THE IMPLICATIONS OF BRNOVICH v. DEMOCRATIC NATIONAL COMMITTEE AND POTENTIAL LEGISLATIVE RESPONSES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

FRIDAY, JULY 16, 2021

Serial No. 117–35

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FRIDAY, JULY 16, 2021

THE IMPLICATIONS OF BRNOVICH v. DEMOCRATIC NATIONAL COMMITTEE AND POTENTIAL LEGISLATIVE RESPONSES

Friday, July 16, 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 1:03 p.m., via Zoom, Hon. Steve Cohen [chairman of the subcommittee] presiding.

Present: Representatives Cohen, Nadler, Raskin, Ross, Jackson Lee, Johnson of Louisiana, Jordan, and Fischbach.

Staff Present: 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; Atarah McCoy, 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; and Kiley Bidelman, Minority Clerk.

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

Without objection, the Chair is authorized to declare a recess of the Subcommittee at any time.

I welcome everyone to today's hearing on the implications of *Brnovich* v. *Democratic National Committee* and potential legislative responses.

Like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. That would be *judiciarydocs@mail.house.gov*. We will distribute them to Members and staff as quickly as we can.

Finally, I would ask all Members and witnesses to mute their microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself at any time when you seek recognition.

I will now recognize myself for an opening statement.

Rights are only as strong and meaningful as the ability to enforce them. Among the most fundamental rights in our country is the right to vote, free from discrimination based on race or ethnicity. And at a time when American democracy itself is under severe threat from demagogue forces, amid a tidal wave of voter suppression efforts in many States since the 2020 election, it is more important that we in Congress help facilitate strong and expansive enforcement of voting rights, and no statute is more central to this effort than the Voting Rights Act of 1965.

Yet, 2 weeks ago, the Supreme Court's conservative majority reiterated its hostility to the VRA's simple purpose of eradicating race discrimination in voting by further undermining the Act's enforcement mechanisms in *Brnovich* v. *Democratic National Committee*. In reaching its decision, the Court compounded the damage it inflicted on the Voting Rights Act in 2013, when it effectively gutted the Act's most powerful enforcement mechanism, its preclearance requirement, section 5 in *Shelby County* v. *Holder*.

In Brnovich, the Court upheld two Arizona voting measures and some legal challenges brought pursuant to section 2 of the VRA, alleging that these measures denied or abridged minority citizens' voting rights on account of race or ethnicity. That is what the section 2 is about.

In 1982, in response to an earlier Supreme Court decision restricting the scope of section 2, Congress wrote the current version of section 2, deliberately choosing to use very broad and expansive language.

Section 2(a) provides that no voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or implied by any State or political subdivision in a manner that results in a denial or abridgement of any citizen's right to vote on account of race, color, or language minority status.

Section 2(b) provides that there is a section 2(a) violation when, based on the totality of the circumstances, it is shown that the political processes of the State or locality are not equally open to participation by minority citizens. That means that minority citizens, quote, have less opportunity than other Members of the electorate to participate in the political process and to elect representatives of their choice.

In 1986, the Supreme Court, in *Thornburg* v. *Gingles*, adopted a list of historical and social factors taken from Senate report of the 1982 amendments to section 2 that courts should consider when assessing whether, under the totality of the circumstances test, the voting Rule violates section 2. Taken together, this expansive rules test has now been in place for four decades.

More troubling than the outcome of the individual cases at issue with Brnovich was the reasoning underlying it and its potential impact to future cases alleging vote denial claims under section 2.

In a brazen opinion, the Court in Brnovich created out of thin air five guideposts that lower courts are to follow in assessing vote denial claims under section 2. These guideposts are found nowhere in the Voting Rights amendment—or Voting Rights Act, directly contradicts section 2's purpose, and potentially narrows its scope.

As Justice Kagan wrote in dissent, the Court was operating in a law-free zone, or this was an activist court not relying on precedent.

Depending on how lower courts interpret and apply these guideposts, any one of them can become a giant loophole for States and localities to discriminate against minority citizens. Taken together, they can present a formidable obstacle for future section 2 plaintiffs alleging vote denial claims.

One particularly offensive example is the, quote, "size of disparity," end quote, guidepost, under which the Court concluded small disparities in the burden imposed by a challenge to voting Rule are less likely than large ones to indicate that an election system is unlawfully discriminatory. Kind of like a light violation of the law.

Put another way, this can be taken to mean that imposing a little bit of racially disparate burdens in voting is okay. That is really amazing.

Of course, section 2 contemplates no such de minimis exception for racially discriminatory burdens in voting. section 2 allows for no voting qualification or other practice or procedure that results in denial or abridgement of the right to vote. In essence, strict scrutiny.

Moreover, how does one assess that a racially disparate burden is small enough not to matter? Just a little bit of discrimination, just a little bit of racial animosity and political politics over race and justice and equality.

The Court provides no answer, leaving the door wide open for voting rights defendants to make the argument, and for lower courts to accept, that many kinds of racially disparate burdens are too small to violate section 2.

In a similar vein, the Court created a mere inconvenience exception to section 2, concluding that an assessment of a section 2 vote denial claim had to account for the usual burdens associated with voting and that such ordinary burdens cannot implicate section 2. Of course, section 2 recognizes no such exception. Moreover, this guidepost put the cart before the horse.

The whole point of a section 2 inquiry, when focused on the interaction of a given jurisdiction's historical and social condition with facially neutral voting rules, is to determine whether such a voting rule, which might impose a mere inconvenience or usual burden on White citizens, might have a discriminatory effect on minority citizens' voting opportunities.

Without section inquiry, no court can objectively say whether a voting Rule imposes a burden that is merely inconvenient. The Court's decision in Brnovich is deeply troubling because of its implications for section 2, what we have left of the Voting Rights Act after the emasculation in 2013. It heightens the risk that future section 2 plaintiffs in vote denial cases will have a harder time prevailing.

It did, however, leave Congress with the option to respond with a legislative fix. We welcome suggestions from our witnesses how to best respond to this problematic decision, other than redistricting the Senate. I thank our witnesses for participating in today's hearing and look forward to their testimony.

Now, I would like to recognize the Ranking Member, who today will be the gentlelady from Minnesota, Ms. Fischbach, for her opening statement.

Ms. FISCHBACH. Thank you very much, Mr. Chair.

Today's Subcommittee hearing is about the decision, the Supreme Court's decision in Brnovich, and this is now the fourth hearing this Subcommittee has held on the Voting Rights Act since April. Today, we will hear the same talking points, which are being repeated daily in the mainstream media.

I don't know anyone who wants to prevent minorities or anyone from voting, but I have many constituents who are calling on me to protect the integrity of our elections. Let me be clear. Republicans want every legally cast vote to be counted and want every election to be free from fraud and error.

There are many commonsense ways of doing this, which I think many of us could agree on behind closed doors and away from the cameras, including the provisions from this case.

With this decision, the Supreme Court refused to politicize the Voting Rights Act and to transfer the authority to regulate elections from the States to the courts.

As we know, the Election Clause of the United States Constitution gives State legislatures the authority to prescribe the times, places, and manners of holding elections. That is simply what Arizona did with its out-of-precinct policy and ballot collection restrictions, both commonsense measures that uphold the integrity of their State's elections.

The DNC disagreed and tried to politicize the VRA by challenging these measures under section 2. On July 1, 2021, the Supreme Court issued its decision, which presented the Court with its first opportunity to weigh in on the VRA section 2 claim that challenged voting laws regulating the time, place, and manner of casting a ballot.

The Court held that Arizona's regulations governing out-of-precinct voting and ballot collections did not violate section 2. Although Justice Alito did not announce a test to govern all similar VRA section 2 challenges, the Court found that equal openness of election procedures remains the touchstone in establishing whether there is a violation of section 2, and courts must examine the totality of the circumstances.

The Court reiterated that States have a compelling interest in preserving the integrity of its election process. The Court received a letter from the Biden Justice Department, agreeing the case presented no VRA section 2 violations.

I look forward to discussing the implications that this case will have on future section 2 litigation.

Like the Shelby decision, and contrary to misinformation, this decision does not gut the VRA. Even after this decision, section 2 remains an effective tool to stop racially discriminative voting laws. However, the decision denies its critics the opportunity to use the VRA as a partisan tool to stop policy decisions that they simply disagree with.

Following the 2020 election, several States have passed commonsense election integrity reform measures, which I again think we could agree on many of them behind closed doors. Unfortunately,

we have already seen a false narrative pushed surrounding election integrity efforts in an attempt to build a false record of voter suppression to build momentum for amending the VRA.

It is disheartening that politician groups and legislators are being maligned as trying to harm the very elections they are trying to secure. For example, just look at the Biden Administration's section 2 lawsuit against Georgia. Georgia's commonsense election integrity law is being attacked as discriminatory.

Instead of attacking the motives of good Americans on both sides, we should be working together to ensure that both, that minorities are protected from discrimination and that our elections are secure from fraud.

I look forward to discussing this landmark voting rights decision today, and I thank all the witnesses for being with us today.

Thank you, Mr. Chair. I yield back.

Mr. COHEN. Thank you, Ms. Fischbach. I appreciate your opening statement and for filling in for Mr. Johnson today.

It is now my pleasure to recognize the Full Committee Chair, the gentleman from the great State of New York, the Empire State, Mr. Nadler, for his opening statement.

Chair NADLER. Thank you, Mr. Chair.

Mr. Chair, I appreciate your holding today's hearing to consider what action Congress should take in response to the Supreme Court's recent decision in *Brnovich* v. *Democratic National Committee*, which significantly narrowed the scope of section 2 of the Voting Rights Act of 1965.

Section 2 prohibits voting practices or procedures that discriminate on the basis of race, color, or Membership in certain language minority groups. While the extent of the fallout remains to be seen, the Brnovich decision appears to have significantly undermined section 2's voting rights protections.

Specifically, it will likely make it harder for plaintiffs to prove vote denial claims under the results test, which Congress adopted in 1982 as a guide for courts to determine whether the plaintiff has established that a challenged voting practice violates section 2's prohibition on discrimination when the challenged practice, while facially neutral, has a discriminatory effect.

One silver lining to this decision, however, is that it leaves Congress with the ability to undo any potential damage the Court has inflicted on section 2. That is because the majority's opinion in Brnovich is based solely on its tortured interpretation of section 2, which is unsupported by the statute's text and is contrary to its purpose, and which Congress can correct through legislation.

Congress included section 2 in the Voting Rights Act with the important purpose of protecting minority citizens from racial discrimination in voting in those areas of the country that were not subject to preclearance under section 5.

In 1980, in the case of *City of Mobile* v. *Bolden*, the Supreme Court interpreted section 2 to prohibit only those voting measures that were motivated by discriminatory purpose, narrowing what had been the then understood scope of section 2.

In response, in 1982, Congress amended section 2's language expressly to broaden its scope. Congress was concerned that State and local policymakers were implementing facially neutral voting

practices—like those affecting the time, place, or manner of elections—that could interact with underlying social conditions created by historical discrimination to result in the denial of minorities' right to vote.

Congress was intent on stopping this more subtle form of discrimination. Yet, in what can only be described as a usurpation of Congress' constitutionally assigned legislative role, the Court in Brnovich announced several new guideposts, seemingly from whole cloth, that lower courts are to consider in evaluating vote denial claims under section 2's results test.

When evaluating claims under these new factors, lower courts could narrow plaintiffs' ability to challenge discriminatory, yet facially neutral, voting practices, the very practices that Congress broadened the scope of section 2 to confront.

None of these new guideposts have a basis in the text or legislative history of section 2. Instead, they appear to reflect what the Brnovich majority thinks the scope of section 2 ought to be, not what Congress actually intended the scope to be when it amended the statute in 1982.

As I have already noted, Congress passed the current version of section 2 in response to an earlier Supreme Court decision that narrowed section 2's scope. Today, 40 years later, Congress again finds itself in the position of having to consider how to clarify the scope of section 2 to ensure that broad voting rights protections remain in place.

The circumstances Congress faces today, however, appear far more dire. The Brnovich decision has come in the midst of a new wave of racially discriminatory voting rights laws across the country, which itself is a result of the Court's disastrous 2013 decision in *Shelby County* v. *Holder*, which gutted the VRA's section 5 preclearance regime.

As many of you know, dozens of Texas lawmakers are in Washington now in a brave attempt to prevent the Texas legislature from jamming through a harsh new voter suppression law. Similar efforts to restrict voting are under way in State legislatures throughout the country. Congress must ensure that Federal protections are in place to block such discriminatory laws.

In a dissent to the Brnovich opinion, Justice Kagan properly raised the alarm. She wrote, "The Voting Rights Act of 1965 is an extraordinary law. Rarely has a statute required so much sacrifice to ensure its passage. Never has a statute done more to advance the Nation's highest ideals. Few laws are more vital in the current moment. Yet, in the last decade, this Court has treated no statute worse."

I could not agree more.

Congress must Act where the Court has failed voters across the country.

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

With that, I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Chair.

It is my understanding that the Ranking Member of the Full Committee, the gentleman from Ohio, Mr. Jordan, does not have

an opening statement. If I am wrong, he is welcome to present at this point.

Mr. JORDAN. No, thank you, Mr. Chair. I associate myself with the remarks of Ms. Fischbach and look forward to the hearing. Thank you for this and I look forward to hearing from our witnesses.

Mr. COHEN. Thank you, Mr. Jordan.

We welcome our witnesses and thank them for participating in today's hearing. I will now introduce each of the witnesses, and after each introduction, will recognize that witness for his or her oral testimony.

I do this a little differently. I give the introduction before they testify so you can kind of have it in your mind, rather than doing them all at once.

Each of your written statements will be entered into the record in its entirety. Accordingly, I ask you to summarize your testimony in 5 minutes. To help you stay within that frame, there is a timer in the Zoom view that should be visible on your screen.

Before proceeding with the testimony, I remind all our witnesses you have a legal obligation to provide truthful testimony in answers to the Subcommittee. Any false statements you make today may subject you to prosecution under section 1001 of title 18 of the U.S. Code.

Our first witness is Sean Morales-Doyle. Mr. Morales-Doyle is acting director of the democracy program at the Brennan Center for Justice at the New York University School of Law, where he focuses on voting rights and elections. He advocates for pro bono reforms, like automatic voter registration and voting rights restoration, while fighting back against voter suppression efforts in the courts.

Prior to joining the Brennan Center, Mr. Morales-Doyle practiced law in Chicago, where he litigated all manners of civil rights and constitutional matters, and I am sure he had broad shoulders.

Mr. Morales-Doyle earned both his undergraduate and law degrees from Northwestern University. He served as a law clerk to the Honorable William J. Hibbler of the U.S. District Court for the Northern District of Illinois.

Mr. Morales-Doyle, you are recognized for 5 minutes.

STATEMENT OF SEAN MORALES-DOYLE

Mr. MORALES-DOYLE. Thank you, Chair Cohen, Ranking Member Johnson, and Members of the Committee. Thank you for the opportunity to testify before you today about the Supreme Court's recent decision and how Congress should respond.

We are witnessing a wave of restrictive voting laws more significant than we have seen since the voting rights was enshrined into law. While the Supreme Court's 2013 Shelby County decision helped open the floodgates to these efforts to roll back voting rights, the Brnovich decision weakened one of the tools we might otherwise use to stem the tide.

So, Congress must once again meet this moment, as it has in the past, in 1965 and in 1982, to protect voters from discrimination. To provide truly comprehensive protection, Congress must restore the

Voting Rights Act to its former glory and pass the For the People Act to set a new standard for elections free from discrimination.

I will start with a brief explanation of the harm the Brnovich decision does and then turn to potential remedies.

The first mistake of the Brnovich majority is that it departs from decades of precedent and shifts the focus of its analysis away from what Congress intended, which was an evaluation of how voting rules interact with the effects of race discrimination. That is the purpose of the totality of the circumstances test in section 2.

The Court shifts its focus to a set of five so-called guideposts for courts to consider moving forward. In my written testimony, I explain in detail how each of these guideposts will lead courts astray from the cause of identifying and rooting out discrimination in voting.

The short version is that they direct courts to view with skepticism characteristics that are in reality the hallmarks of modern-day voter suppression. The reality is that State legislatures are not hacking but slicing away at voting rights from every angle. They shave away access to mail voting. They cut back on in-person voting. They trim voters from the rolls through faulty purges.

While any one slice might appear minor, the end result is death by a thousand cuts. This is how States, in the words of the Fourth Circuit Court of Appeals, target voters of color with almost surgical precision.

The majority in Brnovich seems willing to accept discriminatory burdens, so long as they do not deny the right to vote to too many. The majority doubts a restriction on one method of voting discriminates if there are other methods available.

If a State's voting laws are better than the status quo in 1982, the majority suggests it will be hard-pressed to find them discriminatory.

What is worse, the majority is far too quick to accept the excuse States give for these discriminatory laws in each and every instance—fighting fraud. The Court accepts at face value the lie that currently threatens to undermine our democracy.

My colleagues and I make it our mission to defend the right to vote. This decision, following on Shelby County and others, leaves us facing unprecedented attacks with a blunted tool for fighting back.

So, what is the solution? To remedy the harm done by Shelby County, Congress should restore preclearance by passing the John Lewis Voting Rights Advancement Act.

Now to truly restore our power to push back on discriminatory laws, Congress must strengthen section 2.

First, Congress must ensure that the Court's wrong-headed guideposts won't prevent the identification of truly discriminatory practices. Congress could spell out the considerations that are relevant to determining whether a Rule produces discriminatory results, making explicit the central role that historical and current discrimination must play in the Court's analysis of section 2 claims.

The Senate factors helped guide the courts for decades, but Congress could also elaborate upon them.

Second, Congress must make clear that the true threat to our democracy is race discrimination, not widespread voter fraud. To right-size deference to States, Congress could require courts to consider the tenuousness of the relationship between the policy at issue and the stated goal, or it could require States to prove that the Rule in question actually serves the goal.

Finally, it is critical that Congress make explicit that there is no tolerable level of race discrimination. With these goals in mind, Congress can remedy the harm done to the Voting Rights Act.

Restoring the Voting Rights Act is not enough. Congress must also pass the For the People Act and create a new national standard for voting. This will take some common tactics for restricting voting off the table. We applaud the House for doing its part on this already.

Thank you again for the opportunity to contribute to this conversation.

[The statement of Mr. Morales-Doyle follows:]

BRENNAN CENTER FOR JUSTICE

Testimony of

Sean Morales-Doyle
Acting Director, Voting Rights and Elections Program
Brennan Center for Justice at NYU School of Law[1]

Hearing on the Implications of *Brnovich v. Democratic National Committee* and Potential Legislative Responses

Before the House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
In the United States House of Representatives

July 16, 2021

Thank you for the opportunity to testify about the Supreme Court's recent decision in *Brnovich v. Democratic National Committee* and how Congress should respond. The Brennan Center for Justice at NYU School of Law is disappointed by the damage the Court has done yet again to one of the greatest pieces of legislation this body ever passed, the Voting Rights Act of 1965. We share this committee's concern about the impact the Court's decision will have and applaud your prompt consideration of the proper congressional response. It will take the efforts of many—organizers, advocates, and voters themselves—to ensure that voting rights are protected in the wake of the decision. But only Congress can provide voters the legal protections they need, restore the Voting Rights Act to its former glory, and pass the For the People Act to set a new standard for open elections, free from discrimination, across the country.

I. Congress must once again meet the moment and protect voting rights.

In 1965, our democracy was in crisis. In fact, for its entire history our nation had failed to truly live up to the ideals of democracy and political equality so powerfully written into the Declaration of Independence and Preamble to our Constitution. And for almost a century, it had failed to live up to the promise of the Fifteenth Amendment, that the right to vote would not be denied or abridged on account of race. But in 1965, thanks to the heroism and sacrifice of so many, including your former colleague, Congressman John Lewis, the world finally saw these failures as a crisis. And Congress met the moment, passing a transformative law that finally set the country on a path towards an inclusive democracy that provided people of color and Native Americans the opportunity to participate equal to that of their fellow citizens.[2]

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[1] The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I am the Acting Director of the Voting Rights and Elections Program. My testimony does not purport to convey the views, if any, of the New York University School of Law.

[2] Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

In 1982, after the Supreme Court undermined the effectiveness of that law with a decision that made it harder to challenge discriminatory voting rules and electoral and districting schemes by requiring proof of discriminatory intent,[3] Congress met the moment once again. With the 1982 amendments to the Voting Rights Act, Congress made clear that it intended the law to reach all race discrimination, not just the rules that were plainly motivated by bigotry.[4] The Supreme Court recognized this call to eliminate racism from our elections, applying the "totality of the circumstances" test Congress provided for evaluating whether state action produced discriminatory results in *Thornburg v. Gingles* in 1986 and for decades thereafter.[5]

Now, in 2021, our democracy is once again in crisis. Voters, who turned out in record numbers last fall, are facing a backlash wave of restrictive voting laws more significant than we have seen since before the Voting Rights Act was enacted.[6] As of June 21, 17 states had enacted 28 laws restricting voting access.[7] And this is just the latest wave in an almost decade-long trend of restrictive action following the Supreme Court's 2013 *Shelby County v. Holder* decision.[8] In fact, the Court has issued a series of decisions that have dealt blow after blow to voting rights, and *Brnovich* is just the latest.[9] While the *Shelby County* decision helped open the floodgates of efforts to roll back voting rights, the *Brnovich* decision weakened one of the tools we might otherwise use to stem the tide. As it has before, Congress must meet this moment.

II. The *Brnovich* opinion undermines Congress's goals of addressing race discrimination in voting and does harm to Section 2's effectiveness.

In its opinion in *Brnovich*, the Court's majority ignores the clear intention of Congress in crafting Section 2: to provide a powerful tool to root out race discrimination in voting and representation. The majority also departs from decades of precedent enforcing Section 2 according to that intention. The opinion does not provide a new rule to guide the application of Section 2 by lower courts, but instead creates a new set of so-called "guideposts" that are poorly designed to identify and eradicate discriminatory policies and practices.[10]

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[3] See *Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[4] "This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. 97-417, at 2 (1982).

[5] *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986).

[6] *Voting Laws Roundup: May 2021* (hereinafter "Voting Laws Roundup"), Brennan Center for Justice, accessed July 13, 2021, *available at* https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.

[7] *Id.*

[8] *The Effects of Shelby County v. Holder*, Brennan Center for Justice, (Aug. 6, 2018), *available at* https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.

[9] *See, e. g.*, *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

[10] *Brnovich v. Democratic National Committee*, 594 U.S. ___, slip. op. at 13 (2021).

A. The Court's majority departs from longstanding precedent that was guided by congressional intent and aimed at identifying discriminatory results.

The first mistake of the *Brnovich* majority was to shift the focus of its analysis away from what Congress intended: an evaluation of how voting rules interact with the persistent effects of race discrimination on our society.

The 1982 Amendments to Section 2 clarified that the law was meant to reach voting rules and electoral and districting schemes that produced discriminatory results, even if there was not definitive proof that they were motivated by a discriminatory purpose.[11] More specifically, Congress wanted to ensure that the law accounted for the way that facially neutral policies interacted with the real-life effects of race discrimination. Congress designed the "totality of the circumstances" test to require courts to consider "the impact of the challenged practice and the social and political context in which it occurs" by conducting "a searching practical evaluation of the 'past and present reality.'"[12]

Four years later, when the Supreme Court first interpreted the amended Section 2 in *Thornburg v. Gingles*, the Court embraced guidance from the Senate Judiciary Committee report on the 1982 amendments.[13] That report gave some examples of the circumstances that might be relevant when evaluating allegedly discriminatory results—examples that have become known as the "Senate Factors."[14] The Senate Factors guided courts in conducting the "intensely local appraisal" of how race functioned in the jurisdiction in order to determine whether a disparate impact could in fact be deemed a "discriminatory result," or if it was merely a statistical anomaly.

After *Gingles*, federal courts consistently used this non-exclusive list of relevant factors to assess both "vote dilution" and "vote denial" claims[15] under Section 2.[16] In "vote denial" cases, courts applied the Senate Factors to assess whether a disparate burden on a protected class of voters imposed by a challenged policy or practice is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."[17]

In *Brnovich*, the majority departs substantially from this precedent—and from the congressional intent that spawned it. The majority acknowledges that certain of the Senate

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[11] S. Rep. 97-417, at 2 (1982).

[12] *Id.* at 30, 67.

[13] *Gingles*, 478 U.S. at 44.

[14] S. Rep. No. 97-417, at 28, 29.

[15] The *Gingles* decision arose in the context of a claim of "vote dilution," i.e., a claim that a policy diluted the power of minority votes. By contrast, a claim of "vote denial," like the claim in *Brnovich*, alleges that a policy placed a burden on the ability of minority voters to vote.

[16] *See, e.g., Veasey v. Abbott,* 830 F.3d 216 (5th Cir. 2016) (en banc); *Mich. APRI v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

[17] *See, e.g., Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

Factors may be relevant to applying the discriminatory results test, and expressly states that it is not creating a new test for evaluating claims,[18] but then ignores the Senate Factors entirely in its own analysis. The opinion expressly downplays the importance of taking the persistent "differences in employment, wealth, and education" created by centuries of discrimination into account,[19] focused instead on a set of five new "guideposts."[20]

Contrary to the central mission of the "totality of the circumstances" test, these guideposts are not focused on the past and present race discrimination in the jurisdiction or how the challenged voting rule interacts with it to produce racially disparate burdens on voting.

B. The Court's new "guideposts" are poorly designed and will make it difficult to identify and root out race discrimination in voting.

Due in large part to their departure from congressional intent, the Court's guideposts are simply poor tools for evaluating whether voting policies and practices produce discriminatory results.

The first guidepost is "the size of the burden imposed by a challenged voting rule."[21] The majority says that Section 2's prohibition of the "denial or abridgment" of the right to vote does not reach what are merely the "usual burdens of voting."[22] But in applying this guidepost, the majority uses it to bat away what are actually severe burdens for some voters as "mere inconveniences." While dropping a ballot into the mail may impose nothing more than the "usual burdens of voting" on many voters, there was ample evidence in the record in this case that this was not true for many others, including, in particular, Native American voters. Only 18% of Native American voters in Arizona's rural counties receive home mail delivery, many have to travel long distances to get to a mailbox or a polling place, and many do not have cars to help them make those trips.[23] As Justice Kagan notes, "what is an inconsequential burden for others is for these citizens a severe hardship."[24]

The second guidepost is "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982."[25] The majority uses 1982 as the benchmark for evaluating the burden imposed by a voting rule because that was the year Congress last amended Section 2. Of course, Congress was not satisfied with voting practices in 1982—that is why it amended Section 2 to make it a more effective tool for challenging those practices. Consider what it would mean to cement the status quo of 1982 into place: in the presidential election that preceded the 1982 amendments to Section 2, there was a 12.3-point gap between the

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[18] *Brnovich*, slip. op. at 20.

[19] *Id.* at 25.

[20] *Id.* at 13.

[21] *Id.* at 16.

[22] *Id.*

[23] *Id.* at 36 (Kagan, J., dissenting).

[24] *Id.* at 38.

[25] *Id.* at 17.

turnout rates of white, non-Hispanic citizens and Black citizens.[26] By 2016, this gap had shrunk to 5.9 points—and in 2012, Black voters actually turned out at a higher rate than their white counterparts.[27] Unfortunately, racial gaps in registration and voting persist today, especially in midterm years, but we have taken great strides in the last forty years.

Moreover, looking to the practices in place in 1982 is simply not a helpful standard for rooting out discrimination today. Thankfully, voting practices have come a long way since 1982, when early voting was essentially non-existent and election officials could scarcely imagine electronic pollbooks and online voter registration. But new and improved systems can still discriminate against voters of color, and asking whether a system existed in 1982 does not answer the question of whether it provides voters of color an equal opportunity to vote today.

The third guidepost is the "size of any disparities in a rule's impact on members of different racial or ethnic groups."[28] The majority says that "[s]mall disparities are less likely than large ones to indicate that a system is not equally open."[29] But the Court's application of this principle, if taken to its logical extreme, would allow a truly discriminatory policy to stand so long as it did not disenfranchise too many voters. Additionally, while the Court provides no bright line for what sort of disparity is "too small" to raise a concern, it suggests a willingness to turn a blind eye to policies that disenfranchise thousands of voters. Because the out-of-precinct voting policy at issue in Arizona results in the disenfranchisement of less than one percent of Arizonans, the majority dismisses the fact that thousands of voters of color and Native American voters in Arizona had their ballots thrown out at a rate twice that of white voters.[30]

The fourth guidepost requires courts to "consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision."[31] The majority's application of this guidepost seems to allow a jurisdiction to impose restrictions on one method of voting so long as there is another available. This logic relies on an unrealistic view of how burdens impact voters. A voter whose ballot is tossed out because she showed up at the wrong polling place on Election Day does not suffer less because she could have voted early. And restrictions on a method of voting that is particularly accessible for certain voters because of the realities of their lives—like ballot collection is for rural Native American voters in Arizona—are not canceled out by the availability of other, less accessible methods.

The fifth and final guidepost is "the strength of the state interests served by a challenged voting rule."[32] As phrased, this guidepost is not exactly new. In fact, it is built into one of the Senate Factors, which requires an assessment of whether the connection between the state

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[26] *See* U.S. Census Bureau, *Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964 to 2018*, *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html.

[27] *See id.*

[28] *Brnovich*, slip. op. at 18.

[29] *Id.*

[30] *Id.* at 10.

[31] *Id.* at 18.

[32] *Id.* at 19.

interest and the rule in question is "tenuous."[33] The Court's application of this guidepost, however, suggests that the mere invocation of the specter of voter fraud is enough to justify a discriminatory policy. This is not the first time the Court has accepted a state's claim that its restrictive voting laws were aimed at preventing voter fraud. But the Court's embrace of this pretextual justification for race discrimination is particularly troubling at this moment. For years now, the idea that our elections are haunted by rampant voter fraud has been so thoroughly debunked and exposed as a lie that it is scarcely worth rehashing here.[34] But the true threat that this lie poses to our democracy has only become more clear in the months that led up to the *Brnovich* decision, when the lie became a rallying cry for violent mobs attacking the Capitol in an attempt at overturning the valid results of the 2020 presidential election.

C. The Court's guideposts make it harder to challenge the modern-day approach to vote suppression.

The majority's guideposts are particularly harmful because they downplay the significance of the hallmarks of modern voter suppression. Thanks to the Voting Rights Act, these days we rarely see blatantly race-based disenfranchisement of broad swaths of the electorate. Instead, as Congress noted in 2006, "discrimination today is more subtle."[35] The *Brnovich* majority makes it harder to challenge these more subtle practices.

As Justice Kagan points out, in modern times, one of the "subtle" ways to accomplish discrimination "is to impose 'inconveniences,' especially a collection of them, differentially affecting members of one race."[36] In state after state, in the name of so-called "election integrity," legislatures have sliced away at each of the methods of voting available, sometimes through a series of cumulative changes to policy and other times through omnibus bills that make a number of changes across the system. They shave away access to mail voting by shortening the timeframe to request a ballot, limiting the methods for returning one, or imposing stricter signature requirements. They cut back on in-person voting by limiting early voting hours or requiring strict photo ID to vote. They trim voters from the rolls through laws that make faulty purges more likely or by limiting same-day registration.[37] While any one change might appear minor at first blush, the end result is death by a thousand cuts.

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[33] S. Rep. No. 97-417, at 29.

[34] *See e.g.*, *Brnovich v. DNC*, Amicus Brief of Empirical Elections Scholars In Support of Respondents, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1257/166851/20210120181228016_19-1257%20Amici%20Curiae%20Brief.pdf; Wendy R. Weiser, *The False Narrative of Vote-by-Mail Fraud*, Brennan Center for Justice, (Apr. 10, 2020), *available at* https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud; *Resources on Voter Fraud Claims*, Brennan Center for Justice, (Jun. 26, 2017), *available at* https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims; Douglas Keith and Myrna Pérez, *Noncitizen Voting: The Missing Millions*, Brennan Center for Justice, (May 5, 2017), *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_2017_NoncitizenVoting_Final.pdf; Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice, (Nov. 9, 2007), *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.

[35] 109 Cong. Rec. H5159 (daily ed. Jul. 13, 2006) (statement of Rep. Jackson Lee).

[36] *Brnovich*, slip. op. at 23 (Kagan, J., dissenting).

[37] *See generally* Voting Laws Roundup.

A 2013 law passed by North Carolina in the wake of the *Shelby County* decision provides a perfect example. It imposed a strict photo identification requirement to vote, cut back on early voting, eliminated same-day registration and preregistration for 16- and 17-year-olds, and prohibited out-of-precinct voting. The Fourth Circuit Court of Appeals struck the law down as intentionally discriminatory, finding that it "target[ed] African Americans with almost surgical precision."[38] But using the majority's guideposts for assessing whether the law produced discriminatory results—typically a less difficult standard to prove than discriminatory intent—a skeptical court might view some of these restrictions, standing alone, as imposing a "mere inconvenience." After all, many of them were restrictions of voting policies that did not even in exist in 1982. And because each individual policy might only impact particular segments of the electorate, the burden they impose on voters of color may be too easily dismissed as a "small disparity." And of course North Carolina claimed that it passed the law to prevent voter fraud, a claim the *Brnovich* majority is all too willing to accept without scrutiny. The fact that this North Carolina law that was unquestionably discriminatory bears many of the characteristics that prompt skepticism when following the majority's guideposts demonstrates how ineffective those guideposts are at identifying discrimination.

These small, surgically precise cuts may not disenfranchise as many voters as literacy tests once did, but even those that defend them acknowledged the significance of their impact. When Justice Barrett asked the lawyer representing the Arizona Republican Party what its interest was in keeping the state's out-of-precinct rule on the books, he responded candidly that striking it down would put his party "at a competitive disadvantage."[39] In other words, while the Supreme Court might not have thought the policy impacted enough voters to matter, the parties to the election thought otherwise.

III. Congress must strengthen the Voting Rights Act in multiple ways and put new protections in place through the For the People Act.

For the second time in less than a decade, the Supreme Court has done significant damage to the Voting Rights Act. To remedy the harm done by the *Shelby County* decision, we urge Congress to restore preclearance in the John Lewis Voting Rights Advancement Act. In light of the *Brnovich* decision, it is now also critical that Congress strengthen Section 2. But restoring the Voting Rights Act, while critical, is not enough. Congress must also pass the For the People Act in order to create a new national standard for voting and take some common tactics for restricting voting access off the table.

A. Pass the John Lewis Voting Rights Advancement Act to restore preclearance.

For decades, Section 5 of the Voting Rights Act, which requires jurisdictions with a history of race discrimination to submit changes to voting rules to the federal government for preclearance to ensure they are not discriminatory, was perhaps the most effective legislative remedy for civil rights violations in the history of our nation. It prevented discriminatory policies from ever going into effect. The Supreme Court rendered Section 5 inoperable through its decision in *Shelby County*. In order to provide protection against race discrimination in voting,

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[38] *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

[39] Transcript of Oral Argument at 37-38, *Brnovich*, 594 U.S. ___ (No. 19-1257).

we urge Congress first to restore preclearance by passing the John Lewis Voting Rights Advancement Act. I refer this committee to the testimony of my colleague Wendy Weiser and others for a more detailed explanation of the urgency of passing that legislation.[40] For these purposes, suffice it to say that as voters face the most aggressive attack on voting rights in recent history, it is crucial that they not have to rely on filing and litigating lawsuits to stop discriminatory rules and practices after harm has already occurred.

B. Strengthen Section 2 to provide full protection against race discrimination in voting.

We strongly recommend that Congress also strengthen Section 2, and to do so in a detailed way so as to prevent courts from undermining congressional intent to give full protections against race discrimination in voting. Below I outline some key goals for such legislation and possible approaches to accomplish those goals.

1. Establish appropriate considerations for determining whether a voting rule produces discriminatory results.

One goal for a legislative fix for the harm done by the *Brnovich* decision is to ensure that the wrongheaded considerations put forth in the Court's opinion will not prevent the identification of truly discriminatory voting practices. In the *Brnovich* decision, the Court undermines the effectiveness of the "totality of the circumstances" test by creating a new set of guideposts that betray the spirit of Section 2. One way to limit the damage done by the Court and to prevent courts from doing damage to future legislation is to be more explicit about the considerations that are relevant to determining whether a voting rule produces discriminatory results.

One approach toward this goal can be to provide a list of relevant factors in the statute akin to the Senate Factors, which courts looked to for so many years as part of the totality of circumstances test. Congress could draw on the Senate Factors themselves, but it need not be limited by them in crafting guidance for an effective analysis of the totality of the circumstances.

But whatever guidance Congress provides, it should make explicit the central role that historical and current discrimination must play in the courts' analysis of Section 2 claims. It should reject the idea that we must simply accept pervasive structural inequality and institutional racism and its attendant impact on voting. Indeed, one purpose of a "results test" is to prevent bad actors from crafting facially neutral rules that take advantage of background racial and social conditions to accomplish discriminatory objectives while disguising any discriminatory intent. That is often how classic discriminatory devices like poll taxes and literacy tests functioned to accomplish their shameful objective. The question of how policies interact with those background conditions should be at the heart of the analysis.

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[40] *Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf.

2. Limit the undue deference courts give states in justifying policies that produce disparate burdens.

Congress understood in 1982 that it would often be all too easy for states to offer up "non-racial rationalizations" for discriminatory policies.[41] That is one of the reasons it created a results test. Justice Kagan is correct that "[t]hroughout American history, election officials have asserted anti-fraud interests in using voter suppression laws."[42] The fact is that almost every piece of discriminatory voting legislation ever has been justified as an attempt to prevent fraud. Yet we know that our laws are already effective at preventing fraud and that recent suggestions that widespread voter fraud exists are a lie. Just this past year, the federal Cybersecurity and Infrastructure Security Agency (CISA) issued a statement declaring that the 2020 election "was the most secure in American history."[43] Still, we are witnessing politicians attempt to justify the most aggressive legislative efforts to restrict the right to vote in generations by claiming that they seek to root out fraud.

If the Voting Rights Act is to be fully effective, Congress must make clear that the urgent, current threats to our democracy are race discrimination and efforts to abridge the right to vote, not widespread voter fraud. Thus, when a policy imposes a disparate burden on the right to vote of minority voters, courts should be skeptical of—not deferential to—state claims that the policy is necessary to protect election integrity.

There are a number of ways Congress might communicate the proper way of weighing disparate burdens and state interests. For years, federal courts evaluating Section 2 claims were quite effective at taking legitimate state interests, including the interest of preventing fraud, into account, while still evaluating whether the law or rule in question actually served those interests. So, one possible solution is to write some version of the ninth Senate Factor into the statute, directing courts to consider the tenuousness of the relationship between the policy at issue and the stated interest. Congress can also make explicit that a policy that imposes a disparate burden violates Section 2 if there are less discriminatory alternatives for accomplishing the claimed objective. Another option would be to require the jurisdiction defending a policy that produces a disparate burden to prove that the policy in question actually serves its stated interest. Congress might also consider using some combination of these options.

3. Make clear that there is no tolerable level of race discrimination in voting.

Running throughout the *Brnovich* decision is an assumption that there are some discriminatory burdens on voting rights that Congress did not intend to reach—either because they impact a small number of voters, they fall short of completely denying the right to vote, or they burden only one method of voting but not another. The text of Section 2 already makes clear

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[41] S. Rep. No. 97-419, at 37.

[42] *Brnovich*, slip. op. at 27 (Kagan, J., dissenting).

[43] "Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees," Cybersecurity & Infrastructure Security Agency (Nov. 12, 2020), *available at* https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election.

that "the denial *or abridgment* of the right of *any citizen*" to vote on account of race is illegal.[44] But the *Brnovich* decision suggests that Congress must provide even more clarity. New amendments to Section 2 must make clear that any amount of race discrimination in voting is too much.

A test can take account of smaller racial disparities while still considering the totality of the circumstances—it need not be a "pure" disparate impact test. The statute should make clear that truly discriminatory results cannot be ignored because relatively few people were denied the right to vote on account of race. It should also clarify that a discriminatory voting policy cannot be excused simply because a jurisdiction can point to other policies or methods of voting it provides that are not discriminatory.

C. Pass the For the People Act to set a new national standard for elections.

Congress must do more than simply restore and strengthen the Voting Rights Act, however. To fully address the problem of voter suppression, it is also critical to enact the For the People Act, which we applaud the House for passing in March.[45] Division A of that bill, derived from the federal Voter Empowerment Act written and long championed by Representative Lewis, would set basic federal standards for voting access nationwide, filling critical gaps that the Voting Rights Act cannot. By requiring states to, among other things, modernize voter registration, allow two weeks of early voting and vote by mail, restore voting rights to formerly incarcerated citizens, and refrain from partisan gerrymandering, the For the People Act would take some of the most common tactics for restricting voting rights off the table. These tactics have often been used to target the same communities protected by the Voting Rights Act, but the For the People Act's broad protections will also benefit many other groups, like student voters, who are not the focus of the Voting Rights Act's safeguards. Setting a baseline standard for federal voting access will also help guard against uneven enforcement of anti-discrimination measures. Moreover, a national standard will make clear to the Court that it should not use 1982's voting standards as a benchmark against which to evaluate today's laws.

IV. Conclusion

With these goals in mind, we urge Congress to meet the moment once again, restore the Voting Rights Act to its former glory, shore it up against future judicial erosion, and supplement it with national voting standards in the For the People Act. Thank you again for the opportunity to contribute to this conversation.

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[44] 52 U.S.C. § 10301 (emphasis added).

[45] *See* Leadership Conference on Civil and Human Rights, Letter of Support – The For the People Act and the John Lewis Voting Rights Advancement Act (June 8, 2021), *available at* https://civilrights.org/resource/letter-of-support-the-for-the-people-act-and-the-john-lewis-voting-rights-advancement-act/; *see also Hearing on Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf.

Mr. COHEN. Thank you, Mr. Morales-Doyle. We appreciate your work and your testimony.

Our next witness is Nicholas Stephanopoulos. Mr. Stephanopoulos is Kirkland & Ellis professor of law at Harvard Law School, where he teaches classes on election law and constitutional law, the future of voting rights, and workshops on law and politics and on voting rights litigation and advocacy.

Prior to joining the Harvard faculty, Professor Stephanopoulos taught at the University of Chicago Law School and Columbia Law School. Before that, he was in private practice.

Professor Stephanopoulos received his JD from Yale Law School, his Master of Philosophy from the University of Cambridge, and his AB in government, summa cum laude, from Harvard University.

He also served as a law clerk for the Honorable Raymond C. Fisher, of the United States Court of Appeals for the Ninth Circuit.

Quite an impressive resume.

Professor Stephanopoulos, you are recognized for 5 minutes.

STATEMENT OF NICHOLAS STEPHANOPOULOS

Mr. STEPHANOPOULOS. Thank you, Chair Cohen, Ranking Member Johnson, and distinguished Members of the committee, for inviting me to testify today.

As the Chair mentioned, I am a Professor at Harvard Law School where I specialize in election law.

Much of my work over the years has involved the Voting Rights Act, and most relevant here, I wrote a 2019 article called, "Disparate Impact, Unified Lot," in which I proposed a standard for vote denial claims under section 2 of the Act.

Several justices asked about my proposal at the Brnovich oral argument, and the Court's decision also cited my article.

I would like to make three points about that decision in my testimony today. The first is that it is indefensible as a matter of ordinary statutory interpretation. The Justices in the Brnovich majority claim to be textualists. When reading a statute, they claim that they start with the text, and they end with the text.

The factors the Court announced for future section 2 cases are simply unmoored from the statute's language. You can stare at that language for as long as you want, but you will never find any references to the size of a voting burden or the size of a racial disparity, let alone what policies happened to be in place back in 1982.

The Court's only defense for its extratextual factors is that section 2 mentions the, quote, "totality of circumstances." That phrase supposedly authorizes the Justices to invent whatever criteria they think are appropriate. The totality of circumstances isn't an invitation to the Justices to become our platonic guardians. It is just a reference to the factors listed in the 1982 Senate report.

As Justice Kennedy once wrote, quote, "For this purpose of interpreting the totality of circumstances, the Court has referred to the Senate report on the 1982 amendments."

Until now, the Court hasn't relied on its own idiosyncratic judgment. Bad textualism is bad enough.

My second point, though, is that the Court's flawed reading of section 2 will seriously impair efforts to fight racial discrimination in voting. This is because each of the Court's factors is designed to make it harder for section 2 plaintiffs to win their cases. Each factor puts a thumb on the scale in favor of defendants.

Together, the factors amount to a roadmap showing States how to avoid liability for the racial inequities of their elections.

Take the factor about the State of the world in 1982. In that era, early and mail-in voting were strictly limited. Innovations like automatic voter registration and ballot drop-off boxes were unknown.

So, under the Court's approach, cutbacks to those policies would likely be fine. No matter what racial disparities the cutbacks caused, at worst, they would just return States to the 1982 status quo.

Fortunately, Congress doesn't have to accept the shackles the Court attached to section 2. Brnovich is just a decision construing a Federal statute. If Congress disagrees with the decision, it can and it should override the Court. That is the last point I want to make today.

In particular, I would recommend the insertion of two new paragraphs into section 2. Let me flag that my written testimony includes potential language for these provisions.

The first new paragraph would list the Court's factors and then State that they are not among the circumstances that should be considered in section 2 cases.

The second new paragraph would say that the approach Justice Kagan described in her dissent is part of the totality of circumstances.

Under that approach, there are two critical issues. First, does electoral practice result in a statistically significant racial disparity; and second, is the practice necessary, the least restrictive means to achieve an important State interest.

Something like Justice Kagan's test is already used under title VII and the Fair Housing Act. Justice Kagan's test is also constitutional, given that the rest of disparate impact law is valid.

Most importantly, Justice Kagan's test is effective. Many electoral rules cause significant and unnecessary racial disparities. More such rules are currently being debated around the country.

All these policies would be caught by Justice Kagan's test. So, therefore, Congress ought to embrace that test and move us closer to a world where our elections are finally free of racial inequities.

Thank you very much. I look forward to your questions.

[The statement of Mr. Stephanopoulos follows:]

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Testimony of
Professor Nicholas O. Stephanopoulos,
Harvard Law School

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

The Implications of *Brnovich v. Democratic National Committee*
and Potential Legislative Responses

July 16, 2021

Introduction

Chair Nadler, Vice Chair Dean, Ranking Member Jordan, and distinguished Members, thank you for inviting me to testify before you.

My name is Nicholas Stephanopoulos and I am the Kirkland & Ellis Professor of Law at Harvard Law School, where I teach Election Law, Constitutional Law, and several other classes. Much of my work over the years has involved the Voting Rights Act, which I consider to be the single most impactful statute ever passed by Congress on the subject of elections. Most relevant here, I wrote a 2019 article in the *Yale Law Journal* entitled "Disparate Impact, Unified Law," which proposed a standard for racial vote denial claims under Section 2 of the Voting Rights Act. I also submitted an amicus brief to the Supreme Court while it was still deliberating in *Brnovich v. Democratic National Committee*. This brief was repeatedly referenced by the Justices at oral argument, and my earlier article was cited as well by the Court's eventual decision.

In my testimony today, I want to make three points about the Court's decision in *Brnovich*. First, it is indefensible as a matter of statutory interpretation. The Court imposed one extratextual constraint on Section 2 after another. These limits are nowhere to be found in the language of Section 2, and they are also inconsistent with Congress's goal of ending racial inequities in American elections. Second, the Court's decision will hinder efforts by litigants to bring Section 2 vote denial claims in the future. Several of the extratextual factors devised by the Court will be difficult for plaintiffs to satisfy in most cases. And third, Congress can and should overrule the Court's mistaken decision. Congress should make clear that Section 2 forbids electoral practices that cause statistically significant and unnecessary racial disparities. Congress should also take steps to protect the precious right to vote for all Americans, of all races.

Let me begin with my first point: the poor quality of the Court's statutory interpretation. The Justices in the *Brnovich* majority consider themselves to be textualists. When construing a statute, they say, they begin with the text and they end with the text. Yet the very first factor the Court announced as a relevant consideration for future cases is entirely extratextual. This factor is "the size of the burden imposed by a challenged voting rule."[1] You can stare at Section 2 for as long as you like, but you will never find any language like this. Section 2 actually prohibits *any* "denial or abridgement"[2] of the right to vote on racial grounds. The Court effectively inserted the word "substantial" before "abridgement," in defiance of the statutory text.

The Court's second factor is even worse from a textualist perspective. This factor is "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982."[3] But Section 2 never states, or even hints, that the electoral status quo in 1982 is in any way relevant to the disposition of a vote denial claim. At least the Court's first factor can be seen as a modification of a word that is really in the statute ("abridgement"). The 1982 baseline is manufactured out of whole cloth, not even purporting to be linked to any statutory language.

Bad textualism is bad enough. My second point, though, is that the Court's extratextual inventions will have serious negative consequences for Section 2 litigation. Consider the factor about the size of the voting burden. Future defendants will latch onto this factor and argue that their voting restrictions cause nothing more than "the usual burdens of voting"—a "[m]ere

[1] *Brnovich v. Dem. Nat'l Comm.*, No. 19-1257, slip op. at 16 (U.S. July 1, 2021).
[2] 52 U.S.C. § 10301(a).
[3] *Brnovich*, slip op. at 17.

inconvenience" at worst.[4] Future defendants will also find a friendly audience for this argument in the Court. In *Brnovich*, after all, the Court opined that Arizona's laws discarding ballots cast in the wrong precinct and banning third-party mail-in ballot collection "fall[] squarely within the heartland of the usual burdens of voting."[5] If these onerous practices are inside the heartland, few rules will be outside.

Or take the 1982 baseline for comparison. In that era, many policies that facilitate voting today were either unknown or very rare. In particular, as the Court pointedly observed, "in 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots."[6] The implication is that, going forward, states will be able to limit early and mail-in voting without a serious prospect of Section 2 liability. This is because curbs on these modes of voting, at most, could return states to the 1982 status quo.

This brings me to my third point: Congress need not and should not accept the shackles the Court has placed on Section 2. To restore Section 2 to its proper role, Congress should consider adopting the disparate impact framework that is already used in areas such as employment and housing—and that Justice Kagan endorsed in her powerful dissent. Under this approach, the plaintiff would first have to prove that an electoral practice causes a statistically significant racial disparity. The defendant would then have the chance to demonstrate, through particularized evidence, that the practice is necessary to achieve an important state interest. Finally, the plaintiff could try to show that this interest could be achieved by a different, less discriminatory policy.

This framework is deeply familiar to litigants and courts, having been in place for almost half a century. This framework also avoids the constitutional issues that might be raised by a pure disparate impact standard—one that invalidates laws solely because of their racial disparities. Most importantly, unlike the extratextual factors of the *Brnovich* Court, this framework is *effective*. It would impose liability whenever electoral regulations give rise to statistically meaningful and unnecessary racial disparities. It would thus further Congress' objective, expressed in Section 2 but thwarted by the *Brnovich* Court, of American elections no longer plagued by racial inequities.

But Congress should not just revise Section 2 in response to *Brnovich*. It should also protect the right to vote on a nonracial basis in two further ways. One of these is affirmatively specifying which electoral practices states must and must not use, at least in federal elections. This is the strategy of H.R. 1, the For the People Act, as the bill currently stands. The other way that Congress should safeguard the franchise is by creating a new cause of action, available to all citizens of all backgrounds, against unjustifiably burdensome electoral policies. This claim would be an ideal complement to Section 2, targeting needless *burdens* rather than *racial disparities* in the electoral process. In combination, the two theories would make voting both more racially equitable and more universally accessible.

Flawed statutory interpretation

I will now provide more detail about my three points, starting with the Court's flawed statutory interpretation in *Brnovich*. I explained above that the Court's first pair of factors—the size of the voting burden and the 1982 baseline—are textually unmoored. The same is true for the

[4] *Id.* at 16 (internal quotation marks omitted).
[5] *Id.* at 30 (internal quotation marks omitted).
[6] *Id.* at 17.

Court's remaining considerations: "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups,"[7] "the opportunities provided by a State's entire system of voting,"[8] and "the strength of the state interests served by a challenged voting rule."[9]

The factor about the size of racial disparities, first, suggests that Section 2 might not be violated by small disparate impacts. However, Section 2 specifies that it is breached whenever voting is not "*equally* open" to minority citizens in that they have "*less* opportunity" than white citizens to cast ballots.[10] This language indicates that *any* racial disparity is sufficient (as long as it is statistically shown, in fact, to be a disparity). The Court thus implicitly revised Section 2 again, replacing "equally open" and "less opportunity" with phrases to the effect of "not too unequally open" and "considerably less opportunity."

Next, the factor about a state's whole electoral system runs headlong into Section 2's opening words. These words identify what kind of policy can transgress Section 2: a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure."[11] Notably, each of these terms denotes a specific, singular regulation of the electoral process. None of the terms calls for an examination of *other* electoral policies not challenged by the plaintiff. Nor does any term hint (as the Court held) that a racially discriminatory measure can be excused if a state makes available other, supposedly less burdensome modes of voting.

Lastly, the factor about the strength of a state's interests is textually adrift as well. Section 2 says nothing about the justifications that might be offered for a disputed practice. True, one of the considerations in the Senate report that accompanied the 1982 amendments to Section 2 is "whether the policy underlying [the law at issue] is tenuous."[12] But this Senate factor means that courts should *discount* rationales that are *weak* because of their inherent implausibility or lack of evidentiary backing. In contrast, the Court's factor is aimed at crediting interests, like the avoidance of fraud, that are persuasive in theory but often factually unsupported in practice. This evidence-free approach to justifications is evident in the Court's categorical pronouncement that "the prevention of fraud" is always a "strong and entirely legitimate state interest."[13]

To be clear, these textualist critiques of the Court's opinion are not mine alone. They were also made forcefully by Justice Kagan in her scathing dissent. "The majority's opinion mostly inhabits a law-free zone," she remarked.[14] The opinion "leaves [Section 2's] language almost wholly behind."[15] Rather than focus on the statutory text, the majority "founds its decision on a list of mostly made-up factors, at odds with Section 2 itself."[16] This list is "a set of extra-textual restrictions on Section 2—methods of counteracting the law Congress actually drafted."[17] The majority thus abandons its usual methodology under which "it must interpret a statute according to its text" and

[7] *Id.* at 18.
[8] *Id.*
[9] *Id.* at 19.
[10] 52 U.S.C. § 10301(b) (emphasis added).
[11] *Id.* § 10301(a).
[12] S. Rep. No. 97-417, at 29 (1982).
[13] *Brnovich*, slip op. at 19.
[14] *Id.* at 20 (Kagan, J., dissenting).
[15] *Id.*
[16] *Id.* at 21.
[17] *Id.* at 22.

"has no warrant to override congressional choices."[18] Instead, "the majority flouts those choices with abandon."[19]

Tellingly, the Court did not respond explicitly to any of these textualist objections. That is, the Court did not claim—because it could not claim—that its factors were grounded in particular terms or phrases in Section 2. In fact, the Court's only textualist defense was that Section 2 mentions the "totality of circumstances."[20] According to the Court, this reference authorizes it to recognize any factor it wants: "any circumstance" that, in the Court's sole opinion, "has a logical bearing" on whether voting is racially discriminatory.[21]

But the "totality of circumstances" has never been construed this way—as an open-ended invitation to the Court to devise the factors of its choice. To the contrary, this phrase has always been understood to refer to the ten or so circumstances identified by the 1982 Senate report. The Court made this clear in its very first Section 2 case, *Thornburg v. Gingles*. "The Senate Report specifies [the] factors which typically may be relevant to a § 2 claim," the Court observed.[22] The Court emphatically confirmed this understanding in the 2006 case of *LULAC v. Perry*. "The general terms of the statutory standard 'totality of circumstances' require judicial interpretation."[23] "For this purpose, *the Court has referred to the Senate report on the 1982 amendments to the Voting Rights Act* . . . ."[24] The Court has *not* referred—until now—to its own platonic judgment as to which factors have a "logical bearing" on racial discrimination in voting.[25]

Negative practical consequences

The problems with *Brnovich*, though, run deeper than deficient statutory interpretation. The Court's factors are not just textually unsupportable. They will also be difficult for plaintiffs to satisfy in many future Section 2 vote denial cases. A good deal of racial discrimination in voting that should be unlawful will thus be upheld by courts applying the Court's new framework. As Justice Kagan remarked in her dissent, the Court's factors "all cut in one direction—toward limiting liability for race-based voting inequalities."[26] They "stack[] the deck against minority citizens' voting rights."[27] The negative impact of this stacked deck is the second point I want to highlight in my testimony.

I explained earlier how the Court's first two factors will be stumbling blocks for future plaintiffs. States will argue that their voting restrictions impose the usual burdens of voting, mere inconveniences, hardships no worse than those caused by the Arizona laws approved in *Brnovich*. And conservative courts following the Court's lead will frequently accept this argument. Similarly, states will invoke the 1982 baseline whenever their challenged limits to voting were common in the early years of the Reagan presidency. Tight constraints on early and mail-in voting were prevalent in that era, and modern innovations like automatic voter registration, ballot drop boxes, and curbside voting did not exist at all. So conservative courts are likely to countenance all kinds of cutbacks to these pro-voting policies.

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[18] *Id.* at 41.

[19] *Id.*

[20] 52 U.S.C. § 10301(b).

[21] *Brnovich*, slip op. at 16; *see also id.* at 21 (asserting that the Court's five factors "follow[] directly from what § 2 commands: consideration of 'the totality of circumstances'").

[22] 478 U.S. 30, 44 (1986).

[23] 548 U.S. 399, 426 (2006).

[24] *Id.* (emphasis added).

[25] *Brnovich*, slip op. at 16.

[26] *Id.* at 22 (Kagan, J., dissenting).

[27] *Id.*

The same dynamic will unfold under the Court's third factor, the size of racial disparities. States will assert that the disparate impacts of their electoral regulations are small and therefore do not call for judicial intervention. To back this assertion, states will cite the *Brnovich* Court's analysis of Arizona's law discarding ballots cast in the wrong precinct. Fully *twice* as large a share of minority voters had their ballots rejected under this measure.[28] Yet in the Court's eyes, this "racial disparity in burdens . . . is small in absolute terms."[29] Conservative courts will probably reach the same conclusion about other policies that disenfranchise minority citizens no more than twice as often as white citizens.

Under the Court's fourth factor, too, states will be able to make a potent new claim: that no matter how discriminatory certain practices may be, that discrimination should be overlooked because of other, supposedly less burdensome aspects of states' electoral systems. At present, most states permit voters to cast ballots in multiple ways: in person on election day, in person before election day, or by mail. In response to a Section 2 suit aimed at a restriction on any one of these forms of voting, then, states will be able to point to the existence of the other voting modes. That is just what Arizona did in *Brnovich*—and just what the Court endorsed in its opinion. Arizona's wrong-precinct rule is acceptable, according to the Court, in part because "the State offers other easy ways to vote" such as early and mail-in voting.[30]

Lastly, it takes no imagination to see how states will exploit the Court's factor about the strength of state interests. States will simply cite justifications like the prevention of fraud, and conservative courts will concur with the Court that these rationales are "strong and entirely legitimate."[31] Strikingly, the Court conceded that "there was no evidence that fraud in connection with early ballots had occurred in Arizona."[32] It thus appears that fraud avoidance is a weighty interest even when the relevant type of fraud has not been committed in a jurisdiction. In that case, states will need no facts, no evidentiary record, to defend their voting limits on an antifraud basis. Their mere say-so will suffice.

Considering the Court's factors in combination, the following assessment emerges: From the perspective of conservative courts, Section 2 vote denial plaintiffs will have strong cases only if regulations (1) impose unusually heavy burdens, (2) were rare in 1982, (3) cause large racial disparities, (4) are not complemented by other, supposedly easier forms of voting, and (5) are not justified by familiar state interests. Of course, this is tantamount to saying that, in the view of conservative courts, Section 2 vote denial plaintiffs will *never* have strong cases after *Brnovich*. Perhaps if a state tried to revive a Jim Crow-era exclusion, a litigant would be able to establish each factor, though even that is unclear.[33] But with respect to modern restrictions like photo ID requirements for voting, proof-of-citizenship requirements for registering to vote, cutbacks to early and mail-in voting, voter roll purges, and the like, one or more factors will always be unprovable to conservative courts' satisfaction.

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[28] *See id.* at 28 (majority opinion).

[29] *Id.* at 27.

[30] *Id.*

[31] *Id.* at 19.

[32] *Id.* at 33.

[33] For example, the Supreme Court itself has held that a literacy test "promote[s] intelligent use of the ballot." *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959). So even with respect to a literacy test, a plaintiff might not be able to show that a jurisdiction lacks a strong interest served by the policy.

That said, I certainly do not think that all Section 2 vote denial suits are now doomed. For one thing, not all federal courts share the Supreme Court's hostility to the Voting Rights Act's mission of ending racial discrimination in voting. In the hands of more sympathetic courts, the Court's factors could well be applied in ways that enable some plaintiffs to prevail, even against modern voting limits. For example, nothing in *Brnovich* prevents courts from finding that challenged policies impose sizeable voting burdens when presented with persuasive evidence to that effect. Nor does *Brnovich* bar courts from determining that racial disparities are substantial when they exceed the half-percentage-point difference that the Court deemed small. And nor does *Brnovich* mean that facts are wholly irrelevant to courts' evaluations of state interests. In one passage, notably, the Court hinted that it would give more credence to a state's antifraud justification if the state "could point to a history of serious voting fraud within its own borders."[34]

Additionally, the Court's factors are just that: a non-exhaustive set of circumstances that courts should usually consider when deciding Section 2 vote denial cases. Before naming its factors, the Court "ma[d]e clear that we decline . . . to announce a test to govern all VRA § 2 [vote denial] claims."[35] The Court also described its factors as "guideposts"[36] and "relevant circumstances"[37]—not elements to be satisfied—and confirmed that they were not an "exhaustive list"[38] of pertinent issues. Consequently, after *Brnovich*, courts remain free to weight or discount the Court's factors as they see fit. Courts can also analyze circumstances ignored by the Court, such as the factors from the 1982 Senate report. And courts can conclude that liability is warranted even if only some of the Court's factors point in that direction.

Possible congressional responses

But this is not much of a silver lining. *Brnovich* may not make it impossible to win Section 2 vote denial claims, but it clearly makes doing so considerably more difficult. Fortunately, *Brnovich* is nothing more than a decision interpreting a federal statute. The Court's factors are based only on its flawed reading of Section 2 and its dislike of the Voting Rights Act's mission. There is not a word in *Brnovich* intimating that other, more robust approaches to fighting racial discrimination in voting might be constitutionally suspect. This means that Congress has the authority to override *Brnovich* and restore the teeth that were extracted from the statute by the Court. Congress should exercise this power as soon as possible. Congress should both revise Section 2 to reject the Court's crabbed understanding of the provision and further protect the right to vote on a universal basis.[39] This is the third point I want to make in my testimony.

My preferred amendments to Section 2 would be two new subsections, one negating the *Brnovich* Court's factors,[40] the other setting forth a burden-shifting framework for Section 2 vote denial claims. Under this framework, the plaintiff would first have to prove that an electoral practice causes a statistically significant racial disparity. The defendant would then have the chance to demonstrate, through particularized evidence, that the practice is necessary to achieve an important state interest. Finally, the plaintiff could try to show that this interest could be achieved by a

[34] *Brnovich*, slip op. at 24.
[35] *Id.* at 12.
[36] *Id.* at 13.
[37] *Id.* at 22.
[38] *Id.* at 16.
[39] Additionally, Congress should revive Section 5 of the Voting Rights Act by enacting a new coverage formula. I do not further address Section 5 in my testimony because it is the subject of extensive separate proceedings.
[40] Instead of negating the factor about the strength of the state's interests, I recommend addressing this issue through the burden-shifting framework, under which a practice must be necessary to achieve an important interest.

different, less discriminatory policy. I include below some sample statutory language that would accomplish these aims of quashing the *Brnovich* Court's factors and adopting a burden-shifting framework. Note that there are many other ways in which Section 2 could be helpfully revised, some of which I survey later in my testimony. Note also that this draft language would *not* supplant the 1982 Senate report factors. As part of the totality of circumstances, they would remain relevant considerations.

> (c) In a case involving a challenge to a regulation of the time, place, or manner of voting, the following factors shall not be considered under the totality of circumstances: (1) the size of the voting burden imposed by the regulation; (2) the historical or current prevalence of the regulation; (3) the size of any racial disparity caused by the regulation; and (4) other aspects of the jurisdiction's electoral system not challenged by the plaintiff.
>
> (d) In a case involving a challenge to a regulation of the time, place, or manner of voting, the following factors shall be analyzed under the totality of circumstances on the basis of particularized evidence: (1) whether the plaintiff has established that the regulation results in a statistically significant racial disparity; (2) if so, whether the defendant has established that the regulation is necessary to achieve an important state interest; and (3) if so, whether the plaintiff has established that this interest could achieved by another practice that results in a smaller racial disparity.

In her dissent in *Brnovich*, Justice Kagan endorsed essentially this approach (though without the formal shifting of burdens). After extensively discussing Section 2's text and purpose, she distilled the following test for vote denial claims: "Section 2 demands proof of *a statistically significant racial disparity* in electoral opportunities (not outcomes) resulting from a law *not needed to achieve a government's legitimate goals*."[41] With respect to the statistical significance requirement, she added that it is "standard in all legal contexts addressing disparate impact" because it ensures that a racial disparity did not "arise[] from chance alone."[42] With respect to the necessity requirement, she stressed "the need for the closest possible fit between means and end—that is, between the terms of the rule and the State's asserted interest."[43] This tight means-end nexus "filters out" justifications for voting restrictions that are "assert[ed] groundlessly or pretextually."[44]

As Justice Kagan observed,[45] this disparate impact framework is used in many other contexts (with the formal shifting of burdens). It applies to employment under Title VII of the Civil Rights Act,[46] to recipients of federal funds under Title VI of the Civil Rights Act,[47] to housing under the Fair Housing Act,[48] to age discrimination under the Age Discrimination in Employment Act,[49] to lending discrimination under the Equal Credit Opportunity Act,[50] and to disability discrimination

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[41] *Id.* at 19-20 (Kagan, J., dissenting) (emphasis added); *see also, e.g., id.* at 12 (Section 2 "requires courts to eradicate voting practices that make it harder for members of some races than of others to cast a vote, unless such a practice is necessary to support a strong state interest").

[42] *Id.* at 15 n.4.

[43] *Id.* at 26.

[44] *Id.* at 27.

[45] *See id.* at 26 ("[W]e apply that kind of means-end standard in every other context—employment, housing, banking—where the law addresses racially discriminatory effects.").

[46] *See* 42 U.S.C. § 2000e-2(k).

[47] *See* Civil Rights Div., U.S. Dep't of Justice, *Title VI Legal Manual*, § 7, at 6 (2017).

[48] *See* 24 C.F.R. § 100.500.

[49] *See Smith v. City of Jackson*, 544 U.S. 228, 233–40 (2005).

[50] *See* Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266 (Apr. 15, 1994).

under the Americans with Disabilities Act.[51] If this framework were also employed under Section 2, then, disparate impact law would be unified, proceeding the same way in each substantive area.

The benefits of such unification would extend well beyond intellectual coherence. Because the burden-shifting framework has been used for so long in other fields—approximately half a century[52]—litigants and courts have managed to work out a host of tricky issues. For instance, which statistical methods should be used to calculate racial disparities?[53] Which racial disparities are most relevant, ones following directly from a practice or ones further downstream?[54] Do racial disparities have to be the product of a practice's interaction with historical and ongoing discrimination?[55] What if racial disparities are attributable instead to minority citizens' subjective preferences?[56] And what is the right remedy once liability is established, the invalidation or the relaxation of a practice?[57] Section 2 vote denial law has barely begun to address these questions. The answers courts have reached have also often conflicted. The painstaking resolution of these matters could be avoided if the burden-shifting framework were imported into Section 2. Thanks to decades of litigation and scholarship, this framework would come with ready-made solutions to Section 2's outstanding problems.

Additionally, this framework would allay the constitutional concerns that might arise if Congress adopted a *pure* disparate impact approach—a test that invalidated policies *solely* because of their racial disparities. To reiterate, the Court did not voice any such concerns in *Brnovich*. Then again, no one in *Brnovich* proposed a pure disparate impact approach: certainly not Justice Kagan, who advocated a statistical significance requirement *and* a necessity requirement. The Court's pre-*Brnovich* precedents do suggest two constitutional landmines for a disparate-impact-only test. One is that such a test might exceed Congress's authority to enforce the Reconstruction Amendments. According to the Court, those provisions are violated only by discriminatory intent.[58] A test reaching all racial disparities might be too untethered from underlying constitutional violations. The other danger is excessive race-consciousness in violation of the equal protection principle of colorblindness. To comply with a pure disparate impact approach, jurisdictions might have to focus on race when they enact and amend their electoral rules. "[S]erious constitutional questions then could arise" if "race [was] used and considered in a pervasive way."[59]

The burden-shifting framework evades the congressional authority objection because it reaches only conduct for which a discriminatory purpose can reasonably be inferred. When a practice causes a statistically meaningful racial disparity *and* that disparity could have been mitigated at no cost to any state interest, an invidious aim is at least plausible and maybe even likely. In that scenario, "disparate-impact liability under the [framework] plays a role in uncovering discriminatory intent."[60] Likewise, the burden-shifting framework is not overly race-conscious because it does not ask jurisdictions to eradicate all racial disparities. Rather, it only asks them to reduce these disparities to the extent they can do so without compromising their legitimate objectives. This more modest

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[51] *See* 42 U.S.C. § 12112(b)(6).

[52] Disparate impact law originated in the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[53] *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1611-13 (2019) (discussing the methods used under Title VII and the FHA).

[54] *See id.* at 1613-14 (racial disparities stemming directly from a practice are most relevant).

[55] *See id.* at 1614-16 (interaction with discriminatory conditions is unnecessary).

[56] *See id.* at 1616-17 (attribution to minority citizens' preferences is not a defense).

[57] *See id.* at 1619-20 (invalidation is the usual remedy).

[58] *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fourteenth Amendment).

[59] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 542 (2015).

[60] *Id.* at 540.

scope means that the framework does not "inject racial considerations into every [regulatory] decision" or "perpetuate race-based considerations rather than move beyond them."[61]

Lastly, even if the burden-shifting framework is not as aggressive as a disparate-impact-only test, it is still quite potent. American elections are replete with regulations that cause statistically significant and unnecessary racial disparities. Across the country, states are busy enacting still more such regulations out of a combination of partisanship, racial bias, and non-racist obliviousness to rules' effects on different groups. The burden-shifting framework would bring these efforts to a halt. It would require either the nullification of measures that give rise to unwarranted racial disparities or their substantial revision so that their disparities are smaller and genuinely necessary. This positive impact on American democracy is why Justice Kagan lauded the "sweep and power" of Section 2, if only it were correctly construed.[62] Understood to reach needless racial disparities, Section 2 would be "a statute of significant power and scope"[63] that vindicates "the right of every American, of every race, to have equal access to the ballot box."[64]

The burden-shifting framework, though, is not the only way to revitalize Section 2. Per Justice Kagan's dissent, the framework's main elements—a statistically significant racial disparity and a lack of necessity—could be embraced without varying which party must prove each point. In that case, the plaintiff would presumably have to satisfy both criteria. Alternatively (and as also flagged by Justice Kagan), the statistical significance requirement could be complemented by a *practical* significance requirement. This bar would preclude liability given "a level of inequality that, even if statistically meaningful, is just too trivial for the legal system to care about."[65] Furthermore, Congress could declare that the *Brnovich* Court's factors should *not* be considered without specifying which circumstances *should* be analyzed. This would amount to enacting just the first of the two subsections I outlined earlier. It would effectively return Section 2 vote denial law to its pre-*Brnovich* state.

Congress should carefully study these and other options for revising Section 2. Congress should also implement new protections for the right to vote on a nonracial, universal basis. By this I mean legislation that targets neither racially discriminatory intent nor racially disparate impact but rather voting burdens on all Americans, of all races. One example of this universal strategy is H.R. 1, the For the People Act, which prohibits numerous voting restrictions and mandates various pro-voting policies (for federal elections only).[66] The restrictions banned by H.R. 1 include voter caging, voter intimidation, ex-felon disenfranchisement, and photo ID requirements for voting. In turn, the pro-voting policies instituted by H.R. 1 include automatic and same-day voter registration, early voting for at least fifteen days, and the universal distribution of mail-in ballot applications.

H.R. 1's universal prohibitions and mandates would bolster Section 2 (even an amended Section 2) in several ways. First, they would take effect immediately and without any need for litigation. In contrast, even successful Section 2 suits are typically expensive and time-consuming. Second, H.R. 1's protections would apply everywhere. They would not be limited (as Section 2 litigation is) to racially diverse areas where disparate racial impacts can be shown. And third, there would be no way for states to circumvent H.R. 1's protections. States' existing regulations would be

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[61] *Id.* at 543.
[62] *Brnovich*, slip op. at 11 (Kagan, J., dissenting).
[63] *Id.* at 21 n.7.
[64] *Id.* at 29.
[65] *Id.* at 15 n.4.
[66] *See* For the People Act of 2021, H.R. 1, 117th Cong. (2021).

preempted even if they could convincingly argue that the rules are necessary to achieve important interests.

For an illustration of H.R. 1's efficacy, consider Arizona and its laws discarding ballots cast in the wrong precinct and banning third-party mail-in ballot collection. If the burden-shifting framework were adopted for Section 2, plaintiffs would have a strong case against the measures for the reasons laid out by Justice Kagan. They could file suit, and after significant time and expense, prevail. On the other hand, if enacted, H.R. 1 would instantly and costlessly override these Arizona policies. One of the bill's provisions requires votes to be counted for each race in which an individual is eligible to vote, no matter in which precinct the person actually voted.[67] Another section authorizes a voter to designate any other person to return her mail-in ballot.[68] H.R. 1 would also override these policies everywhere, not just in Arizona and anyplace else litigants managed to bring successful Section 2 claims. Nationwide, wrong-precinct rules and limits on mail-in ballot collection would become relics of the past.

However, H.R. 1's universal prohibitions and mandates have a disadvantage, too, compared to Section 2. Because H.R. 1's protections are *specific*—referring to particular regulations that are forbidden or compelled—they are useless against new voting restrictions that creative vote suppressors manage to devise. Over the last few months, for example, states have banned mobile voting centers, criminalized giving food or water to voters waiting in line, and undermined the integrity of the vote-counting process.[69] H.R. 1 is silent with respect to these new threats to voting.

Congress should therefore supplement H.R. 1 with another universal approach: a new cause of action under which plaintiffs of all races could challenge rules that unjustifiably impede voting. An amendment to H.R. 1, introduced by Rep. Mondaire Jones (D-NY), would codify such a claim.[70] Under this amendment, a policy that imposes a severe or discriminatory burden on voting would be upheld only if the measure is necessary to achieve a compelling state interest. Additionally, a policy that imposes a non-severe, non-discriminatory burden would be allowed only if the measure significantly furthers an important state interest. A constitutional theory similar to this does already exist.[71] But that theory has been applied extremely narrowly by the Roberts Court, which has never ruled in favor of a plaintiff objecting to a voting restriction.[72] Rep. Jones's amendment would enshrine a more aggressive statutory standard under which litigants would be better positioned to attack all kinds of voting limits—common or rare, familiar or novel, resulting in disparate racial impacts or not.

In combination with a fortified Section 2, these two universal tactics would provide sturdy, reinforcing protections for the right to vote. H.R. 1 would establish an impressively high floor for federal elections through its explicit prohibitions and mandates. Above this floor, if revised to incorporate the burden-shifting framework (or some other similarly effective proposal), Section 2 would nullify regulations that cause statistically meaningful and unnecessary racial disparities. Also above H.R. 1's floor, the new statutory cause of action would invalidate unjustifiably burdensome rules. In this way the franchise would be triply safeguarded against efforts to undermine it. H.R. 1

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[67] *See id.* § 1601(a)(2).

[68] *See id.* § 1621(a)(2).

[69] *See, e.g.*, Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. Times, Apr. 3, 2021, at A12.

[70] *See* amend. 62, For the People Act of 2021, H.R. 1, 117th Cong. (2021).

[71] *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428 (1992).

[72] *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008) (upholding a photo ID requirement for voting).

would sweep away most voting restrictions. As amended, Section 2 would target remaining limits based on their disparate racial impacts. And the new statutory claim would catch any further stragglers that hinder voting for no good reason.

Conclusion

The factors for Section 2 vote denial suits that the Supreme Court announced in *Brnovich* are indefensible as a matter of statutory interpretation. They are entirely detached from the statutory text and in some cases directly contravene it. The Court's factors also reveal its ideological opposition to the Voting Rights Act's mission of ending racial inequities in American elections. At every turn, the factors put a thumb on the scale against Section 2 plaintiffs, making it more difficult for them to challenge policies that cause racial disparities. Congress should not accept the Court's neutering of Section 2. It should revise Section 2 to reject the Court's factors and to make clear that regulations that result in statistically significant and unnecessary racial disparities are unlawful. Congress should also pair these amendments to Section 2 with two nonracial, universal responses. One of these is the enactment of H.R. 1, which would protect the franchise through a series of specific measures. The other is the creation of a new cause of action that would guard more generally against the future schemes of would-be vote suppressors.

I hope my testimony helps the Committee to better understand the implications of *Brnovich* and what Congress could do to override the Court's mistaken decision. I thank you again for the opportunity to testify before you, and I look forward to answering any questions you may have.

Mr. COHEN. Thank you, Professor.

Our third witness is Robert Popper. Mr. Popper is a senior attorney and director of voting integrity efforts at Judicial Watch, Incorporated, where he has been an employee since 2013 and has litigated several voting rights cases. He has been practicing as a litigator for 31 years, with special knowledge and expertise in the areas of voting law.

In 2005, he joined the voting section of the Civil Rights Division of the U.S. Department of Justice, where he worked for 8 years, earning a special commendation award for his efforts in enforcing National Voter Registration Act of 1993. He was also promoted to deputy chief of the voting section.

In his time at the DOJ, he managed voting rights investigations, litigation, consent decrees, and settlements in dozens of States, including those concerning the Voting Rights Act of 1965.

Mr. Popper received his JD from Northwestern University School of Law, his undergraduate degree from University of Pennsylvania.

Mr. Popper, you are recognized for 5 minutes.

STATEMENT OF ROBERT D. POPPER

Mr. POPPER. Thank you, Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee.

In my view, the Brnovich decision relied heavily on the plain text of section 2, which Chair read at the beginning of this hearing. The Court analyzed the words "open" and "equally open" using dictionary assistance, and it analyzed the text holistically in the light of, in the context of the additional phrase in that "open" and "equally open" meant in that the Members of a group have less opportunity than other Members of the electorate to participate in the political process and to elect representatives of their choice.

The Court's decision was not unexpected and had been presaged by a majority of circuit courts to have considered this issue.

