of that time?

Ms. RIORDAN. He was.

Mr. JOHNSON of Louisiana. He didn't bring this army of prosecutors at DOJ out to go after this rampant discrimination, did he? I don't remember that.

Ms. RIORDAN. No. As a matter of fact, the amount of people that served in the Voting section has decreased since that time.

Mr. JOHNSON of Louisiana. Since the 2020 election several States have enacted or proposed election law changes, as we have noted in March. Georgia's Governor, Brian Kemp, signed Senate Bill 202 into law. Some of the other witnesses today are just breathless in their opposition to this.

My goodness, Ms. Butler just said requiring, for example, a valid ID to vote is an unreasonable, oppressive requirement. Is that your view on voter ID as well?

Ms. RIORDAN. No, it is not. First, the laws in Georgia already require an ID for in-person voting. Actually, you are treating absentee voters differently than you are treating in-person voters. So, it has already been approved by the courts. I would think that the fact that they are treating those differently probably could be an equal protection claim that someone could bring, since why should we be treating absentee voters differently than in-person voters?

Mr. JOHNSON of Louisiana. Very well said. Last week, of course, the DOJ famously in a press conference filed a lawsuit against Georgia over its voting law. I just want to know if the Department of Justice has issues with that law in Georgia, shouldn't it also file lawsuits against Colorado and New York and other liberal-run States over their election laws, which are more restrictive than what Georgia just passed?

Ms. RIORDAN. I would agree with that. I would also State that the majority of the provisions that they are fighting and filed suit over, are provisions that were temporary to begin with due to the COVID–19 restrictions.

So, basically what they are saying is that we put forward these provisions to make it a little bit easier for people to vote due to COVID, and now we want to keep them permanent. So, they were never meant to be permanent; they were always temporary.

Mr. JOHNSON of Louisiana. Exactly right. The chaos that ensued as a result of the 2020 election was occasioned because of all those irregularities, and it should be incumbent upon us to fix the irregularities, so we don't have that chaos going forward.

Despite the rhetoric you are going to hear from our colleagues across the aisle all day today, isn't it true that States are still best situated to enact changes in election law?

Ms. RIORDAN. I think so. All my time in the Voting Section, reviewing changes under section 5 preclearance, the majority of those changes are really very, very small, very minute. In the time period that I was there, from 2000 until Shelby County, we actually reviewed 222,000 submissions, and there were 81 objections during that time period.

That is less than a third of 1 percent of the submissions that were actually issued an objection.

Some of the things that I included in my written testimony, some of those objections that really were not based in fact, but based on politics were included in those 81 objections.

Mr. JOHNSON of Louisiana. I am out of time, but I think that last phrase summarizes it. Thank you for being here today and being clear and being here in person.

I yield back.

Mr. JOHNSON of Louisiana. Mr. Chair, you are muted.

Mr. COHEN. Thank you. I wish the staff wouldn't mute me every time. I don't need to be muted. Please don't do that.

Mr. Nadler, you are recognized.

Chair NADLER. Thank you, Mr. Chair.

Mr. Tucker, as I noted in my opening statement, the number of Federal observers' appointment has dropped precipitously since Shelby County. To compensate for the significant reduction, DOJ has appointed monitors instead. These monitors appear to be a

poor substitute for observers because they lack the same legal authority to demand access to the voting process.

What can Congress do to strengthen both the authority of the Federal courts and the Attorney General to appoint observers under sections 3(a) and 8 of the Voting Rights Act?

Mr. TUCKER. Thank you so much for that question, Mr. Chair.

As I mentioned in my written testimony, the fix for Federal observers is actually very simple. There are really two that we are talking about here. One is that we, of course, need to restore coverage under section 5 of the Voting Rights Act. That would allow the Attorney General to certify, where it is appropriate, Federal observers in those jurisdictions that are covered for section 5 preclearance.

The other is a very moderate fix in section 3(a) and in section 8 of the Act that would simply ensure that the Attorney General and Federal courts have the ability to appoint Federal observers in places where there is a violation of any Federal voting rights law that implicates denial, both denial for people of color or those who are of language minority groups.

So, it is a very, very simple fix. It is nothing radical. It is very consistent with what we have seen, and I would certainly encourage the Committee to include that in the final version of H.R. 4.

Chair NADLER. Thank you.

Ms. Butler, one particularly unsettling aspect of the stricter voting laws to emerge in the States since the last election is that not only do they target or disproportionately impact minority voters, something we have unfortunately seen before, which remains a persistent problem since Shelby County, they also target election officials and administrators. Many of these election officials and administrators risked their lives to make the 2020 election a success during the COVID–19 pandemic, and then they stood up for democracy against the big lie of widespread voting fraud being pushed by the former President and his allies.

How does SB 202 in Georgia target election officials? Is it your sense that certain election officials in certain counties are being singled out?

Ms. BUTLER. Thank you, Mr. Nadler. Yes, I do.

SB 202 has a provision where the legislature can take over any county boards of election, can remove any supervisor. Also, it goes hand in hand with local legislation where they could actually reconstitute the boards of elections that actually implement the laws on the local level. That has happened already in three counties, and we know there may be six other counties. We are investigating that.

It really takes the responsibility, takes total control. They removed the Secretary of State being the Chair of the State election board, again, not accountable to the voters.

So, it takes over total control of all of the local boards of elections, should they so desire. So, it is a means to not have a voice for voters, to have their voice, and ensure that if they are not happy with the outcome of the election, they can make sure they have the right outcome.

Chair NADLER. Thank you.

Mr. Tucker, one argument that opponents of revitalizing section 5 make, is that preclearance is still available as a remedy under section 3(c) of the Voting Rights Act in cases where a court finds a violation of the 14th or 15th Amendment. Did Congress ever intend, or section 3(c) designed to Act as a substitute for section 5 preclearance?

Mr. TUCKER. Thank you for that question, Mr. Chair.

No, section 3(c) was meant to supplement, not to replace the section 4 coverage formula. As I documented in my written testimony, recently, the *Perez* v. *Abbott* decision shows how reluctant courts can be, even where the record is quite strong, and the court has actually found discriminatory purpose to actually apply that remedy. So, no, it is meant to be complementary, not to be a replacement.

Chair NADLER. What is the importance of that distinction?

Mr. TUCKER. The distinction is that it basically places section 3(c) on the footing that Congress intended when it passed the Act in 1965. It is meant to be an additional measure. It is called the pocket trigger. The reason why it is called the pocket trigger, as I noted in my testimony, Congress intended that would apply to pockets of discrimination that were not covered by the geographic coverage formula in section 4.

Chair NADLER. Thank you. I yield back.

Mr. COHEN. Thank you, Mr. Nadler.

I am going to yield the Chair temporarily to Ms. Ross, the Vice-Chair.

Mr. RASKIN. All right. I am unmuted.

Ms. ROSS. [Presiding.] All right. Thank you, Mr. Chair, and I will now recognize Mr. McClintock for 5 minutes.

Mr. MCCLINTOCK. Thank you, Madam Chair.

The very nature of an election is that somebody wins, and somebody loses. Democracy depends on the losing side accepting the legitimacy of the election. That is imperative, not only that an election be free from fraud, but it be free from the appearance of fraud. We saw in this last election what happens when that appearance is abandoned, and it has been abandoned to a system where it is very difficult to purge voter rolls of people who have died or moved. We then send out ballots to all those names on the rolls, and then we follow up those ballots with partisan workers to collect them.

There was a single woman in my office who received no fewer than five ballots at her apartment in Washington, DC, and I got similar complaints from constituents in my district 3,000 miles away in California.

There is a reason why drug tests can't be mailed in, and for that same reason, we had a system that required people to vote in person, unless they were physically incapacitated from getting to the polls, and that system worked well. The process began with registration. You appeared before a deputy registrar of voters. You swore to your identity and your eligibility. It wasn't hard to find them. You can find them in every neighborhood fire station or library. Registration closed 30 days before the election, so candidates knew who they were communicating with and all parties could then canvas the precinct and challenge names that had moved or died.

Then on Election Day—and that is an important term—we called it Election Day, because it was the day after the debate was over. We all went to our neighborhood polling place which was usually at a neighborhood elementary school or a neighbor's garage. We looked our neighbors on the polling board in the eye as they handed us our ballot. We took that ballot into a curtained booth where nobody, not our spouse, kids, friends, or nobody could pressure us, and we cast our votes according to our own consciences.

We then handed that ballot back to our neighbor who put it in a locked box. Only those who were physically handicapped and could not get to the polls were afforded an absentee ballot, and at 8 p.m., we knew exactly how many votes had been cast, and usually by 10:00 p.m. we knew the results.

These laws applied to all voters of all races, of all backgrounds, and they assured the integrity of the vote and the public's confidence in that vote. Look at how the left has changed all this. Same-day or automatic registration means there is no opportunity to identify fraudulent registrations. Voters can register to vote and then cast votes without ever coming into contact with another human being. Votes are cast long before the debate is concluded. Ballots are mailed to people who died or moved. Votes are cast under the influence of other family Members or friends. Ballot harvesters can collect those ballots, meaning there is no chain of custody from the time that ballot is mailed until the time it is counted. Ballots arrive days after the election, and often, we don't know the results of the election until days, and sometimes weeks later.

Now, Ms. Riordan, we are told that these changes are necessary because some people are incapable of following the simple process that ensure the integrity of the vote. I find that enormously condescending and downright racist. What is your view?

Ms. RIORDAN. I have always found that the statement that any particular minority group is less likely, or unable to follow the statute's provisions in each State to be very racist.

Mr. MCCLINTOCK. How have these changes, recent changes in our election law, affected public confidence in our elections?

Ms. RIORDAN. As someone who looked at the 2020 election, based upon the number of changes in States that really basically did away with many of the election integrity provisions, based upon the allegation that it was necessary for COVID, what you saw across the Nation is people recognizing that the normal types of statutes that were in place requiring signature matching or identification or having your ballot mailed in by a particular day, I think people looked at that and saw that it was more likely that fraud would occur under those circumstances.

Mr. MCCLINTOCK. Doesn't every fraudulent vote invalidate a legitimate vote?

Ms. RIORDAN. Yes, sir.

Mr. MCCLINTOCK. Isn't that the ultimate voter suppression?

Ms. RIORDAN. I would agree with that statement.

Mr. MCCLINTOCK. Thank you. I yield back.

Ms. ROSS. Mr. Raskin, you are recognized for 5 minutes.

You are muted.

Mr. RASKIN. Ms. Butler, I would like to come to you, if I might. I heard one of our colleagues say somebody wins and somebody

loses in every election. I wish they would tell that to Donald Trump. America would be a lot better off if he accepted that. We seem to have two rival theories about what is going on in Georgia today. The way I see it is every time that there has been an advance in people's voting rights in history, there has been a backlash against it.

So, after the Civil War fought to free hundreds of thousands of enslaved people, and to give them the right to vote and to bring them up in the reconstruction process, there was a reaction against that. We saw all kinds of voting restrictions. Some of it was just violence and terror, but some of it was grandfather clauses, literacy tests, poll taxes, character tests, and so on. These laws were instituted to secure the purity of the ballot, which essentially meant keeping Black people from voting. We have seen these constant efforts to undermine voting rights of African Americans in our history.

It seems pretty clear to me that what is going on in Georgia is all about the fact that Georgia just elected its first African-American Senator in history, Senator Warnock, that Joe Biden was first Democratic candidate to win there in decades.

That is certainly what is going on if you ask anybody on the ground in Georgia. Yet, there is this rival theory out there which is, it is really about fraud, corruption, chaos, back to that old cover story for racism. I am wondering if you can help us sort this out, because I don't live in Georgia, and I haven't been there in a long time, but I do know there were 62 lawsuits brought by Donald Trump and his supporters, alleging corruption, fraud, and chaos in the 2020 election, and they were all rejected in the lowest courts in the land, circuit courts and district courts in the State level, and the county courts, all the way up to the United States Supreme Court. They all rejected exactly the kind of stuff we are hearing today about how there is some impurity of the ballot, some assault on the integrity of the ballot. Then I hear people actually accusing, if I am understanding them right, the civil rights forces of racism, because they are opposing efforts to restrict the ballot.

So, would you help us sort this out? Is my sense right that this is just the conventional racist backlash against Black people voting? Or is there some fraud out there no court in the land could find that has been completely rejected? I think that even Attorney General Barr described Donald Trump's claims of voter fraud as BS, and I am being polite there. I am not spelling it out. So, let me turn it over to you, Ms. Butler.

Ms. BUTLER. Thank you. No, there hasn't been any fraud in Georgia. We had three hand counts of the ballots in Georgia. That means all 159 counties did an audit, and they did two recounts, hand recounts, not using equipment, but they did hand counting. We had the GBI and the FBI look at our signature match process. It was found competent. There was nothing that they found wrong with it. There was no fraud. We had an exceeding number of people turn out to vote, because in this pandemic with COVID, they were able to exercise that right to vote, and they did that. Because of that, we now have these egregious laws that will take over local boards of election, take total control.

When I am on the board of election, I was on a board of election, we were responsible for counting the absentee ballots. We were responsible for making sure that the ballots were rejected or accepted. We were responsible for accepting provisional ballots, making sure that proper documentation was received. So, with the entire process to the poll workers being trained, we were responsible.

Mr. RASKIN. Let me interrupt you for one second.

Ms. BUTLER. The election—that was—

Mr. RASKIN. I want to get one other point in here. I know that during the election, or right after it was over, former President Trump called the then Secretary of State Raffensperger, who is a Republican, and said, "Just find me 11,781 votes." He was trying to encourage him to Committee election fraud, voter fraud. Is there anything in legislation that the Republicans are passing that would stop Donald Trump from trying to implant false votes in Georgia, responded to that as all?

Ms. ROSS. The witness will answer very briefly because the gentleman's time has expired.

Ms. BUTLER. No, the law does not address that issue at all. It stops legitimate people from exercising their right to vote.

Mr. RASKIN. Thank you very much. I yield back, Madam Chair.

Ms. ROSS. Mr. Roy is recognized for 5 minutes.

Mr. ROY. I thank the gentlelady.

Ms. Riordan, when the United States Supreme Court struck down section 5, they did so, best of my understanding and recollection, in significant part because it was based on, at that time, 40-year-old data and that it was based on information from 1968, 1972, and it was particularly dated, and in particular, that the record that was put into the record in 2006, when VRA was reauthorized at the time, was replete with examples where there were cover jurisdictions that had certain issues that were being raised, and then noncovered jurisdictions, but there was no real correlation and that that was part of the problem. Is that roughly correct from your recollection of the case?

Ms. RIORDAN. Yes, it is definitely that there seemed to be no legitimate basis to have certain States covered at that particular time, and also, the Supreme Court was very clear, and what they said was it was always supposed to be a temporary provision, because they understood in the 1960s that it was necessary to have section 5, but that in the 2000s, it is no longer necessary.

Mr. ROY. Ms. Riordan, do you think the Department of Justice is particularly objective in the way that it would carry out preclearance? Just a simple answer on that one and then I have a follow-up.

Ms. RIORDAN. I do not.

Mr. ROY. Are you familiar with the Department of Justice Inspector General Report from 2013?

Ms. RIORDAN. I am.

Mr. ROY. Are you aware that chapter 4, part 3 of the report, page 135, highlights that disclosures and other confidential information was leaked to reporters likely by voting section employees?

Ms. RIORDAN. Yes, that happened on a regular basis.

Mr. ROY. What kind of information was leaked? Can you provide examples, keeping in mind we are on the clock, but a few examples for the committee?

Ms. RIORDAN. I think, during the—I want to say the Georgia voting ID case, there were individuals who leaked information from the inner workings of the group that was responsible for reviewing that particular submission. I can think of that. I know that there are a couple of—actually one particular attorney that claimed that she was the basis for one of the books that was written about the DOJ. Those are just two examples.

Mr. ROY. Are you aware of the report highlighting that analysts lied under oath?

Ms. RIORDAN. I am.

Mr. ROY. Do you have any background or examples of that?

Ms. RIORDAN. I know that during the inspector general report, that there was a civil rights analyst that was specifically asked a question by the attorneys that were doing the investigation, and that she lied under oath.

Mr. ROY. The report provides examples of non-attorney voting section attorneys, non-attorney voting section employees, posting comments to websites concerning voting section personnel or matters. One example describes an employee who started a, quote, "cyber gang," unquote, that was engaged in, quote, "cyber-bullying," end quote. According to the report, he took, quote, "he told the OIG that for his internet postings he selected as his alias the name of the protagonist of a well-known novel, because he represented the archetype angry Black guy," end quote, page 129 of the report.

Are these the same people that would be doing preclearances of election law changes under H.R. 4?

Ms. RIORDAN. Yeah, there are some of those same people there.

Mr. ROY. Is that troubling to you?

Ms. RIORDAN. Yes. One of the things that I found to be so shocking while working in the voting section was the fact that it was so political. I just think that a section that is termed "voting," that is supposed to be review voting changes in the Civil Rights Division, should be nonpartisan. It is the furthest thing from nonpartisan.

Mr. ROY. I apologize for being a little bit late. I had a conflict, but I suppose there has been some conversations here about H.R. 1 and S. 1 and about the some of the issues involved with those pieces of legislation. Obviously, right now, having hit a wall in the Senate, do you believe that H.R. 4 is trying to be used as a back door to try to get the Federal takeover of elections carried out in the absence of being able to currently get that executed on the Democratic side of the aisle?

Ms. RIORDAN. I do. I think that this particular bill is looking to reauthorize a provision of the Voting Rights Act that is no longer necessary, because there is no rampant discrimination in voting.

One of the things I said earlier was the fact that during the time period that I was there from 2000 until 2013, there were 222,000 submissions that were submitted by local jurisdictions. Minority—I would say that 98 percent of those submissions really concern moving a polling place within the same building.

Mr. ROY. Right.

Ms. RIORDAN. There is just not rampant voting discrimination between 2000 and 2013. There certainly isn't today.

Mr. ROY. When my colleagues on the other side of the aisle say that quote, "Voting Rights Act has basically been overturned by the court." That is not true, is it? Right? We are talking about section 5. The Voting Rights Act remains firmly in place, protects the rights of American people to vote. Rather what we are doing is allowing States to continue to be able to figure out the laws and place voting booths where they need to be and so forth. Would you agree with that?

Ms. RIORDAN. I would.

Mr. ROY. Thank you, ma'am.

I yield back.

Mr. COHEN. [Presiding.] Thank you, Ms. Ross, for taking the Chair, take the Chair and recognize you for your five minutes of questioning.

Ms. ROSS. Thank you, Mr. Chair.

As a civil rights attorney and former State representative, I have witnessed firsthand the incursion on voting rights in North Carolina and fought against them. In 2011, the North Carolina General Assembly completed redistricting that relied on racial gerrymandering. These newly drawn maps were ultimately struck down by the United States Supreme Court, and in 2017, in *Cooper* v. *Harris*. However, numerous elections occurred during the intervening years.

Those who were elected because of the unconstitutional maps went on to incur incumbent advantage, and in some case, work against the interests of those who were disenfranchised. I was there in the North Carolina General Assembly in 2011 when that redistricting occurred.

In 2013, North Carolina enacted a restrictive voter ID law which the fourth circuit noted, targeted African Americans with almost surgical precision. The very forms of identification prohibited by this law were those disproportionately held by African Americans. The bill eliminated a week of early voting, a period which African Americans utilized the most.

Once again, the courts righted the wrongs of the State legislature. It took nearly 3 years for the litigation to reach its conclusion. During that period, nearly 200 officials were elected, including a U.S. Senator, 13 Members of Congress, and four North Carolina Supreme Court justices.

These cases in North Carolina demonstrate that section 2 litigation, by itself, is not sufficient to protect voting rights. We need to stop voter suppression before it happens, not years afterward.

Disenfranchised Americans cannot wait years for their rights to be restored and uncompensated. It is not possible for voters to truly receive a remedy on the back end. Efforts to undermine our core American values should never be allowed to take effect.

My first question is for Ms. Lakin on the Purcell principle. In your view, did the Supreme Court intend to create this elaborate new voting rights doctrine when it issued its unsigned opinion in *Purcell* v. *Gonzalez* in 2006?

Ms. LAKIN. No, I don't believe that is the case. If you look at the very brief unsigned opinion, as you note, it is mostly a decision

about deference to the lower court's discretion and only in passing does it raise a very commonsense warning that you should consider specific considerations that are—come up in elections when you are balancing the equities in that case, that is, whether or not the injunction is in the public interest, and would not cause irreparable harm. It has grown and metastasized well beyond that brief decision and reference in that case.

Ms. ROSS. Thank you very much.

Mr. Tucker, courts have interpreted section 3(c) to require plaintiffs to prove purposeful discrimination to invoke preclearance as a remedy. Mr. Nadler asked you some questions about this. This is an already high evidentiary bar for plaintiffs to meet, but you note in your testimony that courts have also been reluctant to reach the question of whether the plaintiffs have established intentional discrimination once the plaintiffs have already established discriminatory impact. What accounts for this judicial reluctance?

Mr. TUCKER. Thank you so much for the question.

It actually highlights the same issue that Congress actually visited in 1982 in the 1982 amendments. Following the *City of Mobile* v. *Bolden* decision, that is precisely what we saw with section 2 cases that there was a reluctance, if section 2 was going to be construed in the same manner as the 15th Amendment, that judges are, frankly, hesitant to call their neighbors, to call their friends, to call election officials that they may have dinner with, racist, and that is the fundamental problem.

So, what Congress has proposed in H.R. 4 is a very modest change that would simply recognize that, where voting discrimination has occurred in whatever form, that discrimination should also be subject to section 3(c) preclearance, as the court may find, limited under whatever circumstance and for whatever time period.

Ms. ROSS. Thank you very much, Mr. Chair.

I yield back.

Mr. COHEN. Thank you.

I think Ms. Fischbach is next for 5 minutes.

Ms. FISCHBACH. Thank you, Mr. Chair.

Ms. Riordan, I do thank you for being here in person today. I appreciate that.

As Mr. Johnson had mentioned earlier that we have had several hearings on this topic, but to my understanding, the only thing that has really changed since we have had those hearings is that the Attorney General is launching the suit against State of Georgia over SB 202.

I was just wondering if you could maybe comment on, if the Biden Administration wins that lawsuit, what the effect is going to be on the elections being conducted in Georgia.

Ms. RIORDAN. If the Biden Administration is successful in the section 2 matter, what will happen is one of the things they are asking for is the State of Georgia, of course, to be covered under section 3(c). So, every single voting change in the State of Georgia will need to be submitted to the Department of Justice for preclearance. They are also asking for a preliminary injunction against the changes. So, if they are successful, none of SB 202 will move forward. In addition, they are asking for Federal observers to be placed there.

In the end game, if they are successful in showing that SB 202 was instituted with a discriminatory purpose, which is what they are arguing, then SB 202 will not be able to go forward. It will be declared unconstitutional.

Ms. FISCHBACH. Thank you. What it sounds like to me is a real invasion of the Federal Government in the State elections. What would the implications be if H.R. 4 on States, which are attempting to answer waning faith in elections by strengthening election integrity? What would be the effect of the implications of H.R. 4?

Ms. RIORDAN. I think H.R. 4, when utilized by the Department of Justice, will probably put the kibosh on any State moving forward with election integrity provisions. There is a general thought within the section itself that there is no need for election integrity laws. Additionally, based upon the reauthorization of section 5 in 2006, it is not only whether or not an election mechanism has a purpose, discriminatory purpose, it is also whether or not there is any effect on minority voters.

So, what often happens is you get into a situation where, let's say, there is a voter identification requirement that is submitted for preclearance, and that 88 percent of White voters have that particular ID, but 86.9 percent of African American voters have that ID. That particular change will be objected to by the Attorney General. So, it really comes down to a percentage game within the Department.

Ms. FISCHBACH. Thank you very much.

What do you think about the constitutionality of H.R. 4, and are there areas that you would question the constitutionality?

Ms. RIORDAN. I would question the initial reauthorization of section 5's constitutionality for the simple reason that if anyone reads the decision in *Shelby County* v. *Holder*, they clearly said, stated in that case that for the Federal Government to exert that type of control, again, that they were given under section 5, that there would have to be rampant discrimination against minority voters. Based upon my experience, enforcing these laws for 20 years, that is just not the way that I think the evidence comes in. I also think that changing the standards for a preliminary injunction that demands that a court ignore a State's purpose for making those laws is unconstitutional as well.

Ms. FISCHBACH. Thank you very much. I appreciate it.

I yield back my 49 seconds.

Mr. COHEN. Thank you, Ms. Fischbach. I appreciate that.

Mr. Johnson, you are recognized for 5 minutes.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair, for holding this very important hearing.

Ms. Butler, you previously served as a member of the board of the Morgan County Board of Elections. Is that correct?

Ms. BUTLER. That is correct.

Mr. JOHNSON of Georgia. When were you first appointed to serve?

Ms. BUTLER. I was appointed in 2010.

Mr. JOHNSON of Georgia. You have served all the way up until what point?

Ms. BUTLER. I served until just recently. June 30 was my last day as a board of election member.

Mr. JOHNSON of Georgia. Why was that your last day of service?

Ms. BUTLER. The board was reconstituted, as I had previously stated, through local legislation. It was reconstituted at the request of our majority Republican County Commission under the guise that our board was dysfunctional. What that meant, I don't know.

Mr. JOHNSON of Georgia. Well, let me ask you this now. When you were first appointed to the Board of Elections of Morgan County back in 2010, how were you first appointed?

Mr. JOHNSON of Georgia. I was appointed by the Democratic Party. There were two appointments by the Republican Party, two by the Democratic Party, and one by the county commission.

Mr. JOHNSON of Georgia. So, it was pretty much so and let me ask you about Morgan County now. Morgan County is the county where there are roughly 72.7 percent White and 23.6 percent Black. Is that correct?

Ms. BUTLER. That is correct.

Mr. JOHNSON of Georgia. Back in the 2020 election, about 28.6 percent of the voters voted Democratic. Is that correct?

Ms. BUTLER. That is correct also.

Mr. JOHNSON of Georgia. So, you were previously appointed to serve on the Board of Elections by the Democratic Party which elected two Democrats and the Republicans had two seats that they controlled, and then the county commission appointed one person. That person was nonpartisan?

Ms. BUTLER. Correct.

Mr. JOHNSON of Georgia. So, you had pretty much a nonpartisan board. Now, with Senate Bill 202 having become law, it included a provision that was inserted by your local legislator that changed the way that the Board of Elections Members were chosen, correct?

Ms. BUTLER. That is correct. They are now chosen—I am sorry.

Mr. JOHNSON of Georgia. The changes was that, instead of the process that I just explained and you just explained, now it is the county commission that appointed all five Members to the local Board of Elections, correct?

Ms. BUTLER. That is correct.

Mr. JOHNSON of Georgia. Now your county commission is how many Members on the county commission of Morgan County?

Ms. BUTLER. There are five Members of the county commission.

Mr. JOHNSON of Georgia. How many of those Members are Republican?

Ms. BUTLER. Four.

Mr. JOHNSON of Georgia. So have you a four-to-one Republican majority on the board of commission that will now select the Board of Elections Members. Is that correct?

Ms. BUTLER. That is correct.

Mr. JOHNSON of Georgia. They failed to replace you when your term expired. Have they appointed anybody else to fill your position?

Ms. BUTLER. They have appointed all five Members. They are four Whites and one Black. Our previous board was three Whites and two Black.

Mr. JOHNSON of Georgia. Okay. Do you know the composition of the board now, the Board of Elections? Is it four Republicans and one Democrat?

Ms. BUTLER. I don't know their political affiliation. Predominantly, I would say, yes, they are predominantly Republican.

Mr. JOHNSON of Georgia. Well, now, so as one of your roles as a Board of Election member, you determine where drop boxes would be situated around the county and you check on the absentee ballots and provisional votes. What do you think is going to happen to that now? Will it become politicized in favor of the Republicans as a result of this new change brought about by Senate Bill 202?

Ms. BUTLER. Well, the drop boxes are now limited, and basically, they are to be inside and will not serve the purpose for which they were originally placed to make it easier for people to use them without having to come in contact with anyone, and they could do them at all different hours of the day.

Mr. JOHNSON of Georgia. All of that has been cut out by Senate Bill 202, which requires that the drop boxes be in the early voting locations which are determined by the Board of Elections. Isn't that correct?

Ms. BUTLER. That is correct.

Mr. JOHNSON of Georgia. Okay. With that, Mr. Chair, I yield back. My time has expired.

Mr. COHEN. Thank you.

Now, I would like to recognize Mr. Owens. You talk for 5 minutes.

Mr. OWENS. Thank you, Chair Cohen and Ranking Member Johnson and witnesses. Thank you for holding this hearing and for your participation today.

The Voting Rights Act passed in 1965 is a critical piece of legislation that prohibits racial discrimination in voting. Two months ago, I was asked to participate in a Senate Judiciary hearing titled, "Jim Crow 2021: The Latest Assault on the Right to Vote." As I stated at the hearing, I grew up in the Deep South during the era of actual Jim Crow that actually suppressed voting. The Voting Rights Act effectively ended Jim Crow laws enforcement of the 14th and 15th Amendments to the United States Constitution.

In the United States of America, a person is guaranteed equal protection under the law and equal access to vote, regardless of his or her skin color. However, at the Senate hearing and still today, I was offended to hear the comparison to Jim Crow laws, and recently passed voter reform laws in Georgia.

I am going to focus my remarks today on the one area of alleged voter suppression, the uproar over the requirements that voters produce a Federal ID.

Unfortunately, today, we have heard the same message that we heard earlier this year, that Americans, especially lower income, and minority Americans, particularly Black, are incapable of following laws and rules to vote in election—Federal elections. In fact, the section of S.B. 202, the recently passed Georgia law, states that has brought such outrage from the left, simply because it requires any person applying for an absentee ballot to include evidence of a government-issued ID on the application.

If a voter does not have a driver's license or ID card, that voter can use a current utility bill, bank statement, government check, paycheck, or other government documents to show the name and

address of that voter. By the way, 97 percent, 97 percent of the Georgia voters already have government-issued IDs.

The Georgia law, S.B. 202, includes many positive changes to the State voting laws. For example, S.B. 202 would expand the State's early voting period. It codifies the use of ballot drop boxes. It reduces precinct wait times. This is not voter suppression as was seen before in the voter's right—in the Voting Rights Act passed, and yet President Biden's Justice Department has sued Georgia over S.B. 202 because it allegedly discriminates against Black voters in violation to the Voting Rights Act.

I am bothered by statements that poor Black Americans lack the common sense, education, tenacity, and desire to succeed. This is the very definition of a condescending bigotry, and for those who continue this line of thought, I have questions. Do Italians, Polish, Jewish, and Swedish-Americans also have this problem of finding it impossible to get an ID? By the way, it is impossible to succeed in this country to get a job, education, bank account, travel, or even get a welfare check without a Federal ID.

My observation, this condescending uproar from the left is not about fair voting. It is not about representing the hopes and dreams of poor Black Americans in these urban communities who simply want, like every other American, to succeed. It is about power. Every representative who still has a mass number of constituents in their district who want IDs and have no idea how to get it should be ashamed of themselves. They offend their constituents on the bare basics of representation.

In my most humble opinion, putting together a team to help constituents get an ID, to grab hold of the first rung of the ladder of success is not a heavy lift. Lack to help their constituents, waiting for Big Brother Federal Government to do so is absolute and total negligence.

The bottom line is, Republicans want every legal vote to count, want to make it easier to vote and harder to cheat, and yet Democrats have joined to oppose these election integrity measures. We must do better.

Ms. Riordan—Ms. Riordan—I am sorry. The Constitution leaves it to the States to administer elections within their jurisdiction. Are States best situated to determine how to run their elections?

Ms. RIORDAN. I believe that the States are best. They are the ones that know what is going on, on the ground. They are aware of who their constituents are, and they are the ones that are directly represented and elected by their citizens in each State.

Mr. OWENS. All right. There is another common misconception that the new law bans prohibiting drinking water to voters while voting, waiting in line. In reality, this law does not do this, correct?

Ms. RIORDAN. That is correct.

Mr. OWENS. Okay. The law actually bans electioneering by prohibiting non-poll workers from distributing food and water to waiting voters. However, this is a carve-out that allows poll workers to make available self-service water to those waiting in lines. Is this also your understanding of the law?

Ms. RIORDAN. Yes, it is. As a matter of fact, we would actually witness very often on the Navajo Indian reservations, when we would election observation coverage, that that was a real issue

there, that very often the Democrat Party and the Republican Party actually have barbecues, serving food, *et cetera*, outside of the polling place. There really is no place for that outside of a polling place. We have limitations on where you should be in regard to where people are voting when you are part of a party representing the candidate, and that is what the law is designed to frustrate.

Mr. OWENS. Ms. Riordan, I have run out of time. Thank you again for your clarity.

I yield back.

Mr. COHEN. Thank you.

Next, I will recognize the lady from Houston, Texas, Ms. Garcia.

Mr. GARCIA. Thank you, Mr. Chair, and thank you for this opportunity to, once again, have a discussion, a full discussion, on the Voting Rights Act. Unlike my colleague, the Ranking Member, who complains that this is the third time in 3 months, I wish we would have even more, because this is really a very important topic, not just for those of us in Texas, but for all Americans to ensure the voting rights of all Americans.

So, I wanted to start first with also quoting the Ranking Member. He said, "the goal is to have a fair and free and secure elections." In my judgment, I think we had a fair, a free, and secure election last time.

Ms. Lakin, do you agree? Have we had a fair and free and secure election?

Ms. LAKIN. Thank you for that question. Democracy is strongest when more of us can participate, not less, and the turnout that we saw in this past election and people turning out and voting in record numbers really does support that voters and our democracy is strong and, as far as we can tell, all evidence points that this past election was held in a free and fair manner.

Ms. GARCIA. Thank you. Mr. Tucker, do you agree? I would take a "yes" or a "no" in the interest of time.

Mr. TUCKER. Yes, I agree completely.

Ms. GARCIA. Thank you. Ms. Butler? Yes or no in the interest of time.

Ms. BUTLER. Yes.

Ms. GARCIA. Well, thank you.

Yet, we continue to see that Republican-led State legislatures across the country seek to restrict voting rights based on the erroneous and unfounded claim of voter fraud. So, this, in fact, is a now-or-never moment for American democracy. While I am proud of my House colleagues and the work that we have done in passing H.R. 1, we must continue to fight hard today, every day until we make sure that it passes the Senate.

Voters across the country elected established Democratic majority in both Chambers of Congress and delivered a unified government because we vow to protect democracy. Put simply, this is about ensuring all Americans and all Texans to have and exercise their right to vote, regardless of their race, ethnicity, gender, income eligibility, party affiliation, or language. While the Senate has not voted for the people, our Governor has continued to do and enact voter suppression laws, and, in fact, has called a special session to continue his strategy of doing that in Texas.

So, when I say I commend the Justice Department for recently announcing that they have filed suit against Georgia, it needed to be done, and I am glad they did it, Ms. Butler, to support the work that you and many have done to ensure that all people in Georgia have a right to vote.

It is much like the fight for us here in Texas where Latinos are often too burdened by many of the restrictions imposed by our Governor and his Republican allies, including barriers to an interpreter and barriers for assistance at the voting booth. In light of these attacks, we must continue. Our Texas congressional delegation has sent letters both to the Justice Department, and to Senator Schumer about meeting and urging the passage of For the People Act.

So, Mr. Chair, I have for the record and ask for unanimous consent to put in the record a letter from the Texas delegation to the Attorney General Garland, urging him to protect the Voting Rights Act, also a letter from the Texas congressional delegation to Majority Leader Schumer, expressing the urgent need to preserve every Texan's right to vote, initially my written testimony in June 2014 to the Senate Judiciary Committee on updating the Voting Rights Act in response to the Shelby County decision and, number four, an article on the Justice Department suing Georgia over voting restrictions.

I ask for unanimous consent.

Mr. COHEN. Without objection, such should be done.

[The information follows:]

MS. GARCIA FOR THE RECORD

SYLVIA R. GARCIA
STATE SENATOR
DISTRICT 6

The Honorable Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you for the opportunity to submit this testimony concerning the continuation of discrimination in voting in Texas, and the critical importance, for my constituents, Texans, and voters around the country, of modernizing federal voting rights protections.

My name is Sylvia Garcia. Currently, I represent District 6 in the Texas State Senate, which includes parts of Houston, Pasadena, Baytown, Jacinto City, Galena Park, and northern and eastern Harris County. I have also served as Presiding Judge of the Houston Municipal Courts, Houston City Controller, and Commissioner of the Harris County Commissioner's Court. I am the current Vice Chair of the Texas Senate Hispanic Caucus, as well as the past President and a current member of the Board of Directors of the National Association of Latino Elected and Appointed Officials (NALEO).

I am a Texas native, from the South Texas farming community of Palito Blanco. As a social worker, attorney, and now a public official, my career has revolved around ensuring that every Texan has an opportunity to be heard. The needs and desires my clients and constituents have shared with me in the course of many years of public service have reinforced values I have always held close and tried to live out in my work: to make sure that no one is forgotten; that precious resources are used wisely; and that community decision-makers do so openly and transparently, and maintain accountability to those affected by their decisions.

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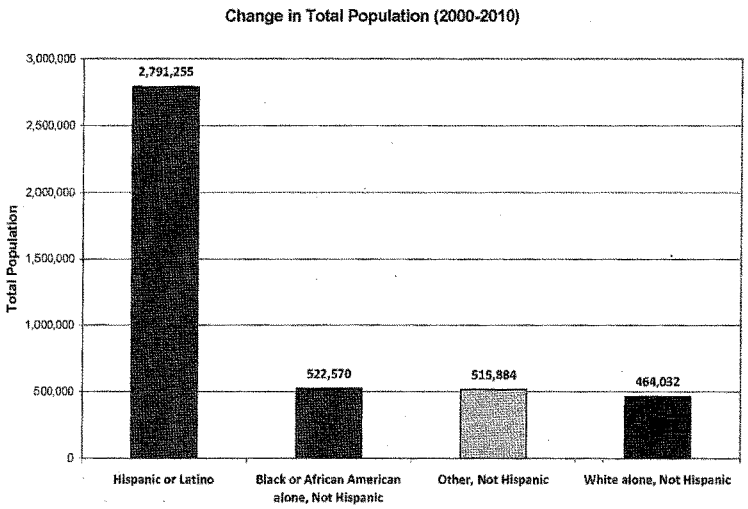
These same values that have guided my work for so many years motivate me to speak out on behalf of the millions of Texans whose opportunities to cast a ballot and to have a meaningful influence on elections remain under threat. A democracy offers empty promises if the citizens the government is intended to serve are not treated equally, regardless of race, ethnicity, or linguistic ability, and if citizens are prevented or dissuaded from participating in civic affairs. Unfortunately, we have too many such instances occurring in my home state today. For the sake of the integrity of our elections and our democracy, Texas urgently needs a modernized fully functioning Voting Rights Act (VRA).

The Rapid Growth of Historically Underrepresented Communities Makes Ensuring Equal Access to the Ballot Particularly Critical for the Health of Democracy

My District, as well as Texas more broadly, illustrates why defending and promoting equal access to the ballot box for voters of all races, ethnicities, and linguistic abilities is particularly critical. In my District and throughout the state, a disproportionate number of residents are members of communities that have historically suffered the brunt of discrimination in voting, education, employment, and other domains. I represent a population that is about 70% Hispanic and about 12% African American. These two groups along with other ethnic or language minority populations constitute significant shares of Texas' population overall. Today 37.6% of Texans now report Hispanic ethnicity. About 12% of Texans are African American, and about 4% are of Asian American, Native Hawaiian or Pacific Islander descent. My constituents and Texans are linguistically diverse as well. Though a majority also speaks English, nearly two-thirds of District 6 residents, and more than one-third of Texans statewide, who are 5 years old or older speak a language other than English at home. The Census Bureau calculates that 7% of all Texans eligible to vote are not fully fluent in English and need language assistance to cast an informed ballot, compared to 4.5% of all eligible voters nationwide.

These minority populations, vulnerable to discrimination in voting, are becoming an increasingly large segment of the electorate. Between the 2000 and 2010 decennial Censuses, Texas' Latino population increased by nearly 2.8 million people, accounting for 65% of statewide population expansion, as illustrated in the chart below. Minorities overall accounted for 89% of Texas growth in the past decade. During the same period, Latinos accounted for a similar, outsized 55.5% of all population growth nationwide. In the year 2000, 31.2% of Texas residents

reported speaking a language other than English at home; according to the most recent Census Bureau figures, this share has increased to 34.6%. Likewise, the percentage of United States residents speaking a language other than English at home grew from 18% in 2000 to 20.5% at most recent count.



Data Sources: Census 2000 Redistricting Data (Public Law 94-171) Summary File PL002 Table; 2010 Census Redistricting Data (Public Law 94-171) Summary File P2 Table

Texas, and our nation as a whole, is growing increasingly diverse and we must do a good job of engaging these communities as voters and candidates. Instead, voting discrimination based on race, ethnicity, and language ability continues in our state, and is alienating communities of color from participating in elections.

Discrimination in Voting in Texas Continues

As Congress considers legislation that would modernize VRA protections, both houses must acknowledge and address the fact that discrimination in voting has deep roots and continues, even today.

Texas has a long record of troubling and pointed attempts to exclude Latino, African American, and other historically underrepresented groups from full

participation in politics and governance. As early as the first half of the 19th century, delegates to Texas's constitutional convention who were preparing for U.S. statehood attempted to preclude the territory's Mexican Americans from the franchise. A second attempt originated in Texas in the 1890s to prohibit people of Mexican heritage from becoming naturalized American citizens and gaining the right to vote. In the first half of the 20th century, Texas jurisdictions developed evolving tactics to limit minority electoral participation and influence. A poll tax was added to the Texas Constitution in 1902, and remained in effect until the state was forced to repeal it in 1966. A 1923 state law barred African Americans from voting in Democratic primary elections, and in the following years numerous jurisdictions prohibited Latino and other voters from participating in white-only primary elections.

The enactment of the VRA in 1965, and its extension in 1975 to provide comprehensive protection to Latino and other language minority voters, ended the use of some of these well-known discriminatory techniques. However, Texas and its sub-jurisdictions have continued to adopt voting policies that impair and prevent minority citizens from casting ballots. Between 1982 and 2005, for example, Texas earned 107 Section 5 objections to voting policies, second only in number to Mississippi. Among them, 97 concerned local laws and affected about 30% of Texas counties home to a disproportionate share – nearly 72% – of the state's non-white voting age population. During this same period, aggrieved voters and candidates brought at least 206 successful lawsuits under Section 2 of the VRA against the state of Texas and Texas municipalities and counties.

In the years immediately preceding the Supreme Court's decision in *Shelby County v. Holder*, Texas and political subdivisions within the state adopted more policies that ran afoul of the VRA's preclearance protections than any other state. In the most recent 15 years, Texas has also amassed more violations of other VRA provisions – Sections 2, 203, and 208 – than any other state. Sadly, the number of discriminatory incidents, prompting litigation, has accelerated in the last five years. These troubling laws aimed at restricting access to the ballot box and voter influence of historically underrepresented voters will only exacerbate Texas' lagging and racially-disparate levels of voter turnout and registration. According to Census Bureau data on the 2012 Presidential election, for example, just 39% of Latino Texans eligible to vote cast a ballot, compared to 48% of Latinos nationwide, 61% of white Texans, and 64% of white Americans. In my own district, the fabric of the community has changed, and unfortunately not everyone

is embracing that change. For instance, two local colleges resisted alterations to their board compositions from at-large districts to single-member districts, and there are plenty of other examples of resistance to progress for voters across Texas.

There is New and Heightened Danger to Latino and Underrepresented Texans' Voting Rights in the Wake of *Shelby County*

In the year since *Shelby County* was decided and preclearance obligations in Texas lifted, policymakers in our state demonstrated an alarming eagerness to move forward both with new voting changes highly likely to impair underrepresented communities' civic participation, and to revisit old proposals already found to be discriminatory, but that were placed on hold. Preclearance coverage was effective in halting the use of many of these provisions *before* they could negatively affect minority voters in Texas. Currently-pending cases under the remaining sections of the VRA are proceeding slowly, and so far have not stopped troubling practices from taking effect, to the detriment of many of my constituents, as well as millions of Texans.

2013 – City of Pasadena

Recent developments in the city of Pasadena are particularly familiar to me, and of particular concern, because many of its residents are also my constituents. In Pasadena, the voting-eligible Latino population has grown exponentially in recent years. Today, just over one-third of Pasadena's potential electorate, and just over half of its adult population, is Latino. Given this increasing Latino presence, it is not surprising that Latinos have been elected to fill two of the eight single-member seats on the Pasadena City Council. The increasingly Latino face of Pasadena residents and governance has, however, sparked some apparent tensions. Facing a Latino majority, Pasadena's mayor Johnny Isbell unilaterally pushed a vote on a controversial plan to convert the city's method of election from eight single-member districts to six single-member districts and two at-large seats. The proposed change from eight to six single-member districts will reduce Latino voting strength in City Council elections. In describing the city, Mr. Isbell was quoted by the *Wall Street Journal* as stating, "The town's identity is plant workers . . . western . . . . It's a heritage that we are proud of." (See Attachment A).

The proposal had been discussed in Pasadena, but never implemented until, as the city's mayor said of conditions post-*Shelby County*, "The Justice Department can

no longer tell us what to do." (See Attachment B). The mayor pursued the change, despite receiving significant expressions of concern from residents in public hearings and in spite of a contrary recommendation by a Review Committee commissioned to study the proposal. The measure was approved by a very slim margin. In the course of public debate, the mayor reportedly expressed racially-themed concerns about the future makeup of a single-member city council. He also argued –without any support or factual validation—that the purported reason more Latino candidates were not elected to municipal positions was because 75% of Latinos in Pasadena were "illegal aliens."

Elections have not yet been held under the new hybrid election system, but there are ongoing community concerns about the new scheme. Four of the current city council districts contain Hispanic citizen-voting age population majorities. At least one incumbent Latino city councilmember may face a difficult re-election campaign in a reconstituted district, which is also home to a neighboring incumbent councilmember. The mayor recognized that Latino candidates of choice were on the cusp of becoming an effective majority of the council in Pasadena and as a way to dilute Latino political power he ramrodded this hybrid redistricting plan. Given racially polarized voting in Pasadena, it is unlikely that a candidate of the Latino community's choice would win a race for an at-large seat. The most likely consequence of the change – a reduction in Latino citizens' influence on elections and presence on governing bodies – combined with its timing and the racial element in related public debate make this a quintessential case for preclearance. (See Attachment C). In the absence of a fully functioning Voting Rights Act, this suspect change will proceed in the next year, with city council elections slated for May 2015.

2013 – Galveston County

In August 2013, Galveston County followed the state's lead in ceasing upon the *Shelby County* decision to move a controversial election change. The *Houston Chronicle* observed that Galveston County was, "the first Houston area government to take advantage of the June 25 U.S. Supreme Court decision to change an election law that otherwise might have been blocked by the Justice Department." (See Attachment D). County Commissioners moved quickly after *Shelby County* to adopt an initiative to reduce the number of justice of the peace and constable districts in the county from eight to four, similar to another change recently rejected for being discriminatory. No public hearings were held on the

topic. Both the rejected and enacted plans reduced the number of districts containing African American and Latino voter majorities. Incumbent officials and a resident challenging the move allege that the measure was adopted to intentionally limit African American and Hispanic voters', noting that the county went ahead with the change with full knowledge of its discriminatory effects.

2013 – Statewide Re-Implementation of Voter ID and Intentionally Discriminatory Redistricting Plan

On June 25, 2013, the Supreme Court announced the *Shelby County* decision, our state proclaimed its newfound ability to put into use the voter ID requirement and redistricting plan that had each been determined by a federal court to be discriminatory. On that very same day, our Attorney General celebrated, in tweets, that, "Eric Holder can no longer deny #VoterID in #Texas after today's #SCOTUS decision. #txlege #tcot #txgop" and "Texas #VoterID law should go into effect immediately b/c #SCOTUS struck down section 4 of VRA today. #txlege #tcot #txgop." The Attorney General also stated that day that, "Redistricting maps passed by the Legislature," meaning those rejected by the federal court in 2012 as intentionally discriminatory in part, "may also take effect without approval from the federal government."

While the Texas legislature ultimately adopted a new set of district plans, based on interim court-created maps that had replaced the intentionally discriminatory redistricting scheme, the state moved forward with its voter ID requirement that was found to be retrogressive in federal court. Mismatches between information in voter registration records and that appearing on IDs have been widely reported, and *The Dallas Morning News* concluded that use of provisional ballots skyrocketed in most of Texas's largest counties in November of 2013 when voter ID was first mandated at polling places. (See Attachment E). The full impact of the law on minority voter communities will become more apparent as Congressional and Presidential elections occur: the best available data on voter registration and turnout by race and ethnicity, from the Census Bureau's Current Population Survey, are collected only on these occasions, once every two years.

The following case examples are a non-exhaustive illustration of the forms in which Texans, including my constituents, have confronted voting discrimination in the immediate past.

Testimony of The Honorable Sylvia R. Garcia
June 25, 2014

Texas Statewide Violations

2001 – Statewide Redistricting

Following a significant increase in Texas's Latino population between 1990 and 2000, a redistricting plan was proposed for the state House of Representatives that would have caused a net loss of districts in which Latinos constituted a majority of registered voters, and in which registered Latino voters enjoyed a realistic opportunity to elect the candidates of their choice. This redistricting plan failed to win approval under the VRA because of its pointed, prospective negative impact on Texas minority voters.

2004 – Statewide Redistricting

Following rejection of discriminatory redistricting plans, the Texas Legislature was ultimately unable to agree on Congressional and statewide district maps post-2000 Census. The state moved forward with court-created maps; nonetheless, in 2004 the Legislature adopted yet another set of new maps to replace the court plan. As Supreme Court Justice Anthony Kennedy observed, "the State took away the Latinos' opportunity because Latinos were about [to] exercise it. This bears the mark of intentional discrimination . . . ." The Court required changes to be made to the state's new maps in order to eliminate the discriminatory impact on Latino voters.

2007 – Statewide Candidate Qualifications for Fresh Water Supply District Supervisors

The Texas Legislature adopted a change to qualifications required of candidates for fresh water supply district supervisor positions, mandating land ownership. The state failed to provide complete demographic information about affected districts and supervisors in the course of the preclearance process, but investigators determined that every incumbent supervisor who would have been prevented by the law from running for re-election because of lack of land ownership was Latino. Moreover, there were significant disparities throughout the state between Anglo and minority rates of land ownership that supported the conclusion that the rule was discriminatory and could not go into effect.

2011 – Statewide Congressional and Legislative Redistricting

In 2011, as our state undertook redistricting for Congressional and state legislative seats, the rapid Latino population growth described above had resulted in Texas gaining 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 racially 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. For as long as they remained in effect, preclearance procedures prevented use of district maps intended to diminish Latino and other voters' voices.

2011 – Statewide Voter ID

Texas recently adopted a particularly restrictive version of a requirement that voters provide one of a limited number of documents to prove their identity before voting. The law excludes some government-issued documents, such as student IDs, from the list of acceptable forms of proof. It also mandates "substantial" similarity between a voter's name as it appears on voter registration records and ID, a rule that has already caused complications and difficulties in voting for married and divorced women who have used various last names, and for Latino voters who alternately use one or both of their parents' last names. Moreover, reviewers found in 2012 that Latino and African American voters in Texas were not only less likely than others to possess the documentation they would need to vote under the law, but were more likely to face significant hurdles to obtaining ID. Latino Texan households, for example, are nearly twice as likely as white Texan households to lack access to a car, which is often needed to reach an ID-issuing location. As in the case of Texas's most recent statewide redistricting, preclearance procedures prevented this voter ID law from taking effect when they were in place.

Texas Political Subdivision Violations

2002 – City of Freeport

In the 1990s, a near-unbroken history of losses by Hispanic-preferred candidates and successful litigation resulted in Freeport's adoption of single-member city council districts. Under this new system, Hispanic-preferred candidates experienced increased electoral success, but a mere ten years later, the city tried to revert back to use of the at-large system that had put the city's minority voters at distinct disadvantage. Upon review, it was determined that racially-polarized voting persisted in Freeport, and would likely cause minority-preferred candidates to uniformly lose at-large elections. This change was rejected, and today Freeport has a Latina mayor and additional Latino representation on its city council.

2002 – City of Seguin

In 1978, Latino plaintiffs sued the city of Seguin for failing to redistrict after the 1970 Census. At the time, the city elected eight council members from four multi-member wards, and the city was 40% Mexican American and 15% African American, yet there had never been more than two minority candidates elected at once to the Seguin City Council. After protracted litigation the U.S. Court of Appeals for the Fifth Circuit required the redistricting plan to be precleared. Nevertheless, Seguin failed to redistrict after the 1980 and 1990 Censuses. By 1993, 60% of the city was minority, but only three of nine City Council members were Latino. Again, Latino plaintiffs won a settlement in 1994 resulting in the creation of eight single-member districts. Yet, following the 2000 Census, Seguin enacted a redistricting plan that fractured the city's Latino population across the districts to maintain a majority of Anglos on the City Council. Seguin amended the plan, following Department of Justice (DOJ) objection, but proceeded to close its candidate filing period so that the Anglo incumbent would run for office unopposed. Latino plaintiffs sued and secured an injunction under Section 5 of the VRA. A new election date was set as part of a settlement agreement, and today, a Latino majority serves on the Seguin City Council. The persistence of the opposition to minority voting power in Seguin presents powerful evidence that the equality principles protected by the VRA would not be vindicated in Texas absent vigilant enforcement of a fully functioning Voting Rights Act.

2006 – North Harris Montgomery Community College District

Officials proposed significant changes to the conduct of elections for seats on the North Harris Montgomery Community College District, located in The

Woodlands, Texas. The changes would have drastically reduced the number of polling places, and created a bifurcation of the community college district and school board elections that would have required voters to make two different trips to vote for candidates for the leadership of both bodies. Emblematic of the disproportionate negative effect these changes would have had on minority voters was the finding by reviewers that, "the [polling] site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79.2 % black and Hispanic) will serve over 67,000 voters." The preclearance process stopped these changes from being implemented.

2007 – Waller County

Waller County is home to Prairie View A&M, a historically black university whose student population accounts for a considerable portion of the county's voting age population. Many of these students typically registered to vote with the assistance of designated volunteer deputy registrars. In 2007, the county changed its criteria for acceptance of registration applications submitted by volunteer deputy registrars, adding several conditions to the list of factors that would result in rejection. The county refused to seek preclearance, despite its obligation to do so. These changes threatened to impair registration of predominantly African American Prairie View A&M students. In settlement of a Section 5 action, the County agreed to stop applying its new criteria for rejection, and to register those applicants who were wrongfully rejected.

2008-09 – Gonzales County

Today, approximately 15% of the adult population in Gonzales County is estimated to be not fully fluent in English, according to the Census Bureau. The County adopted bilingual election procedures in 1976, but attempted to gut them in 2008 and again in 2009. In attempting to gain approval of a plan to reduce assignment of bilingual pollworkers and to use a computer program such as Google Translator to produce bilingual materials, the county election official was quoted in local press as wildly speculating that, "language minority voters are not citizens if they do not speak English." The proposed reductions in language assistance were stopped because of preclearance procedures.

2010 – Runnels County

Like Gonzales County, Runnels County, Texas abruptly changed its long-standing Spanish-language election procedures for the November 2008 general and November 2009 statewide constitutional amendment elections, despite 38% of Hispanic voting-age citizens speaking English less than very well. DOJ interposed an objection to the county's 2008 and 2009 oral assistance procedures. Specifically, half the county voting precincts did not have a bilingual poll worker in 2008 and no precincts had one in 2009, and the county only had one on-call bilingual assistor available by phone that received no calls for assistance in years. The county did not test the Spanish-language proficiency of its bilingual poll workers or provide training for the assistors. Runnels County failed to provide data to demonstrate that the reduction in quality and quantity of oral assistance procedures did not have a retrogressive effect, or even dispute the changes were not motivated, in part, by discriminatory purpose. But for a fully functioning Voting Rights Act, Runnels County would have abandoned its obligation to Latino voters needing language assistance at the polls.

2011 – Nueces County

Nueces County has experienced notable growth in its Latino population and decline in its white population over the past 20 years. Shifting demographics resulted in a Commissioner's Court that for some time had a majority of Hispanic candidates of choice. However, just before post-2010 Census redistricting was to occur, close contests resulted in the election of a majority of Commissioners favored by white voters. These Commissioners were responsible for a 2011 redistricting plan that was determined to "have been undertaken to have an adverse impact on Hispanic voters," according to the DOJ, and to preserve the new majority on the Commissioner's Court, preferred by a majority of white voters. County officials failed to offer reasonable non-discriminatory justification for their district boundary-drawing decisions, and the Commissioner's Court redistricting plan was rejected.

2011 – City of Galveston

Galveston moved to alter the method by which it elects candidates for municipal offices multiple times. In 1993 the city agreed to adopt single-member districts, but just five years later, in 1998, it attempted to revert back to a hybrid single-

member/at-large system that had previously been rejected as discriminatory. Once again in 2011 the city sought to eliminate some single-member districts of the city council, but was stopped because reviewers concluded that the proposed new district plan would have eliminated minority voters' opportunity to exert meaningful influence on elections for at least one seat. The city did not provide any justification for its repeated attempts to eliminate single-member districts, and was adjudged to have failed to prove that its actions were not motivated by discriminatory intent.

2011 – Galveston County

In the same year the city of Galveston pursued at-large elections, Galveston County adopted a redistricting plan for County Commissioner's Court precincts, and a proposed reduction in the number of constable and justice of the peace seats in the county. Unlike in previous years, the County avoided adopting criteria to guide the redistricting process; the Commissioner's Court also specifically avoided notifying its one minority member in advance that a map that would significantly reduce the minority population in that member's precinct would be considered and voted upon. In addition, the proposed elimination of constable and justice of the peace positions would have reduced the number of seats to which minority voters could elect candidates of choice from three to one. The timing of the change – virtually as soon as a previous court order requiring expansion of opportunities for minority voters expired – was not lost on reviewers who noted, "A stated justification for the proposed consolidation was to save money, yet, according to the county judge's statements, the county conducted no analysis of the financial impact of this decision." Both proposed changes failed to pass muster as having been adopted without discriminatory purpose.

2011-13 – Beaumont Independent School District

The African American population of the city of Beaumont is slightly larger, but votes in slightly smaller numbers, than its white population. In 2011, citizens of Beaumont approved along racially polarized lines an initiative to convert from electing seven members of its school board from single-member districts to a "5-2" plan in which two of the seven seats would be elected at-large, by the entire electorate of the city. It was determined that this change would be discriminatory, and the "5-2" plan was blocked through the preclearance process. Soon after this occurred, the three sitting African American members of the school board, who

were not up for re-election until 2015, were challenged pursuant to proposed changes to terms of office, election date, and candidate qualification procedures. These changes would have resulted in the effective and seemingly targeted removal of all three African American school board members, who received no advance notice that an election would be held in their districts, or of requirements for qualifying for re-election. Accordingly, they were prevented from taking effect.

Texans Need a Modernized Fully Functioning Voting Rights Act

The Voting Rights Act provisions that remain in effect today are not enough to meet the significant task of enforcing equal voting rights in Texas. As the numerous examples presented in this testimony demonstrate, municipalities and state officials in Texas continue to adopt laws and policies that selectively impose challenges for minority voters, and disproportionately reduce the value of their votes. Texas has surpassed and continues to outpace every other state in enacting discriminatory voting policies, and must be subject to the strongest protections we can devise.

For nearly fifty years, preclearance procedures did the best job possible of subverting gamesmanship and evolving tactics that denied and limited the minority vote. Preclearance was uniquely effective in preventing discrimination from becoming standard practice and from further diminishing minority voters' opportunities and participation rates in the places – like Texas – with the most egregious patterns of treating voters differently based on their race, ethnicity, and linguistic ability. For instance, Texas withdrew far more requests for approval of proposed voting changes after being asked for further clarifying information than any other jurisdiction between 1982 and 2005. These withdrawals included at least fifty-four instances in which the State canceled discriminatory voting changes after it became evident they would not be precleared. I fear the state legislature will follow with similar actions that could have a discriminatory impact on minority voters, in the absence of the deterrent effect of Section 5 of the VRA. Previous legislation has included residency requirements for voter registration, proof of citizenship for voter registration, reduced early-voting periods, and restrictions on third party voter registration efforts.[1]

[1] *See generally* Tex. H.B. 148, 83d Leg., R.S. (2013); Tex. H.B. 927, 83d Leg., R.S. (2013); Tex. H.B. 966, 83d Leg., R.S. (2013); Tex. H.B. 3074, 83d Leg., R.S. (2013); Tex. H.B. 174, 82d Leg., R.S. (2011); Tex. H.B. 47, 81st Leg., R.S. (2009); Tex. H.B. 157, 81st Leg., R.S. (2009); Tex. H.B. 208, 81st Leg., R.S. (2009); Tex. S.B. 268, 81st

The Voting Rights Act without preclearance cannot meet the needs to combat the vestiges of discrimination in a state like Texas. Section 5 is the most efficient means of alternative dispute resolution of contested voting changes. The revival of several discriminatory initiatives in Texas post-*Shelby County* conclusively establishes the fact that in the absence of a fully functioning Voting Rights Act problematic laws will slip through cracks. We are left with protracted and expensive litigation as the only remaining method of attack against a discriminatory voting change. Litigation imposes a greater burden on everyone concerned, including plaintiffs, defendants, and affected voters and candidates whose fate hangs in the balance, than does administrative review under the preclearance process.

The Voting Rights Amendment Act, S. 1945, proposes solutions to the present gaps in voter protection that are well-tailored to Texas voters' needs. In addition to preclearance coverage, this legislation would increase transparency around election policymaking, redressing the pointed secrecy that has often been used in Texas to limit minority communities' input and obscure suspect changes. By expanding opportunities to send neutral federal observers to monitor compliance with obligations to provide bilingual assistance at the polls, the Voting Rights Amendment Act would reveal those shortcomings that have impaired and frustrated thousands of Latino and other language minority voters. This has been the case in at least ten Texas jurisdictions that have settled charges of violating language assistance requirements in the past 15 years. Additional provisions would give federal courts more discretion to apply pre-emptive protections where warranted. In sum, the Voting Rights Amendment Act would provide effective checks against the kinds of rampant discriminatory actions described herein, and I implore you to take action to restore teeth to and modernize the Voting Rights Act and advance this legislation.

I will conclude by quoting the words of President Lyndon B. Johnson in his Voting Rights Act address before a joint session of Congress on March 15, 1965:

Leg., R.S. (2009); Tex. S.B. 363, 81st Leg., R.S. (2009); Tex. S.B. 391, 81st Leg., R.S. (2009); Tex. H.B. 1143, 81st Leg., R.S. (2009); Tex. H.B. 101, 80th Leg., R.S. (2007); Tex. H.B. 600, 80th Leg., R.S. (2007); Tex. H.B. 626, 80th Leg., R.S. (2007); Tex. H.B. 979, 80th Leg., R.S. (2007); Tex. H.B. 1146, 80th Leg., R.S. (2007); Tex. H.B. 1462, 80th Leg., R.S. (2007); Tex. H.B. 1463, 80th Leg., R.S. (2007).

Testimony of The Honorable Sylvia R. Garcia
June 25, 2014

> "Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books—and I have helped to put three of them there—can ensure the right to vote when local officials are determined to deny it.
>
> In such a case our duty must be clear to all of us. The Constitution says that no person shall be kept from voting because of his race or his color. We have all sworn an oath before God to support and to defend that Constitution.
>
> We must now act in obedience to that oath."

Thank you for the opportunity to testify today.

Respectfully Submitted,

The Honorable Sylvia R. Garcia
Texas State Senate, District 6

Enclosed Attachments (5):

A. Voting-Rights Fights Crop Up, *Wall Street Journal*, Nov. 1, 2013.
B. All in With Chris Hayes, *MSNBC*, Nov. 8, 2013, pages 6-9.
C. Plans to Redistrict Pasadena City Council, *Houston Chronicle*, Aug. 15, 2013.
D. Suit Blasts Galveston Judge Plan as Biased County Commissioners Are Trying to Cut Number of Justice of Peace Courts, *Houston Chronicle*, Aug. 27, 2013.
E. Voter ID Woes Could Soar in Higher-Turnout Elections, Officials Fear, *Dallas Morning News*, Nov. 24, 2013.

Attachment A

Voting-Rights Fights Crop Up; Court Ruling Opens Door for Redistricting by Cities-and Suits by Minorities

The Wall Street Journal Online
November 1, 2013, WSJ.com Edition

THE WALL STREET JOURNAL.
Section: US

Length: 1117 words

Byline: Ana Campoy

Body

PASADENA, Texas-When ***JohnnyIsbell*** first became mayor here in the early 1980s, Hispanics were a minority in this refinery town, famous as the setting for the movie "Urban Cowboy."

Now the Houston suburb is more than 60% Hispanic and Mexican ballads are sung here as often as "Lookin' for Love" from the 1980 film. Gilley's honkytonk bar here burned down more than 20 years ago.

Mr. Isbell, again the mayor, believes it is high time for voters to eliminate two of the city's eight City Council districts, all of which were created to help ensure that Hispanics had a voice in politics, and replace them with two council seats elected citywide. He said the move, on the ballot here Tuesday, would result in more local leaders focused on the good of all of Pasadena.

"They don't care about citywide issues," said the 75-year-old Mr. Isbell of council members chosen to represent sectors of the city.

Until recently, Mr. Isbell's proposal would have required approval from the U.S. Department of Justice under the Voting Rights Act. The department screened revisions to local political districts in mostly Southern regions where discrimination historically had taken place, to ensure that minorities weren't disenfranchised.

But the U.S. Supreme Court ruled this summer that such oversight is no longer necessary, because minorities have made strides since passage of the 1965 law. That opened the door to change in cities such as Pasadena-and spurred new debates about what constitutes fair political representation.

In southeast Texas alone, legal challenges to redrawn voting maps in Galveston County and Beaumont have been complicated by the Supreme Court's ruling, which stemmed from a case involving Shelby County, Ala. The moves are being challenged by minority residents, who claim they would decrease the number of minority officeholders.

Other election changes have taken place in the South following the court decision, ranging from measures by counties to move polling locations in places with large minority populations to statewide laws, like one recently passed in North Carolina, that impose stricter identification requirements for voters.

"Before Shelby County, Galveston had the burden of showing what they were doing was not discriminatory," said Chad Dunn, a lawyer representing minority residents who filed a suit in federal court to block the county's redistricting proposal. "Now, we have the burden."

Joseph Nixon, a lawyer who represents Galveston County in the suit, said the maps were redrawn to eliminate certain unnecessary judicial positions and wouldn't dilute minority voting power.

Voting-rights experts expect the disputes to continue, especially in municipalities that previously were subject to federal oversight under the Voting Rights Act.

In Arizona after the ruling, state Attorney General Tom Horne, a Republican, gave the go-ahead to a redistricting plan for the Maricopa County Community College District that previously had been subject to federal review. Critics of the plan to add two at-large seats to the district's board say it could lead some parts of the region to end up with more representatives than others.

"The likelihood is very much there that it will work against minority representation," said Ben Miranda, one of five existing board members. Mr. Horne's office declined to comment.

In Pasadena, which has a population of roughly 150,000, some residents say special election protections for minorities are no longer necessary due to the city's Hispanic majority. But others say the changes in the city's racial composition haven't yet changed politics due to a lack of voter participation by Hispanics.

More than 55% of Pasadena's ***voting***-age population is ***Hispanic***, but people with a Spanish surname, a proxy for those of ***Hispanic*** origin, represent only around 35% of the registered ***voters***, according to city data.

"It doesn't punch its weight," said Walter Wilson, a political-science professor at University of Texas, San Antonio, of the minority electorate in general.

Pasadena elected all City Council members citywide in 1981, when Mr. Isbell, who has been elected to a total of five four-year terms, first became mayor. A decade later, local activists sued the city, seeking council districts to ensure representation for the growing Hispanic community. The tension was defused a year later, when city leaders moved to create council seats by geographic region.

The proposal before voters on Tuesday would turn two of the eight council seats back into citywide positions, and redraw the remaining six geographic districts to represent regions of the city.

Supporters say the change would unify the council and focus its attention on economic opportunities around Pasadena, including a new cruise-ship terminal and an entertainment district that could include a new version of Gilley's, the rollicking bar that put Pasadena on the map in "Urban Cowboy," starring John Travolta as a refinery worker.

"The town's identity is plant workers...western," said Mr. Isbell, as he swayed on a rocking chair in his office. "It's a heritage that we are proud of."

Opponents say the change would dilute Hispanics' voting power and make it harder for them to voice their needs, such as sprucing up the city's faded, heavily Hispanic north side.

"This city is no longer a Gilley's town," said Councilman Ornaldo Ybarra, 34, who keeps a bobble-head doll of President Barack Obama on his desk.

Mexican flags fly alongside American flags nowadays at Pasadena's car lots, and Hispanic businesses have taken over entire strip malls, including one that houses Cinema Latino, which mostly shows movies subtitled in Spanish and serves tamarind and hibiscus drinks along with Coke.

In a tiny storefront next door to the theater, Jorge Armando, a 32-year-old from the Mexican state of Puebla, sells CDs with music spanning his native country. He said that when people like him can vote-Mr. Armando is a permanent resident seeking citizenship-"things will be very different" for Hispanics in the U.S.

In the meantime, Cody Wheeler, a recently elected council member whose family hails from Mexico, is knocking door to door to urge those who are eligible to vote against the mayor's proposal on Tuesday. Overall turnout in Pasadena is regularly less than 10%.

"We're doing everything in our power to engage the electorate," said Mr. Wheeler, who won his seat last May by 33 votes.

He hadn't convinced Iris Gutierrez, 18, a college student, who could legally vote, but chose not to register because she feared she would be called for jury duty.

"I don't have much interest in it," she said of Tuesday's election.

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ALL IN WITH CHRIS HAYES for November 8, 2013

MSNBC ALL IN with CHRIS HAYES 8:00 PM EST
November 8, 2013 Friday

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Byline: Chris Hayes

Guests: Bill Carter, Eric Boehlert, Steven Reiner, Julie Fernandes, Mike Pesca, Emily Bazelon, Roman Oben, Barbara Buono

Highlight: CBS News is retracting, apologizing for and plans to correct a story it broadcasts on "60 Minutes" about the attack on the U.S. consulate in Benghazi, Libya, that killed four Americans last year. The city of Pasadena, Texas, is attracting attention for one thing related to their government, their effort to suppress the Latino vote.

Body

CHRIS HAYES, MSNBC HOST: Good evening from New York. I'm Chris Hayes.

We begin with a story that has refused to go away and not because of the facts involved, but because of the concerted effort on the right to stoke scandal at any cost.

Tonight, CBS News is retracting, apologizing for and plans to correct a story it broadcasts on its crown jewel program "60 Minutes" about the attack on the U.S. consulate in Benghazi, Libya, that killed four Americans last year -- a story it broadcasts using a government contractor who claimed to be an eyewitness to the attack, but who it appears was not in fact where he said he was on the night in question. The so-called eyewitness did not apparently see the events he claimed to describe.

On "CBS This Morning", "60 Minutes" correspondent Lara Logan acknowledged the mistake.

(BEGIN VIDEO CLIP)

LARA LOGAN, "60 MINUTES" CORRESPONDENT: You know, the most important thing to every person at "60 Minutes" is the truth. And today, the truth is that we made a mistake. And that's very disappointing for any journalist. It's very disappointing for me.

Nobody likes to admit they made a mistake, but if you do, you have to stand up and take responsibility, and you have to say that you were wrong. And in this case, we were wrong.

(END VIDEO CLIP)

HAYES: The explosive charge in Logan's original report was that there was an eyewitness account from a British security contractor named Dylan Davies who used the pseudonym Morgan Jones, who claimed the U.S. could have sent back-up to the besieged facility because he himself was able to go enter it and do battle with the bad guys.

(BEGIN VIDEO CLIP)

LOGAN (voice-over): Morgan Jones scaled the 12-foot high wall of the compound still overrun with al-Qaeda fighters.

MORGAN JONES, CONTRACTOR: One guy saw me. He just shouted, I couldn't believe that it's him because it's so dark. He started walking towards me.

LOGAN: And as he was coming closer --

JONES: I just hit him with the butt of the rifle in the face.

LOGAN: And no one saw you do it?

JONES: No.

LOGAN: Or heard it?

JONES: No, there was too much noise.

(END VIDEO CLIP)

HAYES: To a Benghazi scandal fire that was finally in its dying embers, the "60 Minutes" report was a gallon of gasoline.

The next morning, the FOX News tour began featuring Steve Doocy and Senator Lindsey Graham.

(BEGIN VIDEO CLIP)

STEVE DOOCY, FOX NEWS: CBS did this story on Benghazi and I see criticism from the left where they go, you guys are covering a phony scandal. "60 Minutes" doesn't cover phony scandals.

SEN. LINDSEY GRAHAM (R), SOUTH CAROLINA: If we don't have a joint select committee to get out of this stove-piping problem, we're never going to get the truth. And where are the survivors? Fourteen months later, Steve, the survivors, the people who survived the attack in Benghazi, have not been made able to the U.S. Congress for oversight purposes.

So I'm going to block every appointment in the United States Senate until the survivors are being made available to Congress. I'm tired of hearing from people on TV and reading about stuff and books.

(END VIDEO CLIP)

HAYES: Because of the "60 Minutes" segment, Senator Lindsey Graham was going to block every appointment made by the president.

But even then, that day, even on that Monday, it was apparent that the so-called eyewitness may have had some pretty questionable motives. Media Matters founder David Brock on our show that night disclosed that even FOX News itself was evidently weary of using Dylan Davies as a source.

(BEGIN VIDEO CLIP)

DAVID BROCK, MEDIA MATTERS: And the other witness appears to be some type of British mercenary who apparently in conversations with FOX News, asked for money to talk and so, you know, FOX News even drew a line there, but it was good enough for CBS.

(END VIDEO CLIP)

HAYES: It turns out, CBS was also publishing Davies book, through its company Simon & Shuster, the connection "60 Minutes" did not disclose during that original report.

As for Davies, while FOX News may have shied away from him because he asked for money, it didn't stop the very same FOX News from running more than 13 segments over 11 different shows inspired by the CBS report. The right's delight at mainstream validation of their own pet obsession was even comically evident at a campaign rally for the now defeated Virginia gubernatorial candidate, Ken Cuccinelli, a week before Tuesday's election.