Remember, there has been a long unresolved legal problem as to how to apply section 2 of the Voting Rights Act to time, place, and manner restrictions. Numerous courts over the years have commented on how the Gingles criteria are an uncomfortable fit for vote denial cases, and that guidance was something that the Court provided.

I wanted to note that we have discussed already the five guideposts that the Court identified, and it is important to realize that the Court called them nonexhaustive—a nonexhaustive list of factors to consider in looking at the totality of the circumstances.

Now, bear in mind that the original Senate factors that we all know and work with was a nonexhaustive list. I am quoting now from the 1982 report, from which the Senate factors, where they were first enumerated, and the report says typical factors include—and it lists the nine factors. Then it says, "while these enumerated factors will often be the most relevant ones, in some cases, other factors will be indicative of the alleged dilutions."

That raises another point. The language in section 2 came from *White* v. *Regester* in 1973. That was a multimember district case. Gingles was a multimember district case.

From the beginning, section 2 has been targeted to vote dilution and districting, multimember district, at-large districts kinds of cases.

As I indicated, as I said, courts have routinely commented on how there is no guidance as to how to treat a time, place, and manner restriction.

Now, because it was unresolved, there has been a rash of lawsuits that I would say were of poor quality and should not have been brought. In my written testimony, I discuss the *Ohio Democratic Party* v. *Husted* from 2016. Bear in mind that the alleged section 2 violation that the trial court found to have occurred was that Ohio cut its early voting days from 35 days to 29 days.

Bear in mind as well that as we sit here, Connecticut and Delaware have no early voting. So, it is not that you are going to get sued for whether or not you have early voting; you are going to get sued if you have it and then repeal it. That makes no sense.

Now, I would add that some very famous politicians, including the President of the United States, have invoked Jim Crow. That is, in my view, an outrageous thing to say. At its worst, Jim Crow involved State government officials colluding with domestic terrorists to murder American citizens.

Even if you look at the voting angle of Jim Crow, it involved literacy tests that were six pages long, and no one, I respectfully submit, on this Committee could pass. It involved all White primaries that determined the winner. It was shocking in its extent, but it has nothing to do with 35 days to 29 days of early voting. It has nothing to do with out-of-precinct voting, as in Arizona, for some counties, not all. It has nothing to do with saying that mail ballots after COVID have to be collected by a family member, household member, or caregiver.

We need some perspective in this debate. We need to understand what is happening. I can go on at length, although not according to the clock, but I can talk about the Texas and the Georgia legislation as well. By the way, both Texas and Georgia, unlike Connecticut and Delaware, have early voting.

Thank you, Mr. Chair.

[The statement of Mr. Popper follows:]

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

The Implications of *Brnovich v. Democratic National Committee* and Potential Legislative Responses.

July 16, 2021

Robert D. Popper
Senior Attorney
Director, Voting Integrity
Judicial Watch, Inc.

Good afternoon Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee. Thank you for the invitation to speak with you today. My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 31 years. I have special knowledge and expertise in the area of voting law. In 1995, as a solo practitioner, I represented plaintiffs in a successful constitutional challenge to the design of New York's 12th Congressional District.[1]

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at the DOJ, I managed voting rights investigations, litigations, consent decrees, and

[1] *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).

settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. Of particular relevance, I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and Section 2, the subject of the *Brnovich* decision.[2]

In 2013, I joined Judicial Watch. In my time here, I have litigated voting rights cases in several states and have filed numerous friend-of-the-court briefs before the U.S. Supreme Court—including in *Brnovich*[3]—and in various other courts. I have testified before state legislatures on voting reform measures. In the course of my career, I have published popular pieces and scholarly articles on the subject of voting law.[4]

I. The Law Prior to *Brnovich*.

Section 2 of the Voting Rights Act provides in relevant part that a state or jurisdiction's civil liability for a "denial or abridgment" of the right to vote

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected]

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[2] *Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257 and 19-1258, __ S. Ct. __, 2021 U.S. LEXIS 3568 (July 1, 2021).

[3] Amici Curiae Brief of Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioners, *Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257, Dec. 7, 2020.

[4] *See, e.g.*, *How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier's Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

> class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52. U.S.C. § 10301(b). Although Section 2 clearly forbids intentional discrimination, the cited text also proscribes political processes that *result* in a discriminatory electoral outcome, whether or not intent is claimed or proved. A Section 2 claim that alleges a discriminatory effect, but not discriminatory intent, is often referred to as a "results" claim.

In the seminal case of case of *Thornburg v. Gingles*, 478 U.S. 30, 46 *et seq.* (1986), the Supreme Court explained what must be shown to prevail on a claim of "vote dilution," which alleges that an electoral system has the result, whether intended or not, of "submerging" minority voters in a racial majority. This particular kind of "results" claim is typically made where an at-large or a multi-member district system (at issue in *Gingles*) deprives a substantial racial minority of any effective representation. The analysis in *Gingles*—indeed, the language of Section 2 itself, which was amended in 1982—were based in turn on the analysis supplied by an earlier Supreme Court decision, *White v. Regester*, 412 U.S. 755, 765-66 (1973).

What was not resolved by the Supreme Court in *Gingles* or *Regester* was how a plaintiff could plead and prove a "results" claim that is *not* based on vote dilution. In other words, how should a court assess a claim that a time, place, or manner regulation concerning, for example, the documents needed to register or vote, the hours or locations of poll sites, or the requirements for voting by mail, violated Section 2 of the Voting Rights Act?

Prior to *Brnovich*, courts adopted basically two approaches in resolving such claims. The difference between these approaches ultimately led to a significant split between circuits, and even between different panels of the same circuit. A clear majority of courts and circuits required "proof that the challenged standard or practice causally contributes to the alleged

discriminatory impact by affording protected group members less opportunity to participate." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-38 (6th Cir. 2016); *see Frank v. Walker*, 768 F.3d 744, 752-53 (7th Cir. 2014); *Luft v. Evers*, 963 F.3d 665, 668-69, 672-73 (7th Cir. 2020); *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1233, 1238 (11th Cir. 2020); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 598, 600 (4th Cir. 2016); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989).

A second approach, however, did not require plaintiffs to establish that a challenged procedure itself particularly caused the loss of opportunity proscribed by Section 2, but only that a challenged procedure "affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both." *Veasey v. Abbott*, 830 F.3d 216, 245 (5th Cir. 2016) (en banc); *see League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *see also Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated*, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014). Evidence of "social and historical conditions" is what is known as "Senate Factor" evidence, a reference to the Senate report discussing Section 2. *Id.*; *see* S. Rep. No. 97-417, at 28-29 (1982). In other words, under this second approach, (1) disparate impact, plus (2) general, Senate Factor evidence establishes a violation of Section 2's "results" standard.

II. The Second Approach in Practice.

It was inevitable that this second approach would lead to legal challenges against even

the most ordinary seeming electoral rules. This is because plaintiffs will almost always be able to establish the two prongs of this approach. Every law has a "disparate impact," whether intentional or accidental, regarding any group or subgroup that can be defined. And every region in the country, and, for that matter, in the world, has seen its share of racial and ethnic discrimination. Establishing the necessary "social and historical conditions that have produced discrimination," moreover, is facilitated by utilizing the assumptions inherent in Critical Race Theory, which postulates that existing institutions are designed to reinforce current racial, ethnic, and gender hierarchies.

Accordingly, a great many Section 2 lawsuits were commenced in recent years challenging ordinary seeming regulations—and *changes* to such regulations—governing, for example, the use of absentee ballots, in-precinct voting, early voting, voter ID laws, election observers, same-day registration, durational residency requirements, and straight-ticket voting.[5] These lawsuits were filed notwithstanding that many, or a majority, or even a vast majority of states had an identical statutory framework to that that was being challenged.[6] Indeed, in a less contentious political atmosphere, the bipartisan Carter-Baker Commission in 2005 expressly noted the need for such regulations, including those regarding absentee ballots ("the largest source of potential voter fraud"), out-of-precinct voting, early voting, in-person ID requirements, and election observers.[7]

No regulation or burden seemed too trivial to give rise to a Section 2 lawsuit. A good

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[5] *See* Brief of Senator Ted Cruz and Ten Other Members of the United States Senate as Amici Curiae in Support of Petitioners, Dec. 7, 2020, at 22-24, cited in *Brnovich.*, 2021 U.S. LEXIS 3568 at *21 & n.6.

[6] *Id.* at 22 (noting that 27 states limit out-of-precinct voting); at 24 (noting that only six states offer straight-ticket voting).

[7] *Id.* at 20, 22, 23, 24; *see* Carter–Baker Comm'n on Fed. Elections Reform, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005).

sense of how extreme the new crop of lawsuits could be is afforded by the Sixth Circuit's decision in *Husted*. The district court in that case had declared that an Ohio law that decreased the early voting period from 35 days to 29 days violated Section 2 of the Voting Rights Act. *Husted*, 834 F.3d at 623. The district court reached this conclusion, notwithstanding that it found any resulting disparate burden to be "'modest' (*i.e.*, 'more than minimal but less than significant')," on the theory that the change "interacts with the historical and social conditions facing" minority voters to "reduce their opportunity to participate in Ohio's political process relative to other groups." *Id.* at 625, 626.

In reversing, the Sixth Circuit noted the obvious fact that the loss of one week of early voting was, "[a]t worst," a "contraction of just one of many conveniences that have generously facilitated voting participation in Ohio." 834 F.3d at 628. It noted as well that thirteen states did not "permit any early in-person voting days," and that "[i]ronically," Ohio "would have avoided this challenge altogether" by never adopting an early voting period in the first place. *Id.* at 628-29. Maintaining that state laws had "established a federal floor that Ohio may add to but never subtract from," creating in effect a "one way rachet," was an "astonishing proposition." *Id.* at 623. The court observed:

> Under this conception of the federal courts' role, little stretch of imagination is needed to fast-forward and envision a regime of judicially-mandated voting by text message or Tweet (assuming of course, that cell phones and Twitter handles are not disparately possessed by identifiable segments of the voting population).

Id. at 629.

The facts of *Husted* and these other cases should be kept in mind when assessing the outrageous hyperbole used to describe the kinds of regulations that have been challenged, and the Supreme Court's decision in *Brnovich*. One hears—and large news outlets dutifully report—that there is a "tsunami" of legislation "restricting the right to vote," that states reforming their

mail-in voting laws as COVID retreats are engaged in "voter suppression," and even that these actions represent "the new Jim Crow." These claims are preposterous. At best, they reveal a startling historical ignorance. The grandfather laws, absurd literacy tests, poll taxes, intimidation and terroristic violence of the Jim Crow era have nothing whatever to do with, say, Ohio's restriction of early voting from 35 to 29 days, or with limiting same-day registration. Nor do they have anything to do with regulating absentee ballots, out-of-precinct voting, or voter ID requirements, all reasonable electoral integrity measures approved by the Carter-Baker Commission.

At worst, these statements reveal a startling cynicism, driven by a desire to inflame passions—and to raise funds. Those who talk this way are being irresponsible.

III. The decision in *Brnovich*.

Ultimately, the Supreme Court in *Brnovich* did no more than resolve the issue left open in *Gingles* and *Regester*, namely, what are the standards that govern a Section 2 "results" claim challenging regulations regarding the time, place, and manner of voting? The answers the Court gave to this question mirrored the approach of a majority of courts to have considered the issue.

The Arizona statutes challenged in *Brnovich* were as neutral as the Ohio statutes at issue in *Husted*:

> First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots will not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver.

Brnovich., 2021 U.S. LEXIS 3568, at *13. In determining how to assess a challenge to such regulations, the Court started with the plain language of Section 2. "The key requirement is that … the process of voting [] must be 'equally open' to minority and non-minority groups alike."

Id. at *30-31. "Open" means "without restrictions as to who may participate," and "requiring no special status, identification, or permit for entry or participation." *Id.* at *31 (citations omitted). "'[E]qually open' is further explained by this language: 'in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* As the statute requires, this assessment depends on a "totality of the circumstances."

The Court then propounded a *non-exhaustive* list of factors relevant to such a determination. These include "the size of the burden imposed by a challenged voting rule," as measured against the "usual burdens of voting." 2021 U.S. LEXIS 3568, at *32-33 (citation omitted). "[T]he degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account." *Id.* at *35. "The size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider." *Id.* Courts must also "consider the opportunities provided by a State's entire system of voting." *Id.* at *35-36. And courts must weigh "the strength of the state interests served by a challenged voting rule." *Id.* at *36.

Each of these matters easily fits within a "totality of the circumstances" analysis. None of them should surprise a Section 2 practitioner familiar with the traditional Senate Factors. The fact that these commonsense considerations will make it more difficult to bring the outlandish Section 2 challenges to ordinary rules seen in recent years is a point in their favor, not against them.

The Supreme Court applied these factors to conclude that Arizona's statutes did not violate Section 2. Among other things, the Supreme Court rightly corrected the Ninth Circuit's "highly misleading" presentation of evidence regarding the burdens involved in voting in

precinct. 2021 U.S. LEXIS 3568, at *47. While 99% of minority voters voted in the correct precinct, and 99.5% of non-minority voters did so, it was "statistical manipulation" to say, as the Ninth Circuit majority did, that minority voters voted out-of-precinct "at twice the rate" of white voters. *Id.* at *47-48. "Properly understood, the statistics show only a small disparity that provides little support for concluding that Arizona's political processes are not equally open." *Id.* at *48. Further, the State had a legitimate interest in "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives," which "deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker." *Id.* at 52.

IV. Proposed Legislative Responses.

Brnovich resolved an unsettled question of law regarding the application of Section 2 of the Voting Rights Act to time, place, and manner restrictions. The decision embodied an unremarkable interpretation of the plain text of Section 2 that is wholly consistent with longstanding principles used in applying it. Accordingly, a legislative fix is not necessary—it is a classic "solution in search of a problem."

In particular, the John R. Lewis Voting Rights Advancement Act that was introduced in 2019 (H.R.4) is a bad idea. To begin with, it provides the Attorney General with a new, unchecked power to sue directly for violations of the Constitution. I wrote about the problems with this proposal in response to earlier versions of such legislation.[8] The Voting Section of the Justice Department has in the past proved to be a hotbed of partisanship. An Inspector General's report from March 2013 described the harassment of Republican employees, and race-based

[8] Robert Popper, *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014.

enforcement of the Voting Rights Act.[9] I was Deputy Chief of the Voting Section at the time and personally witnessed many of the incidents recounted in that report. But partisans of every stripe should object to providing such a power to an Attorney General. Choose whomever *you* would describe as the most partisan Attorney General of the past 50 years. Would you want that person intervening in election disputes on behalf of the United States?

H.R. 4 provides enormous power to the Justice Department in other ways. Under a new, two-level preclearance regime, *all* changes concerning certain election-related measures—including redistricting that affects minority groups, and voter ID laws—wherever and whenever adopted, and regardless of justification, would be subject to a preclearance review by the Department. Further, particular states would be "bailed in" to an even more stringent preclearance regime for ten years if, in the most recent 25 years, 15 "voting rights violations occurred" in any state subdivisions, or 10 violations if the state committed one of them. A violation basically means any final judgment, settlement, or consent decree concerning voting rights. It also includes any DOJ objection to a covered voting change that is not overturned. Again, this transfers a great deal of new power to the Attorney General to make, or to refrain from, objections. It also gives power to partisan interest groups who sue under the Voting Rights Act, because their preferred targets will tend to become federally regulated. In addition, partisan administrations in closely contested states may choose to "sue and settle," to run up the number of violations and bring on federal regulation.

The bill is certain to encounter strong constitutional objections. First, to the extent that H.R. 4 purports to enforce the guarantees of the Fourteenth Amendment, "[t]here must be a

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[9] A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION, U.S. Department of Justice, Office of the Inspector General, March 2013, available at https://oig.justice.gov/reports/2013/s1303.pdf.

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). As discussed, the record does not support the claim that voting rights are somehow in peril, nor can it justify a complete federal takeover of states' electoral processes.

Second, to the extent that the application of H.R. 4 would lead to a differing level of oversight of states' electoral regimes, as it inevitably would over time as states' "scores" rise and fall and they are bailed in or out of coverage, it would run afoul of "the fundamental principle of equal sovereignty" between states, which "remains highly pertinent in assessing [their] subsequent disparate treatment." *Shelby County v. Holder*, 570 U.S. 529, 544 (2013), citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

Third, insofar as any of H.R. 4's requirements provide protections based on the disparate treatment of racial and language minority groups—as is explicit, for example, in the bill's redistricting requirements—it risks violating the Equal Protection Clause of the Fourteenth Amendment. As Justice Scalia noted in the context of Title VII, "disparate-impact provisions place a racial thumb on the scales, often requiring" parties "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory." *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). He added that, while the "Court's resolution of these cases makes it unnecessary to resolve these matters today," the "war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them." *Id.* at 595-96. H.R. 4 is likely to bring this "war" to a head.

Robert D. Popper

Mr. COHEN. You are welcome, Mr. Popper, and we thank you for your testimony.

Our final witness is Ezra Rosenberg. Mr. Rosenberg is co-director of the Voting Rights Project and Lawyers' Committee for Civil Rights Under the Law. For that role, he supervised the Lawyers' Committee's national voting rights litigation.

He joined the Lawyers' Committee in November 2014, continuing a 40-year career in the public and private sectors. He previously practiced at a major national firm, where he was actively involved in pro bono representation and successfully challenging Texas' photo ID voting law. He was also one of the lead trial counsels in the case challenging the Secretary of Commerce's decision to add a citizenship question to the 2020 Census.

Mr. Rosenberg received his JD, cum laude, and Order of Coif—Coif—whatever—from the NYU School of Law, and his BA, cum laude, from the University of Pennsylvania.

Mr. Rosenberg, you are recognized for 5 minutes.

STATEMENT OF EZRA ROSENBERG

Mr. ROSENBERG. Thank you, Chair Cohen, today's Ranking Member Fischbach, and the Members. Thank you for giving me the opportunity to testify today on these important issues.

Racial discrimination in voting diminishes our democracy. The Voting Rights Act of 1965, and particularly Sections 2 and 5, has been an indispensable tool in the fight against such discrimination. With the evisceration of section 5 by the Supreme Court in Shelby, section 2 is needed more than ever.

For decades, section 2 has been working quite well. The courts had developed standards designed to meet the intent of Congress to stop not only explicit discrimination but also facially neutral voting laws that, through subtle methods, had a significant impact on minority citizens' right to vote. Thus, the courts adopted standards that recognize that a seemingly innocuous voting practice can interact with underlying social conditions, themselves the consequence of this discrimination, to result in pernicious discrimination in voting.

Those standards were judicially manageable. There has been no flood of questionable section 2 vote denial cases, no widespread invalidation of voting regulations. Indeed, Brnovich marked the first time since the 1982 amendments to the Voting Rights Act that the Supreme Court reviewed a pure vote denial claim.

In Brnovich, writing for the Court's majority, Justice Alito provided guidelines for future treatment of section 2 vote denial cases that were not only new, but also contrary, or at least dilutive of the decades long-accepted standards.

Now, I emphasize that Brnovich does not spell the end of section 2 cases, but it unnecessarily and unreasonably makes it much more difficult for civil rights plaintiffs to win those cases, particularly results cases, when they already were difficult to win. It does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks.

I come to these views after having devoted the bulk of the last decade litigating voting rights cases on behalf of voters of color for the Lawyers' Committee.

The Lawyers' Committee is a national civil rights organization, created at the request of President Kennedy in 1963, to mobilize a private bar to confront issues of racial discrimination pro bono.

In fact, I first became associated with the Lawyers' Committee in 2011, when I was in private practice and volunteered to take on voting rights case pro bono, and that case was the challenge to Texas' strict photo ID law. My experience with that case heavily influences my views here today.

There, we and other groups successfully sued under section 2, and Texas was forced to change its law after the Fifth Circuit ruled en banc that Texas' photo ID law discriminated against Black and Latino voters. The case was hard-fought, took 6 years to litigate. It is difficult to predict how the Fifth Circuit would have applied Brnovich to the facts of the Texas case, but one thing is certain, the case would have been much more difficult to prove and more costly to litigate.

There are at least two approaches that Congress can take in response to the Shelby County/Brnovich assault on the Voting Rights Act. The first is to pass legislation like the John Lewis Voting Rights Advancement Act that addresses the hole in the Voting Rights Act left by the Shelby County decision.

The second is to deal with the expected consequences of Brnovich. Common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a section 2 violation and read it as a signal that they have a get-out-of-jail card to pass additional voter suppressive legislation.

Although we firmly believe that the Court should not apply Brnovich in such manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left to the uncertainty created by the ambiguous and problematic language of Brnovich.

I am going to end with the same quote that Chair Nadler. used from Justice Kagan's dissent. We must share the same speech writer, but it is important language.

> "The Voting Rights Act of 1965 is an extraordinary law. Rarely has a statute required so much sacrifice to ensure its passage. Never has a statute done more to advance the Nation's ideals. And few laws are more vital in the current moment."

Thank you.

[The statement of Mr. Rosenberg follows:]

TESTIMONY OF EZRA D. ROSENBERG
CO-DIRECTOR, VOTING RIGHTS PROJECT
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES
HEARING ON
"THE IMPLICATIONS OF *BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE* AND POTENTIAL LEGISLATIVE RESPONSES"
JULY 16, 2021

I. Introduction

Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties. My name is Ezra Rosenberg and I am the Co-Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for giving me the opportunity to testify today regarding the consequences for voting rights flowing from the recent decision of the United States Supreme Court in *Brnovich v. Democratic National Committee*,[1] and the potential legislative responses to that decision.

Racial discrimination in voting diminishes our democracy. The Voting Rights Act of 1965 (the "Act" or the "VRA"), and particularly Section 2 and Section 5, have been indispensable tools in the fight against such discrimination. Section 5 has already been effectively eviscerated by the Supreme Court's decision in *Shelby County v. Holder*.[2] In my view, the *Brnovich* opinion, while not gutting Section 2, makes it unnecessarily more difficult for plaintiffs to bring Section 2 vote denial "results" cases, running directly counter to Congress' intent in first enacting the Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. In the context of the steps already taken or about to be taken by legislatures in states such as Georgia and Texas in the aftermath of the 2020 election to raise additional barriers to the vote that will impact voters of color more severely than white voters, the full protections intended by Congress when the VRA was first enacted are desperately needed today. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, and view it as a signal from the Court to take even more suppressive action. Congress should take immediate steps to reassert its intention to fully protect the voting rights of voters of color in Section 2 of the Voting Rights Act.

I come to these views after having devoted the bulk of the last decade litigating voting rights cases on behalf of voters of color for the Lawyers' Committee. The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to mobilize the private bar to confront issues of racial discrimination pro bono. In fact, I first became associated with the Lawyers' Committee when I was a partner of a large global law firm, and volunteered in 2011 to take on a voting rights case pro bono. That case was the challenge to Texas's strict photo ID law. After I retired from private practice in 2014, the Lawyers' Committee asked me to join their staff, where I have, as Co-Director of its Voting Rights Project since 2015, supervised the filings on behalf of voters and civil rights organizations in over 100 cases dealing with voting rights, many of them with claims brought under the Voting Rights Act.

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[1] U.S. Supreme Court no. 19-1257, decided July 1, 2021.

[2] 570 U.S. 529 (2013).

My experience with the challenge to Texas's Photo ID law heavily influences my views here today. In that case, we first intervened on behalf of our clients in the proceedings brought by the State of Texas to obtain preclearance from a federal court of its new photo ID requirements, as then required under Section 5 of the Voting Rights Act. The federal court refused to preclear the law,[3] but while Texas's appeal was pending, the Supreme Court issued its decision in *Shelby County* effectively gutting Section 5. The same day, Texas announced it would start implementing the new photo ID law, forcing the Lawyers' Committee and our clients, as well as other civil rights organizations and the Department of Justice to file suit under Section 2 of the Voting Rights Act.

That suit was successful, and Texas was forced to change its law, with the district court ruling – and the Fifth Circuit Court of Appeals affirming en banc – that Texas's photo ID law discriminated against Black and Latinx voters under the effects prong of Section 2.[4] But the case was hard-fought and one of the relatively smallnumber of "vote denial" cases brought under Section 2 of the Voting Rights Act in the last few decades. Yet, had *Brnovich* been issued earlier, it is difficult to predict how the lower courts and the Fifth Circuit would have construed *Brnovich*. One thing is certain, however, the case would have been more difficult to prove and more costly to litigate.

This does not make sense. Since 1965, Section 2 of the Voting Rights Act has stood as a bulwark against racial discrimination in voting, particularly after the 1982 amendment that explicitly created results claims under Section 2. Since this Court's decision in *Shelby County*, Section 2 has become even more indispensable because it is the primary measure to challenge discriminatory voting changes. Congress originally enacted and amended Section 2 to stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens' right to vote. Consistent with the text and purpose of the Act as amended, prior to *Brnovich*, the Supreme Court and several of the Circuit Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly. The standard also recognized that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in pernicious discrimination.[5]

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[3] *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

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

[5] *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

Under that standard, Section 2 has worked for decades as a judicially manageable mechanism to stop voting discrimination. There has been no flood of questionable Section 2 vote denial "results" cases, and no widespread invalidation of voting regulations. Indeed, *Brnovich* marked the first time since the 1982 amendments to the Act that the Supreme Court reviewed a pure vote-denial claim. The reason is clear: The lower courts have taken seriously the Court's guidance, and carefully assessed the effects of challenged voting policies or procedures within each specific jurisdiction, based on the totality of the circumstances.

Brnovich compels an immediate response from this Congress, before some state legislators – intent on creating obstacles that disproportionately result in a negative impact on the rights of voters of color – hear it as a dog whistle to do just that, and before lower courts apply the opinion in ways that elevate unsubstantiated and untrue justifications for new burdensome voting practices over genuine and proved claims of racially discriminatory results.

I cannot put it better than Justice Kagan, in her dissent to *Brnovich*:

> The Voting Rights Act of 1965 is an extraordinary law. Rarely has a statute required so much sacrifice to ensure its passage. Never has a statute done more to advance the Nation's ideals. And few laws are more vital in the current moment.

I have attached the following Lawyers' Committee documents as appendices to my testimony and my testimony draws liberally from them:

- The 2014 report of the National Commission on Voting Rights, *Protecting Minority Voters: Our Work Is Not Done* ("2014 National Commission Report"). The Lawyers' Committee staffed the work of the National Commission, which conducted 25 field hearings and also issued a 2015 report on election administration issues. I have attached the 2014 National Commission Report as Appendix 1.

- The Lawyers' Committee's *Preliminary Report of Racial and Ethnic Discrimination in Voting, 1994-2019*, is attached as Appendix 2.

- A summary of the more than 100 voting cases the Lawyers' Committee has participated in since the Shelby County decision is attached as Appendix 3.

- The Amended Complaint that the Lawyers' Committee filed against the 2021 voter suppression law enacted in Georgia is attached as Appendix 4.

II. Section 2 of the Voting Rights Act

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the "insidious and pervasive evil" of "racial discrimination in voting," which had been "perpetuated . . . through unremitting and ingenious defiance of the Constitution."[6] Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted "contrivances by a state to thwart equality in the enjoyment of the right to vote" and "nullifie[d] sophisticated as well as simple-minded modes of discrimination[,]"[7] prior to the VRA's passage, this language proved largely aspirational.[8]

Responding to the states' tenacious "ability . . . to stay one step ahead of federal law," Congress passed the VRA to provide a "new weapon[] against discrimination."[9] The Act "reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting."[10] The essence of the VRA's protections was exemplified in Section 2, which provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[11]

Notwithstanding Section 2's broad language, jurisdictions sought to evade its reach by placing "heavy emphasis on facially neutral techniques."[12] These "techniques" included everything from "setting elections at inconvenient times" to "causing . . . election day irregularities" to "moving polling places or establishing them in inconvenient . . . locations." [13] In one Mississippi county, voters were forced to "travel 100 miles roundtrip to register to vote."[14] In one Alabama county, "the only registration office in the county [was] closed weekends, evenings and lunch hours."[15] These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they "particularly handicap[ped] minorities."[16]

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[6] *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).

[7] *Lane v. Wilson*, 307 U.S. 268, 275 (1939)

[8] *See, e.g.*, *Katzenbach*, 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).

[9] Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).

[10] *Katzenbach*, 383 U.S. at 315.

[11] Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

[12] *Right to Vote*, *supra* at 552.

[13] *Id.* at 557–58.

[14] Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 Ford. L. Rev. 93, 93 (1983).

[15] *Id.* at 93–94.

[16] *Id.* at 96.

Against this backdrop, and responding to this Court's plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a "discriminatory purpose" element,[17] Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[18] Congress further specified that, under Section 2, a violation is established if, "based on the totality of [the] circumstances," the political processes leading to an election are not "equally open to participation" by minority voters so that they have less opportunity than white voters "to participate in the political process and to elect representatives of their choice."[19] By adopting this "results test," Congress captured the "complex and subtle" practices which "may seem part of the everyday rough-and-tumble of American politics" but are "clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination."[20]

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of minority votes—and *vote denial*—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, "first generation" cases brought under Section 2. Only later did the Supreme Court "determine[] that the Act applies to 'vote dilution' as well."[21]

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[17] 446 U.S. 55, 62 (1980).

[18] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).

[19] *Id.* A claim for violation of Section 2 (and the Fourteenth Amendment) can still be based on a finding of intentional discrimination, by application of the settled standards for proving intentional discrimination as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which includes (1) the historical background; (2) the sequence of events leading to the challenged practice, including procedural and substantive deviations from normal process; (3) relevant legislative history; and (4) whether there is a disparate impact on any group. *See, e.g., N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016).

[20] S. Rep. No. 97-417, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 ("Senate Report").

[21] *See* Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 Colum. L. Rev. 418, 423 (1995). The congressional record accompanying the 1982 Amendments is replete with examples of the discriminatory practices that concerned Congress. The House Judiciary Committee noted that counties in Virginia and Texas had instituted "inconvenient location and hours of registration" and other restrictive practices that acted as "continued barriers" to racial minorities. H.R. Rep. No. 97-227, at 14, 17 (1981) ("House Report"). The Senate Judiciary Committee similarly identified states' "efforts to bar minority participation" through "registration requirements and purging of voters, changing the location of polling places[,] and insistence on retaining inconvenient voting and registration hours." Senate Report at 10 n.22. For example, a Georgia county "adopted a policy that it would no longer approve community groups' requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites." *Id.* at 11.

Thirty-five years ago, in *Gingles v. Thornburg*,[22] the Court recognized that Congress inserted the words "results in" to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice "interact" with pre-existing social and historical conditions to *result in* that burden? Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, "intensely local appraisal,"[23] that accounts for the "totality of [the] circumstances."[24]

In *Gingles*, the Court explained the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters."[25] Recognizing Section 2's command that courts consider the "totality of circumstances," the *Gingles* Court looked to the Senate Report accompanying the 1982 amendments to compile a list of relevant "circumstances."[26] These nine social and historical conditions—the "Senate Factors"—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction's education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine).[27]

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate *burden* on the voting rights of minority voters ("an inequality in the opportunities enjoyed"); and (2) that burden must be *caused* by the challenged voting practice ("a certain electoral law, practice, or structure . . . cause[s] an inequality") because the practice "interacts with social and historical conditions" of racial discrimination.[28] No other Circuit has put forth an alternative formulation.

The Section 2 results inquiry is complex and resource intensive to litigate. The "totality of circumstances" test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of

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[22] 478 U.S. 30, 47 (1986).

[23] *Id.* at 79 (quotation marks omitted).

[24] 52 U.S.C. § 10301(b).

[25] 478 U.S. at 47.

[26] 478 U.S. at 36.

[27] *Id.* at 36–37 (citing Senate Report at 28–29).

[28] *Gingles*, 478 U.S. at 47; *accord League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).[29]

II. *Brnovich v. Democratic National Committee*

A. The Facts

That was the situation until *Brnovich*. In *Brnovich*, the Supreme Court reviewed two Arizona voting practices: one mandated that votes cast out of the voter's precinct ("OOP") not be counted; the other prohibited the collection of mail-in ballots by anyone other than an election official, a mail carrier, or a voter's family member, household member or caregiver. Plaintiffs had claimed that these practices violated Section 2 of the Voting Rights Act.

The United States District Court for the District of Arizona had ruled against the plaintiffs on both claims, but, applying the settled standards described above, the United States Court of Appeals for the Ninth Circuit had reversed, en banc, finding that the out-of-precinct policy violated the "results" prong of Section 2 and that the limitations on collections of absentee ballots violated both the "results" and "intent" prongs of Section 2.

As to the out-of-precinct policy, the Ninth Circuit identified several factors, acknowledged by the district court, leading to a higher rate of OOP voting by voters of color than by white voters: frequent changes in polling locations (polling places of voters of color experienced stability at a rate 30 percent lower than the rate for whites);[30] confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,[31]); and high rates of residential mobility.[32] As a result, 1 in every 100 Black voters, 1 in every 100 Latinx voter, and 1 in every 100 indigenous peoples voter cast an OOP ballot, compared to 1 in every 200 white voters.[33]

As to the absentee-ballot collection limitation, the Ninth Circuit relied on the district court's finding that voters of color were more likely than white voters to

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[29] *See Gingles*, 478 U.S. 30, 44-45 (1986).

[30] *Brnovich v. Democratic National Committee*, Joint Appendix, at 590 (online at https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128_19-1257%20-1258%20Joint%20Appendix.pdf).

[31] *Id.* at 592.

[32] *Id.* at 594.

[33] *Id.* at 595-96.

return their early ballots with the assistance of third parties.[34] The disparity was the result of the special challenges experienced by communities that lack easy access to outgoing mail services, socioeconomically disadvantaged voters who lacked reliable transportation, and voters who had trouble finding time to return mail because they worked multiple jobs or lacked childcare services, all burdens that disproportionately fall on Arizona's minority voters.[35]

Applying the "totality of circumstances" test, with primary reliance on the Senate factors that demonstrated a history of discrimination in Arizona that persists to this day, the Ninth Circuit found that both the OOP policy and the absentee-ballot collection law violated the "results" prong of Section 2 of the VRA. The court also found that the absentee ballot law had been enacted with discriminatory intent, based on statements of the sponsor and a racist video used to promote passage of the law.[36]

B. The Decision, Its Meaning, and Its Consequences

In *Brnovich*, a 6-3 Court reversed the Ninth Circuit's decision. Had it done so by applying the settled standards, we may not be here today. But, in writing for the Court's majority, Justice Alito provided guidelines for future treatment of Section 2 vote denial "results" cases that were not only new, but also contrary – or at least dilutive of – the decades-long accepted standards.

I emphasize *Brnovich* does not spell the end of Section 2 cases. Rather, it unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions, when they already were difficult to win. And it does so in a way that flies in the face of congressional intent. Further, it raises too many ambiguities in too many important areas to leave it to the courts to fill in the blanks. The greater difficulty and ambiguity threaten to undermine the core purpose of the Voting Rights Act.

1. *Brnovich* is a solution in search of a problem

First, *Brnovich* purports to cure a non-existent problem. One of the premises of *Brnovich* is that "[i]n recent years, [Section 2 vote denial claims] have proliferated in the lower courts."[37] In support of this statement, the Court relies on the amicus curiae briefs of Sen. Ted Cruz, the State of Ohio, and the Liberty Justice Center.[38]

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[34] *Id.* at 597.

[35] *Id.* at 598.

[36] Id. at 681.

[37] *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *8 (2021).

[38] *Id.* at n. 6.

However, those briefs describe a total of perhaps 16 cases, dating back over 7 years, and only 3 of them led to a finding of Section 2 liability.

The fact is that since Congress amended Section 2 in 1982 and since the Supreme Court supplied its test for adjudicating Section 2 violations, the Supreme Court has never deemed it necessary to review a single Section 2 vote-denial case. At the same time, there was absolutely no evidence that courts were being overwhelmed by Section 2 vote denial cases. And when such cases are brought, courts have had no trouble applying the standard to separate discriminatory voting practices from benign election regulations. In short, the pre-existing standard had worked well.

2. *Brnovich* reads a remedial statute narrowly

One of the most important canons of statutory construction – and one that gives the greatest deference to congressional intent – is that remedial statutes are to be broadly construed,[39] and there are few statutes in this Nation's history more remedial than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent guidelines, most prominently setting higher standards for both the size of the burden and the size of the disparity, and a lower standard for the State to meet to justify the burdens it is placing on the right to vote.

The touchstone of the *Brnovich* opinion is the Court's construction of the requirement in Section 2(b) that the political process be "equally open" as the "core" requirement of the law.[40] The concept of equal "opportunity" as used in the same statute, the Court acknowledged somewhat grudgingly, "may stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open."[41] In that context, the Court turned to the "totality of the circumstances" test, and said that "any circumstance that has a logical bearing on whether voting is 'equally open' and afford equal 'opportunity' may be considered," and proceeded to list five "important circumstances" that were relevant.[42]

For the most part (with the exception of number (2)), these "important circumstances" seem fairly innocuous: (1) the size of the burden; (2) the degree of departure of the challenged practice from practices standard when Section 2 was amended or which are widespread today; (3) the size of the disparity; (4) the opportunities provided by the electoral process as a whole; and (5) the strength of the

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[39] *See Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (broadly construing the VRA as "aimed at the subtle, as well as tbe devious, state regulations which have the effect of denying citizens their right to vote"); *Tcherepnin. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction)l.

[40] *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *12; 52 U.S.C. § 10301.

[41] *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *12 (emphasis in original).

[42] *Id.*

state's justification for the practice. The devil, however, is in the details and in the ambiguities created by the Court's specific choice of language that may pave the way for state legislatures to enact additional discriminatory laws and for lower courts to apply Section 2 parsimoniously in vote denial "results" cases.

3. The size of the burden should include factors specific to the affected community resulting from discrimination

The first factor that Justice Alito highlighted was the "size of the burden," emphasizing that voters "must tolerate the usual burden of voting."[43] Although this may sound somewhat innocuous, its application by legislatures and lower courts might be colored by a footnote at the end of the paragraph on burden, where Justice Alito expounded on what "openness" and "opportunity" might mean (as, say, with museums or school courses that are open to all) as compared to the "absence of inconvenience" (such as lack of adequate transportation or conflicting obligations).[44] The vagueness with which the Court left this issue, and its relegation to a footnote, may limit its precedential impact, but its practical impact may be substantial.

What Justice Alito does not acknowledge is that some of these indicia of what he calls "inconvenience" are themselves not simply subjective to an individual, but, are reflective of a group's socio-economic circumstances that are themselves the product of a history of discrimination. In the Texas Photo ID case, for example, we were able to demonstrate that not only were Black and Latinx voters more likely than white voters not to possess the required photo ID, but that they were more likely than white voters not to be able to get the ID because of, among other reasons, lack of access to transportation.[45]

The same logic might apply to polling place location and closure decisions that might make it just that much more burdensome for voters of color than for white voters to vote. Or, as in the new Georgia statute, SB 202, prohibiting "line-warming," the provision of food and water to those waiting in line to vote, particularly when voters of color are much more often confronted with long wait-times than are white voters.[46]

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or to return a voted absentee ballot is another new hurdle

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[43] *Id.*

[44] *Id.*

[45] *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016).

[46] Georgia Senate Bill 202 (online at https://www.legis.ga.gov/api/legislation/document/20212022/201498); *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 36; Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, Georgia Public Broadcasting, Oct. 17, 2020, *accessible at* https://www.npr.org/2020/10/17/924527679/why-do-nonwhitegeorgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl.

voters will now face in Georgia under its new omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver's license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia's driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58% more likely and Latinx Georgians are 74% more likely to lack computer access in their homes as compared to their white counterparts.[47] Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

If *Brnovich* is construed by state legislatures as permitting them to impose barriers that affect different racial or ethnic groups differently because of their relative wealth – particularly when those differences are themselves the product of historic discriminatory practices – it will have a serious impact on the voting rights of persons of color.

4. 1982 Standards and Widespread Practice Are Not Important

Second, Justice Alito said that another relevant factor was the degree of departure of the challenged practice from the "standard practice when §2 was amended in 1982," a choice which is largely left unexplained, other than in rebuttal to Justice Kagan's dissent, in which he writes, somewhat tautologically, that "rules that were and are commonplace are useful comparators when considering the totality of the circumstances."[48] Although the Court acknowledges that this would not apply to practices that themselves were discriminatory in 1982, the fact is that such benchmarks are neither necessary nor productive. If the history of voter discrimination in this country has taught us anything, it is that those who want to stop voters of color from voting change their methods with the times, and with the change in the ways voters of color are voting.

Again, Georgia is illustrative. In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots. These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white

[47] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 44.

[48] 2021 WL 2690267, at n.15.

(25.3%) voters.[49] But, Justice Alito's reasoning may be construed as supporting the proposition that, if in 1982, Georgia did not make absentee ballots universally available, that could be a "highly important" consideration, even if voters of color are more heavily impacted than white voters by these changes. State legislatures should not be led to believe that they can get away with erecting new barriers to vote based on what they did 40 years ago.

5. So-called "small differences" can be important.

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that "small differences should not be artificially magnified,"[50] again dealing obliquely with the consequences of the differences being caused by differences in wealth – which may themselves be the result of historic discrimination. Specifically, the Court criticized the Ninth Circuit for finding disproportionate impact based on a relative comparison of the percentage of voters whose votes were rejected because they were cast OOP. In the case of Indigenous, Black, and Latinx voters, the percentage was 1% for each group; in the case of white voters, the percentage was .05.[51]

The Court did not note that the discriminatory OOP practice meant that almost 4,000 votes cast by voters of color had been rejected – and that if their circumstances were equivalent to those of white voters, 2,000 of their votes would have counted.

The Texas Photo ID case is illustrative. There, the court found that, even though over 90% of all groups had the required ID, Black voters were twice as likely as white voters not to have the ID, and Latinx voters were about three times as likely. In fact, the court found that 608,470 Texas voters lacked the ID.[52] Obviously, the Texas numbers are meaningful no matter how viewed. But the point is that smaller numbers may be too. Legislatures and lower courts should not be led to believe that they can chip away at electoral margins by reducing the likelihood of voters of color being able to cast their votes, no matter how small the effect. We need not dwell on the closeness of the 2020 presidential election in Arizona, Georgia, and Wisconsinto underscore the importance of even small differentials in impact.

6. Other opportunities to vote do not necessarily ameliorate discrimination in particular methods of voting

Fourth, Justice Alito explained that the opportunities provided by the entire electoral system should be factored into the equation, implying that the fact that, for

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[49] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 47.

[50] 2021 WL 2690267, at *13.

[51] *Id.* at *4.

[52] *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).

example, access to absentee ballots may be curtailed, it may not matter if the voter can still vote in person.[53] But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it matter that there may be other methods of voting? If all methods of voting made voting equally accessible, there would have to be only one method. Obviously, expanding methods of voting makes it more likely that people will vote. And, equally obviously, contracting them makes it less likely that people will vote. Contracting them in a way that affects some racial or ethnic groups more than others is inconsistent with the language and Congressional intent of Section 2. States should not be led to believe that they have carte blanche to target specific voting practices, when the effect is discriminatory, and try to justify it by the availability of other means of voting.

7. Justification for discriminatory practices must be based on reality

And, fifth, in explaining the state justification factor, the Court seemed to open the door to a state's justifying virtually any discriminatory action simply by parroting the words "fraud prevention."[54] Again, while the Court did not say so explicitly, the fear is that lower courts – and, worse, state legislatures – may so interpret the Court's opinion.

The incongruity of the Court's approach is seen in comparing the hundred of thousands of voters who were potentially deprived from voting under Texas's prior Photo ID law, with the infinitesimally small number of persons even accused of fraudulently voting. A state's choice to prevent non-existent fraud at the expense of thousands of votes, disproportionately of person of color, is not legitimate. Again, permitting such choice, is inconsistent with the language of Section 2 and Congressional intent.

8. The Senate Factors are relevant

The *Brnovich* majority went on to raise questions as to whether the Senate Factors are relevant to a Section 2 vote denial case, implying they are not, but leaving ambiguous precisely what the Court means as to how the few Factors the Court deems potentially relevant fit in, other than superficially.[55]

Although *Gingles* involved vote dilution, the decision addressed Section 2 writ large, recognizing that "Section 2 prohibits *all* forms of voting discrimination, not just vote dilution."[56] Further, *Gingles* recognized the applicability of the various Senate

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[53] 2021 WL 2690267, at *13.

[54] *Id.*

[55] *Id.*

[56] 478 U.S. at 45 n.10 (emphasis added); see Senate Report at 30 (confirming that Section 2 "prohibits practices, which . . . result in the denial of equal access to any phase of the electoral process for minority group members") (emphasis added).

Factors would naturally turn on the type of Section 2 claim at issue.[57] The *Gingles* Court's statement that the Senate Factors will "often be pertinent to *certain types* of § 2 violations," such as dilution,[58] cannot be reconciled with a conclusion that the Factors "*only*" inform one specific type of Section 2 claim.

9. There is no reason not to apply the "least restrictive means" test to Section 2 claims

The one area that the Court conclusively shuts the door on is the use of what it calls the "strict necessity requirement," under which courts had previously required states accused of discriminatory practices to justify "that their legitimate interests can be accomplished only by means of the voting regulations in question."[59] After *Brnovich*, states no longer have to justify their acts of discrimination with such facially reasonable proofs. As Justice Kagan explained in her dissent, an alternative-means inquiry is a legitimate way to ensure that a State is not using facially neutral laws to achieve a discriminatory intent. "[A] State that tries both to serve its electoral interests and to give its minority citizens equal electoral access will rarely have anything to fear from a Section 2 suit."[60] This should not be a heavy lift for a state interested in helping people to vote as opposed to making it more difficult for them to vote.

IV. The Confluence of *Shelby County* and *Brnovich*

When first enacted in 1965 and after the 1982 amendments, the combination of Section 2 and Section 5 of the Voting Rights Act worked together to provide a relatively effective means of preventing and remedying minority voting discrimination. Because of the *Shelby County* decision, that has dramatically changed.

A. Section 5

Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.[61] From its inception, there was a sunset provision for the formula, and the subset provision for the 2006 Reauthorization was 25 years.[62]

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[57] *See id.* at 45.

[58] *Id* (emphasis added).

[59] 2021 WL 2690267, at *14.

[60] 2021 WL 2690267 (KAGAN, J., dissenting) at n.5.

[61] 52 U.S.C. §§ 10303(b), 10304.

[62] 52 U.S.C. § 10303(b).

Section 5 covered jurisdictions had to show federal authorities that the voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters.[63] Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.[64] This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority black district that elected a black preferred candidate at the same black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the black population percentage in the same district, it would invite serious questions that it was retrogressive.

The benefits of Section 5 were numerous and tangible. The 2014 National Commission Report provided the following statistics and information regarding DOJ objections:

> By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.
>
> Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.[65]

In addition to the changes that were formally blocked, Section 5's effect on deterring discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the

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[63] 52 U.S.C. § 10304(c).

[64] 52 U.S.C. § 10304(b), (d).

[65] 2014 National Commission Report at 56.

burden of demonstrating that they were non-discriminatory. In the post-*Shelby* world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which individuals and groups could subscribe to in order to receive this weekly list from DOJ.[66] For submissions of particular interest, DOJ would provide public notice of the change if it believed the jurisdiction had not provided adequate notice of the change.[67] But even more important, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,[68] and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether she or he was aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.[69]

B. The *Shelby County* Decision

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act "'impose[d] current burdens,'" it "'must be justified by current needs.'"[70] The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.[71] The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.[72] The majority made clear that "[w]e issue no holding on §5

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[66] Section 5 Procedures, 28 C.F.R. § 51.32-51.33.

[67] *Id.* at 28 C.F.R. § 51.38(b).

[68] *Id.* at 28 C.F.R. § 51.28(h).

[69] *Id.* at 28 C.F.R. § 51.29.

[70] *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203 (2009)).

[71] *Shelby County*, 557 U.S. at 545-54.

[72] *Id.* at 560 (Ginsberg, J. dissenting).

itself, only on the coverage formula. Congress may draft another formula based on current conditions."[73]

The effect of the *Shelby County* decision is that Section 5 is effectively immobilized as, for now, preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. This special preclearance coverage is authorized by Section 3(c) of the Act. Courts have rarely ordered Section 3(c) coverage, and when they do, it is typically quite limited. Indeed, the only jurisdictions I am aware of that have been subject to Section 3(c) coverage since the *Shelby County* decision are Pasadena, Texas and Evergreen, Alabama.[74] In the case of Pasadena, the only changes subject to preclearance relate to the method of election and redistricting.[75]

As a result, Section 5 is essentially dead until Congress takes up the Supreme Court's invitation to craft another coverage formula. There are compelling reasons for Congress to do so because, as discussed below, voting discrimination has increased in the absence of Section 5, and by, diluting the power of Section 2, and by creating ambiguities as to Section 2's reach, the Supreme Court has now made matters worse.

C. Pre-*Brnovich*, Section 2 was an Imperfect Substitute for Section 5

The year after the *Shelby County* decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the *Shelby County* decision. The Report predicted that voting rights discrimination would proliferate in the absence of Section 5.[76] The subsequent years have demonstrated that the negative impacts we anticipated have come to pass.

In 2019, the Lawyers' Committee did a 25 year look back on the number of times that an official entity made a finding of voter discrimination in the *Preliminary Report of Racial and Ethnic Discrimination in Voting, 1994-2019*, which is attached as Appendix 2. This preliminary analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that the successful court cases occurred in disproportionally greater numbers in jurisdictions that were previously covered under Section 5.

The Lawyers' Committee's Voting Rights Project itself has never been busier than in the *post-Shelby County* years. As of 2019, we had participated in 41 cases, achieving some success in almost 80% of them. By the end of last year, the total of

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[73] *Id.* at 556.

[74] *See Patino v. City of Pasadena*, 230 F. Supp. 667, 729 (S.D. Tex. 2017).

[75] *Id.*

[76] 2014 National Commission Report at 12, 55-64.

post-*Shelby* cases where we participated as a counsel to a party or as amici had ballooned to 100. A short summary of each case is attached as Appendix 3. Because the Lawyers' Committee's has a racial justice mission, all of the cases we have participated in implicate race in some fashion in our view, even if there are no race claims in the case.

This data tells us that voting discrimination remains substantial, especially considering that the Lawyers' Committee is but one organization, and particularly in the areas previously covered by Section 5.

A few specific examples from the Lawyers' Committee's litigation record illustrate why, even before *Brnovich*, Section 2 was an imperfect substitute for Section 5, and why post-*Brnovich*, without congressional action, the situation is more dire.

Prior to *Shelby County*, Texas passed the strictest voter ID law in the country. Because Section 5 was in place, Texas could not implement the law (SB 14) without preclearance from either the Attorney General or the United States District Court for the District of Columbia. The Attorney General refused to preclear the law, and a three-judge panel found that the law had a retrogressive impact on the rights of Black and Latinx voters.[77] The afternoon that *Shelby* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.[78] Several civil rights groups, including the Lawyers' Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2 and DOJ filed its own suit under Section 2, and all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where 55 witnesses, including 16 experts — three-quarters of whom were paid for by the civil rights groups — testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the "results" prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court's injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.[79] Subsequently, an *en banc* panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.[80] But because Section 5 was no longer in effect, elections that took place from June 25, 2013 until the Fifth Circuit *en banc* opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The district court awarded private plaintiffs $5,851,388.28 in attorneys' fees and

[77] *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

[78] *Veasey v. Abbott*, 830 F.3d 216, 227 (5th Cir. 2016).

[79] *Id.* at 227-29, 250.

[80] *Id.* at 224-25.

$938,945.03 in expenses, for a total of $6,790,333.31. The fee award is currently on appeal. As of June 2016, Texas had spent $3.5 million in defending the case.[81] Even with no published information from DOJ, more than $10 million in time and expenses were expended in that one case. And, as noted above, with the issuance of *Brnovich*, the case would have been harder – and certainly more expensive – for plaintiffs to litigate.

In 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of "challenge proceedings" to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers' Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples' Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.[82] Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that will remedy the violations, and required the county's policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

C. <u>The Growing Present Need</u>

Recent events reflect the significant present-day impact of the *Shelby County* decision and the loss of Section 5 and the potential impact of *Brnovich*. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law that changes many aspects of Georgia elections. The law was passed in the aftermath of 2020 and 2021 elections that were extremely close and saw the margins of victory in both presidential and senatorial elections decided by the votes of people of color.

SB 202 has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers' Committee is counsel in one of these suits and the Amended Complaint from that case is attached as Appendix 4.

SB 202 increases the burdens for virtually every aspect of voting from voting by mail through voting in person. At least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place were it

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[81] Jim Malewitz & Lindsay Carbonell, Texas' Voter ID Defense Has Cost $3.5 Million, The Texas Tribune (June 17, 2016), https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/.

[82] Georgia State Conference of the NAACP v. Hancock County, Case No. 15-cv-414 (M.D. Ga. 2015).

not for the decision in *Shelby County*. This is perhaps most clearly demonstrated by Georgia introducing several restrictions focused on voting by mail:

- The new absentee ballot ID requirements mandate that voters include a Georgia Driver's license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.

- The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.

- SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.

- The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.[83]

SB 202 does not stop with its effect on voting by mail. It takes direct aim at voting in person, in a way that targets voters of color, who are more likely to confront long voting lines than white voters in Georgia. Specifically, it prohibits the provision of food and water to such voters within 150 feet of a polling place, other than by election officials.

The effect of the *Brnovich* decision on the challenge to SB 202 remains to be seen, but already defendants have moved to dismiss the complaints on the basis of *Brnovich*. Although, we strongly believe that the complaints as drafted fully and adequately plead a "results" claim under Section 2 even post-*Brnovich*, the very

[83] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint (Appendix 4), at 57-58.

making of these arguments demonstrate how those who support the erection of barriers to vote intend on using that opinion.

Georgia, of course, is not the only state that is considering or has passed laws with new barriers to voting that disproportionately affect voters of color. Florida did so, with SB 90, a law that – similar to Georgia's – imposes new and unnecessary restrictions on absentee ballots, the use of drop-boxes, and line-warming. And Texas appears poised at this writing to pass an omnibus voting bill that would, among other things, empower partisan poll watchers with virtually unfettered access in polling places, while at the same time tying the hands of election officials to stop the poll watchers from engaging in intimidating conduct. Texas has a well-documented history of voter intimidation by poll watchers that has disproportionately affected voters of color. The courts have acknowledged this pattern before—in 2014, a federal district court described this very issue: "Minorities continue to have to overcome fear and intimidation when they vote. . . . [T]here are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote. Additionally, there are poll watchers who dress in law enforcement-style clothing for an intimidating effect to which voters of color are often the target."[84]

The law being considered by the Texas legislature would also ban election officials from distributing absentee ballot applications without request from a voter; allow for the rejection of absentee ballots on the basis of signatures that do not exactly match – in the eyes of untrained election officials – the signatures on file – a practice which has been shown to adversely affect voters of color disproportionately; and place additional burdens on persons assisting others in need of help to vote.

As with Georgia's SB 202, some of these provisions might have been stopped by an effective Section 5 and challenges to some of them may be hampered by the effect of the *Brnovich* decision. The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.[85]

V. The Appropriate Congressional Response

There are at least two approaches that Congress can and should take in response to the *Shelby County/Brnovich* assault on the Voting Rights Act. The record since the *Shelby County* decision demonstrates what voting rights advocates feared: that without Section 5, voting discrimination would increase substantially. Without

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[84] ." *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff'd and reversed on other grounds*, 830 F. 3d ---- (5th Cir. 2016).

[85] *See, e.g., Shelby Cnty.*, 570 U.S. at 536 ("[V]oting discrimination still exists; no one doubts that."); *Nomination of the Hon. Amy Coney Barrett to the Supreme Court: Hearing Before S. Comm. on the Judiciary* (Oct. 14, 2020) ("[R]acial discrimination still exists in the United States and I think we've seen evidence of that this summer.") (statement of Amy Coney Barrett).

legislation like the John Lewis Voting Rights Advancement Act that addresses the hole in the Voting Rights Act left by the *Shelby County* decision, our democracy is at risk. The first step is for Congress to pass such legislation.

Brnovich presents new challenges. Its impacts have yet to be measured, but common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a Section 2 violation giving state legislatures a "Get Out of Jail" card to pass voter suppressive legislation, and justify it simply by claiming "voter fraud." Although we firmly believe that the courts should not apply *Brnovich* in such manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left in the uncertainty created by the ambiguous and problematic language of *Brnovich*. We identify here a number of issues for consideration and would be pleased to work with the Committee on legislative text.:

- Clarify that the "totality of the circumstances" to support a Section 2 violation includes whether historical socio-economic discrimination interacts with the challenged voting practice to make it more difficult for voters protected by the Act to cast their ballots.

- Clarify that to prove the "result" of the discriminatory act, plaintiffs can apply any validly accepted statistical test, which can then be assessed in the totality of the circumstances.

- Clarify that a discriminatory law cannot be justified on the basis that it was a standard practice at a particular date, such as 1982, or is widespread today, but must be judged solely on the totality of the circumstances in the particular jurisdiction, as viewed at the time the action under Section 2 is brought.

- Clarify that, while circumstances relating to the entire electoral system may be relevant to a Section 2 determination, the fact that there are other methods to vote than the challenged practice cannot be conclusive as to a results claim under Section 2.

- Clarify that the state's interest furthered by the challenged conduct may be one factor, and not a singularly overriding factor, in determining the totality of the circumstances, but must be based on more than unfounded apprehensions and the means chosen must be necessary to fulfill the asserted interest.

- Clarify that "totality of the circumstances" may include any or all of the factors deemed relevant by *Gingles*, including the Senate Factors.

- Clarify that partisan motives cannot be an adequate justification for the challenged conduct, if a discriminatory result is the means chosen to meet those motives.

- Put an end to any doubt, as raised by the concurring opinion of Justices Gorsuch and Thomas that there is a private cause of action for a Section 2 violation, as every Circuit Court of Appeals has held.

Mr. COHEN. Thank you, Professor Rosenberg.

I will now recognize myself under the 5-minute Rule and proceed with questioning.

Professor Stephanopoulos, the Brnovich majority is, in my opinion—and I would like to know your opinion—activist and not textural. Would you agree with describing their opinion as an activist decision?

Mr. STEPHANOPOULOS. Thank you, Chair Cohen, for that question. Yes, I would absolutely agree with that assessment. There is a real irony in the current Court's conservative self-description as modest, restrained, textualist, when every line of Brnovich—you can read the insertion of the court's own conservative ideology—that the five factors as we have discussed, are plucked out of thin air. They are not rooted in the actual language of section 2. Every one of them reflects the Court's hostility to the mission of the Voting Rights Act, which is ending racial inequities in American elections.

Mr. COHEN. In some ways, I think of it as being analogous to *Plessy* v. *Ferguson*. Plessy was the—after we had ended reconstruction with the 1976 Hayes-Tilden agreement that was a pox on both political parties. The Court in *Plessy* v. *Ferguson* said separate but equal.

Is this kind of like that in a way, Professor Stephanopoulos, in that they are saying that if it affects certain voters similar to majority voters, in that if they have some problems and the minority has some problems, and it is going to make not much of a discrimination, that it is okay?

Mr. STEPHANOPOULOS. Well, that is a fairly inflammatory analogy, and I don't—

Mr. COHEN. I know. You are not.

Mr. STEPHANOPOULOS. I wouldn't say that the current measures are really the equivalent of Jim Crow. I think they are more fairly described as Jim Crow-light as opposed to Jim Crow 2.

The intent and the massive racial disparities of the real Jim Crow era I don't think are present here, but nevertheless, we have a host of nominally neutral restrictions of voting, that one after another end up causing predictable and substantial racial disparities.

These aren't the huge racial disparities of the late 19th century or the early 20th century, which is why I don't think that this is a Jim Crow 2.0 era. We do see a proliferation of measures that do, in fact, disproportionately and unnecessarily make it harder for minority citizens to vote.

Mr. COHEN. Do you agree with Professor Rosenberg that this is basically a canary in a coal mine, and it portends future cases being interpreted and construed in the same manner?

Mr. STEPHANOPOULOS. I would say it is more than a canary in a coal mine. This is the coal mine itself on fire. This isn't a portent of bad things that might happen in the future. This is the bad things happening right now.

Mr. COHEN. If there are these problems that we can foresee coming as the VRA is eroded, Congress needs to Act to amend the Court rules. Do you have any suggestions on what we need to do in amending the law?

Mr. STEPHANOPOULOS. Yeah. I would recommend following the path that Justice Kagan laid out in her dissent, which is to say that two factors above all are critical in section 2 vote denial cases. Those are, number one, does some regulation of voting cause a statistically significant racial disparity; and if so, number two, is that practice really necessary to achieve some important State interest.

Not all neutral voting regulations would fail under this test, not by a long shot, but some would, the ones that are producing large inequities that can't be justified. Those practices would properly be eradicated. That is exactly what the VRA was meant to accomplish.

Mr. COHEN. Professor Rosenberg [inaudible] consideration that the Court majority read into section 2 is the degree to which a voting Rule departs from local standard practice when section 2 was amended in 1982.

Do you think Congress intended the [inaudible] to remain the standard by which burden is placed on minority voters by present-day voting practices should be forever compared? Was that a time that we just froze in history and there will be no improvements, no changes, no more progress? It is just basically 1982.

Mr. ROSENBERG. Thank you. I assume that was addressed to me, Chair Cohen. I am not a professor as much as I would like to be Professor Stephanopoulos' colleague.

Justice Alito, in his opinion where he set 1982 as what he called a benchmark against which to compare present-day discrimination just doesn't make sense. Not only doesn't make sense, but Justice Alito never explained why. In response to Justice Kagan's dissent, he simply said, "well, it is useful, it is useful because it is useful." That tautology just doesn't really do the job.

As Justice Kagan said in her dissent, section 2 was intended to eradicate discrimination, not to set it in amber, and that is precisely what using a 1982 benchmark does.

If one thing we have been taught by history it is that those who want to discriminate on the basis of race in voting, they change with the times. When at one time, of course, only White people were allowed to vote, and after that, it was declared unconstitutional in the 15th Amendment. Different means were used by those people. They changed with the times.

Poll taxes, literacy tests. After those were rendered unconstitutional, they changed with the time. Closing polling locations, complicated registration systems, voter ID laws that they knew would affect Black and Latino voters much more severely than it would affect White voters.

History also teaches us that those who would discriminate against people of color in their voting will change as those voters of color change the way they vote.

So, now we have voters of color using absentee ballots in places like Georgia more—at a greater rate than do White voters. What happens? Suddenly, the Georgia legislature decides it is going to start clamping down and adding unnecessary and burdensome restrictions on absentee ballots.

States cannot be led to believe that they can get away with voter suppressive legislation by pointing to what happened 40 years ago.

Mr. COHEN. Thank you, Mr. Rosenberg.

That concludes, plus a little bit of extra of my time, and I now recognize Ms. Fischbach for 5 minutes or a little more.

Ms. FISCHBACH. Mr. Chair, I would just ask, Ranking Member Johnson has joined us, and I would defer to him if he had questions before me.

Mr. JOHNSON of Louisiana. I do. I thank you so much and thank you for filling in today.

I apologize for being late to the hearing. I just attended a funeral of a fallen law enforcement officer in my district, and it is quite a sad occasion.

I thank the witnesses for being here. I have questions for Mr. Popper.

Let me just start and say, one of the laws in question in the Brnovich case requires voters to vote in their own precinct. In your estimation, I am wondering if you could tell us how widespread is this requirement across the country, and specifically, is it only limited to States with Republican majority legislatures?

Mr. POPPER. I am sorry for your loss and for your State's loss.

Mr. JOHNSON of Louisiana. Thank you.

Mr. POPPER. It most definitely is not. I wanted to touch on something that Mr. Rosenberg—I almost said Professor Rosenberg—touched on, and that is that when you have a voting Rule that has a disparate impact even by a tiny fraction, you can construct a case on that, prior to Brnovich at least, in which you say, we will take that tiny difference and we will call that a disparate impact, and we will look at historical conditions, having nothing to do with voting in many cases, and we will say that there is a section 2 violation.

That was the old rubric. That is how you get to sue over what are ordinary regulations.

Now, what the Supreme Court identified was the trick that is being played, out-of-precinct voting is used by 1 percent of minority voters, and that means that 99 percent vote in the right precinct.

Out-of-precinct voting is used by 99.5 percent of nonminority voters. This is in Arizona, and this is in the decision. So, in other words, 99 percent minority, 99.5 percent nonminority, well, what do you conclude from that? Minority voters vote out of precinct at twice the rate of nonminority voters.

It is technically true, but the difference between 99 and 99.5 percent is not something that people should sit up and take notice about. It is fair as a part of the totality of the circumstances analysis to say that in the totality of the circumstances, that difference is not appreciable enough.

I would also add that every court paid lip service to the idea, and in many cases it was just lip service. They said that while all courts—I am sorry—that disparate impact is not enough to make a section 2 claim.

You need more. You need some sort of showing. You need some sort of Senate factor evidence, and it has always been unclear what you needed for vote denial.

Well, while saying that, Arizona is a pure disparate impact case when it comes to out-of-precinct voting. The difference between 99.5 and 99 percent was enough to get you a violation, and that is what was reversed by the Supreme Court.

Many other ordinary seeming restrictions, for example, straight-ticket voting, that is only allowed in six States. Six States. So, a State can be sued for trying to restrict straight-precinct voting—or straight-ticket voting.

Procedures and provisions that have vast majority usage throughout the United States are subject to a section 2 claim, particularly if they have been passed and then there is an attempt to repeal them.

Congressman, before you joined us, I had pointed out that both Texas and Georgia have early voting, and Connecticut and Delaware do not.

Now, a perverse incentive of the pre-Brnovich jurisprudence is that it would behoove Connecticut and Delaware never to pass early voting, because if they do, they will always be subject to a section 2 claim if they try to repeal it.

Mr. JOHNSON of Louisiana. Well, and let me just say on the earlier issue, speaking of Connecticut and Delaware, if I am correct—correct me if I am wrong—at least 25 States do not count ballots cast in the wrong precinct, and that includes Connecticut, Vermont, Delaware, and Hawaii. So, it is not just Republican jurisdictions, of course; this is a widespread understanding.

We are running out of time. Let me ask you real quick. Would you agree that the Brnovich decision effectively at least begins to put a stop to partisans using courts to throw out policy decisions they simply disagree with?

Mr. POPPER. It certainly does. As I explain in my testimony, there was a majority decision—and while we were sitting here, I identified nine courts of appeals that would have ruled basically as the Supreme Court did in Brnovich—nine—or decisions. I am sorry. Some of them were double from the same court.

It was this minority decision that was allowing these kinds of, in my view, outrageous claims to proceed against what are very ordinary rules based on the tiniest discrepancies.

Mr. JOHNSON of Louisiana. I don't have the clock, Mr. Chair, so stop me, but do I have time for one more question?

Mr. COHEN. Your time has expired, sir.

Mr. JOHNSON of Louisiana. All right. I yield back. Thank you. Appreciate the accommodation.

Mr. COHEN. You are legislating while driving.

Mr. JOHNSON of Louisiana. I have parked.

Mr. COHEN. Oh, are you? Good. Thank you.

Next is Mr. Nadler.

Chair NADLER. Thank you, Mr. Chair.

Mr. Morales-Doyle, in the Brnovich majority's view, one relevant factor courts should consider when evaluating section 2 vote denial claims is the legitimate State interest justifying the challenged voting rule. The Court observed that rules that are supported by strong State interests are less likely to violate section 2. The Court then pointedly noted that one strong and entirely legitimate State interest is the prevention of fraud.

We all agree that preventing fraud is a legitimate State interest, but we are now living in the age of the big lie, and there is no evidence that widespread voting fraud is a significant problem that affects the outcome of elections. Meanwhile, State after State is en-

acting discriminatory voting practices in the name of election integrity protection.

Are you concerned that this State interest factor opens the door to a lower court upholding a facially neutral yet discriminatory voting practice without even requiring the State to show evidence of widespread voting fraud?

Mr. MORALES-DOYLE. Yes, I am concerned about the way lower courts will apply this guidepost. The fact is that the Senate factors, and the test that has been applied for years under section 2, already took account of State interests. It asked courts to look at whether the connection between the State interest offered up and the policy in question was tenuous or not, and if it were tenuous, then a court might look more skeptically at the policy in question.

Courts have always taken State interests into account. What is troubling about the majority's opinion is how quick the Court is to accept the idea that these policies are actually ruling out fraud and necessary to do so, when actually we have States, including Arizona, are extremely effective at stopping fraud already. That is why we don't see widespread voter fraud.

The Federal Cyber and Infrastructure Security Agency said the 2020 election was the most secure election in American history. This just isn't a problem that needs fixing, and so courts should be skeptical when disparate burdens are being placed on voters of color to pursue it.

Chair NADLER. Thank you. Now, Justice Kagan's dissent notes that a State is not even required to demonstrate that a challenged practice is the least restrictive means for the State to achieve its interests. Can you explain why this is so problematic?

Mr. MORALES-DOYLE. Right. So, as I said, most States are already effectively stopping fraud, and so the idea that States need to add more and more restrictive rules on top of what they already have to accomplish that goal is just not true.

So, what Justice Kagan would say is, if you say that you are preventing fraud but there is a way to do it that doesn't stop people of color from voting, that doesn't impose a disparate burden on people of color, then you should go that route. Frankly, that route, in many instances, would be, leave things as they are, keep the status quo. We are doing a great job of stopping fraud.

Under the majority's opinion you can say fraud, and, unfortunately, they are giving courts a lot of room to run with that excuse and allow discriminatory burdens to persist.

Chair NADLER. Is there any textual basis or legislative history that supports the Court reading this so-called guidepost into section 2?

Mr. MORALES-DOYLE. No. I think the Senate factors from Congress made clear that they did want to take State interests into account, but nothing in the legislative history or in the text suggests that the courts should be so deferential to State interests that they allow claims of fraud—or claims of fighting fraud to trump the goal of rooting out discrimination.

The point of section 2 is to eradicate race discrimination in voting.

Chair NADLER. Thank you.

Mr. Rosenberg, in 1982, Congress amended section 2(a) of the Voting Rights Act, and they added section 2(b) to reverse the Supreme Court's decision in the *City of Mobile* v. *Bolden*, which had interpreted the previous version of section 2 to prohibit only intentionally discriminatory voting rules.

How did courts previously interpret this legislative history up until the Supreme Court's decision in Brnovich? How is the Brnovich decision a significant departure from the Court's previous understanding of this history?

Mr. ROSENBERG. Oh, in every which way, Chair Nadler. The focus of the post-1982 amendment was on effects, irrespective of State justification. Results, effects. That was what the 1982 amendment was all about. What the Brnovich decision does is not only veer from there, but it veers from the totality of the circumstances, a standard that was put into the statute at that time. The focus, as the court in Gingles interpreted that, and it was applied consistently on the interaction between the challenged conduct and historical social and economic discrimination. That is not even mentioned by Justice Alito when he goes through his various guideposts. He doesn't talk about the key factor of the interaction between the challenged conduct and the effects of historical discrimination.

Chair NADLER. Thank you. I see that my time has expired. I yield back.

Mr. COHEN. Thank you, Mr. Nadler.

Now, it comes to one of those moments when the Chair has to make a great decision. Should he recognize Mr. Jordan, who is next up in line to Mr. Johnson, or should he go back to Ms. Fischbach, who was so nice as to yield her time to Mr. Johnson.

Mr. JORDAN. I thank you, Mr. Chair. Go to Ms. Fischbach, and I will wait till the next round.

Mr. COHEN. Thank you, sir.

Ms. Fischbach, you are on.

Ms. FISCHBACH. Well, thank you Mr. Chair, and thank you, Mr. Jordan. I appreciate that. I appreciate you deferring to me.

I just have got a question for Mr. Popper. Justice Alito identified a nonexhaustive list of circumstances for courts to consider as part of the totality of the circumstances review, and I think you touched on it a little bit in your testimony. One of those circumstances is the size of the burden imposed by the voting rule. Justice Alito did note that mere inconvenience is insufficient, and an equally open voting system must tolerate the usual burdens of voting.

Can you expand a little bit on what that means?

Mr. POPPER. Well, yes. In many ways—thank you for your question. I am sorry. I was organizing something else.

In many ways, it is an application of what we call the Anderson-Burdick test, I mean, where you have an administrative burden to a civil right or to voting. You assess the importance of the State interest, and you assess how much of an inconvenience it is. If it is a severe inconvenience, that is one thing. If another point that the court mentions, if there are other ways for you to get done what you need to get done as a voter, you have to take that into account. You have to be practical about this.

I think that in a way, or perhaps directly, what the Court was doing was combating the rash or what it called a proliferation of

lawsuits of little merit that had sprung up, the cottage industry of challenging any restriction of early voting, any restriction of registration or same-day registration, any restriction of voting in precinct, particularly if you once passed the law one way and you are looking to put it back the other way.

I would refer to the atmosphere in Texas. In Texas, consider the law that they are fleeing to avoid passing provides a free voter ID to anyone who doesn't already have one.

What you have to do to identify your absentee ballot is put the number of the voter's driver's license or the number of their free ID or the last four Social or certify that you don't have these numbers.

In Texas, you also—they provide an opportunity for voters using absentee ballots who did it wrong to go back and correct a defect in their ballot, so it is not tossed. You sure don't see that covered in the newspapers, but it is in the statute. They require an assister, someone who gives assistance to give their name.

Now, in California, it can be anyone knocking on your door. It could be—they don't have to say where they are from. They don't have to give their first name, their last name, their real name. They don't have to register. You will never discover, once you receive the ballot in California, that it was collected. Okay?

This merely asks a person to put down their name. What is so shameful about that? So, that is the atmosphere in Texas.

In Georgia, the atmosphere is that you get 3 weeks of early voting. You still get no-excuses absentee ballot. You still get that. In other words, any reason you can have such a ballot. Voters have to submit a State ID number. It does away with signature matching on mail ballots, but signature matching on mail ballots had long been considered problematic and is unclear that it favored one side or the other. It was just hard to tell a bunch of untrained poll workers how to make that assessment. That is the atmosphere in Georgia.

Voting is easy in Ohio. It is easy in Arizona. Frankly, it is easy in most of the country.

So, I think I may have strayed from your question. My apologies.

Ms. FISCHBACH. Well, and maybe—we have just got a couple of seconds left here, but I would just like to kind of follow up and maybe ask you, what is a usual burden of voting as they use that term?

Mr. POPPER. Well, as they said in Crawford, you have to get in your car and go vote. It is not a usual burden to get in your car and drive for 3 hours, and there is lawsuits about that. It is not a usual burden. It is a usual burden to have to show up in person. You can't say, COVID to one side, COVID-style elections to one side. You can't say that that imposes a terrible burden.

I would add too that what was appropriate for COVID may no longer be appropriate and repealing the COVID-related absentee rules isn't discrimination.

Ms. FISCHBACH. Thank you very much, and I am out of time.

Mr. Chair, I yield back.

Mr. COHEN. Thank you. I appreciate it.

Next person will be Congresswoman, Professor, Mr. Raskin.

Mr. RASKIN. Mr. Chair, thank you very much. Thanks to all the witnesses for your testimony.

Our colleague, Representative Fischbach, started by saying that she didn't know anyone who wants to stop people from voting, but even Mr. Popper referred to the history of Jim Crow and the vicious disenfranchisement that took place then. Of course, we all know about the history of grandfather tests and poll taxes and literacy tests and character tests and so on.

Professor Stephanopoulos, let me start with you. Do you agree with Ms. Fischbach's suggestion that the determination to keep people from voting ended at some point, say, between the 1960s and 1970s and today, or does that history continue right up until today?

Mr. STEPHANOPOULOS. I think that history, unfortunately, continues. I think that when politicians regulate the electoral process, they are highly, highly aware of what the likely composition of the electorate is going to be as a result of their regulations. They are also highly, highly aware of which voters are likely to support their party and their candidates and which voters are likely to oppose them.

Mr. RASKIN. Let me ask you about, that if I could? If there is a determination to keep, say, African Americans from voting or Latino voters from voting, not out of racial animosity but because of a prediction, a fair prediction that they will disproportionately support the other party, is that itself race discrimination within the meaning of the Voting Rights Act?

Mr. STEPHANOPOULOS. Well, whether or not it is a discriminatory racial intent, it absolutely is a disparate racial impact if the effect of that regulation is to deny the vote to a larger proportion of African-American or Latino or Asian-American citizens. I think it is complicated when the true motivation is partisan whether one can also label that as invidious racial intent.

Mr. RASKIN. Mr. Rosenberg, let me come to you. The striking thing to me today is that voter fraud is the slogan of people trying to commit voter fraud. One great example of that is Donald Trump's famous hour-long phone call with the Republican secretary of State of Georgia, Brad Raffensperger, in which he twisted his arm, needled him, begged him, and tried to coerce him into finding just 11,780 votes. That is all he was looking for. All of this was done publicly in the name of preventing fraud, preventing voter fraud against him. He was claiming in his big lie that the election was being stolen from him while he was trying openly to commit voter fraud by getting an election official to manufacture and concoct votes that didn't exist.

So, what is the public supposed to do when people who are trying to commit voter fraud are invoking voter fraud as the reason for their disenfranchisement in voter suppression schemes?

Mr. ROSENBERG. Invoking fraud prevention has been used historically to justify discriminatory practices for well over a century. It was used to justify poll taxes. It was used to justify literacy tests. It was used to justify early poll closings. Then it was transmogrified into this feeling that, well, the public is demanding action because they have concerns about election integrity.

What happened is that the people who are purveying this myth of voter fraud are fabricating the justification. They are fabricating the results of the surveys because they are the ones who are out there telling the people that there is fraud when there is not fraud. Then they survey the people, and the people say, oh, we have terrible concerns because there is voter fraud. Then they use those basically false survey results to justify voter suppressive legislation.

Mr. RASKIN. Thank you. Thank you.

Professor Stephanopoulos, let me come back to you. You pointed out that the Brnovich decision is not a constitutional decision; it is a question of statutory interpretation. You are saying that Congress could override the invention of these five guideposts or signposts that were pulled out of a hat by Justice Alito, which we definitely could.

Has the Congress had success before in reversing reactionary decisions by the Supreme Court giving pinched or erroneous interpretations of civil rights statutes by rewriting those statutes or does the Court keep on moving the football at every point?

Mr. STEPHANOPOULOS. Yes. Congress absolutely has had luck at doing that, not just with respect to the Voting Rights Act, but also with respect to the Civil Rights Act. So, section 2's amendment in 1982 is a great example of Congress stepping in to reverse a mistaken court decision, and so is Congress' amendment of the Civil Rights Act of title VII to reverse a Supreme Court decision that overly narrowed the disparate impact theory under title VII of the Civil Rights Act.

Mr. RASKIN. I appreciate that.

My time is up, Mr. Chair, and I yield back to you.

Mr. COHEN. Thank you, Mr. Raskin.

We will now yield to Mr. Jordan for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chair.