Cuccinelli's warm-up act for stoking the crowd in Benghazi, including Congressman Frank Wolf.

(BEGIN VIDEO CLIP)

UNIDENTIFIED MALE: The man who was going to get to the bottom of what's going to happen in Benghazi.

Thank you, Jeremiah. I appreciate that introduction, and we are going to get to the bottom.

(CHEERS)

And if anyone watched "60 Minutes" last night, you can see why we need a --

(END VIDEO CLIP)

HAYES: Then, last Thursday, "The Washington Post" reported that Davies account to "60 Minutes" and the story in his book were different from an incident report he himself filed with his employer, but Blue Mountain Security.

But CBS News stood by their story, continued to defend it, despite multiple queries. CBS News chairman and "60 Minutes" executive producer Jeff Fager said he was proud of the program's reporting on Benghazi and, quote, "confident the source told accurate versions of what happened that night.

But the bottom fell out yesterday when "The New York Times" reporter that Mr. Davies told the FBI he was not in fact on scene until the morning after the attack.

(BEGIN VIDEO CLIP)

LOGAN: What we now know is that he told the FBI a different story and that was the moment for us, when we realized that we no longer had confidence in our source and that we were wrong to put him on air and we apologized to our viewers. We will apologize to our viewers and we will correct the record on our broadcast on Sunday night.

(END VIDEO CLIP)

HAYES: Joining me now is Bill Carter, a reporter for "The New York Times", who covers the television industry. He wrote "The Times" story on this today.

Bill, my head's spinning. How did this happen?

BILL CARTER, THE NEW YORK TIMES: Well, I think it happened because CBS was looking to get a new angle on the story. They got a book and in the book, this security man claimed that he was there and went through what they considered a betting process and decided he was credible and put him on the air. I think they needed a new angle because I don't think they had a lot of other new material in that report.

So, they really needed this guy to be truthful and they were in the middle of this situation where you know, he was saying one thing to his boss and a different thing to them, but it was a credible reason for that, because he had left his villa when he was supposed to not go to the scene, and what he told was a dramatic story and that added a lot of drama to what CBS wanted to report.

HAYES: What's interesting to me is that even when the issues start to be raised about his credibility, Media Matters is raising issues, then on Thursday, there's a "Washington Post" report, you know, it follows this kind of classic cycle, which is ignore, deny, double down, and then eat crow.

CARTER: Yes. And I spoke to Lara Logan before it blew up and she was very adamant about how credible this guy was.

HAYES: She was adamant about how credible he is to you when you talked to her?

CARTER: Yes, she said she believed in what he said and she didn't think he had given two versions and the FBI report would prove that. That he gave the same report to the FBI that he gave to CBS. And so, that became really the critical aspect of, with the FBI report corroborates it.

HAYES: So, you got two versions of the event, you got the diversion of event, the incident report, I stayed in my villa, I wasn't there the night I said I saw these dramatic things. You have what he told the CBS cameras and the audience of "60 Minutes", and the tiebreaker was what did he tell FBI, and the tiebreaker goes to he was not there.

CARTER: And it turns out he gave three interviews to the FBI. They interviewed him three separate times. And, you know, each occasion, he told the story the way it came out in the incident report. He stayed at the villa, he didn't go to the scene.

I spoke to CBS about that last night and they were obviously taken aback by that. They then spent the next couple of hours themselves checking with their FBI sources and by this morning, they had gotten the same report we had, which is that the FBI version was not their version.

HAYES: I want to bring in Eric Boehlert, senior fellow at Media Matters for America, Steven Reiner, former producer for "60 Minutes" and CBS, now director of broadcast and digital journalism at Stony Brook University.

Eric, well, you guys -- I mean, in some ways, this is not to be uncharitable here, but I'll tell the truth. This is a little over- determined in the case of Media Matters, like you guys are a liberal group. You fact check conservatives, conservatives obsessed with Benghazi, people might say maybe people like to say, well, Media Matters stopped clock being right, you know, twice a day.

But, you guys were right about this.

ERIC BOEHLERT, MEDIA MATTERS: No, we have been right about Benghazi for 13 months. I mean, we have been fact checking the story to death, and when CBS decided we want to piece of that pie, we want a piece of that right wing media narrative, there are lingering questions when there are none, when this story has been exhaustively researched by Congress. Military have talked about what the reinforcement responsible was.

When they decided to sort of key into that buzz machine, you talked about you know, FOX News the next day for an hour, the senator talking about it. What's the number one way to know you hit a home run? The next day, a senator's talking about your story.

They knew it was all predetermined. They couldn't resist it. The story didn't add up. There were no lingering questions.

The conflicts of interest should have stopped them. The discrepancies in the narrative should have stopped them. They should have apologized a week ago.

This whole thing is a train wreck, conception, execution, denial.

HAYES: I want to make clear here, Steven, I don't want to like put a dagger in "60 Minutes." I have tremendous admiration for "60 Minutes". I really do. It's incredible franchise. It's incredible they do the journalism they do. That they get the ratings they do. That they produce the profit they do.

In some ways it's like a miracle it exists in television journalism, which I think is why all of us take it so seriously. What is it like in that building today?

STEVEN REINER, FORMER CBS "60 MINUTES" PRODUCER: It's obviously a very, very difficult day for everyone there, but my question is how much real self-examination is being done there. I watched Lara this morning on CBS this morning and even though there was an apology, and even though it was borderline mistakes were made, I don't believe there was still an adequate explanation of just what kind of vetting really was done, at the end of the day.

Journalism 101, you have a single source.

HAYES: Yes, exactly.

REINER: And you have --

HAYES: The most dangerous thing in the universe.

REINER: And you have a single source who is a self-interested source because the source is trying to sell books. Then, you have a story, which is a political hot potato, which can be red meat to certainly one side of the argument and it seems to me that raises the bar and makes it more crucial that you do your due diligence.

And I didn't hear anything in the explanation of what we did to vet that leads credibility to can be red meat to certainly one side of the argument we were fooled. You shouldn't have been fooled.

HAYES: So, the Boehlert piece is here, right, is that this was basically, you see this story, you think this is going to light up the right.

BOEHLERT: It did.

HAYES: And it did and it's also like a box for us to check the next time we're accused of liberal media. Remember, we did that Benghazi story.

Just so folks understand the universe this is coming out, Threshold is the imprint of Simon and Shuster, that was publishing the book, although it has now been recalled. Being pulled out of -- we're trying to get video of them packing up the books. That would be a good --

CARTER: By the way, that's a CBS decision.

HAYES: Right, that's a CBS decision, its' getting pulled from the top.

Now, Threshold is a conservative imprint that publishes books by Glenn Beck, Sarah Palin, the book, "Censorship: The Threat to Silence Talk Radio", Mark Levin. I mean, that's the world this story is coming out of. Those are some red flags.

BOEHLERT: Yes. You know, they wants to key into it, like I said, there's an automatic audience there. But when you're going to wade into that, you have to be careful. You cannot stain your reputation just because you want to sort of fuel this.

One other quick point, after the National Guard story, you know, 2004, "60 Minutes," their last real huge embarrassment, they appointed a panel. Came outside, did lots of interviews, hired lots of lawyers and looked at this. I don't see, if they did that for that, how do they don't --

HAYES: I want to talk about that. Mary Mapes, who is famously Dan Rather's producer on the story of the National Guard documents, which were forged documents about President George W. Bush's record in the National Guard, famous Rather-gate scandal.

Mary Mapes had this to say, "My concern is the story is done very pointedly to appeal to more conservative audience's beliefs about what happened at Benghazi. They appear to have done the story to appeal specifically to political conservative audience obsessed with Benghazi, believes that Benghazi is much more than a tragedy".

You can't avoid the parallels here, Bill.

CARTER: Well, you can't avoid them because everybody's going to think of it.

I mean, I do think -- to me, this is a far lesser scandal because I don't see this as people aren't doing this sort of in a presidential election, trying to influence voting, et cetera. I think, I may be wrong, but I think people have to step back and say, look, there's a lot of agendas that were being played out here.

You're saying CBS wanted to court the right or whatever.

HAYES: Well, I was saying, I call it the Boehlert piece.

CARTER: OK, that's (INAUDIBLE).

But my sense is they were wanting to do something on Benghazi, spent a lot of time doing it and didn't have a lot. And then this guy's book showed up. That's what I think. That's my guess.

REINER: It was a mini perfect storm. They needed to inject a big B12 shot into that Benghazi story.

(CROSSTALK)

REINER: One of the things we try to tell some of our students is how to watch television and be aware this that fellow's story, had nothing. I mean, in essence, had nothing to do with the same old story they were telling in the rest of the piece. This was a little bit of smoke and mirror -- let's inject a dramatic, heroic story, and somehow we'll give the rest of it deeper meaning.

CARTER: I want to say one thing. Getting involved in this, you then see the impact, because the State Department didn't like this at all. They didn't like this at all. And they kind of went after this guy. They wanted to go after.

And so, reporting on this is a minefield. It's a minefield.

HAYES: Right. And what I don't want to happen is to, well, if something is an ideological minefield, let's not step into it.

What does have to happen --

(CROSSTALK)

BOEHLERT: How about debunking it?

HAYES: Or just do diligence and put up what appears to be a fabricator and put the credibility of the crown jewel of CBS News on the line.

Bill Carter from "The New York Times", Eric Boehlert from Media Matters, Steven Reiner from Stony Brook University -- thank you all really.

Coming up, this is the city of Pasadena's Web site. See here where it says we have the kind of community, culture and responsiveness that are attracting attention. They are attracting attention for one thing related to their government. Their effort to suppress the Latino vote.

Why a Texas ballot initiative was the most important election of the week you haven't heard about, coming up.

HAYES: Later on the show, we're going to talk about Jonathan Martin, a Miami Dolphins offensive lineman who was allegedly bullied so mercilessly, he left the team. Sadly, Martin's experience is not unique. Extreme locker room hazing is pretty uncommon.

So, on a more sober note, tonight, I want to know, what questions would you ask someone who spent a lot of time in an NFL locker room? Tweet your answers @allinwithchris, or post to Facebook.com/allwithchris. I'll share a couple later in the show when we talk to someone who was in an NFL locker room for 12 years.

Stay tuned. We'll be right back.

HAYES: Earlier this year, the Supreme Court dealt the Voting Rights Act its most devastating blow in the 48 years since its enactment, when by a 5-4 vote, it suspended the important enforcement of the crucial section five of the act. It got a very core of the law and it meant that nine states would be free the change their election laws without getting preclearance approval from the federal government.

We've been talking for months about the potential and likely ramification of this decision and this week, we saw it play out in dramatic fashion on Election Day in one city in Texas.

(BEGIN VIDEOTAPE)

HAYES (voice-over): Pasadena, Texas, a suburb of Houston, sometimes calling stinkadina from the smell of its chemical plants and oil refineries, home of 150,000 people, and the setting, the iconic film, "Urban Cowboy".

UNIDENTIFIED MALE: Cowboy?

UNIDENTIFIED MALE: Depends on what you think a real cowboy is.

HAYES: But like a lot of Texas towns, Pasadena has changed radically since the days when John Travolta walked the streets in a 10 gallon hat.

UNIDENTIFIED FEMALE: Pasadena not longer a small town, but a not so small city.

HAYES: The changes come in the last ten years thanks to growth in the Hispanic population, which has risen from 48 percent to 62 percent, making white people a minority in the new Pasadena.

Luckily for them, they are still a majority of the ***voting*** population. While the ***Hispanic*** population accounts for a majority of Pasadena residents, Hispanics make up only 32 percent of the city's voters, but the people who are running Pasadena see the writing on the wall. They know there are only a few voter registration drives and maybe a comprehensive immigration reform bill away from being relegated to minority status.

So, this summer, Pasadena Mayor ***JohnnyIsbell*** came up with a plan. Right now, the city is run by maybe and eight council members. Each member is elected from one of eight districts each representing a section of the city.

And for the first time in the city's history, there are now two Hispanics on the council. One is Cody Ray Wheeler.

CODY RAY WHEELER, PASADENA CITY COUNCIL MEMBER: We kind of came in there, looking to bring change, reform, to really engage in the community and we've called the mayor out on a lot of things we thought weren't very honest.

HAYES: In August, Isbell started pushing a plan to shrink the number of districts from eight to six, and replace those two with at large seats to be voted on by everyone in Pasadena, and by everyone, we mean the town's white voting majority.

WHEELER: He decided to make a full power grab and he didn't care who you'd have to step over to get it.

HAYES: To the community, the goal of the plan was pretty clear.

PATRICIA GONZALES, PASADENA RESIDENT: I think what he's trying to do is trying to stop us from being able to get the things we need and be able to be the majority. He doesn't like it.

HAYES: Dilute the power of the ***Hispanicvote*** and hand two council seats to the majority white voting population. Ensuring the citywide, majority white population could band together and retain their power.

WHEELER: What this effectively does is give the south part of town the majority of council.

HAYES: It turns out this is precisely the sort of thing section five of the Voting Rights Act was designed to block. In fact, Supreme Court Justice Ruth Bader Ginsburg cited this precise type of discrimination from a pre-section five world when a Voting Rights Act came before the court earlier this year.

RUTH BADER GINSBURG, SUPREME COURT JUSTICE: These second generation barriers included racial gerrymandering, switching from district voting to at large voting.

HAYES: Did you hear that? At large voting -- it's the oldest trick in the book and it's so immediately recognizable that when a neighboring Texas town of Beaumont cooked up a similar at large plan, it was blocked by the Justice Department in December of 2012.

But then, the Supreme Court killed section five of the Voting Rights Act in their 5-4 decision in Shelby v. Holder. And the mayor of Pasadena, ***JohnnyIsbell*** made his move.

WHEELER: He blatantly said at the first meeting we had, now that the preclearance from the Voting Rights Act is gone, we're going to redistrict the city.

HAYES: In the mayor's own words --

MAYOR ***JOHNNYISBELL***, PASADENA: The Justice Department can no longer tell us what to do.

HAYES: So, this summer, Isbell arguing that certain council members don't care about citywide issues, moved to put his own at large plan on the ballot.

WHEELER: The mayor's quite aware of what this does, but he just seems to not care.

HAYES: On Tuesday, the folks of Pasadena went to vote on proposition one and the majority won by a margin of 87 votes. Now, that section five is dead, there are thousands of potential Pasadenas all across the South.

(END VIDEOTAPE)

HAYES: We should note that Patricia Gonzalez who we spoke to in that report is a resident of Pasadena, also community activist with the Texas Organizing Project.

Joining me now is Julie Fernandes, former deputy assistant attorney general in the civil rights division of the Department of Justice, now, a senior policy analyst at the Open Society Foundations.

All right. You used to work at a desk, getting applications from places that wanted to do changes like this. How common or anomalous is the story of Pasadena?

JULIE FERNANDES, OPEN SOCIETY FOUNDATIONS: Well, I think changes to the method of election are actually the second most common type of voting change, that drew objections during the days of section five, so they were ones that often got a lot of scrutiny because you always have to ask the question why and assess the impact in the way your piece described.

HAYES: I think what's interesting about this story, (a), if I'm not mistaken, the Shelby County case that came before the court that initiated the court striking down was not dissimilar case. It was actually a change to the gerrymandering of a district of a relatively small town.

And what I think is interesting is we talk about voter ID and stuff happening at the state level. There is a lot of stuff that happens at the municipal level where these fights can get really nasty, and when the stakes are high -- property taxes, school equity, things like that that we don't necessarily see from the national level.

FERNANDES: That's part of what we lost here when we lost section five, is we lost the ability to know about this stuff. Everybody's going to know about statewide redistricting, everybody is going to know about statewide law changes. But places like Pasadena, Texas, or little towns, Clara, Alabama, Shelby County, all over the country, they're going to be doing things to manipulate the system, things that sort of define who the electorate is for their advantage, that has a significant minority impact and we're just not going to know about it because we don't have section five.

HAYES: Just so people can see in that map, these are the entire states that were formerly subject to preclearance which (INAUDIBLE). They range from Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia.

Talk to me about the case of Beaumont because that was a case in which you had basically a very similar set of facts and precisely the sort of thing the Justice Department said no way.

FERNANDES: Right. Just in December of 2012 is the perfect analogy, just in December of 2012, the Beaumont ISD made a change, I think it was from seven single member districts to five single member and two at large.

HAYES: Sounds familiar.

FERNANDES: Yes, very similar story and the same region of the state. And DOJ determined that was going to have an impact. In this case, I think from your piece, it's also clear that there's a concern about there being a discriminatory purpose as well, which is a constitutional violation.

And I think, you know, in fact, we see in Texas, a similar thing in Galveston, Texas, twice. I think once fairly reasonably, one in the late '90s. This is not an unusual technique and the situation where the minority population is growing, you have districts and there's an attempt to say how do you stop that growth from impacting the outcome of the election. It's classic.

HAYES: So, what is the recourse now that section five isn't there, preclearance is gone, the vote happened on Tuesday. The people who want to change, the mayor got his way. That's the change -- I think the city's constitution essentially, the charter.

So, what can people do?

FERNANDES: I think the resource is and I think there are people looking at whether or not there's a way to challenge in under section two of the Voting Rights Act, the part of the act still there, that you can use to bring a lawsuit to say this action was purposely discriminatory or had discriminatory effect. But those lawsuits take forever, Chris, they take a long time, they're expensive.

If the plaintiffs have such a case and if they prevail, we're looking at two years or more before we're going to have a resolution. That's two years with this -- a council elected this system, which is an arguably discriminatory system, setting the policy for that town.

HAYES: Right. Two careers in which we have these two at large districts, which we may lose all Hispanic representation in this town that is majority Hispanic, what could be past in the interim, which is the whole entire reason section five and four of Voting Rights Act, the preclearance was there.

Julie Fernandes from the Open Society Foundation, thank you so much.

FERNANDES: Thanks.

HAYES: Coming up --

(BEGIN VIDEO CLIP)

BARBARA BUONO (D-NJ), GUBERNATORIAL CANDIDATE: New Jersey represents the last vestiges of the old boy machine politics that used to dominate states across the nation. And unless more people are willing to challenge it, New Jersey's national reputation will suffer.

(END VIDEO CLIP)

HAYES: That was Democratic candidate for governor of New Jersey, Barbara Buono, in her speech following loss to Governor Chris Christie. She has a lot to say about the race and the governor and her fellow Democrats, and she will be my guest right here, next.

(BEGIN VIDEO CLIP)

BARBARA BUONO, (D) NEW JERSEY GUBERNATORIAL CANDIDATE: The democratic political bosses, some elected and some not, made a deal with this governor despite him representing everything they are supposed to be against. They did not do it to help the state. They did it out of a desire to help themselves politically and financially.

(END VIDEO CLIP)

HAYES: That was former democratic New Jersey State Senator, Barbara Buono, on Tuesday, following her --

SEN. BUONO: Hey, I am still a senator.

(LAUGHING)

HAYES: Still senator -- good point, following her blowout loss to Chris Christie in the governor's race in a speech in which she also thanked her supporters for withstanding, quote, the onslaught of betrayal from our own political party. It is a victory speech/announcement for his 2016 presidential run that night. Christie suggested, he is the one guy who is figured out how to bring people together in a time of political polarization.

(BEGIN VIDEO CLIP

CHRIS CHRISTIE, (R) NEW JERSEY NEWLY ELECTED GOVERNOR: I know that tonight a dispirited America angry with their dysfunctional government in Washington -- looks to New Jersey to say, "Is what I think happening really happening?" Are people really coming together? Are we really working African-Americans and Hispanics, suburbanites and city dwellers, farmers and teachers? Are we really all working together?

Let me give the answer to everyone who is watching tonight, under this government, our first job is to get the job done and as long as I am governor, that job will always, always be finished.

(END VIDEO CLIP)

HAYES: There is a lot more to the story of how Chris Christie brought people together in New Jersey and the governor wants to tell you and there is no one better to tell that tale than current state Senator, Barbara Buono of New Jersey. Senator, thank you so much for being here.

BUONO: Great to be here.

HAYES: You use this word, betrayal, in your concession speech.

BUONO: Yes.

HAYES: It is a strong word. Why did you use that word?

BUONO: Well, I just thought it would be important to be honest. You know, I struck a positive note as well because I think that this is an election first woman to run for governor of the state of New Jersey in a Democratic Party, definitely a ground breaking event.

And I want to make sure that all the young women and young men for that matter and minorities knew that it can be done, even in the face of insurmountable odds. That said, the Democratic Party unfortunately cut deals with Chris Christie and we really never had a chance in terms of gaining the financial support and institutional support that we really needed.

HAYES: You were outfund raised, I think of 6-1, if I am not mistaken --

SEN. BUON: That is academic at this point.

HAYES: Well, the question -- I mean what do you mean by cut deals? I think the story - here is the story that the national media is saying about Chris Christie. In these polarized times, here is the guy who hugs President Obama after Sandy, who is in a Obama state that went Obama by 17 points, democratic state, won by a whopping, you know, whatever was 30 points on Tuesday night, you know? And, is bringing people together. What about the bringing people together, do people outside of New Jersey politics not understand?

BUONO: Well, I can tell you in New Jersey, he ha not brought people together. People are -- you know, we have the highest unemployment in the region for the last four years. People are struggling. But, what this governor has done, people's eyes glaze over when he tells jokes on late night T.V. and he talks about Sandy, Sandy, Sandy, and the fact of the matter is, you know, the Democratic Party bosses and Chris Christie struck a deal.

HAYES: What does it mean? What strike a deal mean?

BUONO: Well, you know? It can mean different things for different people. You know, for those in South Jersey that meant that Chris Christie would not mount an offensive against their senators and assembly people in that district.

It could mean different things in the Northern end of the state depending on what your political interests are and what your business interests are. And, the fact to the matter is, I think that people of New Jersey deserves someone to represent them and not someone's narrow political and business interests.

HAYES: So, there is a kind of nonaggression pact, essentially, that is struck between members of your party in the state senate, George Norcrossis one of them in South Jersey, right? Yes?

BUONO: Yes.

HAYES: That basically, they are not going to go after Christie because it is in their own interest to be able to work with him to deliver whatever goods they need for their district.

BUONO: Look, Chris Christie -- nobody is more enamored with Chris Christie than himself. And, he said, he is a straight talker; but, let me just tell you this. You put a political boss in front of him and say this is what you need to do to get elected in the next election and you will see him fold like a cheap suit.

HAYES: You say Christie?

BUONO: Yes.

HAYES: What do you mean by that?

BUONO: Well, you know he really does not -- he said it himself when he was in Boston a few months ago. He said if you want someone who stands for anything, or ideology or conviction, then I am not your guy because I am in it to win it. And, honestly, I do not care that he is running for president. It is how he is running for president.

HAYES: But, then what is wrong with this mono. I mean when you look at Washington, right, the thing that everyone is talking about warning for are the days of transactional deal making politics.

BUONO: They are?

HAYES: Well, people, when people look at the shutdown, they say, "Well, if we had things like earmarks, if there are ways to have kind of these transactional deals, that things would work."

BUONO: There is a big difference between having a deal that benefits the people of New Jersey or the people of the nation or any state and a deal that is solely to benefit the political or business interests of someone. That is the big difference. Compromise and transactional politics, I think, are two very different things and I have a very different impact on the people and the democracy.

HAYES: What is work going to be for you like as a member of the senate caucus in the state of New Jersey after saying the things you said, after being abandoned and betrayed by your fellow democrats?

BUONO: Look. I have always run against the bosses. Back in 1994, when I first transfer the assembly, I ran against the political bosses' candidate and I won. And, then again when I ran in the senate, they said I could not win, and I did.

And, I became the first woman majority leader, first woman budget chair because there were all these deals that were being made. You know I am always going to be the person I am. I have been there and I will continue to be there for the people of New Jersey and that is it. Very simple.

HAYES: All right. State Senator, Barbara Buono, thank you so much for your time.

BUONO: Thanks for having me.

HAYES: Coming up, the story everyone is talking about this week. NFL bullying. My guest will include a former NFL player, who says fans have demanded total access and immersion in the game and then complain about the culture in the same breath. Stay with us.

HAYES: Earlier in the show, we asked you what questions you would ask someone who spent years in an NFL locker room. We got a ton of answers on Twitter and Facebook. Here is just a few, Sean from Twitter asked, "Was there any discussion about harassment laws and your rights when you were hired by the NFL?

Stevie wonders, "If you saw this happening, would you intervene. I was choke it in the first place." And, Cindy wants to know, "Who sets the code of conduct in a locker room? How is that person chosen and is the code of conduct condoned by the coaches?" Those are great questions. Thanks to HBO's series "Hard Knocks," we can actually take a look inside a real NFL locker room. Here is what was happening last year with the Miami Dolphins.

(BEGIN VIDEO CLIP)

RICHIE INCOGNITO, MIAMI DOLPHINE GUARD: You check your Facebook lately? Maybe you should not use your (EXPLICIT WORD) number for your iPad password, bud. 8484.

UNIDENTIFIED MALE SPEAKER (1): I used it.

INCOGNITO: Weird.

UNIDENTIFIED MALE SPEAKER (2): Got him.

INCOGNITO: It is a good guess. You might want to check your Facebook, bud.

UNIDENTIFIED MALE SPEAKER (1): What does it say? (EXPLICIT WORD)

INCOGNITO: I was going to put something up there rude, but then I saw the picture of your girlfriend, I felt bad.

(END VIDEO CLIP)

HAYES: He seems, nice, right? Charming Facebook (inaudible) that clip Dolphins Lineman, Richie Incognito is at the center of a bullying harassment hazing scandal that is rocking the NFL this week. In just a few short minutes I will be joined right here in the studio by a former player who said this week that you only get bullied in an NFL locker room if you allow it to happen.

HAYES: It is the bullying scandal that has shaken a multibillion dollar business to its foundation. The story is absolutely thrown into disarray. The organization Forbes calls the most lucrative sports leak in the world. The $9 billion industry that is, The National Football League.

Well, it began last week when reports emerged that Miami Dolphins Jonathan Martin had left the team after a prank his teammates pulled on him in the cafeteria. A prank Martin apparently did not find funny. He sings that in a reporting he got frustrated and smashed his tray on the floor and left the facility.

Initially, the story out of Miami was that Martin left the team because he needed quote, "Assistance for emotional issues." In the days since, new allegations have emerged indicating that Martin was the victim of intense sadistic and persistent bullying and hazing in the locker room.

And, according to reports, the chief instigator of that bullying was his team Richie Incognito. Incognito for his part has quite a story. In 2003, he was suspended by his college coach of Nebraska. A year later convicted a misdemeanor assault, same year suspended indefinitely by Nebraska and he was dismissed from Oregon's program after only a week with the team then after a few years in the NFL in 2009, he was voted the league's dirtiest player in a poll of fellow players.

Fellow teammate Cam Cleeland remembers Incognito as and I am quoting directly, "An immature unrealistic scumbag with no personality and locker room cancer who just wanted to fight everybody all the time." Earlier this week, Incognito jumped on Twitter to defend himself and challenge a reporter from ESPN tweeting, "If you or any of the agents you sound off for have problem with me, you know where to find me. #bringit."

Which the reporter did by tweeting some of the messages Incognito allegedly left on Martin's phone like, "Hey, what's up, you half N-word piece of expletive." On Sunday, the dolphins announced Incognito had been suspended for conduct detrimental of the team. Now, the NFL is investigating just yesterday. Martin's camp released this statement. Jonathan Martin's toughness is not an issue. He endured harassment that went far beyond the traditional locker room hazing.

Jonathan looks forward to getting back to playing football. In the meantime, he will cooperate fully with the NFL investigation. The scandal has just ripped back the curtain in the part of the football world we do not get to see every week, when we tune in to watch what is essentially managed to televise violence, which also happens to be the most successful form of entertainment in America today.

Joining me now is Mike Pesca, Sports Correspondent for NPR. Emily Bazelon, Senior Editor of legal affairs, writer for "Slate." Also author of a great book, "Sticks And Stones: Defeating The Culture of Bullying and Rediscovering the Power of Character and Empathy.

Mike I want to begin with you. This has blown up. I mean, it is kind of remarkable to me what a fire storm this has created. And, I think the entry point into why it is, is you see Jonathan Martin, who is just a massive human being, who does one of the most physically demanding, intimidating, strenuous jobs in America probably and you think, how could this guy be bullied. Right? That is the core of it.

MIKE PESCA, NPR SPORTS CORRESPONDENT: Right. And, it is the job of so many Americans, so many armchair quarterbacks that they say -- you to them, it speaks to toughness and it speaks like this lost ideal of whatever their version of masculinity is.

And, this is why when it came out, you did not need a lot of information. In fact people did not have a lot of information. The first day when people were debating it, they did not even know about the death threats that he got from Incognito and some of the slurs that you read.

But, you know, the debate was, how do you not stand up for yourself? How do you not punch the other guy in the nose? And, that came from players, former players, the GM of his team, just everyone.

HAYES: From the GM of his team. Former players, coming out like Ricky Williams, who I like and respect.

PESCA: Yes. I am a football fan of Jeff.

HAYES: He is a really thoughtful guy. Emily, as someone who wrote about and studied bullying, I am really curious to hear your reaction to the kind of disbelief that is being expressed both in the league and I think people watching that someone of that size could be bullied. And, I want you to talk about that right after we take this break.

HAYES: We are back. I am here with Mike Pesco and Emily Bazelon. And, joining us now is Roman Oben a former NFL player, who is a left tackle, now a football analyst for MSG and MY9 News. He is wearing a super bowl ring. I never held a super bowl ring in person. It is massive.

All right, Emily, I want to go to you on this -- This bullying question. What was your reaction to someone who wrote a whole book on bullying to the reaction of so many people, how could this massive individual be bullied?

EMILY BAZELON, WRITER FOR SLATE: Look, Jonathan Martin is a big guy in a locker room with a lot of other big guys. And, I think what matters here is the context. He is the new player. Richie Incognito is the veteran, who is in a leadership position and you can be socially excluded and made to feel harassed and terrible about yourself by other people. You can go through that kind of psychological torment and bullying, no matter how big you are.

HAYES: Yes. I think the psychological component of this is key. But Roman, you are someone -- you have been tweeting basically being like -- what a lot of other players have said, which is, "Look, if you can't take the heat, get out of the kitchen," I guess? I mean how are you reacting to this?

ROMAN OBEN, FORMER NFL PLAYER: Well, I think given this incident, there is different levels between what is a rookie responsibility, or getting the donuts and doing all those things and what Richie Incognito did to Jonathan Martin. And, as these ten levels have saw in between there and I think -- At those cases, someone should have said hey, lay off this kid. I'm a man first. Deal with it in the parking lot.

And, obviously in regular society, in bullying in the bigger picture, you can't deal with it that way, but talking about a football environment because I played football in the locker, I mean that is how you deal with it. So, you deal with the locker room with locker room issues and unfortunately, this story has become so huge that you have Ph.Ds and people in education and if this is the workplace, you would not have to buy lunch for everyone everyday. You would not be in the hazing. But, unfortunately, this has come out, a lot of things I have seen throughout my whole career and college.

HAYES: OK. So, what I think we need to do here is distinguish between a few different categories and things.

OBEN: Right.

HAYES: So, there is hazing, which is like "Hey, rookie, pick up my pads," which I think is a kind of -- I guess kind of a jerk move; but, like that is okay. That is not the worst thing in the universe.

OBEN: No. Not at all.

HAYES: And, there is a rookie dinner, where we run up a $15,000 tab and you have to pay for it. Well, that sucks, I mean -- but -- OK that is not violent. Then, there is physical violence. I want to hear the story because this Incognito guy seems to me, just diagnosing like something of a psychopath.

This is a former player Cam Cleeland, who was clubbed in the face by a sock filled with coins that free-agent linebacker Andre Royal had spent all day collecting from teammates -- Incognito. It shattered Cleeland's eye socket and nearly cost him his eye, which now provides him only with partial vision. That is not hazing. That is assault. Right? Am I wrong about that? Or does that happen in locker rooms all the time.

OBEN: It is assault and when we read it, it is awful, but in the football environment, we always tow that line between what is a passionate head coach and what is the appropriate. What is motivation? What is getting in a guy's face and what is inappropriate? What's getting a rookie tougher, seeing what a guy is made of and what's a racist comment and I think Richie Incognito absolutely went too far. We have all acknowledged that. But, there is an unwritten rule, and this has not been discussed this week. If you cannot deal with the Richie Incognito, and I do not feel this way, but if you can't deal with Richie Incognitos of the world, what are you going to do on third and ten against Jared Allen?

HAYES: That is -- I am sorry. That is crap.

OBEN: Hey! Look. Why do these teams scrutinize these rookies when they come out of college? Why does the general manager for the Miami, Dolphins asked Ded Bryant, was your mother a prostitute? This is the same organization.

HAYES: OK. So, there is two ways to go by responding to that. And, I want to get Emily's response to that question. But, here is my response to that is that first of all, you are making me feel like, "A. I got to think the psychological make-up that allows you the stand tough and strong under conditions of third and ten and in these sort of relentless, sadistic mental games are different, but may be they are not.

But, if they are not, then what you make me feel is that like football is just a game of sadism and violence and kind of a mall of horror that we all gaze upon and clap for. Like if you are telling me there is not that much difference than playing this game and being hounded this way in a locker room, I am like, "Oh, football is even more messed up than I thought."

OBEN: But, the fans want it, though. They want Hard Knocks. They want to go in the locker room. They want to see this stuff. And, when this happens, "It is oh! I can't believe these guys behave this." Well, it is football. It is not a fourth grade at recess.

HAYES: Right. But, it is also -- Mike. --

PESCA: But, It is not football. I mean so many teams have come out and said that sort of behavior would never happen in our locker room and I think what is troubling is that you are here saying rightly so, there is a fine line. There is a gray area. This is way over the line, but you ask the Dolphins. The Dolphins, all are sticking up for Incognito.

HAYES: Right.

PESCA: They are all saying, "Well, this is not the situation that you understand it." And, the rest of the league is kind of 50/50 on its Incognito was right. But the Dolphins all stick together. That shows me a sort of group mentality.

HAYES: Yes.

PESCA: Very troubling.

HAYES: That is my question for you, Emily, which is I think everyone now says, "Yeah, this was over the line."

OBEN: 100%.

HAYES: And, we have heard the voice mails that are just like, "I am threatening to kill you." Like you can't threaten to kill people or rape their loved ones, which is also happening.

BAZELON: Right. Right.

HAYES: So, why do not people intervene even when -- even when they know it is wrong and over the line?

BAZELON: You know, sometimes, it is easier to side with the dominating bully and it is harder to side with the person who in this case is being accused of breaking the code by going public. And, so I think this is a real test for the NFL.

I mean think about the message that this is sending to high school kids and their coaches about the kinds of team behavior we should be evaluating. If it is Richie Incognito who emerges from this as the one who has all the defenders in the sports world, then what does that say about kids who are being hazed and harassed on their team and who come forward and ask for help.

HAYES: If you are in that locker room, when you play that in your head, do you think you would have said something? You would have done something?

OBEN: 100% because I said from the rookie responsibility to where it led, you say, "Hey, Richie, lay off this kid. He is going to have to help us when he is a second round pick. Let's try something else."

HAYES: Have you ever done that, actually? Have you been in those situations?

OBEN: 100%. And, I have been in both sides of it. I have been in there when they are taping rookies, and a guy stripped down to his jock strap, and they are Icey -- I mean all these stuff -- all right, guys, that is enough, guys. That is enough. And, that is why people said, "Oh, this would not happen in the Steelers' locker room. The Giants or Patriots or teams have sustained, leadership sustained. A long head coach. This would happen in a Miami, Dolphins where they are trying to reestablish their identity.

HAYES: Emily Bazelon from Slate Mike Pesco for NPR and former NFL player, Roman Oben. I really wish we had an hour to talk about this. May be we will have you all back, really. Thank you so much. That is "All In" for this evening. The "Rachel Maddow" Show starts right now. Good evening, Rachel.

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Attachment C

Plans to redistrict Pasadena City Council

After former House Majority Leader **Tom DeLay**'s fall from grace, we thought that Texas politicians would know better than pursue mid-decade redistricting. Not so in Pasadena, where Mayor **Johnny Isbell** is trying to change Pasadena's city council districts.

Isbell proposed last month to replace two of Pasadena's single-member districts with two at-large seats. The Bond/**Charter Review Committee** recommended against moving forward with the changes, at least for the upcoming election. But the proposal alone is distressing enough. Historically, replacing districts with at-large seats has been used to discriminatory ends, and such moves are often blocked by the **Department of Justice**. Only a few months ago, that would have been the case here. Not anymore. For decades, the Voting Rights Act has been a useful speed bump in Texas. Due to our history of discrimination, any alteration to voting laws or processes had to be approved by the Department of Justice. When the **Supreme Court** struck down the part of the VRA that based preclearance requirements on past discrimination, it busted open a hole in that wall, and Texas politicians have wasted no time to climb through.

This newfound lack of federal oversight allows local politicians to implement maps that threaten to discriminate against minority voters. The current individual districts in Pasadena allow large, compact and politically cohesive minority populations to elect the representatives of their choice. Replacing these districts with at-large seats could dilute minority voting power, submerging the voting-bloc in a sea of majority voters.

As our Founding Fathers wrote in the Federalist Papers, our republic cannot function if the full spectrum of our nation's diverse interests do not have representation in government. Decades of discrimination kept vast segments of society away from the table, and only now do we start to see representation rising to the ideals our nation was founded upon. That progress is brought to a halt when cities such as Pasadena make it more difficult for a growing Hispanic population to take part in the democratic process.

Even with the removal of direct barriers to voter registration, historic discrimination in education, housing, employment and health services hinders minority ability to participate effectively in the political process and elect representatives of their choice. Pasadena's city government makes this point painfully clear - Hispanics comprise a majority of the voting-age population, and a majority of a voting-age population in six of the eight city council districts, but have yet to turn that into electoral success.

Anyone who cares about functioning government should be troubled by such a disconnect between population and representation.

Attachment D

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2013 WLNR 21307877

Houston Chronicle

August 27, 2013

Section: B

Suit blasts Galveston judge plan as biased County commissioners are trying to cut number of justice of peace courts

Harvey Rice

GALVESTON - A Galveston County plan slashing the number of justice-of-the-peace districts from eight to four intentionally discriminates against minority voters and should be blocked, according to a federal lawsuit filed Monday.

The lawsuit comes exactly one week after Galveston County commissioners approved a redistricting plan for justices of the peace similar to one rejected last year by the U.S. Justice Department. The department opposed the plan because it reduced the number of districts with black and Hispanic majorities from two to one, as does the one adopted last week.

Galveston County was the first Houston-area government to take advantage of the June 25 U.S. Supreme Court decision to change an election law that otherwise might have been blocked by the Justice Department. The decision in Shelby County v. Holder effectively ended a requirement that Texas governments receive Justice Department approval before making any changes affecting voting. Since then Pasadena has asked voters to approve a redistricting plan that previously was blocked by the Justice Department, and the city of Galveston is considering doing so.

By cutting the number of justice of the peace districts in half, Galveston commissioners reduced the number of judges from nine to four. Although the county has eight districts, there are nine justices of the peace because two are elected from a single precinct, an unusual arrangement arrived at under a 1992 consent judgment in a discrimination lawsuit.

'They did it anyway'

Attorney Joe Nixon, whose firm was hired by the county to redraw the justice-of-the-peace districts, said the plan is in compliance with the 1965 Voting Rights Act. "It's hard to say there was race involved when of the five seats lost one was a minority and four were non-minorities," Nixon said. He said the proportion of minority districts is the same as in the plan the Justice Department approved for commissioner's districts.

Attorney Chad Dunn, who filed the lawsuit, said the new plan is both intentionally discriminatory and has a discriminatory effect. "The county was already told by the Department of Justice that this plan was discriminatory," Dunn said. "The county knew the plan was discriminatory, and they did it anyway."

Seeking injunction

Commissioners said the number of districts needed to be reduced to improve efficiency and save money. They argued that the change would save $1 million annually, noting that two of the existing justices of the peace accounted for only 2 percent of the county caseload.

The lawsuit by two black justices of the peace, two black constables, a Hispanic constable and a black Galveston County resident asks the court for an injunction halting the use of the new districts in November elections.

The lawsuit also asks the court to declare that the new plan dilutes the voting strength of minority voters in violation of the Voting Rights Act and it amounts to unconstitutional gerrymandering. It also asks the court to reinstate the requirement for Justice Department approval of changes to election policies.

'Like Pearl Harbor'

The president of the city of Galveston chapter of the National Association for the Advancement of Colored People, David Miller, said he was upset that the lone minority commissioner on the court, Stephen Holmes, who is black, was not consulted about the change and that it was made without public hearings. "That was like Pearl Harbor. That was a sneak attack," Miller said.

The failure to consult Holmes was a reason cited last year by the Justice Department for blocking a plan to redistrict commissioner's districts and is another reason for asking the court to halt the latest redistricting plan, Dunn said.

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---- Index References ----

News Subject: (Minority & Ethnic Groups (1MI43); Social Issues (1SO05); Government Litigation (1GO18); Judicial Cases & Rulings (1JU36); Legal (1LE33))

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Attachment E

dallasnews
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Voter ID woes could soar in higher-turnout elections, officials fear

By BRITTNEY MARTIN
Austin Bureau
bmartin@dallasnews.com
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AUSTIN — Delays at the polls this month due to glitches with voters' identifications could signal a bigger problem to come next year, when many more turn out for state and county elections.

Thousands of voters had to sign affidavits or cast provisional ballots on Nov. 5 — the first statewide election held under the state's new voter identification law — because their name on the voter rolls did not exactly match the name on their photo ID.

It took most only a short time, but election officials are concerned that a few minutes per voter to carefully check names and photos against voter registration cards, and then to have voters sign affidavits or fill out provisional paperwork, could snowball into longer waits and more frustration.

A review by *The Dallas Morning News* found that 1,385 provisional ballots were filed in the state's 10 largest counties. In most of them, the number of provisional ballots cast more than doubled from 2011, the last similar election, to 2013.

Officials had no exact count for how many voters had to sign affidavits, but estimates are high. Among those who had to sign affidavits were the leading candidates for governor next year, Republican Greg Abbott and Democrat Wendy Davis.

"If it made any kind of a line in an election with 6 percent [voter] turnout, you can definitely imagine with a 58 percent," said Dallas County elections administrator Toni Pippins-Poole.

In Dallas County, 13,903 people signed affidavits affirming their identity.

The statewide election included nine proposed constitutional amendments, along with various local city and school board offices and propositions. It was the first to take place under Texas' 2011 law requiring that voters present a government-issued photo ID when they vote.

Name-match issues might surface for women who recently married or divorced and changed their identification but not their voter registration. For others, a shortened version of a name might appear on one document, while the full name is on the other.

Signing the affidavit didn't interfere with their ballot counting in the election, and election workers were instructed to give the voter the benefit of the doubt on a name-match issue.

Alicia Pierce, a spokeswoman for the secretary of state's office, which oversees elections, said officials worked to make the affidavit process as simple as possible. To sign the affidavit, voters need to initial after their signature on the poll's sign-in sheet.

Voters are also given the option to update their voter registration information at the polls. Pierce said officials hope that shortcut, along with continued voter education campaigns, will cut down on the number of affidavits and provisional ballots needed next time.

Those without the proper ID or who refused to sign an affidavit could fill out a provisional ballot. Such ballots are not counted unless

the voter presented the proper identification to elections officials within six days.

Harris County, the state's largest, had 704 voters fill out provisional ballots. Of those, 105 were cast because the voter failed to show an acceptable photo ID.

Constitutional-amendment elections tend to draw a much lower turnout than elections for the governor, other statewide officials, countywide officials and members of Congress. Voter ID critics fear that means many voters who didn't cast ballots this year will have trouble in March, when the Republican and Democratic parties hold primaries, or next November's general election.

State Rep. Trey Martinez Fischer, D-San Antonio, said longer lines could deter working voters, voters with children and others from voting.

"Voter ID is a solution looking for a problem," said Martinez Fischer, who has worked to defeat the law. "There's not a voter identification problem in the state of Texas."

The law, which the Legislature enacted in 2011, was delayed by the U.S. Justice Department's objection but took effect earlier this year, when the Supreme Court struck down federal oversight of elections in Texas and other states.

Now, Democrats and civil rights groups, along with the Justice Department, are suing to try to overturn the law, arguing that it has a disproportionate effect on minorities. U.S. District Judge Nelva Gonzales Ramos will hold a trial in September in Corpus Christi.

Republicans say requiring ID is a necessary step to eliminating the possibility of fraud in elections.

A *Dallas Morning News* analysis in September found that just four cases of voter irregularity pursued by Abbott, the state attorney general, since 2004 could have been prevented by the photo ID requirement.

Follow Brittney Martin on Twitter at @beadotmartin.

Did you see something wrong in this story, or something missing? Let us know.

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61 Comments

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33RD DISTRICT, TEXAS

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SUBCOMMITTEE ON MILITARY PERSONNEL

Congress of the United States
House of Representatives
Washington, DC 20515–4333

May 26, 2021

Office of the Attorney General
950 Pennsylvania Avenue Northwest
Washington, D.C. 20530

Dear Attorney General Garland:

As members of the Texas Congressional Delegation, we write to request information regarding the Department of Justice's efforts to protect the voting rights of Texas citizens, amid partisan efforts by Texas Republicans to pass dangerous legislation that will restrict the right to vote and make it harder for communities of color across Texas to cast their ballots.

During the 2020 election, Texans across our state risked their lives to vote during a deadly pandemic to ensure their voices were heard at the ballot box. The 2020 election has repeatedly been shown to be secure and accurate and in Texas brought the highest voter turnout in nearly 30 years.[1] Despite this success however, Texas leaders are participating in the dangerous trend occurring in numerous states across the country pushing discriminatory Jim Crow-style voter suppression laws on our constituents.

These bills will suppress minority voter turnout and silence the voices of Black, Hispanic, people of color, and those with disabilities into law while making voting harder for the general public in the state of Texas. These bills will roll back local efforts meant to widen access by curbing extended early voting hours, prohibiting drive-thru voting and making it illegal for local election officials to proactively send applications to vote by mail to voters, even if they qualify.[2]

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1 https://www.chron.com/news/election2020/article/texas-election-2020-voter-turnout-15704851.php

2 https://www.texastribune.org/2021/04/01/texas-voting-restrictions-legislature/

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In light of this attack on voting rights and our extreme concern about the impact on our constituents, we respectfully request a written response to the following questions by July 1st, 2021:

1. What action, if any, will be taken by the Department of Justice to review/challenge Texas Senate Bill 7 if passed? This bill, amongst other provisions, contains provisions that would forcibly redistribute polling places away from communities of color.[3]
2. Will the Justice Department commit to setting aside funds to challenge this bill or other discriminatory laws that violate section 2 of the Voting Rights Act?
3. Please describe any other current measures the Justice Department is taking to prevent voter suppression efforts the State of Texas.

Thank you for your prompt attention to this matter. Should you have any questions about this request, please contact Luke Dube at 202-225-9897 or luke.dube@mail.house.gov.

Sincerely,

Marc Veasey
Member of Congress

Colin Allred
Member of Congress

3 https://www.texastribune.org/2021/05/23/texas-voting-polling-restrictions/

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Justice Department suing Georgia over voting restrictions

By Devan Cole, Christina Carrega, Fredreka Schouten, Evan Perez, Ariane de Vogue and Dianne Gallagher, CNN
Updated 1:16 PM ET, Fri June 25, 2021

(CNN) The Justice Department is suing Georgia over new voting restrictions enacted as part of Republican efforts nationwide to limit voting access in the wake of President Donald Trump's election defeat.

The state law imposes new voter identification requirements for absentee ballots, empowers state officials to take over local elections boards, limits the use of ballot drop boxes and makes it a crime to approach voters in line to give them food and water.

Republicans had cast the measure as necessary to boost confidence in elections after the 2020 election and Trump's repeated and unsubstantiated claims of fraud, but Democrats in the state have called the new law voter suppression and likened it to Jim Crow-era voting laws.

Fact check: What the new Georgia elections law actually does

RELATED: Trump is doing more lying about the election than talking about any other subject

The lawsuit, coming days after Senate Republicans sunk their Democratic counterparts' signature voting and election bill during a key test vote, represents an early example of the Biden administration attempting to use the levers of government to try to block restrictive state laws.

Though President Joe Biden has underscored independence between the Oval Office and the Justice Department, he has nonetheless indicated that voting rights is a major agenda item for his entire administration. Biden narrowly won the state of Georgia during the 2020 presidential election, the first Democratic presidential nominee to pull it off since 1992.

Read the full lawsuit here

"This lawsuit filed is the first of many steps we are taking to ensure that all eligible voters can cast a vote that all lawful votes are counted and that every voter has access to accurate information," Attorney General Merrick Garland said at a news conference Friday.

READ: Justice Department lawsuit challenging Georgia voting law

Civil Rights Division leader Kristen Clarke said the Georgia law is aimed at Black and minority voters.

"These legislative actions occurred at a time when the Black population in Georgia continues to steadily increase and after a historic election that saw record voter turnout across the state, particularly for absentee voting, which Black voters are now more likely to use than White voters," Clarke said during the news conference. "Our complaint challenges several provisions of SB 202 on the grounds that they were adopted with the intent to deny or a bridge, Black citizens, equal access to the political process."

Republican Gov. Brian Kemp issued a defiant statement in response to the department's announcement, calling the lawsuit "born out of the lies and misinformation the Biden administration has pushed against Georgia's Election Integrity Act from the start."

Kemp accused the administration of "weaponizing the US Department of Justice to carry out their far-left agenda that undermines election integrity and empowers

federal government overreach in our democracy."

Secretary of State Brad Raffensperger said it's "no surprise that (the DOJ) would operationalize their lies with the full force of the federal government. I look forward to meeting them, and beating them, in court."

DOJ to launch task force to address rise in threats against election officials

Following the Georgia law's passage, Biden called on Congress to pass voting rights legislation that would counter measures like it.

The President at the time called the Georgia law "Jim Crow in the 21st Century" and "an atrocity."

DOJ using Voting Rights Act

The Justice Department is suing Georgia under Section 2 of the Voting Rights Act. It forbids voting qualifications that "result" in the "denial or abridgment" of the right to vote "on account of race."

Challenges under Section 2 can only be brought once the regulation at hand has gone into effect.

Garland's efforts, however, could be impacted by a current Supreme Court case, Brnovich v. DNC, where the Republican National Committee and Arizona's attorney general are defending two provisions of state law against a Section 2 challenge brought by the Democratic National Committee.

One regulation wholly rejects ballots for local, state and national races if they are cast in the wrong precinct and another says that only certain persons -- like family members -- may deliver another person's completed ballot to the polling place.

A federal appeals court invalidated both under Section 2, stressing the state's "long history of race-based discrimination against its American Indian, Hispanic and African American citizens."

Now the DNC is fearful that the Supreme Court will limit the reach of Section 2 and allow the provisions to remain in effect.

More action from DOJ to come, including on audits

Also Friday, the Justice Department announced a task force to address the rise in threats against election officials. Jurisdictions across the country, especially with high-stake local elections like in Fulton County, Georgia, reported receiving threats and racist taunts.

Garland said that the Justice Department will decide to file more federal civil lawsuits against states that have passed restrictive voting laws.

"We're looking at laws that were passed before, as well as the ones that have been recently passed, and as they are being passed, and we'll make the same kind of judgment that we made with respect to this one," Garland said.

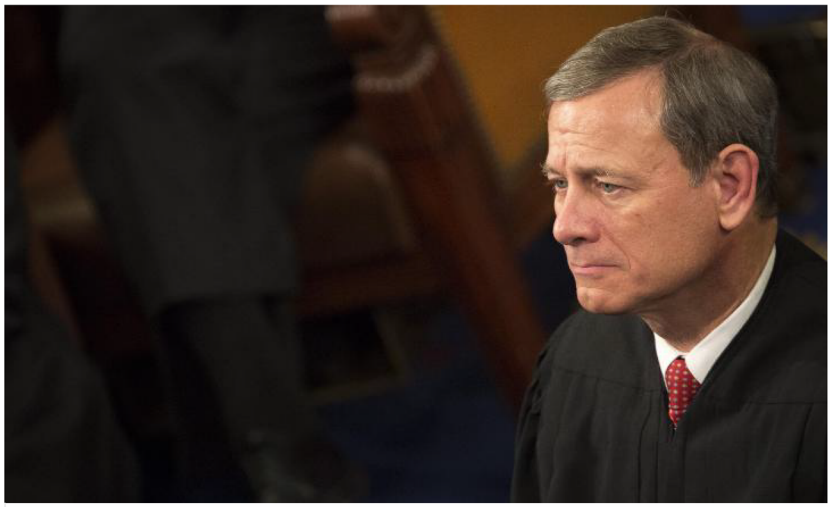
This year alone, 14 states have passed controversial voting rights laws that Garland flagged.

"Some jurisdictions, based on disinformation, have utilized abnormal post-election audit methodologies that may put the integrity of the voting process at risk and undermine public confidence in our democracy," the attorney general said.

Georgia law challenged in multiple lawsuits

Georgia became the first presidential battleground this year to pass new voting restrictions in the wake of Biden's White House victory -- setting off legal battles and prompting rebukes from major corporations in the state. Major League Baseball pulled the All-Star Game out of Georgia in protest.

Before the Justice Department's action Friday, at least seven lawsuits already had been filed, challenging its provisions.



How the Supreme Court laid the path for Georgia's new election law

Shortly after it was passed in March, the law had already been challenged in court by a trio of voting rights groups: the New Georgia Project, the Black Voters Matter Fund and Rise Inc. The lawsuit said the new law "disproportionately impacts Black voters, and interacts with these vestiges of discrimination in Georgia to deny Black voters (an) equal opportunity to participate in the political process and/or elect a candidate of their choice."

Opponents of Georgia's law applauded the DOJ's move, with NAACP President Derrick Johnson saying it "speaks to the level of urgency that is needed to protect our fragile democracy and ensure that all voices are heard."

State government

Voting rights activists have voiced particular alarm at parts of the law that give the Republican-controlled state government new powers over how elections are run in the state's Democratic strongholds.

Under the law's provisions, the Republican-controlled legislature now has the power to select three out of five members of the state elections board. And that board has new powers to replace local election officials it deems as poorly performing. The board now can take over election administration in up to four counties at a time.

Additionally, lawmakers removed the secretary of state as a voting member of the state elections board. Raffensperger, the current secretary of state, resisted Trump's false claims of election fraud in 2020 and now faces a primary challenge from a strong ally of the former president, GOP Rep. Jody Hice.

This story has been updated with additional reaction and background information.

CNN's Maegan Vazquez contributed to this report.

Ms. GARCIA. Great. Ms. Lakin, I have a question for you. I have been concerned particularly every election—I represent a 77 percent Latino district. We get complaints daily as the election starts, even in voting, about the difficulties Spanish-speaking voters have in getting an interpreter to be able interpret anything at the polls, bringing any friends to help them and assistance to vote, or if bringing in their own interpreter to vote.

What can we do under section 203 to ensure that any American with a language barrier has full access to registering to vote and exercising their right to vote at the ballot?

Ms. LAKIN. Thank you for your question.

The voter protections in 203 itself that provides that voters who seek assistance to be able to vote with very limited exceptions should have that opportunity. That should be enforced and respected for voters.

Ms. GARCIA. Well, we don't. It is happening here in Texas. My question was: What else should we be doing under that section, or any other section of the Voting Rights Act, to make sure that everyone has the access to the ballot? I can tell you that as a Senator in Texas, I have a bill to ensure the right to interpreter and I couldn't even get it out of committee, and so it is happening. It is real. It happens every election here in Texas.

Ms. LAKIN. In the assistance of Federal observers that I would pass it to Dr. Tucker to make sure that these provisions are being enforced would go a long way.

Ms. GARCIA. Mr. Tucker.

Mr. TUCKER. I would just add that section—

Mr. JOHNSON of Georgia. The gentlelady is out of time.

Mr. COHEN. We are over time. We are over time. I hate to interrupt. We are over time, and we have got to yield back to the next speaker. We are 1 minute over.

Ms. GARCIA. Mr. Chair, could I just ask then that he submit his response in writing for the record?

Mr. COHEN. Sure. Thanks.

Ms. GARCIA. Thank you, Mr. Tucker.

Mr. COHEN. Thank you.

Next, we will recognize Ms. Cori Bush from the great State of St. Louis.

Ms. BUSH. Yes, the great city of St. Louis.

St. Louis and I thank you, Chair Cohen, for convening this hearing and acknowledging St. Louis. Thank you.

To all my colleagues here today and elsewhere, we are running out of time. Just in the last few weeks alone, some of our colleagues in the Senate have actively been undermining our ability to deliver significant voting reforms. I want to focus my remarks today on nonpartisan Federal election observers.

We all watched as Georgia passed S.B. 202 with a provision that makes it a crime punishable by up to a year in jail for nonpartisan volunteers—nonpartisan volunteers to provide bottled water for voters in line outside of polling places. That is what we are up against. Several Republican-controlled States have gone out of their way, time and time and time again, to suppress Black voters because they fear our power and our political vision for America.

They know what we stand for. That is justice and our liberation in its totality.

Some of my colleagues can sit here and use coded language about States' rights and the Federal Government, or we can call it what it is. This is a conversation about one party's intent, and their ongoing White supremacist attempts to suppress the power of Black and Brown, indigenous, and other marginalized voters. Missouri, my State of Missouri, Georgia, Texas, Arizona, and the list goes on. Each of these States have introduced and passed restrictive voter laws. They will continue to do this without this type of oversight.

It is for this reason that nonpartisan Federal election observers are needed to investigate, document, and build a record of discrimination that can be used in courts and to inform legislation. These nonpartisan observers strengthen our election process by providing information and oversight when poll workers and administrators are often and otherwise overstretched and overworked. In 2016, Federal election observers were only sent to five States during our presidential election. This was one of the smallest deployments of Federal observers since the 1965 Voting Rights Act. Scaling back observers make it difficult to detect and counter efforts to intimidate voters, meaning, we don't even know how bad it is in many States across the country.

So, Mr. Tucker, how do Federal observers play an important role in enforcing the Voting Rights Act and how has their role been diminished. I am sorry. How has it been diminished since the Supreme Court's decision in Shelby County?

Mr. TUCKER. Thank you so much for that question.

As I noted in my testimony, I think the easiest way to think of Federal observers is with the acronym, PEP. A lot of us, that is how we remember cases. It stands for progress, enforcement, and preventing. Basically, they prevent discrimination from occurring. They make voters feel more comfortable. People are less likely, if they have people watching, they are less likely to discriminate against minority voters. They enforce because where they document instances in which violations of the 14th or 15th amendment of the VRA have occurred, DOJ has that information that they can prosecute it criminally, if necessary.

Then they also measure progress because that is really important. Many of the jurisdictions are covered under Federal court orders, and it helps the Federal judge assess, how are they doing? Are they actually coming into compliance with the terms of the order?

Shelby County's impact has been twofold. One is that, as I noted, by limiting the section 4 coverage formula for section 5, it essentially eliminates the mechanism by which the Attorney General can certify jurisdictions for observers. Then the second thing, as I also noted, is that Federal courts are reluctant to find intentional or purposeful discrimination which has limited the scope of section 8, 3(a) relief.

Ms. BUSH. Thank you.

Ms. Butler, how have polling site closures disproportionately impacted Black, Brown, and indigenous voters?

Ms. BUTLER. Well, I tell you, most of the polling locations in Georgia—there have been over 200 or so since the Shelby deci-

sion—they are predominantly in African-American communities. So, that is how it has impacted. It has made them so that they consolidate them. People have to drive further without—in rural areas without public transportation. Everyone doesn't drive. So, it makes it difficult. It is just a barrier for people to be able to exercise their right to vote freely.

Ms. BUSH. Yes. Our right to vote is the foundation of our democracy. The right to vote is our instrument for change. Who we choose to represent us is a reflection of our struggles and our aspirations as a country and a society. It angers me that this fundamental right is often suppressed in this functioning democracy.

Thank you, and I yield back.

Mr. COHEN. Thank you, Ms. Bush.

Now, I recognize from Houston, Texas, where they not only sing, but they dance, Sheila Jackson Lee.

Ms. JACKSON LEE. Mr. Chair, thank you for your generosity and thank you for this hearing.

A statement of fact that seems to have eluded my great friends on the other side of the aisle. The Supreme Court case decided by the conservative court, the Shelby case, with a decision that did not need to be rendered in the manner in which it did, completely exploded the preclearance provisions and provided the opportunities of freedom, emancipation voting for African-American voters and other voters at the polls.

Let me be very clear. The very existence of my district and others were because of the 1965 Voting Rights law. The very existence of my current 18th congressional district is because of the 1965 Voting Rights Act and its modifications and reauthorization in the 2000s.

So, any commentary about poor voters, or African-American voters not able to get ID cards, incredulous thinking about why are we having these hearings, we are having these hearings because the Supreme Court instructs us to have hearings so we can fix and redo and put back in place a vital lifeline for American voters of all kinds to have an equal right to vote and that is clearly why.

Now, let me compare both the 4 years of the Trump Administration where they barely opened the door of the Civil Rights Division, and offered three weak section 2 cases, compared to the Obama study in 2013, this major voting rights under section 2 of the North Carolina case that brought fairness to those in North Carolina, as my colleague said, two Texas cases that involves fair redistricting and the voter ID.

In fact, my case right now is in the court. It is a voter case, a voter ID district. I am at the mercy of the Voting Rights Act to do the redistricting in Texas. Let me colleagues know, and I have said it on today, on this stage, 2021. We will have to fight to make sure that Texas is fair, so that the districts are not stolen, because the basis of the growth in Texas is based on authority to support African American.

So, that lays the groundwork for my questions. This is an outrage to even be suggesting that we do not need that I think is important. The Shelby, the justification relief upon the conservative majority, the justification relied upon by the conservative majority of the Supreme Court to strike down section 4 of the Voting Rights

Act, today, essentially comes down and that of times change, Chief Justice has stated that times have changed. What he neglected to add is the reason why the times change for.

So, my question to you, Ms. Lakin, is explain why section 2 is not an adequate substitute for vigorous section 5 preclearance. My time is running because of the predicate that I laid, but I would appreciate it. I have another question.

Ms. LAKIN. Just quickly, it is incredibly expensive, costly, complex, and time-consuming to bring section 2 litigation. As a result, elections can take place. Hundreds of elected officials and millions of votes can be cast under regimes that courts later find are discriminatory. There is no way to compensate voters who have suffered from this discrimination after the fact. There is no way to rerun those elections. So, section 2 is simply, it is important, and it is a vital tool for voting rights advocates, but it is not sufficient.

Ms. JACKSON LEE. The damage was already done with the voting ID law when we had to come in on the section 2 in Texas. Thank you so very much.

Ms. Butler, let me publicly apologize to you for having given such wonderful service and then having your position eliminated by a move that looks to me that they would imbalance between the ultimate persons elected. It was based on party. So, give me your sense what would have been helpful to you if there was a preclearance as it would be for a voting mission that you—Ms. Butler?

Ms. BUTLER. Well, preclearance, of course, would have made sure that any of these changes would have gone through DOJ's preclearance process and I do believe they wouldn't have gone through. We have had to expend a lot of our time as being plaintiffs in lawsuits for exact match for polling location changes, and these types of changes wouldn't have occurred if section 5 of the Voting Rights Act was operable. We wouldn't have experienced this, I do believe, and it was strictly from what I can determine right now, based on our objections to barriers to the voting process.

Ms. JACKSON LEE. Thank you.

Mr. Tucker, so many of my voters have stated, senior citizens or people of color, they are bilingual. There are various issues, but they have the right to vote. What is the special emphasis of Federal observers how important those are? Mr. Tucker?

Mr. TUCKER. Yes. So, observers, as I mentioned, ensure that voters are able to exercise their ballot freely, free of discrimination, and free of intimidation. They are able to enter the polling place. If they need assistance, they document that. If it is not given, they document that as well.

They basically are the eyes and ears for the Attorney General for Federal court and for private attorneys general that are trying to enforce the 14th and 15th Amendments.

Ms. JACKSON LEE. Thank you.

Mr. Chair, I want to submit into the record the following if I could: Mail ballot drop-off locations; Houston Chronicle, "Governor Abbott Limits Mail Ballot Drop-Off Locations"; NBC News, "Racist Voter Suppression"; Texas Tribune, "It's Harder to Vote in Texas"; and "A Strong Voting Rights Act is Needed Now More Than Ever" The Hill, dated June 26th, 2021, op-ed.

I ask unanimous consent to submit these in the record. Mr. Chair, thank you, and that is why we are going to write a strong Voting Enhancement Act.

Mr. COHEN. Thank you. They will be admitted into the record.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

Gov. Abbott forces Harris County to close 11 mail ballot drop-off sites, leaving just one
Houston Chronicle
https://www.houstonchronicle.com/politics/texas/article/Abbott-mail-ballot-drop-off-harris-county-election-15612991.php
October 1, 2020

Gov. Greg Abbott on Thursday declared that counties can designate only one location to collect completed mail ballots from voters, upending some counties' election plans and drawing condemnation and accusations of voter suppression from across the state and country.

The surprise move came in the form of a proclamation that countermanded a legal argument the Texas solicitor general had made in a lawsuit the day before and spurred the threat of legal action by the League of United Latin American Citizens and other civil rights groups.

Most immediately, it forced Harris County to abandon 11 sites set up to allow voters to drop off their absentee ballots. The proclamation takes effect Friday.

Abbott's proclamation also said that counties, to improve ballot security, must allow poll watchers to "observe any activity conducted at the early voting clerk's office" related to the delivery of marked ballots.

"The state of Texas has a duty to voters to maintain the integrity of our election," Abbott said in a statement. "These enhanced security protocols will ensure greater transparency and will help stop attempts at illegal voting."

The abrupt announcement drew sharp rebukes from Democrats incensed that Abbott would make absentee voting more difficult for those worried about exposure to the novel coronavirus at the polls.

U.S. Rep. Al Green, D-Houston, said the move, with voting already underway, was "about as good an example as we'll get" showing why Texas again should be subject to supervision under the Voting Rights Act.

“Republicans are on the verge of losing, so Governor Abbott is trying to adjust the rules last minute,” Texas Democratic Party Chairman Gilberto Hinojosa said in a statement. “Courts all over the country, including the Fifth Circuit yesterday, have held that it is too late to change election rules, but our failed Republican leadership will try anyway.”

Harris County Judge Lina Hidalgo also rejected the idea that Abbott’s proclamation was aimed at protecting election integrity.

“This isn’t security, it’s suppression,” Hidalgo said in a statement. “Mail ballot voters shouldn’t have to drive 30 miles to drop off their ballot or rely on a mail system that’s facing cutbacks.”

Abbott did not cite any examples of voter fraud, which election law experts say is rare.

Just 0.2 percent of 85,922 absentee voters hand-delivered their ballots during the low-turnout July primary runoff; 39 of the 404 ballots for the Nov. 3 election that have been returned through Thursday were dropped off by voters.

Voting by mail has become a national issue as the presidential election approaches while the country remains in the grip of the coronavirus pandemic, with Democrats pushing voters to consider using the method and accusing the Trump administration of trying to sabotage the U.S. Postal Service to disrupt the election. Trump repeatedly has tried to discourage mail balloting, saying it is not secure and is ripe for fraud, even though he uses it frequently.

Texas is one of seven states where all voters are not eligible for mail ballots. Despite that, and a lawsuit from Attorney General Ken Paxton seeking to bar Harris County from sending mail ballot applications to all 2.4 million registered voters, the county has seen an exponential increase in mail ballot requests during the COVID-19 pandemic.

County Clerk Christopher Hollins projects turnout could hit as high as 1.5 million, a record; more than 207,000 mail ballots have been requested already.

To accommodate the surge, Hollins had set up 12 locations — 11 of them county clerk annex offices — throughout the 1,777-square-mile county to collect mail ballots. They offered residents an alternative to placing their ballots in the mail, amid concerns the U.S. Postal Service would struggle to deliver ballots on time.

Under Abbott's proclamation, the county now will be able to accept ballots only at its election headquarters at NRG Arena.

Hollins accused Abbott of going back on his word in a July 27 proclamation intended to make voting easier during the pandemic. He said Harris County for weeks has advertised its dropoff locations.

"To force hundreds of thousands of seniors and voters with disabilities to use a single dropoff location in a county that stretches nearly 2,000 square miles is prejudicial and dangerous."

Assistant County Attorney Douglas Ray said the governor's claim that limiting mail ballot collection to one site will combat fraud makes no sense. At each location the Harris County set up, voters had to deliver their own ballots, sign in, speak with an assistant clerk and provide identification.

Consolidating that process to one site will make dropping off a ballot more cumbersome, he said.

"It's a bit like saying we had a hurricane and everybody needs water, so we're going to have everybody go to a single location," Ray said. "We're not going to distribute it around town."

The governor's announcement caught election administrators off guard. Fort Bend County announced five dropoff sites on Thursday morning and then had to scuttle those plans.

Travis County Clerk Dana DeBeauvior said she received no warning she would have to close three locations, and accused Abbott of trying to deliberately manipulate the election. She told the Austin American-Statesman she would consider a legal challenge to Abbott's order.

It appeared to have no affect, however, on the enormous counties in West Texas whose area exceeds that of some New England states. The three largest — Brewster, Pecos and Hudspeth — have just one dropoff location.

State Sen. Paul Bettencourt, R-Houston, praised Abbott for ensuring poll watchers would be able to observe the arrival of mail ballots, writing on Twitter they are "sunshine preventing fraud." The Secretary of State's Office had said Tuesday that poll watchers were not permitted at ballot drop-off sites, but Hollins said he had no objection.

Abbott's proclamation partially achieves what a group of Houston Republicans, including Harris County Republican Party Chairman Keith Nielsen and conservative activist Steve Hotze, had sought in a lawsuit filed with the Texas Supreme Court.

They argued that Harris County was violating the Texas Election Code by setting up multiple locations to collect mail ballots, accepting mail ballots before in-person voting began and extending the early voting period. It was Abbott, however, who added an extra week of early voting in an effort to ensure residents could vote safely during the COVID-19 pandemic.

Kyle Hawkins, the state solicitor general, on Wednesday argued in a brief to the Texas Supreme Court that multiple dropoff locations were permitted under Abbott's July election order. They became illegal only when Abbott issued his proclamation on Thursday.

The governor's spokesman did not respond to a request to explain what prompted Abbott to take action now.

The announcement of Abbott's proclamation came hours after Paxton praised a federal appeals court for reinstating the Legislature's ban on straight-ticket voting, noting that voting already had begun.

"Last-minute changes to our voting process would do nothing but stir chaos and increase opportunities for voter fraud," Paxton said.

LATINO

'Racist voter suppression': Texas laws keep Latinos from the ballot box, groups say

As the state sees more Latino eligible voters, it keeps making it harder to register and to vote, Latino legal and civil rights organizations say.

— Voters stand in line to cast their ballots inside Calvary Baptist Church in Rosenberg, Texas on March 1, 2016. Erich Schlegel / Getty Images file

Oct. 3, 2020, 8:08 AM EDT

By Suzanne Gamboa

SAN ANTONIO – The coronavirus pandemic could challenge Latino voter turnout this year, and voting advocates say it just adds to the barriers intentionally enacted to keep Latinos and voters of color from casting their ballots.

"Texas has a long history; it's the state that has the most pronounced, overt, racist voter suppression tactics that we know of," said Lydia Camarillo, president of the Southwest Voter Registration Education Project, formed in 1974 when Mexican Americans still were being kept from voting.

Latinos are almost 40 percent of the population and are on track to be the state's largest population group by next year. Latino turnout has been rising, but those trying to ramp up the bloc's voting in the state must each year overcome laws and measures that play a role in keeping them from voting.

Of more than 15,000 Covid-19 deaths in Texas so far, 56.1 percent are Hispanics and 30.1 percent are whites.

But Texas Republican Gov. Greg Abbott has refused to expand its mail-in voting to accommodate people concerned about being exposed to the virus when they go to the polls.

Abbott did expand early voting by six days, but others in his party are suing to prevent that expansion.

Abbott went further by announcing the shutdown of satellite locations for Texans allowed to vote by mail. He is allowing one drop-off box per county – a move, he said, that would protect the integrity of the elections and stop illegal voting.

The announcement drew immediate criticism and a lawsuit filed by the League of United Latin American Citizens.

The governor's decision will have a big impact in Texas' large urban counties, where Democrats have been winning, including in Harris County, the nation's third most populous county.

Harris County Judge Lina Hidalgo slammed the governor's decision, noting that the county for which she serves as the chief elected official is bigger than the state of Rhode Island. "This isn't security, it's suppression," she said in a tweet.

If Texas wanted to facilitate broad participation, it would ensure remote and early voting were widely available, along with multiple, convenient and broadly available polling places, said Thomas Saenz, president and general counsel for Mexican American Legal Defense and Educational Fund.

"That is not what Texas is doing," Saenz said. "That's for a reason. Texas authorities know they are suppressing the vote."

"The infrastructure of suppression"

Texas' history of disenfranchising voters – from holding whites-only primaries, to barring people from voting based on whether they speak English, to outright intimidation and closing voting locations in minority locations – was so notorious that for years the state had to get Department of Justice approval for any election changes under Section 5 of the Voting Rights Act.

There's no question that Latinos' youth and the population's disparities in education and income are factors in voter turnout. Younger people are less likely to show up at the polls. Voters who do, often are more educated and have higher incomes, Saenz said.

But Texas Latinos' voter registration is lower than that of Hispanics in other parts of the country, so demography and disparities aren't the only explanation. "Given Texas' history, you have to believe some of that is obviously linked to race," he said.

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In 2013, the Supreme Court gutted the Voting Rights Act, and within hours, Texas imposed a strict Voter ID law. As an example, it allows only certain forms of ID – such as a gun permit – but not a college identification card, which is what many young voters have. An early version of the law was found to deliberately discriminate against Blacks and Latinos.

"For 144 years, Texas has perfected the science of suppressing voters at the ballot box," Beto O'Rourke, a former presidential candidate and former congressman, said in a recent virtual Democratic event. Its preference for gun permits over college IDs is part of an "infrastructure of suppression," he said.

Without the federal government oversight, the state became a national leader in reductions of polling sites, according to a study by The Leadership Conference Education Fund.

Last year, the state tried to purge its rolls of tens of thousands of voters based on flawed Texas drivers' license data. The attempted purging followed a year in which Latinos had doubled their turnout at the polls. Although the state was stopped, the tactic may have terrorized some voters fearful of doing the wrong thing into skipping voting, Saenz said.