I would just come to Mr. Popper. I think in your opening statement, you said there were a couple other States you wanted to highlight and, frankly, didn't have the time in your 5 minutes, which I understand. We always run out of time in these hearings. So, I was just going to give you a chance to talk about—I think one of the States you mentioned was Texas. I actually forget the other State that you may have referenced, but I will give you a few minutes to talk about those States and what is happening there and how it relates to our subject matter.

Mr. POPPER. Thank you, Congressman. I think I did speak about them. I managed to sneak them in somewhere.

Mr. JORDAN. Okay.

Mr. POPPER. I was merely making the point I thought that in Texas, the atmosphere is so loaded in favor of getting people to the polls. It is in Georgia, too. These two bills, I find almost universally that the people who are the angriest about them—and I don't include anyone on this Committee. I am just saying that in other conversations, there are people who haven't read this legislation.

Mr. JORDAN. If I could, Mr. Popper. My understanding is in both States, there was already great access, amazing access for people to vote, which is what we want. We want to make it easy to vote, hard to cheat. It is a cliche statement, but it is accurate. So that was already the case, but these two pieces of legislation actually

make it easier for all residents in Georgia and Texas to get to the polls. Is that accurate?

Mr. POPPER. I would say it is accurate. When you are talking about being able to on your absentee ballot certify that you don't have the necessary numbers or provide that—if you have an ID number or if you have a Social Security number. Who doesn't have a Social Security number? There are people who don't, but if you don't, all you have to do is certify that you don't have one.

Mr. JORDAN. Yeah.

Mr. POPPER. Who is this going to scare off?

I would like to say just a word about voting fraud, Congressman, if I could.

Mr. JORDAN. Sure. Go ahead.

Mr. POPPER. Voting fraud is hard to detect by its nature. It is not heavily penalized. My favorite example of this, no doubt, and I almost regret the day when they repealed this because I will lose the talking point. In Vermont, double voting is a $200 penalty, no jail time, and selling maple syrup without a license is $5,000 and a year in jail. Okay. Why would you invest any State resources in ferreting out double voting in those circumstances? There are States that admit they don't even track these.

That to one side, what I hate, what I don't like is when you say that it is rare, because you take the total number of votes and you divide it by the instances of fraud. Is that how you measure securities fraud? There are only a couple of hundred securities fraud cases per year, but how many millions or is it billions of securities transactions?

Mr. JORDAN. Right.

Mr. POPPER. Everyone knows that just because of the nature of the enterprise, you need rules. Okay. Kitchens should be clean. Voting should be clean. Securities should be clean.

I also am mystified as to why people are aware that people will cheat at baseball. I read a book about people cheating at sumo wrestling. I have cheated at solitaire, and no one will cheat at something as consequential as voting.

Mr. JORDAN. Yeah. Thank you. Thank you, Mr. Popper.

Mr. Chair, I yield back.

Mr. COHEN. Thank you, Mr. Jordan.

Who won those solitaire games, Mr. Popper?

Mr. POPPER. I did. I paid.

Mr. COHEN. Thank you.

Ms. Ross, you are recognized for 5 minutes.

Ms. ROSS. Thank you, Mr. Chair, and thank you very much for having this important hearing so close after the Supreme Court's decision. We have a lot of work to do on voting rights this session of Congress, and it is very important that we understand the law and do the right thing.

I want to talk about the State of North Carolina. As a former civil rights attorney and a State legislator in North Carolina, I have seen up close the hidden ways in which States and localities can restrict citizens' rights to vote, and I have fought against them.

I want to talk briefly about *Thornburg* v. *Gingles*, a seminal Supreme Court case that has been referred to, which upheld a ruling from the Federal District Court in North Carolina. Decided in

1986, it solidified the 1982 amendments to the Voting Rights Act, and utilized several of the factors enumerated in the 1982 Senate report for how to consider potentially discriminatory laws.

The Supreme Court affirmed what the district court in my home State had found, that the essence of a section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause inequality in voting opportunities.

In Brnovich, the Court turned away from this interpretation, narrowed the scope of section 2, and subverted Congress' efforts to clarify the Voting Rights Act. I fear that this decision will embolden State legislatures, including my own, to enact more restrictive voting laws, and I have reason to have this fear.

This is exactly the effect that Shelby County had on North Carolina's State legislature, which enacted a restrictive voter ID law and repealed other laws that had expanded the franchise, and disproportionately targeted African Americans with surgical precision. This monster voter suppression law was later struck down after years of litigation.

Congress must Act to protect the bedrock of our American democracy, and I am grateful for the suggestions from our witnesses on how we can do that. I look forward to voting on several of these suggestions.

My first question goes more to the specifics of this effects test, and it is for all the witnesses, though I would like Mr. Stephanopoulos to begin.

Justice Kagan cited the Senate report, which we have talked about, which was amendments to the VRA which, incidentally, was signed into law by President Reagan. She wrote, "Congress meant to eliminate all discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups, and that broad intent is manifest in the provision's broad text."

Do you agree that section 2 manifests Congress' broad intent to eliminate all voting discrimination?

Mr. STEPHANOPOULOS. I do. I think that with section 2, Congress aimed to eliminate all significant and unnecessary racial disparities in our elections, and many of the Court's factors in Brnovich point in exactly the other direction, frustrating Congress' intent and the language of the statute.

Ms. ROSS. Thank you. It looks like Mr. Rosenberg has something to add.

Mr. ROSENBERG. Yes. I would just add, and we set forth in our written testimony, that a basic canon of statutory construction is remedial statutes must be construed broadly, and Justice Alito and the majority in Brnovich did just the opposite here.

Ms. ROSS. Okay. My second question goes back to this attempt to freeze in time what election laws were in 1982 by the Supreme Court, and I find that particularly upsetting because we have made so much progress on election laws, and Congress even has expanded ways to enhance the franchise, particularly with the Help America Vote Act.

Do you think that there is any justification for saying that Congress has not indicated that we want to move forward with helping America vote that the Supreme Court could hang its hat on?

For any of the Members. Yes, Mr. Morales-Doyle.

Mr. MORALES-DOYLE. No, I don't think there is any basis for that. I appreciate you bringing up North Carolina as an example. The case you referenced which found that the North Carolina legislature was targeting African-American voters with almost surgical precision involved changes to a number of laws rolling back early voting, getting rid of same-day registration, things that didn't exist in North Carolina in 1982. Yet, that, as the Fourth Circuit Court of Appeals held, is how States now intentionally go after voters of color, that no one could question after that Court's finding that that was discriminatory, and yet, using 1982 as a benchmark would send you down the wrong path. That is why these guideposts are so misguided.

Ms. ROSS. Thank you.

Mr. Chair, I yield back.

Mr. COHEN. Thank you, Ms. Ross.

Is Mr. McClintock with us? If not, is Mr. Roy with us? If not, is Mr. Owens with us? If not, is Mr. McCarthy with us? Well, how about Ms. Cheney? She doesn't count.

All right. Mr. Hank Johnson is not with us. I think Ms. Garcia is next. Ms. Garcia with us? Is she having technical difficulty?

Ms. Sheila Jackson Lee. You are here.

Ms. JACKSON LEE. I am here.

Mr. COHEN. You are here, and you are glorious and resplendent and recognized.

Ms. JACKSON LEE. I am delighted. Thank you so very much.

Thank you for, as has been said earlier, for you holding this important hearing. I almost wish I could transpose myself to the United States Senate to be able to have at least a 7–10-minute moment of inquiry.

Before I start, let me indicate that I have heard so many people offer the name of John Lewis on the other side or the other body, including Republicans. We happen to be this weekend naming a vessel, a Navy vessel, after John Lewis. More than a tribute, but I hope most of the witnesses on this panel would agree with me that the greatest tribute to John Lewis is to protect the fundamental right to vote and to reinforce the basis of the 1965 Civil Rights Act, which is the 15th Amendment.

So, my inquiries will go along those lines, but let me also indicate that because of the inertia and inaction of the Senate, faith leaders and Black women gathered yesterday, of which I participated virtually, along with the Democratic Texas delegation who, contrary to Governor Abbott, is working very hard to be able to insist that there must be action in the Senate. To the extent that our Chair of the Congressional Black Caucus, Joyce Beatty, was arrested, some of us will intend to do such in the coming weeks, because John Lewis did believe in nonviolent civil disobedience, and we must act. I am very glad that the House is acting, Chair Cohen is acting, as we move on this very important legislation.

I also want to follow up and pose a question. Mr. Popper, I believe, I just want to make a comment, and I would like Mr. Rosenberg, Mr. Morales-Doyle to focus on these questions. I heard the line of questioning about section 2 that it basically is used for par-

tisan activity, partisan challenges, and is, in essence, of its own self a contributor to fraud.

Would you respond to the value of section 2 and that in your course of service have not seen section 2 be used and manipulated by individuals who are trying to be partisan? Was the voter ID legislation partisan when, in the State of Texas, there were at least eight counties without DPS officers that would allow Hispanics and others to access with a voter ID?

Would you go first, Mr. Rosenberg? My time, I know, is short. Mr. Rosenberg.

Mr. ROSENBERG. Yes. Thank you, Congresswoman Lee, and thank you for that question. I will say two things very quickly. Number one, you cannot use discrimination against people of color to achieve partisan goals. That is unlawful. It is unconstitutional, period. Texas photo ID law, which I litigated, we proved that it was done with discriminatory intent and discriminatory results.

I will turn it over to Mr. Morales-Doyle.

Ms. JACKSON LEE. Mr. Morales, would—thank you, sir. Mr. Morales, would you take up the point of what I believe Mr. Popper said, is that section 2 has only been used by those of us that engage in partisan litigation. Do you believe that is what section 2 has been used for?

Mr. MORALES-DOYLE. No, I do not. Thank you for the question. Mr. Rosenberg, I, and many of our colleagues do this work at nonpartisan organizations. Our goal is not to accomplish some partisan outcome; our goal is to protect voting rights. That is the point of section 2.

I would remind everyone that section 2 and its amendments in 1982 were passed by bipartisan agreement in both Houses of the legislature. The amendments in 1982 were signed into law by President Reagan. There is an amicus brief filed in this case in the Supreme Court by Congressional Staffers on both sides of the aisle from 1982 talking about their intent in passing this law and how it was being subverted by many of the arguments being made, which the Supreme Court ultimately took up.

This is not a partisan goal that we have here. The goal is to protect voting rights. I think sometimes folks are too quick to give the people who are passing these restrictive laws a pass, suggesting that they are acting only with partisan intent. We are talking about race discrimination. This law is meant to protect against race discrimination.

Ms. JACKSON LEE. Unfortunately, it was obliterated by the Arizona case.

Let me quickly raise the point of the big lie and the continuous representation of my colleagues on the other side of the aisle of fraud in the 2020 election where 150 million people voted.

Let me quickly ask one question for Mr. Rosenberg and Mr. Doyle and the other gentleman whose name I don't have right now because of where I am. In any event, can you just give me a yes or no question. Mr. Rosenberg, you can go first. Is the filibuster part of the Constitution? Yes or no.

Mr. ROSENBERG. It is not part of the Constitution.

Ms. JACKSON LEE. Mr. Morales-Doyle?

Mr. MORALES-DOYLE. No, it is not.

Ms. JACKSON LEE. Mr. Popper? Is it?

Mr. POPPER. No, it is not.

Ms. JACKSON LEE. There is another witness there that doesn't show up on my screen. Forgive me. Can you answer, sir?

Mr. STEPHANOPOULOS. Yeah. Of course, the filibuster is not part of the Constitution.

Ms. JACKSON LEE. So let me just go back to Mr. Rosenberg and Mr.—

Mr. COHEN. The gentlewoman's time has expired.

Ms. JACKSON LEE. Pardon me?

Mr. COHEN. Your time has expired.

Ms. JACKSON LEE. Can I ask for it on the record and then I will look for an answer later?

Mr. COHEN. Sure.

Ms. JACKSON LEE. All right. I would be interested in knowing—and this is a global question. The fundamental rights of voters that has been evidenced by our President and pursuant to the 15th Amendment, I would like an answer as to whether the filibuster, which is a rule, would be superior to that right, therefore blocking fundamental voting rights legislation from going forward in either—well, in the United States Senate. I am going to put that on the record.

I thank you, Mr. Chair, and I hope I will be able to get answers from these distinguished witnesses. Thank you.

Mr. COHEN. Thank you, Ms. Jackson Lee.

Ms. Garcia is not with us, so if that is the case, we have expired our time. We thank the witnesses extremely for their thorough testimony and their help. We appreciate your appearing.

Without objection, all Members have 5 legislative days to submit additional written questions, and Ms. Jackson Lee has submitted her first one, but they will come in writing as well, or additional materials for the record.

With that, the hearing is adjourned. Thank you.

[Whereupon, at 2:31 p.m., the subcommittee was adjourned.]

APPENDIX

The Case for Restoring and Updating the Voting Rights Act

A Report of the American Civil Liberties Union 2021

Submitted for the Record in Support of Legislation to Enhance the Voting Rights Act

July 14, 2021

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Introduction

With approximately eight million members, activists, and supporters, the American Civil Liberties Union (ACLU) is a nationwide organization that advances its mission of defending the principles of liberty and equality embodied in our Constitution and civil rights laws. For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in the courts, legislatures, and communities to defend and preserve the Constitution and laws of the United States. The ACLU's Voting Rights Project, established in 1965, the same year the Voting Rights Act was enacted, has filed more than 300 lawsuits to enforce the provisions of our country's voting laws and Constitution. The goal of the Voting Rights Project is to ensure that all Americans have access to the franchise and can participate in the political process on an equal basis. The Voting Rights Project has historically focused much of its work on combating efforts targeting the political rights of minority voters, who continue to face grave threats to their voting rights. In addition to our work in the courts, the ACLU's Washington Legislative Office has led the ACLU's efforts to develop and strengthen federal laws protecting the right to vote for decades. In 2015, the ACLU launched its National Political Advocacy Department, and, through our work so far, has launched a 50-state campaign to protect and expand access to the ballot nationwide.

More than a century ago, the Supreme Court famously described the right to vote as the right that is preservative of all others.[1] We are not truly free without self-government, which requires a vibrant participatory democracy where there is fair and equal representation for everyone. The right to vote is an essential act of self-determination—indispensable to the promise of "government of the people, by the people, and for the people."

Yet since our nation's founding, racial and ethnic minorities have fought pernicious efforts to block them from political representation. After the Civil War and Reconstruction period—when newly emancipated Black men were, for a brief period, able to exercise their political rights and hold elected office—more than a hundred years of state-sanctioned voting discrimination followed, which prohibited Blacks and other minority groups from political participation.[2] By the turn of the twentieth century, official and systematic

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

[2] African Americans did not possess the right to vote prior to the Civil War. With the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, African Americans and others were granted the right to vote free from racial discrimination, U.S. CONST. amend XV, § 1; *see* U.S. CONST. amend. XIV, § 1, and both amendments gave Congress express power to enforce the amendments with appropriate legislation. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend XV, § 2. But after a brief period of federal enforcement action following the Civil War, Congress and the executive branch abandoned those efforts. For the next hundred years, Southern states undertook sweeping efforts to disenfranchise African Americans and other minority voters by continuing to enact procedural barriers and discriminatory prerequisites to voting, such as literary tests, and through state-sanctioned violence. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 69-93 (Basic Books 2000); *see also* Section I *infra* for more on the historical background leading up to the ratification of the Fourteenth and Fifteenth Amendments and adoption of the Voting Rights Act of 1965.

attempts to block people from voting based on their race or ethnicity had greatly intensified. Many whites feared the exercise of political power by minority voters, and ideologies of racial hierarchy were popular concepts undergirding the structure of numerous state constitutions and for entrenching white supremacy.[3]

Congress enacted the Voting Rights Act in 1965 after trying and failing for almost a century to remedy the affliction of racial discrimination in the voting process and the failure to dismantle state-sanctioned disenfranchisement of African Americans in particular.[4] The most powerful enforcement tool in the Voting Rights Act is the federal preclearance process, established by Section 5. It requires states and political subdivisions with the worst records of voting discrimination to federally "preclear" voting changes, either administratively with the Attorney General or through a declaratory judgment action in federal court. Section 4(b) of the Act established the criteria identifying jurisdictions that would be subject to preclearance, i.e. the "coverage formula." Section 5 requires covered jurisdictions to demonstrate that a proposed voting change does not have a discriminatory purpose or effect before the change can be enforced.

Since its enactment in 1965, Section 5 has had the greatest impact in dismantling voting discrimination of any congressional action, successfully blocking more than 1,000 instances of discriminatory election rules advanced by state and local officials that would have weakened minority voting power or blocked minority voters from casting a ballot altogether.[5] Section 5 also served as a strong deterrent against countless discriminatory voting changes from going forward.[6] Because of its effectiveness, Congress reauthorized Section 5 four times, most recently in 2006.[7] At the time, Congress concluded that although there was significant progress in reducing barriers to voting, there was continued evidence of a pattern of racial discrimination in the covered jurisdictions that justified reauthorization of Section 5's protections.[8]

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[3] Many of these state constitutional provisions remain today and continue to lock in unequal representation and political conditions. *See, e.g., Evidence of Current and Ongoing Voting Discrimination: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019) (testimony of Derrick Johnson, President, NAACP, discussing historical context of provision in the Mississippi Constitution requiring majority vote requirement for both the state's popular vote and state House districts for any statewide office and resulting exclusion of successful Black candidates for statewide office); JEFF MANZA AND CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 59-66 (Oxford Univ. Press 2008) (discussing racial origins of felon disenfranchisement rules and finding clear correlation between racial threats—the theory that dominant groups perceive suhordinate groups as a threat when subordinate groups gain power to the detriment of the dominant group—and the adoption of state felon disenfranchisement rules).

[4] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

[5] See H. R. REP. NO. 109-478, at 22 (2006).

[6] *Id.* at 24.

[7] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

[8] *See* H.R. REP. NO. 109-478, at 2, 21-53 (2006).

Despite the vast legislative record compiled by Congress—which included 21 hearings spanning two years and more than 15,000 pages of record evidence[9]—on June 25, 2013, in the case *Shelby County v. Holder*, the Supreme Court held that the coverage formula in Section 4(b) of the Act was unconstitutional,[10] rendering Section 5 preclearance inoperative. In a 5-4 decision, the Supreme Court held that while "voting discrimination still exists," the coverage formula was unconstitutional on the basis that it had not been updated in 40 years, and was untethered from current conditions of discrimination.[11] Therefore, the formula could no longer be used as a basis for identifying jurisdictions for preclearance. The majority opinion also expressed concerns with the coverage formula's disparate treatment of states. Chief Justice John Roberts posited that these federalism concerns could be alleviated if the coverage formula is sufficiently tailored to the problem it targets; in that case, he maintained that it was not.[12] So while the preclearance requirement itself remains constitutionally valid, Section 5 is generally deprived of force or effect without a valid coverage formula to identify the jurisdictions subject to preclearance.

With this decision, voters lost the most powerful mechanism to block racially discriminatory voting changes and the ability to learn of potentially discriminatory changes prior to their enforcement. Sure enough, after the *Shelby County* decision, states unleashed a torrent of voting restrictions. Since the 2013 decision, the ACLU, its affiliates, and scores of other voting rights groups, organizers, and litigators have been battling an onslaught of discriminatory voting changes in the courts, legislatures, and local government bodies. Evidence uncovered during the course of litigation and other advocacy demonstrates that many of the voting changes have been aimed squarely at voters of color, preventing them from casting their ballots or to minimize their collective voting strength. The most conservative federal courts in the country have struck down several of these laws as racially discriminatory, but often only after years of these laws being in force, during which hundreds of elections took place.

Importantly, in the *Shelby County* ruling, the Supreme Court invited Congress to update the Voting Rights Act and ensure that the statute is responsive to voting discrimination where it occurs in the country, stating: "We issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[13] Thus, Section 5's continued operation depends on Congress updating the Voting Rights Act in a manner that complies with the Court's decision, and Congress continues to have strong constitutional grounding to do so. For decades, the Supreme Court has recognized that Congress acts at the apex of its constitutional power when legislating to exercise the enforcement power granted to it by the Fourteenth and Fifteenth Amendments to block racial discrimination in the voting process.[14] Congress also has broad power under the

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[9] *See Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

[10] *Shelby Cty v. Holder*, 570 U.S. 529, 557 (2013).

[11] *Id.* at 551-52.

[12] *See id.* at 553.

[13] *Id.* at 557.

[14] *See generally City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Elections Clause of Article 1, Section 4, of the Constitution to regulate the conduct of federal elections.[15]

Congress must therefore continue to exercise its constitutional authority, because strong federal protections for the right to vote remain vital in modern America. As demonstrated in this report, voting practices denying or abridging the right to vote on account of race, ethnicity, and language minority status continue in a manner that is flagrant and widespread. The *Shelby County* decision, in halting the preclearance remedy, was itself highly consequential to creating the current conditions of voting discrimination minority voters are now contending with. As Justice Ruth Bader Ginsburg forecasted in the opinion's dissent, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[16] Today we stand caught in the downpour: immediately following *Shelby County*, many states, particularly those formerly covered by preclearance, passed voter suppression and other discriminatory voting laws unlike anything seen in a generation.[17]

These attacks have come as part of backlash to record voter turnout. In part due to the public health and safety accommodations in response to the COVID-19 pandemic, which allowed more voters than ever before to cast a ballot by mail, voter turnout surged in the 2020 elections.[18] In particular, Asian-American and Latinx voter turnout rose dramatically to historic highs, while Black voter turnout rebounded from a dip in 2016. Minority voters played key roles in the outcomes of various elections, particularly the presidential race in Georgia, Pennsylvania, and Arizona, as well as two run-off elections for U.S. Senate in Georgia in January 2021.[19] Unfortunately, in the wake of this historic turnout – which spanned political parties and demographic groups – various states responded by making it harder to vote, passing omnibus bills that restrict access to the franchise in ways big and small.

And while the tactics used by officials to discriminate have shifted in light of legal developments and political conditions, the strategies have remained the same, such as efforts to dilute minority voting strength, limit voting opportunities, and advance laws that, while neutral on their face, are intended to deny or abridge the rights of minority voters.

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[15] *See* U.S. CONST. art. 1, § 4; *see also Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *Foster v. Love*, 522 U.S. 67, 69 (1997).

[16] *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J. dissenting).

[17] 4 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/; 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/researchreports/voting-laws-roundup-may-2021.

[18] *See* William H. Frey, *Turnout in 2020 Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows*, Brookings (May 5, 2021), https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/.

[19] *See id.*; Nate Cohn, *Why Warnock and Ossoff Won in Georgia*, N.Y. Times (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/upshot/warnock-ossoff-georgia-victories.html.

Additionally, racially polarized voting – that is, when membership in a racial or ethnic groups strongly predicts voting behavior – has actually intensified under current political conditions, increasing the returns for bad actors for perpetrating racial discrimination at the ballot box.[20]

Without congressional action, official acts of voting discrimination will persist against minority voters. Tools are needed to block discriminatory voting changes before they impact voters, because once the right to vote is lost it is virtually impossible to remedy. Overturning prior elections to rectify the ills of the past is difficult to administer, disfavored by courts, and politically complicated. Racial discrimination also infects public confidence in free and fair elections among our citizenry at a time when our election system is viewed with particular scrutiny by the public. Decisive congressional action is needed to protect voters who continue to be targeted by cynical attempts to thwart their political voices and to ensure our electoral system is fair and constitutional.

This report is divided into four parts. First, we provide a brief overview of the conditions leading to the passage of the Voting Rights Act of 1965 and review the Act's provisions, as well as changes made in subsequent reauthorizations to update its protections. Second, we provide an analysis of current law governing Congress's power to enact remedial legislation to address voting discrimination after *Shelby County*. Next, we provide information on current conditions of voting discrimination since the last reauthorization of the Voting Rights Act in 2006 based on the ACLU's litigation experience and other advocacy work and identify weaknesses in current enforcement mechanisms. Finally, we review key provisions of the Voting Rights Advancement Act we believe are minimally necessary to provide protection against voting discrimination. Included with the report are two appendices. Appendix A lists the ACLU's voting rights cases, where the organization provided direct representation or participated as amicus. Appendix B is the written testimony of Sophia Lin Lakin, Deputy Director of the ACLU's Voting Rights Project, submitted for the House Judiciary Committee's June 29, 2021 hearing, "The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Elections Observers, and Notice," which supplements this report's discussion of the efficacy of Section 2 litigation and barriers to winning injunctive relief sufficient to protect voting rights.

I. HISTORICAL OVERVIEW

> *Since the franchise was first guaranteed to Negroes, there has been a history in the South of efforts to render the guarantee meaningless. As devices have been struck down, others have been adopted in their place. An understanding of this history is relevant to an understanding of the progress of Negroes in the*

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[20] *See* Ed Kilgore, *Racially Polarized Voting Is Getting Extreme in the South*, N.Y. MAG: INTELLIGENCER (Dec. 6, 2016), http://nymag.com/intelligencer/2016/12/racially-polarized-voting-is-getting-extreme-in-the-south.html; Harry Enten, *It's Much Harder To Protect Southern Black Voters' Influence Than It Was 10 Years Ago*, FIVETHIRTYEIGHT (Dec. 5, 2016), https://fivethirtyeight.com/features/its-much-harder-to-protect-southern-black-voters-influence-than-it-was-10-years-ago/; LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 9-13 (March 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

> *South under recent Federal laws and the obstacles which they face in achieving full and free participation in the electoral and political process.*[21]

This was the observation of the first report by the U.S. Commission on Civil Rights, issued in 1968, reviewing the impact of the Voting Rights Act of 1965. Although intended to be a reflection of lessons from the past, the report foretells challenges that continued for decades since and persist today. This history remains important to Congress's inquiry into current conditions of discrimination at the ballot box, why official acts of discrimination continue against minority voters, and the malign adaptability of racial voting discrimination.

a. Reconstruction and post-Reconstruction

After the Civil War, the federal government attempted a series of actions to ameliorate unequal conditions of free Blacks and emancipated slaves during the Reconstruction period. The government began that work by recasting our nation's concept of citizenship and the rights associated with it. The most important acts were the ratification of the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments.[22] The Thirteenth Amendment abolished slavery,[23] the Fourteenth Amendment established the guarantees of citizenship, due process, and equal protection against state encroachment,[24] and the Fifteenth Amendment prohibited the denial or abridgment of the right to vote of citizens on the basis of race, color, or previous condition of servitude.[25] The Fourteenth and Fifteenth Amendments endowed all citizens with the right to vote free from racial discrimination. Importantly, both expressly gave Congress the power to enforce their guarantees through legislation, placing the responsibility for enforcing their guarantees of equal treatment squarely on Congress' shoulders.[26]

At the same time, Black Americans joined organized movements, conventions, and petition drives to demand suffrage and protest their exclusion from the franchise.[27] In 1867, the federal government began Reconstruction initiatives in earnest to rebuild the South and reorient power structures away from the traditional white Southern governments. Congress and the executive branch undertook a range of enterprising actions to implement the change in legal status of Black Americans and combat attacks on their political rights. A centerpiece of federal action was the Reconstruction Act of 1867, which required former Confederate states to ratify the Fourteenth Amendment and amend their state

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[21] U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A STUDY OF THE POLITICAL PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESS IN 10 SOUTHERN STATES SINCE THE PASSAGE OF THE VOTING RIGHTS ACT OF 1965 1 (May 1968), https://www2.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf [hereinafter USCCR 1968 REPORT].

[22] The Civil War Amendments were adopted notwithstanding extreme resistance and controversy surrounding their provisions. *See* KEYSSAR, *supra* note 2, at 77-83.

[23] U.S. CONST. amend XIII, § 1.

[24] U.S. CONST. amend XIV, § 1.

[25] U.S. CONST. amend XV, § 1.

[26] *See* Section II *infra*.

[27] *See* KEYSSAR, *supra* note 2, at 70.

constitutions to require Black male suffrage in order to be readmitted to the Union. This effectively required Southern governments to guarantee full civil and political rights for Black males.[28] This and other enforcement measures allowed hundreds of thousands of Black men to register to vote in the 10 states of the Old South.[29] The integration of Blacks into political life had a radical effect on the composition of federal, state, and local government bodies.[30] The former Confederate states sent 16 African Americans to serve in Congress, including two U.S. Senators from Mississippi.[31] African Americans held positions in state legislatures and statewide offices across the South, including as secretaries of state and lieutenant governors in Mississippi and South Carolina.[32] At one point, over half of the representatives in South Carolina's lower legislative chamber were Black.[33] And, for the first time in American history, African Americans held positions of political power in their communities as school board officials and justices of the peace.[34] This new representation had some of the anticipated impact on civic and political life as the region's first public school systems were established, bills were introduced to improve voting rights and governing institutions, and efforts were made to rebuild and diversify the shattered Southern economy. [35]

Predictably, severe opposition throughout Reconstruction challenged the dramatic increase in political power of African Americans.[36] At the end of Reconstruction in 1877, dynamic

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[28] *See* Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428.

[29] *See* Enforcement Act of 1871, An Act to enforce the rights of citizens to vote in the several states of this union, ch. 99, 16 Stat. 433 (imposing criminal penalties for interfering with voting and authorizing federal courts to appoint supervisors of elections to protect the voting process from interference); Enforcement Act of 1870, An Act to enforce the Right of Citizens of the United States to vote in the Several States of the union and for other Purposes, ch. 114, 16 Stat. 140 (implementing the Fifteenth Amendment by prohibiting discrimination in voting or voting qualifications on the basis of race, color, or previous condition of servitude, imposing penalties for violations, and granting district courts power to enforce the law's provisions).

[30] *See* USCCR 1968 REPORT, *supra* note 21, at 1-3.

[31] *Id.* at 3.

[32] *Ibid.*

[33] *Id.* at 2.

[34] *See id.* at 3.

[35] *See ibid.* (highlighting advances in public education and government reform and in Georgia, Florida, and North Carolina with leadership by Black legislators).

[36] Despite the progress during Reconstruction, African Americans' access to voting and political participation continued to be a target of intimidation, interference, and violent reprisals throughout the South. *See* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA 84 (Harvard Univ. Press 2018). One horrific example documented by the House Committee on Elections recounted over 2,000 people that were killed or injured in Louisiana in the weeks prior to 1868 Presidential election in midnight raids, secret murders, and open riots. USCCR 1968 REPORT, *supra* note 21, at 4 (citing JOINT SELECT COMMITTEE ON THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, REPORT OF THE JOINT SELECT COMMITTEE APPOINTED TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, SO FAR AS REGARDS THE EXECUTION OF LAWS, AND THE SAFETY OF THE LIVES AND PROPERTY OF THE CITIZENS OF THE UNITED STATES AND TESTIMONY TAKEN, 42D CONG., 2D SESS., REP. NO. 41, pt. 1, at 21-22 (1872)). Intimidation and interference were also widespread when African Americans went to vote on Election Day when harassment and intimidation occurred

shifts in political power largely resulting from the political backlash and a national economic downturn led the federal government to abandon its efforts to advance the promise of the Fourteenth and Fifteenth Amendments.[37] As a result, states were once again free to use legal and extralegal methods to reestablish a racially segregated system. Once readmitted to the Union, white supremacist leaders in Southern states rewrote their state constitutions and intensified efforts to establish a rigid system of racial separation and hierarchy between whites and Blacks.[38] In the absence of political representation, the infamous Black Codes and similar discriminatory laws flourished, resegregating Blacks from civic life throughout the former Confederacy.[39] The political backlash wiped out most of the gains achieved during the Reconstruction period, foreshadowing a destructive trend in America's pursuit for an inclusive democracy.

As a key source of civic and political empowerment, the suffrage of Black people was a focal point of the backlash. Between 1890 and 1910, every state of the former Confederacy had enacted laws that were race-neutral in language but intended to disenfranchise Black voters en masse.[40] Southern states established literacy tests and enacted "grandfather clauses"—exempting individuals whose grandfathers were eligible to vote—to allow illiterate whites to bypass literacy tests,[41] in effect preventing only former slaves and their descendants from voting.[42] Other disfranchising practices were just as widespread, including poll taxes, vouchers of "good character," disqualification for "crimes of moral turpitude" (i.e. felony disenfranchisement laws), residency requirements, and property qualifications to register to vote.[43] Although some rules were explicit in excluding Blacks from political participation, such as rules instituting white primary elections,[44] most of the laws and practices were "color-blind" facially but fashioned or systemically administered in a way to eliminate the ability of Black citizens to vote or diminish their ability to vote on an equal basis.[45]

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near polling sites and election fraud committed by those intending to block African Americans' votes from counting. *Id.* at 4-7.

[37] *See* LICHTMAN, *supra* note 36, at 88-94.

[38] *See id.* at 94.

[39] *See id.* at 97. In addition to legislative acts targeting Black political rights, widespread acts of terror, such as white mob violence and lynchings, were rampant throughout the South and went unprosecuted. The Ku Klux Klan, a white supremacy terrorist organization formed after the Civil War and similar paramilitary organizations used violence as a tool to strategically intimidate Blacks and deny them an equal place in American society. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 342 (Harper & Row 1988).

[40] *See* LICHTMAN, *supra* note 36, at 94.

[41] *See* USCCR 1968 REPORT, *supra* note 21, at 6, 8, 10; LICHTMAN, *supra* note 36, at 94.

[42] *See* USCCR 1968 REPORT, *supra* note 21, at 6 n.54; LICHTMAN, *supra* note 36, at 94.

[43] LICHTMAN, *supra* note 36, at 94.

[44] *See* USCCR 1968 REPORT, *supra* note 21, at 6-8 for brief summary on white primaries and *Smith v. Allwright*, 321 U.S. 649 (1944), which held white primaries unconstitutional.

[45] *See generally Giles v. Harris*, 189 U.S. 475 (1903) (upholding tests and other requirements required by Alabama law to register to vote that were discriminatorily administered against Black

These efforts caused the percentage of registered Black voters to drop swiftly. In Louisiana, for example, Black voter registration dropped from 130,334 in 1896 to 5,320 in 1900 and to 1,342 by 1904, representing a 96% decrease in Black registration.[46] In South Carolina, Black registration decreased from 92,081 in 1876 to 2,823 in 1898, and in Mississippi the decrease dropped from 52,705 in 1876 to 3,573 in 1898.[47] Black presidential turnout in the 11 former Confederate states dropped from an average of 61% in 1880 to 2% in 1912.[48] By the 1950s, the voter registration rate of Blacks in the South remained steadily low due to the extreme nature of suppressive legal and extralegal tactics, such as in Alabama and Mississippi where the registration rates were 5.2% and 4.4%, respectively.[49]

b. Congressional efforts to address voting discrimination prior to 1965

With the beginnings of the civil rights movement in the 1950s, Congress reengaged in efforts to advance protections for African American voting rights for the first time since the end of Reconstruction. Congress's first attempt was the Civil Rights Act of 1957, which established the U.S. Commission on Civil Rights to examine issues of racial discrimination in the voting process and recommend corrective measures.[50] The law also enacted a federal prohibition against voter intimidation, coercion, or interference, gave the Attorney General the power to sue to enjoin such acts, and established the Civil Rights Division at the Department of Justice.[51] Congress made another effort with the Civil Rights Act of 1960, which gave federal courts authority to issue special orders declaring individuals qualified to vote if a pattern or practice of voting discrimination in a particular area was found, and required local officials to retain and provide registration and voting records to the Attorney General upon request to help identify patterns of discrimination.[52] Finally, the Civil Rights Act of 1964, among its many new protections, prohibited jurisdictions from imposing different voting qualifications on individuals within the jurisdiction and also prohibited discrimination in the voter registration process.[53]

However, the ability of these bills to protect the right to vote suffered from a structural deficiency: despite strong federal protections, after-the-fact enforcement proved extremely

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citizens in practice on the basis that the practices were neutral on their face and applied to all citizens); U.S. COMMISSION ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 4-19 (May 1965), https://www2.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf.

[46] USCCR 1968 REPORT, *supra* note 21, at 8.

[47] John Lewis and Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 107 (1972) (citing BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 111 (J. Grant, ed. 1968)).

[48] LICHTMAN, *supra* note 36, at 96 (citing KENT REDDING AND DAVID R. JAMES, ESTIMATING LEVELS OF MODELING DETERMINANTS OF BLACK AND WHITE VOTER TURNOUT IN THE SOUTH, 1880 TO 1912, HISTORICAL METHODS 34 (2001)).

[49] *See* H.R. REP. NO. 89-439 (1965).

[50] Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101-105, 71 Stat. 637.

[51] *Id.* at §§ 111, 121, 131.

[52] Civil Rights Act of 1960, Pub. L. No. 86–449, §§ 301, 601, 74 Stat. 90.

[53] Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241.

ineffective against the widespread practices and devices utilized across the South to prevent African Americans from registering to vote, voting, or having their votes count. In 1963, the U.S. Commission on Civil Rights reported that the six years of enforcing the new federal voting rights laws were "ineffective" at solving the problems they were aimed at addressing, citing the inherent delays in the judicial process.[54] U.S. Attorney General Nicholas Katzenbach cited the "tortuous, often-ineffective pace of litigation" in his testimony before Congress in 1965.[55] In evaluating the adequacy of their efforts under the Civil Rights Acts of 1957, 1960, and 1964, Congress concluded that "[e]xperience has shown that the case-by-case litigation approach will not solve the voting discrimination problem...The inadequacy of existing laws is attributable to both the intransigence of local officials and dilatory tactics, two factors which have largely neutralized years of litigating effort by the Department of Justice."[56]

c. The Voting Rights Act of 1965

It was in this context that Congress came to understand that prophylactic measures were necessary for federal legislation to effectively "banish the blight of racial discrimination in voting."[57] The Voting Rights Act is broadly viewed as one of the most successful pieces of civil rights legislation enacted by Congress and was the culmination of decades of struggle to claim fundamental rights and liberties for all citizens derived from the ballot box. The tipping point for decisive federal action occurred when Alabama State Troopers viciously attacked a group of civil rights activists, led by Congressman John Lewis, as they marched from Selma to Montgomery, Alabama, in peaceful protest of continued systematic denial of African Americans' suffrage. "Bloody Sunday," as it came to be known, happened on March 7, 1965, in Selma, Alabama. Days later President Lyndon Johnson, in a special joint session before Congress, announced the introduction of a bill "designed to eliminate illegal barriers to the right to vote," "to strike down restrictions to voting rights in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote," "eliminate tedious, unnecessary lawsuits which delay the right to vote," and "ensure that properly registered individuals are not prohibited from voting."[58] Two days later, on March 17, Congress introduced the Voting Rights Act of 1965, and after several months of deliberation on its provisions, President Johnson signed it into law on August 6.[59] Through the years, it

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[54] U.S. COMMISSION ON CIVIL RIGHTS, 1963 REPORT 25 (Sept. 1963), https://www2.law.umaryland.edu/marshall/usccr/documents/cr11963a.pdf.

[55] H.R. REP. NO. 89-439 (1965); *Hearing on the Proposed Voting Rights Act of 1965 Before the House Comm. on the Judiciary*, 98th Cong. (1965) (statement of Attorney General Nicholas deB. Katzenbach).

[56] S. REP. NO. 89-162 (1965).

[57] *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

[58] Lyndon Baines Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965), H.Doc. 117, 89th Cong., 1st sess.

[59] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). Section 2 was later amended to include language minorities as a protected class. Voting Rights Act Amendments of 1975 § 206.

has undergone several reauthorizations and amendments to update its protections and to respond to current conditions of discrimination.[60]

As initially enacted, the law advanced several strategies to stamp out rampant efforts in the South and elsewhere to disenfranchise African Americans and other minorities. First, it established a permanent, nationwide ban on discriminatory voting practices or procedures. Codified in Section 2 of the Act, this provision prohibits states or local jurisdictions from adopting any voting qualifications, prerequisites, standards, practices, or procedures that result in the denial or abridgement of the right to vote on account of race or color.[61] Section 2 is enforceable by both private plaintiffs and the Attorney General and extends to claims of racially discriminatory results, in addition to discriminatory purpose.[62] At the time the Voting Rights Act was being proposed and debated, Section 2 was understood to closely match the guarantees of the 15th Amendment, that is the right to vote without denial or abridgement on the basis of race.[63]

The 1965 Act also permitted the Department of Justice to send federal examiners to certain jurisdictions to supervise the registration of voters and to certify election observers to help ensure compliance with federal laws.[64] These provisions proved hugely effective at increasing the number of registered voters and for increasing voter turnout in the South and elsewhere. The 1965 Act also temporarily suspended voting tests and devices, such as literacy tests, in covered jurisdictions[65]—a prohibition that became nationwide in 1970[66]

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[60] *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

[61] Voting Rights Act of 1965 § 2

[62] In 1982, after the Supreme Court decided *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which a plurality of the Court held that Congress intended for Section 2 to extend only to claims of discriminatory intent, Congress amended Section 2 to expressly provide for discriminatory results claims. *See* Voting Rights Act Amendments of 1982 § 3.

[63] *Voting Rights: Hearing on S. 1564 before the S. Comm. on the Judiciary*, 89th Cong. 208 (1965). The Supreme Court would later impute a requirement that in lawsuits under Section 2, plaintiffs would have to prove that such denial or abridgement was intentional, though Congress would amend the Act shortly afterward to undo this. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 65 (1980) (plurality); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

[64] Voting Rights Act of 1965 §§ 6-9.

[65] Voting Rights Act of 1965 § 4. The Act initially defined "tests or device" as any requirement that a person, as a prerequisite for voting or registration for voting, (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or knowledge of any particular subject, (3) possess good moral character, or (4) prove qualifications by the voucher of registered voters or members of any other class. *Id.* The Act was later amended to include as a voting test or device English-only elections where at least 5% of the voting age citizens in a jurisdiction are members of a single language minority. *See* Voting Rights Act Amendments of 1975 § 203.

[66] Voting Rights Act Amendments of 1970 § 6.

and permanent in 1975.[67] It also banned poll taxes[68] and imposed criminal and civil penalties for individuals seeking to deprive others of the right to vote.[69]

In addition to these comprehensive measures, the Act introduced Section 5, the most potent remedial measure contained in the Act's protections, which required federal preclearance of any proposed voting changes in covered jurisdictions before the changes were enforced. Section 5 required a rigorous review process where the onus was on the jurisdiction to demonstrate to either the U.S. the Attorney General or the U.S. District Court for the District of Columbia or that the change would not have the purpose or effect of denying or abridging the right to vote on the basis of race or color (or, per the 1975 amendments, on the basis of language minority status).[70] The jurisdictions subject to preclearance were identified through a coverage formula contained in Section 4(b) of the Act, which captured jurisdictions (i) that maintained any test or device for voting as of November 1, 1964, and (ii) where less than 50% of voting age residents were registered to vote or voted in the November 1964 general election.[71] Applying this same criteria to subsequent presidential elections, subsequent amendments to the Act in 1970 and 1975 added jurisdictions that maintained a voting test or device and where less than 50% of voting age residents were registered to vote or voted in the November 1968 and November 1972 presidential elections.[72]

In enacting the coverage formula, Congress ensured that certain jurisdictions that it had identified as having the worst records of voting discrimination were captured by the coverage formula.[73] Congress then established the criteria—low voter registration and turnout rates, plus the use of tests or devices—to capture those jurisdictions. In identifying the worst offenders, Congress undertook a comprehensive review, gathering what it deemed reliable evidence of voting discrimination.[74]

Congress gave special consideration to the Justice Department's unsuccessful efforts to effectively address discriminatory voting practices through litigation on a case-by-case basis, which, as explained, had largely failed to open the voting and registration process to Black voters. Confronted with hostile and opportunistic state and local officials, the Justice Department would prove one discriminatory practice or procedure to be unlawful and

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[67] Voting Rights Act Amendments of 1975 § 102.

[68] Voting Rights Act of 1965 § 10.

[69] *Id.* at §§ 11-12.

[70] *Id.* at § 5.

[71] *Id.* at § 4.

[72] Voting Rights Act Amendments of 1970 § 4; Voting Rights Act Amendments of 1975 § 202.

[73] *See South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966).

[74] *Id.* at 309-315 (reviewing Congressional findings from H.R. REP. NO. 89-439, 8-16 (1965); S. REP. NO. 89-162, pt. 3, 3-16 (1965)). From the start, Congress acknowledged the formula did not perfectly capture some places with terrible records of voting discrimination, such as Texas and Arkansas, and also included some places for which, at the time, Congress lacked evidence of discrimination, such as Alaska (even though Alaska, as Congress came to understand later, did in fact have a terrible record of voting discrimination against Alaska Native voters). To address this, Congress included the "hail in" and "bail out" mechanisms, discussed *infra*.

enjoin it, only to see a new one substituted in its place. Litigation would then have to commence anew to challenge the new practice or procedure, in an endless loop. Congress cited the impotency of its previous legislation aimed at protecting African American suffrage and the lack of effective litigation tools available to private plaintiffs and the Department of Justice:

> What has been the effect of the 1957, 1960, and 1964 voting rights statutes? Although these laws were intended to supply strong and effective remedies, their enforcement has encountered serious obstacles in various regions of the country. Progress has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process. Judicial relief has had to be gaged not in terms of months—but in terms of years. With reference to the 71 voting rights cases filed to date by the Department of Justice under the 1957, 1960, and 1964 Civil Rights Acts, the Attorney General testified before a judiciary subcommittee that an incredible amount of time has had to be devoted to analyzing voting records—often as much as 6,000 man-hours—in addition to time spent on trial preparation and the almost inevitable appeal. The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.[75]

To protect against overbreadth of the coverage formula, Congress included a provision for the termination of preclearance coverage, also known as "bail out," if a jurisdiction successfully files a declaratory judgment action in federal district court establishing the absence of voting discrimination for a period of years according to certain criteria set by the Act.[76] Congress also included a provision to protect against under-inclusiveness by giving federal courts the ability to retain oversight—i.e. "bail in" to preclearance review—of a jurisdiction for a period of time if a Fourteenth or Fifteenth Amendment violation warranted it.[77]

The preclearance process proved an immediate success, and it was dramatically more effective than previous legislation at mitigating, deterring, and blocking racially discriminatory voting practices. The results were measurable by significant increases in Black voter registration and turnout, particularly in the South. The May 1968 report by the U.S. Commission on Civil Rights examining Black voter participation since the Act's 1965 enactment concluded that "the Voting Rights Act has resulted in a great upsurge in voter registration, voting, and other forms of political participation by Negroes in the South."[78] In the Deep South, Black voter registration rates increased an average of 67% between 1964

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[75] H.R. REP. NO. 89-439, at 9–11 (1965); *see also South Carolina v. Katzenbach*, 383 U.S. at 328.

[76] Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (1965). This criteria was amended from initial enactment through reauthorizations. As initially enacted, "bail out" required a jurisdiction to show that it had not used a test or device denying or abridging the right to vote on account of race or color for in the five years preceding the filing of a declaratory judgment action.

[77] *Id.* at § 3(c).

[78] USCCR 1968 REPORT, *supra* note 21, at iii.

and 1968, and there was a dramatic overall increase in the rates of nonwhite voter registration measured in individual states covered by preclearance.[79] The Commission also reported large increases in Black voter turnout and a doubling in the number of Black elected office holders.[80]

Yet while great progress was made, state and local jurisdictions continued to innovate new ways to diminish the voting strength and political power of African Americans. The same U.S. Civil Rights Commission report concluded:

> Nevertheless, many new barriers to full aud equal political participation have arisen, including measures or practices diluting the votes of Negroes, preventing Negroes from becoming candidates, discriminating against Negro registrants and poll watchers, and discriminating against Negroes in the appointment of election officials. Intimidation and economic dependence in many areas in the South continue to prevent Negroes from exercising their franchise or running for office fully and freely.[81]

The Commission discussed at length the problem of dilution tactics that swiftly replaced the voting barriers that had been successfully weakened by the 1965 Act. Instead of thwarting the ability of African Americans to register or physically cast a vote, these measures aimed to dilute the individual and collective weight of votes cast by Black voters relative to white voters. These methods and devices included reapportionment and redistricting of voting boundaries, changes to methods of elections (e.g. conversion to at-large elections), and annexations of predominantly Black jurisdictions with predominantly white jurisdictions.[82] For example, after the surge in Black voter registration in 1966, Mississippi enacted 12 new laws altering the state's election laws to diminish the weight of votes cast by Black voters. These new laws included measures advancing at-large elections systems for county boards of education and boards of supervisors, as well as several reapportionment and redistricting statutes that diluted African American voting strength in Mississippi.[83] Alabama and local counties throughout the state pursued similar strategies in response to the substantial increase in Black voter participation.[84]

In each subsequent reauthorization of the Act, Congress determined that as minority voter participation grew, jurisdictions increasingly turned to practices that diluted minority

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[79] VALELLY, RICHARD. THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 4 (University of Chicago Press 2004). In the 10 states examined, the Commission reported that the nonwhite registration rate had increased: from 19.3% to 51.6% in Alabama; from 40.4% to 62.8% in Arkansas; from 51.2% to 63.6% in Florida; from 27.4% to 52.6% in Georgia; from 31.6% to 58.9% in Louisiana; from 6.7% to 59.8% in Mississippi; from 46.8% to 51.3% in North Carolina; from 37.3% to 51.2% in South Carolina; from 69.5% to 71.7% in Tennessee; up to 61.6% in Texas; and from 38.3% to 55.6% in Virginia. USCCR 1968 REPORT, *supra* note 21, at pp. 12-13, 223.

[80] *See* USCCR 1968 REPORT, *supra* note 21, at 14-15, 211-221.

[81] *Id.* at iii.

[82] *Id.* at 21-39.

[83] *Id.* at 21-23, 30-35.

[84] *Id.* at 23-25, 26-30.

voting strength. The nature of Section 5 objections and court decisions reflected this trend[85] Congress intended for Section 5 to keep up with the evolution of voting discrimination to prevent new schemes and practices that diminish minority voting power, recognizing "that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render votes meaningless.[86] In view of this, Congress continued to strongly endorse Section 5 as the appropriate remedy to protect against new devices adopted to discriminate and disempower.

d. Voting Rights Act amendments and reauthorizations: 1970-1982

Through periodic reauthorizations, Congress amended the Voting Rights Act several times to respond to newly identified and emerging voting discrimination practices, updating the Act's protections in 1970, 1975, 1982, 1992, and 2006.[87] In 1970, Congress updated the original 1965 coverage formula—originally capturing Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 28 counties in North Carolina[88]—to add voter registration and turnout data and the use of tests or devices by jurisdictions in the 1968 presidential elections as an additional coverage metric.[89] The 1970 amendments added Bronx, Kings (Brooklyn), and New York (Manhattan) counties in New York, counties in Wyoming, California, Arizona, and Idaho, election districts in Alaska, and towns in Connecticut, New Hampshire, Maine, and Massachusetts to the list of covered jurisdictions.[90] The temporary suspension of tests or devices contained in the 1965 Act became nationwide in 1970 and permanent in 1975. The 1975 amendments also amended the coverage formula again to include in the list of covered jurisdictions those which had voter registration or turnout below 50% and used a test or device in the 1972 presidential elections.[91]

The 1975 amendments also addressed discrimination directed at language minority voters for the first time. The Senate Judiciary Committee report explained:

> Title III is specifically directed to the problems of 'language minority groups,' that is, racial minorities whose dominant language is frequently other than English. [The Act] defines language minorities as persons who are 'American

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[85] *See* H.R. REP. NO. 109-478, at 2 (2006); S. REP. NO. 97-417, at 6 (1982); H.R. REP. NO. 94–196, at 10 (1975); S. REP. NO. 94-295, at 16 (1975); H.R. REP. NO. 91-397, at 3283 (1969).

[86] H.R. REP. NO. 97–227, at 17 (1982); *see also* H.R. REP. NO. 109-478, at 5 (2006).

[87] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

[88] H.R. REP. NO. 94-196, at 5 (1975). The 1965 coverage formula also captured four counties in Arizona, Honolulu County, Hawaii, and Elmore County, Idaho. *Ibid.*

[89] Voting Rights Act Amendments of 1970 § 4.

[90] S. REP. NO. 94-295, at 13 (1975).

[91] Voting Rights Act Amendments of 1975 § 202.

> Indian, Asian American, Alaskan Natives, or of Spanish heritage.'...The Committee singled out the 'language minority' groups for several reasons. First, as discussed above, illiteracy is all too often a product of racially discriminatory educational systems...Second, while the documentation of discrimination and non-responsiveness by the states was substantial with regard to the particular minority groups, the Subcommittee was presented with no evidence of difficulties for other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups.[92]

During the House Judiciary Committee's hearings, expert witness testimony relayed that language-minority groups were subjected to instances of discriminatory plans, annexations, and acts of physical and economic intimidation.[93] One member of Congress noted that "[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas."[94] Congress pointed to the problem that "states and local jurisdictions have been disturbingly unresponsive to the problems of these minorities" and determined that "[b]ecause so many states and counties have not responded to the situation confronting language minority citizens, the Committee believes strongly that Congress is obligated to intervene."[95]

Congress addressed this discrimination in a few ways. Congress added as a test or device the use of English-only elections where at least 5% of voting age residents in a jurisdiction are from a single language minority group.[96] These amendments resulted in the addition of Alaska (which had previously successfully bailed out of coverage), Arizona, Texas, several counties in California, Colorado, Florida, South Dakota, New York (which had also successfully bailed out), and two Michigan townships.[97] The 1975 amendments also added a requirement, commonly known as Section 203, that certain states and political subdivisions conduct bilingual elections. The requirement applies to covered jurisdictions in which a single language minority is more than 5% of the eligible voters and extends to noncovered jurisdictions where a language minority is more than 5% of the eligible voters and the illiteracy rate within the language minority is higher than the national average.[98] In 1992, Congress extended the language minority provisions for an additional 15 years, concluding that "the type of discrimination previously encountered by these language minority populations still exists, and the need for [Section] 203 continues" and that "without a

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[92] S. REP. NO. 94-295, at 38.

[93] *See* LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 36-37 (Univ. of Ok. Press 2010).

[94] *Id.* at 27.

[95] S. REP. NO. 94-295, at 39.

[96] *Id.* at § 203.

[97] S. REP. NO. 97-417, at 117 (1982); *see also* U.S. DEP'T OF JUSTICE, JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5, http://www.justice.gov/crt/about/vot/sec_5/covered.php.

[98] Voting Rights Act Amendments of 1975 § 203.

federal mandate, much needed bilingual assistance in the voting process, meant to ensure the guarantees of the Fourteenth and Fifteenth Amendments, may disappear."[99]

e. The 2006 reauthorization

In 2006, the Section 5 preclearance provision and Section 4 coverage formula were again set to expire. Congress undertook an exhaustive two-year investigation to examine and document evidence of ongoing discrimination in the covered jurisdictions. In its review, Congress built an extensive record of continuing discrimination in the covered jurisdictions since the 1982 reauthorization, largely consisting of evidence of vote dilution but also practices that denied or burdened the ability of minority voters to cast a ballot. The House Report cited evidence of continued discrimination by covered jurisdictions consisting of:

(i) over 700 objections interposed by the Justice Department between 1982 and 2006;

(ii) hundreds of voting changes that were withdrawn after requests for more information by the Justice Department;

(iii) successful Section 5 enforcement actions undertaken in covered jurisdictions since 1982 against election practices that would have diluted minority voting strength, such as annexations and at-large methods for electing officeholders;

(iv) the number of requests for declaratory judgments denied by the D.C. District Court;

(v) the continued filing of Section 2 cases that originated in covered jurisdictions, predominantly vote dilution cases;

(vi) litigation initiated by the Justice Department since 1982 to enforce sections 4(e), 4(f)(4), and 203 to protect language minority access; and

(vii) the tens of thousands of federal observers sent by the Justice Department to monitor elections between 1982 and 2006.[100]

The House evidence also included a nationwide analysis of Section 2 cases showing that, of all the successful Section 2 litigation undertaken in the previous 25 years, more than half had occurred in the covered jurisdictions, notwithstanding the powerful protection of Section 5 and the fact that the covered jurisdictions contained less than 39% of the country's total population.[101]

Congress concluded that violations continued to be concentrated in these areas and warranted reauthorization of Section 5 preclearance and the 4(b) coverage formula, finding

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[99] H.R. REP. NO. 102-665 (1992).

[100] H.R. REP. NO. 109-478, at 2 (2006); *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2, 120 Stat. 577 (2006).

[101] H.R. REP. NO. 109-478, at 53.

that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years."[102] The House Report concluded that the 2006 reauthorization represented "one of the most extensive legislative records in the Committee on the Judiciary's history,"[103] which included 21 hearings, testimony from 90 witnesses, and more than 15,000 pages of record evidence.[104] The ACLU submitted a report to Congress reviewing our voting rights litigation docket since the previous 1982 reauthorization.[105] The report—close to 900 pages and reviewing 293 cases in 31 states—concluded that purposeful discrimination was still widespread in places where it had historically existed against minority voters and that Section 5 continued to be a critical tool for blocking discriminatory voting practices.[106] The report also concluded there was a continuing pattern of racially polarized voting in the covered jurisdictions and hostility to minority political participation was an ongoing problem. Additionally with the Section 203 minority language assistance provision and federal observers provision due to expire, the ACLU presented evidence that both of these provisions were necessary to deter and remedy ongoing discrimination. Both provisions were reauthorized by Congress, passing the Senate with a vote of 98-0 and the House with a vote of 390-33.

II. CONGRESSIONAL AUTHORITY TO REMEDY RACIAL DISCRIMINATION IN VOTING AFTER *SHELBY COUNTY*

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which

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[102] Voting Rights Act Reauthorization and Amendments Act of 2006 § 2.

[103] H.R. REP. NO. 109-478, at 5 (2006).

[104] Brief for Respondent-Intervenors at 4, Shelby Cty v. Holder, No. 12-96 (2013) (citing H.R. REP. NO. 109- 478, at 5 (2006); S. REP. NO. 109-295, at 2 (2006)).

[105] MCDONALD, *supra* note 20.

[106] Examples from ACLU litigation of discrimination against minority voters presented in the report included: restrictive photo ID laws; discriminatory annexations and deannexations; challenges by white voters or elected officials to majority-minority districts; pairing Black incumbents in redistricting plans; refusing to draw majority-minority districts; refusing to appoint Blacks to public office; maintaining a racially exclusive sole commissioner form of county government; refusing to designate satellite voter registration sites in the minority community; refusing to accept "bundled" mailing voter registration forms; refusing to allow registration at county offices; refusing to comply with Section 5 or Section 5 objections; transferring duties to an appointed administrator following the election of Blacks to office; white opposition to restoring elections to a majority Black town; requiring candidates for office to have a high school diploma or its equivalent; prohibiting "for sale" and other yard signs in a predominantly white municipality; disqualifying Black elected officials from holding office or participating in decision making; relocating polling places distant from the Black community; refusing to hold elections following a Section 5 objection; maintaining an all-white self-perpetuating board of education; challenges to the constitutionality of the National Voter Registration Act; failure to provide bilingual ballots and assistance in voting; county governance by state legislative delegation; challenges to the constitutionality of the Voting Rights Act; packing minority voters to dilute their influence; and using discriminatory punch card voting systems. *Id.* at 16-19.

> *are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*
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> *McCulloch v. Maryland*, 1819[107]

The framers of the Fifteenth Amendment drew on Chief Justice John Marshall's precept to formulate the scope of Congress's enforcement powers under the Civil War Amendments.[108] Rooted in the Constitution's Supremacy Clause, this maxim defines Congress's expansive powers to enforce the Fifteenth Amendment's guarantee that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Congress continues to have sweeping power under the Fifteenth Amendment to identify and eradicate racial discrimination in voting. Regarding preclearance, an unbroken line of Supreme Court decisions going back a half century confirms that the Voting Rights Act's prophylactic remedy is a valid exercise of congressional power. As explained below, Supreme Court jurisprudence continues to forcefully uphold Congress's power to enforce the command of the Fifteenth Amendment to "banish the blight of racial discrimination in voting."

Additionally, although not addressed in *Shelby County*, Congress may act to protect minority voters through its expansive authority under the Elections Clause, which gives Congress supervisory power over federal elections. Though less prominent in previous congressional deliberations on the Voting Rights Act, the Supreme Court has consistently recognized Congress's broad powers under the Clause. Congress should consider this power as additional, considerable authority to the extent policies address federal elections.

a. Supreme Court review of the Voting Rights Act prior to *Shelby County*

The Voting Rights Act's heightened degree of federal oversight over local voting changes has been repeatedly challenged by jurisdictions seeking to free themselves from federal review—although they could also "bail out" of coverage by proving the absence of discriminatory practices for a period of years. In 1966, one year after the Act's passage, the Supreme Court applied a rational basis standard of review to uphold Section 5 preclearance and the Section 4 coverage formula as constitutional exercises of Congress's Fifteenth Amendment enforcement power in *South Carolina v. Katzenbach*[109] The Court expressed its use of the standard as follows:

> The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved power of the States, *Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting*...Section 1 of the Fifteenth Amendment declares that '(t)he right of citizens of the United States to vote shall not be denied or abridged by the

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[107] 17 U.S. 316 (1819).

[108] *See Shelby Cty. v. Holder*, 570 U.S. 529, 567 (2013).

[109] 383 U.S. at 301, 324 (1966).

> United States or by any State on account of race, color, or previous condition of servitude.' This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice....The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.[110]

The Court continued:

> [Section] 2 of the Fifteenth Amendment expressly declares that 'Congress shall have the power to enforce this article by appropriate legislation.' By adding this authorization, the Framers indicated that Congress was chiefly responsible for implementing the rights created in [Section] 1. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation...Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.[111]

The Court's analysis was highly deferential to Congress's evaluation of the problem targeted by the Act and its legislative judgment in enacting remedies to address them.[112]

Unsuccessful legal challenges followed each reauthorization in 1970,[113] 1975,[114] 1982,[115] and 2006.[116] With respect to the 1975 amendments, the Supreme Court issued a major

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[110] *Id.* at 325. (Emphasis added.)

[111] *Id.* at 326-26. The Court also mirrored the language of *McCulloch* when describing the power of Congress to legislate to enforce the Civil War Amendments: "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Id.* at 236 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-346 (1879)).

[112] Rational basis is a highly deferential standard of review and carries with it a strong presumption of validity of a legislative act. Judicial inquiry is typically limited to whether Congress has a rational basis for determining the problem and whether the means selected to address it are reasonable and appropriate. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964).

[113] *Georgia v. United States*, 411 U.S. 526, 534-35 (1973) (reaffirming *Katzenbach*'s holding that the Act was a permissible exercise of congressional power under the enforcement clause of the Fifteenth Amendment).

[114] *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (rejecting the City of Rome, Georgia's, contention that the Act exceeded Congress's Fifteenth Amendment enforcement power and that the Act violated principles of federalism).

[115] *Lopez v. Monterey Cty.*, 525 U.S. 266, 268, 283, 284-85 (1999) (rejecting California's argument that preclearance unconstitutionally violated state sovereignty and affirming that Congress's Fifteenth Amendment enforcement powers extend to protect against voting practices that are discriminatory in either purpose or effect).

[116] *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013) (finding the coverage formula under the Act unconstitutional); *Northwest Austin Municipal Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009)

ruling on Congress's Fifteenth Amendment enforcement powers in *City of Rome v. United States*. In that case, the City of Rome, Georgia, appealed the denial of preclearance of several annexations on multiple grounds, including by challenging the constitutionality of Section 5. The Court rejected the City of Rome's argument that preclearance violated federalism principles. It concluded that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[117] The Court reinforced *Katzenbach*'s holding that "the Fifteenth Amendment supersedes contrary exertions of state power" and again applied rational basis review to hold that "Congress has the authority to regulate state and local voting through the provisions of the Voting Rights Act."[118]

The *City of Rome* plaintiffs also argued that Section 5 could not constitutionally prohibit voting changes that had only a discriminatory effect and that the Fifteenth Amendment only prohibits laws enacted with a discriminatory purpose. The Court firmly rejected this argument, holding that Congress, in exercising its remedial powers under the Fifteenth Amendment, could prohibit voting changes that are discriminatory in effect to enforce the amendment's proscriptions.[119]

Up until the 2006 reauthorization, the Supreme Court acknowledged the preclearance process's uncommon intrusion into state and local policymaking but consistently upheld the constitutionality of Section 5 and the coverage formula because "the Fifteenth Amendment permits the intrusion."[120] Yet, even as the Court repeatedly upheld the Act's constitutionality, the Court increasingly narrowed the Act's reach over a series of decisions,[121] ultimately expressing skepticism regarding the continued viability of the coverage formula.

(raising "serious constitutional questions" relating to the Act's coverage formula and preclearance remedy).

[117] *City of Rome*, 446 U.S. at 179-180.

[118] *Ibid.*

[119] *Id.* at 173-77. In making this holding—that Congress can prohibit voting practices that have only a discriminatory effect—the Court essentially extended its reasoning in *Katzenbach* upholding the Act's ban on literacy tests in the covered jurisdictions as an appropriate exercise of congressional power, because the covered jurisdictions had imposed the tests to effectuate voting discrimination, even if applied and administered in a nondiscriminatory fashion. *Id.* at 176-77.

[120] *Lopez*, 525 U.S. at 284-85.

[121] *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 479–80 (2003) (determining that, in assessing whether a Section 5 violation has occurred, courts should consider factors beyond the traditional inquiry into minorities' ability to elect candidates of their choice); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (holding that Section 5 does not extend to purposefully discriminatory voting changes that are not enacted with a specific retrogressive purpose); *City of Mobile v. Bolden*, 446 U.S. 55, 58 (finding that Congress intended Section 2 to only proscribe purposeful voting discrimination) (1980). Each of these decisions were legislatively overturned by Congress in subsequent reauthorizations.

b. Current burdens, current needs, and the equal sovereignty principle announced in *Northwest Austin* and *Shelby County*

The Act's 2006 reauthorization was initially challenged in *Northwest Austin Municipal Utility District No. 1 v. Holder*.[122] In *Northwest Austin*, a small Texas utility district filed suit seeking relief under the Act's "bailout" provision, which allows political subdivisions to be released from preclearance if certain conditions are met which prove the jurisdiction has been discrimination-free for a period of years. The utility district argued in the alternative that if it was ineligible for bail out, Section 5 posed an unconstitutional intrusion into local sovereignty. A three-judge district court panel upheld the constitutionality of Section 5.[123]

The utility district appealed to the Supreme Court, and, in a departure from previous cases reviewing the Act, the Court surveyed favorable changes in voting patterns in covered jurisdictions since 1965 and remarked in dicta that, close to 50 years later, the "preclearance requirements and its coverage formula raise[d] serious constitutional questions."[124] The Court cited federalism concerns to aver that "a departure from the fundamental principle of equal sovereignty [among states] requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets"[125] and warned that "the [Act] imposes current burdens and must be justified by current needs."[126] The Court ultimately avoided the constitutional question by concluding that the utility district was eligible to bail out from coverage under Section 4(a) of the Act and made no holding regarding preclearance or the coverage formula.

Taking this strong signal from the Court regarding its view of the Act's constitutionality, a year after the *Northwest Austin* decision, Shelby County, Alabama, brought suit in the D.C. District Court against Attorney General Eric Holder after his objection to proposed voting changes within the county in *Shelby County v. Holder*. Unlike the plaintiff in *Northwest Austin*, however, Shelby County did not qualify for bailout. The county instead sought a declaratory judgment that Section 5 preclearance and the Section 4 coverage formula were facially unconstitutional and a permanent injunction against their enforcement. The district court ruled against the county and upheld the Act after finding that the legislative record from the 2006 reauthorization offered ample justification for Congress to reauthorize Section 5 and continue the Section 4(b) coverage formula.[127]

The D.C. Circuit Court of Appeals affirmed, agreeing with the district court's assessment that the legislative record amply supported reauthorization and that litigation under Section 2 remained, by itself, inadequate to protect the rights of minority voters within the covered jurisdictions, and accorded deference to Congress's judgment that preclearance was still necessary.[128] The D.C. Circuit focused its inquiry on "whether [the coverage formula],

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[122] 557 U.S. 193 (2009).

[123] *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, 573 F.Supp.2d 221 (D.D.C. 2008).

[124] *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. at 204.

[125] *Id.* at 203.

[126] *Ibid.*

[127] *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011).

[128] *Shelby Cty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012)

together with bail-in and bailout, continues to identify the jurisdictions with the worst problems."[129] After weighing the combined effectiveness of Section 2 lawsuits across the country with the deterrent effect of Section 5, the court concluded that the coverage formula continued "to single out the jurisdictions in which discrimination is concentrated," and therefore passed constitutional muster.[130]

On review by the Supreme Court, Chief Justice John Roberts' majority opinion directly took up the question of constitutionality but did not make a holding regarding Section 5. Instead, the Court ruled on the Section 4(b) coverage formula, finding it unconstitutional in light of current conditions. In doing so, Chief Justice Roberts announced two principles guiding the majority's decision, directly referring to the dicta from *Northwest Austin* noted above: *first*, the Voting Rights Act imposes current burdens that must be justified by current needs, and *second*, a departure from the fundamental principle of "equal sovereignty" of the states requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets.[131]

Chief Justice Roberts concluded that the statutory coverage formula did not meet these criteria because it was based on voter registration and turnout data and practices from the 1960s and 1970s, while voter registration and turnout in the covered states had risen dramatically and the practices upon which the coverage formula were based had since been banned.[132] The majority thus concluded that the coverage formula irrationally distinguished between the states "based on decades-old data and eradicated practices."[133] With respect to the legislative record, the majority identified the "fundamental problem" that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."[134] It further claimed that it was "not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today."[135]

The Court particularly scrutinized the disparate coverage formula as violating the principle of "equal sovereignty," repeatedly emphasizing that the disparate treatment of states must be sufficiently justified. The Court directed that, in order to serve the Fifteenth Amendment's purpose to ensure a better future, that "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions; it cannot rely simply on the past."[136]

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[129] *Id.* at 879.

[130] *Id.* at 883.

[131] *Shelby Cty. v. Holder*, 570 U.S. 529, 542 (2013).

[132] *Id.* at 551.

[133] *Id.*

[134] *Id.* at 554.

[135] *Id.*

[136] *Id.* at 553.

c. Reconciling *Shelby County* with existing Supreme Court precedent upholding the Voting Rights Act

Even after *Shelby County*, Congress acts at the zenith of its power when it enacts legislation to enforce the guarantees of the Fifteenth Amendment,[137] which "targets precisely and only racial discrimination in voting[.]"[138] In full, the Amendment reads:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.[139]

By affirmatively granting Congress authority to enforce its terms, the Fifteenth Amendment was "specifically designed as an expansion of federal power and an intrusion on state sovereignty."[140] It made Congress "chiefly responsible for implementing the rights created by the amendment."[141] The Voting Rights Act—particularly its preclearance system—reflects Congress's definitive attempt to remedy voting discrimination in the face of "'unremitting and ingenious defiance of the Constitution."[142] The Act's prophylactic approach reflects Congress's understanding of the continuing vulnerability of minority voting rights and that the sacred right to vote, once lost or abridged, is impossible to remedy. In adopting preclearance, Congress was also guided by the limits of previous legislation, including the Civil Rights Act of 1957 which authorized the U.S. Department of Justice to sue for injunctive relief on a case-by-case basis.[143] As discussed above, this proved inadequate to protect minority voting rights, leading Congress to create the preclearance structure that proved much more effective.

The *Shelby County* majority did not overrule, or even call into question, the prior holdings of *Katzenbach*, *City of Rome*, and other decisions by the Court upholding the constitutionality of the Voting Rights Act; indeed, Chief Justice Roberts insisted that the majority opinion did not conflict with those cases.[144] Accordingly, these cases should be read in alignment to the extent possible.

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[137] *See Hayden v. Pataki*, 449 F.3d 305, 359 (2d Cir. 2006).

[138] *See Shelby Cty. v. Holder*, 383 U.S. at 567 (Ginsburg dissenting).

[139] U.S. CONST. amend XV, § 1.

[140] *Lopez v. Monterey Cty.*, 525 U.S. 266, 282 (1999).

[141] *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

[142] *City of Rome v. United States*, 446 U.S. 156, 173-74 (1980) (quoting *Katzenbach*, 383 U.S. at 309.).

[143] *See* Part. IV, Pub. L. 85-315, 71 Stat. 634 (1957).

[144] *See Shelby Cty.*, 383 U.S. at 535, 545-46 (invoking *Katzenbach* to reinforce that preclearance is a "stringent" and "potent" remedy and "an uncommon exercise of congressional power," but could be justified by "exceptional conditions."); *see also id.* at 539 (referring to the Court's previous decisions upholding the constitutionality of the Act); *id.* at 544 (averring that *Katzenbach* rejected the notion

First, because *Shelby County* did not make a holding on Section 5, the preclearance process itself remains constitutional.[145] As indicated, an unbroken line of Supreme Court decisions going back more than 50 years confirms that the preclearance component is a valid exercise of congressional authority under the Fifteenth Amendment.[146] Rather, the *Shelby County* majority opinion concluded that the coverage formula that Congress adopted when it reauthorized Section 5 in 2006 irrationally relied on outdated data.[147]

Second, the majority opinion in *Shelby County* did not disturb established precedent that Fifteenth Amendment enforcement legislation must meet a rational basis standard of review.[148] While the majority opinion's focus on current needs and burdens to justify the coverage formula noticeably departed from prior decisions that were highly deferential to Congress, such as *Katzenbach*, it repeatedly invoked "rationality" as the proper metric to gauge the constitutionality of the coverage formula.[149] It also cited *Katzenbach* to reach its conclusion that the 1965 coverage formula was rational in practice and theory,[150] while the reauthorization of the 2006 coverage formula was irrational.[151]

Legislation ought to be found rational, and thus constitutional, so long as a new coverage formula differentiates among jurisdictions in a manner that is responsive to current conditions of discrimination and the remedies adopted by Congress are sufficiently related to address the discrimination. As this report details in Section IV *infra*, the updated protections contained in the Voting Rights Advancement Act provide the tools needed to enforce the constitutional guarantee to vote free from official acts of discrimination, to remedy racial discrimination where it is most likely to exist, and to create systems to help ensure discriminatory voting practices are blocked before they can victimize voters.

Finally, it bears brief discussion that legislative action to reinstate the coverage formula based on current needs should survive the test of "congruence and proportionality"

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that the equal sovereignty principle operated as a bar on differential treatment, but did not suggest that the principle was irrelevant to the constitutional inquiry).

[145] Congress should take note, however, that the majority opinion in dicta seemed to suggest that Section 5 pushed the limits of constitutional bounds. *See id.* at 544-45.

[146] *See Lopez v. Monterey Cty.*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

[147] *See Shelby Cty.*, 570 U.S. at 551 ("Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s.").

[148] *See id.* at 569 (Ginsburg noting in her dissent: "Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed "rational means."). Notably, the majority did not respond to Justice Ginsburg's statement in dissent that the majority did not claim to alter precedent setting rational basis as the standard of review.

[149] *See Shelby Cty.*, 570 U.S. at 552, 554, 556.

[150] *Id.* at 550 (citing *South Carolina v. Katzenbach*, 383 U.S. at 330).

[151] *See, e.g., id.* at 554, 556 (concluding that reliance on vote dilution evidence highlights the irrationality of a coverage formula based on voting tests and access to the ballot.).

associated with challenges to Congress's Fourteenth Amendment enforcement power.[152] Prior to the release of the *Shelby County* decision, scholars and practitioners widely expected the Court to clarify whether the congruence and proportionality standard superseded the rationality analysis employed in Fifteenth Amendment cases such as *Katzenbach*[153] because the Court often treated its jurisprudence of Congress's Fourteenth and Fifteenth Amendment enforcement powers as coextensive.[154] The Court did not appear to apply the congruence and proportionality standard in *Shelby County*, and—as some justices have recognized—it can be difficult to predict how the Court will apply its enforcement jurisprudence in the future.[155] Still, the Court's cases suggest that a restored preclearance formula that accounts for current conditions of discrimination and its attendant burdens upon states would be also be found valid under that test.[156]

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[152] *See generally City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

[153] Indeed, the Court highlighted the unresolved standard three years earlier in *Northwest Austin*. *See Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 204 ("The parties do not agree on the standard to apply . . . . [T]hat question has been extensively briefed in this case, but we need not resolve it."). The Court then gave additional reason to believe that it would address the standard when it modified the question presented in *Shelby County* to include the question of whether Section 5 also violated the Fourteenth Amendment. *See* Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1498 (2014).

[154] *See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *Lopez v. Monterey Cty.*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendment as coextensive."); *City of Boerne*, 521 U.S. at 518 (citing "parallel power to enforce the provisions of the Fifteenth Amendment").

[155] *See Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 44 (2012) (Scalia, J., dissenting) ("[T]he varying outcomes we have arrived at under the 'congruence and proportionality' test make no sense.").

[156] Courts applying the "congruence and proportionality" test first outlined in *City of Boerne v. Flores*, commonly engage in a three-part inquiry to assess the appropriateness of the "fit" between the constitutional right that Congress endeavors to protect and the means it adopts to do so. First, the court must identify with "precision the scope of the constitutional right" that Congress sought to remedy. *Bd. Of Trustees of Univ. of Ala. V. Garrett*, 531 U.S. at 356. In the context of the Voting Rights Act's preclearance framework, Section 5 protects two decidedly fundamental rights worthy of jealous protection: the right to vote and the right to be free from racial discrimination. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights[.]"); *see also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

Second, the *Boerne* test considers "whether Congress identified a history and pattern of constitutional [violations] by the States" concerning the relevant constitutional right. *Bd. Of Trustees of Univ. of Ala. V. Garrett*, 531 U.S. at 368. Updated to reflect "current needs" as a result of recent or continuing examples of racial discrimination in voting, Section 5 preclearance should comfortably clear this second factor. To start, the Supreme Court has recognized that Congress may more easily show a "pattern of constitutional violations," *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 722 (2003), when the legislation at issue targets state conduct "subject to a heightened standard of judicial scrutiny." *Tennessee v. Lane*, 541 U.S. 509, 528-29 (2004). The right to be free from racial

Yet, the rational basis standard continues to be the presumptive lodestar for the question of whether a coverage formula enacted by Congress identifying jurisdictions subject to preclearance—and any additional remedies—is within its Fifteenth Amendment enforcement powers. In prior cases upholding the coverage formula, and preclearance as a whole, the Supreme Court weighed whether Congress's chosen means to "effectuate the constitutional prohibition of racial discrimination in voting" were rationally related to that goal.[157] The Court's answer over decades consistently showed deference to Congress's judgment that the preclearance formula was "rational in both practice and theory."[158] Thus, *Shelby County* should not be read to bar what the Supreme Court invited Congress to do: "draft another formula based on current conditions."[159] Congress should accept the Supreme Court's invitation to craft an updated Voting Rights Act based upon its guidance that it should be responsive to current conditions of discrimination as well as carefully pursue a coverage formula that identifies jurisdictions for preclearance based on a record of where and when discrimination is most likely to occur.

d. Congressional power under the Elections Clause

Shelby County did not speak on another source of congressional authority for preclearance found outside of the Fourteenth and Fifteenth Amendments—the Elections Clause of Article I of the U.S. Constitution.[160] The Elections Clause provides that state legislatures "shall prescribe" the "Times, Places and Manner of holding Elections for Senators and

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discrimination and the right to vote are quintessentially such rights. Separately, in *City of Boerne*, the Supreme Court expressly cited the legislative record supporting the Voting Rights Act preclearance in cases like *Katzenbach* and *City of Rome* as indicative of congruence and proportionality. *See City of Boerne*, 521 U.S. at 530-32. Only the requirement of more "current conditions" the Court announced in *Shelby County* could possibly have justified a different result in that case. But now, preclearance restoration proposals that are presently before Congress are based on recent voting rights violations, and thus would cure the problem of "currency," as *Shelby County* articulated them.