A voter registation obstacle course

After Monday, Oct. 5, it will be too late to register to vote in Texas.

The state has one of the earliest deadlines for registering – while it also spurns online registration. Federal law requires states to allow people to register to vote when they apply for a driver's license. The state finally began to comply this week, after a federal judge ordered it. Texas now allows people who update or renew their licenses to also get on the voter rolls. Otherwise, people must fill in an application, print out the completed form and mail it in or drop it off.

Texas has also made it tough to register voters, requiring people to be deputized by taking training and passing an exam. The person registering must be able to vote in Texas and can only register voters in the county where they are deputized, for a limited time. There are 254 counties in Texas.

In 2017, the Republican-led Texas Legislature ended straight ticket voting – when a person votes for all candidates of a single party by checking or clicking on one box.

It came as more Democrats were straight ticket voting. Democrats won a reinstatement of straight ticket voting, but a three-judge panel of the 5th Circuit Court of Appeals overturned the decision this week after Republicans appealed.

— A caucusgoer marks an official ballot during the Nevada Republican presidential caucus in Las Vegas on Feb. 23, 2016. Andrew Harrer / Bloomberg via Getty Images file

Jason Villalba, a former Republican state representative who formed the Texas Hispanic Policy Foundation, said his Republican colleagues in the Legislature never intentionally diminished or limited the ability of Latinos to vote.

But there was a big concern among Republicans that Democrats would “game the system” and “harvest votes” among constituencies that do not historically vote, are economically disadvantaged and are people of color, said Villalba, now an independent voter. He acknowledged “exceptional ignorance to our community” exists.

Young Latinos boost voter numbers

The nonprofit Move Texas has been working since January to register voters, especially young people of color. It has mailed out 400,000 applications with stamped return envelopes.

The pandemic stalled the work that involved going to campuses and other places with clipboards and registering people – and underscored how difficult it is to register in Texas, said Drew Galloway, Move Texas executive director.

"Voter suppression is alive and well and we've known this since Move Texas started in 2013. We really had to help young people overcome these barriers set up by the state," Galloway said. He said 41 percent of the state is under age 30 and 63 percent of that group are young people of color, mostly Latino.

Despite the tougher registration rules, Latino voting has grown simply because of numbers. Albert Morales, senior political director for Latino Decisions polling firm, said 730,000 Latino Texans have turned 18 since Hillary Clinton ran in 2016.

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Camarillo's Southwest Voter Registration Education Project had planned to visit high school classrooms to register at least 140,000 students who will be old enough to vote by Election Day.

Texas law requires schools to offer registration twice in a school year, but Camarillo said compliance is not enforced. The closure of schools by the pandemic hurt Camarillo's plans and

now the group is relying on principals encouraging students to reach out to her group.

The state's secretary of state announced last month that 16,617,436 million Texans registered to vote, a record.

There are 5.6 million Latinos eligible to vote this year. But as of 2018, only 2.7 million were registered to vote and 1.9 million voted that November in the midterms.

Camarillo said she expects 2 to 2.1 million Latinos still will make it to the polls despite the obstacles.

Mary Moreno is the spokeswoman for the Texas Organizing Project, which is working to turn out 800,000 Latinos in November. The governor takes pride in Texas being first in everything, but not when it comes to voter participation, she said. “Everything he’s done has effectively suppressed the vote," she said. Abbott's latest limits on ballot drop-off locations "is the latest example.”

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Suzanne Gamboa

Suzanne Gamboa is a national reporter for NBC Latino and NBCNews.com

TEXAS 2020 ELECTIONS

Analysis: It's harder to vote in Texas than in any other state

Voting laws in Texas are the most restrictive in the country. And voter turnout here is among the lowest, too. Maybe those facts are related.

BY **ROSS RAMSEY** OCT. 19, 2020 4 AM CENTRAL

A voter cast a ballot in Austin last week. Miguel Gutierrez Jr./The Texas Tribune

Editor's note: If you'd like an email notice whenever we publish Ross Ramsey's column, click here.

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How hard is it to register to vote and then to vote in Texas?

It's harder than in 49 other states, according to a "cost-of-voting index" compiled by political scientists at Northern Illinois University, Jacksonville University and Wuhan University in China.

Obviously, it's not impossible to vote in Texas; more than 10% of the state's registered voters — about 2 million citizens — had already cast their ballots, either in person or by mail, by Thursday night. That's certainly a sign of enthusiasm, and could either be a signal of a bigger-than-normal turnout or that a lot of Texas were itching to vote and did so as soon as they could.

But the state has erected obstacles throughout the voting system, and when you compare the comfort and convenience of voting in Texas with other states, Texas ends up at the bottom of the list.

Voting and election law is a persistent struggle in Texas between those who want to knock down impediments to voting and those who think more safeguards are needed to secure the process and the results — though the evidence for this is both anecdotal and thin.

That particular battlefield ranges from voter ID to current legal battles over how many drop-offs each county is allowed to provide for voters who would rather not put their absentee ballots in the mail, who's eligible to vote by mail and whether counties with curbside voting are making things too simple.

Here's how the researchers wrote up our state's position on the list: "Texas maintains an in-person voter registration deadline 30 days prior to Election Day, has reduced the number of polling stations in some parts of the state by more than 50% and has the most restrictive pre-registration law in the country, according to the analysis."

States at the top of the list — where it's easiest to vote — have voting conveniences that aren't available here, like online voter registration, automatic voter registration and allowing voters to register as late as Election Day. (The Texas deadline was Oct. 5.)

Some have universal mail-in voting, which the study considers a hallmark of a state where it's easy to vote. In Texas, voting by mail is only available to people ages 65 and older, to eligible voters confined to jail, for voters who are out of their county of residence during voting, and for voters who cite a disability that prevents them from safely going to the polls.

And higher-rated states require only a signature for in-person voting, instead of tight voter photo identification laws like the one in Texas.

Texas has one of the lowest voter turnout rates in the country, turning out 45.6% of its population of eligible voters in 2018, compared with a national average of 49.4%, according to the United States Election Project. In the last presidential race, in 2016, turnout was 51.4% of the state's eligible voters, a number that includes adults eligible to vote whether they registered or not. The national average was 60.1%.

The cost-of-voting index is an update of a study that includes indexes for elections back to 1996. In 2016, Texas was fifth from the bottom of the list, in company with Indiana, Tennessee, Virginia and Mississippi. This time around, Texas is behind every other state, in the bottom of the barrel with Georgia, Missouri, Mississippi and Tennessee.

Maybe the low turnout in Texas is related to the state's restrictive voting laws. Maybe eligible adults in Texas are less interested in voting, and the state's voting laws are just an excuse for the low civic engagement.

There's a way to find out, if state lawmakers' goal is to get more Texans voting. If they wanted more people to vote, they'd make it easier.

THE HILL

A strong Voting Rights Act is now more than ever

BY REP. SHEILA JACKSON LEE (D-TEXAS), OPINION CONTRIBUTOR — 06/27/21 08:15 AM EDT
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Manchin warns House Democrats over bipartisan infrastructure bill delay

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Eight years ago yesterday, June 25, 2013, the Supreme Court handed down its infamous decision in Shelby County v. Holder, 570 U.S. 529 (2013), which immobilized the Department of Justice from subject discriminatory voting and election law changes to prior review and approval, or "preclearance." It was predicted at the time by me and others defenders of the precious right to vote that the Court's misguided and naïve decision would usher in a wave of state and local initiatives intended to suppress and nullify the rights of Black Americans, persons of color, young adults, and marginalized communities to exercise the most basic act in the political process voting.

As we have seen, this prediction has tragically come to pass. In recent months, reactionary bill passed by the Texas Senate, along with the 253 bills to restrict or curtail voting rights, have been introduced in 43 states, and illustrates the fierce urgency of Congress passing, and the signing by President Biden, of the John Lewis Voting Rights Advancement Act and the already House-passed H.R. 1, the "For The People Act," which, among other things, would protect and make it easier to vote in federal elections, end congressional gerrymandering, and increase safeguards against foreign interference.

In Shelby, the justification relied upon by the conservative majority of the Supreme Court to strike down Section 4 of the Voting Rights Act today essentially comes down to this: "Times change." Chief Justice John Roberts was right, times have changed. What he neglected to add is that

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the change was due almost entirely to the existence *and vigorous enforcement* of the Voting Rights Act.

In the same way that the vaccine invented by Dr. Jonas Salk in 1953 eradicated the crippling effects but did not eliminate the cause of polio, the Voting Rights Act succeeded in stymying the practices that resulted in the wholesale disenfranchisement of African Americans in the southern region of our country but not in eliminating the motivations underlying them. And that is why the vaccine of the Voting Rights Act is needed as much today as Dr. Salk's vaccine is needed to prevent another polio epidemic.

Before the Voting Rights Act was passed in 1965, the right to vote did not exist in practice for most African Americans. And until 1975, most American citizens who were not proficient in English faced significant obstacles to voting, because they could not understand the ballot. Even though the Indian Citizenship Act gave Native Americans the right to vote in 1924, state law determined who could actually vote, which effectively excluded many Native Americans from political participation for decades. Asian Americans and Asian immigrants also suffered systematic exclusion from the political process.

In 1964, the year before the Voting Rights Act became law, there were approximately 300 African-Americans in public office, including just three in Congress. Few, if any, Black elected officials were elected anywhere in the South. By 2013, because of the Voting Rights Act, there were more than 9,100 black elected officials, including 43 members of Congress, the largest number ever. The Voting Rights Act opened the political process for many of the approximately 6,000 Latino public officials that have been elected and appointed nationwide, including 263 at the state or federal level, 27 of whom serve in Congress. Native Americans, Asians and others who have historically encountered harsh barriers to full political participation also have benefited greatly.

In his Shelby opinion, the chief justice applauded this remarkable progress and concluded that the Voting Rights Act was so successful in preventing the states with the worst and most egregious records of voter suppression and intimidation from disenfranchising minority voters that those states should no longer be subject to the federal supervision that was responsible for the success he celebrates.

In concluding that in determining which states would be subject to pre-clearance, Congress was only concerned about states with a "recent history of voting tests and low voter registration and turnout," Chief Justice Roberts confused the symptom with the disease. Congress used registration and turnout data to select which states should be subject to federal pre-approval of voting changes *because that was the most efficient way to identify those places with the longest and worst history of voter disfranchisement and entrenched discrimination and blatant racism by recalcitrant jurisdictions.*

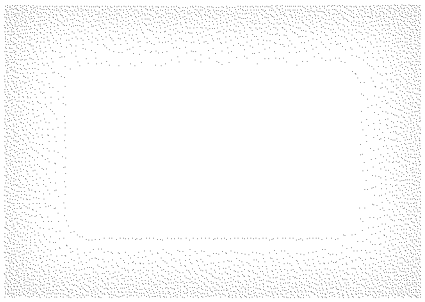
Congress understood that while a multitude of formulas could be conjured to identify which governmental units would be subject to preclearance, there was and could be only one way for a covered jurisdiction to overcome the need to pre-clear its election laws, and that was by satisfying an independent federal judiciary that it had renounced its discriminatory past and could be trusted not to employ any artifice that would result in a return to those days of shame.

But in a record exceeding 15,000 pages in length compiled after holding 21 hearings and receiving testimony from more than 150 witnesses, Congress carefully and meticulously documented why the covered states could not yet be trusted to refrain from a return to their days of shame. And because of Section 5, they could not do so if they tried.

That is why opponents of the Voting Rights Act long chafed at the pre-clearance provisions of Section 5, repeatedly tried to have it repealed legislatively or invalidated judicially, celebrated the Court's Shelby decision by putting into place that very day schemes like photo ID to suppress, prevent, or dilute the vote of Black Americans and marginalized communities.

Section 5 is the "anchor" providing the federal government the power to protect the right to vote guaranteed by the 15th Amendment, section 2 of which imbues Congress with special "power to enforce . . . by appropriate legislation." Without Section 5, Congress recognized that many of the advances of the past decades could be wiped out overnight with new schemes and devices, such as the mid-decade redistricting that was conducted in my home state of Texas, which the U.S. Supreme Court struck down in part in LULAC v. Perry, 546 U.S. 399 (2006) and would be banned by the For The People Act.

Nearly 15 years ago, on July 12, 2006, when the legislation renewing the Voting Rights Act was being debated, I addressed the House and said:



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"With our vote today on H.R. 9, each of us will earn a place in history. Therefore, the question before the House is whether our vote on the Voting Rights Act will mark this moment in history as a "day of infamy," in FDR's immortal words, or will commend us to and through future generations as the great defenders of the right to vote, the most precious of rights because it is preservative of all other rights. For my part, I stand with Fannie Lou Hamer and Rosa Parks and Coretta Scott King, great Americans who gave all and risked all to help America live up to the promise of its creed."

I was proud to vote to reauthorize the Voting Rights Act for the next 25 years, but I am not proud of the Supreme Court's ruling in the Shelby County case holding Section 4 of the VRA to be unconstitutional and I predict that in time this decision will take its place alongside the Court's decisions in Dred Scott, Korematsu, and Plessy as among the most shameful and intellectually dishonest in its history.

Congresswoman Jackson Lee is a Democrat from Texas's 18th District. She is a senior member of the House Committees on Judiciary and Homeland Security and is Ranking Member of the Homeland Security Subcommittee on Border and Maritime Security. She holds the seat previously held by the late Congresswoman Barbara Jordan.

TAGS JOHN LEWIS JOE BIDEN VOTING RIGHTS ACT SHELBY COUNTY V. HOLDER

SHARE TWEET

Ms. JACKSON LEE. Thank you.

Mr. COHEN. We appreciate that.

That concludes today's hearing. It was an excellent hearing. We should have probably just discussed the big lie, and that is the reason why everything has changed with the voting laws and with the need to have monitors and everything else that we haven't had since in the past when we had President Bush, a President in the tradition of Presidents. Instead, we had the big lie, which Bill Barr [inaudible].

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. The hearing is adjourned. Thank you.

[Whereupon, at 12:10 p.m., the Subcommittee was adjourned.]

APPENDIX

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"Why Should I Go Vote Without Understanding What I Am Going to Vote For?" The Impact of First Generation Voting Barriers on Alaska Natives

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"WHY SHOULD I GO VOTE WITHOUT UNDERSTANDING WHAT I AM GOING TO VOTE FOR?"[1] THE IMPACT OF FIRST GENERATION VOTING BARRIERS ON ALASKA NATIVES

*James Thomas Tucker**
*Natalie A. Landreth***
*Erin Dougherty Lynch****

1. Trial Tr. 424:14-15 (Test. of Frank Logusak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014). Please note that docket citations are included for filings, motions, orders, and any exhibits attached to those documents. There are no docket citations for deposition transcripts, exhibits introduced in depositions, trial transcripts, and trial exhibits, except those that were filed with motions. All materials are on file with the authors.

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INTRODUCTION

In 1975, Congress amended the Voting Rights Act of 1965 (VRA) specifically to include voters who spoke a language other than English. Designated Section 203, the amendment added language minorities to the protected categories of voters, and created a mandate that all voting materials in Alaska be provided in several Alaska Native languages. Another key component of the VRA, Section 5, required certain jurisdictions with egregious histories of voting discrimination to clear voting changes with the U.S. Department of Justice (DOJ), a process known as preclearance. Taken together Sections 203 and 5 of the VRA meant that the State of Alaska and all of its political subdivisions were required to provide all voting materials in Alaska Native languages, and once initiated none of this assistance could be removed or reduced absent preclearance from DOJ.

Despite these protections, the State of Alaska ignored federal law and subjected Alaska Natives to discriminatory voting practices for decades. Yet, regardless of the open and fairly widespread discrimination in Alaska, in *Shelby County v. Holder*, the D.C. Circuit Court of Appeals remarked that the VRA's Section 5 coverage formula may be imprecise because certain jurisdictions—like Alaska—were simply "swept in" under preclearance despite "little or no evidence of current problems."[2] The court cited no evidence for its sweeping conclusion, and—as *Toyukak v. Treadwell* later demonstrated—the Circuit Court and later the Supreme Court were wrong. The first generation voting barriers that existed when the VRA was amended in 1975 still existed nearly 40 years later when *Shelby County* was decided. Indeed, until recently Alaska was a stark example of the various forms voting discrimination and its antecedents can take.

Alaska's discriminatory voting practices existed well before the VRA and begin with the State's decision to offer unequal educational opportunities to Alaska Native students, first when Alaska was a territory and later as a fledging state. Up until the late 1970s, Alaska operated a public school system in urban, largely non-Native areas only. School-age children in rural, largely Native areas had no local schools in their villages, and thus had to choose between their home and families and an education at a boarding school far from their community. This system was not dismantled until after nearly a decade of litigation ended in the early 1980s, and litigation aimed at securing equal educational opportunities continued until recently. Discrimination begets discrimination, and the generations of students that grew up in this system who chose not to go to boarding school or were otherwise denied equal educational opportunities were, as a consequence, largely unable to read and write English fluently. These students became voters who should have benefitted from the protections of Sections 203 and 5, yet Alaska maintained discriminatory voting practices until it was sued in 2007 and 2013.

2. Shelby Cnty. v. Holder, 679 F.3d 848, 880–81 (D.C. Cir. 2012).

This article explores the many forms of discrimination that have persisted in Alaska, the resulting first generation voting barriers faced by Alaska Native voters, and the two contested lawsuits it took to attain a measure of equality for those voters in four regions of Alaska: *Nick v. Bethel* and *Toyukak v. Treadwell*. In the end, the court's decision in *Toyukak* came down to a comparison of just two pieces of evidence: (1) the Official Election Pamphlet that English-speaking voters received that was often more than 100 pages long; and (2) the single sheet of paper that Alaska Native language speakers received, containing only the date, time, and location of the election, along with a notice that they could request language assistance. Those two pieces of evidence, when set side by side, showed the fundamental unequal access to the ballot. The lessons learned from *Nick* and *Toyukak* detailed below are similarly simple: (1) first generation voting barriers still exist in the United States; and (2) Section 203 of the VRA does not permit American Indian and Alaska Native language speaking voters to receive less information than their English-speaking counterparts. The voters in these cases had been entitled to equality for 40 years, but they had to fight for nearly a decade in two federal court cases to get it.

I. ALASKA: A LEGACY OF DISCRIMINATION

The United States purchased Alaska in 1867 from Russia, without consulting Alaska's Native people or considering them citizens.[3] Decades of neglect by the federal government followed, until in 1884 Congress created a governing structure for Alaska with an Organic Act that invited settlers to come to Alaska and claim land from the indigenous peoples already living there.[4] The following influx of non-Natives resulted in not only a loss of lands, but in Alaska Natives being subjected to segregation and discrimination in nearly every aspect of cultural, political, and social life.[5] For example, stores and restaurants placed signs in their windows that

3. *See* 33 HUBERT HOWE BANCROFT, THE WORKS OF HUBERT HOWE BANCROFT 609 (San Francisco, A.L. Bancroft & Co. 1886) (describing Alaska Natives' reaction as "discontent arose, not from any antagonism to the Americans, but from the fact that the territory had been sold without their consent, and that they had received none of the proceeds of the sale."); *see also* THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 77 (1985) (quoting a man from Western Alaska: "They sold this land, which is ours and belonged to our forefathers since time immemorial. The Russians . . . sold our land to the U.S. government for money, even if it was not their land.").

4. *See* CHARLES K. RAY, DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, ALASKA NATIVE EDUCATION: AN HISTORICAL PERSPECTIVE 1–2 (1973).

5. *See* STEPHEN HAYCOX, ALASKA: AN AMERICAN COLONY 209 (2002). The Alaska Advisory Committee to the U.S. Commission on Civil Rights summarized the relationship between Alaska Natives and non-Natives: "The histories of Alaska Natives and American Indian groups have many similarities. Theirs are histories marked by conquest, genocide, forced cultural and land loss." ALASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA 3 (2002) [hereinafter ALASKA ADVISORY COMM.].

read, "No Natives or Dogs Allowed."[6] Communities established segregated churches, hotels, playgrounds, swimming pools, and movie theatres, which often restricted Native patrons to seats in the balcony.[7] In addition, many deeds included restrictive covenants that prevented property from being conveyed to Alaska Natives.[8] Although the territorial legislature passed the Alaska Equal Rights Act in 1945, which provided to all Alaska citizens "the full and equal enjoyment of accommodations, advantages, facilities, and privileges" of public places, discrimination against Alaska Natives persisted, perhaps most prominently in Alaska's voting laws and segregated schooling system.

The 1915 Territorial Act continued the policy of denying Alaska Natives citizenship unless they could prove through individual examination that they had abandoned "any tribal customs or relationship" and adopted "the habits of a civilized life"[9]—forcing Alaska Natives to choose between their culture and identity, and the right to vote. After Congress passed the Indian Citizenship Act in 1924, it should have become more difficult to disenfranchise Alaska Native voters. Nevertheless, the following year the territorial legislature responded by passing a literacy test requirement for voting. The Alaska Daily Empire stated that Alaska Natives "cannot be even remotely considered as possessing proper qualifications"[10] for voting, and the Fairbanks Daily News-Miner warned of Native voters of a "lower order of intelligence."[11] Supporters of the literacy test ran an advertisement in the Juneau newspaper stating that its purpose was "to prevent the mass voting of illiterate Indians" and that the test was an "opportunity to keep the Indian in his place."[12]

The new literacy test law made education a critical component of the political process at a time when educational opportunities for Alaska Natives lagged far behind those of their non-Native counterparts. After Russia's cession of Alaska in 1867, the federal government offered no schooling to Alaska Natives. In the communities where limited educational opportunities were available, it was due solely to the presence of

6. Donn Liston, *Gruening Rights Fight Recalled*, ANCHORAGE DAILY NEWS (June 18, 1974), http://www.alaskool.org/projects/ancsa/articles/ADN/Gruening_Rights_Fight.htm.

7. Terrence M. Cole, *Jim Crow in Alaska: The Passage of the Alaska Equal Rights Act of 1945*, *in* AN ALASKA ANTHOLOGY: INTERPRETING THE PAST 314, 315-19 (Steven W. Haycox & Mary Childers Mangusso eds., 1996).

8. *See Copy of a Covenant Restriction Drafted in 1948 in Anchorage, Alaska*, Alaskool.org, http://www.alaskool.org/projects/JimCrow/cov_res.htm (last visited Mar. 24, 2017); *1953 Warranty Deed*, ALASKOOL.ORG, http://www.alaskool.org/projects/JimCrow/warrdeed.htm (last visited Mar. 24, 2017).

9. Ch. 24, §§ 1–2, 1915 Alaska Sess. Laws 52, 52–53 (repealed 1959).

10. FRED PAUL, THEN FIGHT FOR IT at 47 (2003).

11. Cole, *supra* note 7, at 318.

12. Stephen W. Haycox, *William Paul, Sr. and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 17, 21 (1986).

missionaries.[13] Generally, there was no secondary schooling available for communities without missionary schools. With 1884's Organic Act, the federal government assumed responsibility for the education of Alaska Natives.[14] Segregated schools were established by non-Natives before the turn of the century and into the gold rush era.[15] The Nelson Act of 1905 created a fully segregated school system, and required that "the schools specified and provided for in this Act shall be devoted to the education of White children and children of mixed blood who lead a civilized life."[16]

Three years later, the definition of "civilized life" was tested in *Davis v. Sitka School Board*, a case in which six Native children, each with a parent who was part-White, attempted to attend a public school for White children.[17] The court explained that the "civilized life" requirement in the Nelson Act arose because the "Indian in his native state has everywhere been found to be a savage, an uncivilized being, when measured by the White man's standard."[18] The court proceeded to evaluate the children's civilized characteristics by inspecting the features of one of the children's mothers, considering the children's geographical location and relationship with their tribe, and who the children played with. The court ultimately ruled that the children were not sufficiently civilized: "Those who from choice make their homes among the uncivilized or semi-civilized people and find their sole social enjoyments and personal pleasures and associations cannot, in my opinion, be classed with those who lead a civilized life."[19] The *Davis* decision effectively barred Alaska Native children from public schools. Though a Native mixed-blood student won the right to attend a public school in Ketchikan twenty years later,[20] subsequent events showed that segregated schools in Alaska persisted.

Alaska's limited involvement in Native education, and the federal government's inadequate efforts to provide for it, negatively impacted Alaska Native children in a wide variety of ways. Many were sent to feder-

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13. *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 239 (David Schultz, ed., 2009) (listing communities where schooling was available and the churches who offered education).

14. Thomas Alton, *Politics, Economics, and the Schools: Roots of Alaska Native Language Loss Since 1867*, 20 ALASKA HIST. 17, 25 (2005).

15. Stephen E. Cotton, *Alaska's "Molly Hootch Case": High Schools and the Village Voice*, 8 EDUC. RES. Q. 30, 31-32 (1984) [hereinafter Cotton, *Molly Hootch Case*].

16. An Act To provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes, S. 3728, 58th Cong. §7 (1905).

17. 3 Alaska 481, 489–90 (D. Alaska Terr. 1908).

18. *Id.* at 484.

19. *Id.* at 486–94.

20. Jones v. Ellis, 8 Alaska 146, 147–49 (D. Alaska Terr. 1929).

ally-run boarding schools thousands of miles from home.[21] The state began providing public education to Native children in certain locations in the 1960's, but only at the primary school level.[22] The lack of secondary school options for Alaska Natives had profound and harmful effects on children, families, and communities.[23] By 1972, only 2,200 out of over 51,000 Alaska Natives had a high school education.[24] It was not until *Tobeluk v. Lind*, commonly known as the Molly Hootch case, was settled in 1976 that Alaska agreed for the first time to establish secondary schools in all 126 villages that requested one.[25]

Though the Molly Hootch settlement ultimately resulted in the building of 92 new high schools around Alaska, the state persisted in providing Alaska Native children with unequal educational opportunities.[26] In 1999, in *Kasayulie v. State of Alaska*, the Alaska Superior Court found that the state continued to use a dual, arbitrary, unconstitutional, and racially discriminatory system for funding schools.[27] In 2007, the Alaska Superior Court again found that the state had violated its constitutional responsibility to maintain a public school system by failing to sufficiently oversee the quality of secondary education in many Alaska Native communities and provide a "meaningful opportunity to learn the material" on a graduation exam.[28]

Alaska's history of educational discrimination against its Native citizens has had a direct impact on Alaska Native enfranchisement. The complete lack of schooling available to village elders and the poorer quality rural schools that slowly appeared in more recent years are closely connected to limited English proficiency. The data on literacy and educational attainment bears this out.[29] And the effects of educational discrimination persist; in 2002, the Alaska Advisory Committee to the U.S. Commission on Civil Rights found that Alaska Native students "score lower on achievement tests than any other minority group, and considerably lower

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21. Agreement of Settlement at 6, *Tobeluk v. Lind*, No. 72-2450 (Alaska Super. Ct. Sept. 3, 1976) [hereinafter Molly Hootch Settlement]. *See also* CHARLES K. RAY, ALASKA NATIVE EDUCATION: A HISTORICAL PERSPECTIVE (1973).

22. Stephen Cotton, *Thirty Years Later: The Molly Hootch Case*, 9 SHARING OUR PATHWAYS (Alaska Rural Systemic Initiative, Fairbanks, A.K.), Sept./Oct. 2004, at 4.

23. Molly Hootch Settlement, *supra* note 21, at 9–12.

24. Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 108 (2007).

25. Molly Hootch Settlement, *supra* note 21, at 14.

26. Cotton, *Molly Hootch Case*, *supra* note 15, at 31.

27. *See Kasayulie v. Alaska*, No. 3AN-97-3782-CIV (Alaska Super. Ct. 1999), 1999 WL 34793400.

28. Decision and Order at 193-95, *Moore v. Alaska*, No. 3AN-04-9756-CIV (Alaska Super. Ct. June 10, 2007), 2007 WL 8310251, at *84.

29. Dan McCool Expert Witness Report 28-29, *Toyukak v. Treadwell*, case no. 3:13-cv-00137-SLG (D. Alaska), Trial Exh. 151.

than White students."[30] Over 80 percent of Alaska Native graduating seniors were not proficient in reading comprehension.[31] Quite simply, as access to education increases, so does literacy and vice versa.

II. THE VOTING RIGHTS ACT IN ALASKA

A. *Section 5 of the Voting Rights Act*

Section 5 provides that any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect in a jurisdiction or its subdivisions on November 1, 1972," cannot be implemented unless it "has been submitted . . . to the [U.S.] Attorney General, and the Attorney General has not interposed an objection within sixty days . . ." or the jurisdiction obtains a declaratory judgment from the U.S. District Court for the District of Columbia that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group.[32] Colloquially called "preclearance," essentially froze election laws in place, and changes could not be made unless and until they were approved by the Attorney General or District Court in advance. The purpose of preclearance was to stop discriminatory laws from being implemented and prevent harm before it occurred, rather than placing the burden on voters to sue to stop the law's implementation or allowing an election tainted by discriminatory practices to be conducted. Section 5 did not apply everywhere; its application was limited to states and jurisdictions that had a demonstrated history of discrimination.

Accordingly, Section 4 of the VRA created a "coverage formula" consisting of two elements. First, the state or jurisdiction maintained a "test or device" as a prerequisite to registration or voting as of November 1, 1964. This prong targeted literacy tests, morality tests, and the like. Second, less than 50 percent of persons of voting age were registered to vote in the state or jurisdiction as of November 1, 1964, or less than 50 percent of persons of voting age voted in the state or jurisdiction in the presidential election of November 1964.[33] This prong targeted jurisdictions in which the "test or device" had reduced registration and turnout. Although Section 5 was renewed five times, the last time in 2006, the coverage formula in Section 4 largely remained the same, with two exceptions. Amendments added the benchmark years of 1968 and 1972 to the statute.[34] In 1975, Congress added language minorities to the Section 4 coverage formula and added that "test or device" would now also mean

30. ALASKA ADVISORY COMM., *supra* note 5, at 19.

31. Landreth & Smith, *supra* note 24, at 108–09.

32. 42 U.S.C. § 1973c(a).

33. 42 U.S.C. § 1973b.

34. 42 U.S.C. § 1973b(b).

using English only voting materials in a state or jurisdiction "where the Director of the Census determines that more than five per centum of the citizens of voting age residing [in that jurisdiction] are members of a single language minority."[35]

Although the Census numbers and turnout percentages would change over time, the jurisdictions identified by the Section 4 coverage formula and subject to the preclearance requirements in Section 5 changed very little over time. There was a set of usual suspects: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia. Those states were covered in their entirety at the time of the *Shelby County v. Alabama* decision. In addition, the Census determinations resulted in various counties being covered in California, Florida, New York, North Carolina and South Dakota.[36] The statewide coverage applied primarily to southern states, except Arizona and Alaska. This led to the development of a myth that the coverage formula targeted, and was intended to punish, the southern states and Alaska was simply swept in by mistake.

B. *The Alaska Native Landscape*

While Native voters nationwide experience a wide variety of barriers to political participation, nowhere have the obstacles to voting been more prevalent than in America's "Last Frontier." Alaska is uniquely situated because it has the largest percentage of Native voters of any state. According to 2010 Census estimates, American Indians and Alaska Natives comprise 17.7 percent of Alaska's citizen voting-age population. New Mexico is the next closest state, with 10.4 percent.[37] Alaska's Native peoples are also more geographically isolated than American Indians in the lower forty-eight states. Many Native villages are "roadless," meaning there are no roads that lead to them. They are only accessible by air or by boat, and they may be unreachable for long periods because of unpredictable inclement weather conditions.[38] Physical separation of villages is compounded by language barriers among non-English speaking voters of the more than

35. 42 U.S.C. § 1973b(f)(3).

36. A table that includes all of the Federal Register cites for covered jurisdictions is available at https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

37. *See* U.S. CENSUS BUREAU, 2006–2010 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES SEX BY AGE BY CITIZENSHIP STATUS, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_B05003&prodType=table (last visited Apr. 14, 2016).

38. *See* Sari Horwitz, *In Rural Villages, Little Protection for Alaska Natives*, WASH. POST (Aug. 2, 2014), http://www.washingtonpost.com/sf/national/2014/08/02/in-rural-villages-?little-protection?-for-alaska-natives. *See also Maps of Alaska*, ALASKA.ORG, http://www.alaska.org/assets/content/maps/Alaska-Driving-Map.pdf (last visited Apr. 14, 2017) (giving an overview of the roads in Alaska). The roads are represented in red and almost entirely concentrated in the areas around Anchorage and between Anchorage and Fairbanks. The areas with the highest LEP population, and the subject of the two cases discussed herein, are directly to the west of Anchorage along the Bering Sea.

twenty indigenous languages spoken in Alaska.[39] Native voters in six Alaska regions have limited-English proficiency (LEP) rates of at least nine percent among voting-age citizens,[40] with as many as one-third of those eligible voters illiterate.[41] Alaska thus has a very significant population of Native language speakers who are limited-English proficient and geographically isolated.

These geographic and linguistic barriers are further complicated by another unique feature of Alaska's election system: most Alaskan Native villages are located in regions with no organized county-level government.[42] Unlike other states, "a large part of Alaska is not in any organized borough," the state's county-equivalent, but instead subdivide "the unorganized portion of Alaska into *census areas* for the purposes of presenting statistical data."[43] As a result, in nearly all Alaskan Native villages state officials conduct every aspect of elections, except for some municipal elections.[44] The state's Division of Elections (DOE) is responsible for voter registration, poll worker recruitment and training, absentee and early voting, ballot and voting machine preparation, Election Day activities, and

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39. *See* Alaska Native Language Ctr., *Languages*, U. ALASKA-FAIRBANKS https://www.uaf.edu/anlc/languages (last visited Jan. 4, 2016) (listing twenty Alaska Native languages and their many dialects).

40. *See* U.S. CENSUS BUREAU, PUBLICLY RELEASED DATA FILES FOR THE 2011 SECTION 203 DETERMINATIONS, https://www.census.gov/rdo/pdf/Census2010_Section203DeterminationsData.zip (last visited Jan. 4, 2016) [hereinafter ALASKA BOROUGH/CENSUS AREAS, 2011 DETERMINATIONS DATA FILES]. Those regions include: the Bethel Census Area (31.3 percent); the Kusilvak Census Area (14.1 percent); the Dillingham Census Area (12.9 percent); the North Slope Census Area (11.8 percent); the Northwest Arctic Census Area (9.8 percent); and the Nome Census Area (9.5 percent). *Id.*

41. *See id.* (showing illiteracy rate among Yup'ik-speaking LEP voting-age citizens in the Dillingham Census Area is estimated at 32 percent). The VRA defines "illiteracy" as "the failure to complete the 5th primary grade." 42 U.S.C. § 1973aa-1a(b)(3)(E).

42. *Compare* Michael E. Krauss, *Indigenous Peoples and Languages of Alaska*, ALASKA NATIVE LANGUAGES CENTER (2013), http://www.uafanlc.arsc.edu/data/Online/G961K2010/ipla-map-20130712.pdf (mapping geographic location of Alaska Native villages by language group), *with* ALASKA DEP'T OF LABOR & WORKFORCE DEV., ALASKA BOROUGH/CENSUS AREAS (2014), http://labor.alaska.gov/research/census/maps/state/2014/AlaskaBorCA.pdf [hereinafter Alaska Map] (depicting the boundaries of Alaska's organized boroughs and unorganized census areas).

43. U.S. CENSUS BUREAU, GEOGRAPHIC AREAS REFERENCE MANUAL 4-2 (Nov. 1994), https://www.census.gov/geo/reference/garm.html (italics in original). A majority of Alaska's land mass is included in the ten designated census areas. *See* ALASKA BOROUGH/CENSUS AREAS, 2011 DETERMINATION FILES, *supra* note 40.

44. Native villages with municipal governments are responsible for conducting certain municipal elections. *See generally* ALASKA STAT. § 29.26.010 (2014) (the governing body of a municipality "shall prescribe the rules for conducting an election"); *see also* ALASKA STAT. § 15.10.105 (2006) (municipal elections not conducted by the local government are administered by the state).

vote tabulation.[45] There are four regional election offices: Anchorage, Juneau, Fairbanks, and Nome.[46] Three of those four are on the limited road system, while Nome is only accessible by air or boat. Moreover, Nome is on the Seward Peninsula, north of the Yukon-Kuskokwim Delta where the voters at issue in the following cases reside, and Nome is roughly 300 miles as the crow flies from the City of Bethel. In other words, for Native voters in these areas there is no physical access to election offices, unless a voter is willing to fly to it. The ability of Alaska Natives to register and cast a vote that is counted is thus directly conditioned on whether the statewide DOE officials provide access to election services equal to those offered to non-Natives. This article addresses that very issue.

C. *American Indians and Alaska Natives, and the VRA*

Like election officials in other parts of Indian Country, the DOE is required to provide election services in Native languages. In 1975, Congress responded to the disenfranchisement of American Indian and Alaska Native voters by amending the VRA to require assistance in their native languages.[47] The mandate, codified in Section 203 of the Act, applies to jurisdictions where language minority citizens suffer from the effects of educational discrimination and need assistance and materials in a non-English language in order to register and vote effectively.[48] Since 1975, sev-

45. *See generally* ALASKA STAT. § 15.10.105 (2006) (director of elections division is responsible for "the supervision of central and regional election offices, the hiring, performance evaluation, promotion, termination, and all other matters relating to the employment and training of election personnel, and the administration of all state elections" and activities under the National Voter Registration Act of 1993). The Division's activities are administered by four regional supervisors located in Anchorage, Fairbanks, Juneau, and Nome. *See* ALASKA STAT. § 15.10.110 (1996).