Third, the court determines whether the scope of the law is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (quoting *City of Boerne*, 521 U.S. at 532). To apply this factor the Supreme Court has commonly considered a remedial law's "tailoring" to determine whether it properly remedies the discerned pattern of unconstitutional conduct without imposing undue cost to states' sovereign constitutional authority—for example, by proscribing more conduct than is necessary to cure the offending conduct. On that score, Section 5 preclearance should be viewed favorably, as the need for a remedy to unconstitutional racial discrimination in voting cannot be gainsaid, and the mechanism Congress proposes should find support in an updated legislative record. Finally, any reviewing court, including the Supreme Court, would be compelled to acknowledge that *City of Boerne* cited Section 5 preclearance as a properly tailored, "congruent and proportional" remedy to violations of the Fifteenth Amendment.

[157] *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (recognizing "Congress' authority under § 2 of the Fifteenth Amendment [is] no less broad than its authority under the Necessary and Proper Clause.").

[158] *Katzenbach*, 383 U.S. at 330.

[159] *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

[160] *See* U.S. Const. art. I, § 4.

Representatives," while "the Congress may *at any time* by Law *make or alter such Regulations*."[161] This is an expansive grant of federal authority, which the Supreme Court has held affords Congress "general supervisory power over the whole subject" of federal elections,[162] to exercise "as and when [it] sees fit."[163] Congress, in turn, has directly relied on those powers to enact critical voting legislation like the National Voter Registration Act, which the Supreme Court has determined permissibly overlays a "superstructure of federal regulation atop state voter-registration systems."[164]

Congress was mindful of its broad authority under the Elections Clause when it passed the Voting Rights Act. In addition to the Fifteenth Amendment, the 1965 House Report states that the enacted bill was "also designed to enforce ... article 1, section 4" of the Constitution.[165] This is critical because as Justice Antonin Scalia wrote in 2013, federalism concerns ebb when Congress acts under the Elections Clause, as "States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates according to federal law.'"[166] Simply put, "the Clause ... 'invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt [their] choices.'"[167]

The Election Clause's grant of power to Congress to protect the integrity of federal elections has clearly featured less prominently in litigation and debates over the constitutionality of preclearance than the Civil War Amendments. But the Supreme Court has consistently recognized Congress's broad "authority to provide a complete code for congressional elections."[168] And the Court has also been clear that Congress can *combine* its Election Clause and Fifteenth Amendment powers to ensure that the "great organisms of [the federal] executive and legislative branches should be the free choice of the people" made without the "violence and internal corruption" of racial discrimination.[169] Congress may surely rely on its Elections Clause authority to "prevent the implementation of local laws

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[161] *Id.* (Emphasis added)

[162] *Ex Parte Siebold*, 100 U.S. 371, 388 (1879).

[163] *Id.* at 384.

[164] *Arizona v. Inter Tribal Council of Ariz. (ITCA)*, 570 U.S. 1, 4 (2013).

[165] H.R. REP. NO. 89-439 (1965); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 ("To enforce the fifteenth amendment to the Constitution of the United States *and for other purposes*.").

[166] *ITCA*, 570 U.S. at 14 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)). *See also Cook v. Gralike*, 531 U.S. 510, 522-23 (2001) (aside from Elections Clause, "No other constitutional provision gives the State authority over congressional elections, and no such authority could be reserved under the Tenth Amendment").

[167] *ITCA*, 570 U.S. at 8-9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)).

[168] *Id.*

[169] *Ex parte Yarbrough* ("*The Ku Klux Cases*"), 110 U.S. 651, 666-67 (1884).

and practices that impede the ability to register for and participate in federal elections,"[170] as it has done through the Voting Rights Act.

III. HOSTILITY TO MINORITY POLITICAL PARTICIPATION PERSISTS AT LEVELS THAT JUSTIFY A RESTORED AND UPDATED VOTING RIGHTS ACT

> *Our fathers believed that if this noble view of the rights of man was to flourish, it must be rooted in democracy. The most basic right of all was the right to choose your own leaders. The history of this country, in large measure, is the history of the expansion of that right to all of our people.*
>
> President Lyndon B. Johnson's Special Message to Congress, March 15, 1965

Voting discrimination in the United States has manifested according to historical sentiments, political shifts, and available practices based on legal developments. Chief Justice John Roberts was correct in observing that, after initial enactment of the Voting Rights Act in 1965, "[n]early 50 years later, things have changed[.]"[171] He also correctly noted that voter registration and turnout have improved dramatically, largely due to the success of the Voting Rights Act. In enacting the Voting Rights Act of 1965, Congress chose to apply the preclearance remedy to jurisdictions that, in Congress's judgment, were most likely to pursue voting policies that discriminated on the basis of race. Based on its review at the time, Congress wisely chose to identify these jurisdictions based on metrics closely associated with racial discrimination: the use of voting tests and devices, voter registration, and turnout rates. Congress was proven correct in making these determinations—the Act was immediately successful and dramatically increased voter registration and turnout rates in the covered jurisdictions.[172]

Despite these gains, voting discrimination persisted through other means, justifying and necessitating the continued enforcement of Section 5 and other provisions of the Voting Rights Act through subsequent reauthorizations of the law. Discriminatory tactics separate and apart from the massive barriers erected to thwart registration and turnout—barriers such as poll taxes and literacy tests—necessitated reauthorization of preclearance in 1970, 1975, and 1982. The Supreme Court upheld all of these, even in the face of major improvements in Black voter registration and turnout. Indeed, Congress intended for the

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[170] Brief of Gabriel Chin et al. as *Amici Curiae* Supporting Respondents at 4, *Shelby Cty. v. Holder*, No. 12-96 (2013).

[171] *Shelby Cty. v. Holder*, 570 U.S. 529, 547 (2013).

[172] *See* USCCR 1968 REPORT, *supra* note 21, at pp. 12-13, 223 (reporting in 1968 that nonwhite registration rate had increased dramatically as a result of the 1965 Act: from 19.3% to 51.6% in Alabama; 40.4% to 62.8% in Arkansas; 51.2% to 63.6% in Florida; 27.4% to 52.6% in Georgia; 31.6% to 58.9% in Louisiana; 6.7% to 59.8% in Mississippi; 46.8% to 51.3% in North Carolina; 37.3% to 51.2% in South Carolina; 69.5% to 71.7% in Tennessee; up to 61.6% in Texas; and from 38.3% to 55.6% in Virginia).

Voting Rights Act to keep up with new strategies devised to suppress minority voters.[173] As famously noted by Justice David Souter in *Reno v. Bossier Parish*:

> In fine, the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.[174]

a. Current indicia of discrimination

The election of Barrack Obama in 2008 was a transcendent moment in our nation's history. Many believed the election signaled America's transformation into a post-racial society, but it was far from the moment of absolution that many had hoped for or expected.[175] The surge in voter registration and turnout among people of color in 2008 was one of the most diverse electorates in American history—and it was met swiftly with legislative retaliation in the states.[176]

When the Supreme Court nullified preclearance in *Shelby County v. Holder* in 2013, the Court released the worst offenders from federal oversight of their voting changes in the midst of the growing backlash against increased minority voter participation. These states, and other states with less culpable records, took the *Shelby* decision as a signal to enact voting restrictions with impunity, opening the flood gates to levels of voting discrimination unlike anything the country had seen in a generation. In effect, the majority opinion in *Shelby County* itself was highly consequential in creating the conditions of voting discrimination that minority voters are currently facing. A squall of voting restrictions by states and localities were advanced on a national scale, wreaking havoc on voters, including photo ID laws, restraints on voter registration, voter purges, cuts to early voting, restrictions on the casting and counting of absentee and provisional ballots, documentary proof of citizenship requirements, polling place closures and consolidations, and criminalization of acts associated with registration or voting.[177]

The surge of minority political participation catalyzed a renewed race to stop voters from exercising the franchise, and these changes have purposefully targeted people of color to counteract their increased political power and engagement. The right to vote in many ways

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[173] *See* H.R. REP. NO. 109-478, at 2 (2006); S. REP. NO. 97-417, at 6 (1982); H.R. REP. NO. 94–196, at 10 (1975); S. REP. NO. 94-295, at 16 (1975); H.R. REP. NO. 91-397, at 3283 (1969).

[174] *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part).

[175] *See generally* NAACP Legal Defense and Educational Fund, Inc., "POST-RACIAL" AMERICA? NOT YET: WHY THE FIGHT FOR VOTING RIGHTS CONTINUES AFTER THE ELECTION OF PRESIDENT BARACK OBAMA (2009), https://www.naacpldf.org/wp-content/uploads/Post-Racial-America-Not-Yet_Political_Participation.pdf.

[176] *See generally* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 247-85 (Picador 2015).

[177] Appendix A to this report documents these events at length to the extent the ACLU provided direct representation or participated as amicus.

is now defined by a margins game: slicing off margins of the electorate—diluting the strength of their votes—to tip the balance of political power. This problem has proven to be particularly acute when there is a surge in minority electoral interest or participation.[178] As states expanded absentee balloting during the COVID-19 pandemic, voluntarily and in response to lawsuits brought by organizations, including the ACLU and its affiliates, to protect people's right to vote, health, and safety.[179] This surge was particularly acute in communities of color, especially Asian-American and Latinx communities, and the decisive role that voters of color played in key races has in turn led to a fever pitch of state legislation and efforts to restrict access to the ballot.[180]

At the same time, Congress should heed the fact that current discrimination continues to employ many of the same tactics devised decades ago that justified the initial passage and subsequent reauthorizations of the Voting Rights Act, and which persist in many parts of the country, particularly on the local level. Redistricting, apportionment, and modification of methods of elections continue to be advanced by state and local officials to dilute minority voting strength. Additionally, practices such as poll closures, challenges to voter or candidate eligibility, and schemes to keep minority voters off the registration rolls or have their absentee or provisional ballots count continue. We document these practices at length in Appendix A attached to this report, summarizing the ACLU's litigation docket from 2006 to present.

Relatedly, Congress must also understand the continuing significance of racially polarized voting. Racially polarized voting refers to patterns where voting blocs within a jurisdiction fall along racial lines. The presence of racially polarized voting often results in the defeat of the electoral choices of a cohesive set of voters of color by the majority and indicates that race is an important factor in the electorate's political choices. For this reason, the Supreme

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[178] *See, e.g., League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) (Justice Kennedy concluding, "In essence [Texas] took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation"); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 216 (4th Cir. 2016) (similarly concluding that North Carolina "took away minority voters' opportunity because they were about to exercise it.") (*quoting LULAC*)); German Lopez, *North Dakota's new voting restrictions seem aimed at Native Americans who vote Democrat* (Oct. 31, 2018) (describing how former Sen. Heidi Heitkamp 2012 electoral victory won with Native American support, and the North Dakota legislature responded by instituting a photo ID law intended to discriminate against Native American voters), https://www.vox.com/policy-and-politics/2018/10/31/18047922/north-dakota-voter-id-suppression-heitkamp.

[179] *See* Appendix A, which details the ACLU's voting rights caseload, including its COVID-19 related cases.

[180] William H. Frey, *Turnout in 2020 Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows*, Brookings (May 5, 2021), https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/; Brennan Ctr. for Justice, *State Voting Bills Tracker 2021*, https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 (collecting state voting bills proposed or enacted in 2021).

Court and Congress have pointed to the persistence of racially polarized voting as probative of purposeful discrimination that justifies remedial legislation to protect minority voting rights.[181] The Court has repeatedly acknowledged that the presence of racially polarized voting "bear[s] heavily on the issue of purposeful discrimination," because "[v]oting along racial lines allows those elected to ignore [minority] Black interests without fear of political consequences."[182] In support of the 2006 Voting Rights Act reauthorization, Congress concluded:

> The Committee finds it significant that the ability of racial and language minority citizens to elect their candidates of choice is affected by racially polarized voting... [It] is the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process. Testimony presented indicated that "the degree of racially polarized voting in the South is increasing, not decreasing... [and is] in certain ways re-creating the segregated system of the Old South."[183]

The ACLU's report submitted in support of the 2006 reauthorization also concluded that, "[o]ne of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered jurisdictions."[184] Based on our review of our litigation docket, we continue to find the strong presence of racially polarized voting, which has actually increased in intensity.[185]

b. The public lacks effective tools to enforce their rights under the Constitution and federal law

In dicta in his opinion in *Shelby County*, Chief Justice John Roberts laid out a path for Congress to follow in enacting an updated Voting Rights Act to respond to current conditions of discrimination. Referring to the 1965 coverage formula as "rational in both practice and theory," Roberts highlighted that the formula "looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both." Through our litigation and other

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[181] *See Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."); *see* H.R. REP. NO. 109-478, at 34 (2006).

[182] *See Rogers v. Lodge*, 458 U.S. 613, 623-24.

[183] *See* H.R. REP. NO. 109-478, at 34 (2006).

[184] MCDONALD, *supra* note 20.

[185] *See, e.g., Mo. State Conference of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006 (E.D. Mo. 2016); *Wright v. Sumter Cty. Bd. of Elections and Registration*, 301 F.Supp.3d 1297 (M.D. Ga. 2018); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004); *see also Kilgore, Enten, supra* note 20.

advocacy, we have been able to identify the discriminatory policies largely responsible for causing recent violations of voters' federally protected rights.

The effect of these discriminatory voting laws and practices have resulted in an explosion of litigation to protect voters from state and local officials' violations of federal law. Since *Shelby County*, the ACLU has opened more than 70 new voting rights matters, including cases filed and investigations, and we currently have more than 30 active matters.[186] Between the 2012 and 2016 Presidential elections alone, the ACLU and its affiliates won 15 voting rights victories, protecting more than 5.6 million voters in 12 states that collectively are home to 161 members of the House of Representatives and wield 185 votes in the Electoral College.[187] In the 2020 presidential election year, the ACLU won 28 victories in 21 states and Puerto Rico to safeguard the voting rights of millions of Americans as the COVID-19 pandemic spread across the country and states struggled – or refused – to adapt voting procedures to protect public health while still ensuring access to the ballot.

Following *Shelby County,* Section 2 of the Voting Rights Act is the heart of federal protection for the right to vote. It applies nationwide, to every state and local jurisdiction, and has no expiration date. The ACLU's recent Section 2 litigation experience reveals two things: first, our record of success in blocking discriminatory voting changes—with an overall success rate in Section 2 litigation of around 80%—reveals that state and local officials are continuing to engage in a widespread pattern of racial discrimination and are committing pervasive violations of federal law. Second, it shows that as important as Section 2 is, we lack the tools needed to stop discriminatory changes to voting laws *before* they taint elections. Discriminatory laws that we ultimately succeeded in blocking have remained in place for months or even years while litigation proceeded—time in which other elections were held and hundreds of government officials were elected under discriminatory conditions.

However, even Section 2 is under attack. On July 1, 2021, the Supreme Court issued a decision in *Brnovich v. Democratic National Committee*, reversing a Ninth Circuit decision finding a Section 2 violation and upholding two voting restrictions in Arizona.[188] The decision adopted a new standard for Section 2 claims, one which is unduly cramped and at odds with the law's intent of eradicating all voting practices that have racially discriminatory effects. While it preserves Section 2 as a vehicle for challenging the most egregious forms of racial discrimination, the Court narrowed the statute, raising the bar even higher to successfully attack racially suppressive laws. The decision comes at a perilous time for voting rights, amid a wave of state voter suppression laws. As Justice Elena Kagan wrote in dissent, "Section 2 of the Act remains, as written, as expansive as ever— demanding that every citizen of this country possess a right at once grand and obvious: the right to an equal opportunity to vote."[189] She continued that even though

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[186] These numbers are based on a recent review of the ACLU's internal case management system.

[187] *See* Dale Ho, *Let People Vote: Our Fight for Your Right to Vote in This Election*, ACLU (Nov. 3, 2016), https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/let-people-vote-our-fight-your-right-vote-election.

[188] No. 19-1257, 2021 WL 2690267 (U.S. 2021).

[189] *Id.* at *2 (Kagan, J., dissenting).

"[m]aybe some think that vote suppression is a relic of history—and so the need for a potent Section 2 has come and gone," that provision remains a "crucial tool to achieve th[e] goal" of ensuring to everyone, regardless of race, "an equal chance to participate in our democracy."[190]

And while the ACLU continues to bring a number of successful Voting Rights Act cases after *Shelby County*, the nature and number of cases have changed due to the loss of Section 5 and the resulting blitz of discriminatory voting changes. Prior to *Shelby County*, the ACLU focused a large part of our docket on voting discrimination at the local level—where discrimination tended to be especially entrenched and challenging to identify and address. Indeed, Section 5 was uniquely effective at rooting out discrimination at the county or municipal level. For example, between 1982 and 2006, the Justice Department interposed a total of 112 objections to voting changes in Mississippi, most of which occurred on the county and local level.[191] 68 of 91 objections interposed in Georgia during this period were to changes advanced by county or municipal officials.[192] After *Shelby County*, the ACLU and our affiliates have had to pivot away from addressing local discrimination and instead devote substantial resources to challenging statewide action impacting millions of voters. These cases are harder to bring and resolve, meaning that local officials – who have been emboldened by *Shelby County* just as state officials have been – act without scrutiny.

Adding to the difficulty, there is no longer a means to effectively monitor voting changes occurring at the local level since preclearance was rendered inoperative and jurisdictions are no longer required to report voting changes to the federal government. We continue to bring successful challenges against local jurisdictions under Section 2, but those cases have become far fewer without notice of voting changes and the prophylactic protection afforded by preclearance. For comparison, between 1982 and 2006, the ACLU brought 145 lawsuits in the State of Georgia alone; of these cases, approximately 125 of these were against local jurisdictions.[193] In the six years since *Shelby County* was decided—about one quarter of the comparative time period—we have been able to bring four cases in Georgia, only two of which were challenges to local voting practices.

Overall, the ACLU and our state affiliates have litigated fourteen Section 2 cases to judgment, settlement, or other resolution since *Shelby County*. Eleven of the ACLU's fourteen Section 2 cases have produced favorable outcomes[194] for our clients, a success rate

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[190] *Id.* at *41.

[191] H.R. REP. NO. 109-478, at 37 (2006).

[192] *Id.*

[193] *See* MCDONALD, *supra* note 21, at 4.

[194] We rely on 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."). Professor Katz's study was cited by Congress during the 2006 Voting Rights Act reauthorization and in Justice Ginsberg's dissent in *Shelby*

of 78.6%.[195] The following table summarizes the ACLU's Section 2 litigation since *Shelby County*:

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
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

County. *See Shelby County*, 133 S.Ct. at 2642 (Ginsberg, J., dissenting) (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong., 1st Sess., pp. 964–1124 (2005)).

[195] By way of comparison, our recent review of Section 2 cases available on Westlaw that were decided since *Shelby County* indicates an overall success rate of less than 30%.

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
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

A few points stand out from a review of our recent Section 2 litigation.

First, there is a strong public interest in blocking discriminatory voting changes before they take root and impact elections. When elections take place during the time that voting rights litigation is pending and under conditions that are later found to be discriminatory, there is no way to adequately compensate the victims of voting discrimination after-the-fact. Voting rights are different than other civil rights, because going through the legal process can only affect future elections. Unlike a case of employment or housing discrimination, where a

person could be compensated monetarily or made whole by reinstatement of a job or apartment, elections cannot be re-run. Instead, voters can only seek relief for future elections, while those who won office under discriminatory regimes make policy and accrue the benefits of incumbency. Therefore, there is a strong public interest in ensuring the integrity of the voting process by insulating it from discrimination.

Making matters worse is that Section 2 cases—and voting discrimination cases generally—take substantial time to litigate, leaving discriminatory voting systems in place for months or even years before they are ultimately blocked or rescinded. The average length of time that the ACLU's Section 2 cases have taken to litigate from filing to resolution is 731 days, or more than two years.[196] Even when we seek preliminary relief to protect voters while the case is pending, or otherwise litigate Section 2 cases on expedited schedules to mitigate the discriminatory impact on voters during elections, it still usually takes years to block discriminatory voting laws through Section 2 litigation. This reflects the fact that voting rights litigation, and Section 2 litigation in particular, is highly complex. Section 2 cases are among the most difficult cases tried in federal court. The Federal Judicial Center issued a study showing that voting rights cases impose almost four times the judicial workload of the average case, and that voting cases are the sixth most work-intensive type of the sixty-three types of cases that come before the federal district courts.[197]

In the eleven ACLU Section 2 cases that resulted in favorable outcomes for our clients since the *Shelby County* decision, more than a dozen elections were held between the time of filing and the ultimate resolution of that case. In the interim, more than 350 federal, state, and local government officials were elected under regimes that were later found by a court to be racially discriminatory or which were later abandoned by the jurisdiction.[198]

For example, in 2011, the Justice Department blocked a redistricting plan for the Board of Education of Sumter County, Georgia, that would have reduced the number of African

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[196] This number includes two rather unusual Section 2 cases filed in 2016 related to voter registration deadlines affected by Hurricane Matthew, which were completed in a matter of days (*FDP v. Scott* and *Bethea v. Deal*), as well as a COVID-19 related case which was also litigated on an abridged schedule (*People First Alabama v. Merrill*). If those three cases are excluded, the average length of the ACLU's Section 2 cases is 911 days—more than 2 and a half years from filing to resolution.

[197] *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). This testimony was cited in the D.C. Circuit's ruling in *Shelby County*. *See Shelby Cty. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev'd on other grounds*, 570 U.S. 529 (2013). *See also Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 96 (2006) (statement of Rob McDuff, Att'y, Jackson, Mississippi).

[198] This is a conservative estimate for a number of reasons. In calculating the number of elections held under a discriminatory regime (and the number of offices elected during those elections), we limited our calculation to federal and state elections, and excluded local elections (except where the elections practice challenged was a local elections practice). For example, for a challenge to a statewide law, we included the number of statewide elections that took place under the discriminatory regime, but excluded local elections from our calculation; we also excluded local government officials elected—either in a statewide election or in a local-only election.

Americans on the board from six out of nine to two out of seven total members.[199] The proposed plan resulted in a 5-2 majority of white-preferred candidates on the Board of Education in a county where African Americans outnumbered white residents in total population (52% compared to 42.1%), voting age population (49.5% to 46.7%), and the number registered voters (48.5% to 46.7%). Prior to this objection by the Department of Justice, the apportionment and method of election of members of the Sumter County Board of Education had for decades been the subject of multiple objections interposed by the Attorney General and litigation by private plaintiffs under Section 5.[200] After *Shelby County*, the Board immediately implemented its plan to reduce the number of African Americans on the board. The ACLU promptly filed a Section 2 lawsuit in 2013 that was finally resolved *seven years later* in 2020, when a federal appeals court affirmed a lower court judgment finding that the plan violated the Voting Rights Act.[201] The trial court decision was rendered five years after the plan went into effect (and appeals were exhausted an additional two years later), meaning African American students and their parents were unlawfully deprived of equal representation on the school board during that time period.[202]

In 2014, the ACLU represented the Missouri State Conference of the NAACP, filing a lawsuit challenging the Ferguson-Florissant school district's at-large method of electing school board members under Section 2. In 2014, the student body of the district was approximately 80% African American, and African Americans constituted a slight minority of the district's voting age population. Due to racially polarized voting, there was not a single African-American director on the seven-member school board as recently as 2014. In August 2016, the district court ruled in favor of the plaintiffs in a lengthy opinion finding that the at-large method of electing school board members was racially discriminatory. The school district appealed the decision to the Eighth Circuit, which unanimously affirmed the district court's decision.[203] The school board then appealed to the U.S. Supreme Court, which denied cert in 2019, ending the case after four years of litigation—and the 2015, 2016, 2017, and 2018 elections were held during that time in which nine members of the school board were elected.

Finally, in August 2013 the ACLU and other organizations challenged a sweeping election law in North Carolina that enacted numerous restrictions on voting opportunities for African American voters. These restrictions included cuts to early voting, eliminating preregistration and same-day registration, and prohibiting out-of-precinct voting, which, collectively, about one million North Carolina voters had used in the 2012 presidential election. The legislature also enacted a highly restrictive photo ID requirement. In a

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[199] *Field Hearing on Voting Rights and Election Administration in Georgia Before the Subcomm. on Elections of the H. Comm. on H. Administration*, 116th Cong. 1 (2019) (statement of Sean Young, Legal Director, ACLU of Georgia); *see also Wright v. Sumter Cty. Bd. of Elections*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

[200] *Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (1985); 541 F.Supp. 55 (M.D. Ga. 1981).

[201] 979 F.3d 1282 (11th Cir. 2020).

[202] *Id.* at 1-2.

[203] *Mo. State Conference of NAACP v. Ferguson-Florissant Sch. Dist.*, No. 16-4511 (8th Cir. Jul. 3, 2018).

unanimous opinion, the Fourth Circuit held that the law was enacted by the state legislature with the intent to discriminate against the state's African American voters.[204] This case took 34 months to litigate—almost three years—from filing the complaint to a ruling by the Fourth Circuit. In the interim, the 2014 general election took place, with 188 federal and state officers elected—including a U.S. Senator, 13 congressional representatives, four state supreme court justices, and 170 seats for state legislature.[205] In other words, almost 200 federal and state officials in North Carolina were elected under a discriminatory regime that the Fourth Circuit found "target[ed] African Americans with almost surgical precision."[206] While the law has since been struck down, there is no way to now compensate the African American voters of North Carolina—or our democracy itself—for that gross injustice.

The ACLU and others used all available tools to prevent this from happening, initially litigating this complex matter on an expedited timeline and seeking a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted.[207] Unfortunately, the Supreme Court stayed the Fourth Circuit's ruling[208]—presumably due to concerns that the case was decided too close to the general election[209]—effectively leaving the discriminatory regime in place for the 2014 election. The Supreme Court later permitted the preliminary ruling from the Fourth Circuit to go into effect.[210] Despite the plaintiffs ultimately prevailing on the final merits of the case[211] and using every legal tool available, with remarkable speed given the complexity of the case, there were no adequate legal avenues to prevent the discriminatory law from tainting the 2014 election.

Second, there are few tools available for the public to track and effectively respond to discriminatory voting changes that occur in their communities now that jurisdictions no longer have to notify the Attorney General of voting changes. As changes to voting practices are often more difficult to identify at the local level—where much voting discrimination continues to occur—the lack of effective methods to monitor voting changes has become a major problem.

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

[205] *See* North Carolina State Board of Elections, 11/04/2014 General Election Results – Statewide, available at https://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0.

[206] *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (*"NAACP v. McCrory"*).

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

[208] *North Carolina v. League of Women Voters of N.C.*, 135 S.Ct. 6 (Oct. 08, 2014).

[209] *See* Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 449 (2016).

[210] 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. Carolina*, 135 S. Ct. 1735 (2015). 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 206.

[211] When the law was struck down after final judgment before the 2016 presidential election, *see NAACP v. McCrory*, 769 F.3d 224), the Supreme Court declined to hear an appeal of that decision as well. *See North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

Since *Shelby County* was decided, there have been a total of 125 Section 2 cases that have been reported on Westlaw in which courts have rendered a determination on liability, preliminary or otherwise, or in which the parties have settled. Of these 125 Section 2 cases, the plaintiffs have been successful in 34 cases[212] (the ACLU and/or its affiliates were counsel in eleven of these 34 successful Section 2 cases).[213] And out of the 34 successful cases, 20 were successful challenges to local practices.

Successful Section 2 Cases Decided Since *Shelby County* That Are Reported on Westlaw							
	Case Name	**Citation / Case Number**	**State**	**Year**	**Dilution or Denial**	**Practice Challenged**	**Def.**
1	Molina v. County of Orange	2013 WL 3009716 (S.D.N.Y.)	NY	2013	Dilution	County Redistricting	County
2	Hubbard v. Lone Star College System	No. 4:2013-cv-01635	TX	2013	Dilution	At-Large Districts	Univer-sity
3	Wandering Medicine v. McCulloch	906 F. Supp. 2d 1083 (D. Mont., 2012), 544 Fed. Appx. 699 (9th Cir.).	MT	2013	Denial	Polling Places; Registration Deadline	State
4	Allen v. City of Evergreen	2014 WL 12607819 (S.D. Ala.)	AL	2014	Dilution	City Redistricting	City
5	Jackson v. Bd. of Trustees of Wolf Point	2014 WL 1794551 (D. Mont.)	MT	2014	Dilution	School Redistricting	City

[212] 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, it is inevitably under-inclusive in some respects. It does not, for example, include all of the ACLU cases discussed in the previous section—some of which have not been reported on Westlaw.

[213] *See Florida Democratic Party v. Scott*, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016); *Jackson v. Wolf Point*, 2014 WL 1794551 (D. Montana April 24, 2014) (settled); *Missouri NAACP v. FFSD*, 894 F.3d 924 (8th Cir. 2018); *Montes v. City of Yakima*, 2015 WL 11120966 (E.D. Wash. June 19, 2015); *Navajo Nation Human Rights Comm'n v. San Juan Cty.*,281 F. Supp. 3d 1136 (D. Utah 2016); *NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Ohio NAACP v. Husted*, 768 F.3d 524 (2016) (vacated as moot, but ultimately settled); *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F.Supp.3d 1297 (M.D. Ga. 2018).

6	Favors v. Cuomo	39 F.Supp.3d 276 (E.D.N.Y. 2014)	NY	2014	Dilution	State Legislative Redistricting	State
7	OH NAACP v. Husted	768 F.3d 524 (6th Cir. 2014)	OH	2014	Denial	Early Voting	State
8	Benavidez v. Irving Indep. Sch. Dist.	2014 WL 4055366 (N.D. Tex. 2014)	TX	2014	Dilution	At-Large Elections	School Board
9	Ga. NAACP v. Fayette County	118 F.Supp.3d 1338 (N.D. Ga. 2015)	GA	2015	Dilution	At-Large Elections	County
10	Montes v. City of Yakima	2015 WL 11120966 (E.D. Wash.)	WA	2015	Dilution	At-Large Elections	City
11	MI APRI v. Johnson	833 F.3d 656 (6th Cir. 2016)	MI	2016	Denial	Straight-Ticket Voting	State
12	Missouri NAACP v. FFSD	201 F.Supp.3d 1006 (E.D. Mo. 2016)	MO	2016	Dilution	At-Large Elections	School Board
13	NC NAACP v. McCrory	831 F.3d 204 (4th Cir. 2016)	NC	2016	Denial	Voter ID; Early Voting; Same Day Registration	State
14	Brakebill v. Jaeger	2016 WL 7118548 (D.N.D.)	ND	2016	Denial	Voter ID	State
15	Sanchez v. Cegavske	214 F.Supp.3d 961 (D. Nev. 2016)	NV	2016	Denial	Early Voting	State
16	Pope v. County of Albany	94 F.Supp.3d 302 (N.D.N.Y. 2015)	NY	2016	Dilution	County Redistricting	County
17	Veasey v. Abbott	830 F.3d 216 (5th Cir. 2016)	TX	2016	Denial	Voter ID	State
18	Navajo Nation v. San Juan Cnty.	162 F. Supp. 3d 1162 (D. Utah, Feb. 19, 2016), aff'd 929 F.3d 1270 (10th Cir. 2019)	UT	2016	Dilution	Districting	County
19	Bear v. County of Jackson	2017 WL 52575 (D.S.D. 2017)	SD	2017	Denial	Early Voting	County

20	Patino v. City of Pasadena	230 F.Supp.3d 667 (S.D. Tex. 2017)	TX	2017	Dilution	County Redistricting	County
21	Huot v. City of Lowell	280 F. Supp. 3d 228 (D. Mass. 2017)	MA	2017	Dilution	At-Large Districts	City
22	Navajo Nation Human Rights Comm. V. San Juan County	281 F. Supp. 3d 1136 (D. Utah 2017)	UT	2017	Denial	Vote by Mail	County
23	U.S. v. City of Eastpointe	378 F. Supp. 3d 589 (E.D. Mich. 2019)	MI	2017	Dilution	At-Large Districts	City
24	Georgia Coalition for the People's Agenda v. Kemp	347 F. Supp. 3d 1251 (N.D. Ga. 2018)	GA	2018	Denial	Voter Purges	State
25	Thomas v. Bryant	366 F. Supp. 3d 786 (S.D. Miss. Feb. 16, 2019), aff'd 961 F.3d 800 (5th Cir. 2020) (en banc)	MS	2018	Dilution	State districting	State
26	Ala. State Conf. of the NAACP v. City of Pleasant Grove	2019 WL 5172371 (N.D. Ala. 2019)	AL	2019	Dilution	At-Large Elections	City
27	Flores v. Town of Islip	382 F. Supp. 3d 197 (E.D.N.Y., 2019)	NY	2019	Dilution	At-Large Districts	Town
28	Blackfeet Nation v. Stapleton	4:20-cv-95 (D. Mont. 2020)	MT	2020	Denial	Failure to open Satellite election office	State
29	Harding v. Edwards	484 F.Supp.3d 299 (M.D. La. 2020)	LA	2020	Denial	Early Voting	State
30	Molina v. County of Orange	2013 WL 3009716 (S.D.N.Y.)	NY	2020	Dilution	Districting	County

31	NAACP v. East Ramapo Central School District	462 F. Supp. 3d 368 (S.D.N.Y., May 25, 2020), aff'd 984 F.3d 213 (2d Cir. 2021)	NY	2020	Dilution	Districting	School District
33	Spirit Lake Tribe v. Jaeger	2018 WL 5722665 (D.N.D. 2018)	ND	2020	Denial	Voter ID	State
34	Holloway v. Virginia Beach	2021 WL 1226554 (E.D.V.A.)	VA	2021	Dilution	At-Large Elections	County

For the ACLU and other voting rights advocates, half the battle is simply learning about new voting changes. This is particularly true at the local level, where there are often fewer resources available to assist community members to examine and respond to changes in voting laws. For example, in Irwin County, Georgia, the Board of Elections in 2017 attempted to close the single polling location that existed in the only Black neighborhood in the county, contrary to the recommendations of the non-partisan Association of County Commissioners of Georgia. While the Board alleged that it wanted to close this polling place to save costs, it also opted to keep open a polling place located at the Jefferson Davis Memorial Park in a neighborhood that was 99% white. After the ACLU of Georgia threatened litigation, the Board rejected this discriminatory proposal. The ACLU of Georgia only learned about these proposed closures in this rural Georgia county because one of its members happened to live in the area and alerted the affiliate.[214]

In 2018, in Randolph County, Georgia, which is located in the southwest corner of the state and 60% Black, the Board of Elections tried to close seven of the nine polling locations in the county. The ACLU of Georgia only found out because a resident happened to read a small notice in the legal section of a local weekly paper and reached out for help. Our affiliate had less than two weeks before the 2018 general election to undertake intensive advocacy, including the threat of litigation, to counter the efforts by the Board to close the voting sites. Only after significant resources were invested in legal, media, and organizing work did enough public scrutiny build to force the Board to vote to keep the polling locations open. During the course of our advocacy, it was discovered that the Board had hired a consultant, handpicked by Secretary of State Brian Kemp who was running for Governor at the time, who recommended closing polling places in counties that were almost all disproportionately Black.[215]

These are just two recent examples from Georgia, which has 159 counties. The ACLU was only able to respond when alerted by residents who became aware of voting changes by happenstance. Additionally, more advocacy and resources were required to block

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[214] *Field Hearing on Voting Rights and Election Administration in Georgia Before the Subcomm. on Elections of the H. Comm. on H. Administration,* 116th Cong. 1 (2019) (statement of Sean Young, Legal Director, ACLU of Georgia).

[215] *Ibid.*

discriminatory voting changes on the backend than those needed in a process where officials are required to affirmatively notify the public in a reasonable manner. Under preclearance, individuals, community organizations, and other impacted stakeholders could—and often did—weigh in with the Justice Department to share their views on the proposed change and its impact on voters. Without legal requirements for fair notice of voting changes, jurisdictions do not provide adequate public notice of changes in voting procedures until it is too late. This leaves the public unable to provide input on decisions affecting the voting process before implementation. Since the voting public no longer has a formal say on the propriety of voting changes through the preclearance process, voting changes are often advanced by local officials without consideration of public perception or reaction. Unfortunately, since *Shelby County* over 200 polling places have closed in Georgia.

Finally, it bears mention that the loss of preclearance has effectively halted the Justice Department's federal observer program, another resource no longer available to monitor the conduct of local elections for voting discrimination.[216] The coverage formula invalidated by *Shelby County* also served as a basis for the Attorney General to identify jurisdictions to send federal observers.[217] This outcome has substantially weakened the federal government's ability to identify potential election issues and protect voters from discrimination.

IV. SOLUTIONS IN THE VOTING RIGHTS ADVANCEMENT ACT: BLOCKING DISCRIMINATORY VOTING CHANGES BEFORE THEY IMPACT VOTERS

Voting discrimination not only persists—after the *Shelby County* decision, it has become frenzied. Stronger protections for voting rights are needed to prevent voting discrimination. Our experience highlights the need for restored and enhanced voting rights protections reflected in the John Lewis Voting Rights Advancement Act (VRAA), including new preclearance processes based on current conditions, a more protective standard for obtaining and sustaining preliminary relief in voting discrimination cases, and robust notice and transparency requirements necessary to block official acts of voting discrimination before they are implemented. Each of these measures aim to provide prophylactic protection for voters.

a. Preclearance for risky actors and risky behavior

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[216] As part of the House Judiciary Committee's June 29 hearing on the need to enhance the protections of the Voting Rights Act, James Tucker, who serves as pro bono counsel to the Native American Rights Fund, submitted written testimony on the need for a federal observer program, which the ACLU supports. *See* Testimony of Dr. James Thomas Tucker, *The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary* (June 29, 2021), https://docs.house.gov/meetings/JU/JU10/20210629/112839/HHRG-117-JU10-Wstate-TuckerJ-20210629.pdf.

[217] See U.S. DEP'T OF JUSTICE, FACT SHEET ON JUSTICE DEPARTMENT'S ENFORCEMENT EFFORTS FOLLOWING SHELBY COUNTY DECISION, https://www.justice.gov/crt/file/876246/download.

The Voting Rights Advancement Act of 2019 includes a new preclearance provision with a rolling coverage formula based on recent voting rights violations that would prevent discriminatory changes to voting laws from taking effect before an election. The updated coverage formula would make states eligible for preclearance coverage based on a record of recent voting violations, with coverage generally triggered by 15 violations in the state, or 10 violations in the state if at least one was committed by the state itself, over the most recent 25 calendar years, or in other words, the last two redistricting cycles following the decennial census.[218] The formula also captures sub-jurisdictions that commit three or more voting violations in the previous 25 calendar years. If jurisdictions remain discrimination free for 10 years, they would also only be subject to preclearance for that 10 year period.

Following Supreme Court's instructions in *Shelby County*, the new formula of the 2019 bill is based on an objective set of reliable criteria: recent violations of federal voting rights laws or, short of a court finding of a violation, evidence of violations elicited through settlements and consent decrees approved by a federal court, admissions of liability, objections issued by the Department of Justice, and judicial denials of declaratory judgments. The preclearance provision would apply equally to every state, assessing them on an individual basis based only on recent evidence of voting discrimination.

Additionally, the 25-year "look back" period is a reasonable standard that covers two decennial census and redistricting cycles. This is important to ensure that voters are not subject to "whack-a-mole" types of relief and to deter states from simply adopting other discriminatory practices after the second redistricting cycle in response to remedies imposed following the previous cycle. The duration of this period also reflects that it is not uncommon for litigation that arises from redistricting to take years to resolve. This often means violations are not cured for that time period and potentially run up on the heels of the next redistricting cycle. Additionally, bad actor jurisdictions typically exhibit discriminatory patterns over the span of more than one redistricting cycle. For example, in the ACLU's prior report to Congress supporting the 2006 reauthorization of the Voting Rights Act, we documented protracted litigation that arose in Georgia after the 1980, 1990, and 2000 redistricting cycles, in South Carolina after the 1980, 1990, and 2000 cycles, and in Virginia after the 1990 and 2000 redistricting cycles.[219]

The Voting Rights Advancement Act of 2019 also advances a new practice-based preclearance mechanism based on current evidence of discrimination that adheres to Chief Justice John Roberts's pillar of equal sovereignty. Complementing the geographic trigger, this new provision triggers preclearance based on the record of the voting practice itself being discriminatory when used in combination with demographic triggers. The covered practices include practices that we have observed are used to discriminate against voters of color, including changes to methods of elections, jurisdiction boundaries, redistricting, documentation or qualifications to vote, the availability of multilingual voting materials, and polling place locations and resources.[220] As documented in this report, as well as our 2006 report to Congress for the last reauthorization of the Voting Rights Act,[221] the ACLU's

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[218] *See* Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. § 3(b) (2019).

[219] *See* MCDONALD, *supra* note 21, at 108, 113, 126, 566, 568, 576, 691, 693.

[220] H.R. 4, 116th Cong. § 4A (2019).

[221] *See generally* MCDONALD, *supra* note 21.

experience demonstrates that these types of voting changes are the most common practices adopted to discriminate, and practice-based preclearance would stop the most pernicious uses of them before they go into effect in jurisdictions with a significant minority population or growth in population.

b. Congress should enact a more protective preliminary injunction standard

Preclearance is a singular remedy that helps ensure the worst offenders of voting discrimination are subject to the rigors of preclearance review. However, based on recent experience, remedial legislation should also effectively address discriminatory changes arising in places with little history of voting discrimination. These voters must also have a legal mechanism available to help effectively block harmful voting changes before they are enforced without having to wait for years of protracted litigation to be resolved. To this end, the Voting Rights Advancement Act provides another important safeguard against voting discrimination in jurisdictions that would not be covered by preclearance. This provision revises the common law standard for obtaining and sustaining a preliminary injunction in federal voting rights litigation[222]—facilitating the ability of plaintiffs to block potentially discriminatory voting laws before they can taint an election.

i. Statutory "serious question" preliminary injunction standard

Section 7 of the Voting Rights Advancement Act of 2019 articulates a revised standard for preliminary injunctive relief when adjudicating alleged violations of federal voting laws. It states that the court shall grant relief if it determines that:

> "the complainant has raised a serious question whether the challenged voting qualification or prerequisite to voting or standard, practice, or procedure violates this Act or the Constitution and, on balance, the hardship imposed upon the defendant by the grant of relief will be less than the hardship which would be imposed upon the plaintiff if the relief were not granted. In balancing the harms, the court shall give due weight to the fundamental right to cast an effective ballot."[223]

The "serious question" test is a flexible standard that provides heightened protection for possible violations of federal voting rights laws, while permitting courts to exercise equitable discretion given the facts and circumstances of a particular case.

There are two aspects of the revised preliminary injunction standard to highlight. It clarifies that plaintiffs may obtain preliminary relief based on a showing of (1) a "serious question" that the challenged practice violates the Voting Rights Act or the Constitution; and (2) that the balance of hardships falls in favor of the plaintiffs, with due weight given to the fundamental right to vote.[224] Section 7 also provides that, on appeal, a jurisdiction's inability to enforce its voting laws will not by itself constitute irreparable harm that would tilt in favor of a stay of preliminary relief. Had this provision been in place in 2014, the preliminary injunction that the ACLU won in North Carolina may have remained in effect

[222] *Id.* at § 7.

[223] H.R. 4, 116th Cong. § 7(b)(4) (2019).

[224] *Id.*

for the 2014 midterm, blocking North Carolina's discriminatory law during from tainting that election. This provision could have also protected Black voters in Ohio, which instituted massive cuts to early voting in 2014 after Black voters in the state overwhelmingly voted early in the 2008 and 2012 Presidential elections. The Supreme Court stayed the district court's preliminary injunction initially blocking the cuts from being implemented, which vacated the injunction as a result.[225]

The revised preliminary injunction standard underscores what makes the right to vote different from other civil rights. In theory, victims of discrimination in other areas, such as in employment or housing, can be compensated after the fact with money damages and possibly made whole. But once an election occurs under discriminatory conditions, disenfranchised voters have irrevocably lost their ability to participate in the democratic process, which cannot be—and would not be—compensated with monetary damages for that election. Government officials are elected, the benefits of incumbency vested, and there is no way to undo or mitigate the discrimination that has occurred during an election. For these reasons, perhaps more so than in any other area, discrimination in voting must be prevented before it occurs. Our experience illustrates that stronger statutory protections are necessary for that prophylactic purpose.

ii. Congress has the authority to alter the standards for preliminary injunctive relief

Importantly, Congress has authority to modify the standards for granting injunctive relief through legislation; this authority extends to courts' issuance of preliminary injunctions. Preliminary injunctions are considered by courts an "extraordinary remedy," because their issuance occurs before parties' rights have been fully adjudicated.[226] Yet Congress, in its judgment, can determine that the public interest warrants special protection in certain situations and has the discretion to enact a more lenient standard. The Supreme Court has expressly recognized this authority in a series of decisions dating back 75 years and repeatedly concluded that Congress may revise or alter the standard for issuing injunctive relief. In fact, a review of relevant case law shows that courts have never called into question Congress's power to modify the standards for injunctive relief. Most often, the court's inquiry has focused on whether or not Congress had in fact intended to change the conditions under which a plaintiff may acquire injunctive relief. Here, we evaluate congressional authority to revise the standard for granting preliminary injunctive relief and conclude that Section 7 is wholly in line with its authority.

Under the common law approach—reflected in Rule 65 of the Federal Rules of Civil Procedure—federal courts traditionally consider four factors when evaluating whether to grant preliminary injunctive relief: (i) the strength of the plaintiff's claim on the merits; (ii) whether it is likely the plaintiff would suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in the plaintiff's favor; and (iv) whether

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[225] *See Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014).

[226] *See generally* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995).

an injunction is in the public interest.[227] There is some fluidity as to the precise manner by which these factors are applied by courts.[228]

Notwithstanding the common law method, Congress may legislate the standard by which a preliminary injunction may be granted or denied by a court. The Supreme Court has explicitly and repeatedly recognized Congress's authority to alter the traditional equitable considerations for granting injunctive relief, including the issuance of preliminary and final injunctions.[229] The Court initially recognized this authority with respect to courts ordering final equitable relief, including permanent injunctions. The Court then extended its reasoning to conclude that Congress has the same general authority with respect to preliminary injunctions, since the analytical frameworks for each form of relief are nearly identical.[230] The Supreme Court has also held that Congress can statutorily require that courts issue injunctions automatically when merits violations are found of particular laws, suggesting Congress's power to regulate courts' equity jurisdiction is broad.[231]

The Court has also expressed that congressional intent must be clear in its legislative command when revising courts' equity jurisdiction. In the case *Weinberger v. Romero-Barcelo*, the Court stated:

> "Congress may intervene and guide or control the exercise of the courts' discretion, but [the Court does] not lightly assume that Congress has intended to depart from established principles...'Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'"[232]

Congress has revised preliminary injunction standards as part of their remedial provisions in several areas of federal law. Each of these statutes also have been subject to judicial review acknowledging the legislatively modified standard. These statutes include the

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[227] *Id.*; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

[228] Several circuits apply a "sliding scale" approach, where a plaintiff that demonstrates a strong likelihood of success on the merits may be held to a lower standard with respect to the other factors under consideration, and, conversely, a plaintiff who does not make a strong merits would be required to make a stronger showing of the other factors. Other circuits adhere to a complete evaluation of all four factors.

[229] *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006).

[230] *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

[231] *See TVA v. Hill*, 437 U.S. 153 (1978) (holding that Congress required in the Endangered Species Act that a final injunction automatically issues once a merits violation is shown).

[232] 456 U.S. 305, 313 (1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)

Petroleum Marketing Practices Act,[233] Endangered Species Act,[234] National Labor Relations Act,[235] Federal Trade Commission Act,[236] and the Securities Exchange Acts of 1933 and 1934.[237]

The modified preliminary injunction standard in the Voting Rights Advancement Act of 2019 is particularly important because in recent years, there has been a general reluctance by courts to issue preliminary injunctions requested by impacted voters, particularly when the voting change in question is being challenged in proximity to an election.[238] This judicial reticence extends to the Supreme Court, which in a series of recent decisions has reversed or stayed preliminary injunctions that were granted by lower courts close to the date of an election.[239] This judicial doctrine is sometimes referred to as the "*Purcell* principle" and refers to a judicial policy prominently acknowledged in *Purcell v. Gonzalez*, a 2006 per curiam opinion indicating that courts should not issue orders changing election rules in close proximity to an election.[240]

But the *Purcell* principle is likely inapposite where Congress has legislated a preliminary injunction standard because it is a judicially created doctrine based on policy considerations regarding the public interest, not a matter of constitutional interpretation.[241] It may therefore be overridden by Congress through legislation. Indeed, Congress is generally the more suitable body to evaluate and make determinations regarding what is in the public interest with respect to the enforcement of federal laws and availability of legal remedies for violations of those laws. To be sure, there is an exceptionally strong public interest in ensuring the conduct of free and fair elections.

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[233] *See* 15 U.S.C. § 2805(b); *Mac's Shell Serv., Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175 (2010).

[234] *See* 16 U.S.C. § 1536; *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *see also National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782 (9th Cir. 2005); *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

[235] *See* 29 U.S.C. §160 (j); *Chester ex rel. N.L.R.B. v. Grane Healthcare Co.*, 666 F.3d 87 (3d Cir. 2011).

[236] *See* 15 U.S.C. 53(b); *FTC. v. Inc. 21com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal 2010).

[237] *See* 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d); *SEC v. Bravata*, 763 F.Supp.2d 891 (E.D. Mich. 2011); *SEC v. Homestead Properties, L.P.*, 2009 WL 5173685 (C.D. Cal. 2009); *SEC v. Schooler*, 912 F.Supp. 2d 1341 (S.D. Cal. 2012).

[238] *See* Hasen, *supra* note 206, at 449.

[239] *Id.*

[240] *Id.* at 428. In a 2006 per curiam opinion, the Supreme Court in *Purcell v. Gonzalez* 549 U.S. 1 (2006) vacated a Ninth Circuit injunction which had temporarily blocked use of Arizona's strict new photo ID law. The Court in *Purcell* criticized the Ninth Circuit both for not explaining its reasoning and for issuing an order just before an election which could cause voter confusion and problems for those administering elections. In the 2014 election cases, the Court consistently voted against changing the electoral status quo just before the election.

[241] *See* Appendix B, which demonstrates the issues and inconsistencies with how courts apply the *Purcell* principle that effectively stymie efforts by voting rights advocates to block discriminatory laws and practices *before* an election.

c. Notice and transparency provisions

On a basic level, notice of proposed election changes and their impact is critical for community awareness of changes in voting procedures so voters can comply, cast an effective ballot, or provide feedback to officials as to how the change will impact voters' ability to exercise the franchise. Thus, election officials should provide reasonable notice of potential changes of voting changes before implementation. Before *Shelby County*, Section 5 not only prevented racially discriminatory changes from going into effect, but also functioned as a notice requirement with the Justice Department serving as a central hub for the Section 5 submissions.[242] The public was able to receive notice of the proposed voting changes, review them, and provide the Justice Department with comments regarding their impact. Now, since Section 5 has been immobilized, a huge part of the battle to protect voting rights is finding out where and when discrimination is occurring, particularly at the local.

The Voting Rights Advancement Act of 2019 addresses these concerns by including an important section with notice and transparency requirements, separate from the federal preclearance process, to ensure that voters, especially minorities, are able to defend their right to vote against sudden, arbitrary, or discriminatory elections changes. Moreover, notice requirements pose an exceedingly low burden on jurisdictions and come with a high reward to the public and to voters.

Section 5 of the bill serves these goals. It establishes specific requirements for all election changes related to federal elections, polling place resources during federal elections, and changes relating to federal, state, or local constituencies and political boundaries.[243] Specifically, Section 6(a) requires states and political subdivisions that make voting changes during the 180 days prior to an election for federal office provide the public notice of the change within 48 hours in a way that is reasonably convenient to access and is available on the internet. This permits public notice of important voting changes in reasonable proximity to an election. Section 6(b) requires each state and political subdivision to provide the public notice reasonable notice of changes to polling place resources prior to the 30th day before an election for federal office, or if a change occurs less than 30 days before an election, within 48 hours. This requirement would make it easier to identify resource inequities between polling locations and discourage elections officials from making arbitrary changes to polling locations, resources, and hours. Section 6(c) establishes requirements for public notice of federal, state, or local voting changes that involve redistricting, reapportionment, and changes to methods of election. The jurisdiction would be required to provide such notice no later than 10 days after making the change as well as information on the geographic area impacted and related demographic and electoral data. This section is important to allowing deliberation and examination of potentially racially dilutive effects of these voting changes. It would permit citizens to more easily ascertain whether the change of an election boundary or type is legitimately related to a proper

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[242] *See* Department of Justice, Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, https://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-1965-amended (last updated Aug. 6, 2015); Archive of Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, https://www.justice.gov/crt/archive-notices-section-5-activity-under-voting-rights-act-1965-amended (last updated Nov. 16, 2017).

[243] H.R. 4 § 6.

government objective or criteria, or if other impermissible factors like racial discrimination predominated. Further, state legislatures and others who are responsible for creating a jurisdiction's political sub-boundaries would be further accountable, based on publicly available data, for what the redistricting plans they adopt.

Overall, the provisions of section 6 serve to provide sunlight and awareness regarding voting changes and would greatly enhance the ability of citizens to see understand election changes that may impact them.

Conclusion

The price of inaction to protect the voting rights of Americans is high, and history offers a myriad of examples demonstrating its cost to the nation. Congress must act now to cement the legacy of the Voting Rights Act and guard tbe rights of all Americans. Our history is a continuum of periods where galvanized voters exercise their political rights followed by largescale efforts by those with power to quash that political rise. Historical and current evidence show that the right to vote remains perilous for many Americans. Congress must realize their bounded duty to fulfill the promise of the Fourteenth and Fifteenth amendments and restore the Voting Rights Act for a new generation.

Appendix A

The cases summarized in this appendix are cases where the ACLU provided direct representation on behalf of plaintiffs or participated as amicus. We include cases that were active as of, or filed in, 2006 or later. The year listed next to each case represents the year the initial complaint was filed.

1. Schwier v. Cox – Georgia 2000

With some exceptions, the Privacy Act of 1974 makes it unlawful for "any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number."[1] The law protects individuals registering to vote from having to disclose their social security numbers unless the state required such disclosure before the Privacy Act was enacted. In 1999, after they moved to Walton County, Georgia, and tried to register to vote, Deborah and Theodore Schwier were told they had to disclose their social security numbers. When they declined to do so, the county rejected their voter registration applications. In October 2000, the ACLU filed suit on behalf of the Schwiers under the Privacy Act and the Civil Rights Act of 1964,[2] which makes it illegal to deny anyone the right to register and vote for any act or omission immaterial to determining voting qualifications.[3] The suit sought to require election officials to permit the Schwiers to register and vote without disclosing their social security numbers.[4]

The court preliminarily enjoined the county, allowing the Schwiers to vote if they tendered their social security numbers under seal. Their social security numbers would not be permanently entered into election records and would be destroyed if they ultimately prevailed in the suit.[5] Much of the subsequent dispute turned on whether Georgia's voter registration law qualified for the Privacy Act's exception, i.e. whether Georgia required voters to disclose their social security numbers prior to January 1, 1975. The district court initially ruled for the state, holding that neither the Privacy Act nor the Civil Rights Act of 1964 gave the plaintiffs a private right of action.[6] The plaintiffs appealed, and the United States intervened to defend the Privacy Act's constitutionality. The court of appeals reversed and remanded, holding that both the Privacy Act and the Civil Rights Act afforded

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[1] P.L. 93-579, § 7(a)(1), 88 Stat. 1896.

[2] *See* Docket Sheet, Schwier v. Cox, No. 1:00-cv-2820 (N.D. Ga. Oct. 26, 2000).

[3] *See* Pub. L. No. 88-352, § 101, 78 Stat. 241.

[4] LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 181-184 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

[5] *See Schwier v. Cox*, 412 F.Supp.2d 1266, 1268 (N.D. Ga. 2005).

[6] *See Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003).

a private right of action.[7] The court's opinion was significant because other courts had previously rejected private suits under both statutes.[8]

On remand, the district court ruled for the plaintiffs. The court concluded that Georgia's voter registration system did not qualify for the Privacy Act's exception because the state statute's plain language as of December 31, 1974, asked registrants for their social security number "if known at the time of application" and did not uniformly require disclosure.[9] The court also held that the state violated the Civil Rights Act of 1964 because the disclosure of applicants' social security numbers was not "material" to whether they were qualified to vote under state law.[10] On appeal, the court of appeals affirmed the district court's judgment.[11]

2. Thompson v. Glades County – Florida 2000

In 2000, the ACLU filed suit on behalf of Billie Thompson, the first African American to run for the Glades County school board and only the second African American to run for countywide office, against Glades County, Florida. The suit challenged the at-large method of election for the five-member county commission and board of education as diluting minority voting strength in violation of Section 2 and the Constitution.[12] In 1998, when Thompson ran for the school board, the population of the county was 10,576, 10.5% of which was African American. Thompson received 42% of the vote in the Democratic primary against the incumbent but was defeated. The suit also alleged that the State of Florida had a racially discriminatory intent in enacting the at-large method of election systems, which had a racially discriminatory effect.

Glades County was sparsely populated and extremely economically depressed, with employment dependent mostly on citrus farming. African Americans did not fare well economically compared with whites: Black residents' per capita income was half that of whites, the unemployment rate of Blacks was double that of whites, and the poverty rate of Blacks was three times that of whites. There was also a history of official discrimination against African Americans in Glades County, including discrimination against African Americans attempting to exercise their rights to the franchise.[13] A trial was held in October 2001, in which expert testimony presented the history of racial discrimination in Florida,

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[7] *Ibid.*

[8] LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 184 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

[9] *Schwier v. Cox*, 412 F.Supp.2d 1266, 1274-75 (N.D. Ga. 2005).

[10] *Id.* at 1276.

[11] *Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006).

[12] Plaintiffs' Complaint for Injunctive and Declaratory Relief, No. 2:00-cv-212 (M.D. Fla. May 12, 2000).

[13] *See id.* at ¶ 15.

and in Glades County in particular, and the discriminatory purpose behind the state's switch to at-large methods of elections and the extent of racially polarized and racial bloc voting.[14]

Three years after the trial, the court issued a condensed decision finding that, although white voters in Glades County tended to vote as a bloc to defeat candidates of choice of African Americans and acknowledged the long history of racial discrimination behind the at-large election system, the plaintiffs failed to establish a Section 2 or a constitutional violation.[15] The court appeared to base its decision on an erroneous conclusion that there was no viable remedy, rejecting an illustrative five-member plan drawn by the plaintiffs with one district containing a 50.23% African American and 15.23% Hispanic voting age populations, with the evidence showing that African Americans and Hispanics voted cohesively. The plan had an overall deviation of 8.6%. The court determined that it was not permitted to impose a plan with an 8.6% deviation and that African Americans would be a minority in an equal population plan. It further found that a plan with a 50.23% African American voting age population was not viable because "to translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person."[16] The court therefore found that the proposed district was "in reality only an influence district," placing an unprecedented burden on the Section 2 plaintiffs because it effectively required them to prove it was impossible for a minority candidate to be outvoted in a remedial plan.

The plaintiffs appealed the decision of the trial court on their Section 2 claim to the Eleventh Circuit. The appeal was argued in May 2005, and in July 2007, nearly 27 months later, the appellate court reversed.[17] It held that the district court clearly erred in several of its Section 2 determinations and that plaintiffs had in fact established a viable remedy. Specifically, it held that the district court's ruling that a minority supported candidate could not win in the proposed district depended on an assumption, contrary to the record, that all whites would register, turn out to vote, and then vote for the same candidate against the candidate of choice of the African American voters. The record in fact showed that the average white crossover vote was 19%. The court of appeals remanded for reconsideration of the record under the correct view of the law.[18]

The county filed a petition for rehearing en banc, which was granted.[19] The court directed the parties to brief additional issues, particularly about the record on crossover voting and whether the plaintiffs had raised the issue of using crossover votes to make their remedy effective. The ACLU brief laid out in detail that the issue of crossover voting had been raised as part of the remedy pre-trial, at trial, and in a motion for reconsideration. The

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[14] *See Thompson v. Glades Cty.*, No. 2:00–cv–212, 2004 WL 5616892,*15-16 (M.D. Fla. 2004)

[15] *Id.*

[16] *Id.*

[17] *Thompson v. Glades Cty.*, 493 F.3d 1253 (11th Cir. 2007).

[18] *Id.*

[19] *Thompson v. Glades County*, 508 F.3d 975 (11th Cir. 2007).

ACLU also pointed out that this was an alternative argument since in the plaintiffs' view, the evidence showed that the remedy would be effective no matter how white voters cast their votes. Two weeks after the en banc argument, the court announced that "[t]he judges of the en banc court are equally divided on the proper disposition of this case." Consequently, the judgment of the district court that ruled against plaintiffs was affirmed by operation of law.[20]

In a similar case, *Bartlett v. Strickland*, the U.S. Supreme Court agreed to hear an issue that it sidestepped in four previous cases—whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is an absolute, bright line requirement for a vote dilution claim under Section 2 of the Voting Rights Act. Because the U.S. Supreme Court took up a similar case for review, the ACLU filed a petition for writ of certiorari. However, the Court subsequently held that no Section 2 violation could be established where a minority was less than 50% of the voting age population in a district,[21] and the Court denied the petition for writ of certiorari in *Thompson v. Glades County*.[22]

3. Bone Shirt v. Hazeltine – South Dakota 2001

In December 2001, the ACLU filed suit on behalf of four Native American voters after the South Dakota legislature redrew the boundaries of the state's 35 legislative districts; each district elected one member of the state senate and two members of the state house for a total of 105 elected members.[23] Every house member was elected at-large in each district, except for one district that was subdivided into two single-member districts. Though the state was 8.25% Native American, Native Americans constituted a majority in only two of the 35 districts. Moreover, they were unnecessarily "packed" into one of the two majority-minority districts, District 27, constituting 90% of the total population of the district. The plaintiffs argued this supermajority of Native American voters was substantially higher than necessary to give Native American voters an equal opportunity to elect candidates of their choice.[24] The adjoining district, District 26, was 30% Native American and they tended to vote as a bloc with Native American voters in District 27.[25] The plaintiffs sued, arguing that the plan diluted Native American voting strength by packing Native Americans into one district while diluting their voting strengtb in the neighboring district in violation of Section 2 of the Voting Rights Act. The plaintiffs also argued that the state did not submit the plan for preclearance as required by Section 5 of the Voting Rights Act, since two counties in the state were covered jurisdictions impacted by the new plan.

In 2002, a three-judge court ordered the state to submit its 2001 redistricting plan to

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[20] *Thompson v. Glades County*, 532 F.3d 1179, 1180 (11th Cir. 2008).

[21] *Bartlett v. Strickland*, 556 U.S. 1 (2009).

[22] *Thompson v. Glades*, 532 F. 3d 1179 (11th Cir. 2008), cert. denied, 556 U.S. 1126 (2009).

[23] Complaint at ¶¶ 23-24, Bone Shirt v. Hazeltine, No. 3:01-cv-03032 (D.S.D. Dec. 26, 2001).

[24] *Id.* at ¶¶ 34-36.

[25] *Id.* at ¶¶ 37, 40.

federal officials for preclearance.[26] The state submitted its plan to the Department of Justice, which cleared it for implementation despite the packing of Native American voters. After substantial discovery and a trial, the district court considered the plaintiffs' Section 2 claim. In a lengthy 144-page opinion, the court ruled for the plaintiffs and made extensive findings of racially polarized voting in addition to past and continuing discrimination against South Dakota's Native American population.[27] The court found "substantial evidence that South Dakota officially excluded Indians from voting and holding office."[28] For example, Native Americans encountered numerous difficulties in obtaining registration cards from county auditors, whose behavior "ranged from unhelpful to hostile."[29] The court also determined that local officials regularly accused Native Americans of voter fraud and that such accusations were unfounded, politically motivated, and intended to intimidate.[30] The court acknowledged "Indian[s] in Districts 26 and 27 bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process."[31] In sum, the court found that there was "a significant lack of responsiveness on the part of elected officials to Indian concerns."[32] The court also concluded that the plaintiffs had demonstrated that there were several ways to draw an additional majority-Native American district and gave the state an opportunity to fashion a new plan. After the state declined to do so, the court adopted the plaintiffs' proposed plan that remedied the Native American vote dilution.[33] On appeal, the Eighth Circuit affirmed the district court's decision.[34]

4. Black v. McGuffage – Illinois 2001

In January 2001, the ACLU brought a civil rights class action on behalf of individual African American voters challenging the non-uniform, arbitrary, and unequal voting systems used in Illinois under Section 2 of the Voting Rights Act and the Fourteenth Amendment.[35] In Illinois, the average residual vote rate in the 2000 presidential election was approximately 3.85%. Chicago, which used punch card voting systems, had a residual vote rate of 7.06%, although in one precinct it was as high as 36.73%.[36] Based on statistics demonstrating the racial disparity in residual vote rates based on the voting system used, the plaintiffs argued that because African American and Latino voters were more likely to

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[26] *Bone Shirt v. Hazeltine*, 200 F. Supp. 2d 1150 (D.S.D. 2002).

[27] *See generally Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).

[28] *Id.* at 1019.

[29] *Id.* at 1025.

[30] *Id.* at 1026.

[31] *Id.* at 1038.

[32] *Id.* at 1046.

[33] *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035 (D.S.D. 2005).

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

[35] Complaint at ¶ 1, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Jan. 11, 2001).

[36] *Black v. McGuffage*, 209 F. Supp. 2d 889, 893 (N.D. Ill. 2002).

vote with punch cards than other voters, minority voters were less likely to have their votes counted than non-minority voters.[37]

The parties reached a settlement agreement after extensive litigation and lengthy court-ordered settlement discussions. Approved in December 2003, the agreement called for implementation of new and improved voting technology by March 2006 and at least partial reimbursement of the plaintiffs' costs.[38] The agreement provided that the plaintiffs could reinstate the litigation if the defendants failed to implement the new technology by the specified deadline. The court retained jurisdiction until January 2007, at which point it released the parties from the agreement's terms.

5. Cottier v. City of Martin – South Dakota 2002

Martin, located in southwestern South Dakota, is a small city of slightly more than 1,000 people, nearly 45% of whom are Native American. It is the county seat of Bennett County, which was created out of the Pine Ridge Indian Reservation in 1909. At the time of the filing of the lawsuit, the county had a slight Indian population majority (52%). Like many border towns in the American West, Martin has seen more than its share of racial conflict.[39] The city was governed by a city council consisting of a mayor, who was elected at-large, and six council members, who were elected from three two-member wards. In January 2002, following the decennial census, the Martin City Council adopted a new redistricting plan for the city council wards.[40]

In 2002, the ACLU filed suit on behalf of two Native American voters, alleging that the redistricting plan adopted by the city had the purpose and effect of diluting Native American voting strength in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[41] Despite being a significant part of the population, Native Americans had been unable to elect any candidates of their choice to the city council because the redistricting plan ensured white voters controlled all three city council wards.[42]

After more than two years of discovery, the case went to trial in June 2004. The district court ruled against the plaintiffs, finding that the plaintiffs had not established the third

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[37] *See* Complaint at ¶¶ 3, 26, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Jan. 11, 2001); *see also* Fourth Amended Complaint at ¶¶ 46-47, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Oct. 9, 2003).

[38] Order Approving Settlement Agreement, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Dec. 15, 2003).

[39] *See Cottier v. City of Martin*, No. 5:02-cv-05021, at *1-3, slip op. (D.S.D. Mar. 22, 2005).

[40] Supplemental Complaint at ¶ 14, Wilcox v. City of Martin, 02-cv-5021 (D.S.D. Sept. 6, 2002).

[41] *See id.*

[42] *See id.* at ¶ 23, Wilcox v. City of Martin, 02-cv-5021 (D.S.D. Sept. 6, 2002); *Cottier v. City of Martin*, No. 5:02-cv-05021, at *2-3 (D.S.D. Mar. 22, 2005).

Gingles factor that whites voted as a bloc usually to defeat the candidates preferred by Native American voters in city elections.[43]

The plaintiffs appealed, and in May 2006 the Eighth Circuit reversed the district court's ruling, concluding that the plaintiffs did in fact establish that the candidates of choice of Native American voters were usually defeated by whites voting as a bloc, thus meeting the third *Gingles* factor. It vacated the lower court's opinion and remanded for further consideration on the totality of circumstances analysis.[44]

On remand, the district court held that the challenged system violated Section 2 of the Voting Rights Act. The court found there was a long, elaborate history of discrimination against Native Americans in South Dakota in matters relating to voting. Particularly in Martin, the court found Native Americans continued to suffer the effects of past discrimination, including lower standards of living and levels of income, education, home ownership, and automobile ownership. The court also found that Martin city officials had taken intentional steps to thwart Native American voters from exercising political influence and that the city was apportioned in a manner that unlawfully diluted their voting strength, causing a persistent and unacceptable level of racially polarized voting in Martin.[45]

The decision ordered a "full and complete remedy" for the plaintiffs. After the city refused to propose a new election plan, the district court ordered Martin to implement a system of cumulative voting for the city council.[46] The first election under the cumulative voting plan was held, and three Indian-friendly candidates were elected. The city appealed the district court's ruling on the merits of the plaintiffs' claim, as well as its remedial order imposing cumulative voting.

In December 2008, a three-judge panel of the Eighth Circuit affirmed the district court's judgment in the plaintiffs' favor.[47] The panel found that the district court's determination that vote dilution was supported by substantial evidence in the record and that the district court did not abuse its discretion when it imposed cumulative voting as the remedy. The Eighth Circuit subsequently vacated the panel's ruling, however, when it granted the city's petition for rehearing en banc. In a divided 7-4 opinion, the en banc court ruled in May 2010, that the original decision of the district court dismissing the complaint for failure to satisfy the third Gingles factor was proper.[48] The plaintiffs filed a petition for a writ of certiorari, but it was denied by the Supreme Court in November 2010.[49]

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[43] *Cottier v. City of Martin*, No. 02–5021, 2005 WL 6949764 (D.S.D. May 5, 2005).

[44] *Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir. 2006).

[45] *See Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1185 (D.S.D. 2006).

[46] *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 938 (D.S.D. 2007).

[47] *Cottier v. City of Martin*, 551 F.3d 733 (8th Cir. 2008).

[48] *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010).

[49] *Cottier v. City of Martin*, 562 U.S. 1044 (2010).

6. Quick Bear Quiver v. Nelson – South Dakota 2002

Prior to the 2013 decision in *Shelby County v. Holder* immobilizing Section 5 preclearance of the Voting Rights Act, Shannon and Todd counties in South Dakota were covered jurisdictions and required to submit voting changes for federal preclearance. When the counties became covered jurisdictions pursuant to the 1975 amendments to the Voting Rights Act, the South Dakota Attorney General at the time voiced his opposition to the counties' coverage under the law and his intention to ignore the preclearance mandate, a practice that continued for the next 25 years.[50] Following over 600 unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd counties sued the state in August 2002 to force it to comply with Section 5.[51] In December 2002, the parties entered an agreed-upon consent order that required the state to preclear its backlog of unsubmitted voting changes and gave the court continued jurisdiction over the matter to ensure compliance with Section 5.[52] It also referred the matter to a magistrate to develop with the parties a comprehensive remedial plan "that will promptly bring the State into full compliance with its obligations under Section 5."[53] As a result of the consent order, by April 2005, the state had submitted 714 statutes and 545 administrative rule changes to the Department of Justice for preclearance.[54]

In January 2005, separate plaintiffs filed a lawsuit in Charles Mix County alleging the county commission districts were malapportioned in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[55] Because of that lawsuit, the South Dakota legislature passed a bill establishing a process for emergency redistricting of county commissioner districts to resolve the malapportionment claim, and Charles Mix County officials submitted a redistricting request pursuant to the new rules.[56] However, the state did not request preclearance of the new emergency redistricting law, so the plaintiffs in *Quick Bear Quiver* filed a motion for a temporary restraining order[57] and preliminary and permanent injunctions[58] requesting the law be enjoined from enforcement absent preclearance, which were all granted.[59] In granting the preliminary injunction, the district

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[50] *See Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027, 1029 (D.S.D. 2005).

[51] Complaint at ¶ 1, Quick Bear Quiver v. Hazeltine, 5:02-cv-05069 (D.S.D. Aug. 5, 2002).

[52] Consent Order at ¶¶ 3, 6, Quick Bear Quiver v. Hazeltine, No. 5:02-cv-05069 (D.S.D. Dec. 27, 2002).

[53] *Id.* at ¶ 4.

[54] *Quick Bear Quiver*, 387 F.Supp.2d at 1029.

[55] *Ibid.*

[56] *Id.* at 1030.

[57] Plaintiffs' Motion for a Temporary Restraining Order, Quick Bear Quiver v. Nelson, No. 5:02-cv-05069 (D.S.D. March 11, 2005).

[58] Plaintiffs' Motion for a Preliminary and Permanent Injunction, Quick Bear Quiver v. Nelson, No. 5:02-cv-05069 (D.S.D. March 15, 2005).

[59] *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027 (D.S.D. 2005).

court issued a strongly worded decision, saying that state officials, "for over 25 years ha[d] intended to violate and ha[d] violated the preclearance requirements of the VRA," and that the new bill "g[ave] the appearance of a rushed attempt to circumvent the VRA."[60] The court enjoined implementation of the new emergency redistricting bill until the state complied with Section 5.[61] The state submitted the redistricting bill for preclearance and petitioned the Supreme Court for review. The Department of Justice granted preclearance, and the Supreme Court dismissed the case as moot at plaintiffs' request.[62]

7. Levy v. Lexington Cty. S.C. Sch. Dist. Three Bd. of Tr. – South Carolina 2003

This was a vote dilution lawsuit brought by the ACLU in 2003 on behalf of Black residents of Lexington School District 3, one of five school districts lying wholly or partially within Lexington County, South Carolina. Prior to the filing of the lawsuit, no Black person had ever been elected to the school board under the challenged system of at-large nonpartisan elections, despite the fact that Blacks constituted 28.5% of the population of the school district.[63]

Lexington County has a long history of racial discrimination: schools were racially segregated; town ordinances required segregation in places of public accommodation; there was racial discrimination in hiring; the Ku Klux Klan was active in the county; Blacks were excluded from juries; election campaigns were characterized by racial appeals; whites fled the Democratic Party because of its support of civil rights laws; and housing was constructed on a segregated basis.[64] Horace King, a resident of Lexington County, was head of the South Carolina chapter of the Christian Knights of the Ku Klux Klan in the 1990s. To promote the organization's white supremacist goals, he encouraged Klan members to burn Black churches. In 1998, a member of the local Ku Klux Klan pled guilty to shooting three black teenagers outside a rural nightclub in Pelion in Lexington County.[65]

A trial occurred in March 2006, and after a lengthy delay of three years, during which elections were held for the school board in 2006 and 2008, the district court issued a detailed order on February 19, 2009, in which it held that the challenged at-large system diluted minority voting strength in violation of Section 2 of the Voting Rights Act.[66] Among its numerous findings were that South Carolina and Lexington County had a voluminous history of racial discrimination which had continuing effects: voting was racially polarized, few minorities had been elected to office, churches, businesses, communities, and clubs remained segregated, Blacks had a depressed socio-economic status, Black registration and

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[60] *Id.* at 1034.

[61] *Id.* at 1034-35.

[62] *Nelson v. Quick Bear Quiver*, 546 U.S. 1085 (2006).

[63] *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338, at *1 (D.S.C. Feb. 19, 2009).

[64] See *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338, at *2 (D.S.C. Feb. 19, 2009); Brief of Appellees at ¶¶ C-F, Levy v. Lexington Cty, No. 09-1550 (4th Cir. June 23, 2009)

[65] Brief of Appellees at ¶ E, Levy v. Lexington Cty, No. 09-1550 (4th Cir. June 23, 2009).

[66] *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338 (D.S.C. Feb. 19, 2009).

turnout were depressed, elected officials were unresponsive to the needs of the Black community, and Black students had depressed levels of academic achievement. After the complaint was filed, the school board recruited a retired Black school teacher to run for office in an effort to defeat the lawsuit.[67]

The school district appealed, and one of its main arguments was that the trial court should have considered the two election cycles that took place after trial but before the court issued its opinion. Oral argument was heard by the Fourth Circuit on September 24, 2009, and on December 21, 2009, it vacated and remanded the case for further consideration of the 2006 and 2008 elections.[68]

On remand, the district court conducted more hearings and heard testimony from the parties' expert witnesses concerning the 2006 and 2008 elections. The district court also engaged the services of a statistical expert to educate the district court regarding the methodologies used by the parties' experts. In April 2012, the district court concluded that the plaintiffs failed to satisfy their burden of establishing a cognizable violation of Section 2 of the Voting Rights Act and granted summary judgment in favor of the school district.[69]

8. Kirkie v. Buffalo County – South Dakota 2003

In 2003, the ACLU filed suit in federal court alongside the Crow Creek Sioux Tribe to challenge a method of election diluting the voting strength of indigenous voters in Buffalo County, South Dakota. The 2000 Census listed Buffalo County as the poorest county in the nation.[70] The county was overwhelmingly Native American with 83% of voters belonging to the Crow Creek Sioux Tribe. The method for electing the county's three-member commission—in effect for decades—packed nearly all of the county's Native American population, 1,692 of the 2,032 residents, into one district.[71] White residents made up only 17% of the population but controlled the remaining two districts and, thus, the county government. The inter-district deviation was 218%—20 times the legal limit under the one person-one vote equal protection principle (total deviations of greater than 10% are presumptively unconstitutional).[72] The plan's unlawfulness was raised with the Buffalo County Commission prior to the lawsuit, but the commission did not act to cure its

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[67] *Id.* at *1-19.

[68] *See Levy v. Lexington Cty.*, 589 F.3d 708 (4th Cir. 2009).

[69] See *Levy v. Lexington Cty.*, No. CA 3:03-3093-MBS, 2012 WL 1229511, at *1 (D.S.C. Apr. 12, 2012), as amended (Apr. 18, 2012).

[70] Press Release, ACLU, ACLU of the Dakotas Challenges Districting Scheme that Prevents Native Americans from Holding Office (Mar. 20, 2003), https://www.aclu.org/press-releases/aclu-dakotas-challenges-districting-scheme-prevents-native-americans-holding-office; *see* LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 769-770 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

[71] Complaint at ¶ 20, Kirkie v. Buffalo County, No. 3:03-cv-0311 (D.S.D. Mar. 20, 2003), 2003 WL 24224114.