46. See the list of locations at: http://elections.alaska.gov/Core/contactregionalelectionsoffices.php (last visited June 26, 2017).

47. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). For a comprehensive discussion of the legislative history of the language assistance provisions, *see* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT at 55–110, 165–203 (David Schultz, ed., 2009).

48. The amended VRA states:

> The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

eral regions of Alaska must provide assistance in Alaska Native languages.[49] In those regions, language assistance must be available for voting activities in every type of public election, including primary, general, and special elections.[50] Jurisdictions covered by Section 203, such as Alaska, generally must ensure that all "voting materials" they provide in English are also provided to voters in the languages of all groups or sub-groups that triggered coverage:

> [A]ny registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.[51]

This provision was qualified by a term that allowed oral translation for a brand new category called "historically unwritten" languages:

> [W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.[52]

The term "historically unwritten" was not defined there and appeared nowhere else in statute, creating a knot that would take the next decade to unravel.[53]

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42 U.S.C. § 1973aa-1a(a). For a summary of educational discrimination suffered by Native voters, resulting in low levels of educational attainment and contributing to the lack of English proficiency, see generally James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-*Boerne *Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 553–59 (2008).

49. *See* TUCKER, *supra* note 47, at 333; 28 C.F.R. § 51, App. Fifteen regions are currently covered in Alaska for Alaska Native languages under the most recent Section 203 determinations issued in late 2016. *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 81 Fed. Reg. 87532, 85733 (Dec. 5, 2016).

50. *See* 28 C.F.R. § 55.10 (1990).

51. 52 U.S.C. § 10503(c) (2016). "Voting materials" include: voter registration materials, voting notices such as information about opportunities to register, registration deadlines, polling place information (including the times they are open, their location, and the voter's election precinct assignment), absentee voting, voting materials provided by mail, all election forms, polling place activities and materials, instructions, publicity, ballots, and other materials or information relating to the electoral process. *See id.*; 28 C.F.R. §§ 55.15, 55.18 (1984). A discussion of what jurisdictions must do to comply with Section 203 is provided in TUCKER, *supra* note 47, at 90–105.

52. 42 U.S.C. § 1973aa-1a(c).

53. *See infra* Section IV.

The regulations accompanying Section 203 issued by the U.S. Department of Justice (DOJ) do not clarify the term. Importantly, the regulations do make it clear that the "historically unwritten" proviso is not a categorical exception for Native languages: "the languages of *some* American Indians and Alaska Natives are unwritten."[54] However, the closest they get to a definition of "historically unwritten" is to say that the language is "commonly used in written form," which merely replaces one vague term for another.[55] Moreover, the two descriptors are not necessarily congruent, since "commonly" suggests current rather than past or historic use. There is no further explanation of the term in the Department's regulations. Compliance with Section 203 is measured by "two basic standards" that do not distinguish between any of the languages covered under the VRA:

> (1) That materials and assistance should be provided in a way designed to allow members of . . . language minority groups to be effectively informed of and participate effectively in voting-connected activities; and
> (2) That an affected jurisdiction should take all reasonable steps to achieve that goal.[56]

In addition, the regulations require that the voting materials "provided in the language of a language minority group be clear, complete and accurate."[57]

Similarly, the legislative history provides some discussion of the reason for the term "historically unwritten," but fails to reveal the clear meaning. When the Voting Rights Act amendments were being debated in 1975, two of Alaska's three-member congressional delegation, Senator Ted Stevens and Representative Don Young, challenged efforts to apply the new language provisions to Alaska Natives.[58] After congressional leadership rejected those efforts, Senator Stevens took a different tack. Acknowledging that "we do want to print our election materials in English only,"[59] Stevens argued that written translations of voting materials should not be provided in Native languages.[60] To achieve that result, he maintained that written translations were unnecessary for what he called "his-

54. 28 C.F.R. §55.12(c) (emphasis added).

55. *Id.*

56. 28 C.F.R. § 55.2(b).

57. *See Apache Cnty. v. United States*, No. 77-1515, Natl'l Indian Law Library 003926 (D.D.C. June 12, 1980) (three-judge court).

58. *See* TUCKER, *supra* note 47, at 62–63, 66, 69–70, 84, 93–98. The third member of the state's delegation, Senator Mike Gravel, testified and submitted evidence in support of efforts to provide language assistance to Alaska Natives. *See id.* at 256.

59. 121 CONG. REC. 24,761(1975).

60. *See* TUCKER, *supra* note 47, at 94–95.

torically unwritten" languages.[61] Congress adopted the Stevens Proviso without objection,[62] and it appears as part of Section 203(c) of the amended VRA.[63] The enacted language does not define "historically unwritten." Senator Stevens himself suggested that a Native language had to be written for longer than 15 years in order to meet the statutory requirement.[64] Interestingly, Senator Stevens added to the Congressional record a letter from Lori Leary, an Alaska election supervisor, that did encourage providing at least some materials written in Native languages, such as sample ballots:

> Perhaps printing "sample" bilingual ballots would be a plausible solution. Sample ballots printed in all those languages which are in written form could be effectively disseminated to the public through a number of ways—the news media, posted in public gathering places, election offices, registrars, city and borough clerk's offices, village and minority leaders, as well as the candidates themselves. Here would be a means whereby the voter would have the opportunity to study, discuss and decide, prior to all elections and in the privacy and leisure of his own time and language, what and how he will vote. . . . Sample bilingual ballots can be the only logical means of reaching this small percentage of our population, without implementing a burdensome, unnecessary and somewhat more confusing feature to our voting system—and still obtain the same objective![65]

This letter was followed by another one from then-Director of the Division of Elections, Patty Ann Polley, who had gone the extra step of figuring out which districts would require sample ballots and how many would be required.[66] Senator Stevens inserted this letter into the record without objection. Taken together, the context of discussions by the bill managers, with input from the Department of Justice, was that "the Stevens amendment simply exempted any language that was unwritten or was not commonly used by the covered language minority."[67] The goal was a practical one: to provide written materials only for people who could read them.

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61. *See* 121 CONG. REC. 24,761 (1975).

62. *See* 121 CONG. REC. H4893 (1975).

63. *See* 52 U.S.C. § 10503(c); *see also* 52 U.S.C. § 10303(f)(4) (2016) (including similar language for jurisdictions covered under Section 5 of the VRA for minority language groups).

64. *See* 121 CONG. REC. 24,208 (1975).

65. *Id.* at 24,207, 24,209 (quoting letter from Lory B. Leary, Se. Election Supervisor, State of Alaska, to Ted Stevens, U.S. Senator from Alaska (May 28, 1975)).

66. *Id.* at 24,209.

67. *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 95-98 (David Schultz, ed., 2009).

Overall, Section 203 and the implementing regulations require that covered jurisdictions: (1) determine whether a language is written or "historically unwritten" based on whether it is "commonly used" by the applicable language minority group; (2) if "historically unwritten," provide all voting materials in oral form; (3) if written, provide voting materials in the covered minority language(s); (4) provide translations of the voting materials that are clear, complete and accurate; and (5) ensure that translations are effective by making them understandable in the language and dialect spoken by the voters, including voting information, assistance through translators, and access equal to what is provided in English. Alaska's failure to comply with these mandates erected yet another barrier for Alaska Native voters, and each of these components would be vigorously challenged in litigation from 2007 to 2015.

III. FIRST GENERATION BARRIERS IN ALASKA

As if these federal barriers were not enough to impede Alaska Natives' access to the ballot box, there are also several "first generation" barriers unique to Alaska. The term "first generation" refers to voting claims focused on ballot access, such as the ability to register to vote or to cast a ballot that is counted.[68] In Alaska, first generation barriers often take the form of disparate in-person voting opportunities between Native and non-Native voters, and—from 1975 to 2015—the lack of language assistance to help LEP Native voters understand the issues on which they were voting. First generation barriers are not a thing of the past and, as discussed below, they have persisted in Alaska. It is only now, after extensive litigation, that they are finally being broken down.

A. *Unequal In-Person Voting Opportunities*

Voting is the means through which citizens to choose their elected representatives, and in the case of direct democracy, determine whether ballot questions should become law. When equal in-person voting opportunities are denied to a particular group, "it perpetuates their place as second-class citizens."[69] But Michael Waterstone[70] has identified another,

68. *See, e.g.*, James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 547–48, n.517 (1999) (collecting citations). By comparison, "second generation" voting claims are most commonly associated with redistricting or other features of the method of election system itself that result in the votes of minorities being diluted. *See* Pamela S. Karlan, *The Impact of the Voting Rights Act on African-Americans: Second- and Third-Generation Issues*, *in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 121–40 (Mark E. Rush ed. 1998).

69. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 369 (2003).

70. Michael Waterstone is a "nationally recognized expert in disability and civil rights law." *Michael Waterstone, Loyola Law School*, LLS.EDU, http://lls.edu/faculty/facultylists-z/waterstonemichael (last visited Sept. 20, 2017).

equally important aspect of voting: "an expressive element" that is a means for "voters to assert their membership in their community, and the community in turn to perpetuate its membership and values over time."[71] Likewise, as noted by Constitutional law scholar Adam Winkler:

> Through participation itself, the voter expresses an identification with the greater community and reveals her attachments to and associations with it. In this way, the act of voting is the individual's . . . method by which the individual 'signs' her name to the social contract and becomes herself part of the collective self-consciousness.[72]

The challenge in administering elections in geographically isolated Native communities can certainly be daunting. As described above, Alaska is unique in that it has "roadless" communities; almost all of which are Native villages.[73] Many villages are also divided by natural barriers. For example, the Yup'ik village of Kasigluk in the Bethel Census Area consists of two smaller villages, Akiuk and Akula, which are divided by the Johnson River.[74] At the time of the 2006 Reauthorization of the VRA, the DOE provided only a single ballot for Kasigluk, at the Community Center located on the Akiuk side of the river.[75] On Election Day, the local election officer announced over the radio "that anyone who wants to vote has to come down to the community center by 11:30 a.m. because that is when the officer is taking the single polling machine to the other side of the river," to the school located in Akula.[76] In short, part-time poll workers and tribal leaders in Native villages have had to come up with their own solutions to the real-world geographical barriers they face. State law at the time required that polling places open at 7 a.m. and close at 8 p.m.[77] However, that law was not obeyed in Kasigluk, so that voters on both sides

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71. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 368–69.

72. Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 368 (1993).

73. *See supra*, Section II.B; Landreth & Smith, *supra* note 24, at 82. DOE acknowledged that there are at least "151 rural communities with precincts that are isolated from connecting road systems; the only way to access these communities is by airplane or boat." Alaska Div. of Elections, *State of Alaska HAVA State Plan 2005 Updated* (Feb. 8, 2005), https://www.elections.alaska.gov/doc/hava/hava_master_plan_january_2005.pdf.

74. *See* Kasigluk, AKIKUK MEMORIAL SCH., http://www.akiukmemorialschool.com/about-kasigluk-akiuk.html (last visited Jan. 4, 2006). Some residents of Akiuk, which is sometimes called "Old Kasigluk," migrated to the Akula side of the river because it has more land. *Id.* However, residents of both villages consider themselves to be a single community. *Id.*

75. *See* State of Alaska, Division of Elections, *List of Polling Place Locations*, http://www.elections.alaska.gov/Core/pollingplacelocations.php (last visited June 26, 2017).

76. Landreth & Smith, *supra* note 24, at 82.

77. *See* ALASKA STAT. § 15.15.080 (1984).

of the river had at least some opportunity to vote in person. It is unknown just how many villages have faced similar geographical challenges.

Many Native villages have been denied polling places altogether. In 2004, twenty-four villages with approximately 1,500 Natives of voting age lacked opportunities to vote in person.[78] DOE's four regional supervisors have been authorized by regulation to "designate a person as a permanent absentee voter" if the "election supervisor determines that the voter resides in a remote area in Alaska where distance, terrain, or other natural conditions deny the voter reasonable access to the polling place."[79] Most voters who reside in the "remote areas of Alaska" are Native,[80] resulting in the impact falling disproportionately on Native voters. Moreover, contrary to the plain language of the regulation, DOE's supervisors have in the past not redesignated voters as "permanent absentee voters" because they lack "reasonable access to the polling place."[81] Rather, they have eliminated existing polling places in the villages where those voters resided. Before 2014, DOE had removed polling places from at least five villages in the Bethel area, one in the Dillingham area, and one in the Kusilvak Census Area.[82] All of the voters in those villages who wished to vote had to do so by a mailed-in absentee ballot.[83] These are called permanent absentee voting (PAV) sites. Even though most of the PAV sites require the DOE to provide assistance in Native languages, all of the materials sent to voters in those villages were in English,[84] and there was no poll worker to provide language assistance.[85] The state's practices prevented many Natives in the

78. Landreth & Smith, *supra* note 24, at 105.

79. 6 ALASKA ADMIN. CODE § 25.650 (2011).

80. U.S. Census Bureau, *American Indians and Alaska Natives in Alaska Map* (2010), http://www2.census.gov/geo/maps/special/AIANWall2010/AIAN_AK_2010.pdf (map depicting locations of Alaska Native villages and population data from the 2010 Census).

81. *See supra* note 77.

82. The Kusilvak Census Area had been known as the Wade Hampton Census Area for several decades. Its namesake was Wade Hampton III, a slave-holding Confederate general from South Carolina, whose son-in-law named a mining region after him in 1913. Alaska Governor Bill Walker renamed the region following backlash in the aftermath of the July 2015 massacre in the Emanuel AME Church in Charleston, South Carolina. *See* Jeff Wilkinson, *After a Century, Alaska District Drops SC Civil War General Hampton's* Name, HERALD (July 14, 2015), http://www.heraldonline.com/news/state/south-carolina/article27202492.html. Although the *Toyukak* litigation was tried before the area was renamed, this article will refer to it as the Kusilvak Census Area.

83. *See* Dep. of Edna Rae "Becka" Baker, *Toyukak v. Treadwell*, at 40:15-41:18, No. 3:13-cv-00137-SDG (D. Alaska Oct. 30, 2013) [hereinafter Baker Dep.].

84. *Id.* at 48:25-49:4; Dep. of Dorie Wassilie, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska April 7, 2009), at 43:23-44:23; Exhibit 5, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Aug. 11, 2008), No. 362-8.

85. Baker Dep., *supra* note 83, at 54:8-23.

affected communities from voting at all, which has been reflected in depressed voter turnout among Native communities.[86]

B. *"Precinct Realignment"*

The use of permanent absentee voting is not the only method DOE officials have used to restrict Native voting. In 2008, the DOE began to implement what it called "precinct realignment," a plan to combine voting locations in several Native villages. The problem was that those villages were not connected by road, so the voters would have had to fly to a neighboring village in order to vote. First, it proposed to "realign" the village of Tatitlek, where 85 percent of the residents are Alaska Native, by closing its polling place and requiring voters to vote in the predominately non-Native community of Cordova 33 miles away.[87] Second, it wanted to "consolidate" the majority Native community of Pedro Bay, which was the subject of a critical mining initiative on the August 2008 ballot, with Iliamna and Newhalen, located 28 miles away by air.[88] Officials likewise sought to "consolidate" Levelock—in which about 95 percent of residents are Alaska Native—with Kokhanok, approximately 77 miles away.[89] In the process, the DOE would have effectively disenfranchised nearly all of the registered Native voters residing in the three villages.[90] This "use of polling places at locations remote" from a minority community violates federal law.[91]

The Department of Justice stopped the DOE's precinct realignment plans. At that time, the entire state of Alaska was covered by Section 5 of the Voting Rights Act,[92] requiring the State to obtain "preclearance," or

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86. For example, in the 2008 General Election, voter turnout was a little more than 66 percent. *See* 2008 General Election November 4, 2008 Official Results, ST. OF ALASKA (Dec. 3, 2008), https://www.elections.alaska.gov/results/08GENR/data/results.pdf. By comparison, turnout in the village of Sleetmute was below 30 percent. *See* Aff. of Shelly Growden, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Dec. 4, 2008), no. 496 at 8–9.

87. Letter from Christopher Coates, Chief, Voting Sec. of U.S. Dep't of Just., to Gail Fenumiai, Dir., Div. of Elections (July 14, 2008) [hereinafter Coates Letter], http://www.narf.org/bloglinks/shelby_county_brief.pdf (App. 32-36). For population data from the 2000 Census, *see* U.S. CENSUS BUREAU, http://www.census.gov/ (last visited Apr. 14, 2017). Distance data is calculated using the U.S. Geological Survey, Geographic Names Information System. *See* U.S. GEOLOGICAL SURVEY, GEOGRAPHIC NAMES INFORMATION SYSTEM, http://www.infoplease.com/atlas/calculate-distance.html (last visited Apr. 14, 2017).

88. *Id.*

89. *Id.*

90. *See* State of Alaska, Division of Elections, *Number of Registered Voters by Party Within Precinct Date: 11/4/2008*, http://www.elections.alaska.gov/statistics/2008/vi_vrs_stats_party_2008.11.04.htm.

91. Brown v. Dean, 555 F. Supp. 502, 505 (D.R.I. 1982) ("The United States Supreme Court has made it clear beyond cavil that the location and accessibility of a polling place have a direct effect on a person's ability to exercise his franchise.") (citing Perkins v. Matthews, 400 U.S. 379, 387 (1971)).

92. *See* 40 Fed. Reg. 49,422 (Oct. 22, 1975).

approval, of any voting changes from the Attorney General of the United States or the U.S. District Court for the District of Columbia before implementing them.[93] When the DOE submitted its proposed changes to the DOJ, the DOJ responded by requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters.[94] Department of Justice officials focused on the obvious problem created by the State's proposal: "how voters will get to the consolidated location" when there were no roads connecting the Native villages to the communities with the polling places.[95] The DOJ also expressed concerns that DOE officials had not consulted with Native voters in the affected villages.[96] Instead of answering the DOJ's inquiries, the DOE abruptly withdrew the submission two weeks later.[97] As a result of the Department of Justice's review, the three villages still have their polling places. However, the absence of Section 5 coverage of Alaska will require Native voters to bring costly litigation in order to block any future efforts by DOE to reduce voting accessibility[98]

C. *Early Voting*

Alaska Native voters have also not had equal early voting opportunities. Similar to over two-thirds of all states,[99] Alaska offered early voting—also called absentee in-person voting—for statewide elections.[100] State law provides that "[f]or 15 days before an election and on election day, a

93. *See* 42 U.S.C. § 1973b. For additional discussion of the application of Section 5 preclearance procedures to Alaska, *see* TUCKER, *supra* note 47, at 58–76; *see also id.* at 70–71 (summarizing preclearance requirements).

94. Coates Letter, *supra* note 87.

95. *Id.*

96. *Id.*

97. Letter from Christopher Coates, Chief, Voting Sec. of U.S. Dep't of Just., to Gail Fenumiai, Dir., Div. of Elections (Sept. 10, 2008), http://www.narf.org/bloglinks/shelby_county_brief.pdf (App. 45-46).

98. Alaska was removed from coverage in 2013, following the Supreme Court's ruling in *Shelby County v. Holder* that the coverage formula was unconstitutional. *See* 133 S.Ct. 2612, 2631 (2013).

99. Currently, in "37 states . . . and the District of Columbia, any qualified voter may cast a ballot in person during a designated period prior to Election Day. No excuse or justification is required." Nat'l Conf. of State Legis., *Absentee and Early Voting* (Mar. 20, 2017), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#early. Eleven percent of all ballots cast nationwide in the 2014 elections did so through early voting. *See* U.S. Election Assistance Comm'n, *2014 Election Administration and Voting Survey* (June 2015), http://www.eac.gov/assets/1/Page/How-Voters-Voted-2014.jpg.

100. Use of Alaska's early voting locations (those other than the state's five permanent elections offices) is limited to statewide primary, general and special elections. *See* 6 ALASKA ADMIN. CODE § 25.500(b) (2008). Ballots for local elections conducted by the state are only available during the early voting period at the five permanent election offices. *See id.* at § 25.500(c).

qualified voter . . . may vote in locations designated by the director."[101] Early voting allows eligible voters to cast ballots in person, just as they can do on the day of the election.[102] However, the location of early voting sites can effectively discriminate against Native voters by denying them in-person early voting opportunities equal to that of non-Natives.[103] Prior to 2014, Alaska's early voting sites were in predominately urban non-Native areas and a few rural "hub-communities."[104]

The disparity becomes readily apparent by looking at the census data for the locations where in-person early voting was provided, highlighting that predominately non-Native areas were offered early voting locations even where the numbers of voters did not appear to warrant it. For example, in the November 2012 election, the city of Anchorage, where non-Natives comprise about 92 percent of the total population,[105] had only four absentee voting locations open during the entire fifteen-day early voting period.[106] Similarly, in the Matanuska-Susitna Borough, where non-Natives comprise about 94 percent of the total population and which has less than one-third the population of Anchorage,[107] five absentee voting locations were open during the entire early voting period.[108] One of those was in Sarah Palin's home town of Wasilla, where the DOE used nearly half of a million dollars in federal Help America Vote Act (HAVA) funds to

101. ALASKA STAT. § 15.20.064(a) (2005); *see also* 6 ALASKA ADMIN. CODE § 25.500(a) (2008) ("Absentee voting stations will be established through the direction and approval of the director" of the DOE).

102. *See* ALASKA STAT. § 15.20.064(b)-(c) (2005) (describing early voting procedures).

103. *See, e.g.*, *Black Bull v. Dupree Sch. Dist.*, No. 3:86-cv-03012 (D.S.D. Dec. 9, 1986) (granting temporary and permanent relief to address 150 mile travel distance of Native voters to the closest polling place).

104. "Hub-communities" are larger villages in rural areas of Alaska with airports that typically have jet service to urban areas such as Anchorage and Fairbanks. Residents of smaller villages in an area serviced by a hub-community will travel to that hub by bush plane, boat, or snow-mobile (when winter conditions permit) for basic shopping needs and for air transportation to larger cities, often to obtain health care services. Examples of hub-communities include Bethel in the Bethel Census Area and Dillingham in the Dillingham Census Area.

105. *See* U.S. CENSUS BUREAU, QUICKFACTS: ANCHORAGE MUNICIPALITY, ALASKA (COUNTY), http://www.census.gov/quickfacts.

106. *See* STATE OF ALASKA, OFFICIAL ELECTION PAMPHLET: REGION II (MUNICIPALITY OF ANCHORAGE & MATANUSKA-SUSITNA BOROUGH) 9–11 (Nov. 6, 2012), https://www.elections.alaska.gov/doc/oep/2012/Region-2-Book-Final-2012.pdf [hereinafter 2012 OEP REGION II].

107. *Quickfacts: Matanuska-Susitna Borough, Alaska*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts.

108. *See* 2012 OEP REGION II, *supra* note 106, at 9–11.

open a permanent satellite office in 2006[109] for the predominately non-Native community of about 8,000 residents.[110]

In sharp contrast, three of the regions with the largest percentage of Native voters were limited to just a handful of in-person early voting locations. The Bethel Census Area, home to at least 39 villages[111] and where Natives comprise about 83 percent of the total population,[112] had only three early voting locations: Bethel, Aniak and Kasigluk.[113] Of those, only Kasigluk is a predominantly Native community. The other 36 Native villages had no early voting. Furthermore, these voters did not have the option of flying to one of the three early voting locations even if they wanted to, because voters must vote in their assigned precinct in order to ensure their vote counts: if a voter from Chefornak went to Kasigluk, for example, he or she would have to vote a questioned ballot. Even worse, the Kusilvak Census Area—which has at least fifteen villages, 95 percent of whom are Native[114]—had only a single early voting location, St. Mary's.[115] The Dillingham Census Area, with more than one dozen villages[116] and Natives comprising nearly three-quarters of the total population,[117] had just one early voting site, in Dillingham.[118] With a handful of exceptions, early voting was universally unavailable in Native villages.

Beginning in at least 2011, the Alaska Federation of Natives (AFN), corporations, tribal councils, voters, and other organizations began re-

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109. *See* Alaska Div. of Elections, *State of Alaska HAVA State Plan 2008 Updated* 25, 38 (Feb. 8, 2008), https://www.elections.alaska.gov/doc/hava/2008HAVA StatePlan.pdf (last visited Jan. 4, 2016) [hereinafter 2008 HAVA Plan].

110. *See Quickfacts: Wasilla, Alaska*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/0283080,00 (last visited Apr. 14, 2017). Approximately 95 percent of Wasilla's residents are non-Native. *See id.*

111. *See* Bethel Census Area, WIKIPEDIA, https://en.wikipedia.org/wiki/Bethel_Census_Area,_Alaska (last visited Jan. 4, 2016).

112. *See Quickfacts: Bethel Census Area, Alaska*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/02050,00 (last visited Apr. 14, 2017).

113. *See* STATE OF ALASKA, OFFICIAL ELECTION PAMPHLET: REGION IV (NORTHERN AND SOUTHWEST ALASKA, ALEUTIAN CHAIN, WESTERN COOK INLET) 9–11 (Nov. 6, 2012), [hereinafter 2012 OEP REGION IV], https://www.elections.alaska.gov/doc/oep/2012/Region-4-Book-Final-2012.pdf.

114. *See* QUICKFACTS: KUSILVAK CENSUS AREA, ALASKA, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/02158,4573870,00 (last visited Apr. 14, 2017).

115. *See* 2012 OEP REGION IV, *supra*, note 113.

116. *See Dillingham Census Area, Alaska*, WIKIPEDIA, https://en.wikipedia.org/wiki/ Dillingham_Census_Area,_Alaska (last visited Jan. 4, 2016); *see also* DILLINGHAM CENSUS AREA, ALASKA DEP'T OF LABOR, http://live.laborstats.alaska.gov/cen/maps/bor/current/070.pdf (identifying some of the Census Area's villages).

117. *See* QUICKFACTS: DILLINGHAM CENSUS AREA, ALASKA, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045216/02070,00.

118. *See* 2012 OEP REGION IV, *supra* note 113, at 9–11.

questing that DOE establish early-voting locations in Native villages.[119] The ANCSA Regional Association's Executive Director explained why in-person absentee voting in advance of the scheduled elections was necessary:

> This is very important to people in our communities because, in August especially [during the primary election], subsistence fishermen and those who are berry picking are likely to be gone for significant periods of time. They often cannot be at voting locations on the exact date of the election. Similar problems often arise in November as well [during the general election], when the weather adds to travel problems. Moreover, given how slow and unpredictable absentee by mail voting can be, many people in our community do not trust this option. Voting by fax is also not considered an option because almost no one has their own personal fax machine, and to fax from the tribal or municipal office costs the voter between $1 to $3 per page; there should be no cost associated with voting. The lack of personal fax machines also eliminates private voting rights, forcing individuals to share their choices if they want to participate in the election.[120]

Moreover, the Native corporations emphasized the inequality of offering early voting to those "who live in urban areas like Fairbanks, Anchorage, and Juneau," asserting "that our rural residents should have the same access to the polls as urban Alaskans."[121] DOE acknowledged receiving several letters from Native groups raising similar concerns.[122] Nevertheless, the DOE's response ignored the obvious unequal treatment, even questioning why in-person early voting was needed there. Instead, the Director of DOE maintained that "there are several ways other than early in-person voting that residents of your community can vote prior to Election Day" that she argued "will be effective and will not result in disenfranchisement."[123] The Director also blamed the Section 5 preclearance requirement for the discriminatory treatment of Natives, contending that it

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119. Alaska Federation of Natives Stmt. of Interest at 2, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014), No. 188-1 (referring to requests for the preceding three years "that the DOE automatically provide early (absentee-in-person) voting locations throughout rural Alaska").

120. Letter from Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass'n, to Gail Fenumiai, Dir., Div. of Elections (July 26, 2012) (on file with author).

121. *Id.*

122. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass'n 1 (Aug. 1, 2012) (on file with author).

123. *Id.*

precluded the DOE from making "further adjustments or changes for the 2012 elections."[124]

In August 2013, following the *Shelby County* decision removing Alaska from coverage for the Section 5 preclearance requirements,[125] at least half a dozen Native organizations and three tribal councils again requested early voting in the villages.[126] They hoped it would easily be accommodated since the preclearance the DOE had complained about was no longer required.[127] In response to those requests, DOE conceded that preclearance was "no longer required."[128] Nevertheless, instead of granting the repeated request, DOE's Director devised a new three-step process as a condition for adding locations in Native villages. First, regardless of any previous requests they had made, tribal councils were required to respond to a survey.[129] There were several different versions of the survey, with the questions worded slightly differently for no clear reason. All surveys were in English, and the key question was often buried in a lengthy and sometimes incomprehensible paragraph describing all the various ways to cast a ballot. Each survey did ask the village to opt-in by indicating "if they would like an absentee in-person voting location," as well as requiring the tribal council to state that "it is willing to serve as the absentee voting location."[130] If the tribal council did not respond, DOE took no further action.[131] Second, if the tribal council responded to the survey, DOE sent out a second letter asking them to reaffirm their earlier response on "whether the tribal council office would agree to serve as the absentee voting location."[132] Third, the tribal council, not the DOE, was required to "designate an individual to serve as the absentee voting official."[133] Only then would DOE consider establishing an in-person early voting location in a Native village.[134] Despite the many requests already made from

124. *Id.* at 2.

125. *See supra* note 98 and accompanying text.

126. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass'n of Village Council Presidents 1 (Aug. 30, 2013) (on file with author) (listing those who requested early voting).

127. Some of the organizations represented several tribal councils. For example, the letter sent by Mr. Naneng was on behalf of the "56 federally recognized Tribes on the Yukon-Kuskokwim Delta" seeking early voting "in all villages in rural Alaska for the 2014 election cycle." *See* Letter from Myron Naneng, President of Ass'n of Village Council Presidents, to Gail Fenumiai, Dir., Div. of Elections 1 (Aug. 15, 2013) (on file with author).

128. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass'n of Village Council Presidents 1 (Aug. 30, 2013) (on file with author).

129. *See id.* at 2.

130. *Id.*

131. *See id.*

132. *See id.*

133. *Id.*

134. *See id.*

organizations representing dozens of tribes, the Director noted that only two, Chevak and Larsen Bay, successfully navigated through these confusing bureaucratic requirements.[135]

In early 2014, in the months leading up to the primary and general elections, the DOE had still taken no steps to establish in-person early voting locations in Native villages. These stalling tactics prompted Native organizations to again request that rural villages be treated equally to non-Native urban areas. Specifically, they asked for the provision of "early voting in every village without requiring villages to 'opt-in' by survey or otherwise. Urban communities are not required to opt-in to early voting, and . . . rural Alaska should have as equal access to voting as urban Alaska."[136] Native organizations likewise requested that DOE provide an additional early voting station during the three-day Alaska Federation of Natives conference to make it more accessible to the thousands of voters who attend that conference.[137] DOE waited more than one month to respond, rejecting both requests.[138] DOE's Director rationalized the disparate treatment of Native villages by asserting that adequate voting locations and absentee voting officials "have historically been more easily found in more populated and/or urban areas."[139]

Ultimately, in-person early voting locations were only established in Native villages after AFN, the ANCSA CEO's Association, and Get Out The Native Vote agreed to engage in self-help and pay the costs.[140] In June 2014, the Native groups took on a burden not required for non-Native groups or voters living in urban areas of Alaska: they performed DOE's statutory duty[141] by identifying voting locations and recruiting absentee voting officials.[142] A total of 128 villages throughout rural Alaska were

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135. *See id.*

136. *See* Letter from Jason Metrokin, Chair of ANCSA Regional Ass'n, to Gail Fenumiai, Dir., Div. of Elections 1 (Apr. 7, 2014) (on file with author).

137. *See id.* at 2.

138. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Jason Metrokin, Chair of ANCSA Regional Ass'n 1-2, 4 (May 9, 2014) (on file with author).

139. *See id.* at 2.

140. *See* Alaska Fed'n of Natives, *AFN and ANCSA Regional Ass'n Release Final List of New Absentee Early Voting Sites in Rural Alaska* (July 16, 2014) [hereinafter Rural Alaska Early Voting], http://www.nativefederation.org/afn-and-ancsa-regional-association-release-final-list-of-new-absentee-early-voting-sites-in-rural-alaska/.

141. *See generally* ALASKA STAT. §§ 15.15.060 (2000) (DOE's *director* "shall pay the cost of necessary election expenses incurred in securing a place for holding the election. . .") (emphasis added); 15.20.045 (2014) ("*The director or election supervisor* may designate persons to act as absentee voting officials" and the "*director* may designate . . . locations at which absentee voting stations will be operated on or after the 15th day before an election up to and including the date of the election") (emphasis added); *see also* 6 ALASKA ADMIN. CODE § 25.500(a) (2008) ("Absentee voting stations will be established through the direction and approval of *the director*" of the DOE) (emphasis added).

142. *See* Rural Alaska Early Voting, *supra* note 140.

designated by the Native groups for in-person early voting locations and approved by DOE.[143] Afterwards, DOE's director attempted to claim credit for making early voting accessible in the villages.[144] AFN sharply rebuked her efforts, explaining that Native organizations were "[t]ired of having our repeated requests rejected" and "offered to do the work for the DOE and organize new early voting locations ourselves . . . . The DOE did not do this—we did."[145] DOE then attempted to limit the number of ballots sent to the Native early voting locations to between 25 and 50, even though most of locations had hundreds of voters.[146] While Alaska Native voters finally secured early voting opportunities, they did so only after substantial struggles and requirements not imposed on non-Natives.

IV. THE SECTION 203 CASES

A. *Nick v. Bethel*

1. Background

Following passage of the language assistance provisions of the VRA in 1975, Alaska became covered for Alaska Native languages. That coverage remained in place in the predominately Native regions of the state when successive determinations were made in 1984, 1992, 2002, and in 2011.[147] As described in the two cases that follow, from 1975 to 2015, the DOE did little to provide complete, clear, and accurate translations of all voting materials and information to Native voters.[148] Municipal officials responsible for conducting certain city elections in Alaska also failed to provide language assistance.[149] Their recalcitrance may have been due, in part, to the English-only movement in Alaska, which succeeded in getting

143. *See id.*

144. *See* Testimony of Gail Fenumiai at 1714:5-17, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014).

145. Alaska Federation of Natives Stmt. of Interest at 2–3, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014), No. 188-1.

146. *See* Letter from Andrew Guy, President & CEO of Calista Corp., to Lt. Gov. Mead Treadwell, Gail Fenumiai, Dir., Div. of Elections, & Becka Baker, Region IV Super. 2 (July 31, 2014) (on file with author).

147. *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 239, 333 (David Schultz, ed., 2009); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 76 Fed. Reg. 63602 (Oct. 13, 2011).

148. *See generally* 28 C.F.R. § 55.19(b) ("It is essential that material provided in the language of a language minority group be clear, complete and accurate. In examining whether a jurisdiction has achieved compliance with this requirement, the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials."); *see also* 28 C.F.R. § 55.2 ("materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities").

149. *See generally* Native Vill. of Barrow v. City of Barrow, No. 2BA-95-117-CI (Alaska Super. Ct. 1995) (discussed in Landreth & Smith, *supra* note 24, at 117–18). The City of Bethel

voter approval of a ballot measure in 1998 that required that only English be used for "all government functions and actions."[150] The ballot measure was meant to block bilingual materials and services to the state's non-English speaking population.[151] Even after Alaska's highest court struck down the provision,[152] Alaska continued to provide English-only elections.

DOE employees were arguably aware of the need for language assistance and the impact of the failure to provide it. In 2004, Native turnout in a predominately Yup'ik region of the state was more than 20 percent below the statewide average turnout rate.[153] The Director of the DOE acknowledged that disparity but was dismissive of it, explaining only that "has been the trend of that area"[154] without recognizing what caused that trend. In preparation for the renewal of the VRA in 2006, the Native American Rights Fund began to investigate the compliance with Section 203 and contacted DOE with several complaints heard from voters.[155] Interviews revealed a wholesale failure to comply with Section 203: lack of trained poll workers fluent and literate in English and the Native language, no outreach and publicity about the availability of language assistance, no telephonic assistance in Native languages, and no translations of written and audio voting information and materials distributed in English.[156] Those facts were later included as part of the record supporting the reauthorization of expiring provisions of the VRA.[157] Instead of addressing the complaints from Native voters, Lieutenant Governor Loren Leman, who was charged by statute with supervision of the DOE, wrote a letter rejecting the information and asserting without any support that Alaska was in full compliance with the VRA.[158]

One year later with no changes in sight, Alaska's inaction compelled Native voters to sue the Lieutenant Governor and DOE officials in the summer of 2007. That case, *Nick v. Bethel*, was brought by Yup'ik-speak-

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was one of the defendants in *Nick v. Bethel*, discussed *infra*, for failing to provide language assistance in municipal elections.

150. *See* Alaska Stat. § 44.12.300 (1998).

151. *See* Susan Fischetti, *Official Language Practical, Reins in Bureaucracy*, ANCHORAGE DAILY NEWS, Apr. 4, 2002, at B6.

152. *See* Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183, 187–88 (Alaska 2007).

153. *See* TUCKER, *supra* note 147, at 261.

154. *Id.*

155. *Id.* at 262.

156. Landreth & Smith, *supra* note 24, at 110–19.

157. The report was included in the congressional record supporting reauthorization. *See Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong., 2d Sess. 1308-62 (2006) (appendix to the statement of Wade Henderson, Exec. Dir., Leadership Conf. on Civ. Rts); *see also Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 18 (testimony of Natalie Landreth, Staff Attorney, Native Am. Rts. Fund).

158. *See* TUCKER, *supra* note 147, at 262.

ing Native voters and tribes located in the Bethel Census Area.[159] The plaintiffs alleged that state election officials violated Section 203 by failing to provide translations of all voting information and assistance in Native languages for voter registration, absentee voting, and Election Day activities.[160] They further contended that officials violated Section 208 of the VRA,[161] which requires that voters be allowed to receive voting assistance from the person of their choice.[162] Although DOE was violating voting rights throughout the state, Native voters in the Bethel region sued before voters in other regions for two reasons. First, the Bethel area has the largest concentration of LEP Native voters in Alaska.[163] Second, Native voters anticipated that DOE officials would implement the remedies obtained in the *Nick* litigation in other regions of Alaska, obviating the need to sue for statewide relief.

Alaska's response to the *Nick* lawsuit took three forms. First, DOE officials blamed the Native language speaking voters themselves. Despite admitting that they had engaged in no outreach and offered no method of feedback for voters about their language needs, the DOE nevertheless criticized voters for not informing them that the state was violating federal law.[164] They offered no explanation for why DOE never responded to the complaints that Native voters made,[165] other than being dismissive and contending they were not valid.[166] Officials also argued that despite the plain language of the law, which required covered jurisdictions to provide language assistance,[167] any violations were attributable to those they asked

159. *See* Complaint at ¶¶ 5–8, *Nick v. Bethel*, No. 3:07-cv-0098-TMB (D. Alaska June 11, 2007).

160. *See id.* at ¶ 25(a)–(e).

161. *Id.* at ¶ 27.

162. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134–35 (1982) (codified as Section 208 of the VRA at 42 U.S.C. § 1973aa-6 (2006)) (providing that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union"). Congress added this amendment because it determined that blind, disabled, elderly, and illiterate were susceptible to having "their vote unduly influenced or manipulated" without assistance. S. REP. No. 97-417, at 62 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 240. Like the mandate for minority language assistance contained in Section 203, voter assistance under Section 208 must be permitted at every stage of the voting process, from registration through actually casting a ballot. *See* S. REP. No. 97-417, at 63 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 241.

163. *See* TUCKER, *supra* note 147, at 359–61 (identifying the number of LEP Alaska Native voters in each region of the state, according to the 2002 Section 203 coverage determinations in effect when the *Nick* litigation was brought).

164. *See id.* at 263–64.

165. Landreth & Smith, *supra* note 24, at 82.

166. *See* TUCKER, *supra* note 147, at 262–63.

167. *See generally* 42 U.S.C. § 1973aa-1a(c), which provides in pertinent part: "Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or

to provide that assistance, and not to DOE. In particular, the Division left translations for radio announcements to local media to air at their discretion as Public Service Announcements (PSAs), without compensation.[168] DOE did not provide any voting information, instructions, or materials in Yup'ik, leaving it to poll workers to struggle with translating often complex ballots and procedures on-the-spot—if they could do it at all.[169] Officials also argued that any language assistance that LEP voters needed could be provided by family members,[170] even though when many tried they were blocked from doing so in violation of Section 208.[171] The DOE also faulted tribal councils for not translating voting materials that they received in English into Yup'ik.[172] In short, the DOE contended that the nearly-universal lack of language assistance for registration and voting activities was caused by the very Native voters who were supposed to receive that assistance.

Second, after the litigation had been filed, the DOE began to develop a fledgling language assistance program. DOE's Director "started looking" at "improving" the State's language program—where references to "improving" were a euphemism for a program that did not exist.[173] When a lawsuit was not immediately filed against DOE, the Director admitted that the language program was "put . . . aside as we were conducting our major statewide election as well as our [school board] election," and was set aside again when DOE was "hit with another statewide special election in April of 2007."[174] The Director maintained that Native voters were not entitled to any language services beyond those the State chose to provide explaining, "Language assistance is not the only assistance that the Division of Elections provides . . . . We have . . . the demands of every voter in the state. I think it would [be] important to balance all of those needs and our resources to be able to make that determination."[175] After the *Nick* plaintiffs sued, state officials took the first

information relating to the electoral process, including ballots, *it shall provide them* in the language of the applicable minority group as well as in the English language" (emphasis added).

168. *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 265 (David Schultz, ed., 2009).

169. *Id.* at 265, 274–75. For example, in a particularly disturbing example of the difficulty Yup'ik-speaking poll workers had in translating complex ballot measures, a natural gas pipeline was translated as "this the path for the gas, this the gas, the one that is not water, but is a . . . gas in the stomach, that can be used to the point where it can become fire." *Id.* at 273–75 (providing other examples of voting information and instructions that were mistranslated by poll workers on-the-spot).

170. *See id.* at 265.

171. *See id.* at 275–77, 285.

172. *See id.* at 265.

173. *See id.* at 264.

174. *See id.*

175. *Id.*

steps to create a language program in Yup'ik in the Bethel region—and nowhere else.[176] Alaska's newfound efforts in early 2008 included the first expenditure of the millions of dollars of federal HAVA funds languishing in an interest-bearing account,[177] compared to the hundreds of thousands already spent to open new voting offices in non-Native areas.[178]

Third, the Stevens Proviso was the cornerstone of Alaska's response to *Nick*.[179] The DOE argued that the Proviso exonerated it from providing any written translations, allowing the DOE to rely solely on the Yup'ik-speaking poll workers it hired in villages—many of whom were untrained—to provide all language assistance. It did not matter to state officials that written Yup'ik was widely taught in the Bethel region, including through bilingual education in the public schools in which children learned to start reading Yup'ik in elementary school.[180] The State likewise urged the federal court to ignore the common usage of written Yup'ik, including among 90 percent of their own poll workers.[181] The State rejected out-of-hand requests from those poll workers for translations of voting materials written in Yup'ik that could be read orally to LEP Native voters.[182] According to DOE, application of the Stevens Proviso required that all Alaska Native languages be considered "unwritten" based solely on the "precedent set by the State" of conducting English-only elections.[183]

2. The Court's Decision

The federal court issued two substantive decisions in the *Nick* case. The first was a decision granting summary judgment to the DOE and holding that Yup'ik was indeed historically unwritten under Section 203. First, the federal court rejected the State's contention that all Native languages were exempt from Section 203's mandate for written translations.[184] Instead, it concluded that a language only fell under the Stevens Proviso if the evidence showed it was "historically unwritten."[185] The court struggled with the meaning of the Proviso because Section 203 was silent on the meaning of "historically unwritten."[186] The court concluded

176. *See supra* notes 168–169 and accompanying text.

177. *See* TUCKER, *supra* note 168, at 264; *see also* 2008 HAVA Plan, *supra* note 111, at 36 ("Alaska has applied for and received $400,000 in accessibility grants for FY 2003, FY 2004, FY 2005, and FY 2006. To date, the Division has not spent these funds . . . .").

178. *See id.* at 25, 38.

179. *See supra* note 61–63 and accompanying text.

180. TUCKER, *supra* note 168, at 283.

181. *See id.*

182. *See id.*

183. *See id.* at 280, 284.

184. *See* Summary Judgment Order at 7, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska July 23, 2008), No. 319 [hereinafter *Nick* Summary Judgment Order].

185. *Id.* at 7.

186. *See id.* at 9–10.

the term had to mean that " 'unwritten' must extend at least several generations into the past,"[187] without considering the contrary statements of the Proviso's own sponsor, Senator Stevens, who said it meant a language had to be written and used for at least 15 years.[188] The court explicitly did "not examine or draw any conclusions on the extent to which written Yup'ik is commonly used today."[189] Applying the "imprecise" test it had developed, the court found that Yup'ik was to be considered a "historically unwritten" language because it did not become commonly used until "after the modern version was developed in the late 1960s."[190] Nevertheless, the court concluded that Alaska "may need to produce certain written materials in order to provide effective oral assistance to Yup'ik voters."[191] This holding, that written materials may be required even if the language was historically unwritten under Section 203, was the first time the Stevens Proviso had been interpreted. It was a critical first step toward the result in the second case. It meant that even if the Proviso was applied, Native voters might still receive the written materials they needed for compete and accurate translations. It was key to eliminating Alaska's use of the Proviso as a vehicle for voting discrimination.

After the federal court found that the Yup'ik language was "historically unwritten" under the VRA, it proceeded to the merits of the Section 203 claim itself. This required the federal court to compare the voting materials received by English-speaking voters and those received by the Yup'ik-speaking voters. In July 2008, the *Nick* court determined that Native voters had met their burden of proving the likelihood of success on their claims that Alaska had violated the VRA.[192] The Court found that the voters had established their Section 208 claim, which "asserts that poll workers have regularly failed to allow voters (or apprise voters of their right) to bring an individual of their choice in the voting booth to assist them in the voting process."[193] The court likewise concluded that the State violated Section 203 by failing to:

> [P]rovide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's [*sic*] originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot

187. *Id.* at 10.

188. *See supra* note 61–63 and accompanying text.

189. *Nick* Summary Judgment Order, *supra* note 184, at 10 n.30.

190. *See id.* at 10, 12.

191. *Id.* at 1–2.

192. *See* Order Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants at 7, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska July 30, 2008), No. 327 [hereinafter *Nick* Order].

193. *Id.* at 9–10.

> questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate; or require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.[194]

The court was especially troubled that "[s]tate officials became aware of potential problems with their language-assistance program in the spring of 2006," but their "efforts to overhaul the language assistance program did not begin in earnest until after this litigation."[195] The court cited three reasons for its injunction: (1) Alaska had been required to provide language assistance to Native voters "for many years"; (2) "the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters"; and (3) Alaska's post-litigation efforts to come into compliance were "relatively new and untested."[196] Taken together, this "evidence of past shortcomings justifie[d] the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections."[197] The decision was accompanied by a preliminary injunction.

The court ordered several remedies to be in place for the 2008 elections.[198] The DOE had to provide poll workers who were fluent in English and Yup'ik in each polling place in the Bethel region.[199] Those workers were to be trained on the requirements for language and voter assistance, as well as "the methods and tools available for providing complete and accurate translations."[200] A language coordinator fluent in Yup'ik had to be hired to "act as a liaison to the tribal councils and Yup'ik-speaking community to ensure the State's efforts result in effective language assistance."[201] Pre-election publicity provided to voters in English had to be "broadcast or published in Yup'ik as well" to include a notice of the availability of language assistance.[202] State officials were required to "consult with Yup'ik language experts to ensure the accuracy of all translated election materials."[203]

Notwithstanding the court's ruling on the Stevens Proviso, and staying true to the order on summary judgment, the court ordered that some

194. *Id.* at 7–8.

195. *Id.* at 8.

196. *Id.*

197. *Id.* at 9.

198. *Id.* at 10–11.

199. *Id.* at 10.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 11.

voting materials must be provided to poll workers in written Yup'ik to ensure the accuracy of translations: a glossary of common election terms and a sample ballot in written Yup'ik, which was "to aid poll workers in translating ballot materials and instructions" for LEP Native voters.[204] Finally, the court ordered that Alaska submit pre- and post-election reports describing its efforts to comply with these requirements.[205]

3. The Settlement

In February 2010, DOE officials settled with the *Nick* plaintiffs.[206] The settlement agreement included several supplements to the court-ordered remedies. Bilingual poll workers unable to attend in-person training had to be provided with training through alternative means, including a video of the in-person training.[207] The DOE was required to confirm the language abilities of the bilingual poll workers and their willingness to provide translations of voting information.[208] The Yup'ik language coordinator had to engage in outreach with Native villages in the Bethel region, including an in-person meeting held every even-numbered year.[209] A Yup'ik Translation Panel was to include language experts who could account for "variations in dialects within the Central Yup'ik language."[210] Because many Native villages did not receive signals from radio stations, the DOE was required to distribute written Yup'ik translations of all election ads to bilingual outreach workers in each village, with instructions "to broadcast those announcements over their village's VHF radio."[211] Outreach announcements were to include information about Alaska's annual "list maintenance" procedures—or voter purges—to all Natives, informing them of the steps required to remain registered to vote.[212] DOE agreed to disseminate written Yup'ik translations of the ballot questions, neutral summaries, for and against statements, and audio translations of candidate statements, except for those of judicial officers.[213] Audio translations were to be provided for several voting procedures, including how to register to vote, procedures for absentee voting, and "special needs" voting for persons physically unable to enter a polling place.[214] The remedies in the set-

204. *Id.* at 10–11.

205. *Id.* at 11.

206. *See* Settlement Agreement and Release of All Claims at 1-3, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Feb. 16, 2010), No. 787-2 [hereinafter *Nick* Settlement Agreement].

207. *Id.* at 6.

208. *Id.* at 7.

209. *Id.*

210. *Id.* at 8.

211. *Id.*

212. *Id.* at 9–10.

213. *Id.* at 8–9.

214. *Id.* at 9.

tlement agreement remained in place with court oversight through the end of 2012.[215]

B. *Toyukak v. Treadwell*

1. Background

The expectation was that the *Nick* settlement would serve as a model for language assistance not only for Yup'ik speakers, but statewide. This expectation was not realized. Rather than simply using the same methods of translations to other areas covered for Alaska Native languages, state officials chose a different path: they limited application of the *Nick* remedies to the Bethel Census Area.[216] DOE officials soon received indications that the decision to limit language assistance in this fashion violated the law. In October 2012, one wrote that she had "a disturbing call yesterday with the Department of Justice regarding our language assistance . . . and the lack of us having any PSAs relating to information appearing on the ballot."[217] She explained, "Since we send out an English voter pamphlet that contains a sample ballot, they say we must also provide information in Native languages about the sample ballot."[218] In February 2013, at the Director's manager's meeting, DOE officials discussed that "we might have a new lawsuit against us about language assistance."[219] Even with that knowledge, the DOE still made no effort to provide language assistance to Native voters outside of the Bethel Census Area.

The absence of language assistance was particularly acute for pre-election information provided to every voter in English. By state law, Alaska is required to mail its Official Election Pamphlet (OEP) to every household with a registered voter at least twenty-two days prior to a statewide general election or an election with a ballot measure.[220] The OEP, which is frequently 100 pages or longer,[221] contains a tremendous amount of information necessary to cast an informed ballot on Election Day, including: candidate statements; Judicial Council recommendations for retention of judicial candidates; sample ballots for all offices; for each ballot proposition, the full text, statement of costs, neutral summary, and pro and con statements; statements explaining bond propositions; material submit-

215. Order Granting Parties' Joint Request for Approval of Settlement Agreement on §§ 203, 4(f)4 & 208 Claims, Rescission of Preliminary Injunction, and Dismissal of Case With Prejudice at 2, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Feb. 16, 2010), No. 787-1.

216. *See supra* Section IV.A.3; *supra* note 159 and accompanying text.

217. Trial Tr. 881:15-884:2, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska June 26, 2014) (quoting Exhibit 330).

218. *Id.* at 883 (referencing Exhibit 330).

219. *Id.* at 661 (referencing Exhibit 321).

220. *See* ALASKA STAT. §§ 15.58.010 (2014), 15.58.080 (2000).

221. *See, e.g.*, Official Election Pamphlets available at http://www.elections.alaska.gov/Core/publications.php.

ted by political parties; constitutional convention questions; and any other information on voting procedures the lieutenant governor considers important.[222] Absent complete, clear, and accurate translations into Native languages of the pre-election information disseminated to voters in English, Alaska Natives were effectively denied an opportunity to meaningfully participate in the election process.

This prompted Alaska Native voters outside the Bethel Census Area to file a second lawsuit in July 2013.[223] *Toyukak v. Treadwell* would become the first Section 203 case fully tried through a decision in thirty-four years.[224] The plaintiffs included two individual voters and four tribal councils from three different regions of Alaska.[225] The Bethel Census Area lies between these regions: the Kusilvak Census Area is to the northwest, the Yukon-Koyukuk Census Area to the northeast, and the Dillingham Census Area to the south.[226] Four plaintiffs represented Yup'ik-speaking LEP voters in the Dillingham and Kusilvak regions,[227] including some close to the Bethel area who speak the Central Yup'ik dialect, and many who speak the Bristol Bay, Chevak/Hooper Bay, Norton Sound, Nunivak, and Yukon dialects (among others).[228] Two tribal councils from Arctic Village and Venetie represented LEP voters who speak the Athabascan language of Gwich'in.[229] In addition to a Section 203 claim, this time the plaintiffs brought a claim under the Fourteenth and Fifteenth Amendments to the United States Constitution because, as a result of the *Nick* case, DOE officials knew they were denying equal registration and voting opportunities to Natives, but had persisted in their violations.[230]

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222. *See* ALASKA STAT. § 15.58.020 (2014).

223. *See* Complaint at ¶ 38, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 22, 2013), No. 1.

224. Prior to the *Toyukak* trial in 2014, the last time a Section 203 case went to trial was in 1980. *See* Apache County v. United States, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court). Most language assistance violations are resolved through pre-litigation memoranda of understanding or shortly after a case is filed by consent decree. *See* U.S. Dep't of Just., Civ. Rts. Div. *Voting Section Litigation*, http://www.justice.gov/crt/voting-section-litigation (last visited Feb. 22, 2016) (listing cases with links to settlement agreements and consent decrees). A minority of language cases are resolved by motions for temporary restraining orders or preliminary injunctions without the need for trial. *See, e.g., Nick v. Bethel*, *supra* Section IV.A.3 (case settled after injunction granted); *U.S. v. Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (case terminated after injunction granted); *U.S. v. Metro. Dade Cnty.*, 815 F. Supp. 1475 (S.D. Fla. 1993) (case terminated after TRO granted).

225. *See* Amended Complaint at ¶¶ 6-11, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Jan. 10, 2014), No. 21 [hereinafter Amended Complaint].

226. *See* Alaska Map, *supra* note 42.

227. *See* Amended Complaint, *supra* note 225, at ¶¶ 6–7, 9–10.

228. *See* Krauss, *supra*, note 45.

229. *See* Amended Complaint, *supra* note 225, at ¶¶ 8, 11.

230. *See id.* at ¶¶ 1, 64-70. The Complaint also documented Alaska's discrimination that created the need for language assistance, particularly educational discrimination, which resulted

Although *Nick* had focused on the Stevens Proviso and whether the fledgling language assistance program should be measured under a "totality of the circumstances" test,[231] in *Toyukak* the DOE asserted that Section 203 merely required "reasonable steps" at providing language assistance measured by "substantial compliance" to be determined at the sole discretion of the election officials.[232] DOE based this argument on the final clause of the regulation that says "an affected jurisdiction should take all reasonable steps to achieve that goal."[233] In other words, the explicit mandate of Section 203 that "any" election materials "shall" be provided "in the language of the applicable minority group" instead meant that a jurisdiction only had to make "reasonable efforts" to achieve the goals of Section 203. This was the crux of the *Toyukak* case. The rest of the case focused on one question: is a covered jurisdiction required to translate every single material or is a covered jurisdiction only required to take "reasonable" steps to allow voters to cast their ballots?

The State's approach would have turned 203's mandate on its head. The statute uses a bottom-up approach, focusing on the LEP voters with "the basic purpose . . . to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities;"[234] in other words, "[c]ompliance . . . is best measured by results."[235] In contrast, DOE urged a top-down approach that had already been rejected,[236] focusing on the means of what state officials did instead of the ends of whether those efforts, if any, allowed Native voters to meaningfully exercise their right to vote.[237] State officials likewise disregarded the *Nick* order that some written translations might be required to

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in high LEP and illiteracy rates among Alaska Natives in the three areas. *See id.* at ¶¶ 21, 23, 27–28, 32–33, 36–44.

231. *See* Draft Jt. Final Pre-Tr. Order, Proposed at 5, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska filed Oct 5, 2009), No. 674.

232. *See* Motion for Partial Summary Judgment & Alt. Motion to Establish the Law of the Case at 16-17, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Apr. 4, 2014), No. 47; *see* Defendants' Trial Brief at 2-3, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Jun. 13, 2014), No. 138.

233. 28 C.F.R. § 55.2(b).

234. 28 C.F.R. § 55.15.

235. 28 C.F.R. § 55.16.

236. *See Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008-09 (9th Cir. 1978) (holding that good faith efforts of compliance were no defense to a Section 203 claim).

237. *See generally* United States v. Berks Cnty., 250 F. Supp. 2d 550, 527 (E.D. Pa. 2003):

> The meaningful right to vote extends beyond the four corners of the voting machine. If voters cannot understand English-only ballot language such as the offices for which candidates are running, propositions, bond authorizations, and constitutional amendments, as well as the printed advertisements of polling place locations and sample ballots, their right to vote is effectively diminished.

"provide effective oral assistance to Yup'ik voters."[238] Instead, the State urged that under the language of the Stevens Proviso the "Court may not order written materials on the ground that they will improve the effectiveness of the Division's program."[239] In reality, DOE officials knew they could not produce evidence that the Division had translated every voting material, and were trying to reduce the scope of Section 203's mandate in order to increase DOE's chances of success at trial.

The argument was unsuccessful at oral arguments on cross-motions for summary judgment, which set the stage for the standards to be applied at trial. The court quickly zeroed in on the problem with DOE's contention: if a jurisdiction is not translating every voting material, it is picking and choosing what materials LEP voters receive. The court inquired whether Section 203 allowed the State to "provide less information if it's an oral language speaker," such as to a Native voter.[240] DOE answered affirmatively, contending "it can provide the information that the specific voter needs."[241] The court suggested that this was inconsistent with statutory language describing an "across the board" approach in which all covered LEP voters were entitled to all voting information in their language.[242] But DOE asserted that although "that may be true for written language, [ ] for Alaska Natives, we can figure out just what really is important for them to get and not provide all the same information . . . that people are otherwise entitled to if they have a written language."[243] DOE asserted it could do this because "that's the language of the proviso," which it claimed provided for "different" treatment of Native voters who were entitled to less information than non-Native voters.[244]

The court pressed DOE as to whether its approach was unconstitutional because it would mean that Alaska Natives were "not going to get everything" non-Natives would receive, but would instead get "fewer things that we think are the most important for them."[245] DOE persisted, contending "it's not just a question of what we think is most important for them but what they need."[246] DOE also asserted there was no Constitutional problem with its approach because "this isn't a Fifteenth Amendment issue," arguing the amendment was limited to "race, color, and previous condition of servitude," and therefore was inapplicable to Native

238. *Nick* Summary Judgment Order, *supra* note 184, at 1–2.

239. Defendants' Trial Brief, *supra* note 232, at 7–8.

240. *See* Tr. of Excerpt of Proceedings (Oral Arg. on Mot. for S.J.) at 40:7-10, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska May 30, 2014), No. 120.

241. *Id.* at 40:11-12.

242. *Id.* at 41:18-23.

243. *Id.* at 41:23-42:3 (court paraphrasing position of the DOE).

244. *See id.* at 42:5-17.

245. *See id.* at 42:18-43:14.

246. *Id.* at 43:15-16.

voters.[247] DOE further asserted that any disparate treatment between Natives and non-Natives under the approach it urged to be taken created equal protection "constitutional problems, potentially, with the entire language assistance scheme."[248]

DOE's assertion that LEP Native voters were entitled to less voting information simply because they spoke a Native language prompted an immediate response from the Department of Justice.[249] The Department filed a Statement of Interest to "set out the Attorney General's position that, contrary to Defendants' argument, Section 203 requires providing *all* the election information in the covered minority languages."[250] The Stevens Proviso did not exempt Native languages from the statutory mandate; it "addresses only the question of *how* the required translation is to be accomplished, not *whether* it must be done."[251] As the Attorney General explained, the "statutory language of Section 203 is clear and broad[:] any information related to the electoral process, including ballots, that is provided to voters in English also must be provided in the covered language, whether the method of providing the information is in written or oral form."[252] Therefore, "[c]ontrary to Defendants' position, the guidance to 'take all reasonable steps' [to provide language assistance] does not exempt a covered jurisdiction. . . . Rather, it articulates the requirement that the jurisdiction take the necessary steps to provide the information contained in *all* election materials . . . in a form that enables protected voters to participate effectively."[253] The Department of Justice also asserted that the Stevens Proviso did not bar the use of written translations: "[J]urisdictions are free to translate information and materials in that written form to supplement its oral translation program where it can assist in outreach and training, and to help ensure consistent and accurate translations."[254] The

247. *Id.* at 44:9-12.

248. *See id.* at 45:4-15.

249. *See* Statement of Interest of the United States of America, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 3, 2014), No. 121.

250. *Id.* at 3 (emphasis in original).

251. *Id.* (emphasis in original).

252. *Id.* at 4.

253. *Id.* at 5 (emphasis in original). The Attorney General explained:

> [T]he steps a covered jurisdiction takes towards compliance cannot be viewed as "reasonable" if the jurisdiction fails to provide effective assistance to voters regarding the content of the ballots. Hiring purportedly "bilingual" poll officials without ensuring their fluency level or training them to competently perform their job is not reasonable and does not reach the standard required by the Attorney General for Section 203 compliance. Reasonable steps for the jurisdiction to take in that situation would be to ensure fluency, competence and adequate training for the bilingual poll officials, so that they *are* able to provide effective assistance.

Id. at 8 (emphasis in original).

254. *Id.* at 6 n.3.

Attorney General concluded that DOE's "purported exemption finds no support in the text of Section 203 or in three decades of case law involving Indian country."[255] This Statement of Interest confirmed what the Plaintiffs had been arguing, namely that a jurisdiction had to translate *everything*, and the Stevens Proviso only affected the mode by which that could be done.

2. The Court's Decision on the Legal Standard

The court agreed with the plaintiffs and the Attorney General of the United States. As an initial matter, the Court rejected "the position of the State that the Fifteenth Amendment does not apply in this case," finding that "the Ninth Circuit recognized applicability of that Amendment to the rights of Native Alaskans and American Indians to exercise the right to vote."[256] The constitutional mandate of equal treatment therefore did not support the State's argument that the Stevens Proviso required that Natives receive less voting information:

> [T]he goal of the Voting Rights Act is to accord equal opportunity for all citizens to participate in elections and it would be, in my mind, inconsistent with that goal to have a lower level of assistance provided to limited-English proficient Alaska Native and American Indian citizens than is provided to other individuals that fall within the category that Congress identified as needing assistance in elections . . . . [T]he [Stevens] [P]roviso should be interpreted as altering only the means by which information relating to registration and voting is communicated to limited-English proficient Alaska Natives but it does not permit the Division to diminish the content and extent of the information that must be provided.[257]

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255. *Id.* at 9.

256. *See* Tr. of Law of the Case, at 6:19-7:5, *Toyukak v. Treadwell*, (3:13-cv-00137-SLG) (D. Alaska June 4, 2014) (citing *United States v. Blaine Cnty.*, 363 F.3d 897 (9th Cir. 2004)); *see also United States v. Blaine Cnty.*, 157 F. Supp. 2d 1145, 1152 (D. Mont. 2001) ("The fact that the [Voting Rights] Act was primarily intended to remedy discrimination against African Americans in the southern states in the 1960's does not make it any less proper to use as a remedy for discrimination against Native Americans today. There is ample evidence that American Indians have historically been the subject of discrimination in the area of voting."), *aff'd*, 363 F.3d at 897.

257. *See* Tr. of Law of the Case, at 6:19-7:5, *Toyukak v. Treadwell*, (3:13-cv-00137-SLG) (D. Alaska June 4, 2014) (citing United States v. Blaine Cnty., 363 F.3d 897 (9th Cir. 2004) at 14:14-15:3); *see also id.* at 15:12-16:6 (finding that approach consistent with how federal courts applied the Stevens Proviso). *See generally* U.S. v. Sandoval County, 797 F. Supp.2d 1249, 1251 (D.N.M. 2011) (three-judge court) (observing that "in ongoing violation of both the VRA" and a consent decree, the county "had failed to furnish the covered voters all oral instructions, assistance, and other information relating to voting" to the covered LEP American Indian voters).

This interpretation flatly rejected the construction urged by the State by avoiding "putting . . . election officials . . . in the position of having to determine what may or may not be most important . . . to a [LEP] Alaska Native voter. . . ."[258] In the court's view, it was simply untenable to place the DOE in the position of having to make those choices. Moreover, the very practice of selecting which materials to translate resulted in unequal access to election information.

Considering this was the first Section 203 case to be fully tried in over three decades, the court had no choice but to break new ground. In rejecting differential access to voting information, the court set forth a two-step test to examine 203 claims. The first step is to examine "whether the State's standards, practices, and procedures provide substantially equivalent registration and voting information to [LEP] Alaska Natives . . . as is communicated in the English language . . . ."[259] The second step required proof "that the State has not taken all reasonable steps to try to implement its standards, practices, and procedures" to provide equal voting information to Native voters.[260] The threshold was whether the DOE provided the "substantial equivalent" for each voting material. The court would find that because the DOE did not do so, the second step would never be applied.

3. The Trial

Against the backdrop of this legal standard, the evidence showed that the DOE had made a policy choice to limit the *Nick* remedies to the Bethel Census Area. The DOE's 2012 plan entitled "Alaska Native Language Assistance" identified those remedies as being restricted to "BCA tribes," referring to the Bethel Census Area.[261] Yup'ik voting materials, such as audio CDs for the 2012 General Election with translations of candidate statements, ballot measure and neutral summaries, and pro and con statements for ballot measures, were designated for the "BCA only" and were not sent to villages in other regions.[262] The State's only language coordinator had "election duties for the Bethel census area only,"[263] despite being responsible for coordinating translations of all Native languages covered in Alaska.[264] The coordinator did not recall spending any time working on language assistance in villages located in the Dillingham or

258. *See* Tr. of Law of the Case, *supra* note 257, at 16:9-14.

259. *Id.* at 16:18-22.

260. *Id.* at 17:10-12.

261. *See* Pls.' Trial Exh. 58 at SOA 006154-55, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

262. *See* Dep. of Dorie Wassilie, Yup'ik Language Coordinator, at Vol. 2, 161:19-163:4 & Exh. 196 [hereinafter Dep. of Dorie Wassilie].

263. *Id.* at 133:19-23; *see also id.* at 133:4-5, 134:13-19.

264. *Id.* at 82:20-83:21.

Kusilvak areas.[265] DOE's in-person community outreach meetings in 2008, 2009, 2011, and October 2013 (after the *Toyukak* case was filed in July) were held in Bethel and limited to only villages in the Bethel Census Area.[266] Native villages in the rest of the State were not invited.[267]

A November 2012 e-mail contained one of the more surprising admissions of the lack of language assistance in other areas. A regional elections supervisor acknowledged that she "only sent the Yup'ik ads and samples to the BCA outreach workers."[268] The supervisor described receiving a complaint from the village of Emmonak (located in the Kusilvak region) "that the voters need to [be] more educated on what is on the ballot, and the candidates running for office—and that the Division of Elections should provide all the information in Yup'ik, including the ballots. She stated that she was concerned . . . that elders there aren't getting assistance."[269] Reflecting the DOE's official policy at that time, another manager reminded the supervisor that because the village was "not in BCA" the language coordinator "doesn't send them anything" and she was "not sure how the [Tribal Council] would know we have Yup'ik materials."[270] Not only was Yup'ik language assistance limited to the Bethel area, election officials were wondering how voters in other regions found out about the translated materials. DOE first attributed their inaction to Section 5 preclearance, arguing that the VRA mandate required unequal treatment because they had only had approval to implement language procedures in the Bethel region. However, the DOE also conceded it made no effort to submit changes in language procedures in other areas after the *Nick* settlement agreement was reached in early 2010.[271]

Moreover, even for the Bethel region, language assistance appeared to decline after the *Nick* settlement agreement ended. The State's language coordinator left DOE on December 31, 2012,[272] the same day that the settlement agreement expired.[273] A new language coordinator was not

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265. *Id.* at 58:3-10.

266. Exh. 181; Dep. of Shelly Growden, 129:3-130:6, 134:15-23, 135:17-136:10, 187:16-20; Dep. of Michael Jackson, 73:3-74:6.

267. *Id.*

268. Exhibit 49 at 1: E-mails between Edna Rae "Becka" Baker, Election Supervisor for Region IV, and Shelly Growden, Elections System Manager, *Toyukak v. Treadwell* No. 3:13-cv-00137-SLG (D. Alaska Nov. 27, 2012) [hereinafter Baker Email].

269. *Id.*

270. *Id.*

271. *See* Trial Tr. 817:19-18:23, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 26, 2014) [hereinafter Test. of Shelly Growden].

272. *See* Trial Tr. 558:12-14 (test. of Dorie Wassilie), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 25, 2014).

273. *See Nick* Settlement Agreement, *supra* note 206, at 14.

hired until August 2013,[274] two weeks after the *Toyukak* case was filed.[275] During the nine months that the new language coordinator worked for DOE, he reported that he only spent ten percent of his time working on language assistance in the Bethel region, with the remaining ninety percent performing data entry of voter registration forms.[276] Those limitations were contrary to the allocation of federal HAVA funds, which paid for half of the coordinator's salary and required that he spend fifty percent of his time on language assistance.[277] Tellingly, the State's records showed that expenditure of HAVA funds spiked during the *Nick* litigation and decreased precipitously after the case was settled.[278] Alaska's Yup'ik Translation Panel likewise almost fell into disuse following *Nick*, holding no in-person meetings after March 2009[279] until May 2014, on the eve of the *Toyukuk* trial.[280]

DOE did little to provide translations of election information in the Gwich'in language in the Yukon-Koyukuk region. All voting materials offered in the area were written in English.[281] From 2004 to 2013, the State did not disseminate any sample ballots written in Gwich'in.[282] Alaska officials did not view their duty to provide Native voters with equal access to the voting process as a priority, or even a necessity. For example, in 2008, when there were four propositions on the ballot, a DOE manager asked that only two be translated into Gwich'in. The manager wrote, "If you have time to do the other measures, that would be fine, but at the least we need #1 and #4."[283] There is no evidence that even the partial translations were ever provided to Yukon-Koyukuk poll workers or voters. In December 2013, after the *Toyukak* case was filed, DOE contacted a translator for

274. Dep. of Shelly Growden, Elections System Manager, at 21:8-18, 86:5-11, 121:21-24.

275. *See* Amended Complaint, *supra* note 225.

276. *See* Trial Tr. 1065:14-1070:18 (Test. of Michael Bryan Jackson), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 30, 2014).

277. *See* Trial Tr. 1723:1-1724:22 (Test. of Gail Fenumiai), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014).

278. *See* Pl.'s Closing Arg. PowerPoint at slide 95, "Amount of HAVA funds spent for language assistance by year and timing of Section 203 litigation," *Toyukak v Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014).

279. *See* Dep. of Dorie Wassilie, *supra* note 262, at 34:8-14, 35:1-8.

280. *See* Pls.' Closing Arg. PowerPoint, *Yup'ik Translation Panel Work During Litigation*, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014); *see also* Trial Tr. 1680:23-1681:9 (Test. of Frank Chingliak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014) (panel member did no work for the Yup'ik Translation Panel between 2010 and May 2014).

281. *See* Trial Exh. 249, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

282. *See* Trial Exh. 251, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska); Dep. of Michelle "Mickey" Speegle, Region III Supervisor, at 24:21-23.

283. E-mail from Shelly Growden, Elections System Manager, to Adeline Peter Raboff (Aug. 2, 2008), Trial Exh. 252 at SOA_011164, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

the first time since 2008 to request translations of voting materials into Gwich'in for the upcoming 2014 election.[284] Similarly, state officials made no effort to provide radio announcements in Gwich'in, even after a voter in the region informed them of a radio station that reached a large number of LEP voters.[285] When *Toyukak* went to trial in July 2014, Alaska still had not made any voting announcements in the Gwich'in language through radio stations located in the Yukon-Koyukuk Census Area.[286] Like other regions outside of the Bethel area, election officials did not travel to any of the Gwich'in-speaking Native villages to facilitate their provision of language assistance.[287] Touch-screen voting machines, which included English language audio to assist sight-impaired voters,[288] did not have any audio translations in the Gwich'in language on them.[289]

Alaska officials also disregarded Section 203's mandate to provide language assistance in all dialects of Yup'ik in the Dillingham and Kusilvak regions.[290] Curiously, they did so despite recognizing that "[w]e will have to provide assistance in several dialects of the covered language,"[291] as they had for Inupiaq language assistance "in both the Seward Peninsula dialect and the Northern dialect."[292] DOE officials were aware that there was more than one dialect of Yup'ik[293] and that the most common dialects spoken in the Dillingham and Kusilvak regions were the Bristol Bay and

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284. *See* E-mail from Shelly Growden, Elections System Manager, to Marilyn Savage (Dec. 12, 2013), Trial Exh. 252 at SOA_011164, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

285. *See* Exh. 499, *Toyukak v. Treadwell*, case no. 3:13-cv-00137-SLG (D. Alaska); Test. of Shelly Growden, *supra* note 271, at 1398:20-1399:11.

286. Dep. of Shelly Growden, Elections System Manager, at 1398:11–19.

287. *See* Dep. of Michelle "Mickey" Speegle, Region III Supervisor, at 18:24-19:11, 21:1-17.

288. *See generally* ALASKA STAT. § 15.15.032 (2004) (authorizing the director to designate precincts with touch-screen voting machines and requiring one unit at each such precinct with electronically generated ballots "that would allow voters with disabilities, including those who are blind or visually impaired, to cast private, independent, and verifiable ballots").