[72] *Id.* at ¶¶ 24-25.

problems despite having the ability to do so during a reapportionment process. Instead, the commission determined that the existing districts "were as regular and compact in form as practicable and required no change."[73]

The ACLU's lawsuit alleged that the districting plan was malapportioned to discriminate against Native American voters.[74] The plaintiffs sought to dissolve existing district lines, draw a new set of nondiscriminatory lines, and call for a special election to fill the county commission. The parties settled the case through a consent decree whereby the county admitted its plan was discriminatory and agreed to submit to judicial preclearance under Section 3(c) of the Voting Rights Act through January 2013.[75] With the decree in place, the county's Native American community was able to elect two candidates of choice.

9. Prye v. Blunt – Missouri 2004

The Missouri state constitution prohibits any person from voting who "by reason of mental incapacity" has a legally appointed guardian.[76] Missouri's Probate Code establishes the procedures by which an individual might be adjudicated as incapacitated and a guardian appointed. An "incapacitated person" is "one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur."[77] The ACLU, with the Bazelon Center for Mental Health Law and the Illinois-based Guardianship and Advocacy Commission, challenged that statute in 2004 on behalf of a plaintiff who required a guardian for certain transactions but was fully capable of understanding the voting process and voting on his own.[78]

Born in 1952, Steven Prye was one of the first Black students to attend desegregated Central High School in Memphis, Tennessee, in the late 1960s. His commitment to ending discrimination intensified sharply while at Central after he witnessed some white teachers celebrating the April 4, 1968, assassination of Dr. Martin Luther King Jr. The Lorraine Motel, where Dr. King was shot, was just one mile away from the school. After graduating from Yale University, attending Harvard Law School, and receiving a Master of Laws in taxation from New York University (NYU), the plaintiff taught courses at NYU, Vermont Law School, and the University of Illinois School of Law. At age 49, he was diagnosed with

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[73] *See id.* ¶ 27.

[74] *Id.* at ¶ 1.

[75] *See* Consent Decree at ¶ 27, Kirkie v. Buffalo County, No. 3:03-cv-0311 (D.S.D. Jan. 27, 2004), 2003 WL 24224114.

[76] MO. CONST. art. 8, § 2.

[77] Mo. Rev. STAT. § 475.010(9).

[78] Complaint, Prye v. Blunt, No. 04-4248-CV-C-ODS (W.D. Mo. Oct. 8, 2004).

a serious mental illness. A guardian was appointed and in 2004 the plaintiff came to live in Missouri.[79]

Prye challenged the state law which prohibited him from voting, relying upon the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and the U.S. Constitution. The Missouri district court acknowledged the importance of voting as preservative of all other rights, but refused to enjoin the state's restriction on voting before the 2004 election. It rejected the plaintiff's equal protection claims and concluded that the ADA and the Rehabilitation Act did not protect his right to vote. After the election, the plaintiff, joined by the Missouri Office of Protection and Advocacy Services (MOPAS) and other individuals, including Bob Scaletty, and with the ACLU's assistance, filed an amended complaint, challenging Missouri's blanket denial of the right to vote to persons who have been adjudged incapacitated.[80] Lead plaintiff Prye passed away in January 2006, but the case he initiated continued to be pursued by MOPAS and Scaletty.

Scaletty was diagnosed as suffering from schizophrenia and, due to his mental illness, placed under a full guardianship in 1999 in accordance with procedures established by Missouri law. The guardianship order, however, expressly provided that Scaletty retain the right to vote. Despite the guardianship order protecting his right to vote, Scaletty was subsequently denied the right to vote in 2004 by election officials who explained that state law does not allow individuals under a guardianship order to vote.[81] However, in January 2005, having learned of their mistake (after Scaletty became a party in this case), the Kansas City Board of Election Commissioners sent Scaletty's guardian a voter identification card on his behalf and advised that Scaletty was eligible to vote in the next election.[82]

On July 7, 2006, the defendants' motion for summary judgment was granted.[83] The plaintiffs argued that Missouri violates federal law by denyiug the right to vote to all persons under a full guardianship order due to a finding of incapacity because at least some incapacitated individuals are qualified to vote, notwithstanding a probate court's finding of incapacity. The court found that the Missouri law did not violate the ADA as the law in question affords individualized determination of a person's abilities and limitations, was designed to differentiate those who are qualified to vote from those who are not, and denied the right to vote to those who lack the mental capacity to exercise the right to vote.

On appeal, the Eighth Circuit affirmed the district court's grant of summary judgment although on somewhat different grounds.[84] Here the court found that MOPAS lacked associational standing because the specific claim asserted required participation by individual persons with specific claims. Additionally, the court found that Scaletty's claim

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[79] *See* First Amended Complaint for Declarative and Injunctive Relief at ¶¶ 24–28, No. 04-4248 (W.D. Mo. Dec. 6, 2004).

[80] *See id.*

[81] *See id.* ¶¶ 29-34.

[82] *See* Answer to Kansas City Election Board at ¶¶ 2–3, 2005 WL 3683622 (W.D.Mo. 2005)

[83] *Prye v. Carnahan*, No. 04-4248-CV-C-ODS, 2006 WL 1888639 (W.D. Mo. Jul. 7, 2006).

[84] *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d. 803 (8th Cir. 2007).

for equitable relief was moot as the guardianship order preserved his right to vote, elections officials advised Scaletty that he would be allowed to vote in the next election, and there was no reasonable expectation that the 2004 error would be repeated. The court also found that the plaintiff's claim that Missouri categorically prohibits those under full guardianship to vote without an individualized inquiry failed to prove the prohibition was categorical.

10. New Jersey State Conference NAACP v. Harvey – New Jersey 2004

In January 2004, civil rights organizations and private plaintiffs, represented by the ACLU and Rutgers Law School Constitutional Litigation Clinic, filed suit in New Jersey state court challenging that New Jersey's law disfranchised individuals with convictions who were on probation or parole. Plaintiffs contended that the law disproportionately impacted Black and Latino Americans, who face substantially higher rates of prosecution, conviction, and incarceration[85] as an extension of the racial discrimination endemic in the criminal justice system.[86] African Americans made up approximately 13.6% of New Jersey's total population, but 63% of the prison population, over 60% of the parolee population, and 37% of those on probation.[87] Latinos constituted 13.3% of New Jersey's total population, but 18% of the prison population, 20% of the parolee population, and 15% of those on probation.[88] Collectively, Blacks and Latinos made up 81% of the total prison population, more than 75% of the parolee population, and more than 52% of those on probation; they also comprised more than 62% of those denied the right to vote under New Jersey's disenfranchisement law.[89]

The lawsuit was the first in the nation that challenged a disenfranchisement law based on a state's constitution. The suit made two claims: first, that the state disfranchisement law has a discriminatory impact on Black and Latino Americans and denies them the guarantee of equal protection under the New Jersey Constitution, and second, that the disproportionate impact of the state's disfranchisement law dilutes the voting strength of Black and Latino communities and deprives them of the ability to elect candidates of their choice, also in violation of the equal protection guarantee of the New Jersey Constitution.[90] The plaintiffs also contended that there is no public benefit or government interest served by denying suffrage to individuals on probation or parole.[91] The plaintiffs included the New Jersey State Conference of the NAACP, Latino Leadership Alliance of New Jersey, and several impacted minority voters who were otherwise eligible to vote.

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[85] Complaint at ¶ 1, N.J. State Conf. NAACP v. Harvey, No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div. Jan. 4, 2004).

[86] *See generally id.* at ¶¶ 27, 33-40.

[87] *Id.* at ¶ 23.

[88] *Id.* at. ¶ 24.

[89] *Id.* at ¶¶ 25, 28.

[90] *Id.* at ¶¶ 45-53.

[91] *Id.* at ¶ 2.

The state trial court granted New Jersey's motion for summary judgment, ruling that the plaintiffs failed to state a claim upon which relief could be granted.[92] In November 2005, the state appellate court affirmed the lower court's judgment.[93] The court reasoned that the New Jersey Constitution specifically authorized its disenfranchisement law and that the plaintiffs did not claim that it was enacted with an invidious purpose. The Supreme Court of New Jersey denied certiorari in March 2006.[94]

Following the final decision, the ACLU and Rutgers Law School Constitutional Litigation Clinic filed a petition in September 2006 with the Inter-American Commission on Human Rights, an autonomous body of the Organization of American States. The petition requested it find that the denial of New Jersey citizens' right to vote while they are on probation or parole violates universal human rights principles.[95] The United States responded on April 7, 2010 that the petition should be dismissed for failure to exhaust domestic remedies.[96] The ACLU filed responses on May 20, 2010, and November 15, 2010, arguing that the petitioners had exhausted all available remedies and that further pursuit of such remedies would be futile.[97] Unfortunately, the Commission, without notice, archived the case due to its inaction on the petition, and the case is no longer pending.

11. Blackmoon v. Charles Mix County – South Dakota 2005

In January 2005, the ACLU sued Charles Mix County, South Dakota, on behalf of four tribal members after years of attempting to persuade the county to correct its apportionment scheme. The complaint alleged that the three county commission districts were malapportioned in violation of Section 2 of the Voting Rights Act and drawn to discriminate against Native American voters in violation of the Fourteenth and Fifteenth Amendments.[98] Initially in November 2001, the ACLU wrote to the county on behalf of the Yankton Sioux Tribe that the county's districts violated the one person-one vote principle of the Fourteenth Amendment and diluted Native American voting strength by splitting them into two districts. State law required the county to redraw districts in February 2002, but

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[92] *N.J. State Conf. NAACP v. Harvey* No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div.).

[93] *N.J. State Conf. NAACP v. Harvey*, 885 A.2d 445 (N.J. Super. App. Div. 2005).

[94] *N.J. State Conf. NAACP v. Harvey*, 895 A.2d 450 (N.J. 2006).

[95] *See* Petition Alleging Violations of the Human Rights of the State Conference of the NAACP et. al by the United States of America and State of New Jersey, submitted September 13, 2006, https://www.aclu.org/legal-document/petition-behalf-men-and-women-state-new-jersey-prohibited-voting-pursuant-state?redirect=cpredirect/26731.

[96] Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Petition No. P-990-06: Michael Mackason et al. (Apr. 7, 2010) (on file with author).

[97] Letter from Steven M. Watt et al., Senior Staff Attorney, ACLU Human Rights Program, to Dr. Santiago Canton, Exec. Sec., Inter-American Comm'n on Human Rights (Nov. 15, 201) (on file with author); Petitioners' Observations to the Response of the Government of the United States of America (May 20, 2010) (on file with author).

[98] Complaint at ¶¶ 3-4, 36-39, Blackmoon v. Charles Mix Cty., 4:05-cv-04017 (D.S.D. Jan. 27, 2005).

the county commission opted to leave its then-current districts in place. Each district had a majority white voting age population, despite the fact that Native Americans made up 30% of the county and that it was possible to draw a compact majority Native American district. The total population deviation among the districts was 19%—almost certainly unconstitutional.[99]

In an effort to avoid court-supervised redistricting, the county asked the state to pass legislation establishing a process for emergency redistricting, as state law otherwise generally prohibited the county from redistricting until 2012.[100] The legislature complied and passed a bill, which the governor promptly signed, allowing a county to redistrict—with the permission of the governor and secretary of state—any time it became "aware" of facts that called into question whether its districts complied with federal or state law.[101] However, South Dakota failed to preclear the new law with the Department of Justice.

Before the county could take advantage of the new law, four Native Americans in a separate lawsuit obtained a preliminary injunction stopping the state from implementing the new voting law for emergency redistricting, unless and until it was precleared under Section 5 of the Voting Rights Act.[102] The preliminary injunction effectively put the law on hold temporarily.

Afterwards the district court in *Blackmoon* granted the plaintiffs' motion for partial summary judgment on their malapportionment claim, finding a violation of the one person-one vote standard of the Equal Protection Clause of the Fourteenth Amendment.[103] The county eventually adopted a remedial plan that cured both the malapportionment and vote dilution claims and secured federal supervision of its elections through 2024.[104]

Subsequently, residents of the county approved a referendum in an attempt to increase the size of its county commission from three to five positions. The county commissioners submitted its plan to the Justice Department for preclearance, which was rejected on the basis that the county had not met its burden to prove that the increase was not motivated by a discriminatory purpose.[105] Consequently, the three-member plan with one majority Native American district remained in place. The first elections held under the new districts occurred in 2006 and resulted in the first Native American to serve on the commission. Monitoring of voting changes in the county remains ongoing.

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[99] *See id.* at ¶ 39.

[100] S.D. CODIFIED LAWS § 7-8-10.

[101] *See* H.B. 1265, 80th Leg., 2005 Sess. (S.D. 2005).

[102] *See Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005).

[103] *Blackmoon v. Charles Mix County*, 4:05-cv-04017, 2005 WL 2738954 (D.S.D. 2005).

[104] Consent Decree, Blackmoon v. Charles Mix County, 05-cv-04017 (D.S.D. Dec. 4, 2007).

[105] Letter from Grace Chung Becker, Acting Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Sara Frankenstein Gunderson (Feb. 11, 2008), https://www.justice.gov/crt/voting-determination-letter-14.

12. Crawford v. Marion County Election Board – Indiana 2005

In May 2005, the Indiana Democratic Party and Marion County Democratic Central Committee filed a lawsuit challenging Indiana's photo ID law, alleging violations of the First and Fourteenth Amendments, the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act.[106] The challenged law required in-person Election Day voters to present federally or state-issued photo ID before being able to vote. The plaintiffs argued that the requirement selectively and arbitrarily burdened and disenfranchised qualified voters, that it was a poll tax on voters who did not possess such identification, and that the burdens fell disproportionately on the poor or others of limited means.[107] The plaintiffs also argued that no evidence of fraudulent in-person voting supported the requirement.[108] The ACLU separately filed suit in state court on behalf of elected officials and civic organizations, which was removed to federal court and consolidated with the lawsuit brought by the Democratic Party.[109]

The district court dismissed the complaint[110] and a divided panel of the court of appeals affirmed.[111] While noting that "[n]o doubt most people who don't have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates," the panel's majority concluded that the state law was not an undue burden on the right to vote. The majority decision relied in part on the unfounded conclusion that because the plaintiffs, who did not have the required photo ID, did not indicate in the court record that they intended to vote, the plaintiffs were "unaffected by the law" and thus there were "no plaintiffs whom the law will deter from voting."[112]

Consequently, the panel's majority affirmed the complaint's dismissal on grounds that there were a minimal number of voters adversely affected by the law and that the state articulated a reasonable basis for the law, which was to prevent voter fraud. (Notably, Judge Posner, who authored the panel's majority, later expressed that the case might have been wrongly decided.[113]) However, the dissenting judge found that "[t]he Indiana voter

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[106] Complaint for Declaratory and Injunctive Relief, Indiana Democratic Party v. Rokita, No. 1:05-cv-00634 (S.D. Ind. May 2, 2005).

[107] *See id.* at ¶¶ 17-19.

[108] *See* Amended Complaint for Declaratory and Injunctive Relief at ¶ 22, Indiana Democratic Party v. Rokita, No. 1:05-cv-00634 (S.D. Ind. May 27, 2005).

[109] *See* Minute Entry, Crawford v. Marion Cty. Election Bd., No. 1:05-cv-00804 (S.D. Ind. June 23, 2005).

[110] *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

[111] *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

[112] *Id.* at 951-52.

[113] *See* John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, NY TIMES (Oct. 16, 2013), https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html; *see also* Richard Posner, *I Did Not 'Recant" on Voter ID Laws*, THE NEW REPUBLIC (Oct. 27, 2013), https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id.

photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[114] The dissent also acknowledged that the "law will make it significantly more difficult for some eligible voters . . . to vote," including the "poor, elderly, minorities, disabled, or some combination thereof."[115] A divided court of appeals denied *en banc* review.[116]

The plaintiffs then filed a petition for writ of certiorari to the U.S. Supreme Court, which was granted.[117] In an April 2008 opinion, the Court upheld the Indiana law by a 6-3 vote.[118] The Court applied the balancing test it outlined in *Anderson v. Celebrezze,* which directs courts to weigh the asserted injury to the right to vote against interests the state advances to justify its attendant burdens.[119] The Court determined that Indiana demonstrated a legitimate and important interest in preventing voter fraud and protecting public confidence in elections. The Court also ruled that obtaining a free photo ID card did not pose a substantial burden on voting since voters could vote by provisional ballot. The Court's ruling, however, did leave open the door to additional as-applied challenges to photo ID laws if plaintiffs demonstrate that such requirements impose an excessive burden on their right to vote.

13. Common Cause v. Billups – Georgia 2005

In September 2005, the ACLU and the ACLU of Georgia, on behalf of voters and seven non-profit organizations filed suit challenging Georgia's 2005 photo ID law that required voters to present certain forms of photo ID before being able to vote in-person. Political appointees at the Justice Department precleared the law over the objections of career attorneys that the state failed to meet its burden of proof to demonstrate the law did not have the effect of retrogressing minority voting strength.[120] The plaintiffs argued in both facial and as-applied challenges that the law would impose an unnecessary and undue burden on the fundamental right to vote of hundreds of thousands of registered Georgia voters and was an unconstitutional poll tax under the Twenty-Fourth Amendment and violated Section 2 of the Voting Rights Act, the Civil Rights Act of 1964, the Equal Protection Clause, and the Georgia Constitution.[121] The plaintiffs also argued that the stated purpose of the photo ID

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[114] *Crawford*, 472 F.3d at 955 (Evans, J. dissenting).

[115] *Ibid.*

[116] *See Crawford v. Marion Cty. Election Bd.*, 484 F.3d 436 (7th Cir. 2007).

[117] *Crawford v. Marion Cty. Election Bd.*, 551 U.S. 1192 (2007).

[118] *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

[119] 460 U. S. 780, 789 (1983).

[120] *See* Dan Eggen, *Criticism of Voting Law Was Overruled*, WASHINGTON POST (Nov. 17, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504_pf.html; *see also* Section 5 Recommendation Memorandum: Aug. 25, 2005, https://www.brennancenter.org/sites/default/files/analysis/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf.

[121] Complaint for Declaratory and Injunctive Relief, Common Cause v. Billups, No. 4:05-cv-201 (N.D. Ga. Sept. 19, 2005).

law, to prevent voter fraud, was a pretext intended to conceal the true purpose of the law, which was to suppress voting by the poor, the elderly, and the infirm, and by Black, Latino, and other minority voters. The plaintiffs presented evidence of this fact, including the lack of voter fraud in the state. [122]

In October 2005, a federal court preliminarily enjoined the photo ID law. The court ruled that the plaintiffs established a likelihood of success on the merits of their claims that the law was in the nature of a poll tax and a violation of the Equal Protection Clause, and sufficiently demonstrated those impacted by the law would suffer irreparable harm without the injunction.[123]

The legislature amended the statute in 2006 to provide what it deemed a free Georgia photo voter ID card to any registered voter who needed one. The ACLU sued on behalf of a set of plaintiffs on similar grounds[124] and requested a preliminary injunction.[125] A court granted the injunction in the run-up to the July 2006 primary elections.[126] In granting the injunction, the court concluded that the plaintiffs had established a likelihood of success again on the merits of their Equal Protection Clause claim and would suffer irreparable harm without the injunction.

However, despite its prior rulings, the district court eventually ruled that the plaintiffs lacked standing and decided the constitutional issues against the plaintiffs as well, denying a permanent injunction and dismissing the case.[127] The court determined the burden on the plaintiffs was slight because they testified that they could get ID cards if necessary to vote, and the court therefore applied rational basis analysis to uphold the law. The court also held the state's interest in preventing voter fraud trumped any burden on voters, even though there was no evidence of voter fraud by impersonation in Georgia for more than a decade—the only type of fraud an ID requirement could address.

The plaintiffs appealed, arguing that the law affected a large number of Georgia voters and had an adverse discriminatory impact on the state's African American residents.[128] The plaintiffs' evidence included a data match completed by the Secretary of State that sought to identify registered voters who did not have an ID issued by the Georgia Department of Driver Services (DDS). The match identified 289,426 registered voters without a DDS-issued ID.[129] And although African Americans made up 27.9% of all registered voters in

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[122] *Id.* at ¶¶ 47-51.

[123] *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1362, 1367, 1375 (N.D. Ga. 2005).

[124] Second Amended Complaint for Declaratory and Injunctive Relief, Common Cause v. Billups, No. 4:05-cv-00201 (N.D. Ga. Apr. 26, 2006).

[125] Motion for a Preliminary Injunction, Common Cause v. Billups, No. 4:05-CV-201 (N.D. Ga. July 5, 2006).

[126] *Common Cause v Billups*, 439 F.Supp.2d 1294 (N.D. Ga. 2006).

[127] *Common Cause v. Billups*, 504 F.Supp.2d 1333, 1383 (N.D. Ga. 2007).

[128] Brief of Appellants, Young v. Billups, No. 07-14664 (11th Cir. May 28, 2008).

[129] *Id.* at 7-8.

Georgia, African Americans comprised 49% of registered voters without a DDS-issued ID.[130] The plaintiffs also argued that the district court's decision was inconsistent with the standards the Supreme Court established for assessing the law's burden on voters and that the court should have applied strict scrutiny analysis because the law was discriminatory and created an undue burden on the right to vote.[131]

The Eleventh Circuit Court of Appeals found the data match unpersuasive, citing data errors and failure of the match to account for other acceptable forms of identification. While it concluded the plaintiffs had standing, the Eleventh Circuit affirmed the decision of the district court[132] and determined that Georgia's interest in preventing election fraud provided sufficient justification for the 2006 law and outweighed the burden imposed by the Georgia statute. The Supreme Court subsequently denied the plaintiffs' petition for a writ of certiorari.[133]

14. Large v. Fremont County – Wyoming 2005

In 2005, the ACLU filed a lawsuit against Fremont County, Wyoming, on behalf of Native American voters who were members of the Eastern Shoshone and Northern Arapaho Tribes residing on the Wind River Indian Reservation. The plaintiffs alleged that the at-large elections for the Fremont County Board of Commissioners diluted Native American voting strength in violation of the Constitution and Section 2 of the Voting Rights Act.[134] At the time, Native Americans accounted for approximately 20% of the population, but with all five county Board of Commission seats elected at-large with staggered terms, no Native American candidates of choice were able to be elected despite receiving substantial support from the community.[135] The defendants filed an answer denying the allegations of the complaint and a motion for summary judgment on the ground that Section 2, as applied in Indian Country to a county that was not covered by the special preclearance provisions of Section 5 of the Voting Rights Act, was unconstitutional.[136] The plaintiffs filed a brief opposing the motion.[137] On December 14, 2006, the United States filed a notice of intervention to defend the constitutionality of Section 2 and subsequently filed a brief to

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[130] *Id.* at 9.

[131] *See id.* at 42-52.

[132] *Common Cause v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

[133] *NAACP v. Billups*, 556 U.S. 1282 (2009).

[134] Complaint at ¶ 1, Large v. Fremont Cty., 05-CV-0270 (D. Wyo. Oct. 20, 2005).

[135] *Id.* at ¶ 9-10.

[136] Defendants' Answer to Complaint, Large v. Fremont Cty., No. 05-CV-0270 (D. Wyo. Nov. 30, 2005).

[137] Plaintiffs' Reply in Opposition to Summary Judgment, Large v. Fremont Cty., No. 05-CV-0270 (D. Wyo. Dec. 1, 2005).

that effect.[138] On January 26, 2007, the district court denied the defendants' motion for summary judgment.[139]

Following depositions and discovery, the case was tried over a two-week period in February 2007. The district court issued an opiniou finding that the at-large method of elections for the Fremont County Commission diluted the voting strength of Native Americans in violation of Section 2.[140] The court made extensive findings regarding past and pervasive ongoing discrimination against Native Americans, particularly in the area of voting, racially polarized voting, the isolation of the Native American community, and the lack of responsiveness by the county Commission to the special needs of Native Americans.[141]

The parties were directed to propose districting plans to replace the at-large system. The county proposed plans that created a majority Native American single-member district with the other four members of the commission elected from the remainder of the county at-large.[142] The plaintiffs' proposed plan consisted of five single-member districts.[143] In August 2010, the district court adopted the plaintiffs' plan and concluded the county's proposal was not an adequate remedy for the Section 2 violation because it treated Native American and white voters differently and state law did not authorize "hybrid" plans.[144]

While the county did not appeal the finding of a Section 2 violation, it appealed the remedy adopted by the district court. In February 2012, the Tenth Circuit affirmed the lower court's decision, holding that the county's proposed plan was not entitled to legislative deference because it did not "adhere as closely as possible to the contours of the governing state law."[145] The Tenth Circuit also determined that "settled Supreme Court precedent . . . strongly favors single-member districts in court-ordered plans."[146] After the Tenth Circuit's decision was issued, the district court also ordered that the county pay the plaintiffs' costs and attorney's fees.[147] The county did not appeal, and the case closed—filed in 2005 and resolved in 2013, the case took 8 years to litigate.

15. Farrakhan v. Gregoire – Washington 2006

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[138] United States' Notice of Intervention Pursuant to 28 U.S.C. 2403(a), Large v. Fremont Cty., No. 05-CV-0270 (D. Wyo. Dec. 14, 2006).

[139] *Large v. Fremont Cty.*, No. 05-CV-0270, 2007 WL 9709756, at *1 (D. Wyo. Jan. 26, 2007).

[140] *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176, 1231 (D. Wyo. 2010).

[141] *See generally id.*

[142] *See Large v. Freemont Cty.*, No. 05-CV-0270, 2010 WL 11508507, at *2 (D. Wyo. Aug. 10, 2010), *aff'd*, 670 F.3d 1133 (10th Cir. 2012).

[143] *Id.* at *6.

[144] *Id.* at *10-13.

[145] *Large v. Fremont Cty.*, 670 F.3d 1133, 1135 (10th Cir. 2012).

[146] *Id.* at 1135.

[147] *Large v. Fremont Cty.*, No. 05-CV-0270, 2013 WL 12342417, at *1 (D. Wyo. Sept. 20, 2013).

Farrakhan v. Gregoire was a long-running case in which minority plaintiffs argued that discrimination in the state's criminal justice system led to high rates of disfranchisement for minorities in violation of Section 2 of the Voting Rights Act.[148] The Washington state constitution provided for the automatic disfranchisement of all persons convicted of "infamous crimes," defined as those punishable by death or imprisonment. The case was originally filed by the NAACP Legal Defense and Educational Fund, Inc., and the University Legal Assistance law clinic at Gonzaga Law School on behalf of a group of Black, Latino, and Native American incarcerated individuals. The plaintiffs presented evidence showing that Black Americans sentenced for serious crimes were more likely to be given aggravated sentences by the state's superior courts than whites sentenced for serious crimes, including the Spokane Prosecuting Attorney's office that sought the death penalty against an eligible Black person 100% of the time compared to 21% of the time for a white person. The plaintiffs also highlighted that the populations of Black, Latino, and Native Americans in state and federal correctional facilities were disproportionately large given their overall proportion in the general population.[149] The plaintiffs argued that the racial disparities were the result of racial discrimination in the Washington state criminal justice system, causing higher rates of arrest, conviction, longer sentences, and fewer suspended sentences.[150]

In 2000, a federal court granted the defendants' motion for summary judgment.[151] The Ninth Circuit affirmed in part and reversed in part, finding that the lower court had applied an incorrect Section 2 analysis and that the plaintiffs had a cognizable claim that the disproportionate disfranchising of racial minorities based on criminal convictions violated Section 2. [152] On remand, the district court found there was racial bias in the enforcement of Washington's criminal laws and the data and analysis in plaintiffs' expert reports was "compelling evidence of racial discrimination and bias in the Washington criminal justice system."[153] The court also found credible the testimony of expert witnesses that the disparate impact on racial minorities was not explained by causes other than the racial bias. Nonetheless, the district court granted the state's motion for summary judgment, ruling that the lack of evidence of other forms of discrimination within the electoral system weighed in favor of the state and that there had to be more of a causal link

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[148] *Farrakhan v. Gregoire,* No. 2:96-cv-00076, 2006 WL 1889273, at *9 (E.D. Wash. July 7, 2006).

[149] *See* Plaintiffs' Fourth Amended Complaint Adding New Causes of Action at ¶¶ 16-20, Farrakhan v. Locke, No. 2:96-CV-00076. (E.D. Wash. Oct. 26, 1999).

Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997) (reciting factual and procedural background).

[150] *Id.* at ¶¶ 20-21.

[151] Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, Farrakhan v. Locke, No. 2:96-cv-00076 (E.D. Wash. Dec. 1, 2000).

[152] *Farrakhan v. Washington,* 338 F.3d 1009 (9th Cir. 2003).

[153] *Farrakhan v. Gregoire*, No. CV-96-076, 2006 WL 1889273, at *4 (E.D. Wash. July 7, 2006).

between the discrimination within the criminal justice system and vote disfranchisement.[154]

Plaintiffs appealed, and the ACLU of Washington submitted a motion to file an amicus brief supporting a reversal of the lower court's decision. The ACLU argued that the district court erred in its analysis of Section 2, arguing that since disfranchisement was automatic upon conviction, the racial bias in the criminal justice system worked with the state election law, so nothing more was required to establish a violation of Section 2. [155] The court denied the motion to file an amicus brief without providing any reason, but it listed the brief as one of the documents before the court in its opinion issued in January 2010.[156]

Then, in a 2-1 decision the court granted summary judgment to the plaintiffs on their vote denial claim. It concluded that there was discrimination in Washington's criminal justice system based on race, and that such discrimination clearly hindered the ability of racial minorities to participate effectively in the political process. As a consequence, the state's felon disfranchisement law violated Section 2 of the Voting Rights Act.

However, on October 7, 2010, in an en banc decision, the Ninth Circuit reversed the panel's ruling, concluding that the plaintiffs failed to present evidence of intentional racial discrimination in the operation of Washington's criminal justice system and did not meet their burden of establishing a violation of Section 2 of the Voting Rights Act.[157] The plaintiffs did not file a petition for certiorari to the Supreme Court.

16. Libertarian Party of New Mexico v. Herrera – New Mexico 2006

In an effort to remove barriers for new political parties, the ACLU sued New Mexico in July 2006 to invalidate a two-petition ballot access system imposed on minor parties.[158] The challenged law required new parties to collect signatures to petition for formal party status and then required nominees from those parties to gather signatures on a second petition for their names to appear on the ballot. No such requirement existed for Republican or Democrat nominees. The lawsuit charged that New Mexico's law was unduly burdensome and violated the First and Fourteenth Amendment rights of political association by forcing new parties to seek signatures from non-party members in order to appear on the ballot. They sought declaratory and injunctive relief generally prohibiting the defendants from enforcing the two-petition system and injunctive relief requiring the defendants to place Libertarian Party nominees on the ballot for the 2006 general election.[159]

In September 2006, a New Mexico federal district court rejected the challenge and granted

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[154] *See id.* at *9.

[155] Amicus Curiae Brief of the American Civil Liberties Union of Washington in Support of Appellants' Position Seeking Reversal, Farrakhan v. Locke, No. 01-35032 (9th Cir. Apr. 20, 2001).

[156] *Farrakhan v. Gregoire,* 590 F.3d 989 (9th Cir. 2010).

[157] *Farrakhan v. Gregoire*, 623 F.3d 990, 994 (9th Cir. 2010).

[158] Complaint, Libertarian Party of N.M. v. Herrera, 6:06-cv-00615 (D.N.M. July 11, 2006).

[159] *Id.* at ¶ 1.

summary judgment for the defendants.[160] The court implicitly noted that the measure was in place to minimize large numbers of third party and independent candidates on New Mexico ballots. The court upheld the law on the basis of the Supreme Court's decision in *Illinois State Board of Elections v. Socialist Worker Party*, which supported a state's interest that "a candidate demonstrate some support before being placed on the ballot... [to] safeguard[] the integrity of elections by avoiding overloaded ballots with frivolous candidacies, which in turn diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process." [161] The court also reasoned the burdens imposed by New Mexico's ballot access law were less burdensome than other laws previously upheld by the Supreme Court.[162] The ACLU appealed, and the Tenth Circuit affirmed the lower court's ruling.[163] The plaintiffs did not appeal the Tenth Circuit's decision.

17. Boustani v. Blackwell – Ohio 2006

In 2006, the ACLU, the ACLU of Ohio, and other civil rights organizations filed suit in Ohio on behalf of two dozen organizations and a group of naturalized citizens challenging a law requiring naturalized citizens to produce a certificate of naturalization when voting in-person or within 10 days of casting a provisional ballot.[164] The state did not request documentation from native-born citizens. Moreover, the naturalization certificate cost more than $200 to obtain and took nearly a year to receive once requested. The suit challenged this requirement as a poll tax under the Twenty-Fourth Amendment and an undue burden on the fundamental right to vote for a specific group of voters in violation of the Fourteenth Amendment.[165] Because the law also allowed poll workers to ask voters if they were naturalized and demand proof of citizenship, the suit separately challenged the law as encouraging racial profiling of U.S. citizens belonging to certain ethnic groups.[166]

The federal court enjoined the law and struck it down as unconstitutional under both the Fourteenth and Twenty-Fourth Amendments.[167] The court agreed that the law imposed an undue burden on the right to vote, subjected naturalized citizens to disparate treatment, and constituted an unconstitutional poll tax.[168] Although the court halted the law's enforcement, the statute remained on the books, leaving the plaintiffs concerned that poll

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[160] *Libertarian Party of N.M. v. Vigil-Giron*, 6:06-cv-00615, 2006 WL 8443845 (D.N.M. 2006).

[161] *Id.* (citing *Ill. State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 183-84 (1979)).

[162] *Id.* at *7-9

[163] *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303 (10th Cir. 2007).

[164] Complaint for Declaratory and Injunctive Relief at ¶ 15, Boustani v. Blackwell, No. 1:06-cv-02065 (N.D. Ohio Aug. 29, 2006).

[165] *Id.* at ¶¶ 36-38.

[166] *Id.* at ¶¶ 39-42.

[167] *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006).

[168] *Id.* at 825-27.

workers would continue to enforce additional requirements for naturalized citizens. The plaintiffs filed a motion for additional relief in 2012 asking the court to compel the state to educate poll workers on the law's abrogation and also to require that signs be placed at polling places to advise naturalized voters of their rights.[169] The court denied the order finding a lack of standing; no further action has been taken in the case.[170]

18. Ariz. v. Inter Tribal Council of Ariz.; Gonzalez v. Ariz. – Arizona 2006

In November 2004, Arizona voters approved Proposition 200, a ballot initiative that amended Arizona law by requiring individuals to provide proof of citizenship to register to vote and photo identification. Three lawsuits were filed and consolidated in federal court challenging the new requirements.[171]

The ACLU and additional co-counsel represented the Inter Tribal Council of Arizona, League of Women Voters of Arizona, League of United Latin American Citizens, and other individual and organizational plaintiffs asserting violations of the Fourteenth and Twenty-Fourth Amendments, the Civil Rights Act of 1964, Section 2 of the Voting Rights Act, and the National Voter Registration Act (NVRA). With respect to the proof of citizenship requirement, the plaintiffs argued that the identification requirements imposed an unnecessary and undue burden on the fundamental right vote for thousands of eligible Arizonans who were otherwise qualified to register to vote, but did not possess or were unable to access the documents specified as "satisfactory evidence" of citizenship.[172] The plaintiffs also argued that the proof of citizenship requirement was preempted by the NVRA, at least with respect to voters who apply to register to vote using the federal voter registration form. The plaintiffs cited evidence that Native Americans living on reservations in Arizona, encompassing approximately 25 million acres, were more likely to be living below the poverty line and less likely to have residential home addresses, utility bills in their names, drivers' licenses, and other documents prescribed for proving citizenship under the new law.[173] and the means to obtain the documents proving citizenship.[174] The plaintiffs also argued the rules would especially burden the elderly, disabled, nursing home residents, and other individuals living in rural areas or without

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[169] Motion for Additional Relief, Boustani v. Blackwell, No. 1:06-cv-02065 (N.D. Ohio Sept. 25, 2012).

[170] *Boustani v. Husted*, No. 1:06-cv-2065, 2012 WL 5414454, at *2 (N.D. Ohio 2012).

[171] Consolidation Order, González v. Arizona, No. 2:06-cv-1268 (D. Ariz. Jun. 1, 2006); Consolidation Order, González v. Arizona, No. 2:06-cv-1268 (D. Ariz. Aug. 4, 2006) (consolidating Complaint, González v. Arizona, No. 2:06-cv-1268 (D. Ariz. May 9, 2006); Complaint, Inter Tribal Council of Ariz. v. Brewer, No. 3:06-cv-1362 (D. Ariz. May 24, 2006); Complaint, Navajo Nation v. Brewer, No. 3:06-cv-1575 (D. Ariz. June 20, 2006)).

[172] Complaint at ¶ 27, Inter Tribal Council of Ariz. v. Brewer, No. 3:06-cv-1362 (D. Ariz. May 24, 2006).

[173] *Id.* at ¶ 29.

[174] *Ibid.*

access to transportation.[175] The proof of citizenship requirements also severely hampered the voter registration efforts of the plaintiffs.[176]

The plaintiffs sought a preliminary injunction to prohibit the implementation of the proof of citizenship and voter ID requirements for the 2006 midterm election.[177] The district court denied the motion, but an injunction pending appeal was initially granted by the Ninth Circuit.[178] However, the Supreme Court vacated that order.[179] The Ninth Circuit subsequently affirmed the denial of injunctive relief by the district court.[180]

Discovery in the case proceeded and a trial was held in July 2008. The plaintiffs put forth evidence that between January 2005 and the Fall 2007, 31,550 voter registration applications were rejected for failure to provide proof of citizenship, of which 90% had listed the United States as their place of birth. Subsequently, only 11,000 of the total rejected applications were able to register. Plaintiffs also highlighted that although Arizona's population increased by 650,000 people (11%) between 2004 and 2007 in the first three years of Proposition 200, the number of registered voters declined by more than 11,000 voters. With respect to the photo ID requirement, the plaintiffs showed that while voters without acceptable ID were able to cast a conditional provisional ballot, they needed to produce an ID within 5 days for their vote to count, and between 63% and 77% of provisional ballots went uncounted, while many potential voters simply left without voting in the 2006 election after being asked to present ID.[181] Additionally, the plaintiffs' evidence showed that many Native Americans over the age of 40 did not have birth certificates because they were not born in hospitals and could no longer be issued a delayed birth certificate because no living birth witnesses remained.[182] On August 20, 2008, the district court entered judgment for defendants.[183]

The plaintiffs appealed to the Ninth Circuit, which issued a 2-1 opinion in October 2010 that held the NVRA preempted Proposition 200's proof of citizenship requirement for registration, making the law invalid. The Court of Appeals rejected the plaintiffs' additional arguments that the voter ID requirement violated the Voting Rights Act and the Fourteenth and Twenty-Fourth Amendments. The Ninth Circuit, sitting en banc, issued a

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[175] *Id.* at ¶ 30.

[176] *Id.* ¶ 31.

[177] Plaintiffs' Motion for Preliminary Injunction, Gonzalez v. Arizona, No. 06-cv-1268 (D. Ariz. Aug. 9, 2006).

[178] Order on Motion for Preliminary Injunction, Gonzalez v. Arizona, No. 06-cv-1268 (D. Ariz. Aug. 9, 2006).

[179] *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

[180] *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

[181] *See Gonzalez v. Ariz.*, No. 06-cv-01362, 2008 WL 11395512 (D. Ariz. Aug. 20, 2008).

[182] *Id.*

[183] *Id.*

subsequent ruling blocking the proof of citizenship requirement under the NVRA, but upheld the voter ID requirement.

On appeal to the Supreme Court, the Court affirmed that Arizona was prohibited from requiring individuals using the federal voter registration form to submit documentary proof of citizenship to register to vote, unless the procedure was approved by the U.S. Election Assistance Commission.[184] In an opinion authored by Justice Scalia, the Court held that the NVRA preempted Arizona's documentary proof of citizenship requirement, and Arizona's refusal to register voters using the federal form without documentary proof was in conflict with the NVRA and therefore unlawful. The Court held that the NVRA requires all states to "accept and use" the federal voter registration form and noted that "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available."[185]

19. Jenkins v. Ray – Georgia 2006

Following the 2000 census, the Georgia General Assembly redrew the state's Board of Education districts and redistricted the five single-member districts for the Randolph County Board of Education.[186] The state submitted the redistricting plan to the Justice Department, which granted preclearance in 2002.[187] One of the new district lines ran through the middle of property belonging to District 5 Board Member and Chairman of the Board, Henry L. Cook, a Black incumbent, leaving his residence in District 4 and his farmland in District 5. District 5 was a majority Black district. Historically, District 4 was predominantly white. A state judge initially ruled that Cook was a District 5 elector, and Cook was reelected as the District 5 board member.[188] However, in a subsequent election local election officials decided that Cook resided in District 4, making him ineligible to run for his seat.[189]

Black voters in Randolph County sued, supported by the ACLU, alleging that the decision amounted to a new redistricting plan and should have been precleared under Section 5.[190] A three-judge panel agreed and granted the plaintiffs summary judgment.[191] The court relied on the assessment by the Department of Justice that its initial redistricting approval was contingent on Cook retaining District 5 eligibility[192] and concluded that the change was a "standard, practice, or procedure with respect to voting" that required additional

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[184] *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013).

[185] *Id.* at 12.

[186] Complaint at ¶ 7, Jenkins v. Ray, No. 4:06-cv-00043 (M.D. Ga. Apr. 17, 2006).

[187] *Id.* at ¶ 8.

[188] *See id.* at ¶¶ 16-17.

[189] *See id.* at ¶ 17.

[190] *Id.* at ¶ 22.

[191] *Jenkins v. Ray*, No. 4:06-CV-43, 2006 WL 1582426 (M.D. Ga. 2006) (per curiam).

[192] *Id.* at *3.

preclearance.[193] Upon review, the Justice Department denied preclearance, concluding that there was sufficient evidence to prevent the county from meeting its burden of proving an absence of a discriminatory purpose.[194] The case closed in 2007.

20. Strickland v. Clark – Mississippi 2006

The ACLU filed this case on behalf of plaintiffs in October 2006, challenging Mississippi's disenfranchisement rules in state court.[195] Article 12, Section 241 of the Mississippi Constitution prohibits individuals convicted of 10 enumerated crimes—murder, rape, forgery, bribery, obtaining money or goods under false pretense, bigamy, embezzlement, perjury, theft, and arson—from voting in state and certain federal elections; the provision, however, allows individuals with a conviction of one of the 10 crimes to still vote in U.S. presidential elections.[196] In 2004, the state Attorney General interpreted "theft" as including 11 additional crimes, and the decision was precleared by the Department of Justice in 2005.[197] The Mississippi voter registration application form listed the 21 crimes that purportedly disqualify a person from registering to vote or voting in all state and federal elections—11 of which are not included in Article 12, Section 241. The form also did not include a provision that permitted individuals convicted of the enumerated crimes to vote in presidential elections.[198]

The plaintiffs filed the lawsuit against the Secretary of State and state Attorney General arguing that the defendants denied individuals convicted of the enumerated crimes the right to vote in presidential elections and violated the right of individuals convicted of one of the state Attorney General's 11 additional theft crimes to vote in state and federal elections. The plaintiffs alleged violations of the Mississippi Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the National Voter Registration Act.[199] The plaintiffs sought declaratory and injunctive relief and moved to extend the voter registration deadline so that individuals convicted of one of the additional eleven crimes could vote in the November 2006 election. The plaintiffs also sought a temporary restraining order and preliminary injunction, which were denied. The state then filed a motion to dismiss the plaintiffs' claim, which was also denied.[200] After discovery requests were propounded, additional plaintiffs filed a motion to join the suit in February 2008, but

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[193] *Ibid.*

[194] *See* Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep't of Justice, to Tommy Coleman, Esq. (Sept. 12, 2006), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2700.pdf.

[195] Complaint, Strickland v. Clark, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

[196] MISS. CONST. art. 12, § 241; *see also* Complaint at ¶ 2, Strickland v. Clark, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

[197] Complaint at ¶ 22-25, Strickland v. Clark, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

[198] *Id.* at ¶ 3-4.

[199] *Id.* at ¶ 6.

[200] *See* Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at n.1, Young v. Hosemann, No. 3:08-cv-567 (S.D. Miss. Sept. 12, 2008).

the state court did not rule on that motion,[201] so they filed a separate suit in federal court.[202]

21. NAACP v. Carnahan – Missouri 2006

In September 2006, the NAACP and several other civic organizations and individual plaintiffs sued the Missouri Secretary of State and other state officials in a lawsuit seeking a declaratory judgment that the state's new photo ID requirement to vote was unconstitutional and to enjoin its enforcement.[203] The plaintiffs argued that the photo ID law imposed an unauthorized, unnecessary, and undue burden on the fundamental right to vote in violation of the Fourteenth Amendment, an unconstitutional poll tax in violation of the Twenty-Fourth Amendment, was a violation of the Civil Rights Act of 1964, and a violation of Section 2 of the Voting Rights Act. Among the factual allegations presented were the various costs necessary to obtain an acceptable photo ID to vote, including the underlying documents to obtain an acceptable ID, and how the law would disproportionately burden Black and Latino voters, students, women, the disabled, the elderly, and the working poor.[204] State officials themselves estimated that the law could disenfranchise 170,000 to 240,000 eligible voters.[205]

The plaintiffs filed a preliminary injunction motion in September 2006 to enjoin enforcement of the law.[206] The plaintiffs' suit was voluntarily dismissed without prejudice in November 2006[207] after the Missouri Supreme Court, in separate state litigation, struck down the law as violating several provisions of the Missouri Constitution.[208] The Missouri Supreme Court in an en banc decision affirmed the trial court's conclusions that the law placed a substantial burden on the fundamental right to vote and violated the state constitution's equal protection clause and guarantee of the right of qualified, registered citizens to vote.[209] The court also agreed that the photo ID law placed heavy burdens on specific populations and rejected the state's argument that the law was justified to protect against voter fraud because the facts did not support that in-person voter fraud was a

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[201] *See id.* at 2.

[202] Complaint for Injunctive and Declaratory Relief, Young v. Hosemann, No. 3:08-cv-567 (S.D. Miss. Sept. 19, 2008).

[203] Complaint for Declaratory and Injunctive Relief, NAACP v. Carnahan, No. 2:06-CV-04200-SOW (W.D. Mo. Sep. 6, 2006).

[204] *See id.* ¶¶ 25-37.

[205] *See id.* ¶ 24; *see also Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. 2006).

[206] Plaintiff's Motion for a Preliminary Injunction, NAACP v. Carnahan, No. 2:06-cv-04200 (W.D. Mo. Sep. 22, 2006).

[207] Order Lifting Stay, Dismissing Motion for Preliminary Injunction, and Dismissing Case without Prejudice, NAACP v. Carnahan, No. 2:06-CV-04200-SOW (W.D. Mo. Nov. 21, 2006).

[208] *Weinschenk*, 203 S.W.3d at 206. The ACLU and several other organizations filed an amicus brief in support of the plaintiffs in the state case. Brief for NAACP, Inc., et al. as *Amici Curiae*, Weinschenk v. State, 203 No. SC 88039 (Mo. 2006).

[209] *Weinschenk*, 203 S.W.3d at 204.

problem in Missouri.[210] With respect to the state's argument that it had a compelling interest in combating the perception of voter fraud, the court found that "[w]hile the State does have an interest in combating those perceptions [of voter fraud], where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement."[211]

22. Stewart v. Blackwell – Ohio 2006

Voters in Ohio, represented by the ACLU and ACLU of Ohio, brought a class action lawsuit in 2002 challenging the state's use of punch card ballots and optical scan systems.[212] Neither system used by Ohio provided notice to voters if there were possible errors in how they marked their ballots that could prevent their votes from being counted. The plaintiffs sued the Ohio Secretary of State, members of the Ohio Board of Examiners for the Approval of Electoral Marking Devices, members of various county boards of elections, and members of various county councils. At the time, Ohio relied predominantly on punch card voting systems; 69 of the state's 88 counties used punch cards. Those 69 counties included 72.5% of all registered voters in Ohio and 74% of the state's 11,756 voting precincts. Among the 19 counties that did not use punch cards, two used lever voting machines, six had electronic voting devices, and 11 used optical scanning equipment.[213]

The plaintiffs were two subclasses of voters. The first argued that non-notice punch card and optical scan systems violated the Fourteenth Amendment.[214] The second consisted of African American voters from Hamilton, Summit, and Franklin counties who alleged their votes were disproportionately at risk of being rejected in violation of Section 2 of the Voting Rights Act.[215] Using lay and expert testimony, the plaintiffs demonstrated racial disparities in counted votes due to flaws in non-notice technology. Election officials in Hamilton County also repeatedly expressed concern that punch card systems disfranchised African American voters in Cincinnati.

During the 2000 presidential election, punch card voting equipment resulted in greater intra-county racial differences in overvoting and undervoting than notice technology. The analysis by the plaintiffs' expert, Dr. Richard Engstrom, showed that in the 2000 presidential election in Hamilton County, the county seat of Cincinnati, Black voters' ballots were rejected for overvoting at nearly seven times the rate of non-Black voters.[216]

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[210] *See id.* at 209-210.

[211] *Id.* at 218.

[212] Complaint for Declaratory and Injunctive Relief with Class Allegations, Stewart v. Blackwell, No. 5:02-CV-2028 (N.D. Ohio Oct. 11, 2002).

[213] *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 810 (N.D. Ohio 2004).

[214] Complaint for Declaratory and Injunctive Relief with Class Allegations at 32, Stewart v. Blackwell, No.5:02-CV-2028 (N.D. Ohio Oct. 11, 2002).

[215] *Ibid.*

[216] LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF

His Hamilton County analysis showed that Blacks undervoted at nearly twice the rate of non-Blacks, and adjusted for estimated and intentional undervotes, suffered unintentional undervotes seven and a half times more than non-Black voters. In Montgomery County, the county seat of Dayton, Black voters experienced residual voting around two and a half times as often as non-Black voters. Similarly, Black voters in Summit County, the county seat of Akron, experienced overvoting more than nine times the rate of non-Blacks. Summit County's Black voters also experienced total undervoting almost two and a half times more frequently than non-Blacks and unintentional undervoting over three times more than other voters.[217]

The plaintiffs compared these results with Franklin County, which used direct record electronic (DRE) voting machines in order to determine if election machinery was the cause of the disparities and found there was no racial disparity in the number of overvotes in the county. DRE machines also appeared to reduce the rate of accidental under-voting. For non-Blacks, the rate became negligible, and for Black voters, it dropped below 1%, nearly eliminating the racial gap in accidental undervotes.

The plaintiffs' experts testified that racial disparities in the residual vote rates could not be separated from the evident and consistent socioeconomic disparities between Blacks and whites in each of the three counties. However, while error-prone punch card machines used in Hamilton, Summit, and Montgomery counties amplified racial disparities in the counties and caused a gap in residual ballot rates between white and Black voters, the voting technology used in Franklin County prevented a similar gap. In other words, unlike the three defendant counties, Franklin County's use of DRE machines overcame ambient racial disparities to ensure that Blacks and whites had an equal opportunity to participate in the political process.[218]

On December 14, 2004, the district court ruled against the plaintiffs.[219] The court did not find a Section 2 violation, primarily because majority white counties in the state also had high residual vote rates. The plaintiffs appealed and argued that the court erred by applying a "rational basis" level of scrutiny. Sitting *en banc*, the court of appeals vacated the judgment for mootness, since the challenged machines were no longer in use.[220]

23. Citizen Equal Rights Alliance v. Johnson – Montana 2007

Citizens Equal Rights Alliance, Inc. and associated entities filed suit in federal court in May 2007, alleging that various forms of fraud were committed during the November 2006

THE AMERICAN CIVIL LIBERTIES UNION 805 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

[217] *See id.*

[218] *See Stewart*, 356 F. Supp. at 795-796.

[219] *Id.*

[220] *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007).

general election on the Crow Indian Reservation in Big Horn County, Montana.[221] The plaintiffs claimed that the tribal government's endorsement of certain tribal members running for Big Horn County offices in the 2006 election constituted "election fraud and/or voting rights abuses,"[222] even though the right of an organization or group to endorse candidates for public office is protected by the First and Fourteenth Amendments of the Constitution.[223] The plaintiffs' other claims of fraud, including double voting and insecure ballot boxes, were similarly without merit. Despite failure to establish evidence of fraud, the plaintiffs argued that the alleged fraud diluted white voting strength in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act and sought removal of all precincts from the Crow Indian Reservation.

The ACLU filed a motion to intervene on behalf of Crow tribal members in July 2007.[224] In November 2007, the district court granted motions to dismiss in favor of the county and state defendants.[225] Among its findings, the court determined that the plaintiffs failed to state a federal claim and failed to prove that the defendants had acted with discriminatory intent or racial animus against the plaintiffs or white voters of the county. The complaint's dismissal mooted the ACLU's motion to intervene. However, the plaintiffs were allowed to file an amended complaint joining federal officials as additional defendants.[226] Once again, the ACLU filed a motion to intervene on behalf of tribal members.[227] But, in March 2008

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[221] Complaint for Declaratory and Injunctive Relief at ¶¶ 1, 14, Citizen Equal Rights Alliance v. Johnson, No. 1:07-cv-00074 (D. Mont. May 24, 2007).

[222] *See id.* at ¶ 14.

[223] This was not the first time whites had accused Indians of voter fraud in Big Horn County. Carroll Graham, a non-Indian and a state senator from Big Horn County, charged that election fraud had been committed during the 1982 primary and requested an investigation by the State Commissioner of Political Practices. He complained, among other things, that Indian voters had been bribed with sandwiches and potato chips by the successful primary candidates or their supporters. Jack Lowe, an attorney with the commissioner's office, conducted a four-day investigation of the allegations and concluded that no fraud had occurred. According to Lowe, the practices complained of "would raise no eyebrows in some other parts of the state." Lowe concluded that "the most striking feature of Big Horn County politics is this: there is a very unfortunate racial polarization taking place. This election is seen by some as a sort of latter-day Indian uprising." A federal court, in a successful Indian vote dilution case, described the allegations of voter fraud on the Crow Reservation as "unfounded." *See Windy Boy v. County of Big Horn,* 647 F. Supp. 1002 (D. Mont. 1986).

[224] Motion for Leave to Intervene, Citizen Equal Rights Alliance v. Johnson, No. 1:07-cv-00074 (D. Mont. July 16, 2007).

[225] Order Granting Defendants' Motion to Dismiss, Citizen Equal Rights Alliance v. Johnson, No. 1:07-cv-00074 (D. Mont. Nov. 5, 2007).

[226] Amended Complaint for Declaratory and Injunctive Relief, Motion for Leave to Intervene, Citizen Equal Rights Alliance v. Johnson, No. 1:07-cv-00074 (D. Mont. Nov. 19, 2007).

[227] Motion for Leave to Intervene, Citizen Equal Rights Alliance v. Johnson, No. 1:07-cv-00074 (D. Mont. Feb. 19, 2008).

the plaintiffs filed a voluntary notice of dismissal of their case.[228]

24. Madison v. Washington – Washington 2007

In March 2006, King County Superior Court Judge Michael Spearman struck down a Washington state law that denied voting rights to thousands of formerly incarcerated persons solely because they owed court-imposed fines. The ACLU and ACLU of Washington represented three individuals who were unable to vote because they could not pay the court-imposed financial obligations. The challenged state law prohibited individuals from voting after they finished their prison terms until they completely satisfied a number of fines and fees. These legal financial obligations included docket and filing fees, court costs, restitution, and costs related to incarceration. Interest on these court-imposed assessments accrued at 12% a year.[229] According to Washington's own statistics, more than 90% of people were indigent at the time of charging, so it was extremely difficult for many returning citizens to pay the financial assessments upon release. Additionally, at the time of litigation, disfranchisement affected about 3.7% of eligible voters in Washington—almost double the national average, and more than 250,000 people in Washington could not vote because of a prior felony conviction. The impact of the disenfranchisement law was widespread and disproportionately impacted people of color in Washington, where marked racial disparities in the state's incarceration rate meant the state disfranchised almost 25% of all voting-age African American males.[230]

After a favorable lower court ruling granting summary judgment for the plaintiffs, the state appealed.[231] In a 6-3 decision issued in July 2007, the Supreme Court of Washington reversed. The majority held that persons with felony convictions no longer had a fundamental right to vote and, as a result, applied a rational basis standard to review the law—the lowest level of judicial scrutiny. The court concluded that Washington had a rational basis for "limiting political participation of those unwilling to abide by laws and in requiring the completion of all sentence elements before the right to vote is restored."[232] The court did not address the plaintiffs' argument that people's financial inability—not their unwillingness—to pay financial obligations does not indicate whether or not they are law-abiding citizens. Three dissenting judges countered that the financial conditions violated the Equal Protection Clause, reasoning that drawing a financial line between some formerly incarcerated persons—thus allowing some to vote but not others—was impermissible.[233] The case generated support for the legislature to repeal the conditioning

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[228] Notice of Dismiss, Motion for Leave to Intervene, Citizen Equal Rights Alliance v. Johnson, No. 1:07-cv-00074 (D. Mont. Mar. 25, 2008).

[229] Complaint, Daniel Madison v. State of Washington, No. 04-2-33414-4 SEA (Sup. Ct. Wash. Oct. 21, 2004).

[230] Press Release, ACLU, Washington Court Strikes Down Modern Form of Poll Tax (Mar. 28, 2006) https://www.aclu.org/press-releases/washington-court-strikes-down-modern-form-poll-tax.

[231] *Madison v. State*, No. 04-2-33414-4SEA, 2006 WL 3713716 (Wash. Super. 2006).

[232] *Madison v. State*, 163 P.3d 757, 771 (Wash. 2007).

[233] *Id.* at 778-82 (Alexander, J., Chambers, J., Johnson, J., dissenting)

of voting rights restoration on the ability to pay off all court-imposed fines and fees.[234]

25. Nick v. Bethel – Alaska 2007

In June 2007, the ACLU, ACLU of Alaska, and Native American Rights Fund represented Alaskan Natives in the Bethel Census Area of Alaska, where more than 10,000 Yup'ik speakers reside. They contended the state and the City of Bethel failed to provide language assistance in the Yup'ik language as required by the special minority language provisions of the Voting Rights Act, Section 4(f)(4) and Section 203.[235] These complaints alleged the failure to provide written language assistance to voters by way of translations of election materials and the failure to provide oral language assistance by way of translators, interpreters, and adequately trained election officials. The plaintiffs also claimed that the defendants failed to comply with the preclearance provision of Section 5 of the Voting Rights Act and sought to allow Alaska Native limited-English proficient voters to receive assistance from the person of their choice as required by Section 208 of the Voting Rights Act.

The litigation presented a number of distinct challenges. Not only were the plaintiffs geographically isolated and remote, making travel difficult and time consuming, but it was difficult to communicate without the assistance of Yup'ik translators. For example, attorneys for the plaintiffs engaged in election monitoring during the general election on November 4, 2008, but to do so they had to fly on small planes to several isolated Native villages and utilize translators to interview, follow up, and obtain translated declarations from voters about their experiences at the polls.[236]

In July 2008, the plaintiffs obtained a preliminary injunction against the state defendants. The district court held that the plaintiffs had demonstrated a substantial likelihood of success on the merits of their claims and enjoined the state from further failure to provide adequate and effective language assistance. Specifically, the court ordered the state to undertake efforts to provide mandatory poll worker training in the requirements of the law, hire a language assistance coordinator fluent in Yup'ik, recruit bilingual poll workers or translators, provide written sample ballots in Yup'ik, provide preelection publicity in Yup'ik, ensure the accuracy of translations, provide a Yup'ik glossary of election terms, and submit pre and post-election reports to the court.[237]

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[234] *See* WASH. REV. CODE § 29A.08.520(1); *see also* Felons and Voting Rights, WASHINGTON SECRETARY OF STATE, https://www.sos.wa.gov/elections/voters/felons-and-voting-rights.aspx (regarding fines, restitution, or other legal financial obligations, "You are not required to completely pay off your fines, restitution, or other legal financial obligations (LFOs) before you register to vote. However, your voting rights can be revoked if the sentencing court determines that you have failed to comply with the terms of your legal financial obligations").

[235] *See* Complaint, Nick v. Bethel, No. 3:07-cv-0098 (D. Alaska Jun. 11, 2007); First Amended Complaint, Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska May 22, 2008).

[236] ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2010-DECEMBER 31, 2010 8, https://www.aclu.org/sites/default/files/field_document/VRP_Annual_Report_2010.pdf.

[237] *Nick v. Bethel*, No. 3:07-cv-00098, 2008 WL 11456134, at *6-7 (D. Alaska July 30, 2008).

On July 31, 2009, the court accepted a consent decree and settlement agreement entered into by the plaintiffs and the City of Bethel.[238] It provided for translators at the polls, mandatory training for all translators working in city elections, the provision of a Yup'ik-English election glossary, broadcasting of Yup'ik-language election announcements, advance publication of translator services prior to elections, and translation of initiatives and referenda into written Yup'ik. [239] The city also agreed to seek Section 5 preclearance of the settlement agreement.

Following more litigation, the plaintiffs and the state defendants entered into a settlement agreement providing for minority language assistance to Yup'ik speakers including poll workers to serve as bilingual translators, Yuip'ik sample ballots, a comprehensive Yup'ik-English glossary of election terms, radio election ads in Yup'ik, election video broadcasts in Yup'ik, outreach to Yup'ik speakers, the formation of a Yup'ik Translation Panel, translation of ballot measures, and compliance with Section 5 preclearance. The agreement also called for payment of the plaintiffs' lawyers fees and retention of enforcement jurisdiction by the district court until December 31, 2012. The agreement was formally approved by the district court on February 16, 2010. [240] Monitoring of elections and the implementation of the settlement agreements is ongoing.

26. Johnson v. Bredesen – Tennessee 2008

For several years, Tennessee had one of the most cumbersome and confusing felon re-enfranchisement schemes in the nation. In 2006, the legislature amended the law to allow people convicted of "infamous crimes" to apply for a Certificate of Restoration. The law, however, requires that applicants pay all victim restitution and be current on any child support obligations.[241] Prior to the 2006 amendment the state did not require individuals with past convictions, who had otherwise completed all the terms of their sentence, to pay legal financial obligations before being eligible to seek restoration of their voting rights.[242]

On February 25, 2008, the ACLU and ACLU of Tennessee filed a lawsuit challenging the requirement to pay legal financial obligations as a condition of rights restoration as unconstitutional under the Fourteenth and Twenty-Fourth Amendments and state laws.[243] The lawsuit also highlighted the fact that individuals who do not have a criminal conviction but owe outstanding child support do not risk losing their voting rights for failure to pay.

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[238] Order from Chambers, Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska July 31, 2009).

[239] *See* Consent Decree and Settlement Agreement, Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska July 9, 2009).

[240] 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 (D. Alaska Feb. 16, 2010).

[241] *See Johnson v. Bredesen*, 624 F.3d 742, 744–45 (6th Cir. 2010).

[242] *Id.* at 745.

[243] Complaint for Declaratory Relief, Injunctive Relief, and Nominal Monetary Damages, Johnson v. Bredesen, No. 3:08-cv-00187 (M.D. Tenn. Feb. 25, 2008).

Two of the three plaintiffs in the case, Terrence Johnson and Jim Harris, owed outstanding child support payments but had custody of their children.

The complaint also included a due process claim on behalf of a plaintiff who, prior to the lawsuit being filed, attempted to complete and submit a Certificate of Restoration application. The law requires a supervising authority, such as a probation officer or criminal court clerk, to complete a portion of the Certificate of Restoration. However, the state had not implemented a set of procedures that all counties have to follow when determining whether a person convicted of an "infamous crime" owes a legal financial obligation, and if so, whether that person has satisfied the requirement. Supervising authorities refused to sign the form for this plaintiff on the grounds that he owed victim restitution. Yet, neither the county nor the state provided him with documentation confirming whether or not he owed any money.[244]

Three of the defendants filed a motion to dismiss for failure to state a claim, which the court denied. The defendants then filed a motion for a judgment on the pleadings, arguing that even assuming all of the allegations in the complaint were true, the plaintiffs' claims still failed as a matter of law. After a hearing, the court granted the defendants' motion as to all of the claims except for the due process claim. The parties eventually settled one of the plaintiff's claims, and he was able to vote in the November 4, 2008, general election.

The plaintiffs appealed the dismissal of the remainder of their claims to the Sixth Circuit. In a 2-1 decision, a panel affirmed the dismissal of the plaintiffs' claims.[245] The majority ruled that Tennessee's re-enfranchisement scheme does not violate the Equal Protection Clause because the State has a rational basis for requiring payment of restitution and child support, even if the child support payment has nothing to do with the underlying conviction. The panel also held that conditioning the right to vote on payment of restitution and child support is not equivalent to imposing a poll tax and, therefore, the Twenty-Fourth Amendment is not implicated.[246] The majority also rejected the plaintiffs' claim under the Privileges and Immunities Clauses of the U.S. Constitution and Tennessee Constitution, reasoning that the provisions do apply to voting rights.[247] In her dissent, Judge Moore concluded that the Supreme Court's decisions in *Harman v. Forssenius*,[248] *Griffin v. Illinois*,[249] and its progeny, required the court to conclude that the law violated both the Equal Protection Clause and the Twenty-Fourth Amendment.[250] The plaintiffs filed a petition for rehearing en banc which the Sixth Circuit denied on December 17, 2010.[251]

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[244] *See id.* at ¶¶ 1–9.

[245] *Johnson*, 624 F.3d 742.

[246] *Id.* at 750-754.

[247] *Id.* at 751-752.

[248] *Harman v. Forssenius*, 380 U.S. 528 (1965).

[249] *Griffin v. Illinois*, 351 U.S. 12 (1956).

[250] *Id.* at 754-780.

[251] *Johnson v. Haslam*, 624 F.3d 742 (6th Cir. 2010), cert. denied, 563 U.S. 1008 (2011).

27. Morales v. Handel; Morales v. Kemp – Georgia 2008

This action was filed by the ACLU, the Lawyers' Committee for Civil Rights Under Law, and the Mexican American Legal Defense and Educational Fund (MALDEF) to challenge a new system of voter verification involving citizenship checks being implemented by the state of Georgia weeks prior to the 2008 presidential election.[252] Georgia's system attempted to match information of voter registration applicants with information contained in the state's Department of Driver Services database and the Social Security Administration database to verify eligibility, flagging individuals whose information did not match to local registrars for special scrutiny. Without providing procedures for evaluating citizenship, the Secretary of State directed county election officials to not permit individuals with flagged registration records to vote a regular ballot unless and until the county verified the individual's citizenship. Individuals designated as potential noncitizens would instead have to vote a "challenged" ballot.[253]

The complaint argued that the process was inaccurate and error-prone, resulting in the plaintiff being wrongly flagged as a noncitizen and deemed ineligible to vote, even though he had duly registered and had taken steps to prove his citizenship in response to the county's scrutiny of his citizenship status by providing a passport to the county clerk.[254] The plaintiff sought declaratory relief and temporary and permanent injunctive relief on behalf of himself and the class of residents of Georgia who had submitted timely voter registration forms and were wrongly being flagged as noncitizens. The plaintiff argued that the flawed matching procedures were illegally implemented because the state failed to seek preclearance as required by Section 5 of the Voting Rights Act and was in violation of the National Voter Registration Act (NVRA), which prohibits systematic challenges to voter registration 90 days prior to an election subject to certain exceptions provided in the statute which did not apply in this case.[255]

Georgia argued that it was complying with the NVRA and that because it was attempting to comply with a federal law, the change did not reflect a policy choice made by state or local officials and did not have to be precleared.[256] Specifically, Georgia argued that the verification procedures were adopted in a purported effort to comply with the Help America Vote Act (HAVA) and its directive to states to accurately maintain their statewide voter registration lists and verify certain voter information.[257] HAVA provides a process for states to remove duplicate registrations and help ensure the accuracy of information submitted by

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[252] Complaint for Declaratory and Injunctive Relief – Class Action, Morales v. Handel, No. 1:08-cv-03172 (N.D. Ga. Oct. 9, 2008).

[253] *Id.* at ¶¶ 34-35.

[254] *Id.* at ¶¶ 58-59.

[255] *See id.* at ¶¶ 64-69; Motion for Preliminary Injunction and Temporary Restraining Order and to Convene Three-Judge Court, Morales v. Handel, No. 1:08-cv-03172 (N.D. Ga. Oct. 9, 2008).

[256] Response to Motion for Temporary Restraining Order and Preliminary Injunction at ¶ 3, Morales v. Handel, Case No. 1:08-cv-03172 (N.D. Ga. Oct. 10, 2008).

[257] *See id.*

the registrants by matching registrants' information against information contained in a state's drivers' license database and the Social Security Administration database.[258] Such information, however, does not include information on citizenship status, since voters already verify their citizenship during the registration process. Further, HAVA does not require states to use the matching process to verify *eligibility* to vote, which is what Georgia attempted to do and in a manner that wrongly flagged eligible voters as noncitizens.[259]

A three-judge court was empaneled and granted the plaintiff's motion for a preliminary injunction, finding that at least two aspects of the state's voter verification procedure constituted changes in the state's voting process and required Section 5 preclearance prior to implementation.[260] During the course of litigation, the state submitted the voting changes to the Department of Justice for preclearance. The organizations representing the plaintiff then filed a comment letter with Department of Justice in November 2008, asking it to either object to the submission or request additional information to evaluate its impact upon language and racial minorities. The Justice Department interposed an objection to the state's submission, finding that the verification procedures were inaccurate and discriminatory and determining that the procedure created disparate voting burdens for Latino, Asian American, and African American citizens than for white citizens.[261]

In September 2009,Georgia moved to dismiss arguing that the verification program was authorized under both state and federal law and that the plaintiff's complaint was moot given the state's newly enacted proof of citizenship law.[262] The plaintiff moved for summary judgment seeking a final judgment permanently enjoining the Secretary from using the voter verification procedures unless the procedures were precleared.[263] In June 2010, the three-judge panel issued an order finding that the appropriate remedy was to extend the existing preliminary injunction to the upcoming elections in Georgia.[264] Subsequently, Georgia filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment that the voter verification program did not violate Section 5, discussed *infra*.

28. State ex rel. Colvin v Brunner – Ohio 2008

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[258] Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 18-20, Morales v. Handel, No. 1:08-cv-03172 (N.D. Ga. March. 10, 2009).

[259] *Id.* at ¶ 21.

[260] *Morales v. Handel*, No. 1:08-cv-03172, 2008 WL 9401054, at*8 (N.D. Ga. Oct. 27, 2008).

[261] Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to The Honorable Thurbert E. Baker, Attorney Gen. (May 29, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf.

[262] *See* Defendant's Brief in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, Morales v. Handel, No. 1:08-cv-03172 (N.D. Ga. Sept. 4, 2009).

[263] Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief, Morales v. Handel, No. 1:08-cv-03172 (N.D. Ga. Sept. 4, 2009).

[264] Order, Morales v. Handel, No. 1:08-cv-03172 (N.D. Ga. Jun. 15, 2010).

In 2006, Ohio began permitting voters to receive no-fault absentee ballots in person at the county boards of elections as a form of early voting. Many election officials promoted absentee voting as a way for voters to avoid the long lines and technical glitches that plagued elections in Ohio. In 2008, Ohio's registration deadline was October 6, but early and absentee voting began on September 30. This allowed a prospective voter to register to vote and receive an absentee ballot in person on the same day during a five-day window, in essence a variation of same day registration known as "Golden Week." When news broke that Democrats' Get Out the Vote efforts would take advantage of this directive, Republicans threatened to sue. They argued that a voter must be registered to vote for at least 30 days before receiving an absentee ballot.

Two registered voters filed for a writ of mandamus to require the Ohio Secretary of State to prohibit the "Golden Week" practice of allowing voters to register and vote on the same day.[265] The ACLU, together with various national and local voting rights groups, filed an amicus brief urging the court to dismiss the voters' claims. The brief argued that the plaintiffs' interpretation of state law was erroneous and violated Section 202 of the Voting Rights Act, Section 1971 of the Civil Rights Act, the National Voter Registration Act, and the First and Fourteenth Amendments.[266]

On September 29, 2008, the Ohio Supreme Court ruled against the plaintiffs and held that any voter who would be registered for 30 days as of Election Day on November 4 would be able to request and receive an absentee ballot.[267]

29. State ex rel. Skaggs v. Brunner; NEOCH v. Brunner – Ohio 2008

ACLU as amicus for defendants

This litigation was originally filed in the Ohio Supreme Court on November 13, 2008, challenging then Ohio Secretary of State Jennifer Brunner's determination that approximately one thousand provisional ballots cast by registered and qualified voters, which lacked a printed name or signature on the ballot envelope, nonetheless complied with state law and should be counted. The plaintiffs were two voters from Franklin County who filed suit to challenge this determination and requested a writ of mandamus and temporary restraining order against Brunner and the Franklin County Board of Elections to prohibit them from counting the ballots.[268] The issue originated as the result of the Franklin County Board of Elections' decision to create its own provisional ballot envelope form for use in the 2008 general election, even though a provisional ballot envelope format was prescribed by the Secretary of State. Franklin County's provisional envelope included a written instruction that a voter was required to print their own name on the form—had the board used the Secretary of State's prescribed form, a poll worker would have filled out the form

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[265] *See* Verified Petition for Writ of Mandamus, State ex rel. Colvin v Brunner, No. 08-1813 (Ohio Sept 12, 2008).

[266] Brief of *Amici Curiae* 1Matters et al. in Opposition to Relators' Petition, Ohio ex Rel. Skaggs v. Brunner, No. 2:08-cv-1077 (Ohio Nov. 13, 2008).

[267] *State ex rel. Colvin v Brunner*, 120 Ohio St.3d 110 (Ohio 2008).

[268] Complaint, Ohio ex Rel. Skaggs v. Brunner, No. 2:08-cv-1077 (Oh. Supreme Ct. Nov. 13, 2008).

for the provisional voter and simply asked the voter to sign.[269] Ohio law also required poll workers to verify that a provisional voter had executed and signed the written affirmation.

Approximately 1,000 provisional ballots cast in Franklin County in the November 4, 2008, election were alleged to have been incomplete because they lacked a printed name or signature.[270] Also at issue were the results of three extremely close congressional races in the Fifteenth Congressional District, Twentieth House District, and Nineteenth House District, which might have been determined by the 1,000 provisional ballots.[271] All of the disputed ballots were cast by voters who were properly registered and eligible to vote in their precincts and included a name, either in print or signature form, and other information that allowed the voters who cast the ballots to be identified.[272]

The case was removed to federal court and considered with two other consolidated cases challenging Ohio's provisional ballot process for the 2008 election.[273] On November 14, the plaintiffs moved to remand the case back to state court, arguing that no federal question was raised that gave the federal district court jurisdiction.[274] The district court denied the motion on November 16, finding in part that the complaint contained Equal Protection Clause questions.[275] On November 20, the district court granted summary judgment for the Secretary of State and permitted the provisional ballots to be counted. The district court determined that the deficiencies on the provisional ballot forms associated with the disputed ballots were the result of poll worker error in failing to verify completion of the form, as required under state law.[276] The plaintiffs appealed, arguing that removal and consolidation was improper, as they had not pled any federal claims, and that the district court's erred in granting summary judgment to the Secretary of State.[277]

The ACLU filed an amicus brief arguing that the plaintiffs' interpretation of the law violated Section 1971 of the Civil Rights Act of 1964, which prohibits officials from denying the right of any individual to vote because of an error or omission on any document relating to any application, registration, or other act requisite to voting if immaterial to determining

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[269] *See* Brief for ACLU Voting Rights Project and ACLU of Ohio as *Amici Curiae* in Opposition to Relators' request for a writ, at 3, Ohio ex rel. Skaggs v. Brunner, No. 08–4585 (6th Cir. 2008).

[270] *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 509 (2008).

[271] *See* Complaint at ¶8, Ohio ex Rel. Skaggs v. Brunner, No. 2:08-cv-1077 (Oh. Supreme Ct. Nov. 13, 2008); *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d at 511-512.

[272] *See State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d at 509.

[273] *See Ohio Republican Party v. Brunner*, No. 2:08–cv–913 (S.D. Oh. 2008); *Northeast Ohio Coalition for Homeless v. Brunner*, No. C2-06-896 (S.D. Oh. 2008).

[274] Motion for Remand of Case to the Ohio Supreme Court, Ohio ex rel. Skaggs v. Brunner, No. 2:08-cv-1077 (S.D. Oh. Nov. 14, 2008)

[275] *Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 826 (S.D. Ohio 2008).

[276] *State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 836-37 (S.D. Ohio 2008).

[277] *See* Emergency Motion of Relators/Appellants, Ohio ex rel. Skaggs v. Brunner, No. 08-4585 (6th Cir. Nov. 20, 2008).

the voter's qualifications.[278] On November 25, the Sixth Circuit agreed with the plaintiffs' argument that federal jurisdiction was improper and remanded the case back to the Ohio Supreme Court.[279] The ACLU again filed an amicus brief in support of Secretary Brunner's determination that the ballots should be counted on the same theory under Section 1971 of the Civil Rights Act of 1964. However, the Ohio Supreme Court ruled that state law required the provisional ballot envelope be completely executed in order for the ballots to count.[280] As a result, nearly 1,000 Ohio registered voters' ballots were discarded, potentially swinging the outcome of the three races.

30. Ohio Republican Party v. Brunner – Ohio 2008

In September 2008, the Ohio Republican Party filed suit against the Ohio Secretary of State in federal court seeking a temporary restraining order and preliminary and permanent injunctions to block a directive issued by the Secretary allowing voters to register to vote and receive an absentee ballot on the same day during the five-day overlap between state's voter registration and absentee voting periods. Effectively, the overlap between the registration and absentee voting periods permitted voters to register and vote on the same day for those five days.[281] The plaintiff wanted to prohibit this and alleged that the Secretary of State's directive violated various state and federal laws. The ACLU, ACLU of Ohio, and other civil rights organizations filed an amicus brief arguing that there was no federal question giving the district court jurisdiction over the case and that the court should abstain from second-guessing an interpretation of the state's election law by the chief state election official[282] since there was a similar petition pending in the Ohio Supreme Court.[283] The brief further argued that if the relief sought by the plaintiff was granted, it would violate federal voting laws rather than uphold protected voting rights.[284] The district court abstained from ruling in light of the Ohio Supreme Court's decision on September 29, 2008, upholding the actions taken by the Ohio Secretary of State.[285]

On October 5, the plaintiffs filed a renewed motion for a temporary restraining order requesting the court to rule on its claim under the Help America Vote Act (HAVA), which

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[278] Brief for ACLU Voting Rights Project and ACLU of Ohio as *Amici Curiae* in Opposition to Relators' request for a writ, at 4, Ohio ex Rel. Skaggs v. Brunner, No. 08–4585 (6th Cir. 2008).

[279] *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008).

[280] *Ohio ex rel. Skaggs v. Brunner*, 900 N.E.2d 982 (Ohio 2008).

[281] Verified Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction, Ohio Repuhlican Party v. Brunner, 2:08-cv-00913 (S.D. Ohio Sept. 26, 2008).

[282] Brief as *Amicus Curiae* of ACLU of Ohio et al. in Opposition to Plaintiffs' Application for Temporary Restraining Order, Ohio Republican Party v. Brunner, No. 2:08-cv-00913 (S.D Ohio Sept. 29, 2008).

[283] *See* Verified Petition for Writ of Mandamus, State ex rel. Colvin v. Brunner, No. 08-1813 (Ohio Sept. 12, 2008).

[284] *Id.* at 8-18.

[285] *Ohio Republican Party v. Brunner*, No. 2:08–CV–00913, 2008 WL 4445193 at *3 (S.D Ohio 2008) (citing *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110 (S. Ct. Ohio 2008)).

the court had not done previously. The renewed motion alleged that the Secretary violated HAVA by failing to verify new registrations against the Ohio Bureau of Motor Vehicles and Social Security Administration databases.[286] The Secretary argued that her office was in full compliance with the requirements of HAVA and, further, that HAVA does not mandate the use of database matching to verify voter eligibility or to be used to challenge or purge voters.[287] The ACLU and others again filed an amicus brief in support of the Secretary, which explained that the point of HAVA database matching was to prevent duplicate registrations, not to purge voters or subject them to unwarranted challenges at the polls.[288] However, the district court granted the temporary restraining order and directed the Secretary to perform verification of new registrants' identity and match their information to Ohio's motor vehicles database and the Social Security Administration database.[289]

The Secretary of State appealed the order to the Sixth Circuit, and on October 14 the full Sixth Circuit, sitting en banc and in a divided decision, denied the motion to stay the temporary restraining order.[290] The Secretary then appealed to the U.S. Supreme Court to overturn the en banc decision. The ACLU and others filed another amicus brief in the Supreme Court in support of the Secretary's request, advancing several arguments for why the temporary restraining order was wrongly issued.[291] On October 17, the Supreme Court granted the stay and vacated the temporary restraining order. Without deciding the merits, the Court determined that the plaintiff was not likely to prevail on the question of whether a private party could raise a HAVA claim to justify the issuance of a temporary restraining order.[292]

On November 4, 2008, the plaintiffs amended their complaint to allege violations of provisional ballot rules and challenge directives issued by the Secretary of State to guarantee consistent treatment of provisional ballots throughout the state.[293] This portion of the case was consolidated with *Northeast Ohio Coalition for the Homeless v. Brunner.*[294]

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[286] *See* Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal, Republican Party of Ohio v. Brunner, No. 2:08-cv-00913 (N.D. Ohio Oct. 5, 2008).

[287] *See* Memorandum in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order and Preliminary Injunction at ¶¶ 8-18, Republican Party of Ohio v. Brunner, No. 2:08-cv-00913 (N.D. Ohio Oct. 8, 2008).

[288] *See* Brief of *Amicus Curiae* ACLU of Ohio et al. in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order, Ohio Republican Party v. Brunner, No. 2:08-cv-00913 (S.D Obio Oct. 7, 2008).

[289] *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 966 (S.D Ohio 2008).

[290] *Ohio Republican Party v. Brunner,* 544 F.3d 711 (6th Cir. 2008).

[291] Brief of *Amicus Curiae* ACLU of Ohio et al. in Support of Appellant's Application for Stay of Temporary Restraining Order, Brunner v. Ohio Republican Party et al., No. 08A332 (2008).

[292] *Brunner v. Ohio Republican Party*, 55 U.S. 5, 6 (2008).

[293] Amended and Supplemental Complaint for Preliminary and Permanent Injunction, Ohio Republican Party v. Brunner, No. 2:08-cv-00913 (S.D. Ohio Nov. 4, 2008).

[294] Order Granting Motions to Consolidate, Northeast Ohio Coalition for the Homeless v. Brunner, No. C2-06-896 (S.D. Ohio Nov. 6, 2008).

However, the plaintiffs subsequently dismissed their claims in late November.[295]

31. Project Vote v. Madison Cty. Bd. of Elections – Ohio 2008

In September 2008, the ACLU and the ACLU of Ohio sued an Ohio county in federal court for denying absentee ballots to newly registered voters in violation of a directive issued by the Ohio Secretary of State.[296] Specifically, Directive 2008-63, required county boards of election to permit same-day registration and absentee voting during the five-day window where the voter registration and absentee voting periods overlapped (the same directive at issue in *State ex rel. Colvin v. Brunner* and *Ohio Republican Party v. Brunner*).[297] Project Vote sought a temporary restraining order against the Madison County Board of Elections because the county indicated that it would not follow the directive. The complaint asserted violations of state law, the First and Fourteenth Amendments, the National Voter Registration Act, the Civil Rights Act of 1964, and the Voting Rights Act. The plaintiffs asked the court to enjoin Madison County to comply with state law and the Secretary of State's directive.[298]

On September 29, 2008, the U.S. District Court in the Northern District of Ohio granted Project Vote's request for a temporary restraining order and directed the Madison County Board of Elections to permit prospective voters to register and request an absentee ballot simultaneously.[299] That same day, the Ohio Supreme Court affirmed a lower court ruling upholding Directive 2008-63.[300] Ultimately, Project Vote filed a motion to dismiss without prejudice after the Ohio Supreme Court's decision and official election results showed that ballots cast by voters between September 30 to October 6 had been honored.[301]

32. State ex rel. Myles v. Brunner – Ohio 2008

The McCain presidential campaign sent absentee ballot request forms to roughly one million Ohio voters. The McCain request forms included a checkbox with a statement that read, "I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election." The Ohio Secretary of State instructed boards of

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[295] Order Granting Motion to Voluntarily Dismiss, Ohio Republican Party v. Brunner, No. No. 08-4242/08-4243/08-4251 (6th Cir. Nov. 5, 2008).

[296] Complaint for Declaratory and Injunctive Relief, Project Vote v. Madison Cty. Bd. of Elections, 08-cv-2266 (N.D. Ohio Sept. 24, 2008).

[297] *See* Memorandum to Directive 2008-63 from Jennifer Brunner, Ohio Sec'y of State, to All Counties; BOE Contacts (Aug. 13, 2008); *see also* OHIO REV. CODE § 3509.02(A).

[298] *See* Complaint for Declaratory and Injunctive Relief at ¶ 45, Project Vote v. Madison Cty. Bd. of Elections, 1:08-cv-2266 (N.D. Ohio Sept. 24, 2008).

[299] Project Vote v. Madison County, No. 1:08-cv-2266, 2008 WL 4445176, at *12 (N.D. Ohio Sep. 29, 2008).

[300] *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110 (Ohio 2008).

[301] *See* Plaintiffs' Motion to Dismiss Without Prejudice, Project Vote v. Madison Cty. Bd. of Elections, 1:08-cv-2266 (N.D. Ohio Dec. 22, 2008).

elections to reject any forms where the voter failed to check a box next to a statement that they are an eligible elector, even if voters signed the bottom of the form affirming that they were eligible. Voters who received the McCain mailers, did not check the box, and had their absentee ballot requests rejected, filed suit in the Ohio Supreme Court to compel boards of elections to not reject absentee ballot applications on that basis.[302] The ACLU of Ohio along with other organizations filed an amicus brief[303] opposing the Secretary's position. The ACLU argued that Ohio law required the absentee ballot request to simply contain certain information, not in a specific form, and that rejecting an application for inconsequential errors or omissions violated Section 1971 of the Voting Rights Act prohibiting officials from denying any individual the right to vote because of immaterial errors or omissions.

The Ohio Supreme Court upheld the voters' complaint on state law grounds. It ordered the Secretary of State to direct boards of elections to refrain from rejecting absentee ballot applications if the voter left the box next to a qualified-elector statement unmarked and to issue absentee ballots to those applicants.[304]

33. ACLU of Ohio v. Brunner – Ohio 2008

In January 2008, the ACLU of Ohio and two voters filed a complaint against state and local election officials in Cuyahoga County in the Northern District of Ohio. The complaint challenged the county's use of non-uniform, unequal, and inaccurate voting technologies as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Section 2 of the Voting Rights Act.[305] The plaintiffs argued that the voting technology advanced by the county had a disproportionate and negative impact on the franchise of Black voters.[306]

The defendants in the lawsuit were in the process of changing the voting technology used in Cuyahoga County from less error-prone voting technology that provided voters notice of ballot errors, to a voting system that was more error-prone, did not provide such notice of potential ballot errors, and would result in those votes being thrown out.[307] Before the 2008 primary election, Cuyahoga County used touchscreen voting machines with auditable paper trails. Because of various issues with the Cuyahoga County Board of Elections and the Secretary of State, the Secretary of State ordered the county to use central count optical scans for future elections.[308] Central count did not provide voters notice of overvotes,

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[302] *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328 (Ohio 2008).

[303] Reply Brief of Amici The Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Relator's Petition for Writ of Mandamus, State el el. Myles v. Brunner, No. 2008-1842 (Ohio 2008) .

[304] *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328 (Ohio 2008).

[305] Complaint, ACLU of Ohio v. Brunner, No. 1:08-cv-00145 (N.D. Ohio. Jan. 17, 2018).

[306] *Id.* at ¶ 3.

[307] *See id.* at ¶¶ 21-54.

[308] *Id.* at ¶ 40.

unintentional undervotes, or an opportunity to cast a corrected ballot.

Subsequently, the legislature abolished the use of central count optical scans after May 1, 2008.[309] Accordingly, in March 2008 the court issued an order stating that the "[d]efendants will prepare stipulations indicating that they have no intention of using non-notice voting technology based on their interpretation of Senate Bill 286 and funding concerns related to HAVA."[310] The state and county defendants stipulated that the November 2008 election would be conducted using notice technology, and plaintiffs moved to dismiss without prejudice.[311] The court granted the motion in April 2008.[312]

34. Gillette v. Weimer – Virginia 2008

In 2008, the ACLU represented an individual plaintiff in a lawsuit against elections officials in Prince William County, Virginia, for refusing to allow him to vote because he did not have a photo ID.[313] At the time, Virginia law permitted voters without ID to cast a ballot by signing an affidavit.[314] The plaintiff was denied this process,[315] and the complaint charged violations of state law, the Fourteenth Amendment, and Section 5 of the Voting Rights Act for failing to preclear a voting change before implementation since Virginia was a covered jurisdiction.[316] The parties negotiated a consent decree in which defendants agreed to follow state law to permit voters who do not present an ID to cast a ballot if they sign an affidavit attesting to their identity and voter registration status and to post signage indicating the voters' rights.[317]

35. Green Party of Michigan v. Land – Michigan 2008

The ACLU and ACLU of Michigan, on behalf of the Green Party of Michigan, Libertarian Party of Michigan, and others challenged the constitutionality of a state law that required the Michigan Secretary of State to provide voter lists containing party preference data information only to the chairpersons of the two major political parties.[318] The plaintiffs,

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[309] *See* S.B. 286, 127th Gen. Assem., 2007-2008 Sess.(Ohio 2008).

[310] Minutes of Proceedings/Order, ACLU of Ohio v. Brunner, No. 1:08-cv-00145 (N.D. Ohio Mar. 13, 2008).

[311] *See* Plaintiffs' Motion to Dismiss Without Prejudice, ACLU of Ohio v. Brunner, 1:08-cv-00145 (N.D. Ohio Apr. 2, 2008)

[312] Order Granting Plaintiffs' Motion to Dismiss Without Prejudice, ACLU of Ohio v. Brunner, 1:08-cv-00145 (N.D. Ohio Apr. 4, 2008).

[313] *See* Complaint, Gillette v. Weimer, No. 1:08-cv-00188 (E.D. Va. Feb. 28, 2008).

[314] *See id.* at ¶¶ 10-11.

[315] *See id.* at ¶¶ 14-18.

[316] *See id.* at ¶ 1.

[317] *See* Consent Decree, Gillette v. Weimer, No. 1:08-cv-00188 (E.D. Va. June 19, 2008).

[318] *See* Complaint for Declaratory and Injunctive Relief at ¶¶ 13-24, Green Party of Mich. v. Land, 2:08-cv-10149 (Mich. Jan. 11, 2008).

three minor parties, a journalist, and a political consultant, argued that the statute violated their First Amendment right to access and report on information of public interest and the Fourteenth Amendment's Equal Protection Clause.[319] The district court agreed, concluding in March 2008 that the statute was unconstitutional because it severely burdened the First Amendment rights of association of minor parties and denied them an equal opportunity to win votes by putting them at a distinct disadvantage. The court concluded that the law was not justified by any compelling state interest.[320] The state chose not to appeal the decision.

36. Van Hollen v. Government Accountability Board – Wisconsin 2008

ACLU participating as amicus

The Attorney General of Wisconsin filed for a writ of mandamus to require the Wisconsin Government Accountability Board (GAB) to retroactively run a matching check on voter registrations received prior to when the state's computerized voter registration database went live on August 6, 2008. For registrations after this date, the GAB performed a process to verify information on registration records with information from the state driver's license database and the federal Social Security Administration database. The Wisconsin Attorney General claimed that the Help America Vote Act (HAVA) required voter registration data to positively match information in the Social Security Administration or state driver's license databases to determine eligibility before voters could receive a ballot on Election Day.[321] The Attorney General argued that this process was necessary to prevent the dilution of the rights of qualified voters with those of ineligible voters by risking fraud in the voting process.[322]

The ACLU and several other civil rights and civic organizations filed an amicus brief in support of the defendants' motion to dismiss, arguing that the state Attorney General's interpretation of HAVA was flawed. First, while HAVA includes a limited database matching process to support list maintenance activities—which the GAB was following for registrations after August 2008—it does not require the retroactive process the Wisconsin Attorney General was attempting to force or that the matching process be used to determine voter eligibility.[323] In fact, the GAB specifically declined to link its voter registration database matching process with voter eligibility because of flaws inherent in the matching process and allowed registrants whose information was unsuccessfully matched to still be placed on the registration rolls and to vote in the same manner as other voters. Second, HAVA actually imposes specific restrictions on the authority of states to remove individuals from voter registration rolls to prevent the removal of qualified,

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[319] *See id.* at ¶¶ 39-51.

[320] *See Green Party of Mich. v. Land*, F. Supp. 2d 912, 917-18, 924 (E.D. Mich. 2008).

[321] Petition for Writ of Mandamus, Van Hollen v. Gov't Accountability Bd., No 2008-CV-004085 (Wis. Ct. App. Oct. 23, 2008).

[322] *See id.* at ¶¶ 2-3.

[323] *See* Brief as *Amici Curiae* of The Lawyers' Committee for Civil Rights Under Law et al. in Support of Defendant's Motion to Dismiss at 2, Van Hollen v. Gov't Accountability Bd., No. 08-CV-004085 (Wis. Ct. App. Oct. 6, 2008).

registered individuals.[324]

As in other cases where officials attempted to confirm voting eligibility through database matching, problems stemming from clerical errors, mismatching of different people with similar names, or inconsistent use of initials or nicknames resulted in false positives. A 2008 test comparison of Wisconsin's statewide voter registration system data with Wisconsin Department of Transportation data showed that more than 20% of new voters were a mismatch, an implausible number;[325] in fact, four of the six members of the Government Accountability Board themselves failed the initial data crosscheck.[326] Division Administrator Nat Robinson noted that "[i]t's clear the data quality issue must be addressed before this cross-checking function can be used to ensure reliable voter data." In October 2008, the state court dismissed the Attorney General's complaint, holding that neither HAVA nor state law required voter information to match Social Security data as a condition for voting.[327]

37. Kennedy v. Avondale Estates – Georgia 2008

The town of Avondale Estates, Georgia, had long been a predominantly white enclave before it became mostly non-white. One of the mechanisms used to exclude Black homeowners was a 1967 municipal ordinance that prohibited the display of yard signs that limited information on real estate available for purchase.[328] This technique was common in predominantly white neighborhoods that sought to stave off integration, but such ordinances were seldom enforced.[329]

Although unconstitutional,[330] the ordinance remained unchallenged until 1998 when, two days before a primary election, Avondale Estates residents Tanya Greene and Sean Maher placed a campaign sign on their front lawn in support of a candidate for superior court judge. Like Ms. Greene, the candidate was an African American who had devoted much of his professional career to representing indigent persons facing the death penalty. The city

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[324] *Ibid.*

[325] Press Release, WISCONSIN ELECTIONS COMMISSION, Accountability Board Members' Voter Data Do Not Match Department of Transportation Records (Mar. 18, 2008), https://elections.wi.gov/node/696.

[326] *See id.*

[327] *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-4085 (Wis. Ct. App. Oct. 23, 2008).

[328] *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

[329] LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 281 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

[330] *See Linmark Assoc. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ban on residential "for sale" signs unconstitutional); *Ladue v. Gilleo*, 512 U.S. 43 (1994) (total ban on political signs unconstitutional).

clerk removed the sign on her lunch break the next day.[331]

Separately, Avondale Estates resident Laurie Hunt made a yard sign criticizing the city for not firing the city manager for making racist comments on the job. The city manager, who was also the police chief, was accused of saying "[t]he police officer's uniform patch would look better if it had a nigger on the patch with a noose around his neck."[332] The city council fined the police chief $5,000.00 but did not discharge him. When the city manager/police chief saw Ms. Hunt's sign, he asked one of his officers to "just stop and ask the people to remove the sign."[333] Three squad cars visited Ms. Hunt and issued her a citation with a potential $100 fine.

In 1998, several city residents represented by the ACLU filed suit against the city alleging that the ordinance was unconstitutional.[334] In discovery, plaintiffs learned that no version of the sign ban was in place before the effective date of Section 5 of the Voting Rights Act and that the 1967 ordinance had never been submitted for preclearance under Section 5. Because regulations implementing Section 5 include "change[s] affecting the right or ability of persons to participate in political campaigns" as an example of covered changes[335] and Georgia was a covered state, the plaintiffs amended the complaint to include a Section 5 violation.

After the lawsuit was filed, the city adopted a moratorium on enforcing the ordinance, and after plaintiffs filed for summary judgment, the ban was repealed insofar as it applied to political and "for sale" yard signs.[336] For the general election in 2000, residents could display political signs—without fear of police interference—for the first time in three decades.

Though the main problem—the total ban on political yard signs—was resolved in the plaintiffs' favor, the city amended its ordinance five times during the litigation, which created other issues regarding size, setback regulations, and unequal treatment based on content.[337] When the district court issued an order on the remaining issues, it concluded

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[331] LAUGHLIN MCDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 282 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

[332] *Id.* (citing INVESTIGATIVE REPORT OF ALLEGATION OF RACIAL DISCRIMINATION, PREPARED FOR THE MAYOR AND THE BOARD OF COMMISSIONERS, CITY OF AVONDALE ESTATES, GEORGIA 3 (Aug. 15, 1998)).

[333] *Id.* (citing Plaintiffs' [First] Motion for Summary Judgment at 21, Maher v. Avondale Estates, No. 1:00-CV-1847 (N.D. Ga. Oct. 20, 2000)).

[334] *Maher v. Avondale Estates*, No. 1:98-CV-2584 (N.D. Ga. Sep. 4, 1998); refiled and assigned No. 1:00-CV-1847 (N.D. Ga. Jul. 20, 2000).

[335] 28 C.F.R. § 51.13(k).

[336] *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184, 1188 (N.D. Ga. 2005).

[337] *Ibid.*

that Section 5 did not cover political signs.[338] The plaintiffs filed a motion for reconsideration, which the court denied in February 2006.[339]

38. New York State Board of Elections v. López Torres – New York 2008

ACLU participating as amicus

This case involved a constitutional challenge to the elaborate system that governs the election of judges to the New York State Supreme Court, which is the state's principal trial court. The state requires major parties to nominate judicial candidates at conventions for each of the 12 judicial districts in the state, who then appear on the general election ballot. These judicial candidates are nominated by delegates who attend the conventions and must themselves stand for election from each judicial district. To successfully become a delegate, individuals need to petition their way onto a ballot and run in a primary election held several weeks before the conventions. Elected delegates from each party then meet at the judicial conventions to nominate the parties' candidates for judicial office.[340] The system, broadly prescribed by state law, effectively worked in a way where control of the delegate petition and election process— dominated by local leaders of the major parties—led to the control of judicial nominees.[341] In effect, the system functioned in a way that created very low burdens for judicial candidates supported by local party leaders—who could take advantage of party infrastructure and resources to elect favored delegates—and large burdens for judicial candidates that did not enjoy party support because of the extremely cumbersome process for recruiting delegates to vote for them.

Because of the virtual impossibility of becoming a judicial candidate without party support under this complex process, a set of judicial candidates and their supporters brought a constitutional challenge on First Amendment and Equal Protection Clause grounds. They argued that the system deprived voters of the right to choose their parties' judicial candidates and imposed insurmountable burdens on challenger candidates who seek a major party nomination without the support of local party leaders. After a lengthy analysis of the process, the district court agreed with the challengers and issued a preliminary injunction,[342] which the Second Circuit affirmed,[343] concluding that the plaintiffs were likely to succeed on the merits of their First Amendment claim because the system was set up so that party leaders, and not voters, effectively selected the justices of New York's Supreme Court.

The New York State Board of Elections, the New York County Democratic Committee, New York Republican State Committee, and other defendants petitioned the Supreme Court for

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[338] *Id.* at 1217-18.

[339] Order, Maher v. Avondale Estates, 1:00-cv-1847 (N.D. Ga. Feb. 9, 2006).

[340] *See N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 200 (2008).

[341] *See López Torres v. N.Y. State Bd. Of Elections*, 411 F. Supp. 2d 212, 217-223 (E.D.N.Y. 2006).

[342] *Id.* at 255-256.

[343] *López Torres v. N.Y. State Bd. Of Elections*, 462 F.3d 161 (2d Cir. 2008).

certiorari review, which was granted.[344] The petitioners argued that the constitutional challenge to the state system impermissibly intruded into the associational rights of the parties' leadership to choose standard-bearer candidates. The ACLU and New York Civil Liberties Union filed an amicus brief in support of the lower court's decision, arguing that the challenged system not only deprived voters and candidates of the realistic opportunity to participate in the nominating process, but also imposed severe burdens on voters and candidates unnecessary to further a compelling interest.[345]

The Supreme Court disagreed. In a unanimous opinion, it reversed the lower court.[346] The Court determined First Amendment associational rights of political parties does not confer associational rights on individuals to be able to join or wield a certain degree of influence in the party. The court also determined parties might control their membership during a candidate-selection process in a manner that helps the party produce a nominee who, in their view, best represents its political platform.[347]

39. Riley v. Kennedy – Alabama 2008

In 1985, the U.S. Attorney General precleared a local law in Alabama providing for a special election to fill midterm vacancies on the Mobile County Commission.[348] This was an exception to the state law practice that provided for gubernatorial appointment for vacant county commission seats. After the Governor called a special election pursuant to the new local law to fill an opening on the commission, a lawsuit was filed seeking to enjoin the election on the basis that it conflicted with state law. Ultimately, the Alabama Supreme Court ruled that the local law violated the Alabama Constitution.

The Alabama Legislature subsequently passed a law in 2004 that the Justice Department precleared, which provided that the Governor would appoint individuals to vacancies in county commissions unless a local law authorized a special election. A lawsuit followed to compel a special election for a vacancy on the Mobile County Commission on the basis that the new Alabama state law revived the previous local special election law from 1985. The Alabama Supreme Court again intervened, holding that the new state law could only apply prospectively and could not revive the previous local law.[349] One of the plaintiffs from this case then sued in federal court alleging that Section 5 of the Voting Rights Act required Alabama to preclear the two decisions of the Alabama Supreme Court on the matter. The U.S. District Court for the Middle District of Alabama agreed and concluded that the 1985 local law was the most recent precleared practice put into place and the baseline from

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[344] *N.Y. State Bd. of Elections v. López Torres*, 549 U.S. 1204 (2007).

[345] Brief as *Amicus Curiae* of the American Civil Liberties Union and New York Civil Liberties Union in Support of Respondents, N.Y. State Bd. of Elections v. López Torres, No. 06–766 (July 13, 2007).

[346] *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 209 (2008).

[347] *Id.* at 202-03.

[348] *See Riley v. Kennedy*, 553 U.S. 406 (2008).

[349] *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005); *see Riley*, 553 U.S. at 406.

which to determine a "change" under Section 5.[350]

The state appealed and the Supreme Court granted review. On appeal, the state argued that a decision by a covered jurisdiction's highest court invalidating a law should not count as a voting change subject to Section 5. The state also argued that a state law found to be unconstitutional by a state's highest court cannot serve as the baseline for changes in voting or retrogression and that the decision by the three-judge court raised constitutional and workability concerns.[351]

The ACLU filed an amicus brief in support of the respondents in February 2008, arguing that the language and legislative history of Section 5, as well as its implementation, showed that changes in voting implemented in covered jurisdictions pursuant to state court orders should be subject to preclearance.[352] Notably, the Attorney General interposed numerous objections to voting changes implemented as a result of court orders. Those objection letters were submitted as part of the legislative record supporting the 2006 Voting Rights Act reauthorization.[353] Congress similarly approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975 and recognized that litigation could lead to changes requiring preclearance when it extended Section 5 in 1982.[354] Section 5 preclearance was meant to prevent retrogression in minority voting strength without regard for the legality of a practice under state law.

In a 7-2 decision, the Supreme Court held that the local 1985 voting change was never "in force or effect" within the meaning of Section 5. As such, the law did not mark a "change" from the baseline, and Alabama's reinstatement of prior practice did not require preclearance.[355] The Court did not decide any of the questions that could have weakened or limited Section 5's scope.

40. Avitia v. Superior Court of Tulare County [356] – California 2008

In 2008, the ACLU joined a lawsuit brought on behalf of Rosalinda Avitia and several other Latino voters residing in and around the city of Visalia in Tulare County, California. The plaintiffs challenged the at-large elections for the five-member Board of Directors of the Tulare Local Healthcare District.

Avitia was the ACLU's first case involving claims under the California Voting Rights Act of 2001 (CVRA). CVRA provides a cause of action for vote dilution similar to Section 2 of the

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[350] *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006).

[351] *See generally* Brief for Appellant, Riley v. Kennedy, No. 07–77 (Jan. 14, 2008).

[352] Brief *Amicus Curiae* of the American Civil Liberties Union and ACLU of Alabama in Support of Appellees, Riley v. Kennedy, No. 07–77 (Feb. 21, 2008).

[353] *Id. at 5.*

[354] *Ibid.*

[355] *Riley v. Kennedy*, 553 U.S. 406, 422-23 (2008).

[356] *See* ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2010-DECEMBER 31, 2010 13-14, https://www.aclu.org/sites/default/files/field_document/VRP_Annual_Report_2010.pdf; *Avitia v. The Superior Ct. of Tulare Cty.*, No. 07-cv-224773 (Cal. Sup. Ct. Tulare Cty. 2008).

Voting Rights Act, but is broader and operates without some of the limitations imposed by judicial decisions over the last two decades. Specifically, plaintiffs bringing claims under CVRA need not demonstrate the feasibility of a district in which a minority group constitutes a majority of the electorate (the so-called *Gingles* district). Moreover, the totality of the circumstances, or Senate Report Factors, usually required in addition to evidence of racially polarized voting and the *Gingles* district were probative but not necessary to a claim of vote dilution under CVRA.

The plaintiffs in *Avitia* brought suit in 2007 to address the fact that there had only been one Latino on the Tulare Local Healthcare District's Board of Directors since the body's inception in 1946, despite the fact that as of 2000, Latinos comprised 47.3% of the population in the district. The plaintiffs' expert witness, Dr. J. Morgan Kousser, did an analysis of voting patterns and concluded that voting was racially polarized in a number of Healthcare District elections and propositions since 1994.

In August of 2008, the plaintiffs moved unsuccessfully for a preliminary injunction to enjoin the district from conducting and certifying the results of the November 2008 election for two members of the Board of Directors. Despite the defendant's failure to submit any contradicting expert testimony or evidence regarding polarized voting in the district, the state superior court held that the plaintiffs did not establish a strong likelihood of success on the merits. The court essentially adopted some of the concerns with plaintiffs' statistical evidence proffered by the defendant, even though federal case law supported the plaintiffs' evidence and their interpretation of CVRA's requirements. The superior court also denied the defendant's motion for a judgment on the pleadings, two motions for summary judgment, various motions to compel discovery, and a motion to dismiss for failure to join indispensable parties.

Following lengthy negotiations, the parties agreed to a settlement providing that a proposal calling for the adoption of district or "zone" elections for the Board of Directors be put on the ballot no later than June 2012. If the proposal was approved, the new plan would be implemented in the November 2012 elections. Because the plaintiffs were confident the proposal would be adopted, they agreed that if it was defeated they would not refile their complaint. The state court approved the settlement agreement on February 16, 2010.

41. Baker v. Chapman – Alabama 2008

In July 2008, the ACLU and ACLU of Alabama filed this suit.[357] Alabama's constitution provides for the disfranchisement of persons previously convicted of certain crimes.[358] The three disenfranchised plaintiffs had past convictions for offenses—forgery, escape, and receiving stolen property—that were not on the legislature's list of disfranchising crimes.[359] One of the plaintiffs attempted to register and vote but was told that she was ineligible due

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[357] Complaint, Baker v. Chapman, No. 03-CV-2008-900749.00 (Cir. Ct. Ala. 2008).

[358] ALA. CONST. art. VIII, § 177.

[359] Complaint at ¶ 2, Baker v. Chapman, No. 03-CV-2008-900749.00 (Cir. Ct. Ala. July 21, 2008) (citing Ala. Code § 15-22-36.1(g)).

to her offense even though her crime—receiving stolen property—was on neither the legislature's nor the attorney general's list of crimes involving moral turpitude.[360]

The plaintiffs asserted that Alabama's disfranchisement scheme violated the state's separation of powers doctrine, which leaves the designation of disfranchising offenses to the legislature and not the state Attorney General, as well as state and federal equal protection, due process, and privileges and immunities doctrines. The plaintiffs also argued the state's requirement that individuals pay all restitution, fines, and legal costs before having their the right to vote restored violated equal protection laws and was an impermissible wealth-based qualification for exercise of the franchise.[361]

The trial court dismissed the plaintiffs' suit in October 2008 for lack of standing on the grounds that two of the plaintiffs had not suffered any injury because they never attempted to vote and that the third plaintiff who was denied the right to register had not exhausted other state remedies.[362] The plaintiffs appealed the dismissal to the Alabama Supreme Court,[363] and the court affirmed the trial court's order in a per curiam opinion in June 2010, without offering any factual or legal basis for its decision.[364]

42. S.C. Green Party v. S.C. State Election Commission – South Carolina 2008

In August 2008, the ACLU filed a lawsuit in federal court on behalf of the South Carolina Green Party and Eugene Platt challenging the state's "sore loser" statute.[365] South Carolina's electoral scheme permits "fusion voting," an electoral practice that allows a candidate to seek the nomination of more than one party, and in turn, allows more than one party to nominate the same candidate. Separately, South Carolina's "sore loser" statute prohibits a candidate from having their name placed on the general election ballot as a candidate of a certified political party if the candidate lost the party's primary.[366] Platt was chosen by both the Green Party and Working Family Party as their candidate for a state legislative house seat but lost the nomination for the same office in the Democratic primary. As a result, the election commission prohibited Platt from appearing on the general election ballot. The plaintiffs argued that the application of the state's rules violated the First and Fourteenth Amendments and sought declaratory and injunctive relief prohibiting the election commission from applying the sore loser statute to disqualify candidates from appearing on the general election ballot for one party because of a loss in another party's primary or convention. The plaintiffs also sought preliminary and

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[360] *Id.* at ¶ 54.

[361] *See id.* at ¶¶ 78-102.

[362] *See* Order, Baker v. Chapman, No. 03-CV-2008-900749.00 (Cir. Cit. Ala. Oct. 8, 2008).

[363] *See* Appellant Brief, Baker v. Chapman, 3-CV-2008-900749.00 (Ala. Jan. 30, 2009).

[364] *See Baker v. Chapman*, 83 So.3d 588 (Ala. 2010).

[365] Complaint at ¶ 1, S.C. Green Party v. S.C. State Election Comm'n, No. 08-cv-2790 (D.S.C. Aug. 7, 2008).

[366] S.C. CODE ANN. § 7-11-10.

permanent injunctions requiring the defendants to place Platt on the ballot for the November 2008 General Election.[367]

The district court held oral arguments in September 2008, and denied the plaintiffs' motion for preliminary injunction prohibiting defendants from disqualifying Platt from the general election ballot as the Green Party's nominee for the state house seat.[368] The plaintiffs and defendants then both filed summary judgment motions. The defendants argued that Platt was disqualified from appearing on the ballot as the Green Party candidate for the seat in question based on the state's sore loser statute, the party loyalty pledge statute, and the filing deadline statute.[369] The plaintiffs challenged the constitutionality of each statute as applied to Platt.[370] The court granted the defendants' summary judgment motion, finding that the application of the sore loser statute in connection with fusion voting did not elevate the plaintiffs' burdens to a level requiring strict scrutiny. The court maintained that Platt and the Green Party had notice of the sore loser statute when he decided to seek multiple nominations and similarly assumed the associated risks.[371] The court also found that significant state interests were served by South Carolina's sore loser statute as applied to fusion candidates, including maintaining party stability and avoiding voter confusion. The court did not address the party-loyalty pledge statute or the filing deadline statute.

The plaintiffs appealed to the Fourth Circuit, raising three questions, including whether the state, consistent with the First and Fourteenth Amendments, could exclude a candidate who won two party nominations but subsequently lost a third, thereby leaving the two nominating parties without a candidate on the general-election ballot.[372] The Fourth Circuit rejected the plaintiffs' arguments, concluding that the burden the sore loser statute placed on the Green Party's association rights was not severe, stating, "[t]he Green Party retained the right to select Platt, or any other candidate, at its state convention. It was Platt's own decision to seek the Democratic Party's nomination, not interference by members of the Democratic Party in the Green Party's nomination process, that affected the Green Party's ability to retain Platt on the general election ballot as its preferred nominee."[373] As a result, the court applied a low standard of scrutiny to determine that

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[367] Complaint, S.C. Green Party v. S.C. State Election Comm'n, No. 08-cv-2790 (D.S.C. Aug. 7, 2008); Plaintiffs' Motion for a Preliminary Injunction, S.C. Green Party v. S.C. Election Comm'n, No. 08-cv-2790 (D.S.C. Aug. 7, 2008).

[368] Minute Entry, S. C. Green Party v. S.C. State Election Comm'n, No. 08-cv-2790 (D.S.C. Sept. 18, 2008).

[369] Memorandum in Support of Motion for Summary Judgment, S. C. Green Party v. S.C. State Election Comm'n, No. 08-cv-2790 (D.S.C. May 22, 2009); *see also* S.C. CODE ANN. §§ 7-11-10, 7-11-210, 7-11-15.

[370] Plaintiffs' Motion for Summary Judgment, S. C. Green Party v. S.C. State Election Comm'n, No. 08-cv-2790 (D.S.C. May 22, 2009).

[371] *S.C. Green Party v. S.C. State Election Comm.*, 647 F.Supp.2d 602 (D.S.C. 2008).

[372] Appellants' Brief at 2-3, S.C. Green Party v. S.C. State Election Comm'n, No. 09-1915 (4th Cir. Sept. 28, 2009).

[373] *S.C. Green Party v. S.C. State Election Comm.*, 612 F. 3d 752, 757 (4th Cir. 2010).

South Carolina's sore loser statute advanced state regulatory interests, including the state's interest in minimizing excessive factionalism and party splintering, reducing the possibility of voter confusion, and ensuring orderly, fair, and efficient procedures for the election of public officials.[374]

43. United States Students Association v. Land – Michigan 2008

In September 2008, the ACLU, on behalf of the United States Student Association Foundation, Michigan State Conference of NAACP Branches, and ACLU of Michigan, brought suit seeking injunctive relief against the Michigan Secretary of State and other Michigan election officials in a challenge to the election officials' unlawful processes used to reject, cancel, or remove the names of voters from the voter registration rolls. Michigan used a process whereby it would use voter identification cards returned as undeliverable as a basis for rejecting a person's registration and would also cancel a registrant's application if the registrant obtained an out-of-state driver's license.[375] The plaintiffs argued these processes violated provisions of the National Voter Registration Act that govern the voter notification and removal process relating to states' voter registration rolls, as well as the Civil Rights Act of 1964 and the First and Fourteenth Amendments. The plaintiffs sought a preliminary injunction to protect the ability of eligible voters wrongfully affected by these policies to cast ballots in the November 2008 election. The district court granted the preliminary injunction with regard to the removal of voters whose registration cards were returned, but denied the motion with regard to the driver's license issue.[376]

With regards to the driver's license issue, the district court emphasized that the plaintiffs' likelihood of proving their allegations of standing to challenge this practice was "questionable." The district court also noted that, unlike the undeliverable identification cards, the driver's license practice provided some out-of-state driver's license applicants with the opportunity to reaffirm their Michigan residence and remain on the voting rolls and denied the preliminary injunction for this issue.[377] By contrast, the court found that the plaintiffs made a strong showing of a likelihood of success on the merits of the undeliverable registration cards issue and enjoined the state from canceling or rejecting a voter's registration based upon the return of the original identification card as undeliverable. Michigan state officials appealed the injunction and sought an emergency motion to stay the injunction, but the Sixth Circuit denied the motion for a stay concluding that "the preliminary injunction is necessary to protect the individual voters of Michigan affected by the undeliverable-voter-ID-card practice."[378] Shortly after the Sixth Circuit decision, the case settled in exchange for the defendants' agreement not to reject or cancel individual voter registrations solely because the original identification card was returned as undeliverable or because the individual surrendered their Michigan driver's license and

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[374] *Id.* at 759.

[375] Complaint, U.S. Student Ass'n Found. v. Land, 2:08-cv-14019 (E.D. Mich. Sept. 18, 2008); First Amended Complaint, U.S. Student Ass'n Found. v. Land, 2:08-cv-14019 (E.D. Mich. Oct. 7, 2008).

[376] *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. 2008).

[377] *Id.* at 946.

[378] *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008).

obtained a driver's license in another state without specific written confirmation that the individual changed their residence for voting purposes.[379]

44. Young v Hosemann – Mississippi 2008

Represented by the ACLU, two individuals with felony convictions filed a civil rights action in September 2008 under federal and state laws in federal district court in Mississippi.[380] The plaintiffs alleged that Article 12, Section 241 of the Mississippi Constitution explicitly allows individuals to vote for U.S. President and Vice President, notwithstanding a criminal conviction, if they are citizens of the United States, at least 18 years old, meet residency requirements, and have not been adjudicated "non compos mentis."[381] Both plaintiffs alleged that they met all of the qualifications for an elector in the State of Mississippi and that the defendants' disfranchisement of them violated Section 241 of the Mississippi Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the National Voter Registration Act. The plaintiffs asked the court for declaratory and injunctive relief and simultaneously filed a motion for a preliminary injunction.

On September 25, 2008, the district court denied the motion for a preliminary injunction from the bench and issued an order stating that "the Defendants' interpretation of Section 241 of the Mississippi Constitution is correct, thus Plaintiffs are not likely to succeed on the merits of their claims."[382] On appeal, the Fifth Circuit denied the plaintiffs' motion for emergency injunctive relief pending appeal.

On March 9, 2009, the district court granted the defendants' motion to dismiss the complaint for failure to state a claim, reaffirming its prior conclusion that the "plaintiffs were entitled to no relief because the court does not find the plaintiff's interpretation [of Section 241] to be a fair or reasonable construction, and because the court concludes that defendants have correctly construed this provision."[383]

The plaintiffs appealed to the Fifth Circuit. On February 25, 2010, in a published opinion, the court of appeals affirmed the district court's decision, finding that "the text of § 241 is perfectly clear and perfectly contrary to the construction urged by the appellants."[384]

45. Kelly v. McCulloch; Kelly v. Johnson – Montana 2008

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[379] Settlement Agreement and Stipulation of Dismissal with Prejudice, U.S. Student Ass'n Found. v. Land, Case No. 2:08-CV-14019 (E.D. Mich. Jun. 24, 2010).

[380] Complaint for Injunctive and Declaratory Relief, Young v. Hosemann, No. 3:08-cv-00567 (S.D. Miss. Sept. 12, 2008).

[381] MISS. CODE ANN. § 23-15-11; MISS. CONST. art. 12, § 241; Complaint for Injunctive and Declaratory Relief at ¶¶ 11-21, Young v. Hosemann, No. 3:08-cv-00567 (S.D. Miss. Sep. 12, 2008).

[382] Order Denying Motion for Preliminary Injunction, Young v. Hosemann, No. 3:08-cv-00567 (S.D. Miss. Sep. 25, 2008).

[383] Order Granting Motion to Dismiss, Young v. Hosemann, No. 3:08-cv-00567 (S.D. Miss. Mar. 9, 2009).

[384] *Young v. Hoseman*, 598 F.3d 184, 191 (5th Cir. 2010).

On April 8, 2008, the ACLU and the ACLU of Montana, filed a lawsuit in federal court challenging Montana's ballot access system for independent and previously unqualified parties.[385] The complaint charged that the state's ballot access law violates the rights guaranteed by the First and Fourteenth Amendments. It was filed on behalf of U.S. Senate candidate Steve Kelly and voter Clarice Dreyer. Kelly ran as an independent candidate for U.S. Representative in 1994 and was the last independent candidate for statewide office to appear on the ballot.

Under Montana law, independent and minor party candidates can appear on the general election ballot only if they submit the signatures of 5% of the total votes cast for the successful candidate for the same office in the last general election. A 2007 state law also added a filing fee and moved the petition deadline from June to March—more than 200 days before the election. Major party candidates, by contrast, do not have to submit any signatures in order to appear on the primary ballot and they appear on the general election ballot automatically when they win a primary election.[386]

The district court denied the plaintiffs' motion for a preliminary injunction seeking to have Kelly put on the 2008 general election ballot. The parties filed cross motions for summary judgment in the summer of 2009. On February 3, 2010, the district dismissed the complaint on the grounds that neither of the plaintiffs had standing.[387] The plaintiffs appealed.

The Ninth Circuit heard oral argument on November 5, 2010, and on December 10, 2010, reversed and remanded concluding that both plaintiffs had standing as a matter of law as registered voters.[388] Upon remand, the district court ruled that the deadline for independent and minority party candidates to file for office and submit signatures was unconstitutionally early.[389] The district court cited in its opinion the U.S. Supreme Court ruling in Anderson v. Celebrezze that "... protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena... Competition in ideas and governmental policies is at the core of our electoral process and First Amendment freedoms."[390] The district court also found that the 5% signature requirement and the 1% filing fee did not impose a severe burden and that Montana had an important state interest that justified the burden imposed by the signature and fee requirements.[391]

46. Northwest Austin Municipal Utility District Number One v. Gonzales – Texas 2008

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[385] Verified Complaint, Kelly v. Johnson, 2:08-cv-00025 (D. Mont. Apr. 8, 2008).

[386] *Kelly v. McCulloch*, No. CV-08-25, 2010 WL 11583553, at *1 (D. Mont. Feb. 3, 2010).

[387] *Id.* at *3.

[388] *See Kelly v. McCulloch*, 405 F. Appx. 218, 219 (9th Cir. 2010).

[389] *Kelly v. McCulloch*, No. CV-08-25, 2012 WL 1945423, at *8 (D. Mont. May 25, 2012).

[390] *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

[391] *Kelly v. McCulloch*, No. CV-08-25, 2012 WL 1945423, at *3,4 (D. Mont. May 25, 2012).

This case was a challenge to the constitutionality of the 2006 reauthorization of Section 5 of the Voting Rights Act. Northwest Austin Municipal Utility District Number One (NAMUDNO), a subjurisdiction of Texas, a state covered by Section 5, sought a declaratory judgement to bailout of coverage from Section 5 pursuant to Section 4(a) of the Act, which permits jurisdictions to exempt themselves from coverage upon a showing of being discrimination-free for a period of years.[392] Additionally, NAMUDNO sought a declaratory judgment that Section 5 was unconstitutional.[393] Texas became a covered jurisdiction as a result of the 1975 amendments to the Voting Rights Act, which added as a test or device for purposes of the Section 4(b) coverage formula the use of English-only elections in jurisdictions where at least 5% of voting age citizens constitute a single language minority.[394]

The ACLU, ACLU of Texas, and ACLU of the District of Columbia represented a minority resident of NAMUDNO, and was granted leave to intervene. The plaintiff argued that NAMUDNO lacked standing to bail out and also that the extension of Section 5 was constitutional.[395] Several other civil rights organizations also intervened to defend the constitutionality of Section 5.

Following discovery, all parties filed motions for summary judgment. In a lengthy decision entered on September 4, 2008, the three-judge court granted the motions of the Attorney General and the various defendant-intervenors, ruling that NAMUDNO did not qualify as political subdivision under the Voting Rights Act and therefore could not bailout from coverage under Section 4(a).[396] The court also held, after an extensive analysis of the legislative record, that the extension of Section 5 was constitutional under the Fourteenth and Fifteenth Amendments.[397] The court based its opinion on the extensive congressional record of Section 5 objections, continued racial bloc voting, patterns of discrimination by the covered jurisdictions, and litigation under Section 2 of the Voting Rights Act. The court also noted that the extension passed unanimously in the Senate and by an overwhelming majority in the House of Representatives, indicating that the judgment of Congress for the continued need of Section 5 was due deference by the courts.[398]

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[392] *See* 52 U.S.C § 10303(a).

[393] Complaint, Northwest Austin Mun. Utility Dis. No. One v. Gonzales, No. 1:06-cv-01384 (D.D.C. Aug. 4, 2006).

[394] *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400 (1975).

[395] *See* Motion for Leave to Intervene as Defendants, Northwest Austin Mun. Utility Dist. No. One v. Gonzales, No. 1:06-cv-01384 (D.D.C. Nov. 3, 2006).

[396] *See Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, 573 F.Supp.2d 221, 231-235 (D. D.C. 2008).

[397] *See id.* at 266.

[398] *See ibid.*

NAMUDNO filed a jurisdictional statement in the Supreme Court, which noted probable jurisdiction on January 9, 2009.[399] The Court heard oral arguments in April 2009 and issued its much-anticipated ruling in June 2009. In an 8-1 opinion written by Chief Justice John Roberts, the Court declined to decide the issue of the constitutionality of Section 5. Instead, the Court ruled that the utility district was in fact eligible to bailout from Section 5 coverage and as a consequence the Court would "avoid the unnecessary resolution of constitutional questions" involving Section 5.[400]

Foreshadowing the 2013 *Shelby* decision, the majority opinion stated in dicta that "the Act imposes current burdens and must be justified by current needs," "the Act's preclearance requirements and its coverage formula raise serious constitutional questions," questioned whether the "statute's disparate geographic coverage is sufficiently related to the problem that it targets," and that "[t]he Act also differentiates between States, despite our historic tradition that all States enjoy 'equal sovereignty.'"[401] Yet the opinion also underscored the vital role the Act played in American politics, stating that "[t]he historic accomplishments of the Voting Rights Act are undeniable," and the improvements in minority political participation "are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success."[402]

Following remand, the utility district, the United States, and the intervenors filed a proposed consent decree allowing the utility district to bailout from Section 5 coverage. The consent decree was approved by the three-judge court in November 2009, and the claim challenging the constitutionality of Section 5 was dismissed without prejudice. [403]

47. Green Party of Arkansas v. Daniels – Arkansas 2009

On August 27, 2009, the ACLU and ACLU of Arkansas filed suit in federal court on behalf of the Green Party of Arkansas and two of its members in an action to preserve the Green Party's place on the state ballot in the 2010 election. Candidates of state-certified political parties are granted automatic access to the ballot in Arkansas. Under Arkansas state law, once a political party achieves certification it must earn at least 3% of the total votes cast for the office of governor or nominees for presidential electors at the first general election after the party becomes certified in order to retain its status as a state-certified political party.[404] The Green Party successfully petitioned to become a certified political party in 2006 and 2008 by filing petitions comprised of 10,000 Arkansas voters. However, following certification in 2006 the Green Party received only 1.65% of the vote for governor and in

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[399] Probable Jurisdiction Noted, Northwest Austin Mun. Utility Dist. No. One v. Gonzales, 557 U.S. 193 (Jan. 9, 2009).

[400] *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

[401] *Id.* at 203-04.

[402] *Id.* at 202.

[403] Consent Judgement and Decree, Northwest Austin Mun. Utility Dist. No. One v. Holder, No. 1:06-cv-1384 (D.D.C. Nov. 3, 2009).

[404] Ark. Code Ann. § 7–1–101(21)(C)

2008 the Green Party's candidate for president (Cynthia McKinney) earned only 0.3% of the votes cast (although the Green Party's candidates for U.S. Senate and U.S. House of Representative each received more than 15% of the votes cast in their respective races). In each case, following the 2006 and 2008 elections, the Secretary of State subsequently decertified the Green Party.[405]

The plaintiffs argued that based upon the 2008 U.S. House and Senate election results, it was apparent that the Green Party had substantial support among Arkansas voters and that decertification of the party because of a poor showing for the party's presidential candidate, who did not campaign in Arkansas, violated the political and associational rights of the Green Party and its members.

The district court granted the defendant's motion for summary judgment.[406] It acknowledged that the ballot access statute undoubtedly burdens constitutionally protected rights, but held that Arkansas had a vital interest in organizing and regulating elections and the burden imposed upon plaintiffs' rights was not severe. Because of the importance of the constitutional rights at issue and the burdens placed upon them by state law, the plaintiffs appealed the district court's decision.

On appeal, the court of appeals affirmed the district court's grant of summary judgment and found that the ballot access statute did not impose a severe burden on the Green Party's associational rights, and as such, was not subject to strict scrutiny.[407] The court also found that the burden the statute imposed on the Green Party's associational rights were significantly outweighed by Arkansas's important regulatory interests in preventing ballot overcrowding, frivolous candidacies, and voter confusion.

48. Moore v. Franklin County Board of Elections and Registration – Georgia 2009

After finding that a ballot was cast by a voter who did not reside in the city of Franklin Springs, the Superior Court of Franklin County, Georgia, set aside the results of a mayoral election decided by a single-vote margin.[408] The court ordered a special election for December 29, 2009—just 19 days after its ruling, which was not submitted for Section 5 preclearance. Franklin Springs is home to Emmanuel College, and many student-voters were away for the year-end holidays, making them unable or unlikely to participate in the special mayoral election.

The winner of the disputed election, an employee of Emmanuel College, appealed the Superior Court's decision to hold a special election and requested a stay from the Georgia Supreme Court. The ACLU and Lawyers Committee for Civil Rights Under Law filed an

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[405] *Green Party of Arkansas v. Daniels*, 733 F. Supp. 2d 1055 (E.D. Ark. 2010).

[406] *Id.*

[407] *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011).

[408] *See* ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2009-DECEMBER 31, 2009 20-21, https://www.aclu.org/sites/default/files/field_document/vrp_annualreport_2009.pdf (reviewing *Moore v. Franklin County Board of Elections and Registration*, No. 09-FV-1038-J (Ga. Sup. Ct. 2009)).

amicus brief supporting the request, which argued that the lower court failed to comply with Section 5 and that setting the election during the holiday season would unfairly and unnecessarily burden student voters. Amici relied upon the Twenty-Sixth Amendment and numerous court decisions invalidating disparate treatment of students seeking to register and vote. The Georgia Supreme Court, however, denied the request for a stay. The election went ahead on December 29, and the challenger was elected by five votes.[409]

49. Bartlett v. Strickland – North Carolina 2009

In this suit, several county commissioners in North Carolina alleged that state officials' redistricting plan, which attempted to preserve minority voting power in a 39% African American North Carolina House of Representatives district, violated the North Carolina Constitution because the district did not encompass whole counties and instead included portions of four different counties. In that district, Black voters had recently joined with white "crossover" voters to elect candidates of choice in contrast to North Carolina's long history of denying Black Americans equal opportunity in state elections.[410] In response to the complaint, the state officials argued that Section 2 of the Voting Rights Act of 1965 prohibiting minority vote dilution required the redistricting plan because the Black population in the district was sufficiently large and geographically compact to constitute a majority under the terms of the Voting Rights Act. The North Carolina Superior Court entered summary judgment for the state officials.[411]

On appeal, the North Carolina Supreme Court held that because the minority group did not comprise a numerical majority of citizens of voting age (at least 50% of the population in the applicable district), the redistricting plan did not meet the conditions of the Voting Rights Act. Instead, the plan had to comply with North Carolina's Constitution, which prohibits counties from being divided for purposes of state legislative districts. Thus, the court reversed the lower court's decision and declared the plan unlawful.[412]

The U.S. Supreme Court granted certiorari and agreed to hear the question of whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is a strict requirement for a vote dilution claim under Section 2 of the Voting Rights Act. The ACLU submitted an amicus brief along with other civil rights groups, arguing that the state court's position was inconsistent with the history, purpose, and prior interpretation of the Voting Rights Act.[413] The Supreme Court ultimately held that no Section 2 violation could be established where a minority was less than 50% of the

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[409] *Id.*

[410] Brief of NAACP, Cindy Moore, Milford Farrior, Mary Jordan, and the ACLU as *Amici Curie* in Support of Petitioners at 5-7, Bartlett v. Strickland, No. 07-689 (2009).

[411] *See Pender County v. Bartlett*, No. 04 CVS 06966, slip op. at 2 (N.C. Super. Ct. Jan. 9, 2006).

[412] *Pender Cty. v. Bartlett*, 649 S.E.2d 364 (N.C. 2007).

[413] Brief of NAACP, Cindy Moore, Milford Farrior, Mary Jordan, and the ACLU as *Amici Curie* in Support of Petitioners at 5-7, Bartlett v. Strickland, No. 07-689 (2009).

voting age population in a district.[414] Crossover districts like the one at issue in this case, the Court ruled, did not meet the *Gingles* requirement that a minority is sufficiently large and geographically compact enough to constitute majority in a single-member district for purposes of a Section 2 claim under Voting Rights Act's vote dilution provision.

50. Coronado v. Napolitano — Arizona 2009

The ACLU and ACLU of Arizona filed a lawsuit challenging two aspects of Arizona's felon disfranchisement rules: (1) the denial of voting rights to formerly incarcerated individuals with past felony convictions based on their inability to pay the court fines, fees, and restitution associated with their sentences, and (2) the disfranchisement of people convicted of non-common law felonies.[415] Under Arizona law, every person convicted of a felony is stripped of their civil rights, including the right to vote, serve on a jury, and run for public office.[416] Individuals who have only one criminal conviction are eligible for automatic restoration of their voting rights once they receive a Certificate of Absolute Discharge from the state and pay all of their legal financial obligations.[417] Those convicted of two or more felonies must seek discretionary approval from a judge before the state can restore their civil rights, a process that is arbitrary and intimidating.[418]

Three of the plaintiffs had only one criminal conviction but remained ineligible for automatic rights restoration because they owed outstanding legal debts to the state. The plaintiffs argued that conditioning the right to vote on the payment of fines or fees is in the nature of a poll tax and violates the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution, the Voting Rights Act, and state laws.[419] The lawsuit also argued that the scope of crimes covered by Arizona's felon disenfranchisement rules were inconsistent with the intent of the Fourteenth Amendment and that Congress only intended to permit states to disenfranchise individuals convicted of serious common law felonies such as murder and treason. Thus, there is no constitutional provision or exception that would permit states to automatically deny basic voting rights for drug-related crimes or other acts that were never felonies at common law.

In January 2008, the district court dismissed the complaint for failure to state a claim, determining that because fines and fees are terms of an individual's sentence, Arizona was permitted to disenfranchise individuals on that basis and that Section 2 of the Fourteenth

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[414] *Bartlett v. Strickland*, 556 U.S. 1, 14-15 (2009).

[415] Complaint, Coronado v. Napolitano, No. 2:07-cv-01089 (D. Ariz. June 1, 2007).

[416] *See* ARIZ.CONST., art. VII, §2; Ariz. Rev. Stat. Ann. § 13–904; *see also Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at *1 (D. Ariz. Jan. 22, 2008).

[417] Ariz. Rev. Stat. Ann. § 13-907.

[418] Ariz. Rev. Code § 13-908; *Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at *1 (D. Ariz. Jun. 1, 2007).

[419] *See* Complaint at ¶¶ 58-83, Coronado v. Napolitano, No. 2:07-cv-01089 (D. Ariz. June 1, 2007).

Amendment provided an affirmative sanction for states to disfranchise persons convicted of rebellion or other crimes.[420]

Plaintiffs filed an amended complaint in April 2008 to include specific allegations regarding the racial disparities resulting from the disfranchisement law and the negative, disproportionate impact of the state's fines and fees requirement on indigent people.[421] The defendants moved to dismiss the amended complaint, and the court granted that motion in November 2008.[422] The court essentially reiterated its reasoning in dismissing the original complaint, ruling that the plaintiffs did not have a fundamental right to vote because of their previous convictions, the legislative history behind passage of the Fourteenth Amendment did not support the plaintiffs' interpretation of Section 2, and the fines and fees requirement did not result in discrimination on the basis of wealth even though it might have a disparate impact on indigent people.[423] The court also determined that the plaintiffs were not entitled to any discovery regarding the factual allegations in the complaint, so dismissal at such an early stage in the litigation was warranted.[424]

The plaintiffs appealed the court's decision to the Ninth Circuit, and the case was consolidated with *Harvey v. Brewer*, which focused solely on the disfranchisement of people convicted of non-common law felonies.[425] The Ninth Circuit heard oral argument in October 2009, and issued its opinion affirming the lower court's decision in May 2010. As to the plaintiffs' non-common law felony claim, the court ruled that a plain reading of the phrase "other crime" in Section 2 of the Fourteenth Amendment, as well as the phrase's past and contemporary usage, supported the court's conclusion that the term applies to all crimes, not just common law felonies.[426] The court also rejected the plaintiffs' challenge to Arizona's fines and fees requirement, reasoning that "[j]ust as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights."[427] The *Harvey* plaintiffs filed a motion for rehearing en banc which the court denied on July 16, 2010. The plaintiffs decided not to file a petition for certiorari to the Supreme Court.

51. Gray v. South Carolina State Election Commission – South Carolina 2009

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[420] *Coronado v. Napolitano*, No. CV 07-1089, 2008 WL 191987 (D. Ariz. Jan. 22, 2008).

[421] *See* Amended Complaint for Declaratory Relief, Injunctive Relief, and Nominal Monetary Damages at ¶¶ 45-46, 63, CV 07-1089 (D. Ariz. Apr. 30, 2008).

[422] *Coronado v. Napolitano*, No. CV 07-1089, 2008 WL 4838707, at *6 (D. Ariz. Nov. 6, 2008), aff'd sub nom. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010).

[423] *See generally id.*

[424] *Id.* at *3.

[425] 605 F.3d 1067 (9th Cir. 2010).

[426] *See id.* at 1073-1079.

[427] *Id.* at 1079.

In August 2009, the ACLU filed this action on behalf of individual South Carolina citizens and the United Citizens Party against the South Carolina State Election Commission under Section 5 of the Voting Rights Act. The suit argued that a voting change related to the state's reinterpretation of the its filing deadline statute required preclearance and claimed violations of the First and Fourteenth Amendments.[428] The plaintiffs requested declaratory and injunctive relief prohibiting the defendants from enforcing the reinterpreted filing deadline against them.[429] Between 1998 and April 16, 2008, the Election Commission interpreted the law to allow candidates to run as candidates for one or more political parties in the general election as long as they filed a "Statement of Intent of Candidacy" for one political party during the filing period. On April 16, 2008, the Election Commission voted to require candidates seeking party nominations to file a Statement of Intent during the filing period for each political party in which the candidate planned to run in the general election.[430]

The plaintiffs filed a motion for preliminary injunction to enjoin the South Carolina State Election Commission from implementing the change absent compliance with Section 5.[431] The parties agreed to dispense with a hearing on the preliminary injunction and proceed directly to a hearing on the merits based on stipulated facts and oral arguments in November 2009.[432] This proceeding failed to resolve the issue and the district court requested additional targeted discovery, which was completed in February 2010. In March 2010, the district court found in favor of the plaintiffs and granted a permanent injunction. The court held that the subsequent policy constituted a change that required preclearance because it required multiple Statements of Intent where a single filing sufficed before; and the implementation of the subsequent policy resulted in an election practice that differed from the baseline practice established by the most recent preclearance that was in force and effect.[433]

52. Janis v. Nelson – South Dakota 2009

In February 2009 the ACLU, the ACLU of South Dakota, and local counsel filed suit on behalf of Native Americans who resided on the Pine Ridge Reservation in Shannon County, which was one of two counties in South Dakota covered by Section 5 of the Voting Rights Act.[434] The plaintiffs were denied the right to vote because of past felony convictions, despite the fact that their sentences did not include incarceration and state law expressly

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[428] Complaint at ¶ 1, Gray v. S.C. State Election Comm'n, No. 3:09-cv-02126 (D.S.C. Aug. 12, 2009).

[429] *Ibid.*

[430] *Id* at ¶ 17.

[431] Plaintiffs' Motion for a Preliminary Injunction, Gray v. S.C. State Election Comm'n, No. 3:09-cv-02126 (D.S.C. Aug. 14, 2009).

[432] *Gray v. S.C. State Election Comm'n*, No. 3:09-cv-02126, 2010 WL 753767, at *1 (D.S.C. Mar. 1, 2010).

[433] *Id.* at *3.

[434] Complaint for Declaratory and Injunctive Relief and Compensatory and Nominal Damages, Janis v. Nelson, No. 5:09-cv-05019 (D.S.D. Feb. 18, 2009)

provides that persons convicted of felonies would only be denied the right to vote while incarcerated in the state penitentiary. The plaintiffs argued that the removal of their names from the voter registration rolls constituted a change in voting that was not precleared as required by Section 5 and was unlawful under state and federal law, including the Fourteenth Amendment, the Help America Vote Act (HAVA), the National Voter Registration Act (NVRA), and Section 2 of the Voting Rights Act.[435]

After the state placed the names of the voters back on the voter registration rolls, the state attempted to dismiss the action as moot, which the court denied.[436] Thereafter the state filed a motion to dismiss all counts of the plaintiffs' amended complaint, or alternatively, for a judgment on the pleadings.[437] The state made several arguments, including that the plaintiffs never claimed they actually tried to vote, even though the plaintiffs explained they feared prosecution if they attempted to do so, and that any alleged wrongdoing laid with local election officials and not state officials.[438] The state also argued that Section 5 was unconstitutional and outdated as applied to Shannon County, as the county was experiencing high voter registration and turnout rates above the national average.[439] The court rejected these arguments, and in a second decision entered the same day, the court denied requests by state and county officials that they not be required to comply with discovery requests made by the plaintiffs.[440]

Ultimately the parties reached a settlement, whereby the plaintiffs and the state agreed upon the impact of felony convictions on individuals' right to vote, including retention of the right to vote for people convicted of felonies who are sentenced only to probation, fines, fees, or restitution. The defendants also agreed to advance various amendments to state laws and conduct affirmative outreach and public education regarding the right to vote for individuals with felony convictions.[441] Based on the settlement, the parties stipulated to dismissal of the litigation with prejudice, which was granted by the court.[442]

53. League of Women Voters of Indiana v. Rokita – Indiana 2009

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[435] First Amended Complaint for Declaratory Relief, Injunctive Relief, and Monetary Damages, Janis v. Nelson, No. 5:09-cv-05019 (D.S.D. Oct. 7, 2009).

[436] *Janis v. Nelson*, No. 5:09-cv-05019, 2009 WL 4505935 (D.S.D. Nov. 24, 2009).

[437] State Defendants' Amended Motion to Dismiss, or in the Alternative, Motion for Judgment on the Pleadings, Janis v. Nelson, No. 5:09-cv-05019 (D.S.D. Nov. 4, 2009).

[438] *See generally id.*

[439] *See Janis v. Nelson*, No. 09-cv-5019, 2009 WL 5216902, at *7 (D.S.D. Dec. 30, 2009).

[440] *Janis v. Nelson*, No. 09-cv-5019, 2009 WL 5216898 (D.S.D. Dec. 30, 2009).

[441] Settlement Agreement and Release in Full of All Claims, Janis v. Nelson, No. 09-cv-5019 (D.S.D. May 25, 2015).

[442] Judgment of Dismissal, Janis v. Nelson, No. 09-cv-5019 (D.S.D. May 26, 2010).

Three months after the decision of the Supreme Court in *Crawford v. Marion County Election Board*,[443] which rejected a federal challenge brought by the ACLU and others to Indiana's photo ID law, in July 2008 the League of Women Voters of Indiana filed suit in state court seeking a declaration that the photo ID law violated the Indiana State Constitution. The plaintiff argued that the law imposed a substantive new qualification on the right to vote that was unauthorized by the Indiana Constitution. The state filed a motion to dismiss in September 2008, and, after oral arguments in the trial court, the motion was granted based on the court's determination that the photo ID law was a procedural regulation that did not constitute a voter qualification and was not arbitrary or unreasonable.[444]

The Indiana Court of Appeals reversed and struck down the law under the Equal Privileges and Immunities Clause of the state constitution, reasoning that the law effectively added a qualification beyond those constitutionally permitted and was not merely a procedural regulation.[445] The court further held that exempting absentee voters and voters living in a state-licensed care facility from the ID requirement was an unconstitutional disparate treatment of voters and violated the requirement of uniform application of state election laws.[446]

In November 2009, the ACLU, together with the Southern Coalition for Social Justice, filed an amicus brief, which argued that the decision of the court of appeals was correctly decided in conformity with decisions from other states interpreting their state constitutions' Equal Privileges and Immunities Clauses.[447] The ACLU argued that the Indiana Supreme Court should follow other state courts reviewing analogous or similar state constitutional provisions, where they invalidated similar voting restrictions by using a more expansive approach to finding constitutional violations (i.e. more frequent heightened scrutiny when reviewing certain classifications) than was available under federal equal protection law.[448]

In June 2010, the Indiana Supreme Court reversed the court of appeals and upheld the photo ID law. The plaintiff argued, as it did in the lower court, that the distinctions made by the photo ID law—first, between in-person and absentee voters, and second, between senior citizen voters living in state care facilities serving as voting locations and senior citizens living outside of such facilities—were each impermissible. The court rejected these arguments and found that the first distinction was justified pursuant to the legislature's general power to set identification requirements and that applying the same ID requirement to absentee voters was an impractical method for identification purposes when

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[443] *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

[444] *See League of Women Voters of Ind. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App., 2009).

[445] *Id.* at 165.

[446] *Id.* at 168-69.

[447] *See* Brief of ACLU and Southern Coalition for Social Justice as *Amici Curiae* Supporting Appellants at 3-7, League of Women Voters of Ind. v. Rokita, No. 49S02–1001–CV–50 (Ind. June 30, 2010).

[448] *See id.* at 7-10.

compared to in-person identification at a voting location. The court determined the second distinction was also permissible due to the relatively minimal number of similarly situated voters exempted from the photo ID requirement, and thus was an "insubstantial disparity."[449] Within this framework, the court determined that the law met the requirement of uniform application as a "specific legislative regulation associated with additional accommodations extended by the legislature" and did not have different requirements for in-person, as opposed to absentee, voters. The court analogized this to the "accommodations" that allow for early and absentee voting.[450] The court left open the possibility of a successful "as-applied" claim of constitutional invalidity, mentioning potential individual claims, such as hardship of obtaining an ID in the first instance due to fees or other requirements for obtaining the ID.[451]

54. Swann v. Handel; Swann v Kemp – Georgia 2009

The ACLU filed this lawsuit on behalf of disenfranchised Georgia voters in September 2009, challenging the constitutionality of Section 21-2-381(a)(1)(D) of the Georgia Code, which prohibits election officials from mailing absentee ballots to a place other than the permanent mailing address, temporary out-of-county, or out-of-municipality address of a voter unless they will be out of the county on Election Day. Election officials in the state interpreted this provision as prohibiting the mailing of absentee ballots to people incarcerated in the same county they reside in who otherwise remain eligible to vote.[452] However, eligible individuals incarcerated outside of their county of residence would be able to receive their absentee ballot. The plaintiffs incarcerated within their county of residence asserted that the law violated their right to equal protection under the Fourteenth Amendment and the right to due process based on the defendants' failure to inform them that they would not be able to receive an absentee ballot in jail.[453]

Both the plaintiffs and defendants filed motions for summary judgment. In October 2010, the district court denied the plaintiffs' and granted the defendants' motion.[454] The court decided that the plaintiffs' equal protection claim failed because they were not treated differently than similarly situated individuals. The court also reasoned that because the plaintiff's absentee ballot application listed his registered address on his county ballot application, the defendants did not commit any acts that deprived him of his right to vote.[455] Likewise, the court found that the plaintiff's due process claim failed because the

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[449] *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 770-772 (Ind. 2010).

[450] *Id.* at 768.

[451] *Id.* at 773.

[452] *Id.* at ¶¶ 30-31.

[453] *Id.* at ¶¶ 39-47.

[454] *Swann et al. v. Handel*, Case No. 1:09-CV-2674, 2010 WL 4117448 at *1 (N.D. Ga. Oct. 18, 2010).

[455] *Id.* at *3.

board did not deny his application and therefore did not fail to inform him that his application was denied.[456]

The plaintiffs appealed to the Eleventh Circuit in October 2010 seeking the court's determination on whether the plaintiff was required to list the jail's address on his absentee ballot application in order to challenge the constitutionality of the law in question as it applied to him.[457] In response, the defendants argued that plaintiff lacked standing to raise his equal protection claim on the grounds that because he never listed the jail as his mailing address on the absentee ballot application, his injury was not traceable to the defendants. The Eleventh Circuit agreed with the defendants and determined that the plaintiff would not have received a ballot at the jail regardless of the application of the statute because he did not provide the jail address on his application.[458] The Court vacated the district court's decision and instructed the district court to dismiss the action for lack of subject matter jurisdiction, which it did in April 2012.[459]

55. Tempel v. Platt – South Carolina 2009

George E. Tempel, Chairman of the Charleston County Democratic Party, brought an action in South Carolina state court in August 2008 to enjoin Eugene Platt from being a candidate for the South Carolina state house in the November 2008 general election.[460] A South Carolina candidate oath law—also known as a "sore loser" law—requires every candidate for office to sign an oath to abide by the results of a party's primary. If the candidate loses the party's primary, the law bars the candidate from petitioning or campaigning as a write-in candidate on the general election ballot for any office for which the party has a nominee. South Carolina was also one of four states that permitted fusion voting, allowing a candidate to run in more than one party's primary. Thus, the state's candidate oath law operates with the fusion voting system to bar a candidate who loses a party's primary from having their name placed on the general election ballot by another political party that nominates them. While Platt won the nominations of the Green Party and Working Family Party for the state legislative house seat, he subsequently lost the nomination for the same office in the Democratic primary. At the urging of the Democratic Party, the South Carolina State Election Commission disqualified Platt from appearing on the general election ballot as the Green Party's nominee. Platt and the Green Party separately challenged this ruling in federal court.[461] Platt argued that the case was not ripe for decision in view of this separately pending federal action.

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[456] *Id.* at *4.

[457] Brief of Appellant, Swann v. Kemp, No. 10-14901 (11th Cir. Dec. 6, 2010).

[458] *Swann v. Kemp*, 668 F.3d 1285 (11th Cir. 2012).

[459] Order, Swann v. Kemp, No. 1:09-CV-2674 (N.D. Ga. Apr. 24, 2012).

[460] *Tempel v. Platt*, No. 08-CP-10-4978 (S.C. Ct. of Common Pleas 2009).

[461] *See* Complaint, S.C. Green Party et al. v. S.C. State Election Comm., No. 3:08-cv-2790 (D.S.C. Aug. 7, 2008).

The circuit court granted the injunction pursuant to S.C. Code Ann. § 7-11-210 (2000), which authorizes a party chairman to obtain injunctive relief if a defeated party primary candidate pursues appearing on a general election ballot in a race where the party has a nominee.[462] Represented by the ACLU, Platt appealed to the South Carolina Supreme Court, which affirmed the circuit court's injunction in January 2010.[463]

56. English v. Chester County – Pennsylvania 2010

In January 2010, the ACLU, ACLU of Pennsylvania, and Public Interest Law Center of Philadelphia filed a lawsuit in federal court in Pennsylvania on behalf of Black residents and Lincoln University students against Chester County. The plaintiffs argued that that the county's Board of Elections and Department of Voter Services had deprived Black Americans in Lower Oxford East Township of their right to vote by assigning them to inconvenient and inadequate polling facilities.[464] Residents of the township, most of whom were Black and comprised almost 70% of the township's precinct, had historically voted at a polling place located on the campus of Lincoln University, a Historically Black College and University, where most of the precinct's voters reside. In 1992, after a Lincoln University professor won a seat on the local school board in a hotly contested election, the county moved the polling place to a building several miles away that was significantly smaller and had fewer voting machines.[465] The polling place remained at that location despite continued requests to return it to Lincoln University.[466]

In recognition of the high numbers of newly registered voters in the 2008 primary, precinct residents anticipated a large turnout of Black voters and petitioned the board of elections to return the polling place to the Lincoln University campus prior to the 2008 general election.[467] The board of elections refused.[468] Predictably, the polling location's numerous problems plagued the precinct's voters on Election Day. Lines began before polls opened, and delays began as soon as the polls open. The voter registration rolls at the precinct did not contain an up-to-date list of registered voters because the board had failed to provide it. The delays, combined with the inadequacy of the facility to accommodate the number of voters who had turned out, most of whom were Black, waited up to seven hours in the pouring rain to cast their votes—far longer than voters elsewhere in Chester County. A poll watcher caused further delays by challenging the identities of young Black voters throughout the day.[469] Despite multiple attempts to resolve the issues with the board of

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[462] *See Tempel v. Platt*, Case No. No. 2010–MO–002, 2010 WL 10097777, at *1 (S.C. Jan. 19, 2010).

[463] *Id.* at *1-*2.

[464] *See* ACLU OF PENNSYLVANIA, ENGLISH, ET AL. V. CHESTER COUNTY, https://www.aclupa.org/our-work/legal/legaldocket/englishetalvchestercounty.

[465] Complaint at ¶ 2, English v. Chester Cty., No. 2:10-cv-00244 (E.D. Pa. Jan. 10, 2010).

[466] *Id.*

[467] *Id.* at ¶ 29.

[468] *Id.* at ¶ 34.

[469] *See id.* at ¶¶ 35-45.

elections, the board refused to take any action. The result was low voter turnout and a racially disparate impact in the precinct with the highest percentage of Black voters in the county.[470]

The suit alleged that the polling location was in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[471] It asked the court to order Chester County to return the Lower Oxford East polling place to the Lincoln University campus, authorize federal elections monitors, and award damages to residents who faced extreme difficulties or were prevented from voting in the 2008 general election.[472] In April 2010, the parties settled the case based upon an agreement with the board of elections that it would return the polling place to the Lincoln University campus.[473]

57. Georgia v. Holder – Georgia 2010

In June 2010, the state of Georgia sued the U.S. Attorney General when its voter registration verification process did not obtain preclearance under the Voting Rights Act.[474] Georgia adopted a system attempting to match the information of voter registration applicants with information contained in the state's Department of Driver Services and Social Security Administration database for verification and flag individuals whose information did not match to local registrars for further inquiry. The state did not initially obtain preclearance under Section 5, even though the new system was clearly a voting change that required preclearance. The state used the Help America Vote Act's (HAVA) voter registration list maintenance process to justify its new system, even though HAVA does not require a matching process to verify voter eligibility and in fact contains specific prohibitions against the process Georgia was trying to implement. During the preclearance process, the Attorney General twice rejected Georgia's verification process, finding the matching program was "seriously flawed," that "thousands of citizens who are in fact eligible to vote under Georgia law have been flagged," that the "impact of these errors falls disproportionately on minority voters," and that "applicants who are Hispanic, Asian or African American are more likely than white applicants, to statistically significant degrees, to be flagged for additional scrutiny."[475]

Nonetheless, Georgia sought a declaratory judgement that its verification process did not violate Section 5 of the Voting Rights Act or, alternatively, a ruling that the preclearance

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[470] *See id.* at ¶ 46.

[471] *See id.* at ¶¶ 102-119.

[472] *See id.* at 20.

[473] Settlement Agreement and Mutual Release at ¶ 1, English v. Chester Cnty., No. 2:10-cv-00244 (E.D. Pa. Aug. 9, 2010).

[474] Expedited Complaint for Declaratory Judgment, Georgia v. Holder, No. 1:10-cv-01062 (D.D.C. June 22, 2010).

[475] Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to The Honorable Thurbert E. Baker, Attorney Gen. (May 29, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf.

requirement was unconstitutional.[476] The ACLU and the Lawyers' Committee for Civil Rights intervened on behalf of the Georgia State Conference of the NAACP, the Georgia Association of Black Elected Officials, and the Georgia Coalition for the Peoples' Agenda.[477] A month after intervention, Georgia filed an amended complaint, and within hours the Attorney General abruptly informed the court that it would preclear the system, even though it was substantially similar to the one the Justice Department had objected to a year earlier. The parties filed a joint motion to dismiss on August 20, 2010. The intervenors argued that the unusual process and decision to immediately preclear a system that was previously determined as "seriously flawed" resulted in the denial to the intervenors of access to materials submitted during the preclearance process, and that Georgia nonetheless did not meet its Section 5 burden.[478] The intervenors requested that the Court require Georgia and the Department of Justice to explain the events that led to the administrative preclearance.[479] The court declined to do so and dismissed the action.[480]

58. Spirit Lake Tribe v. Benson Cty. – North Dakota 2010

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court that closing the precincts on the Reservation would make it difficult or impossible for many residents to vote in violation of the federal and state constitutions and Section 2 of the Voting Rights Act.[481] The ACLU filed an amicus brief in support of the Tribe's Section 2 claim and its motion for a preliminary injunction.

Following an expedited hearing, the district issued a preliminary injunction on October 21, 2010, requiring the county to maintain the two polling places on the reservation. It concluded that closing the precincts would have a disparate impact on Native American voters who lacked access to transportation or to voting by mail.[482] After the preliminary injunction was granted, the parties entered into a consent decree and settlement in October

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[476] Expedited Complaint for Declaratory Judgment, Georgia v. Holder, No. 1:10-cv-01062 (D.D.C. June 22, 2010).

[477] Motion for Leave to Intervene as Defendants, Georgia v. Holder, 1:10-cv-01062 (D.D.C. June 6, 2010).

[478] *See* Notice by Defendant-Intervenors, Georgia v. Holder, 1:10-cv-01062 (D.D.C. Aug. 21, 2010); Response to Plaintiff's and Defendant's Joint Motion to Dismiss by Defendant-Intervenors Brooks, et al., Georgia v. Holder, No. 1:10-cv-01062 (D.D.C. Sept. 7, 2010).

[479] Response to Plaintiff's and Defendant's Joint Motion to Dismiss by Defendant-Intevenors Brooks, et al. at 12-13, Georgia v. Holder, No. 1:10-cv-01062 (D.D.C. Sept. 7, 2010).

[480] *Georgia v. Holder*, 748 F. Supp. 2d 16, 19 (2010).