289. *See* Dep. of Michelle "Mickey" Speegle, Region III Supervisor, at 24:15-19; Trial Exh. 250 at SOA_006355, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

290. *See generally* 28 C.F.R. § 55.13(a) ("Some languages . . . have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction's obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects."); *see also* 28 C.F.R. § 55.11 ("In enforcing the Act, the Attorney General will consider whether the languages, forms of languages, or dialects chosen by covered jurisdictions in the electoral process enable members of applicable language minority groups to participate effectively in the electoral process . . . .").

291. E-mail from Shelly Growden, Elections System Manager, to several recipients (Jan. 2, 2008), Trial Exh. 11 at SOA_5863, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

292. E-mail from Shelly Growden, Elections System Manager, to Cindy Allred (Sept. 13, 2010), Trial Exh. 177, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

293. *See* Dep. of Shelly Growden, Election System Manager, at 28:3-20; Trial Exhs. 180 & 240, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

Yukon dialects, respectively.[294] They had received voter requests for voting materials and information to be translated into several Yup'ik dialects.[295] Nevertheless, DOE prepared one common written translation for all of its Yup'ik material, and that is Modern Central Yup'ik,[296] spoken primarily in the Bethel region.[297] Translations on touch-screen voting units likewise were all in the Central Yup'ik dialect.[298] The State downplayed the import of translating voting materials into all Yup'ik dialects, arguing that the differences were "slight."[299] Bilingual poll workers in villages outside of the Bethel area told a different story at trial. They did not use the Bethel Yup'ik sample ballots because they could not read them, having to instead perform on-the-spot translations from the English ballots into the dialect spoken in their village.[300] One of the Yup'ik Translation Panel members admitted that panel members "were aware that the dialect might not be . . . understandable in parts of the Yukon Yup'ik, Bristol Bay, and Chevak, Mekoryuk. You know, they have totally different dialects."[301]

Expert Dan McCool testified that DOE's resistance to providing full language assistance to Alaska Native voters was part of a "continuing organizational culture" in which Alaska viewed the VRA "as something [it is] forced to do, instead of looking at the policy goal of being sure that everyone has the opportunity to participate" in elections.[302] According to McCool, the State's behavior was "part of a pattern I see over a long period of time, a consistent culture—they're going to fight this. When forced to do something, they're going to do it, but only when they've been ordered

294. *See* Dep. of Dorie Wassilie, *supra* note 262, at 84:1-4, 85:12-22; Trial Exh. 244 at 83-86, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

295. Trial Tr. 1546:4-1547:9 (Cross examination of Edna Rae "Becka" Baker), *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska July 2, 2014).

296. *See* Dep. of Shelly Growden, Election System Manager, at 28:3-20; Trial Exhs. 180 & 240, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

297. *See* Michael E. Krauss, *Indigenous Peoples and Languages of Alaska*, ALASKA NATIVE LANGUAGES CENTER (2013), http://www.uafanlc.arsc.edu/data/Online/G961K2010/ipla-map-20130712.pdf; *see also* Dep. of Dorie Wassilie, *supra* note 262, at 85:23-86:6 (testifying that Central Yup'ik is the most common dialect spoken in the Bethel area).

298. *See* Trial Tr. 175:5-175:20 (Test. of Brenda Tall), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 23, 2014).

299. *See* State's Motion for Partial Summary Judgment & Alternative Motion to Establish the Law of the Case at 6, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska Apr. 4, 2014).

300. *See* Trial Tr. 170:25-171:8, 175:5-175.20 (Test. of Brenda Tall); *see also* Trial Tr. 716:14-24 (Testimony of Edna Rae "Becka" Baker), *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska June 26, 2014) ("It's the poll worker's responsibility to provide oral translations in their language . . . I am assuming that if they are providing assistance to the voter, that they would provide that assistance to that voter in their language of their community.").

301. Dep. of Frank Chingliak, at 13:1-13, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska).

302. Rich Mauer, *Expert in Native Voting Rights Trial Says Alaska Has Long History of Discrimination*, ALASKA DISPATCH NEWS (June 30, 2014), http://www.adn.com/article/20140630/expert-native-voting-rights-trial-says-alaska-has-long-history-discrimination.

to."[303] He explained the evidence of DOE's resistance to Section 203's mandate by placing it in the context of state policy toward the Native tribes:

> This enduring, multi-faceted conflict has generated bitter feelings and resentment; it is impossible to analyze this conflict and not conclude that purposeful discrimination is at work here. I do not believe any fair-minded, objective observer could examine the history of Alaska Natives and their relationship to the state government, and reach any other conclusion. Whether it is the delivery of educational resources or other services, or assistance in voting, each act of beneficence by the state toward Native people has been presaged by a federal law or court case that mandated such behavior. This could only be interpreted as purposeful behavior intended to reduce or minimize Native Alaskan voting.[304]

McCool concluded that the DOE's "attitudes and behaviors don't look to me like the behaviors of an agency that's absolutely devoted to providing equal opportunity to all voters, even if it's difficult. The attitude is let's do what the law requires and absolutely no more."[305]

Even where some language assistance was provided, there were problems as well. The quality of the Central Yup'ik translations provided by the State frequently changed the meaning from the information provided to voters in English. Experts on the translation panel struggled with how to translate words and election terms, some of which have no counterpart in the Yup'ik language.[306] When translation problems were identified, DOE managers did not always correct them. For example, a 2009 audio recording of voting procedures inaccurately translated the term "absentee voting" as "to be voting for a long time."[307] DOE's language coordinator and a translation panel member agreed that the translation error "throws the meaning of absentee voting off and makes it mean all together [sic] different."[308] Nevertheless, an election manager directed the recording to be aired over the radio anyways. In response, the language coordina-

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303. *Id.*

304. Dan McCool Expert Witness Report, 47–48, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska), Trial Exh. 151.

305. Mauer, *supra* note 302.

306. For example, the five-member panel spent two days trying to translate the Alaska's 2014 oil tax ballot measure, but were unable to complete it. *See* Trial Tr. 1574:10-12, 1581:18-1582:10 (Test. of Alice Fredson), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014).

307. E-mail from Dorie Wassilie, Yup'ik Language Coordinator, to Shelly Growden, Elections System Manager, and Alexa Tonkovich (Sept. 17, 2009), Trial Exh. 247, at SOA_12081, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

308. *See id.*

tor tried to justify the inaccuracy by writing that she did not "think it should cause too much confusion . . . We'll be criticized by the plaintiffs if they catch it, but what the heck, it's a similar word and hope that it goes right over their heads!☺"[309] With this lack of attention to accuracy, bilingual poll workers and the LEP voters themselves were left to try to figure out the meaning of complex election terms and ballot language.

Alaska attempted to explain the lack of complete, clear, and accurate written and audio translations by arguing that "[t]he Division relies primarily on outreach workers and poll workers to provide oral language assistance."[310] However, the State's own records showed that outreach workers were unavailable about two-thirds of the time to provide translations of any pre-election information.[311] Sometimes, even when the State recruited an outreach worker, that individual did not provide any translations or other voting information to LEP voters in their village.[312] The DOE used a "Certificate of Outreach" to identify the tasks that were to be completed before the election. Those tasks included posting a notice and announcing over the radio that language assistance was available, a date for voter registration in the village, and announcements about election deadlines.[313] Workers were not directed to translate the voluminous OEP mailed to every voter in English.[314] Lead plaintiff Mike Toyukak testified that at his polling place in Manokotak (in the Dillingham area),[315] no one had ever translated the candidate statements for him.[316] The absence of pre-election information in their native language had a direct impact on how Native voters cast their ballots. Frank Logusak from the village of Togiak, in the Dillingham area, testified that without translations of judicial candidate statements, "I always put 'no' all to the judges because I don't know their background. I vote no all of them to that, all the judges

309. E-mail from Dorie Wassilie, Yup'ik Language Coordinator, to Shelly Growden, Elections System Manager, and Alexa Tonkovich (Sept. 17, 2009), Trial Exh. 248, at SOA_12080, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska) (emoji included in original).

310. Trial Tr. 1830:5-6 (State's closing argument), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014).

311. *See* Pls.' Closing Arg. PowerPoint at slide 45, "Defendants' lack of pre-election workers (2008-2012)" *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014). For elections held from 2008 to 2012, outreach workers were unavailable 75 percent of the time in the Dillingham area, 63 percent of the time in the Kusilvak area, and 69 percent of the time in the plaintiff villages of Arctic Village and Venetie. *Id.*

312. *See, e.g.*, Trial Exh. 226 at SOA_833, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska) (outreach worker in a Kusilvak area village reported in response to identified activities, "forgot to do that," "no, didn't do that," and "did not provide any services").

313. Trial Exh. 226, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

314. *See id.*; *see also supra* notes 220–22 and accompanying text (describing the content of the OEP and requirements for its dissemination under Alaska law).

315. *See* Amended Complaint, *supra* note 225, at ¶ 6.

316. Trial Tr. 392:11-12 (Test. of Mike Toyukak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014).

in Alaska. . . . Without knowing their background, why should I vote yes for them to be a judge?"[317] It bears repeating that the only information being translated before the election was the registration deadline, the date and time for the election, and a notice that language assistance would be available at the polls on Election Day. All of the other information English-speaking voters receive in the OEP was missing.

The DOE fared little better in providing language assistance at polling places on Election Day. Although training was supposed to be mandatory,[318] between one-third and two-thirds of poll workers in the Dillingham and Kusilvak regions did not attend training in a given election cycle.[319] From 2008 to 2012, as many as half of the villages lacked an in-person translator for all the hours their polling places were open.[320] In the community of Dillingham—the village with the greatest number of LEP voters of any village in the three census areas[321]—the DOE designated the bilingual poll worker as an "on-call" translator who was not physically present in the polling place.[322] Despite Section 203's mandate and census data showing that at least 125 LEP Native voters lived in Dillingham (18.2 percent of all voters), an election supervisor rationalized the lack of a bilingual poll worker in Dillingham by speculating it was "[p]robably because there was no need for one there."[323] The only translated written material available in the polling place was the sample ballot. All of the information contained in the OEP was unavailable in the polling place, because the DOE considers it campaign material and thus not allowed.[324] This meant that that an LEP Native language speaking voter was not receiving the information from the Official Election Pamphlet either before or on Election Day. It was a voting information blackout. As for the ballot measures themselves, those were translated and available at the polling place, but the

317. Trial Tr. 418:20-419:15 (Test. of Frank Logusak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014).

318. Test. of Shelly Growden, at 1404:2-4; *see also* Trial Tr. 727:5-11 (Test. of Edna Rae "Becka" Baker), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 26, 2014) (DOE communicates to poll workers that training is mandatory and "we beg and plead with them to come to training").

319. *See* Trial Exhs. 217, 219-220, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska). For example, in the 2008 election, 69 percent of all poll workers in the Dillingham area and 50 percent in the Kusilvak area did not attend training. *See id.*

320. *See id.* For elections held from 2008 to 2012, bilingual poll workers were unavailable during all voting hours 48 percent of the time in the Dillingham Census Area and 22 percent of the time in the Kusilvak Census Area. *See id.*

321. *See* ALASKA BOROUGH/CENSUS AREAS, 2011 DETERMINATIONS DATA FILES, *supra* note 40.

322. Dep. of Edna Rae "Becka" Baker at 85:4-9, 105:11-16.

323. *Id.* at 86:6-13.

324. Trial Tr. 1797:3-1798:9 (Plaintiffs' Closing Argument and Summary), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014).

first time LEP voters saw them was when they walked into the voting booth.[325]

4. The Court's Findings and Holding

After weighing the evidence, the federal district court issued a decision on record in early September 2014.[326] The court concluded that "based upon the considerable evidence," the plaintiffs had established that DOE's actions in the three census areas were "not designed to transmit substantially equivalent information in the applicable minority . . . languages."[327] The public service announcements and translated materials DOE offered to Natives were "only a limited subset of the election materials" and were not a "substantial equivalent" of what the Division provided in English.[328] In particular, the court found the greatest disparity in the dissemination of voting information in the OEP:

> [It is] [s]ignificant to the Court that the English version of the official election pamphlet that is mailed in English in every household in the state with a registered voter a few weeks before the election is not available in any language, English or otherwise, at the polling sites due to statutory restrictions on campaigning at the polling place. So what you have at the polling place is the ballot language and the list of candidates but not the material that is distributed in English in the official election pamphlet, such as the pro/con statements and the neutral summaries for ballot measures, the candidate statements, and other information in the official pamphlet.[329]

The evidence did not support the State's argument that its outreach workers disseminated pre-election information.[330] DOE failed to provide any outreach worker in villages where a tribal administrator had declined assistance even where Census numbers indicated a covered population,[331] an approach that violated Section 203.[332] Where outreach workers were avail-

325. Trial Tr. 386:16-386:18 (Test. of Irene Camille), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014).

326. *See* Tr. of Decision of the Court, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 3, 2014).

327. *Id.* at 6:24-7:6.

328. *Id.* at 7:21-8:1.

329. *Id.* at 8:24-9:10.

330. *Id.* at 9:21-10:6.

331. *Id.* at 10:8-11:4.

332. *See generally* 42 U.S.C. § 1973aa-1a(b)(4) (providing that Section 203 coverage determinations are not reviewable and are effective upon publication in the Federal Register); *see also Briscoe v. Bell*, 432 U.S. 404, 410 (1977) (unanimously concluding that Congress had the authority to prohibit court challenges to the finality of coverage determinations). As the court explained, surveys "should not be used as a basis to eliminate language assistance in a community

able, they were limited to working no more than five hours before each election to translate for every voter in the village—which in some cases was hundreds of voters—and were not paid at a rate consistent with "comprehensive translators and interpreters."[333] There was also no evidence that workers were provided with copies of the OEP or informed that they were expected to translate it into the Native language spoken in their village.[334] The four minutes that DOE included on language assistance on its training video and its written materials focused solely on Election Day, and did not include any instructions that pre-election translations and assistance were to be offered.[335] The lack of pre-election assistance could not be redressed on Election Day because Alaska's electioneering statutes barred anything beyond translating the ballot in the polling place, such as by providing translations of candidate statements and pro/con statements of ballot measures.[336]

The court found that the language needs in each of the three census areas were not being met. The plaintiffs had "demonstrated that there are different dialects in Dillingham and [Kusilvak] from the Central Yup'ik dialect in Bethel."[337] There was evidence that "different individuals . . . raised this concern with the Division over the past several years," but the Division "only translated its Yup'ik materials solely into the Central Yup'ik dialect" and other dialects were not represented among translation panel members.[338] As a result, while "a Yup'ik sample ballot is a sound idea for the provision of language assistance services, its value outside of the Bethel Census Area [was] limited."[339] As to the Yukon-Koyukuk Census Area, during 2014 the DOE had "approached with some renewed energy the goal of providing meaningful oral language assistance to Gwich'in LEP Alaska Natives,"[340] but it had "not yet provided the substantial equivalent there."[341] Accordingly, the State of Alaska violated Section 203 of the

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that has been designated as needing services under the Voting Rights Act." Tr. of Decision of the Court, *supra* note 326, at 11:2-4.

333. *Id.* at 11:5-12.

334. *Id.* at 11:12-12:1.

335. *Id.* at 12:2-23.

336. *Id.* at 12:24-13:13; *see generally* ALASKA STAT. § 15.15.160 (1960) ("During the hours that the polls are open, an election board member may not discuss any political party, candidate, or issue while on duty."); ALASKA STAT. § 15.15.170 ("During the hours the polls are open, a person who is in the polling place or within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question.").

337. Tr. of Decision of the Court, *supra* note 326, at 13:14-16.

338. *Id.* at 13:14-24.

339. *Id.* at 13:24-14:4.

340. *Id.* at 14:22-14:25; *Compare with Nick* Order, *supra* note 192, at 8 and accompanying text (finding that Alaska's efforts to comply with Section 203 in the Bethel census area began after the *Nick* litigation was brought and were "relatively new and untested").

341. Tr. of Decision of the Court, *supra* note 326, at 14:22-15:1.

VRA because its "standards, practices, and procedures" did not permit LEP voters in the three "census areas to receive information about elections . . . that is substantially equivalent to that provided . . . to English-speaking voters."[342]

The court declined to reach the question of whether the plaintiffs had established that Alaska intentionally discriminated against Native voters, taking under advisement the constitutional claim to focus on remedies for the looming general election.[343] The court made several suggestions to be considered by the parties in addressing the Section 203 violation. The readability of public service announcements was a concern because it included confusing election jargon and did not make clear when and how language assistance was available.[344] In addition, the court was concerned with having a bilingual translator in Dillingham "on call" instead of "present at the polling place on election day to assist voters."[345] Translations also needed to correct for dialectical differences in the Dillingham and Kusilvak regions, with minor adjustments included as footnotes on written materials.[346] DOE's use of outreach workers likewise needed to be improved, by including them in all of the covered villages, training them, and ensuring that material in the OEP was translated and disseminated, such as through community meetings.[347] Finally, like in *Nick*,[348] the *Toyukak* court observed that notwithstanding the Stevens Proviso, "even if the statute does not require written materials, are there circumstances in which written materials would be preferable to oral, or in conjunction with oral, to be provided to voters or is that not a good tact to take to meet this 203 obligation."[349]

With the general election less than 60 days away, the court asked the parties to brief what remedies should apply just to the impending election. The court ultimately entered an interim remedial order for the November 2014 General Election with relief more comprehensive than what Native voters obtained in the *Nick* litigation.[350] Perhaps most importantly, the court closed the gap in pre-election information:

> 15. On or before October 10, 2014, the Division shall send to each of the outreach workers in the three census areas (in addi-

342. *Id.* at 15:8-20.

343. *Id.* at 15:21-25.

344. *Id.* at 16:18-17:19.

345. *Id.* at 17:20-24.

346. *Id.* at 17:25-18:5.

347. *Id.* at 18:6-19:11.

348. *See Nick* Order, *supra* note 192, at 6.

349. Tr. of Decision of the Court, *supra* note 326, at 19:15-19.

350. *Compare* Order Re Interim Remedies, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, No. 2206 (D. Alaska Sept. 22, 2014) [hereinafter Interim Order], *with Nick* Settlement Agreement, *supra* note 206.

> tion to the audio translations of ballot measure neutral summaries, pro/con statements, and candidate statements) written translations of the following so as to assist the outreach workers in providing oral translations to LEP voters:
>
> a. Sample ballots including ballot questions;
>
> b. Neutral summaries of each ballot question prepared by the State;
>
> c. Statements of cost associated with ballot questions;
>
> d. Summary of bond measures;
>
> e. Pro and con statements for ballot questions and bond measures;
>
> f. Candidate statements (federal and state offices and judicial candidates);
>
> g. A copy of the Official Election Pamphlet; and
>
> h. A cover letter and updated instruction packet to the outreach workers that emphasizes to each outreach worker that she/he is expected to be available to assist voters to understand all voting information and that encourages workers to call the Division with any questions about performing these tasks.[351]

Acutely aware of the timing in the weeks leading up to the 2014 election, the court added a footnote to this section alerting the DOE to the fact that it was expected to translate the entire Official Election Pamphlet or explain why it could not:

> To the extent the Division maintains it is unable to translate the entire Official Election Pamphlet for the 2014 General Election, it shall make all reasonable efforts to translate as much as possible in accordance with this Order, and shall be prepared to detail in its November 28, 2014 report to the Court the reasons why, despite all reasonable efforts, it was unable to translate the entire pamphlet for the General Election.

For many LEP Native voters, the 2014 General Election was the first time that they would have both early voting and information about the candidate and ballot measures. They were inching closer to being able to cast a meaningful ballot including understanding who and what they were voting for.

In November 2014, Byron Mallott—an Alaska Native who grew up in a household that spoke a Native language—was elected Lieutenant

351. Interim Order, *supra* note 350, at 6–7.

Governor.[352] In the days leading up the election, Mallott and his running mate, Bill Walker, stated their intent to address the issues identified in the *Toyukak* litigation.[353] The federal court directed the parties to meet and confer to see if they could settle the case and jointly propose a remedial plan for the Section 203 violations.[354] Over the course of nine months of negotiations, the parties did so. The plaintiffs, Lieutenant Governor Mallott, and DOE officials worked collaboratively to produce a proposed stipulation and judgment that was entered by the court in late September 2015.[355] The thirty-three page order identifies comprehensive procedures to be put into place to remedy Alaska's Section 203 violations that account for practical issues faced by election administrators.[356] In recognition of voting barriers that predated even the *Nick* litigation, the order includes strong relief to cure the violations, such as federal observers to document compliance efforts and court oversight enforceable by its contempt powers through the end of 2020.[357] Based upon but expanding the interim order, the order made the following changes:

> Pre-election dissemination of information in the Official Election Pamphlet to Alaska Native voters in their language and dialect;
>
> Translation of election information into Gwich'in and several Yup'ik dialects in addition to the translations already made in the Central Yup'ik dialect;
>
> Increased collaboration with tribal councils to meet the needs of Alaska Native voters who need to receive election information in their native languages and dialects;
>
> A full-time employee responsible for administrating and coordinating all of the Division's language assistance activities;

352. *See* Richard Walker, *Election of Walker and Mallott is Historic on Several Levels*, INDIAN COUNTRY TODAY (Nov. 19, 2014), http://indiancountrytodaymedianetwork.com/2014/11/19/election-walker-and-mallott-historic-several-levels-157893.

353. *See generally* Alex DeMarban, *Parnell and Walker Focus on State-Native Relations in AFN Debate*, ANCHORAGE DAILY NEWS (Oct. 24, 2014), http://www.adn.com/article/20141024/parnell-and-walker-focus-state-native-relations-afn-debate ("Walker said that with Mallott as lieutenant governor, there won't be elections disputes between the state and Alaska Natives that must be sorted out in court. 'More communication, less litigation will be our approach,' Walker said.").

354. *See* Order Re Defendants' Comprehensive Report Detailing Compliance, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska filed Dec. 4, 2014), No. 235.

355. *See* Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 30, 2015), No. 282.

356. *See id.* The Order provided that in "exchange" for its entry, "Plaintiffs agree to dismiss their claim under the Fourteenth and Fifteenth Amendments to the United States Constitution and their request for relief under Section 3(c) of the Voting Rights Act . . . without prejudice to Plaintiffs' right to rely on the underlying facts and findings of this case" should further litigation be necessary. *Id.* at 5.

357. *See id.* at 7–8, 30.

> Providing sample ballots in Gwich'in and Yup'ik that voters can bring into the voting booth with them;
>
> Making Gwich'in and Yup'ik dialects available on touch-screen voting machines when it is technologically feasible;
>
> Increased pre-election outreach by bilingual election workers;
>
> Preparation of glossaries of election terms and phrases in Gwich'in and several Yup'ik dialects to guide bilingual poll workers providing language assistance;
>
> Mandatory bilingual poll worker training on how to provide language assistance to voters;
>
> Providing Gwich'in and Yup'ik-speaking voters with a toll-free number through which they can make inquiries in their native languages and dialects;
>
> Relying on Yup'ik and Gwich'in language experts to translate election materials, including information on ballot measures, candidates, absentee and special-needs voting and voter registration;
>
> Pre-election publicity in Gwich'in and Yup'ik through radio ads, public service announcements and announcements over VHF radios in villages that do not receive local radio stations.[358]

With this order, Alaska went from what was a model of poor practices to what could become a model of best practices for language assistance.

As the settlement discussions were reaching their conclusion, Lieutenant Governor Mallott appointed a new DOE Director who is Inupiaq.[359] On January 11, 2016, the DOE hired an Elections Language Assistance Compliance Manager, a new position required under the *Toyukak* settlement agreement.[360] As the new Coordinator explained, she embraced the difficult challenges ahead of her because her position "was created to ensure that Alaskans have . . . an opportunity to exercise their right to vote and be actively engaged in shaping their society, expressing their needs, and holding governing entities accountable."[361]

Although DOE's preparation for the 2016 elections reflected significant progress, reports filed by federal observers suggest its efforts still fell short of fully remedying the Section 203 violations. Some two years after

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358. *See* Stipulated Judgment and Order, *supra* note 355.

359. *See* Charles L. Westmoreland, *Mallott Ejects Elections Director*, JUNEAU EMPIRE (July 27, 2015), http://juneauempire.com/state/2015-07-27/mallott-ejects-elections-director.

360. *See* Office of the Lieutenant Governor Byron Mallott, *New Year Sees Changes for Election Division* (Jan. 11, 2016) [hereinafter DOE Changes], http://ltgov.alaska.gov/Mallott/press-room/full-press-release.html?pr=280; *see also* Stipulated Judgment and Order, *supra* note 355, at 18.

361. DOE Changes, *supra* note 360.

Judge Gleason's September 2014 bench ruling for the Plaintiffs and entry of her interim remedial order, bilingual poll worker training was spotty or lacking for several villages. Federal observers were present for both the August 2016 Primary and November 2016 General Election in villages located in the three census areas.[362] Out of the 120 poll workers interviewed by the federal observers for those elections, only 46 percent (55 poll workers) reported that they had been trained in 2016.[363] In contrast, four percent (5 poll workers) reported receiving training in 2015, ten percent (12 poll workers) reported being trained two or more years earlier, 39 percent (47 poll workers) reported they had never been trained, and one percent declined to answer.[364] Some of the poll workers who did receive training indicated that it was "conducted in English by a non-Native instructor from the Election Office."[365] Bilingual poll workers or interpreters were not trained on "how to translate the contents of the ballot or how to provide procedural instructions" in the covered Alaska Native languages.[366]

In a marked improvement, most, but not all, of the villages had a bilingual poll worker available. In the August 2016 Primary Election, federal observers reported there was no bilingual poll worker available in three out of the nineteen Native villages they observed.[367] In Koliganek, a bilingual poll worker was only available "on call" and was "not present at the polling place."[368] No bilingual assistance was available at polling places located in Dillingham, Kotlik, and Marshall during a portion of the time federal observers were there when the observers documented the only bilingual worker took a break or left the polling place.[369] In the November 2016 General Election, federal observers reported there was no bilingual poll worker available in just one of the twelve Native villages they observed.[370] While federal observers were present, they reported that no bilingual assistance was available at Fort Yukon for an hour and twenty minutes when the interpreter left the polling place.[371] In Venetie, one of the Plaintiff villages, the only Gwich'in-speaking poll worker left three and one-half hours before the polling place closed, and did not return.[372]

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362. *See* Federal Observer Reports for 2016 Elections, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, No. 295, attachments 295-1 to 295-33 (D. Alaska filed Dec. 13, 2016).

363. *See id.*

364. *See id.*

365. Federal Observer Reports for 2016 Elections, *supra* note 362, at 8, attachment 295-1.

366. *Id.* at 9.

367. *Id.* at attachments 295-1 to 295-20.

368. *Id.* at 6, attachment 295-3.

369. *Id.* at 6-7, attachments 295-2, 295-10, 295-11.

370. *Id.* at 6-7, attachments 295-21 to 295-33.

371. *Id.* at 6, attachment 295-32.

372. *Id.* at 6-7, attachment 295-33.

For both elections in 2016, many voting materials were unavailable in the applicable Alaska Native language and dialect. Almost all signage was in English only.[373] Among the nineteen villages in which federal observers were present for the August 2016 primary election, they observed that no voting materials were available in Alaska Native languages in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie.[374] The "I voted" sticker was the only material in an Alaska Native language in Marshall and Mountain Village.[375] Only the Yup'ik glossary was observed in Emmonak.[376] Ten villages had a sample ballot written in Yup'ik,[377] but only two—Koliganek and Manokotak—had written translations of the candidate lists.[378] Only one village, Aleknagik, had a written translation of the OEP available for Yup'ik-speaking voters.[379]

In the November 2016 General Election, federal observers documented that half of the twelve polling places they observed did not have a translated sample ballot available for voters. Five villages—New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie—had no translated sample ballot at all,[380] while the Gwich'in sample ballot in Fort Yukon was "kept at the poll workers' table" and was not provided by the voting machine where voters could use it.[381] The absence of written voting materials had its greatest impact in villages where a trained bilingual poll worker was not present at all times during the election. In sum, Alaska had made significant improvements and committed to changing to better serve its voters, but almost 40 years of violating the VRA cannot be changed overnight. This illustrates why the settlement agreement requires court oversight through the end of 2020.

The 2016 General Election added to the scope of language assistance election officials must provide in Alaska. On December 5, 2016, the Director of the U.S. Census Bureau issued a notice of determination identifying the jurisdictions subject to the language assistance provisions of Section 203.[382] As a result of the 2016 determinations, Alaska Native language assistance now must be provided in fifteen political subdivisions of

373. *Id.* at 5, attachments 295-1, 295-3, 295-33.

374. *Id.* at 10, attachments No. 295-7, 295-10, 295-17, 295-18, 295-19, 295-20.

375. *See id.* at 10, attachments 295-11, 295-12.

376. *See id.* at 10, attachment 295-8.

377. *See, e.g., id* at 10, attachments 295-1, 295-6, 295-9, 295-13, 295-16.

378. *See id.* at 10, attachments 295-3, 295-4.

379. *See id.* at 10, attachment 295-1.

380. *See id.* at 10, attachments 295-23, 295-25, 295-28, 295-31, and 295-33.

381. *See id.* at 10, attachment 295-32.

382. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 (Dec. 5, 2016) (to be codified at 28 C.F.R. pt. 55) [hereinafter 2016 Section 203 Determinations].

Alaska,[383] which is an increase of eight political subdivisions from 2011.[384] Yup'ik coverage was added to the Aleutians East Borough, Bristol Bay Borough, Kenai Peninsula Borough, Kodiak Island Borough, and Lake and Peninsula Borough.[385] Alaskan Athabascan (predominately Gwich'in) coverage has been added to the Southeast Fairbanks and Valdez-Cordova Census Areas, while Inupiat language assistance has been added to the Yukon-Koyukuk Census Area.[386] This "new" coverage has restored the requirement that language assistance be provided in areas where it was lost following *Shelby County*'s elimination in 2013 of statewide coverage for Alaska Native languages that had been in place since 1975.[387] However, the doubling of Alaska Native coverage will be challenging for the DOE because they had not provided language assistance in those areas during the 38 years the areas were included under statewide coverage. Nevertheless, Alaska's election officials have stated their commitment to come into compliance in all covered areas.[388]

CONCLUSION

As the Supreme Court recognized, voting is critical to a democratic society because it is "preservative of all rights."[389] It is the people's primary voice in government and the source of political power.[390] Keeping that in mind, probably the most stunning moment of the *Toyukak* case was when Mr. Mike Toyukak himself took the stand. Counsel flipped through page after page of the Official Election Pamphlet on an overhead projector, asking him if he had ever seen certain election materials before. Had he seen a pro-con statement for a ballot measure? No. Did he recognize an absentee ballot form? No. Did he know there was information about the judicial candidates available? No, he didn't. Finally, going off script, counsel asked when the first time he saw the actual ballot measures or candidates on the ballot was. When he walked into the voting booth on Election Day, he said.[391] In those few moments, it became very real that these Alaska Native

383. *See* 81 Fed. Reg. at 87,533.

384. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602–63,603 (Oct. 13, 2011).

385. 2016 Section 203 Determinations, *supra* note 382, at 87,533.

386. *See id.*

387. *See* 28 C.F.R. pt. 55 (2013).

388. *See* Andrew Kitchenman, *Census Bureau Adds Areas, Languages to Be Translated for Alaska Elections*, ALASKA PUB. RADIO (Dec. 8, 2016), http://www.alaskapublic.org/2016/12/08/census-bureau-adds-areas-languages-to-be-translated-for-alaska-elections.

389. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

390. *See generally* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right to vote freely for a candidate of one's choice is the essence of a democratic society and any restrictions on that right strike at the heart of representative government.")

391. Tr. of Record at 391-93, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska Sept. 30, 2015).

voters had experienced exclusion from not just one or two pieces of voting information that they needed to make informed choices, but exclusion from the entire political process.

The legacy of the *Toyukak* case is a clear statement of equality. The court rejected any notion that a jurisdiction may choose or edit what information to which certain groups of voters have access. And there is no escape hatch for a jurisdiction to claim that it *tried*. In fact, the term "historically unwritten" itself seemed to lose its relevance because it only changed the manner in which information was to be conveyed—not whether or not a voter would receive it. After the first trial in over 30 years, Section 203 now has a clear path. Remedying the impact of Alaska's legacy of discrimination against Alaska Natives, including first generation voting barriers, remains a work in progress. Nevertheless, *Toyukak* marks an important step towards achieving that goal.

The election processes in Alaska have begun to change in recent years due to *Nick* and *Toyukak* and a change in state leadership. However, in closing, it is important to note that the ability of Alaska Natives, among other minority groups, to participate in the political process is now being threatened by the current administration. In response to unproven claims by President Donald Trump that he won the popular vote in November 2016 "if you deduct the millions of people who voted illegally,"[392] the President established a "Presidential Advisory Commission on Election Integrity."[393] The Commission ostensibly has been constituted to examine "the registration and voting processes used in Federal elections," including "those vulnerabilities in voting systems and practices used for Federal elections that could lead to . . . fraudulent voter registrations and fraudulent voting."[394] However, members of the Commission include several individuals who have made careers of actively attempting to suppress the vote of racial, ethnic, and language minority voters whom they believe do not tend to support conservative candidates: Vice-Chair Kris Kobach, Secretary of State of Kansas; Ken Blackwell, Secretary of State of Ohio; Hans von Spakovsky; and J. Christian Adams.[395] Instead of attempting to make voting more accessible for all Americans, these Advisory Commission members have focused their careers on the passage of restrictive voter identification laws, unlawful politicization of the Department of Justice, and policies and practices intended to suppress the voting power of historically disenfranchised groups, including Alaska Natives. The Commission will likely issue "findings" that will serve as a basis for federal legislation that suppresses specific groups of voters. This means that the threats to

392. Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting With Lawmakers*, N.Y. TIMES (Jan. 23, 2017).

393. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 16, 2017).

394. 82 Fed. Reg. at 22,389.

395. For a list of Commission members, see https://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity (last visited Nov. 3, 2017).

historically disenfranchised groups, like the limited-English proficient Alaska Natives in the *Nick* and *Toyukak* cases, may no longer come from state and local governments that fail to abide by the mandates of the Voting Rights Act. Instead, these voters face threats on the federal level from those who would roll back laws meant to protect them, including possibly even the Voting Rights Act itself.

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SENIOR WHIP
DEMOCRATIC CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

COMMITTEE ON THE JUDICIARY

OVERSIGHT HEARING:
"NEED TO ENHANCE THE VOTING RIGHTS ACT: PRELIMINARY INJUNCTIONS, BAIL-IN COVERAGE, ELECTION OBSERVERS, AND NOTICE"

QUESTIONS FOR RECORD
FLOOR STATEMENT

JUNE 29, 2021

FOR SOPHIA LIN LAKIN

1. Please explain why VRA Section 2 is not adequate substitute for a vigorous Section 5 preclearance program.

2. How has the so-called *Purcell* principle has further constrained the effectiveness of Section 2 and other voting rights protections?

3. Is the fact that the Department of Justice has only filed a handful of Section 2 cases since the Shelby County decision probative evidence that the need to revitalize Section 5 preclearance is overstated? Why not?

4. Given the distinct nature of the harm and this limitation on remedies available for Section 2 violations, do you think Congress should

consider altering the standard for preliminary injunctive relief for Section 2 cases?

4. What is your response to the argument that the current standard for preliminary injunctive relief already requires the court to determine if a party will suffer irreparable harm? How are voting rights plaintiffs uniquely disadvantaged by the current standard and why should Congress consider creating a new standard applicable to Section 2 litigation?

FOR SYLVIA BUTLER

1. Please explain how, with almost surgical precision, Georgia SB 202 targets the methods of voting increasingly being used by Black voters and voters of color with arbitrary and unnecessarily burdensome requirements that will disenfranchise voters and potentially expose non-profit civic engagement organizations, such as the PEOPLE'S AGENDA, to large fines and criminal penalties for providing assistance to voters who will now need to navigate the law's complicated procedures?

2. Please describe how during the 2021 legislative session, conservative Republican members of the Georgia General Assembly also waged war against selected counties' Boards of Elections in an effort to purge Black board members.

3. How has your own organization, which focuses on empowering minority voters, been burdened by SB 202?

4. How have polling site closures disproportionately impacted minority voters?

FOR JAMES TUCKER

1. Please discuss the unique role played by Federal observers in preventing voting discrimination, enforcing the VRA, and measuring progress to remedy violations of the VRA and the Fourteenth and Fifteenth Amendments.

2. Please discuss the continuing need for federal observers to monitor elections and why partisan poll watchers do more harm than good in protecting and safeguarding the precious right to vote.

3. One argument that opponents to the revitalization of Section 5 preclearance make is that preclearance is still available as a remedy under Section 3(c) of the Voting Rights Act in cases where a court finds a violation of the Fourteenth or Fifteenth Amendment. Did Congress ever intend for Section 3(c) to act as a substitute for Section 5 preclearance?

4. Currently under Section 3(c) a court may only subject a jurisdiction to preclearance as a remedy when a plaintiff proves a violation of the Fourteenth or Fifteenth Amendment. How frequently have courts invoked "bail in" preclearance as a remedy under Section 3(c)?

5. Courts have interpreted Section 3(c) to require the plaintiffs prove purposeful discrimination to invoke preclearance as a remedy. This is already a high evidentiary bar for plaintiffs to meet but you note in your testimony that courts have also been reluctant to reach the question of whether the plaintiffs have established intentional discrimination once the plaintiffs have already established discriminatory impact. What accounts for this reluctance?

○