[481] Complaint, Spirit Lake Tribe v. Benson Cty., No. 2:10-CV-095 (D.N.D. Oct. 8, 2010).

[482] *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at *1 (D.N.D. Oct. 21, 2010)

2011 requiring the county to maintain the two polling places on the reservation for future general elections, subject to certain conditions.[483]

59. Brown v. Secretary of State of Florida – Florida 2010

This suit was filed by two members of Congress, Mario Diaz-Balart and Corrine Brown, challenging Article III, Section 20 of the Florida Constitution, which was adopted by more than 60% of the state's voters at the November 2010 election. The challenged provision provides standards for congressional redistricting, including that a plan may not favor or disfavor an incumbent or political party or deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. The plaintiffs contended that the state law violates Article I, Section 4, Clause 1 of the U.S. Constitution and the Elections Clause, which gives state legislatures power to prescribe the times, places, and manner of holding elections for members of Congress.[484]

The ACLU and ACLU of Florida represented defendant-intervenors who sought to defend the constitutionality of the state law. The ACLU of Florida played a major role in promoting the adoption of the challenged redistricting standards, and the defendant-intervenors contended that the federal constitution does not prohibit the adoption of redistricting standards by a state's electorate. The motion seeking leave to intervene was filed on December 16, 2010. On January 24, 2011, the Florida House of Representatives filed to join the lawsuit to challenge the adopted provisions.[485]

On September 9, 2011, the district court rejected the lawsuit and granted summary judgment to the defendants.[486] The plaintiffs appealed to the Eleventh Circuit, which upheld the district court's decision on January 31, 2012.[487] The appellate court noted in its decision that the Supreme Court had provided clear and unambiguous guidance, explaining that the term "Legislature" in the Elections Clause refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state.[488]

60. Nix v. Holder; Laroque v. Holder – North Carolina 2010

In 2010, residents of Kinston, North Carolina, filed suit seeking a declaratory judgment that Section 5 of the Voting Rights Act was unconstitutional because it exceeded Congress's enumerated powers and violated equal protection principles.[489] Kinston was a covered jurisdiction under Section 5 and required to obtain preclearance of voting changes before

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[483] Consent Judgment and Decree and Stipulation of the Parties, Spirit Lake Tribe v. Benson Cty., No. 2:10-CV-095 (D.N.D. Oct. 6, 2011).

[484] *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1272-1273 (11th Cir. 2012).

[485] *Id.* at 1274.

[486] *Diaz-Balart v. Browning*, No. 10-23968-CIV, 2011 WL 13175016 (S.D. Fla. Sept. 9, 2011).

[487] *Brown*, 668 F.3d 1271.

[488] *Id.* at 1277.

[489] Complaint, Laroque v. Holder, No. 1:10-cv-0561 (D.D.C. April 7, 2010).

enforcement. The suit was filed after the Department of Justice denied preclearance to a proposed voting change in Kinston that would have replaced the city's partisan electoral system with a non-partisan system with a plurality vote requirement. The Department found the change would likely have a retrogressive effect on the ability of Kinston's Black voters to elect candidates of choice.[490] The Justice Department conducted a statistical analysis of the impact of the change, which demonstrated that the removal of partisan cues in city elections would eliminate the single factor that permitted Black candidates to be elected because Kinston voters based their choice more on the race of a candidate rather than partisan affiliation.[491] The analysis showed that without the party appeal or the ability to vote straight ticket, the limited support from white crossover voters for a Black candidate would diminish in a manner that prevented Black candidates from being elected.[492] The City of Kinston did not join the lawsuit, nor did it seek judicial preclearance of the Section 5 objection.

The ACLU and Southern Coalition for Social Justice intervened on behalf of the North Carolina State Conference of the NAACP and residents of Kinston arguing that Section 5 was a constitutional exercise of congressional authority, the plaintiffs lacked standing, and the district court did not have jurisdiction over the plaintiffs' claims.[493] In December 2010, the district court issued an opinion granting motions to dismiss filed by the Justice Department and the defendant-intervenors.[494] The court concluded the plaintiffs lacked standing, and there was no cause of action for private persons to challenge the constitutionality of Section 5 as applied to the Attorney General's objection to a proposed electoral change.[495] The plaintiffs appealed to the D.C. Circuit Court of Appeals, and the court of appeals reversed and remanded in July 2011.[496] It held that the plaintiff, a candidate for public office in Kinston, had standing and a cause of action to seek declaratory and injunctive relief against the Attorney General on the ground that Section 5 was unconstitutional. On remand, the district court reached the merits of the plaintiffs' claims in December 2011,[497] rejecting that Section 5 exceeds Congress's enforcement powers and holding that Section 5 was "justified by the evidence of persistent, intentional discrimination that Congress amassed."[498] It also rejected their claim that Section 5 violates equal protection principles.

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[490] *See* Letter from Acting Assistant Attorney General Loretta King, Civil Rights Division, Department of Justice to James P. Cauley III, Esq. (Aug. 17, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090817.pdf.

[491] *Id.*

[492] *Id.*

[493] Motion to Intervene as Defendants, Laroque v. Holder, No. 1:10-cv-0561 (D.D.C. July 7, 2010).

[494] Order on Motion to Dismiss, Laroque v. Holder, No. 1:10-cv-0561 (D.D.C. Dec. 20, 2010).

[495] *Id.*

[496] *Laroque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011).

[497] *Laroque v. Holder*, 831 F.Supp.2d 183 (D.C. Cir. 2011).

[498] *Id.* at 228.

The plaintiffs again appealed to the D.C. Circuit Court of Appeals. While the appeal was pending, the Justice Department reversed its position regarding Kinston's proposed voting change in light of new evidence it received in a separate preclearance proceeding.[499] After reviewing that additional evidence, the Attorney General withdrew his objection to the proposed change. Accordingly, in May 2012 the D.C. Circuit determined that the plaintiffs' claims were moot and dismissed the case for lack of jurisdiction.[500] The plaintiffs filed a petition for certiorari, which was denied on November 13, 2012.[501]

61. Shelby County v. Holder – Alabama 2010

Prior to the Supreme Court's 2013 decision in *Shelby County v. Holder* nullifying the preclearance coverage formula, the Supreme Court most recently weighed in on Section 5's constitutionality in 2009 in *Northwest Austin Municipal Utility District No. 1 v. Holder*. In that case, Chief Justice John Roberts expressed skepticism regarding the continuing constitutionality of portions of the Voting Rights Act, opining in dicta that the law "imposes current burdens and must be justified by current needs" and that "[t]he Act also differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty."[502] Animated by the decision, Shelby County, Alabama, filed suit the following year in district court in a facial challenge seeking a declaratory judgment that both Section 5 preclearance and the Section 4(b) coverage formula were unconstitutional and a permanent injunction against their enforcement.[503] The D.C. district court upheld the constitutionality of Section 5 and the coverage formula, granting summary judgment for the Attorney General.[504] The U.S. Court of Appeals for the District of Columbia affirmed, holding that Congress did not exceed its powers by reauthorizing Section 5 and that the coverage formula was still relevant to the issue of voting discrimination.[505] On June 25, 2013, the Supreme Court held that the coverage formula was unconstitutional. In a 5-4 decision, the Supreme Court found that while "voting discrimination still exists," Section 4(b) of the Voting Rights Act was unconstitutional on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination.[506] Therefore, the formula could no longer be used as a basis for subjecting jurisdictions to preclearance.

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[499] *See* Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Div., to Robert T. Sonnenberg, Esq. (Apr. 30, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120430.pdf.

[500] *Laroque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012).

[501] *Laroque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), cert. denied sub nom. *Nix v. Holder*, 133 S. Ct. 610 (2012).

[502] *Northwest Austin Municipal Utility District No. 1 v. Holder,* 557 U.S. 193, 203 (2009).

[503] Complaint, Shelby Cty. v. Holder, No. 1:10-cv-00651 (D.D.C. Apr. 27, 2010).

[504] *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

[505] *Shelby Cty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

[506] *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

62. Frank v Walker – Wisconsin 2011

In December 2011, the ACLU, ACLU of Wisconsin, and National Law Center for Homelessness and Poverty brought suit on behalf of individual plaintiffs challenging Wisconsin's strict photo ID law in federal court, seeking declaratory and injunctive relief.[507] The Wisconsin law requires voters to present identification that is one of a limited list of acceptable photo identification in order to vote. Similar to the impact of photo ID laws in other states, Black and Latino voters in Wisconsin disproportionately lack the required photo ID and the documents necessary to obtain a free state ID card to vote, and as a result are more likely to be disproportionately disenfranchised.[508] Prior to enactment of the photo ID law, voters were generally required to provide proof of residency with a range of acceptable documents, such as utility bills, bank statements, or pay stubs, and not required to provide proof of identity to vote.[509] Over two dozen individual plaintiffs brought class claims under the Fourteenth and Twenty-Fourth Amendments and Section 2 of the Voting Rights Act.

After a two-week trial—in which the parties presented 43 fact witnesses, six expert witnesses, and thousands of pages of documentary evidence—in April 2014, the trial court struck down the photo ID law and permanently enjoined its enforcement, concluding that the law violated Section 2 of the Voting Rights Act.[510] The court also held that the law violated the Fourteenth Amendment by imposing a substantial burden on the right to vote that was not outweighed by the state's asserted justification.[511] In making these determinations, the court found that there was no evidence of voter impersonation fraud and the state had failed to put forward evidence to suggest that its photo ID law effectively prevented other types of fraud. The court also found the photo ID law did not enhance public confidence in voting.[512] With respect to the burden on voters and its discriminatory impact, the court concluded that "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID," and noted that, "to put this number in context, in 2010 the race for governor in Wisconsin was decided by 124,638 votes, and the race for United States Senator was decided by 105,041 votes. Thus the number of registered voters who lack a qualifying ID is large enough to change the outcome of Wisconsin elections."[513] The court also found that while many registered voters would be able to obtain qualifying IDs, many others could not.[514] Finally, the court found it "inescapable" that the photo ID law would disproportionately burden and disenfranchise Black and Latino voters in the state and that the photo ID law's "disproportionate impact

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[507] First Amended Complaint, Frank v. Walker, No. 2:11-cv-01128 (E.D. Wis. Dec. 13, 2011).

[508] *Id.* at ¶¶ 95-96.

[509] *Id.* at ¶ 38.

[510] *Frank v. Walker*, 17 F.Supp.3d 837, 879 (E.D. Wis. 2014).

[511] *Id.* at 863-64.

[512] *Id.* at 847-53.

[513] *Id.* at 854.

[514] *Id.* at 862.

results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance, [and that it] therefore produces a discriminatory result."[515]

Wisconsin appealed the decision to the Seventh Circuit, which in a panel decision reversed the district court's holdings that the law violated Section 2 of the Voting Rights Act and imposes a substantial burden on the right to vote. With respect to the constitutional claim, the court relied on the Supreme Court's 2008 decision in *Crawford v. Marion County Election Board,* which upheld Indiana's photo ID law against a facial challenge, reasoning that the facts of the Wisconsin photo ID case did not justify a different outcome than *Crawford.*[516] With respect to the Section 2 claim, the Seventh Circuit reversed the district court's holding. The panel concluded, after recognizing the lower court's finding of a disparate impact on Black and Latino voters, that the district court failed to find that "substantial numbers of persons eligible to vote have tried to get a photo ID but [had] been unable to do so" or that minority voters have less opportunity to obtain a qualifying photo ID.[517] Judge Richard Posner called a vote for rehearing en banc *sua sponte,* but an equally divided court denied the request. The dissenting judges found this case to be "importantly dissimilar" from *Crawford*—a case which Judge Posner himself authored on behalf of the Seventh Circuit in 2008—and that the evidentiary record before the court was vastly different than in *Crawford.*[518]

The ACLU requested review of the Seventh Circuit's decision by the U.S. Supreme Court, arguing that the Seventh Circuit misinterpreted and misapplied the *Crawford* decision. The ACLU argued that the case was distinguishable from *Crawford* due to the vast evidentiary record demonstrating that Wisconsin voters faced substantial or even insurmountable burdens to obtain a qualifying ID. The request also differentiated the two cases in that Wisconsin's professed interest to prevent voter impersonation fraud was illusory and pretextual in light of the fact that Wisconsin was unable to show a single case of voter impersonation fraud in the state.[519] The petition also argued that the Seventh Circuit's panel decision gravely misinterpreted Section 2 and wrongly rejected the factual findings of racially discriminatory denial and abridgement of the right to vote resulting from Wisconsin's photo ID law.[520] The Supreme Court declined to reconsider the Seventh Circuit's ruling upholding the law, and the law became effective in 2015.[521]

The plaintiffs then undertook a second stage of litigation, advancing remaining constitutional claims that the district court did not resolve in its initial decision, namely,

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[515] *Id.* at 876-78.

[516] *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008).

[517] *Frank v. Walker,* 768 F.3d 744, 745-47 (7th Cir. 2014).

[518] *Frank v. Walker,* 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting).

[519] Petition for Writ of Certiorari, Frank v. Walker, No. 14-803 (Jan. 7, 2015).

[520] *Id.* at 28-30.

[521] Note that the Supreme Court had previously vacated the Seventh Circuit's stay of the district court's permanent injunction. *Frank v. Walker,* 135 S. Ct. 7 (2014).

that the Wisconsin law was unconstitutional as applied to those voters who were unable to acquire a qualifying ID. After initially rejecting the plaintiffs' claim[522] and being reversed on appeal,[523] the district court granted a preliminary injunction in July 2016, instructing that voters who lack photo ID must be able to cast a regular ballot in the November 2016 elections after completing an affidavit. The district court's decision was based on its finding that the plaintiffs had shown some likelihood of success on the merits of their Fourteenth Amendment claim that the photo ID law substantially burdened the right to vote among eligible voters who, even after putting forth a reasonable effort, would be unable to obtain a qualifying ID, and that Wisconsin lacked a viable interest in enforcement of the law with respect to these voters.[524] Wisconsin filed an emergency appeal of this decision with the Seventh Circuit, and on August 10, 2016, the Seventh Circuit stayed the district court's order.[525] On August 26, 2016, the full Seventh Circuit declined to reconsider this decision, holding that the urgency needed to justify an en banc review of the panel decision was not shown because of the state's representation that voters would automatically be able to receive a credential for voting if they requested one in person at a driver's license facility.[526] Because of the Seventh Circuit's order, Wisconsin's photo ID law was in effect without the affidavit alternative for those without ID during the 2016 elections. After the Seventh Circuit issued the emergency stay on the district court's order, the case proceeded to the Seventh Circuit on appeal. Oral argument was held in February 2017.

In June 2020, the Seventh Circuit reversed the injunction requiring Wisconsin to create an affidavit option.[527] On remand, plaintiffs moved for preliminary injunction while the defendants moved for summary judgment. In September 2020, the district court denied the defendant's motion for summary judgment, while granting some preliminary relief requested by the plaintiffs.[528] The court ordered the state to send expediated temporary IDs beginning two weeks before the election and that the state must engage in more public education regarding the temporary receipt process.[529] The case is now in discovery.

63. Citizens In Charge v. Gale – Nebraska 2011

On behalf of Citizens in Charge and other individual plaintiffs, the ACLU and ACLU of Nebraska challenged[530] three provisions of Nebraska law as violating political speech and

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[522] *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2016).

[523] *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016).

[524] *Frank v. Walker*, 196 F. Supp. 3d 893, 904, 914-15 (E.D. Wis. 2016).

[525] *Frank v. Walker*, Nos. 16-3003, 16-3052, 2016 WL 4224616 (7th Cir. Aug. 10, 2016).

[526] *Frank v. Walker*, 835 F.3d 649 (7th Cir. 2016) (per curiam).

[527] Luft v. Evers, 963 F.3d 665 (7th Cir. 2020).

[528] One Wisconsin Inst., Inc. v. Thomsen, 490 F. Supp. 3d 1338 (W.D. Wis. 2020).

[529] *Id.*

[530] *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 918-923 (D. Neb. 2011).

associational rights protected by the First and Fourteenth Amendments.[531] The first law set out a signature distribution requirement for would be independent candidates, requiring them to obtain at least 50 signatures from at least one-third of Nebraska's counties on a candidacy petition before they may appear on the ballot. The second requires petition circulators to be "electors"[532] of the State of Nebraska, a requirement that has been invalidated by federal courts in other circuits. The third requires all petitions to contain language in large, red type stating whether the circulator is paid or is a volunteer. Intervenors filed a subsequent complaint challenging the requirement that petition circulators be "electors" and that all petitions contain language in large, red type stating whether the circulator is paid or a volunteer. [533] Intervenors then filed a motion for preliminary injunction requesting that the court find the petitioner residency requirement violates the First Amendment. The district court denied the injunction, agreeing with the defendants that the Eighth Circuit's decision in *Initiative & Referendum Institute v. Jaeger*[534] was the controlling precedent despite other circuit courts disagreeing with the *Jaeger* analysis upholding similar residency requirements.[535]

On August 30, 2011, the district court issued its ruling that found the ban of election petition circulation by non-residents violated the First Amendment but upheld the requirement that petitions contain language in large, red type stating whether the circulator is paid or a volunteer.[536] The court agreed with plaintiffs that the circulation of petitions is core political speech and there are increased costs associated with using untrained solicitors.[537] Noting the majority of circuit courts that previously reviewed similar restrictions also applied strict scrutiny and made similar determinations, the district court found that the ban on nonresident petition circulators [538] In contrast to the *Jaeger* case, the court had not found evidence in the record of the alleged burden associated with the ban, while the plaintiffs and intervenors in *Citizens in Charge* offered evidence of the increased cost, the limited available pool of circulators and firms in Nebraska if only in-state-petitioners could be utilized, and the lack of fraud[539]

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[531] Complaint, Citizens In Charge v. Gale, No. 4:09CV3255 (D. Neb. Dec. 16, 2009).

[532] According to NEB. REV. STAT. § 32–110, "Elector" shall mean a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age and will attain the age of eighteen years on or before the first Tuesday after the first Monday in November of the then current calendar year.

[533] *See* Motion to Intervene as Plaintiffs, Citizens In Charge v. Gale, No. 4:09-cv-03255 (D. Neb. May 27, 2010).

[534] *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001).

[535] *Citizens in Charge v. Gale*, No. 4:09-cv-03255, 2010 WL 2682772 (D. Neb. July 1, 2010).

[536] *Citizens in Charge v. Gale*, 810 F. Supp 2d 916 (D. Neb. 2011).

[537] *Id.* at 923.

[538] *Id.* at 925.

[539] *Id.* at 926.

In contrast, the district court found that requiring the disclosure in large red type did not impose a severe burden on First Amendment rights.[540] The court found that the disclosure was neither a pejorative label nor compelled speech but simply a way to inform the electorate of the status of the petitioner as paid or volunteer. The court also found no violation of the Equal Protection Clause as the plaintiff offered no evidence that they were a protected class.

64. Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections – New Jersey 2011

The ACLU of New Jersey, Rutgers School of Law-Newark Constitutional Litigation Clinic, and New Jersey Appleseed Public Interest Law Center filed a lawsuit on April 19, 2011, against the Middlesex County Board of Elections on behalf of Rutgers students, Middlesex County residents, the Latino Leadership Alliance of New Jersey, and New Jersey Citizen Action challenging the failure of New Jersey to offer Election Day registration of voters as an unnecessary obstacle to exercise of the right to vote in violation of the state constitution.[541] New Jersey law requires 30 days of residence to qualify as an eligible voter. In order to verify voters' identities, the state also required voters to submit their registration applications at least 21 days before an election. However, new electronic databases that New Jersey implemented in accordance with the Help America Vote Act allowed rapid verification of eligibility, obviating the rationale for the three-week cutoff.[542]

The plaintiffs asserted that the defendant's failure to allow them to register on Election Day and have their votes counted "imposes severe burdens on the fundamental right to vote as guaranteed by the New Jersey Constitution art. 2, Sec. 1, Para. 3, and as implemented by N.J.S.A. 10:6-2(c) of the New Jersey Civil Rights Act."[543] The plaintiffs' motion for summary judgement was denied and the defendant's cross motion for summary judgment was granted by the trial court on December 11, 2013, in an order with limited findings of facts and conclusions of law. The court determined that the advance registration requirement imposed only a minimal burden on the right to vote, and, as a result, there was no need for the state to establish a compelling interest.

The lower court's order was reversed and remanded for further proceedings due to the failure to make sufficient findings of fact and conclusions of law particularly with regard to whether the state had demonstrated that the registration requirement advanced the stated purpose.[544] The appellate court noted that the defendants were asserting a legitimate interest in preventing voter registration fraud as a basis for requiring advance registration, but, per the decision, "...plaintiffs submitted reams of evidence, including certifications,

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[540] *Id.* at 928

[541] Complaint for Declaratory and Injunctive Relief, Rutgers Univ. Student Assembly. v. Middlesex Cty. Bd. Of Elections, 102 A.3d 408 (N.J. Sup. Ct. Ch. Div. Apr. 19, 2011).

[542] *Id.* at ¶¶ 72-75.

[543] *Id.* at ¶ 72.

[544] *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408 (Supr. Ct N.J. App. Div. 2014).

reports and deposition transcripts, in support of their contention that New Jersey's SVRS has eliminated voter fraud as valid concern, and explaining why it was no longer necessary to have an advance registration requirement to ensure the integrity of the electoral process."[545]

On remand for additional findings, the lower court concluded that the registration requirement did not warrant strict scrutiny review, and the state's important interests outweighed the minimal burden on voting rights and again granted the defendant's motion for summary judgement on April 14, 2015. The decision was affirmed on appeal.[546] The Supreme Court of New Jersey denied the plaintiff's petition for certification and ordered that the notice of appeal be dismissed on January 17, 2017.[547]

65. Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n –Arizona 2012

In 2000, Arizona voters adopted an initiative, Proposition 106, which amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest it in an independent commission, the Arizona Independent Redistricting Commission (AIRC). The Arizona Legislature challenged the map for congressional districts adopted by the AIRC in January 2012, seeking a declaration that Proposition 106 violated the Elections Clause of the U.S. Constitution and the adopted congressional maps were unconstitutional and void and an injunction prohibiting the AIRC from adopting or enforcing any maps.[548] The legislature argued that the Elections Clause—which provides, in part, that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"[549]—required that only state legislative bodies conduct congressional redistricting and precluded delegating the task to an independent commission.[550] AIRC responded that "Legislature" should not be read solely to mean elected representatives but rather all legislative authority conferred by the state's constitution, including ballot measures adopted by the people themselves. A three-judge district court rejected the legislature's complaint on the merits,[551] and the Arizona Legislature appealed the decision to the Supreme Court.

The ACLU submitted an amicus brief with other organizations in support of the AIRC, urging the Court to uphold the district court finding that the Elections Clause does not

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[545] *Id.* at 415.

[546] *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 141 A.3d 335 (Supr. Ct N.J. App. Div. 2016).

[547] *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 158 A.3d 567 (N.J. 2017).

[548] *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1049 (D. Ariz. 2014).

[549] U.S. Const., Art. I, § 4, cl. 1.

[550] *See Ariz. State Legislature*, 997 F. Supp at 1051.

[551] *Ibid.*

preclude redistricting by an independent commission created by the people of Arizona.[552] The brief argued that partisan gerrymandering subverts the federal electoral system envisioned by the Constitution by undermining the concept of majority rule, reducing the competitiveness of elections, and contributing to the political polarization that risks gridlock.[553] The brief also argued that citizen-driven structural reforms are a constitutionally permissible form of direct democracy, especially in light of courts' inability to date to address extreme partisan gerrymandering.[554]

The Supreme Court affirmed the district court's judgement, holding in a 5-4 decision that the Elections Clause permits Arizona to use a commission to adopt congressional districts and that "lawmaking power in Arizona includes the initiative process."[555] The Court noted that dictionaries printed at the time of the drafting of the Constitution defined the word "legislature" as "the power that makes laws," and in Arizona, the power to make laws rests not only with the official body of elected representatives but with the voters themselves, who have power under the Arizona State Constitution to pass laws and constitutional amendments through initiatives.[556] The Court noted that such an interpretation of the Elections Clause is "in line with the fundamental premise that all political power flows from the people."[557]

66. ACLU of Iowa v. Schultz – Iowa 2012

In July 2012, the Iowa Secretary of State adopted and immediately made effective through emergency rulemaking two administrative rules impacting voters' ability to stay on the voter registration rolls. The first rule created a procedure where any person, including individuals unconnected with the state, would be allowed to file an unsworn, unverified complaint challenging a voter's eligibility to vote.[558] The second rule allowed the Secretary to initiate challenge and removal proceedings against registered Iowa voters on the grounds of alleged non-U.S. citizenship based on the Secretary's comparison information from the state's voter registration rolls with unspecified state and federal "lists of foreign nationals" and using unspecified criteria.[559] The scheme was similar to voter purges in other states

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[552] Brief of Campaign Legal Center et al. as *Amici Curiae* Supporting Appellees, Arizona State Legislature v. Arizona Independent Redistricting Commission, No. 13–1314 (2015).

[553] *Id.* at 5.

[554] *Ibid.*

[555] *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659 (2015).

[556] *Id.* at 2671.

[557] *Id.* at 2677.

[558] First Amended Complaint for Judicial Review of Agency Action under Iowa Code §17A at ¶ 13, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Aug. 8, 2012).

[559] *Id.* at ¶ 14.

like Florida and Colorado, where thousands of eligible voters had been wrongfully disenfranchised.[560]

The ACLU and League of United Latin American Citizens (LULAC) filed a motion in state court to enjoin the emergency rules on the grounds that the use of emergency rulemaking power was improper under the Iowa Code and that the Secretary exceeded his statutory authority. The plaintiffs argued the rules were vague and posed a substantial risk of depriving qualified voters of their fundamental right to vote.[561] Because the administrative rules were adopted in close proximity to the November 2012 Presidential election, the ACLU sought expedited review by the court. The state filed a motion to dismiss for lack of standing. The trial court denied the defendants' motion to dismiss,[562] and granted the ACLU's motion for temporary injunctive relief.[563] Despite the temporary injunction against the emergency rules, the Secretary proceeded with developing permanent rules through Iowa's standard rulemaking process, which took effect in March 2013.[564]

The ACLU and LULAC then sought to permanently enjoin both the emergency and permanent rules.[565] The district court in Polk County granted the ACLU's motion, ruling that the Secretary exceeded his statutory authority under the Iowa Code but did not address the ACLU's constitutional claim that the rules violated qualified Iowa voters of the fundamental right to vote.[566] The Secretary appealed to the Iowa Supreme Court[567] but ultimately dropped the appeal prior to a ruling in March 2015, effectively keeping in place the lower court's permanent injunction against the rules.[568]

67. Guare v. New Hampshire – New Hampshire 2012

In 2012, individual plaintiffs represented by the ACLU of New Hampshire filed suit in state court challenging a newly enacted law that added an affidavit requirement to the state's

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[560] Press Release, ACLU, Victory for Voting Rights: State Drops Voter Purge Appeal (Mar. 13, 2005), https://www.aclu.org/press-releases/victory-voting-rights-state-drops-voter-purge-appeal.

[561] First Amended Complaint for Judicial Review of Agency Action under Iowa Code §17A at ¶¶ 21-23, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Aug. 8, 2012).

[562] Ruling and Order on Respondent's Motion to Dismiss, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Sep. 11, 2012).

[563] Order on Petitioners' Motion for Temporary Injunction, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Sep. 13, 2012).

[564] Second Amended Petition for Judicial Review of Agency Action under Iowa Code §17A at ¶ 28, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Mar. 29, 2013).

[565] *Id.*

[566] Order re Reconsideration of Review on the Merits, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Mar. 5, 2014).

[567] Motion to Dismiss and Motion for Reconsideration, ACLU of Iowa v. Schultz, No. 14-0585 (Iowa Oct. 20, 2014).

[568] Appellant's Voluntary Dismissal of Appeal, ACLU of Iowa v. Schultz, No. 14-0585 (Iowa Mar. 13, 2015).

voter registration form for registrants to sign, attesting that they are subject to the state's residency laws. By agreeing to become permanent residents of the state, voter registrants would have to meet the state's residency requirements, and thereby would be required to obtain a New Hampshire driver's license and to register their vehicles in New Hampshire—both at significant cost—in order to vote.[569] The new voter registration requirement was not only unnecessary and onerous, it directly conflicted with New Hampshire law governing eligibility to vote. Specifically, New Hampshire law permits all inhabitants with a voting *domicile* to vote; a voting domicile under state law is defined as "that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence."[570] By contrast, state law defines a resident as someone who is domiciled and, additionally, demonstrates intent to designate their place of abode as their principal place of physical presence for the indefinite future to the exclusion of all others.[571] The new law targeted students and other mobile domiciliaries who were qualified to vote in the state, but did not wish to accept the legal financial obligations associated with becoming permanent residents of the state.[572] Notably, state law explicitly permitted students attending school in New Hampshire to choose New Hampshire as their voting domicile.[573] The amended voter registration form thus contained language that directly conflicted with applicable state law and conveyed inaccurate information.

The ACLU of New Hampshire challenged the new voter registration requirement on the ground that it violated various provisions of New Hampshire's state law and constitution and the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution.[574] In September 2012, the Strafford County Superior Court preliminarily enjoined the new voter registration language from being included in the registration form, holding that the language "does not pass coustitutional muster, and hinders educational efforts related to the election pertaining to qualifications for registering to vote." [575] The court added that the language advanced a "confusing expression of the law to be considered by ... those prospective voters in the position of the four student petitioners, that is, non-resident persons who otherwise qualify to vote and would not like to register and/or proceed to exercise their voting rights without feeling they are subjecting themselves ... to residency law obligations."[576]

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[569] Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶ 9, Guare v. New Hampshire, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

[570] N.H. REV. STAT. § 654:1.

[571] N.H. REV. STAT. § 21:6.

[572] Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶ 1, Guare v. New Hampshire, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

[573] N.H. REV. STAT. § 654:1.

[574] Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶¶ 97-135, Guare v. New Hampshire, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

[575] *Rivers v. New Hampshire*, No. 219-2012-CV-00458, slip op. at 7 (N.H. Sup. Ct. Sep. 24, 2012).

[576] *Id.* at 5.

In March 2014, the ACLU of New Hampshire filed a motion for summary judgment asking the Superior Court to issue a final, permanent declaratory judgment that the law violated the New Hampshire Constitution.[577] In July 2014, the Strafford County Superior Court issued a decision striking down the law, finding that it did indeed violate the New Hampshire Constitution.[578] In its decision, the court called the added language "a confusing and unreasonable description of the law" that imposed a chilling effect on the right to vote of those domiciled in New Hampshire. The state appealed this decision to the New Hampshire Supreme Court, which affirmed the trial court ruling in May 2015.[579] The Court concluded: "Because the challenged language is confusing and inaccurate, and because, as the trial court found, it could cause an otherwise qualified voter not to register to vote in New Hampshire, we hold that, as a matter of law, the burden it imposes upon the fundamental right to vote is unreasonable."[580]

68. Montes v. City of Yakima – Washington 2012

In 2012, the ACLU and ACLU of Washington filed suit against the City of Yakima on behalf of Latino voters, arguing that the city's at-large voting system deprived Latino voters of the right to elect a representative of their choice to the city council.[581] The Yakima City Council was comprised of seven members, who were all elected using an at-large process for both residency district and citywide council member seats. No Latino had ever been elected to the city council since the at-large system had been put in place 37 years prior, even though Latino voters accounted for 33.4% of the city's voting-age population.[582] The complaint argued that racially polarized bloc voting prevented Latino-preferred candidates from being elected and cited a history of private and official discrimination against the city's Latino population in employment, education, health services, housing, and in voting and political participation.[583]

After the close of discovery, both parties filed cross-motions for summary judgment.[584] The Department of Justice filed a Statement of Interest in the case, opposing the city's

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[577] Motion for Summary Judgment, Guare v. New Hampshire, No. 219-2012-CV-00458 (N.H. Sup. Ct. Mar. 14, 2014).

[578] *Guare v. New Hampshire*, No. 219-2012-CV-00458 (N.H. Sup. Ct. Jul. 24, 2014).

[579] *Guare v. New Hampshire*, No. 14-0585 (N.H. Sup. Ct. May 15, 2015).

[580] *Id.* at 7.

[581] Complaint, Montes v. City of Yakima, No. 12–CV–3108 (E.D. Wa. Aug. 22, 2012).

[582] *Id.* at ¶¶ 8, 10, 14, 17-27.

[583] *Id.* at ¶¶ 10, 14, 19.

[584] Plaintiffs' Motion for Summary Judgment, Montes v. City of Yakima, No. 12–CV–3108 (E.D. Wa. July 1, 2014); Defendants' Motion for Summary Judgment, Montes v. City of Yakima, No. 12–CV–3108 (E.D. Wa. July 1, 2014).

summary judgment motion.[585] The district court determined that the plaintiffs met the *Gingles* preconditions for Section 2 claims and granted their summary judgment motion. The court found that (1) the Latino population was sufficiently large and geographically compact to allow it to form a majority of voters in a single-member district; (2) the Latino population constituted a politically cohesive minority group and voted as a bloc; (3) the non-Latino majority voted sufficiently as a bloc to enable it to usually defeat the Latino minority's preferred candidate; and (4) the totality of circumstances demonstrated that Yakima City Council elections were not equally open to participation by Latino voters.[586] The court found that there was no genuine issue of material fact that the city's voting system was not equally open to participation by members of the Latino community, in violation of Section 2 of the Voting Rights Act, as well as no issue of fact that the plaintiffs' proposed districting plans were acceptable under existing law.[587] In its Section 2 analysis, the court also discussed a history of voting-related discrimination in Yakima County, including several prior violations of the Voting Rights Act such as literacy tests and failure to provide Spanish-language voting materials as recently as ten years prior.[588] Considering all of the circumstances, the court determined that the non-Latino majority "routinely suffocate[d] the voting preferences of the Latino majority"[589] in violation of Section 2 and required the parties to meet and confer on a proposed injunction and proposed remedial districting plan.[590]

The parties were unable to agree on a joint remedial districting plan, so each side submitted its own plan. A third plan was also submitted by FairVote, a voting-related nonprofit.[591] The defendants' plan and FairVote's plan were each hybrid plans with some single-member districts and some at-large seats, while the plaintiffs' plan included seven single-member districts.[592] The district court rejected the hybrid plans, finding that they would not remedy the Section 2 violations and were potentially unlawful under state law.[593] Instead, the court adopted the plaintiffs' proposed plan and issued a final injunction requiring its implementation.[594] The court also ordered the defendants to pay the plaintiffs' costs and attorney's fees.[595]

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[585] Statement of Interest of the United States of America, Montes v. City of Yakima, No. 12–CV–3108 (E.D. Wa. Aug. 18, 2014).

[586] *See Montes v. City of Yakima*, 40 F.Supp.3d 1377, 1390-1400 (E.D. Wa. 2014).

[587] *Id.* at 1386.

[588] *Id.* at 1409-1410.

[589] *Id.* at 1407.

[590] *Id.* at 1415.

[591] *Montes v. City of Yakima*, No. 12-CV-3108, 2015 WL 11120964, at *3-4 (E.D. Wa. Feb. 17, 2015).

[592] *Id.* at *2-*5.

[593] *Id.* at *7, 9.

[594] *Id.* at *11-*12.

[595] *Montes v. City of Yakima*, No. 12-CV-3108, 2015 WL 11120966, at *1 (E.D. Wa. June 19, 2015).

Both the defendants and FairVote appealed, arguing that the single-member districts violated the Equal Protection Clause.[596] However, the appeal was stayed pending the Supreme Court's decision in *Evenwel v. Abbott*, which eventually held that the Equal Protection Clause does not forbid the use of total population, as opposed to voting-age population or registered-voter population, as the basis for equalizing the size of voting districts. After the *Evenwel* decision, the parties agreed to a joint dismissal of the appeal, leaving the lower court's judgment as final.[597]

69. Veasey v. Abbott; Veasey v. Perry – Texas 2013

Senate Bill 14 (SB 14) was introduced in the Texas legislature in May 2011 and submitted to the Justice Department for preclearance review in July 2011. Considered the strictest photo ID law in the nation, it required Texas voters to present one of seven limited forms of photo ID to cast a ballot. Prior to the law's introduction, Texas voters were permitted to present a variety of documents for proof of identification to vote. SB 14 narrowed the kinds of identification documents Texas voters could use to vote, despite no evidence of in-person voter fraud in Texas.[598] During the legislature's consideration of SB 14, there was significant evidence presented regarding the discriminatory impact of the photo ID law on the state's Black and Hispanic voters, particularly those who lived in poverty. At the time SB 14 was being considered, Texas had the highest rate of poverty in the nation with more than four million people living below the poverty line; three-quarters of which were minorities. State legislators and representatives from civil rights organizations who opposed the bill cited the particular burdens faced by these voters as being the least likely to possess photo ID and the most burdened by the bill's strict photo ID requirement.

Several amendments to SB 14 were proposed to mitigate the discriminatory effect of the bill on minority voters; all were rejected during the legislative process. These mitigating amendments included measures such as allowing state university IDs, providing travel reimbursements for impoverished individuals to obtain a photo ID, and requiring the Secretary of State to conduct a racial impact analysis on whether the photo ID law created disproportionate burdens on minority voters.

Proponents of the bill repeatedly identified voter fraud as the justification for a strict photo ID requirement but provided no evidence showing in-person voter fraud was a problem in Texas. In fact, the legislative record of the bill did not contain a single officially documented

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[596] Notice of Appeal, Montes v. Yakima, No. 12-CV-3108 (E.D. Wa. July 17, 2015).

[597] Order, Montes v. City of Yakima, Nos. 15-35309, 15-35593 (9th Cir. Apr. 12, 2016).

[598] This narrow class of approved identification included: A Texas driver's license; a personal identification card issued by the Texas Department of Public Safety and featuring the voter's photograph; an election identification certificate (a new form of state photo identification document created by SB 14); a U.S. military identification card featuring the voter's photograph; a U.S. citizenship certificate featuring the voter's photograph; a U.S. passport; or a concealed handgun permit issued by the Texas Department of Public Safety. Notably, the law did not permit federal or state government employee photo ID cards, state-issued student photo ID cards, or tribal photo ID cards.

case of in-person voter fraud in the state.[599] The lack of evidence of fraud led opposing legislators and stakeholders to voice concern that the bill was not intended to curb voter fraud but to block disfavored voters from voting.[600]

When Texas initially sought preclearance review from the Justice Department in July 2011, civil rights groups opposed preclearance and submitted comments to the department objecting to the law.[601] In response to the Attorney General's request for more information, Texas submitted a computer-generated list of nearly 800,000 registered voters it had been unable to match with corresponding entries in its Department of Public Safety (DPS) driver's license and state ID database. This "no-match" list consisted of approximately 300,000 voters, almost 40% of whom were Hispanic.[602] Experts also estimated that more than 600,000 registered Texas voters—and many more unregistered but eligible voters—did not have an ID approved under the law.[603] The Attorney General concluded that Texas' own data showed that "Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack" a DPS-issued driver's license or ID card.[604] Further, none of methods that Texas stipulated would help voters attain SB 14 compliant ID alleviated the impact of SB 14 on Hispanic voters. To obtain the supposedly free ID some voters were required to pay $22 for a copy of a birth certificate and all had to travel to driver's license offices, which 81 counties in Texas lacked.[605] Accordingly, in March 2012 the Department of Justice denied preclearance for SB 14.

Texas then filed for a declaratory judgment in the U.S. District Court for the District of Columbia, seeking to preclear the law and including a claim that Section 5 of the Voting Rights Act was unconstitutional.[606] The ACLU intervened, representing individuals and organizations opposed to the voter ID requirement. The court ruled against Texas and blocked implementation of the voter ID law, finding not only that Texas failed to demonstrate that SB 14 would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise... [but] in fact, record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect." Since both the Justice Department and D.C. district court found the photo ID law

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[599] Letter from Tex. State Conf. of the NAACP et al. to T. Christian Herren, Chief, Voting Section, Civil Rights Div., Dep't of Justice, (Sep. 14, 2011).

[600] *See id.* (citing R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS: FINAL REPORT 40-42 (2009), http://www.pewcenteronthestates.org/uploadedFiles/Final%20report20090218.pdf).

[601] *Id.*

[602] *Texas v. Holder*, 888 F.Supp.2d 117, 140 (D.D.C. 2012).

[603] This figure represented approximately 4.5% of all registered voters in Texas at the time. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014).

[604] Letter from Assistant Attorney Gen. Thomas E. Perez, Civil Rights Div., Dep't of Justice to Keith Ingram, Esq. (Mar. 12, 2012), https://www.justice.gov/crt/voting-determination-letter-34.

[605] *See Texas v. Holder*, 888 F.Supp.2d at 140.

[606] *Id.*

would have a retrogressive effect, both entities withheld judgment on whether SB 14 was enacted with a discriminatory purpose.

After the Supreme Court's decision in *Shelby County v Holder* immobilized federal preclearance, however, Texas swiftly implemented the voter ID law. Civil rights groups challenged SB 14 claiming violations of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After extensive discovery and a nine-day bench trial, a district court sided again with the challengers of SB 14 on every claim in *Veasey v. Abbott*.[607] On the question of discriminatory effect on minority voters, the court considered it an "understatement" to "call SB 14's disproportionate impact on minorities statistically significant."[608] The court found that African Americans and Hispanics made up a disproportionate portion of the poor in Texas as compared to whites, which was directly linked to "socioeconomic effects caused by decades of racial discrimination" and that the poor were over eight times less likely to own an ID that satisfied SB 14's definition of a qualifying ID.[609] As a result, the court concluded that "SB 14 specifically burdens" minorities, who were less able than whites to bear the costs associated with obtaining the ID that SB 14 required.[610]

Significantly, the court found that Texas enacted the photo ID law to intentionally discriminate against minority voters.[611] Both "by its interaction with the vestiges of past and current racial discrimination," the court found SB 14 was discriminatorily crafted to harm the ability of minority groups to exercise the right to vote.[612] However, because the district court entered a final order striking down Texas's voter identification laws just nine days before early voting began in the 2014 election, the Fifth Circuit stayed the court's order. Elections were held with SB 14 in place while litigation continued.

Texas then appealed the district court decision to the Fifth Circuit. The ACLU filed an amicus brief in support of the appellees, which principally focused on a Seventh Circuit decision that upheld Wisconsin's photo ID law, a case upon which Texas relied heavily to defend its photo ID law and where the ACLU represented a set of plaintiffs. The ACLU brief argued that the Seventh Circuit decision applied a flawed legal analysis in the Wisconsin case and was wrongly decided, and urged the Fifth Circuit to reject its analysis.[613] The Fifth Circuit panel affirmed the district court's holding that the law had a discriminatory effect in violation of the Voting Rights Act, vacated the holding that the law constituted a poll tax, and remanded for further findings on the discriminatory purpose

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[607] *Veasey*, 71 F. Supp. 3d 627.

[608] *Id.* at 695 (finding that, among registered voters, African Americans were 305% more likely and Hispanics were 195% more likely to lack eligible ID than were whites).

[609] *Id.* at 664.

[610] *Id.* at 672.

[611] *Id.* at 695

[612] *Id.* at 698.

[613] Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellees, Veasey v. Abbott, No. 14–41127 (5th Cir. Mar. 10, 2015).

claim.[614] Texas then sought *en banc* review, which was granted. In the *en banc* proceeding, the ACLU filed another amicus brief supporting affirmance, focusing again on the flawed factual and legal analysis of the Seventh Circuit decision.[615]

When the full Fifth Circuit reached the merits of SB 14 two years after the stay was granted, they affirmed the lower court holding that Texas' photo ID law discriminated against African American and Hispanic voters. The Fifth Circuit supported the district court's finding of "a stark, racial disparity between those who possess or have access to [acceptable photo ID], and those who do not."[616] The court also recognized that SB 14's legislative proponents made little attempt to lessen the discriminatory burden on minority voters, finding "[t]he record shows that drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact."[617] Further, the en banc panel agreed that the stated reason for the necessity of photo ID could be a lie, stating "[t]here is evidence that could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual."[618] The Fifth Circuit remanded the case back to the district court to reevaluate its finding of discriminatory purpose. A cert petition to the Supreme Court was denied, effectively letting the Fifth Circuit decision, largely upholding the district court decision.[619] On remand and pursuant to the Fifth Circuit's instructions, the district court entered an interim remedy to help cure the discriminatory effect of SB 14. The court's remedy allowed voters without one of the limited forms of SB 14 ID to vote a regular ballot after signing a declaration indicating their obstacle to obtaining the ID.[620] This was intended as a "stop-gap" measure to lessen the discriminatory effects of the law on the impending Presidential election while the district court proceeded on remand to examine the discriminatory intent claim. After additional briefing and oral argument, the district court reweighed the evidence according to Fifth Circuit guidance and once again found that SB14 had a discriminatory purpose.[621] During the period that the case was on remand, however, the Texas legislature passed a new law that codified the court's remedy with respect to the plaintiffs' discriminatory effect claim. The district court then permanently enjoined the new law pursuant to the plaintiffs' discriminatory intent claim;[622] a divided panel of the Fifth Circuit overturned the injunction on appeal as premature and an abuse of the district

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[614] *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

[615] Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellees, Veasey v. Abbott, No. 14–41127 (5th Cir. May 16, 2016).

[616] *Veasey v. Abbott*, 830 F.3d 216, 264 (5th Cir. 2016) (en banc).

[617] *Id.* at 236.

[618] *Id.* at 237.

[619] *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

[620] *See Veasey v. Abbott*, 265 F.Supp. 3d 684, 687 (S.D. Tex. 2017).

[621] *Veasey v. Abbott*, 249 F.Supp.3d 868, 871 (S.D. Tex. 2017).

[622] *Veasey*, 265 F.Supp.3d at 700.

court's discretion.[623] In September 2018, nearly seven years after Texas passed its initial photo ID law, the Texas district court dismissed the case for the reasons cited in the Fifth Circuit's opinion.[624] As a result, the Texas photo ID law is partially in place, but only insofar as it was modified to address the Fifth Circuit's finding that the original version of the law violated Section 2's prohibition on voting practices with discriminatory results.

70. League of Women Voters of N.C. v. North Carolina – North Carolina 2013

After *Shelby County v. Holder* was decided and freed North Carolina from federal preclearance, North Carolina's legislature announced its aim of passing an omnibus election reform bill aimed at curbing voter registration and voting opportunities.[625] In crafting the bill, the legislature asked for data from state agencies regarding the use of various voting practices specifically broken down into categories based on race. After obtaining the racial data, the General Assembly passed legislation curtailing voting and registration in five different ways—all of which disproportionately burdened African Americans.[626]

The ACLU, ACLU of North Carolina Legal Foundation, and Southern Coalition for Social Justice filed a lawsuit challenging the law in August 2013. The suit targeted numerous provisions of the North Carolina law that decreased opportunities for North Carolina's African American residents to vote, including reducing the early voting period, eliminating same-day registration, and prohibiting "out-of-precinct" voting—all of which were disproportionately used by African Americans in the 2008 and 2012 general elections.[627] The bill also imposed a strict new photo ID requirement that disproportionately burdened African American voters.[628] The plaintiffs charged that these changes would reduce or eliminate voting opportunities relied on by hundreds of thousands of North Carolinians in recent elections and would result in longer lines throughout the remaining early voting period and on Election Day, further burdening the right to vote.[629]

For example, North Carolina voters utilized early voting opportunities to an overwhelming extent: in the November 2012 elections, more than 2.5 million ballots were cast during early voting—more than half of all of the ballots cast in the election—and in the November 2008 elections, approximately 2.4 million ballots were cast during early voting.[630] At least 70.49% of African American voters cast their ballots during early voting in the 2012 general

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

[624] Final Judgment, Veasey v. Abbott, No. 2:13-cv-00193, (S.D. Tex. Sep. 17, 2018).

[625] 2013 N.C. SESS. LAWS 381.

[626] *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

[627] Complaint at ¶¶ 1, 33, 41, 48, 50, 56, 79, League of Women Voters of N.C. v. N.C., No. 1:13-cv-00660 (M.D. N.C. Aug. 12, 2013).

[628] *Id.* at ¶ 66.

[629] *Id.* ¶ 76.

[630] *Id.* at ¶ 27.

election, as compared with 51.87% of white voters who cast their ballot during that period.[631] In 2008, at least 70.92% of African American voters cast their ballots during early voting, compared to 50.95% of white voters.[632] Data also showed that African American voters used Sunday voting and same-day registration to vote at highly disparate rates compared to white voters.[633] The plaintiffs claimed violations of the Equal Protection Clause of the Constitution and Section 2 of the Voting Rights due to the undeniable burden and outsized impact the changes would have on North Carolina's African American voters and requested declaratory, preliminary, and permanent injunctive relief to block the law from going into effect.

The district court consolidated the challenges to the law and conducted a bench trial in July 2015, with additional days of trial in 2016 on North Carolina's photo ID provisions. The extensive trial record included numerous expert and fact witnesses demonstrating the racial impact and racial animus driving the voting changes. However, in a lengthy opinion in April 2016, the district court rejected the plaintiffs' allegations that the challenged provisions were enacted with discriminatory intent and rejected the plaintiffs' claims under both the Voting Rights Act and the U.S. Constitution.[634]

The Fourth Circuit reversed and ruled decidedly in favor of the challengers to strike down the various provisions of the law. In July 2016, the court held that the challenged provisions of the 2013 law were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.[635] With respect to the racial animus driving the law, the Fourth Circuit observed:

> "[A]lthough the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State's true motivation."[636]

This motivation, the court concluded, was that "the State took away [minority voters'] opportunity because [they] were about to exercise it."[637] With respect to the actions of the General Assembly:

> "[I]n sum, relying on this racial data...[the legislature] enacted legislation restricting all—and only—practices disproportionately used by African

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[631] *Id.* at ¶ 34.

[632] *Id.* at ¶ 36.

[633] *Id.* at ¶¶ 39, 48.

[634] *N.C. State Conf. of NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016).

[635] *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

[636] *Id.* at 214.

[637] *Id.* at 215.

> Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made . . . we cannot ignore the choices the General Assembly made with this data in hand."[638]

Citing the legislature's use of racial data in crafting the voting changes, the court found the legislature made these choices intentionally with respect to cutting same-day registration, early voting, preregistration, and out-of-precinct voting.[639] With respect to the photo ID requirement, the court said that the use of the racial data the legislature used to craft the law "showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles (DMV)." The court stated:

> "[The] pre-*Shelby County* version of SL 2013–381 provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs. After *Shelby County*, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess."[640]

Faced with the factual record, the Fourth Circuit concluded that "the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent."[641] The re-erection of racial barriers constituted "purposeful racial discrimination" and "the record evidence is clear that this is exactly what was done" in North Carolina.[642] That purposeful discrimination was coupled with significant—and predictable—impact, also detailed at length in the Fourth Circuit's opinion.[643] For example, with respect to photo ID, the court found that African Americans "disproportionately lacked the photo ID required by [the law]... [which] establishes sufficient disproportionate impact [to meet legal standards]. The record evidence provides abundant support for that holding."[644] Tactics such as removing public assistance IDs, among others, from a list of accepted IDs while continuing to allow all forms of ID that whites were most likely to have created disproportionate voting barriers. These barriers, coupled with widespread socioeconomic disparities between African Americans and whites in North Carolina, resulted in a regime that injured African Americans voters in a systematic fashion.

The Fourth Circuit enjoined the challenged provisions and granted the plaintiffs declaratory relief, holding the law unconstitutional and in violation of the Voting Rights Act. In December 2016, North Carolina sought Supreme Court review, which the Court

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[638] *Id.* at 230.

[639] *Id.* at 216-218.

[640] *Id.* at 216.

[641] *Id.* at 215.

[642] *Id.* at 226.

[643] *Id.* at 230-32.

[644] *Id.* at 231.

denied in May 2017, effectively letting the decision and findings of the Fourth Circuit stand.[645] Sadly, the unjust impact of law had already impacted numerous elections in North Carolina.

71. Belenky v. Kobach – Kansas 2013

In November 2013, the ACLU and ACLU of Kansas filed a lawsuit in state court challenging Kansas' two-tiered voter registration system. Under the scheme, adopted without legal authority by Kansas Secretary of State Kris Kobach, voters who registered using the federal voter registration form (Federal Form) were only permitted to vote for federal offices and not for state or local elections unless they provided a birth certificate or passport as documentation of citizenship.[646] In effect, the Kansas Secretary of State subjected voters to an unprecedented and unlawful voter registration system that divided them into separate and unequal categories of voters with different rights and privileges based on nothing more than the method of registration.[647] The dual registration system permitted some voters to cast ballots for President and other federal offices, but prohibited them from voting for governor, state legislators, secretary of state, and other state and local offices.[648] The plaintiffs argued that the adoption and enforcement of the dual registration system deprived qualified voters of the right to vote in state and local elections in violation of the Kansas Constitution's guarantee of equal protection. The petition also alleged that the program violated the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, which held that the National Voter Registration Act preempted state documentary proof of citizenship requirements for individuals using the Federal Form to register.[649]

In June 2014, the plaintiffs filed a motion for a preliminary injunction and expedited hearing on the matter.[650] In July 2014, the court declined to grant injunctive relief, finding that uncertainty about the status of the law would further discombobulate the election.[651] Throughout 2015 and 2016, the court rejected a string of attempts by the defendants to dispose of the case, strongly criticizing the dual registration system as being "wholly without a basis of legislative authority" and in violation of state and federal law.[652] The court issued a final order in January 2016 granting summary judgment for the plaintiffs and holding that the Secretary of State overstepped his legal authority by creating a system

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[645] *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

[646] Petition for Declaratory and Injunctive Relief, Belenky v. Kobach, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., Nov. 21, 2013).

[647] *Id.* at 1-2.

[648] *Id.* at 2.

[649] *Ibid.*

[650] Plaintiffs' Motion for a Preliminary Injunction and for an Expedited Hearing, Belenky v. Kobach, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., June 27, 2014).

[651] *See* Memorandum Opinion and Order at 6, Belenky v. Kobach, No. 2013CV1331 (Shawnee Cty. Dist. Ct., Aug. 21, 2015).

[652] *Id.* at 27.

that prevents Federal Form registrants from voting in state and local elections.[653] The court permanently barred any further implementation of the dual-voter scheme, restoring the voting rights of over 17,000 Kansans.[654]

Defendants appealed in July 2016, and in October 2016, the appeals court granted a stay in the appeal pending a final decision in *League of Women Voters v. Newby*.[655] In January 2021, the case was dismissed in response to the denial of certiorari by the Supreme Court in *Fish v. Schwab*,[656] which had held that Kansas's documentary proof of citizenship requirement for voter registration was unconstitutional.

72. Wright v. Sumter County Board of Elections – Georgia 2014

An individual plaintiff, represented by the ACLU, filed suit in 2014 challenging changes to the method of electing members and apportionment of the Board of Education of Sumter County, Georgia.[657] The Sumter County Board of Education packed Black voters into two of the existing five districts and added two more at-large seats. This resulted in a 5-2 majority of white-preferred candidates on the Board of Education in a county where African Americans outnumbered white residents in total population (52% compared to 42.1%), voting-age population (49.5% to 46.7%), and in the number of registered voters (48.5% to 46.7%).[658] Prior to this lawsuit, the apportionment and method of election of members of the Sumter County Board of Education had for decades been the subject of multiple objections interposed by the Attorney General under Section 5 of the Voting Rights Act[659] and

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[653] Memorandum Opinion and Order at 26, Belenky v. Kobach, No. 2013C1331 (Shawnee Cty. Dist. Ct., Jan. 15, 2016).

[654] *Id.*

[655] Order, Belenky v. Kobach, No. 2013CV1331 (Shawnee Cnty. Dist. Ct. Oct. 16, 2016).

[656] 141 S. Ct. 965 (2020).

[657] Injunction to Stop March 18, 2014 and May 20, 2014 Sumter County School Elections, Wright v. Sumter Cty. Bd. of Elections and Registration, No. 1:14-cv-00042-WLS (M.D. Ga. Mar. 7, 2014).

[658] *Wright v. Sumter Cty. Bd. of Elections and Registration*, 301 F.Supp.3d 1297, 1302 (M.D. Ga. 2018).

[659] *See* Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (Sept. 6, 1983), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1990.pdf; Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (Dec. 17, 1982), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1960.pdf; Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (July 13, 1973), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1250.pdf.

litigation by private plaintiffs.[660] Sumter County also has a bitter history of racial discrimination, including in the voting context.[661]

In *Wright*, the plaintiff alleged that the Board's addition of two at-large seats and apportionment of districts diluted African American voting strength in violation of Section 2 of the Voting Rights Act. The district court initially granted summary judgment to the county, but the Eleventh Circuit reversed the decision of the district court and remanded the case for further consideration.[662] The district court held a four-day bench trial in December 2017. At trial, the plaintiff relied on a racial bloc voting analysis of county elections performed by his expert.

The district court, after going through a detailed Section 2 analysis, ruled in favor of the plaintiff in March 2018.[663] The court found, based on the totality of the circumstances, "that African Americans in Sumter County have less opportunity to elect candidates of their choice than do white citizens," resulting in unlawful dilution of African American voting strength in violation of Section 2.[664] It further found that the plaintiff had presented an illustrative plan that was "likely to give African Americans a more proportional representation on the Board of Education than does the current plan."[665] As recommended by the parties, the court directed the Sumter County Board of Elections to confer with the county's legislative delegation to give elected officials the first opportunity to remedy the unlawful election plan. After the Georgia General Assembly declined the court's invitation to devise a remedy, the district court enjoined Sumter County from holding school board elections in 2018 using the unlawful plan.[666] After further efforts to devise a remedy did not bear fruit, the November 2018 general election went forward without any school board races on the ballot in Sumter County.

Meanwhile, the county appealed the injunctions to the Eleventh Circuit. In April 2019, after briefing was complete, the plaintiff filed a motion for a limited remand to allow the

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[660] *See, e.g., Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (11th Cir. 1985); *Edge v. Sumter Cty. Sch. Dist.*, 541 F. Supp. 55 (M.D. Ga. 1981).

[661] For a discussion of this history see Plaintiffs' Brief in Support of his Motion for Summary Judgment, 1:14-cv-00042 (M.D. Ga. Apr. 7, 2017).

[662] *Wright v. Sumter Cty. Bd. of Elections and Registration*, 657 Fed.Appx. 871, 873 (11th Cir. 2016) (per curiam).

[663] *Wright*, 301 F. Supp. 3d at 1297.

[664] *Id.* at 1323.

[665] *Id.* at 1326.

[666] *Wright v. Sumter Cty. Bd. of Elections and Registration*, 361 F.Supp.3d 1296, 1305-06 (M.D. Ga. 2018).

district court to devise a remedy in time for the 2020 school board elections.[667] The Eleventh Circuit granted the motion in May 2019 and returned the case to the district court.[668]

In September 2019, the district court appointed a special master to draw recommended remedial plans, followed by response and replies from parties on both sides.[669] In January 2020, the district court adopted one of the proposed plans with single-member districts that would give the African American community an opportunity to elect Black-preferred candidate, and also moved the election date for the School Board to November to ensure increased voter participation.[670] Although the defendants appealed the decision, the Eleventh Circuit affirmed the district court's remedy in October 2020.[671]

73. NAACP V. Husted – Ohio 2014

In May 2014, the ACLU and ACLU of Ohio, on behalf of the Ohio State Conference of the NAACP, League of Women Voters of Ohio, A. Philip Randolph Institute, Bethel African Methodist Episcopal Church, and other African-American churches, filed suit against the Ohio Secretary of State, filed suit challenging a state law that eliminated the first week of early voting in Ohio and a directive from the Secretary of State even more egregiously slashed the slashed the early voting period by eliminating all Sundays, the Monday before Election Day and all evening voting hours for the upcoming 2014 General Election. The complaint alleged violation of the Equal Protection Clause of the Fourteenth Amendment by burdening the fundamental right to vote and Section 2 of the Voting Rights Act of 1965 by disproportionately burdening African American voters' ability to participate effectively in the political process.[672] Just 16 months earlier, a federal court granted a preliminary injunction, affirmed by the Sixth Circuit, halting the elimination of the last three days of early voting in 2012.[673]

During the 2012 Presidential election, more than 157,000 people voted during the time periods cut by SB 283 and Directive 2014-06. A disproportionately high percentage of those were low-income voters, many of whom were African American. African Americans also disproportionately voted on Sundays through "Souls to the Polls" programs common among

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[667] Plaintiff-Appellee's Motion for a Limited Remand, No. 18-11510; 18-13510 (11th Cir. Apr. 26, 2019).

[668] Order, Wright v. Sumter Cty. Bd. of Elections and Registration, No. 18-11510; 18-13510 (11th Cir. May 16, 2019).

[669] Order, *Wright v. Sumter Cty. Bd. of Elections and Registration*, No. 1:14-CV-42 (M.D. Ga. Sept. 23, 2019), Doc. No. 267.

[670] Wright v. Sumter Cty. Bd. of Elections & Registration, No. 1:14-CV-42 (WLS), 2020 WL 499615 (M.D. Ga. Jan. 29, 2020), aff'd, 979 F.3d 1282 (11th Cir. 2020).

[671] Wright v. Sumter Cty. Bd. of Elections & Registration, 979 F.3d 1282 (11th Cir. 2020).

[672] Complaint, Ohio State Conference of the NAACP v. Husted, No. 2:14-cv-00404 (S.D. Ohio May 1, 2014).

[673] *Id.* at ¶ 1 (citing *Obama for Am. V. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012); *aff'd*, 697 F.3d 423 (6th Cir. 2012)).

the Black church community.[674] The lawsuit challenged these two restrictions on at least three theories: the restrictions: (1) placed an unconstitutional burden upon the right to vote of certain classes of voters (especially lower-income voters), (2) abridged the voting rights of citizens based on their race in violation of Section 2 of the Voting Rights Act, and (3) violated the equal protection clause by reflecting an intent to suppress voting specifically by African Americans.[675]

In September 2014, the Sixth Circuit affirmed the district court's ruling that cuts to early voting in Ohio must be restored in time for the 2014 federal midterm elections,[676] but the Supreme Court stayed the lower court rulings without explanation, restoring the early voting restrictions in a 5-4 decision.[677] In April 2015, parties came to a settlement agreement restoring early voting opportunities, including an additional Sunday of voting for the upcoming presidential general election; a week of expanded weekday evening hours from 8 a.m. to 7 p.m. for the presidential primary election and general elections. The agreement took effect after the May 2015 primary and continued through 2018.[678]

74. Howard v. Augusta-Richmond County – Georgia 2014

The ACLU filed suit against Augusta-Richmond County on behalf of individual African American residents seeking to enjoin a state law that required the county to move its local election date from the November 2014 general election date to the May 2014 primary election date, which historically had a statistically low turnout by voters of color.[679] The county had initially requested preclearance from the Attorney General to move the date of the local election, as it was required to do under Section 5 of the Voting Rights Act. The Justice Department objected, citing statistics that minorities were less likely to vote earlier in the year.[680] In its objection letter, the Justice Department noted that although the law—which provided that all nonpartisan elections for members of consolidated governments be held in conjunction with the primary in even-numbered years—was proposed as statewide legislation and did not name any specific jurisdictions, it only impacted the Augusta-Richmond mayoral and commissioner elections. The six other consolidated governments in Georgia either did not have any nonpartisan elected offices or already elected their

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[674] *Id.*; Press Release, ACLU, ACLU Files Federal Lawsuit Challenging Ohio's Latest Attempts To Slash Early Voting Opportunities (May 1, 2014), https://www.aclu.org/press-releases/aclu-files-federal-lawsuit-challenging-ohios-latest-attempts-slash-early-voting.

[675] *Id.*; ACLU OF OHIO, Case Summary for NAACP, ET AL. V. HUSTED, ET AL. https://www.acluohio.org/archives/cases/naacp-et-al-v-husted-et-al.

[676] *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014).

[677] *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014) (mem.).

[678] Settlement Agreement, NAACP v. Husted, No. 2:14-cv-00404 (S.D. Ohio Apr. 17, 2015).

[679] Complaint, Howard v. Augusta-Richmond Cty., No. 1:14-cv-00097 (S.D. Ga. May 13, 2014).

[680] *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 12810317, at *1; *see also* Objection Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Division, Department of Justice to Deputy Attorney General Dennis R. Dunn, (Dec. 21, 2012).

nonpartisan officers on that date.[681] The objection letter also found that although statistically voter turnout was substantially lower in July than November for both Black and white voters, the drop in the participation rate for Black voters was significantly greater than that for white voters and that the differential had been particularly dramatic in recent elections.[682] The letter also indicated that the Justice Department's analysis of the evidence could not preclude a determination that the change was adopted for a discriminatory purpose, noting:

> "Voting is racially polarized in Augusta-Richmond. Census figures show that the black population has gradually increased over the years, such that black persons now comprise a majority of both the total and voting age populations in the consolidated jurisdiction. As a result of these changing demographics, electoral outcomes are particularly dependent on voter turnout."[683]

After the Supreme Court struck down the Voting Rights Act's Section 4(b) coverage formula as unconstitutional in *Shelby County v. Holder* and rendered Section 5 unenforceable, the Georgia legislature passed a law moving election dates earlier and permitted local governments to move the dates of their elections earlier as well. Augusta-Richmond County took advantage of this new law, prompting the ACLU's suit. The ACLU suit argued that the *Shelby County* decision did not apply retroactively and that the Section 5 objection lodged by Department of Justice was still legally valid; therefore, the state action attempting to move the local elections remained unenforceable.[684]

The district court rejected the plaintiffs' motion for a preliminary injunction and granted the defendants' motion to dismiss.[685] The court also granted the defendants' motion for attorneys' fees, holding that the ACLU's lawsuit was "frivolous, unreasonable, or without foundation," because the result was foreclosed in light of the Supreme Court's prior ruling in *Shelby County*.[686] The plaintiffs appealed, arguing that they had presented evidence that *Shelby County* was not controlling and that the Justice Department's prior objection on Georgia's election dates still held precedential value. The Eleventh Circuit reversed the district court on the issue of attorneys' fees, finding that the lower court abused its discretion because there was no binding precedent at the time the complaint was filed establishing that *Shelby County* applied retroactively.[687] The Eleventh Circuit noted that Georgia's own attorneys had given contradictory statements on the effect of *Shelby County*

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[681] *See* Objection Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Div., Dep't of Justice to Deputy Attorney Gen. Dennis R. Dunn (Dec. 21, 2012).

[682] *Id.*

[683] *Id.*

[684] Complaint, Howard v. Augusta-Richmond Cty., No. 1:14-cv-00097 (S.D. Ga. Apr. 18, 2014).

[685] *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 12810317, at *1 (S.D. Ga. May 13, 2014).

[686] *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 5827144, at *3 (S.D. Ga. Nov. 10, 2014).

[687] *Howard v. Augusta-Richmond Cty.*, 615 Fed. App'x 651 (11th Cir. 2015) (per curiam).

on the Section 5 objection when questioned by state legislators, establishing that the plaintiffs' argument was far from "settled law" when it was filed.[688] The court held that no award of attorneys' fees was appropriate under the circumstances, bringing the case to an end.

75. Griffin v. Schultz; Griffin v. Pate – Iowa 2014

In November 2014, on behalf of Kelli Jo Griffin, an Iowa woman seeking to regain her right to vote, the ACLU and ACLU of Iowa Foundation filed suit in state court against state officials seeking declaratory, injunctive, and mandamus relief to effectuate that right.[689] The Iowa Constitution permanently disenfranchises individuals convicted of "infamous crimes," unless the governor restores the rights of citizenship to Iowa electors made ineligible.[690] From 2005 to 2011, by executive order, Iowa automatically restored voting rights to individuals convicted of felonies upon completion of their sentence, a process that reduced the number of disenfranchised Iowans by 81% and restored the right to vote to an estimated 100,000 individuals.[691] In 2011, the newly-installed governor issued an executive order that rescinded the previous executive order and required citizens with felony convictions to complete an application process of individualized review in order to petition the state for restoration of their voting rights. This move changed longstanding policy in Iowa regarding rights restoration and resulted in only 40 individuals whose rights were restored out of an estimated 14,350 individuals who had discharged a felony offense.[692]

The plaintiff had been previously convicted of non-violent drug crimes, successfully discharged her sentence of probation, and believed she was eligible to vote.[693] Her defense attorney representing her for her drug conviction advised her that her citizenship rights would be automatically restored by the governor's office, and she was not informed she was ineligible to vote. In November 2013, she registered to vote and cast a provisional ballot in a city election in Montrose, Iowa, which was not counted.[694]

After being acquitted of the perjury charge in March 2014, Griffin sued to invalidate the state's rules disenfranchising individuals with certain felony convictions. The suit claimed that the forfeiture of voting rights by those with criminal convictions violated the Iowa Constitution as applied to her case because her non-violent drug conviction did not qualify as an "infamous crime" under the state constitution. She argued that Iowa's process for disenfranchising voters convicted of felonies violated the Iowa Constitution's guarantee of

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[688] *Id.* at 652.

[689] Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, Griffin v. Schultz, No. EQCE077368 (Iowa Dist. Ct. Nov. 7, 2014).

[690] *Id.* at ¶ 2 (citing IOWA CONST. art. IV, § 16; *State ex rel. Dean v. Haubrich*, 83 N.W.2d 451 (Iowa 1957)).

[691] *Ibid.*

[692] *Id.* ¶¶ 2, 28-29.

[693] *Id.* ¶ 1.

[694] *Ibid.*

the right of suffrage and Due Process Clause because it prohibited all Iowans with felony convictions from voting and not just those who had been convicted of "infamous crimes."[695]

The trial court granted summary judgment against Griffin on both claims,[696] and she appealed the decision to the Iowa Supreme Court.[697] The sole issue before the court was whether the felony crime of delivery of a controlled substance is an "infamous crime" for purposes of the Iowa Constitution. After a lengthy analysis of the concept of "infamy" at common law and as defined by other states, the Iowa Supreme Court concluded in a divided 4-3 opinion that "an infamous crime has evolved to be defined as a felony."[698] Accordingly, the court affirmed the trial court's ruling and dismissed Griffin's claims in their entirety.

76. Evenwel v. Abbott – Texas 2014

The Equal Protection Clause generally requires states to equalize the population of their electoral districts; this constitutional precept is known as the "one person, one vote" principle, and was originally articulated in the seminal case *Reynolds v. Sims*.[699] Since the framing of the U.S. Constitution, states have broadly used total population as the metric for apportioning state legislative districts with equal numbers of persons, and the U.S. Constitution requires use of total population for apportioning congressional seats for the House of Representatives to ensure universal and equal representation in the federal government. Despite the long-established precedent of using total population as a basis for apportionment, individual plaintiffs Sue Evenwel and Edward Pfenninger filed a complaint in Texas district court in 2013 alleging that the state senate districts adopted by the Texas Legislature violated the Equal Protection Clause.[700] The plaintiffs argued that the challenged districts were drawn based on the total overall population rather than the total population of eligible voters.[701] The plaintiffs argued that drawing districts of equal population based on the state's total population rather than based on the number of eligible voters diluted the weight of their votes when compared to districts with a lower proportion of eligible voters, in violation of the one person, one vote command under the Equal Protection Clause.[702] The plaintiffs sought declaratory relief that the Texas senatorial

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[695] *Id.* at ¶¶ 30-53.

[696] *Griffin v. Pate*, No. EQCE077368 (Polk Cty. Dist. Ct. Sept. 25, 2015).

[697] *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016).

[698] *Id.* at 205.

[699] 377 U.S. 533 (1964).

[700] Complaint for Declaratory and Injunctive Relief, Evenwel v. Perry, No. 1:14-cv-00355 (W.D. Tex. Apr. 21, 2014).

[701] *Id.*

[702] *See* Brief of *Amicus Curiae* Lawyers' Committee for Civil Rights Under Law at pp. 5-11, Evenwel v. Abbott, No. 14–940 (2016).

districts were unconstitutional and an injunction to prevent the use of the maps in subsequent elections.[703]

The district court granted Texas' motion to dismiss, finding that the plaintiffs "failed to plead facts that state an Equal Protection Clause violation under the recognized means for showing unconstitutionality under that clause."[704] The district court held that the plaintiffs failed to establish that the apportionment base used by Texas, *i.e.*, total population, was forbidden by the Constitution and also failed to show that Texas' senate map did not achieve substantial population equality using total population as the base.[705] In so ruling, the district court rejected the plaintiffs' theory that to satisfy the Fourteenth Amendment, Texas was required to use total eligible voters as its apportionment base.[706]

The plaintiffs' appealed this ruling to the Supreme Court.[707] The ACLU and ACLU of Texas argued in an amicus brief that the use of total population as the metric for state redistricting is consistent with the Framer's understanding of a republican form of government, and that the Framers intended that universal and equal representation through total apportionment would ensure equality of representation for all individuals, not just voters.[708] In April 2016, the Supreme Court affirmed the dismissal of the plaintiffs' claims, holding that "based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population."[709] In reaching its decision, the Court relied on the fact that all states used census total population numbers to draw districts and that only seven states adjusted these census-derived figures in any meaningful way. Of note, in affirming the district court, the Supreme Court expressly declined to resolve whether, as Texas argued, states *might* "draw districts to equalize voter-eligible population rather than total population."[710] Additionally, Justice Thomas in his concurrence noted:

> The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The

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[703] Complaint for Declaratory and Injunctive Relief, Evenwel v. Perry, No. 1:14-cv-00355 (W.D. Tex. Apr. 21, 2014).

[704] Order on Motion to Dismiss, Evenwel v. Perry, No. 1:14-cv-00355, 2014 WL 5780507, at *4 (W.D. Tex. Nov. 5, 2014).

[705] *Id.* at *3.

[706] *Ibid.*.

[707] *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016).

[708] Brief of the American Civil Liberties Union and the ACLU of Texas as *Amici Curiae* in Support of Appellees at 9-13, Evenwel v. Abbott, No. 14–940. (2016).

[709] *Id.* at 1133 (Thomas, J., concurring).

[710] *Id.*

> majority should recognize the futility of choosing only one of these options. The Constitution leaves the choice to the people alone—not to this Court.[711]

This makes it possible that the question of whether states can apportion state electoral districts based on a metric other than total population will again be litigated in federal court and may appear before the Supreme Court.

77. Davidson v. City of Cranston – Rhode Island 2014

Individual plaintiffs and the ACLU of Rhode Island filed suit in federal court in 2014 challenging the redistricting plan adopted by the City of Cranston, Rhode Island, for election of members of the Cranston City Council and the school committee.[712] The plaintiffs alleged that the redistricting plan violates the one person-one vote principle of the Fourteenth Amendment's Equal Protection Clause by counting the population of Rhode Island's only state prison as residents of the ward, even though most of the inmates remain residents of their pre-incarceration communities for virtually all other legal purposes, including voting.[713] 3,433 incarcerated individuals were districted into the electoral ward, accounting for approximately 25% of the district's population despite not having a choice as to where they served their prison sentences and not being able to visit, patronize, or participate in public or private establishments in the city or ward.[714] The plaintiffs alleged that this prison-based gerrymandering results in an unequal system of representation where the prisoner population is used to artificially inflate the population of the ward containing the prison, increasing the district's political power and diluting the voting strength of persons residing in other districts.[715] The plaintiffs sought declaratory relief and an injunction barring the city from conducting elections under the redistricting plan.

The district court granted the plaintiffs' motion for summary judgment in May 2016, finding that the redistricting plan violated the one person-one vote principle.[716] The court reasoned that the inmates "share none of the characteristics" of other constituents in the ward and have no rights or stake in the local civic life or political process. In particular, they do not share in the representation of the ward in the city council, but are nonetheless counted for representation purposes.[717] In the court's view, this differentiated the situation from other cases in which non-voting populations are typically included in the population

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[711] *Id.*

[712] Complaint for Declaratory and Injunctive Relief, Davidson v. City of Cranston, No. 1:14-cv-00091 (D.R.I. Feb. 19, 2014).

[713] *Id.* at ¶ 1.

[714] *Id.* at ¶¶ 17-18.

[715] Complaint for Declaratory and Injunctive Relief at ¶ 1, Davidson v. City of Cranston, No. 1:14-cv-00091 (D.R.I. Feb. 19, 2014); *see also* Sean Young, *'Home' Is Not Where You Are Involuntarily Confined*, ACLU (Oct. 15, 2015), https://www.aclu.org/blog/voting-rights/gerrymandering/home-not-where-you-are-involuntarily-confined.

[716] *Davidson v. City of Cranston*, 188 F.Supp.3d 146 (D.R.I. 2014).

[717] *Id.* at 150.

count for purposes of apportionment. The court granted the requested injunction and ordered the city to propose a districting plan that complied with the one person-one vote principle.[718]

The city appealed the decision to the First Circuit, which reversed, finding that the city's inclusion of the prison population in the surrounding ward was constitutionally permissible.[719] The court reasoned that where total population is used for apportionment, a plaintiff must make a showing of invidious discrimination to support an equal protection claim, which was not shown in this case.[720] The court also reasoned that it was required to give deference to the decision of the local election officials on apportionment[721] and that the Supreme Court had generally approved the use of total population data from the Census for apportionment, which the city had done.[722]

78. Missouri NAACP v. Ferguson-Florissant School District – Missouri 2014

On December 18, 2014, the Missouri State Conference of the NAACP and individual plaintiffs, represented by the ACLU and ACLU of Missouri, sued the Ferguson-Florissant School District challenging the district's at-large method for electing school board members, arguing it denied the district's Black residents an equal opportunity to participate in the political process and elect representatives of their choice in violation of Section 2 of the Voting Rights Act.[723] The Ferguson-Florissant School District extends through numerous municipalities pursuant to a 1975 desegregation order intended to remedy the effects of discrimination against the area's African American students.[724] The area's segregated school system was the result of municipal borders that were initially drawn along racial lines and reinforced through racial housing covenants to avoid increasing African American voting strength in certain areas.[725] The desegregation order that created the school district required that two seats on the then 6-member school board be replaced by designees of the boards of two annexed African American districts.[726] Yet, since the implementation of the three-district desegregation plan in 1976, the demographics of Ferguson-Florissant changed dramatically and what had become a racially integrated school district once again became segregated.[727]

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[718] *Id.* at 152.

[719] *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016).

[720] *Id.* at 142-43.

[721] *Id.* at 143-44.

[722] *Ibid.*

[723] Complaint, Mo. NAACP v. Ferguson-Florissant Sch. Dist., No. 4:14-cv-02077 (E.D. Mo. Dec. 18, 2014).

[724] *Id.* at ¶ 2.

[725] *Id.* at ¶ 8.

[726] *Id.* ¶ 14 (citing *United States v. Missouri*, 515 F.2d 1365, 1373 (8th Cir. 1975)).

[727] *Id.* at ¶ 10.

At the time of filing, the Ferguson-Florissant School District's total voting age population was 51,010; whites constituted a slight majority of the voting age population at 49.69% and Blacks constituted 47.37%, yet Black students made up a majority of the district's student body, accounting for 77.1% of total enrollment in the school district.[728] And while only 13% of the student body in the school district was white, 6 out of the 7 school board members were white.[729] The plaintiffs sued the district arguing that there was inadequate representation of African Americans on the board, and the votes of the district's Black citizens were being diluted by the at-large voting system in violation of Section 2 of the Voting Rights Act. The plaintiffs argued that the school district's African American population was sufficiently numerous and geographically compact enough to allow for the creation of multiple, properly apportioned single-member districts in which African Americans would constitute a majority of the voting age population and that there was a clear pattern of voting cohesion among African American voters who tended to prefer the same candidate, but their preferred candidates were consistently defeated by the at-large system.[730] After a six-day bench trial in January 2016, the district court in August 2016 in a lengthy opinion evaluating the Section 2 claim held that the plaintiffs had established a Section 2 violation, finding that Black voters had less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[731] The court also adopted the plaintiffs' proposed remedial plan and rejected the defendant school district's proposal.[732]

The school district appealed the decision to the Eighth Circuit, which unanimously affirmed the district court's decision.[733] The appellate court concluded that the district court properly found a Section 2 violation after engaging in the appropriate legal analysis and after thorough review of the facts and applicable legal standard.[734] The court found "no clear error in the district court's exhaustive factual findings" or the conclusion that "[g]iven the extent to which African Americans in [the Ferguson-Florissant School District] continue to experience the effects of discrimination, their ability to participate in the political process is impacted."[735] The school district petitioned for certiorari to the U.S. Supreme Court, which declined review.[736]

79. Greater Birmingham Ministries v. John Merrill – Alabama 2015

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[728] *Id.* at ¶ 11.

[729] *Id.* at ¶¶ 15-17.

[730] *Id.* at ¶¶ 22-24.

[731] *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006 (E.D. Mo. 2016).

[732] *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F.Supp.3d 949 (E.D. Mo. 2016).

[733] *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F. 3d 924 (8th Cir. 2018).

[734] *Id.* at 941.

[735] *Id.* at 940.

[736] *Ferguson-Florissant Sch. Dist. v. Mo. State Conf. of NAACP*, 139 S. Ct. 826 (2019).

ACLU and ACLU of Alabama as amicus in support of plaintiff-appellants

In December 2015, plaintiffs represented by the NAACP Legal Defense and Educational Fund, Inc., challenged Alabama's restrictive photo ID law.[737] In 2011, Alabama passed a law that required voters to "provide valid photo identification to an appropriate election official prior to voting."[738] The law requires in-person and absentee voters to present one of seven limited forms of photo ID in order to vote,[739] which Alabama's own data shows Black voters in the state are less likely to possess.[740] The only exception to the prescribed forms of photo ID is a provision that permits a voter to cast a ballot without presenting an ID if two election officials at the voter's polling location "positively identify" the voter.[741]

Despite the purported justification of protecting against voter fraud, proponents of the bill could only point to one documented case of voter impersonation fraud in the 12 years prior to the law's passage.[742] The dubious proposition that the photo ID law is intended to curb voter fraud was further undermined when it was revealed that supporters and sponsors of the bill in the Alabama statehouse had made racist and racially charged comments in the run up to the law's passage. The plaintiffs argued that these statements and the legislative history in Alabama provided evidence of the law's discriminatory intent.[743] In one instance, the photo ID bill's chief sponsor, a state senator who had tried for over a decade to pass a photo ID law, told Alabama newspapers that a photo ID law would undermine Alabama's "black power structure" and that lacking an ID law "benefits black elected leaders."[744] The trial testimony in another case relating to an Alabama ballot initiative revealed that another sponsor of the bill, the chair of the Alabama Senate Rules Committee, referred to Black voters as "aborigines."[745] In another instance, the bill's cosponsors were recorded devising a plan related to a planned ballot measure to depress turnout among Black voters,

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[737] Complaint, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015); *see also* First Amended Complaint, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

[738] ALA. CODE § 17-9-30(a).

[739] *Id.*

[740] *See* Brief for Plaintiffs-Appellants at 27, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018); *see also* First Amended Complaint at ¶¶ 100-103, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

[741] ALA. CODE § 17-9-30(f).

[742] First Amended Complaint at ¶ 70, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

[743] *See* Brief for Plaintiffs-Appellants at 38-42, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018).

[744] *See* Brief for Plaintiffs-Appellants at 38-39, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018); *see also* Scott Douglas, *The Alabama Senate Race May Have Already Been Decided,* NY TIMES (Dec. 11, 2017), https://www.nytimes.com/2017/12/11/opinion/roy-moore-alabama-senate-voter-suppression.html; *Greater Birmingham Ministries v. Merrill,* 284 F. Supp. 3d 1253, 1259 (N.D. Ala. 2018).

[745] *See United States v. McGregor,* 824 F.Supp.2d 1339, 1345 (M.D. Ala. 2011).

whom they slurred as "illiterates," who would ride "H.U.D.-financed buses" to the polls in the 2010 midterm election.[746] The same state legislature that passed the photo ID law also passed an intentionally racially discriminatory voter registration ID requirement and redistricting plan held unconstitutional by a three-judge panel.[747]

At the time the photo ID law was enacted, Alabama had been subject to the preclearance requirements of Section 5 but never sought preclearance for the law. Instead, the state chose to delay implementation until the outcome of *Shelby County v. Holder*, Alabama's challenge to the constitutionality of the Voting Rights Act.[748] The day after *Shelby County* was decided, immobilizing Section 5 of the Act, Alabama—in lock step with other formerly covered jurisdictions—announced it would implement its photo ID law.[749]

The plaintiffs challenged the photo ID law as violating Section 2 of the Voting Rights Act of 1965 on the basis that it was "enacted and/or operate... with the purpose or effect of abridging or denying the right to vote on account of race" and the Fourteen and Fifteenth Amendments to the U.S. Constitution because the defendants "intentionally enacted or operate the law to deny or abridge the right to vote on account of race or color."[750] Over 118,000 registered voters did not have the necessary documentation to vote under the photo ID law, a number that skewed disproportionately Black and Latino.[751] It was also later shown that thousands of voters had their provisional ballots rejected due to the restrictive photo ID law,[752] and African Americans voters were nearly five times more likely to have their ballots rejected than white voters. Thousands more people likely did not appear at the polls to vote because they lacked the required photo ID.[753]

After cross summary judgment motions were filed, the Alabama district court granted summary judgment for the defendants in January 2018. The court ruled that because it found the photo ID law did not "prevent anyone from voting" or otherwise impose a "substantial burden" on African Americans, it was not unconstitutional.[754] Despite significant evidence that the law was motivated by an intent to discriminate, the district

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[746] Brendan Kirby, *Jury at bingo trial hears Sen. Scott Beason's infamous 'aborigines' comment, Ronnie Gilley jailhouse call*, AL.COM (Feb. 17, 2012), https://www.al.com/live/2012/02/jury_at_bingo_trial_hears_sen.html.

[747] Complaint at ¶ 58, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015); *see also Greater Birmingham Ministries*, 284 F. Supp. 3d at 1259.

[748] Complaint at ¶¶ 72-73, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015).

[749] *See id.* at ¶¶ 74-75.

[750] Second Amended Complaint, Greater Birmingham Ministries v. Merrill, No. 2:15-cv-02193 (N.D. Ala. Dec. 6, 2016).

[751] Complaint, *Greater Birmingham Ministries v. Merrill*, No 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015).

[752] Appellant's Brief at 27, Greater Birmingham Ministries v. Merrill, No. 18-10151 (11th Cir. Feb. 21, 2018).

[753] *Ibid.*

[754] *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1277 (N.D. Ala. 2018).

court dismissed the plaintiff's suit because it considered the law's requirements as mere inconveniences. Based on its determination that the law's burden on voters was slight, the district court refused to consider the plaintiffs' evidence that the law targeted minority communities.

The plaintiffs filed a notice of appeal with the Eleventh Circuit in January 2018. The ACLU, ACLU of Alabama, Lawyers' Committee for Civil Rights Under Law, and Campaign Legal Center, filed an amicus in support of the appellants.[755] . In July 2020, the Eleventh Circuit upheld the granting of summary judgment for the defendants, finding that providing a photo ID is a "minimal burden on Alabama's voters."[756]

80. Democratic National Committee v. Hobbs – Arizona 2016

The Democratic National Committee and Arizona Democratic Party filed suit in 2016 challenging under the First, Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act, two Arizona election practices: (1) Arizona's requirement that in-person voters cast their ballots only in their assigned precinct, which Arizona enforces by not counting ballots cast out of precinct even for races in which the voter is qualified to vote, and (2) House Bill 2023, which makes it a felony for third parties to collect early ballots from voters unless the collector falls into one of several exceptions.[757]

After a lengthy bench trial, the district court dismissed the lawsuit on May 10, 2018, finding that the plaintiffs had not carried their burden of showing "that the challenged election practices severely and unjustifiably burden voting and associational rights, disparately impact minority voters such that they have less opportunity than their non-minority counterparts to meaningfully participate in the political process, or that Arizona was motivated by a desire to suppress minority turnout when it placed limits on who may collect early mail ballots."[758] The plaintiffs' evidence included analyses by three experts, and testimony from numerous lay witnesses, including voters, election officials, and community advocates who collected ballots. A divided panel of the Ninth Circuit affirmed on September 12, 2018.[759] The panel majority upheld the district judge's findings that Arizona's requirements "imposed only a minimal burden on voters and were adequately designed to serve Arizona's important regulatory interests."[760] The dissenting judge stated that the in-precinct requirement "has a disproportionate effect on racial and ethnic minority groups," and the ballot collection provision "serves no purpose aside from making

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[755] *See* Brief of ACLU et al. as *Amicus Curiae* in Support of Appellants, Greater Birmingham Ministries v. Merrill, No. 18-10151 (11th Cir. Mar. 1, 2018).

[756] *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 966 F.3d 1202 (11th Cir. 2020), opinion vacated and superseded sub nom. *Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021) (superseding opinion reaches the same holding and follows a similar discussion).

[757] Complaint, *Democratic Nat'l Comm v. Hobbs*, No. CV-16-01065-PHX-DLR (D. Ariz. 2016).

[758] *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 882-83 (D. Ariz. 2018).

[759] *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686 (9th Cir. 2018).

[760] *Id.* at 697.

voting more difficult."[761] Plaintiffs sought a rehearing en banc, which was granted on January 2, 2019. En banc oral argument took place on March 27, 2019.

The ACLU filed an amicus brief in support of rehearing en banc on September 24, 2018, and an amicus brief on rehearing, on January 23, 2019. The ACLU principally addressed the correct legal standard for vote denial claims under Section 2 of the Voting Rights Act. The brief argued that the district court erred by treating the case as one concerning vote dilution, instead of using distinct principles from the Section 2 vote denial analysis, which led the court to require an arbitrary numerical threshold for showing a discriminatory burden on voters. It further argued that the district court committed "a plain legal error" by failing to conduct a totality-of-the-circumstances analysis of how race-based discrimination and disparities relate to the burdensome nature of the voting restriction at issue, as called for by the text of the statute.[762]

En banc, the Ninth Circuit reversed the judgment of the district court, finding that the out of precinct policy in Arizona violates the results test of Section 2 of the Voting Rights Act and that H.B. 2023 not only violates Section 2, but also violates the Fifteenth Amendment.[763] On appeal to the Supreme Court, the ACLU filed another amicus brief urging the Court to adopt the manageable test already adopted by the majority of federal courts of appeals to consider the issue, which involves a fact-based, localized, totality-of-the-circumstances analysis.[764] In July 2021, the Supreme Court reversed the en banc panel, holding that both policies neither violated the Voting Rights Act nor were enacted with a discriminatory purpose.[765] Justice Alito's majority opinion stated that having to find the proper polling place is a normal burden of voting and that the state attempted to accommodate voters while having a strong interested in precinct-based voting and small number of total number of out-of-precinct ballots. Regarding Arizona's ballot collection ban, the opinion held that there is no significant burden on voters as there are many ways to return a ballot and that the prevention of fraud is a legitimate state interest, while plaintiffs did not show the extent of disparate impact. Justice Kagan dissented, writing:

> Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too "radical"—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the

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[761] *Id.* at 732.

[762] Brief of ACLU as Amicus Curiae, *Democratic Nat'l Comm. v. Hobbs*, No. 8-15845 (9th Cir. Sept. 25, 2018).

[763] *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir.), *cert. granted sub nom. Arizona Republican Party v. Democratic Nat'l Comm.*, 141 S. Ct. 221, 207 L. Ed. 2d 1165 (2020), and *cert. granted sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 222, 207 L. Ed. 2d 1165 (2020), and *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021).

[764] Brief of Amicus Curiae the ACLU and the ACLU of Arizona in Support of Respondents, *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021).

[765] *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021).

> majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters. I could say—and will in the following pages—that this is not how the Court is supposed to interpret and apply statutes.[766]

She concluded that as in *Shelby County* decision, the Court once again rewrote and limited the bounds of the Voting Rights Act, which is intended to provide broad protection of the equal opportunity to vote and "designed to bring about 'the end of discrimination in voting.'"[767]

81. Husted v. A. Philip Randolph Institute – Ohio 2016

In *Husted v. A. Philip Randolph Institute*, the Supreme Court, in a 5-4 decision, upheld Ohio's voter purge practice, which the plaintiffs argued violated the National Voter Registration Act (NVRA).[768] The case involved a challenge to Ohio's practice of removing voters from its registration rolls due to a voter's past failure to vote. Under the process, Ohio identified registrants for potential removal from the voter rolls if they did not vote in one election; the state removed those voters if they did not vote in the following four-year period or respond to a notice by the state. This process wrongfully presumed that registrants' failure to vote meant these voters had moved and often removed them from the rolls without their knowledge. In 2015, Ohio conducted a massive voter purge based on this practice and removed of tens of thousands of eligible voters who had not moved or otherwise become ineligible to vote since they last participated in November 2008 and were left unable to vote in the 2015 elections.[769] These voters showed up to vote but could not because they had unwittingly been removed from the rolls.[770] The "failure to vote" process disproportionately impacted voters of color and low income individuals, including the homeless.[771]

The ACLU, ACLU of Ohio, and Demōs, representing A. Phillip Randolph Institute and Northeast Ohio Coalition for the Homeless, challenged Ohio's voter purge practice, arguing that it violated Section 8 of the NVRA, which regulates states' list maintenance practices.[772] During the course of litigation, the ACLU put forward evidence that Ohio removed tens of thousands of voters under this practice, leaving many people to arrive at the polls to vote only to learn that they were no longer registered. The plaintiffs sought an injunction to stop the Ohio Secretary of State from removing more people from Ohio's voter registration rolls

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[766] *Id.* at *2-*3 (Kagan, J., dissenting) (citations omitted).

[767] *Id.*

[768] *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

[769] Plaintiffs' First Amended Complaint at ¶ 6, Ohio A. Philip Randolph Institute v. Husted, No. 2:16-CV-303 (S.D. Ohio Apr. 6, 2016).

[770] *Ibid.*

[771] *Id.* at ¶ 48.

[772] 52 U.S.C. § 20507.

and require the Secretary either reinstate eligible voters who were improperly removed or count their provisional ballots.

The district court found in favor of Ohio[773] but was reversed on appeal by the Sixth Circuit.[774] On review, in a 5-4 decision, the Supreme Court found that Ohio's procedure was not prohibited by the NVRA, reasoning that while the plain language of the statute forbids the removal of a voter where failure to vote is the sole reason for removal, Ohio's procedure did not do so because it required removal of voters based on a failure to vote for two years, plus a failure to return a notice card and failure to vote for four additional years. Justice Sotomayor dissented separately, arguing:

> Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. It is unsurprising in light of the history of such purge programs that numerous *amici* report that the Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters. As one example, amici point to an investigation that revealed that in Hamilton County, 'African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity' since 2012, as 'compared to only 4% of voters in a suburban, majority-white neighborhood.'...*Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process."[775]

She concluded that the Court's decision "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate."[776]

Despite this narrow loss, the parties entered a settlement regarding the inadequacy of Ohio's notification to voters flagged for removal.[777] For the term of the settlement, Ohio is required to permit qualified voters who were removed without proper notice to cast a ballot and have it counted, and the Ohio Secretary of State is required to send eligible voters who

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[773] *Ohio A. Phillip Randolph Institute v. Husted*, No. 2:16-CV-303, 2016 WL 3542450 (S.D. Ohio June 29, 2016).

[774] *Ohio A. Phillip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016).

[775] *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018) (Sotomayor, J., dissenting).

[776] *Id.*

[777] Settlement Agreement, Ohio A. Philip Randolph Institute v. LaRose, No. 2:16-cv-303 (S.D. Ohio May 17, 2016).

are not registered a mailing informing them of that fact and of the registration deadline. The settlement further directs boards of elections to use motor vehicle records to prevent people queued for removal in 2019 from being removed if their motor vehicle records indicate they still reside at the address where they are registered.

82. Howell v. McAuliffe – Virginia 2016

On April 22, 2016, Virginia Governor Terry McAuliffe issued an executive order that granted restoration of civil rights to an estimated 206,000 Virginians who had completed terms of incarceration and been released from supervised probation or parole.[778] The governor issued the Executive Order pursuant to a section of Virginia's state constitution that provides, "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."[779] The governor issued similar orders periodically thereafter to restore the rights of Virginians with felony convictions who had since completed their sentences of incarceration and supervised release.[780] On May 23, 2016, six voters in their individual capacities filed a lawsuit against the Governor, challenging his legal authority to issue and implement the Executive Order. They argued that the orders had injured them because they "diluted Petitioners' votes, created an illegitimate electorate, and threatened the legitimacy of the November elections."[781] The plaintiffs asked the Supreme Court of Virginia to issue a writ of mandamus ordering the cancelation of all voter registrations accepted pursuant to the executive orders and a writ of prohibition proscribing further action by state officials in restoring voting rights "en masse."

In June 2016, the ACLU and ACLU of Virginia filed an amicus brief supporting the Governor's authority under the Virginia Constitution to issue the executive order. The brief also argued that the executive order was consistent with the goals of rehabilitation and reintegration of ex-offenders and of remedying racial inequality resulting from of the racial impact of Virginia's felony disenfranchisement law.[782] The brief was accompanied by affidavits from three individuals who had their rights restored as a result of the Governor's order and who documented the human impact of both disenfranchisement and rights restoration.[783]

In July 2016, the Supreme Court of Virginia concluded that the governor violated the section of the Virginia Constitution disqualifying individuals convicted of felonies from

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[778] Va. Exec. Order No. 13 (Apr. 22, 2016); *see also Howell v. McAuliffe*, 292 Va. 320, 327-28 (Va. 2016).

[779] VA. CONST. art. II, § 1.

[780] *Howell*, 292 Va. at 328.

[781] Verified Petition for Writs of Mandamus and Prohibition and Memorandum in Support of Verified Petition at 15, Howell v. McAuliffe, No. 160784 (Va. May 23, 2016).

[782] *See* Brief of ACLU and ACLU of Virginia as Amici Curiae in Support of Respondents, Howell v. McAuliffe, No. 160784 (Va. 2016).

[783] *Id.*

voting unless their rights are restored, and that he exceeded the authority granted to him by the state constitution by issuing a blanket, group pardon and restoration of voting rights without providing individualized review of each person.[784] The court ordered the Secretary of the Commonwealth, the State Board of Elections, and the Department of Elections to take appropriate measures to reverse the executive orders and cancel the voter registrations of individuals who had regained their voting rights as a result of the Governor's actions.[785] At least 13,000 individuals had their voter registrations cancelled as a result.[786]

The Governor subsequently pledged to quickly restore the voting rights of affected Virginians by conducting individual reviews and restoration orders to eligible persons to comport with the court's decision.[787] In August 2016, the petitioners filed a motion asking the court to order the Governor to prove that he was obeying the court's decision.[788] The motion alleged that Governor McAuliffe was circumventing the court's orders because there was no substantive difference between the previous Executive Orders and subsequent individualized reviews and restoration orders.[789] The Governor and other officials filed a lengthy response outlining the measures taken to comply with the court's decision.[790] The court denied the petitioner's motion in September 2016.[791] Since then, Governor McAuliffe and his successor, Governor Northam, have restored the voting rights to former offenders upon completion of sentence on an individual, person-by-person basis.

83. Florida Democratic Party v. Scott – Florida 2016

On October 6, 2016, about one week before Florida's voter registration deadline, Florida Governor Rick Scott declared a state of emergency due to Hurricane Mathew, a massive, life-threatening hurricane, which caused the mandatory evacuation of 1.5 million people in the state and already killed several hundred people in the Caribbean in the days prior.[792] The hurricane resulted in the closure of state's election offices in 43 counties during the

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[784] *Howell*, 292 Va. at 342-53.

[785] *Id.* at 351-53.

[786] *Id.* at 327-28.

[787] Laura Vozzella, *Virginia's McAuliffe to Announce Restoration of Voting Rights to 13,000 Felons*, WASH. POST (Aug. 21, 2016), https://www.washingtonpost.com/local/virginia-politics/virginias-mcauliffe-to-announce-restoration-of-voting-rights-to-13000-felons/2016/08/20/590b43ee-6652-11e6-96c0-37533479f3f5_story.html.

[788] Petitioners' Motion to Show Cause, Howell v. McAuliffe, No. 160784 (Va. Aug. 31, 2016).

[789] *Id.*

[790] Response to Petitioners' Motion to Show Case, Howell v. McAuliffe, No. 160784 (Va. Sept. 12, 2016).

[791] Order Denying Motion to Show Cause, Howell v. McAuliffe, No. 160784 (Va. Sept. 15, 2016).

[792] Complaint-in-Intervention at ¶ 2, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

critical days before the end of the voter registration period.[793] Yet on the same day he declared the state of emergency, Governor Scott also refused to extend the voter registration deadline for the 2016 Presidential election, which in Florida was October 11, 2016,[794] despite the fact that other states impacted by the hurricane had done so.[795] At the time, Florida did not offer online voter registration or same-day registration, instead requiring registrants to complete a paper form and deliver it in person or by mail to a local elections office or voter registration organization for submission.[796] For comparison, during the six days prior to the voter registration deadline in October 2012, roughly 116,000 Floridians had registered to vote.[797]

On October 9, 2016, the Florida Democratic Party filed suit in federal court to compel the state to extend the voter registration deadline. [798] On October 10, 2016, the district court granted the plaintiffs' request for a temporary restraining order that directed state officials to extend the voter registration deadline by one day, finding that the plaintiffs were likely to prevail on the merits of their Fourteenth Amendment claim.[799] On October 11 the ACLU intervened on behalf of two voting rights organizations, New Florida Majority and Mi Familia Vota, which were actively involved in voter registration activities in the state. The motion to intervene argued that minorities and young people would be particularly burdened and impacted by the state's refusal to extend the registration deadline, since these groups registered at higher rates in the final days of the voter registration period.[800] The plaintiffs argued that the state's enforcement of the original deadline placed an undue burden on the right to vote in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act.[801] On October 12, 2016, tbe district court agreed with the plaintiffs and entered a preliminary injunction that ordered state officials to extend the deadline for six additional days.[802] The state did not appeal, and more than 110,000 voters registered during the extension period.

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[793] *Id.*

[794] Complaint for Emergency Injunctive and Declaratory Relief at ¶¶ 21-22, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

[795] *Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1257-58 (N.D. Fla. 2016).

[796] Complaint for Emergency Injunctive and Declaratory Relief at ¶ 17, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

[797] Complaint-in-Intervention at ¶ 8, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

[798] Complaint for Emergency Injunctive and Declaratory Relief, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

[799] *Fla. Democratic Party*, 215 F. Supp. 3d 1250.

[800] Complaint-in-Intervention at ¶¶ 9-10, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

[801] *Id.* at ¶¶ 20-27.

[802] Order Granting Preliminary Injunction, Fla. Democratic Party v. Scott, No. 4:16-CV-00626 (N.D. Fla. Oct. 12, 2016).

84. Bethea v. Deal – Georgia 2016

In 2016, individual and organizational plaintiffs, the Georgia State Conference of the NAACP and WickForce, filed a complaint for injunctive and declaratory relief and an emergency temporary restraining order against the Georgia Secretary of State. The complaint alleged violations of the Fourteenth Amendment, Section 2 of the Voting Rights Act, and Section 8 of the National Voter Registration Act of 1993 due to the state's failure to extend the voter registration deadline for the 2016 November Presidential election.[803] In October 2016, Hurricane Matthew bore down on the East Coast during the last days of the voter registration period. With six days left in the registration period, the Governor of Georgia issued a mandatory evacuation order impacting five hundred thousand people in parts of six counties across the state and a voluntary evacuation order for residents in low lying areas encompassing 30 Georgia counties.[804] In all, one million Georgians were subject to mandatory or voluntary evacuation.[805]

Yet despite the massive disruption due to Hurricane Matthew during the busiest time of voter registration, state officials inexplicably refused to extend the registration deadline[806] even though it was well-known to state and local election officials that voter registration would have been particularly high during this period. During the final days of the registration period for the 2012 Presidential election over 77,000 people registered to vote in the state.[807] Due to closures, power outages, and other factors exacerbated by Hurricane Matthew, many voters were unable to register by the October 11, 2016, deadline.[808] The failure to extend voter registration impacted racial and ethnic minorities disproportionately during the last few days of the registration period.[809] The complaint cited statistics showing that in the run-up to the October 2012 election, approximately 29.5% of registered voters in Georgia were Black, and of the people who registered to vote during the final days of the registration period, approximately 49.7% were Black.[810] Compounding the issue, online voter registration opportunities were not available to many residents in evacuation areas due to power outages.[811]

The district court issued an order denying the plaintiff's request for a temporary restraining order in October 2016. The court found that the plaintiffs failed to show that their injury outweighed the potential damage a restraining order would have to the state's

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[803] Amended Complaint for Injunctive and Declaratory Relief, Bethea v. Deal, No. 2:16-cv-00140 (S.D. Ga. Oct. 18, 2016).

[804] *Id.* at ¶ 3.

[805] *Id.* at ¶ 18.

[806] *Ibid.*

[807] *Id.* at ¶ 4.

[808] *Id.* at ¶ 5.

[809] *Id.* at ¶ 15.

[810] *Ibid.*

[811] *Id.* at ¶ 38.

interest in running an efficient election because the "requested extension would require local officials to both conduct early voting [beginning on October 17] and continue to register voters through October 25, 2016.[812]

The matter was voluntarily dismissed without prejudice on motion of the plaintiffs in November 2016.[813]

85. Mullins v. Cole – West Virginia 2016

This class action suit for declaratory and injunctive relief was filed on October 20, 2016, in West Virginia state court against the clerk of Cabell County, West Virginia, for refusal to process registration forms submitted through the state's online registration system. The complaint alleged violations of the Equal Protection Clause and Due Process Clause of the Constitution and provisions of the West Virginia Constitution.[814] West Virginia had established an online voter registration system but the clerk of Cabell County refused to process online applications based on her representation in a letter to registrants that the "website does not provide the information that is required, by law, to be provided to this office in order to process a voter applications."

The court granted the plaintiffs' motion for a temporary restraining order after a hearing on October 25, 2016, and the plaintiffs' request for a preliminary injunction on November 21, 2016. The preliminary injunction was converted to a permanent injunction on January 24, 2017. The final order was not appealed by the defendant.

In the order granting the plaintiff's request for a preliminary injunction the court found the Clerk of Cabell County's assertion that the West Virginia registration website did not provide the necessary information to process voter registration patently untrue[815]. Further, the court found that the failure of the Clerk to include information in the letter to online registrants as to how to complete a paper or alternate registration led to a "high likelihood that online applicants in Cabell County will be confused about whether they can vote or not if they return a paper application after the October 18 deadline."[816] The Cabell County Clerk's actions resulted in "disparate treatment and disenfranchisement of thousands of Cabell County residents."[817]

86. Eason v. N.Y. State Bd. of Elections – New York 2016

This case was filed on behalf of the National Federation of the Blind, the Center for the Independence of the Disabled, and individual plaintiffs who are blind. States are required

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[812] *Bethea v. Deal*, 2:16-cv-00140, 2016 WL 6123241 at *3 (S.D. Ga. Oct. 19, 2016).

[813] Order, Bethea v. Deal, No. 2:16-cv-00140 (S.D. Ga. Nov. 11, 2016).

[814] Class Action Complaint, Mullins v. Cole, No. 3:16-cv-9918 (S.D. W. Va. Oct. 20, 2016).

[815] *Mullins v. Cole*, 218 F.Supp.3d 488, 494 (S.D. W. Va. 2016).

[816] *Id.* at 495.

[817] *Ibid.*

by law to meet accessibility and confidentiality standards when providing services such as online voter registration; the compliant alleged that New York is failing to comply with that requirement. Specifically, the plaintiffs alleged that New York's online voter registration system violated these standards because the DMV web pages and downloadable forms could not be read out loud by the screen-reader software used by blind and low-vision people to hear and navigate computer screen content.[818] The software also could not read the fillable form's section on party affiliation on the Board of Elections' website; blind and low-vision voters were forced to disclose this private information when they printed out the form to get someone else to help them sign it, denying them the same degree of privacy and independence afforded to other voters.[819]

The lawsuit alleged violations of the Americans with Disabilities Act and Rehabilitation Act. It sought immediate adjustments to ensure the websites were legally compliant, creation of Board of Elections policies that ensured accessibility and provided a clear path of accountability, and the development of policies and procedures to ensure the sites remained accessible.[820]

The parties reached a settlement on February 15, 2019. Under the settlement agreement, the State Board of Elections and DMV agreed to make their websites accessible to screen-access software within two years.[821] They also agreed to work with an accessibility consultant and put in place practices and procedures to ensure that the websites stay accessible in the long term.[822]

87. Chelsea Collaborative v. Galvin – Massachusetts 2016

This case was filed on November 1, 2016, in Massachusetts state court to challenge the state's requirement that eligible Massachusetts voters register 20 days before an election. The complaint alleged that under the state's voter registration cutoff law thousands of eligible people are barred from voting in each election and that this arbitrary deadline interferes with the fundamental right to vote and unnecessarily disenfranchises voters.[823] The ACLU and ACLU of Massachusetts represented a set of individual and organizational plaintiffs that engaged in voter registration and get-out-the-vote activities. The lawsuit argued the law violated the Massachusetts Declaration of Rights and Massachusetts Constitution and requested the court to issue an order permitting the three individual

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[818] Complaint for Declaratory and Injunctive Relief, Eason v. N.Y. State Bd. Of Elections, No. 1:16-cv-04292 (S.D.N.Y. June 9, 2016).

[819] *Id.*

[820] *Id.*

[821] *See* Settlement Agreement and Stipulated Order of Dismissal at 4-5, Eason v. N.Y. State Bd. Of Elections, No. 1:16-cv-04292 (S.D.N.Y. Feb. 15, 2019).

[822] *Id.* at 7.

[823] Class Action Complaint for Declaratory and Injunctive Relief, Chelsea Collaborative v. Galvin, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 1, 2016).

plaintiffs to vote in the November 2016 election.[824] The plaintiffs argued that under the Massachusetts Constitution, a state statute impinging on the fundamental right to vote can only be upheld if it promotes a compelling state interest that could not be achieved by a less restrictive means[825] and that the arbitrary 20-day voter registration cutoff period was not the least restrictive way to advance a compelling state interest, particularly in light of the significant constitutional injury done unto potential voters of being disenfranchised and the rapidity with which election clerks were able to process voter registration forms.[826] The plaintiffs also moved for a preliminary injunction to permit them to vote in the November 2016 presidential election,[827] which the court granted.[828] After a four-day trial, the court issued a ruling in July 2017, agreeing that the 20-day voter registration cutoff law was unconstitutional and disenfranchises thousands of potential voters throughout the Commonwealth.[829]

Secretary of the Commonwealth William Galvin appealed the decision to the Massachusetts Supreme Judicial Court. The court vacated the lower court decision, holding that the 20-day blackout period for voter registration prior to an election did not violate the Massachusetts Constitution.[830] In reaching its decision, the court determined that strict scrutiny was inapplicable because the voter registration blackout period did not pose a substantial enough interference with the right to vote to justify application of that standard.[831] In its decision, however, the court acknowledged that given current realities the basis for the 20-day voter registration deadline might need to be reconsidered. The court also concluded that "having chosen to impose a deadline for voter registration prior to an election, the Legislature has a continuing duty to ensure that the deadline is no further from election day than what the Legislature reasonably believes is consistent with the Commonwealth's interest in conducting a fair and orderly election."[832] The ruling noted that a commission that lawmakers established in 1993 to study the voter registration deadline never met and that a task force formed under a 2014 elections law also did not meet or produce a report by its August 1, 2017, deadline.[833] "Although the Legislature appeared to have a reasoned basis for requiring voters to register twenty days in advance of an election in 1993, the mechanisms put in place for a periodic review of that requirement

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[824] *Id.* at ¶ 9.

[825] *Id.* at ¶ 25.

[826] *Id.* at ¶¶ 45-53.

[827] Emergency Motion for Preliminary Injunction, Chelsea Collaborative v. Galvin, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 1, 2016).

[828] Order on Motion for Preliminary Injunction at 10-11, Chelsea Collaborative v. Galvin, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 7, 2016).

[829] *See Chelsea Collaborative v. Galvin*, No. 16-cv-3354, 2017 WL 4125039 (Mass. Super. Ct. July, 25, 2017).

[830] *Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth*, 100 N.E.3d 326 (Mass. 2018).

[831] *Id.* at 333-335.

[832] *Id.* at 328.

[833] *Id.* at 338-340.

seem to have failed. Thus, we have a concern that, given the passage of time, the reasoned basis for the 20-day blackout period may need to be reconsidered."[834]

88. Navajo Nation Human Rights Comm'n v. San Juan Cty. – Utah 2016

Representing the Navajo Nation Human Rights Commission and individual Navajo voters, the ACLU, ACLU of Utah, and Lawyers' Committee for Civil Rights Under Law filed suit in 2016 against San Juan County. The lawsuit alleged that the county's decision to switch to a mail-only voting system and to designate the only in-person voting location in the predominantly white part of the county adversely impacted Navajo voters—who constituted 49% of the voting age population of the county—in violation of federal law.[835]

The predominantly mail-only system was highly problematic for Navajo voters for several reasons. First, it did not comply with San Juan County's obligations under Section 203 of the Voting Rights Act to provide adequate language assistance to limited English proficient Navajo voters. Navajo is an unwritten language, and the closure of all but one voting location and the switch to a mail-only ballot system interfered with the county's ability to provide adequate oral assistance, and thus, the ability of Navajo voters to vote.[836] Second, the postal service was unreliable with limited delivery service to rural parts of the county where many Navajo lived, making it difficult for many Navajo voters to receive and return their ballots under a mail-only system.[837]

The only way to vote in-person was at the county clerk's office in the county seat of Monticello, which required Navajo residents to travel more than twice as long as white residents in order to vote in person. On average, the trip for a Navajo voter took over two hours round trip, while the trip for white voters took, on average, under an hour.[838] For residents living in the southwest parts of the county, which were majority Navajo, the round trip to the Monticello polling location took even longer, sometimes taking between nine and ten hours.[839] The significantly greater average distance required for Navajo residents to reach the county seat of Monticello, in the context of socioeconomic factors, such as disparate rates of poverty and access to reliable public and private transportation, and the history of racial discrimination and hostility toward Navajo people, placed a severe and disproportionate burden on Navajo residents' ability to vote.[840] The plaintiffs alleged that the predominantly mail-only system discriminated against Navajo voters in violation of Sections 2 and 203 of the Voting Rights Act and imposed a disproportionate and severe

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[834] *Id.* at 340.

[835] Complaint at ¶ 1, Navajo Nation Human Rights Comm'n v. San Juan Cty., No. 2:16-cv-00154 (D. Utah Feb. 25, 2016).

[836] *Id.* at ¶ 4.

[837] *Id.* at ¶ 6.

[838] *Id.* at ¶ 31.

[839] *Id.* at ¶ 32.

[840] *Id.* at ¶ 7

burden on Navajo voters' fundamental right to vote in violation of the Fourteenth Amendment.[841]

In September 2017, a federal district court granted the plaintiffs' motion to dismiss the defendants' counterclaims, which alleged violations of federal civil rights statutes and Utah tort law, and allowed the lawsuit to proceed to a trial on the merits.[842] In February 2018, the parties reached a positive settlement agreement regarding both claims.[843] The county agreed to implement various measures aimed at providing meaningful and effective language assistance and to create equal opportunities for Navajo voters for the 2018 elections. These changes included providing in-person voting and language assistance at several locations inside the Navajo reservation during the 28 days before an election; maintaining three polling locations with language assistance on the Navajo reservation for Election Day voting; and ensuring quality interpretation of election information and materials into the Navajo language.[844] A motion to dismiss was signed, stipulating that the court would keep jurisdiction over the case.[845]

89. League of Women Voters of the U.S. v. Newby – Washington, D.C. 2016

This case followed up the seminal 2013 case *Arizona v. Inter Tribal Council of Arizona* (*ITCA*), in which the Supreme Court ruled that Arizona was prohibited from requiring documentary proof of citizenship for individuals using the federal voter registration form (Federal Form), unless the proof of citizenship requirement was approved by the U.S. Election Assistance Commission (EAC).[846] In *ITCA*, the Court held that the National Voter Registration Act (NVRA) preempted Arizona's documentary proof of citizenship requirement and the state's refusal to register voters using the Federal Form without documentary proof conflicted with the NVRA. In an opinion authored by Justice Scalia, the Supreme Court held that the NVRA requires all states to "accept and use" the Federal Form and noted that "[n]o matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available."[847]

Congress enacted the NVRA principally to "increase the number of eligible citizens who register to vote in elections for Federal office" and to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration

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[841] *Id.* at ¶¶ 1, 8.

[842] *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1149 (D. Utah 2017).

[843] Order re: Stipulated Settlement and Motion to Dismiss, Navajo Nation Human Rights Comm'n v. San Juan Cty., No. 2:16-cv-00154 (D. Utah Feb. 22, 2018).

[844] *See generally id.*

[845] *Id.*

[846] 570 U.S. 1 (2013).

[847] *Id.* at 9.

requirements.[848] In enacting the NVRA, Congress debated and voted on the question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, and expressly rejected such a proposal.[849] The final conference committee report concluded that a documentary proof of citizenship requirement was not consistent with the purpose of the NVRA and risked being interpreted by states as permitting registration requirements that could "seriously interfere with" the mail registration program under the law.[850]

Despite the NVRA's legislative history, since 2006 Arizona had requested multiple times that the EAC amend the Federal Form to require documentary proof of citizenship; the EAC had repeatedly denied those requests. As contemplated by Congress, the EAC determined that documentary proof of citizenship unjustifiably increased the burden on qualified voters to register to vote because—as has been demonstrated repeatedly in litigation addressing documentary proof of identity requirements—many U.S. citizens either do not possess or cannot reasonably retrieve or afford documentation demonstrating citizenship, such as U.S. passports and birth certifications.[851] Moreover, Arizona was unable to show that there was a widespread problem with noncitizens registering to vote or voting, and the Federal Form already required that voters attest under penalty of perjury that they are U.S. citizens.

After the Supreme Court's decision in *ITCA*, Arizona, Kansas, and Georgia submitted new requests to the EAC to require documentary proof of citizenship. The EAC rejected these requests in a formal decision finding that documentary proof of citizenship requirements were inconsistent with the purposes of the NVRA and were not shown to be necessary by any evidence provided by the states.[852] Arizona and Kansas then filed a lawsuit in the U.S. District Court for the District of Kansas under the Administrative Procedures Act (APA) seeking a writ of mandamus to compel the EAC to modify their state instructions for the Federal Form to require documentary proof of citizenship.[853] After an initial lower court ruling in favor of Arizona and Kansas, the Tenth Circuit reversed the judgment and

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[848] 52 U.S.C. § 20501(b)(1); *see also ITCA*, 570 U.S. at 13.

[849] *See* S. REP. NO. 103-6 (1993); 139 CONG. REC. 5098 (1993); H.R. REP. NO. 103-66, at 23 (1993); 139 CONG. REC. 9231-32 (1993).

[850] H.R. REP. NO. 103-66, at 23-24 (1993).

[851] ALICE P. MILLER, U.S. ELECTION ASSISTANCE COMMISSION, MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM (Jan. 17, 2014).

[852] *See* Complaint for Declaratory and Injunctive Relief at ¶ 3, League of Women Voters of the U.S. v. Newby, No. 1:16-cv-00236 (D.D.C. Feb. 12, 2016).

[853] Complaint, Kobach v. U.S. Election Assistance Comm'n, No. 13-cv-4095 (D. Kan. Aug. 21, 2013).

rejected Kansas and Arizona's APA challenge.[854] The Supreme Court did not grant Kansas' and Arizona's cert petition, effectively letting the Tenth Circuit decision stand.[855]

In 2016, the new EAC Executive Director, Brian Newby—acting unlawfully and contrary to longstanding Commission policy—sent letters to the Secretaries of State of Alabama, Georgia, and Kansas stating, without explanation, that he would allow them to require documentary proof of citizenship.[856] Newby was a former local election official in Kansas and was appointed to his local position by then Kansas Secretary of State Kris Kobach.[857] Newby had also publicly supported Kansas' efforts to achieve a documentary proof of citizenship requirement.[858] The ACLU, along with the Lawyers' Committee for Civil Rights Under Law, the Brennan Center for Justice, and Project Vote, representing private plaintiffs, filed suit against the EAC, arguing that Newby's action was a violation of EAC policy and federal law.[859]

The plaintiffs' motion for a preliminary stay of Newby's action was initially denied by the district court[860] but was granted on appeal by the D.C. Circuit Court of Appeals, effectively blocking the new registration requirements from coming into effect until the suit was resolved.[861] The case returned to the district court, where the judge remanded to the EAC to determine whether Newby had the authority to allow the three states to require documentary proof of citizenship on the Federal Form.[862] In 2017, the EAC announced a split along partisan lines over whether Newby acted within his authority.[863] As a result, the circuit court's preliminary injunction against the burdensome registration requirements remained in place pending final judgment in the district court.

The matter is still pending in district court, where parties have filed cross-motions for summary judgment. The judge is currently considering whether the Tenth Circuit's decision in *Fish v. Schwab* renders this case moot.[864]

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[854] *See Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

[855] *Kobach v. U.S. Election Assistance Comm'n*, 135 S. Ct. 2891 (2015).

[856] Complaint for Declaratory and Injunctive Relief at ¶ 1, League of Women Voters of the U.S. v. Newby, No. 1:16-cv-00236 (D.D.C. Feb. 12, 2016)

[857] *See id.* at ¶ 4.

[858] *Ibid.*

[859] *Id.* at ¶¶ 1-2.

[860] *League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80 (D.D.C. 2016).

[861] *League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016).

[862] *League of Women Voters of United States v. Newby*, 238 F. Supp. 3d 6 (D.D.C. 2017).

[863] U.S. ELECTION ASSISTANCE COMMISSION, INTERPRETATION MEMO OF 2015 POLICY (June 1, 2017).

[864] Order to Show Cause, *League of Women Voters of United States v. Newby*, No. 16-236 (RJL) (D.D.C. Jun. 29, 2021).

90. Brown v. Kobach – Kansas 2016

In 2016, the ACLU filed a lawsuit in state court again challenging a dual voter registration system adopted by Kansas Secretary of State Kris Kobach, this time through a temporary regulation purportedly to formalize and provide a legal basis for the system. The suit charged that the dual registration system violated the Kansas Constitution and state law by preventing qualified Kansas voters from voting in state and local elections due solely to their method of registration using the federal voter registration form (Federal Form).[865] Among other things, the dual-registration system permitted voters who registered either by using the Federal Form or at the Kansas Division of Vehicles while applying for a driver's license to vote only for federal offices, not state or local offices, unless they provided a birth certificate, passport or other documentation of citizenship.[866] Kobach enacted the temporary regulation on the eve of the 2016 primary elections, putting this system in place despite a state court having already declared it unauthorized and prohibiting its implementation in *Belenky v. Kobach*.[867]

A Kansas state judge granted a temporary restraining order, reiterating the previous holding that the system was unauthorized and prohibited, and required Kobach to count all the votes—local, state, and federal—of all registered voters in the primary elections.[868] Later that year, the court granted a permanent injunction, officially ending Kansas' dual-registration scheme.[869] An appeal of this case was stayed pending the outcome in two related federal cases, *Fish v. Schwab* and *League of Women Voters v. Newby*. In March 2021, the court dismissed the case in response to the Supreme Court's denial of cert in *Fish v. Schwab*, discussed below, which held that Kansas's documentary proof of citizenship requirement for voter registration unconstitutional.

91. Fish v. Schwab – Kansas 2016

In February 2016, the ACLU and ACLU of Kansas, on behalf of the League of Women Voters of Kansas and individual Kansans, filed yet another lawsuit challenging Kansas' enforcement of a documentary proof of citizenship requirement.[870] Prior to this latest lawsuit, the ACLU had twice secured court decisions in separate actions that blocked Kansas Secretary of State Kris Kobach from requiring documentary proof of citizenship from individuals trying to register to vote and dissolved a scheme to create a two-tiered

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[865] Petition Pursuant to K.S.A. Chapter 60 for Declaratory and Injunctive Relief at ¶ 2-3, Brown v. Kobach, No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016).

[866] *See id.* at ¶¶ 35-36.

[867] *See id.* at ¶¶ 27-30, 32-34.

[868] Order Granting Temporary Injunction at 7, Brown v. Kobach, No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016) (as memorized in order issued Aug. 11, 2016).

[869] Memorandum Decision and Order, Brown v. Kobach, No. 2016CV550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016).

[870] *See* Complaint for Declaratory and Injunctive Relief, Fish v. Kobach, No. 2:16-cv-02105 (D. Kan. Feb. 18, 2016).

voter registration process in Kansas.[871] At issue this time was a 2013 Kansas law that required documentary proof of citizenship from voter registration applicants applying to register to vote at the Kansas Division of Motor Vehicles.

The National Voter Registration Act (NVRA) requires states to provide people with an opportunity to register to vote when they apply for or renew their driver's licenses at a motor vehicle agency and requires applicants to attest under penalty of perjury that they are U.S. citizens.[872] In enacting the NVRA, Congress specifically rejected allowing states to require documentary proof of citizenship, determining it was "not necessary or consistent with the purposes of this Act" and "could effectively eliminate, or seriously interfere with," the administration or voter registration programs.[873] Despite the clear prohibitions of the NVRA regarding documentary proof of citizenship, which had already been extensively litigated in separate lawsuits, Kansans were required to present additional paperwork demonstrating citizenship in order to register to vote at a motor vehicle agency. In some cases they were not informed of the requirement at all, only finding out later that they had been suspended from registering to vote or purged from the voter rolls.[874] In many cases, because of bureaucratic bungling, individuals who had in fact provided documentary proof of citizenship when registering to vote at a motor vehicle agency were still not duly registered.[875] At the time the complaint was filed, Kansas' enforcement of its proof of citizenship law had blocked over 35,000 individuals from registering to vote.[876]

The plaintiffs alleged that the Kansas documentary proof of citizenship law violated the NVRA, which was enacted to make it easier for Americans to register to vote and maintain their registrations. Plaintiffs sought a declaratory judgment that the law was invalid and an order requiring the state to register the thousands of Kansans who had attempted to register to vote at a motor vehicles office but were denied due to their supposed failure to comply with the documentation requirements.[877]

In June 2018, a federal judge ruled decisively in favor of the plaintiffs and struck down the law after finding it violated the NVRA and the Equal Protection Clause of the U.S.

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[871] *See Brown v. Kobach*, No. 2016-CV-550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016) (mem. op.); *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., Aug. 21, 2015). Both lawsuits successfully prevented Kansas from implementing a dual voter registration system, which was intended to prevent qualified Kansas voters from voting in state and local elections if they did not provide documentary proof of citizenship when they registered to vote using the federal voter registration form.

[872] 52 U.S.C. § 20504.

[873] H.R. CONF. REP. NO. 103-66, at 23 (1993).

[874] Complaint for Declaratory and Injunctive Relief at ¶ 1-8, Fish v. Kobach, No. 2:16-cv-02105 (D. Kan. Feb. 18, 2016).

[875] *Id.* at ¶¶ 46-47.

[876] *Id.* at ¶ 6.

[877] *See id.* at ¶¶ 67-83.

Constitution.[878] The court found that "the law has acted as a deterrent to registration and voting for substantially more eligible Kansans than it has prevented ineligible voters from registering to vote" and that the proof of citizenship requirement had "caused confusion" and "eroded confidence in the electoral system."[879] The judge also held Kansas Secretary of State Kris Kobach in contempt of court for failing to implement her preliminary orders in the case and flouting the court's rules and the rules of civil procedure.[880] The court ordered Kobach to pay the ACLU $26,200 in attorney's fees and attend CLE classes on civil procedure and evidence.[881]

Kansas accepted the contempt ruling but appealed the court's merits ruling to the Tenth Circuit. In March 2019, the Tenth Circuit heard oral arguments for the case. A number of other cases involving similar laws or other actions by Kansas's election officials were stayed pending the Tenth Circuit's decision in this case. In April 2020, the Tenth Circuit affirmed the lower court's ruling and the injunction, finding that the NVRA preempts the documentary proof of citizenship requirement and that the requirement unconstitutionally burdens the right to vote.[882] Defendants petitioned for review by the Supreme Court, but in December 2020, the Supreme Court denied certiorari, leaving in place the findings of the lower courts.[883]

92. (a) Common Cause v Rucho – North Carolina 2016

Common Cause filed suit challenging North Carolina's remedial 2016 redistricting map, which was adopted by the state legislature after the previous map was struck down by a federal court as an unconstitutional racial gerrymander.[884] The challenge was based on allegations that the map was a partisan gerrymander violating the Equal Protection Clause of the Fourteenth Amendment because it diluted the electoral strength of individuals who voted against Republican candidates; the First Amendment, by burdening and retaliating against individuals who voted against Republican candidates on the basis of their political beliefs and association; Article I, Section 2 of the U.S. Constitution, which provides that members of the House of Representatives will be chosen by the people of the several states, by usurping the right of the voters to select their preferred candidates for Congress; and Article 1, Section 4 of the U.S. Constitution because the legislature exceeded its power granted therein.[885] A three-judge panel consolidated the case with a similar challenge,

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[878] *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1054 (D. Kan. 2018).

[879] *See id.* at 1119.

[880] *See Fish v. Kobach*, 294 F. Supp. 3d 1154 (D. Kan. 2018).

[881] *Fish*, 309 F. Supp. 3d at 1119.

[882] *Fish v. Schwab*, 957 F.3d 1105 (10th Cir.), cert. denied, 141 S. Ct. 965, 208 L. Ed. 2d 499 (2020).

[883] *Schwab v. Fish*, 141 S. Ct. 965, 208 L. Ed. 2d 499 (2020).

[884] *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016).

[885] Complaint for Declaratory Judgment and Injunctive Relief at ¶¶ 25-54, Common Cause v. Rucho, No. 1:16-CV-1026 (M.D.N.C. Aug. 5, 2016).

League of Women Voters v. Rucho,[886] and denied a motion to dismiss filed by the defendants.[887]

In January 2018, the court in a lengthy opinion found for the plaintiffs on all of their claims, held that the map was an unconstitutional partisan gerrymander, enjoined use of the map, and directed the legislature to adopt yet another remedial map.[888] The court denied the defendants' motion to stay its ruling pending a Supreme Court decision in *Gill v. Whitford*, a separate partisan gerrymandering challenge to Wisconsin's state assembly maps.[889] Thereafter, the defendants filed an emergency application for a stay with the Supreme Court, which was granted in January 2018.[890] Subsequent to the Supreme Court's decision in *Whitford*, the case was remanded for further consideration.[891] In August of 2018, a three-judge panel issued a decision again finding the map unconstitutional on all counts asserted by the plaintiffs.[892] The panel subsequently granted defendants' motion to stay pending Supreme Court review.[893]

The Supreme Court agreed to hear the appeal. The ACLU, the New York Civil Liberties Union, ACLU of North Carolina, and ACLU of Maryland jointly filed an amicus brief arguing that partisan gerrymandering claims are justiciable and that the plaintiffs in the two cases under review had established unconstitutional gerrymanders.[894] The amicus brief argued that partisan gerrymandering violated the First Amendment when districts are drawn with the purpose and effect of entrenching partisan advantage because the First Amendment commands neutrality regarding the regulation of speech and other forms of political expression. The ACLU amici also stressed that courts in various cases had used workable evidentiary tools to determine whether an improper partisan gerrymander had taken place.

Despite the series of holdings of five separate federal district courts finding partisan gerrymandering unconstitutional on First Amendment and other grounds, on June 27,

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[886] Order on Joint Motion to Consolidate for Discovery and Trial, Common Cause v. Rucho, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Feb. 7, 2017).

[887] Order Denying Defendants' Motions to Dismiss, Common Cause v. Rucho, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Mar. 3, 2017).

[888] *See Common Cause v. Rucho*, 279 F .Supp. 3d 587, 690-92 (M.D.N.C. 2018).

[889] *Common Cause v. Rucho*, 284 F. Supp. 3d 780 (M.D.N.C. 2018)

[890] *Rucho v. Common Cause*, 138 S. Ct. 923 (2018).

[891] *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018).

[892] *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018).

[893] Order Granting Defendants' Motion to Stay, Common Cause v. Rucho, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Sept. 12, 2018).

[894] Brief of ACLU, NYCLU, ACLU of North Carolina, and ACLU of Maryland as *Amicus Curiae* in Support of Affirming District Court Judgments, Rucho v. Common Cause, No. 18-422; 18-72 (Mar. 8, 2019).

2019, the Supreme Court held that partisan gerrymandering claims are nonjusticiable, vacated the lower court's decision in *Rucho*, and remanded the case for dismissal.[895]

(b) Benisek v. Lamone – Maryland 2013

In November 2013, a set of plaintiffs filed a complaint in the U.S. District Court for the District of Maryland challenging the congressional redistricting plan enacted by the Maryland General Assembly following the 2010 Census, alleging the plan constituted violations of Article 1, Section 2 of the U.S. Constitution and the First and Fourteenth Amendments.[896] At issue were the remedial maps for Maryland's Fourth, Sixth, Seventh, and Eighth congressional districts, each of which contained non-contiguous and demographically distinct segments that resulted in election outcomes that skewed Democratic. The case was initially dismissed in 2014 as nonjusticiable and for failure to state a claim by a district court judge without convening a three-judge panel.[897] The dismissal was affirmed by the Fourth Circuit,[898] and the plaintiffs appealed to the Supreme Court which granted review.[899] In December 2015, the Supreme Court unanimously rejected the decisions of the lower courts to dismiss the case without convening a three-judge panel, which the Court determined was required by federal law.[900]

On remand, a three-judge panel denied the defendants' motion to dismiss, holding that the plaintiffs presented a justiciable claim,[901] and in 2017 the plaintiffs filed a motion for a preliminary injunction blocking the use of the maps and, alternatively, summary judgment. The district court denied the plaintiffs' request for a preliminary injunction, held the summary judgement motion in abeyance, and entered an order staying any further proceedings pending a decision by the Supreme Court in *Gill v Whitford*, another highly anticipated partisan gerrymandering case.[902] The plaintiffs filed an appeal to the Supreme Court seeking to overturn the lower court's denial of a preliminary injunction.[903] The ACLU submitted an amicus brief supporting the appellants, principally arguing for a standard of review for partisan gerrymandering cases that requires a showing of legislative intent to secure a partisan advantage and that the resulting map has the effect of entrenching the favored party against changes in voter preferences. The brief also argued that the assessment of partisan gerrymandering should focus on the plan as a whole, rather than on

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[895] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019).

[896] *See generally* Complaint, Benisek v. Lamone, No. 1:13-cv-03233 (D. Md. Nov. 5, 2013); Amended Complaint, Benisek v Lamone, No. 1:13-cv-03233 (D. Md. Dec. 2, 2013); Second Amended Complaint, Shapiro v. McManus, Case No. 13-cv-3233 (D. Md. Mar. 3, 2016).

[897] *Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D. Md. 2014).

[898] *Benisek v. Mack*, 584 Fed. Appx. 140 (4th Cir. 2014) (per curiam).

[899] *Shapiro v. Mack*, 135 S. Ct. 2805 (2015).

[900] *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015).

[901] *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586 (D. Md. 2016).

[902] *Benisek v. Lamone*, 266 F. Supp. 3d 799, 816 (D. Md. 2017).

[903] Plaintiffs' Notice of Appeal, Benisek v. Lamone, No. 13-cv-3233 (D. Md. Aug. 25, 2017).

a single district.[904] In June 2018, the Supreme Court affirmed the decision not to preliminarily enjoin the map in a per curiam opinion, finding that it was not abuse of discretion.[905] The Court issued its decision in *Whitford* the same day.[906]

The district court subsequently took up and granted the plaintiffs' motion for summary judgment, granted the plaintiffs' request to permanently block further use of the 2011 plan, and ordered new maps be drawn.[907] The defendants appealed the decision to the U.S. Supreme Court, and the plaintiffs consented to a discretionary stay of the order pending appeal.[908] In January 2019, the Supreme Court announced that *Benisek* would be heard along with *Common Cause v. Rucho*, discussed *supra*. As discussed above, the ACLU, the New York Civil Liberties Union, ACLU of North Carolina, and ACLU of Maryland filed an amicus brief arguing that partisan gerrymandering claims are justiciable and that the *Benisek* plaintiffs—along with plaintiffs in *Rucho*—had proven unconstitutional gerrymanders.[909] In June 2019, as it did with *Rucho*, the Supreme Court held that partisan gerrymandering claims are nonjusticiable, vacated the lower court's decision in *Benisek*, and remanded the case with instructions to dismiss for lack of jurisdiction.[910]

93. ACLU v. Trump – Washington D.C. 2017

The ACLU filed a lawsuit in federal court against President Donald Trump, Vice President Mike Pence, and the Pence-Kobach Commission, alleging that Trump's newly created Presidential Advisory Commission on Election Integrity violated federal law by holding its meetings behind closed doors and failing to allow documents to be available for public inspection in violation of the Federal Advisory Committee Act.[911] Kansas Secretary of State Kris Kobach was appointed Vice Chair of the committee. Because of Kobach's involvement in a number of lawsuits surrounding unlawful voter suppression tactics, many civil rights organizations were apprehensive that the commission would be used to justify nationwide voter suppression measures.[912] The lawsuit sought declaratory, injunctive, and mandamus

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[904] Brief of the ACLU, ACLU of Maryland, and NYCLU as *Amici Curiae* in Support of Appellants, No. 17-333 (Jan. 29, 2018).

[905] *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam).

[906] *Gill v. Whitford*, 138 S. Ct. 1916 (2018). The Court in *Whitford* principally addressed the issue of standing and remanded the case back to the lower court on that issue.

[907] *Benisek v. Lamone*, 348 F.Supp. 493, 525 (D. Md. 2018).

[908] Order Granting In Part Consent Motion to Stay, *Benisek v. Lamone*, No. 17-333 (Nov. 16, 2018).

[909] Brief of ACLU, NYCLU, ACLU of North Carolina, and ACLU OF Maryland as *Amicus Curiae* in Support of Affirming District Court Judgments, Rucho v. Common Cause, No. 18-422; 18-72 (Mar. 8, 2019).

[910] *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

[911] Complaint for Declaratory and Mandamus Relief, ACLU v. Trump, No. 1:17-cv-01351 (D.D.C. July 10, 2017).

[912] *See, e.g.*, Press Release, Civil and Human Rights Coalition Blasts Presidential Commission on Election 'Integrity,' (May 11, 2017), https://civilrights.org/2017/05/11/civil-and-human-rights-coalition-blasts-presidential-commission-on-election-integrity/.

relief, requiring the commission to hold open meetings and make all records and minutes open for public inspection.[913]

The district court denied the request for a preliminary injunction in July 2017.[914] The ACLU filed an amended complaint in January 2018[915] after commission documents were released in a related case in the same court filed by a member of the commission itself.[916] On the same day as the ACLU's filing, Trump issued an executive order terminating the commission.[917] The defendants moved to dismiss for mootness, but the parties agreed to a stay while the a similar case, Dunlap v. Presidential Advisory Commission on Election Integrity, is being decided. As the Commission no longer exists, the ACLU moved to dismiss without prejudice in July 2020, which the court granted.[918]

94. Missouri NAACP v. State of Missouri – Missouri 2017

On June 8, 2017, the Missouri NAACP and the League of Women Voters of Missouri, represented by the ACLU and Advancement Project, filed a petition for injunctive and declaratory relief with respect to the requirements of Missouri's new voter ID law, arguing that the law fails to provide mandated funding to properly implement the law.[919] Specifically, the petition alleged that there was insufficient appropriation of state funds to cover all costs associated with implementing the law, including all costs for related public education, free voter IDs and birth certificates, and training of poll workers. The plaintiffs argued that the law could not be enforced because Section 115.427.6(3) provides that, "If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced."[920] According to the petition, the Secretary of State and Department of Revenue's combined reasonably necessary implementation costs would total nearly $6 million, which is more than 350% of the actual appropriation.[921]

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[913] *See generally* Complaint for Declaratory and Mandamus Relief, American Civil Liberties Union v. Trump, No. 1:17-cv-01351 (D.D.C. July 10, 2017), https://www.aclu.org/legal-document/american-civil-liberties-union-v-donald-trump-complaint.

[914] *American Civil Liberties Union v. Trump*, 266 F.Supp.3d 133 (D.D.C. 2017).

[915] Amended Complaint for Declaratory, Injunctive, and Mandamus Relief, American Civil Liberties Union v. Trump, No. 1:17-cv-01351 (D.D.C. Jan. 3, 2018).

[916] *See Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 286 F.Supp.3d 96 (D.D.C. 2017).

[917] Exec. Order No. 13820, 83 Fed. Reg. 969 (Jan. 3, 2018).

[918] Plaintiffs' Notice of Voluntary Dismissal, ACLU v. Trump, No. 1:17-cv-01351 (D.D.C. Jul 20, 2020); Order, ACLU v. Trump, No. 1:17-cv-01351 (D.D.C. Jul 22, 2020) (dismissing case without prejudice).

[919] *See* Petition for Injunctive and Declaratory Relief at ¶¶ 3-6, 34-39, Mo. NAACP v. Missouri, No. WD81484 (Mo. Cole Cty. Cir. Ct. 2017).

[920] *Id.* at ¶ 39.

[921] *Id.* at ¶ 35.

The Circuit Court of Cole County, Missouri, granted the state's motions for judgment on the pleadings and dismissed the case without prejudice on January 2, 2018.[922] The Missouri NAACP and the League of Women Voters timely appealed to the Missouri Court of Appeals. The court found on October 30, 2018, that the appellants' claims against the state were not precluded by sovereign immunity or on the ground that appellants' suit was not ripe for adjudication.[923] The court determined that the trial court's judgment on the pleadings and dismissal for failure to state a claim was reversible error: "The petition alleged that the insufficiency of the appropriation was demonstrated by the disparity between the cost estimates to implement the statute in Fiscal Year 2018 which were submitted to the legislature and the legislature's actual appropriation for Fiscal Year 2018, and was demonstrated in part by the allegedly inadequate manner in which the Secretary of State sought to discharge his advance-notice obligations. The allegations in Appellants' petition adequately pleaded a claim alleging insufficient appropriation."[924]

Trial in the case was held in August 2019, and post-trial briefing was completed in October 2019. A decision is pending.

95. Whitest v. Crisp County Georgia Bd. of Education – Georgia 2017

The ACLU brought suit against Crisp County, Georgia, challenging the at-large method of electing members of the county's Board of Education under Section 2 of the Voting Rights Act. Crisp County has six members of the Board of Education who each serve six-year staggered terms in non-partisan elections. The suit seeks to prove that this method prevents Black community members, who make up 43% of Crisp County, from electing even one representative of their choice.[925] The plaintiffs have requested that the court enjoin any elections under the existing at-large method and redistrict in a way that complies with Section 2 of the Voting Rights Act, allowing areas of the county that are heavily populated with black citizens to elect their own representative.[926]

The case was stayed for several years while the parties underwent unsuccessful mediation efforts to discuss a proposed settlement involving single-member districts. In August 2020, the stay was lifted, and the case is now in discovery.

96. NAACP v. East Ramapo Central Sch. Dist. – New York 2017

The NAACP, represented by NYCLU, filed a lawsuit challenging the at-large method of electing members of the East Ramapo Central School District, alleging that the method allowed the white majority in the community to control the entire board and effectively

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[922] *State Conf. of NAACP v. Missouri*, 563 SW 3d 138, 145-146 (Mo. Ct. of App. 2018).

[923] *Id.* at 147-48.

[924] *Id.* at 151.

[925] Complaint at 4, Whitest v. Crisp Cty. Bd. of Ed., No. 1:17-cv-00109-LJA (M.D. Ga. June 14, 2017).

[926] *Id.* at 7.

disenfranchise the minority members of the community.[927] The suit further alleged that the at-large voting method filled the school board with white representatives who voted to redirect state funds into predominantly-white private schools, leaving predominantly-minority public schools underfunded (over 99% of private-school students in East Ramapo are white, while 96% of public-school students in East Ramapo are students of color).[928] The only board member elected with Black and Latino voter support was initially forbidden from serving, until the legislature stepped in and passed a law restoring her full term.[929]

East Ramapo has been under state oversight since 2015 when a state report found that the district favored the needs of private school students over public school students and that the district had eliminated nearly 450 public school positions between 2009 and 2014, including 200 teachers as well as all social workers. Additionally, the state-appointed monitor found that public school programs for kindergarten, arts, athletics, and music were cut, while private school programs were increased.[930]

The case was filed in the Southern District of New York, with several Black and Latino parents of public school students serving as plaintiffs. The court denied the school board's motion to dismiss in mid-2018. In May 2020, following a bench trial spanning seventeen days, the district court found that the district's at-large method of elections resulted in minority vote dilution in violation of the Voting Rights Act.[931] The court found that the election system gave Black and Latino residents less opportunity to elect representatives of their choice, and enjoined the district from using this at-large system moving forward, ordering a plan to be drawn with nine single-member districts.[932] The school district appealed to the Second Circuit, which affirmed the district court's decision in January 2021.[933] The Second Circuit held that the totality of circumstances supported a finding of a violation of Section 2 of the Voting Rights Act.

97. Saucedo v. Gardner – New Hampshire 2017

Individual plaintiffs, represented by the ACLU, filed a lawsuit in 2017 challenging New Hampshire's signature match requirement for absentee ballots that required local election officials to compare the signature of every voter's absentee ballot application with the signature on an affidavit sent with the ballot.[934] An election official was required to reject

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[927] Complaint, *NAACP v. East Ramapo Central Sch. Dist.*, No. 7:17-cv-08943-CS-JCM (S.D.N.Y. Nov. 16, 2017).

[928] Complaint at 3.

[929] Complaint at 13.

[930] Complaint at 14.

[931] *NAACP v. E. Ramapo Sch. Dist.*, 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).

[932] *Id.* at 417-18.

[933] *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

[934] *See* Complaint for Declaratory and Injunctive Relief at ¶ 15, Saucedo v. Gardner, No. 1:17-cv-00183 (D.N.H. May 10, 2017).

the ballot without notice to the voter if—using no objective criteria—the signature did not appear to them to conform to what they envisioned was a matching signature.[935] In doing so, election officials had rejected the ballots of several hundred absentee voters in recent elections.[936] The plaintiffs argued that this procedure violated voters' rights under the Fourteenth Amendment and Americans with Disabilities Act.

The plaintiffs' summary judgment submission included testimony concerning New Hampshire's processing of absentee ballots and statistics from the 2016 general election regarding the rejection of absentee ballots.[937] It also included the expert report of a forensic document examiner who specialized in handwriting and signature identification. The expert opined that a person's signature may vary for a variety of reasons, that variations were more prevalent in persons who are elderly, disabled, or who speak English as a second language, and that extensive training and several exemplars are required for proper signature analysis.[938] He further predicted that New Hampshire election officials would likely make erroneous determinations due to lack of training and multiple exemplars.[939]

The district court granted the motion for summary judgment on the plaintiff's facial challenge on Fourteenth Amendment procedural due process grounds.[940] The court reasoned that the signature match requirement "fails to guarantee basic fairness" under the Fourteenth Amendment for several reasons: it vested moderators "with sole, unreviewable discretion to reject ballots due to a signature mismatch"; the "absence of training and functional standards on handwriting analysis"; and "the lack of any review process or compliance measures."[941] Since the court granted relief based on the plaintiffs' procedural due process claim, it declined to address their remaining claims. Based on its liability finding, the court permanently enjoined enforcement of the New Hampshire statute.[942] New Hampshire did not appeal.

98. Peter La Follette v. Alex Padilla – California 2017

An individual plaintiff and the ACLU of North California filed suit in state court in 2017 challenging California's signature-match requirement for mailed ballots. This provision of California law required local election officials to reject vote-by-mail ballots if they believed the signature on a ballot envelope did not match the signature on file for the voter. Officials did so without notice to the voter or any opportunity to cure the perceived mismatch. The

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[935] *Ibid.*

[936] *Id.* at ¶ 16.

[937] Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment as to All Claims at¶ 50, No. 1:17-cv-00183 (Mar. 19, 2018).

[938] *Saucedo v. Gardner,* 335 F. Supp. 3d 202, 205-206 (D.N.H. Aug. 14, 2018).

[939] *Id.* at 212.

[940] *Id.* at 202.

[941] *Id.* at 222.

[942] *Id.*

plaintiffs argued that this requirement violated voters' rights to due process and equal protection under the Fourteenth Amendment and the California Constitution.[943]

In the 2016 general election, over half of California's 14.6 million voters voted by mail. An estimated 45,000 absentee voters' ballots were rejected due to a signature mismatch, without giving voters adequate notice or an opportunity to cure.[944] In support of their motion for a writ of mandate prohibiting the California Secretary of State and county registrars from rejecting ballots due to signature mismatches, the plaintiffs submitted several declarations addressing factual issues. They also submitted declarations from a forensic document expert in handwriting and signature identification and a political sociologist who conducted a study of vote-by-mail use by California voters.[945]

The California Superior Court granted the plaintiffs' motion for a writ of mandate in March 2018.[946] The court held that California's requirement facially violated the due process clauses of the federal and state constitutions because it "fails to provide for notice that a voter is being disenfranchised and/or an opportunity for the voter to be heard," which are "fundamental rights."[947] The court relied on experts who "cite several reasons why a person's signature may differ on two occasions"[948] and cited several federal court rulings that invalidated similar signature match laws.[949] The court effectively granted injunctive relief by ordering that "no ballot may be rejected based on a mismatched signature without providing the voter with notice and an opportunity to cure before the election results are certified."[950]

California appealed to the California Court of Appeal in April 2018. In December 2018, the court of appeals dismissed the appeal as moot because California passed new legislation in September 2018 that provides voters with an opportunity to correct or verify a mismatched signature before the certification of election results, which implemented the remedy sought by the plaintiffs in this case.

99. Common Cause Indiana v. Lawson – Indiana 2017

The ACLU, ACLU of Indiana, and Demōs filed a lawsuit in federal court on behalf of Common Cause Indiana challenging a state law that permitted election officials to immediately purge the registrations of Indiana voters based on an interstate matching

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[943] Verified Petition for Writ of Mandate and Memorandum of Points & Authorities at ¶ 65-75, La Follette v. Padilla, No. CPF-17-515931 (Sup. Ct. Cal. Aug. 23, 2017).

[944] *Id.* at ¶ 41.

[945] *See generally id.*

[946] Order Granting Plaintiffs' Motion for Writ of Mandate, La Follette v. Padilla, No. CPF-17-515931 (Sup. Ct. Cal. Mar. 5, 2018).

[947] *Id.* at 6.

[948] *Id.* at 2.

[949] *Id.* at 4-5.

[950] *Id.* at 6.

program known as the "Interstate Voter Registration Crosscheck Program" (Crosscheck). Indiana would remove voters flagged by the faulty matching system without notifying voters or any grace period to cure.[951]

The ACLU argued that Crosscheck was inaccurate and unreliable, utilizing a matching protocol that—according to a study by a team of researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft—incorrectly flagged people as potential double voters more than 99% of the time.[952] The same study found that Crosscheck's standard procedure, as applied by Indiana, would wrongfully eliminate the registrations of more than 300 legitimate voters for every potential double vote prevented.[953] Crosscheck also had racially discriminatory outcomes according to numerous studies evaluating the program and its methodology. The flawed system flagged voter registration records with the same first and last name appearing in more than one state, which disproportionately targeted voters of color, who are much more likely to have similar first and last names according to U.S. census data, for removal.[954] An analysis also showed that Crosscheck flagged one in six Latinos, one in seven Asian Americans, and one in nine African Americans as potential double registrants.[955]

The suit charged that Indiana's purge procedures violated the National Voter Registration Act (NVRA), which requires states to follow a minimum notice process and waiting period before a state may remove a voter from the rolls and that voter registration list maintenance programs be reasonable, uniform, and nondiscriminatory. Crosscheck was championed and administered by then Kansas Secretary of State Kris Kobach, who has a long history of initiating and implementing numerous voter suppression tactics. A federal court granted the ACLU's request for a preliminary injunction in 2018, blocking implementation of the new law.[956]

Indiana appealed the preliminary injunction to the Seventh Circuit. In August 2019, a unanimous panel of the Seventh Circuit affirmed the district court's preliminary injunction. The Seventh Circuit concluded that the organizational plaintiffs had standing to challenge

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[951] Complaint for Declaratory and Injunctive Relief, Common Cause Indiana v. Lawson, No. 1:17-cv-03936 (S.D. Ind. Oct. 27, 2017).

[952] *Id.* at ¶ 43 (citing SHARAD GOEL ET AL., ONE PERSON, ONE VOTE: ESTIMATING THE PREVALENCE OF DOUBLE VOTING IN U.S. PRESIDENTIAL ELECTIONS, 2-3, 25-26 (Harv. Univ., Working Paper, Jan. 13, 2017), https://scholar.harvard.edu/files/morse/files/1p1v.pdf.).

[953] *See* SHARAD GOEL ET AL., ONE PERSON, ONE VOTE: ESTIMATING THE PREVALENCE OF DOUBLE VOTING IN U.S. PRESIDENTIAL ELECTIONS 1 (Harv. Univ., Working Paper, Jan. 13, 2017).

[954] Complaint for Declaratory and Injunctive Relief at ¶ 47, Common Cause Indiana v. Lawson, No. 1:17-cv-03936 (S.D. Ind. Oct. 27, 2017).

[955] *Id.*

[956] *Common Cause Indiana v. Lawson*, 327 F.Supp.3d 1139 (S.D. Ind. 2018). A separate lawsuit challenging Crosscheck was filed by the Indiana State Conference of NAACP and League of Women Voters of Indiana in federal court and a preliminary injunction was granted in that case as well. *Indiana State Conf. of NAACP v. Lawson*, 326 F.Supp.3d 646 (S.D. Ind. 2018). The cases were consolidated on appeal by the Seventh Circuit.

Indiana's list maintenance program.[957] Regarding the plaintiffs' likelihood of success on the merits, the Seventh Circuit concluded that Indiana's policy of "remov[ing] [voters] from the rolls based on Crosscheck without direct notification of any kind" appeared "inconsistent with the NVRA" "on its face."[958] The court explained that removal from voter lists based on "an inference from information provided by Crosscheck" could not likely be construed as a "request for removal . . . from the registrant" as the NVRA demands.[959] Separately, the court concluded that Indiana's argument that a notification from Crosscheck qualified as "confirmation in writing" that a voter moved was also likely to fail, as it "defie[d] the structural logic of the [NVRA] by allowing a state to bypass [its] notice procedure."[960]

On remand, the district court stayed litigation until May 1, 2020 to allow the parties an opportunity to resolve the case. In this period, the state passed a new law SEA 334, which amended SEA 442, and state defendants moved to dismiss the cases on the basis they were mooted out by the new law. However, on August 20, 2020, the district court denied this motion, and granted summary judgment in plaintiffs' favor, finding the new law suffered from the same defects as the old one, because it allowed cancellation of voter registrations without direct contact from the voter.[961] The state then appealed the ruling to the Seventh Circuit, which held oral argument on April 22, 2021.[962] A decision is pending.

100. League of United Latin American Citizens v. Reagan – Arizona 2017

In November 2017, the League of United Latin American Citizens and the Arizona Students' Association, represented by Campaign Legal Center, filed a lawsuit for declaratory and injunctive relief against the Arizona Secretary of State challenging the state's dual registration system. Arizona administered a voter registration system whereby registrants who completed either the state voter registration form or the federal voter registration form (Federal Form)—prescribed by the National Voter Registration Act (NVRA)—without providing documentary proof of citizenship would not be duly registered for both federal and state elections.[963] If a voter completed the Federal Form without documentary proof of citizenship, the voter was only registered to vote in federal elections but not state elections.[964] If a voter completed the state form without documentary proof of citizenship, the voter was not registered in state or federal elections.[965] Additionally, Arizona was failing to register voters who already had provided documentary proof of

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[957] *Common Cause Indiana v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019).

[958] *Id.* at 959.

[959] *Id.* at 960.

[960] *Id.* at 962.

[961] *Indiana Conf. of the NAACP v. Lawson*, 481 F.Supp.3d 826 (S.D. Ind. 2020).

[962] *League of Women Voters of IN v. Sullivan*, No. 20-2815 (7th Cir. 2020).

[963] Complaint for Declaratory and Injunctive Relief at ¶ 1, LULAC v. Reagan, No. 2:17-cv-04102 (D. Ariz. Nov. 7, 2017).

[964] *Id.* at ¶ 3.

[965] *Ibid.*

citizenship to the state through its Motor Vehicle Division (MVD), which the state could have used to confirm citizenship of registrants given the fact that Arizona already had a process of verifying registrant information against the MVD database.[966] Arizona adopted the dual registration practices presumably to get around the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona*, which held that the NVRA preempted Arizona's documentary proof of citizenship requirement for individuals using the Federal Form to register.[967]

The plaintiffs argued that Arizona's dual registration policies unduly burdened the right to vote in violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment. The litigation was ultimately settled through a court-ordered consent decree in June 2018. The consent decree requires that the state provide instructions to county recorders so that voters using the state form would be registered to vote in federal elections, regardless of added documentary proof of citizenship requirements imposed for registration in state elections.[968] The consent decree further requires county recorders to advise registrants of the state's documentary proof of citizenship requirement, provide the necessary information in order to be registered as "full ballot" voters, and provide public education and information on pertinent websites.[969]

Notwithstanding the settlement, the matter continued to create problems for Arizona voters. Prior to the close of voter registration in 2018, Luis Cisneros, a naturalized citizen and Arizona resident, went to update his voter registration after moving only to be told that his registration was rejected because he was incorrectly identified as a noncitizen.[970] Working to correct this error, Mr. Cisneros brought his passport to prove his citizenship but was told by the Pima County Recorder's Office that, contrary to the terms of the consent decree, while he would be registered to vote, his ballot would not count for the 2018 election since it was after the voter registration deadline.[971] The ACLU and the ACLU of Arizona represented Mr. Cisneros and sought to have the Pima County Recorder restore his voter registration and have his ballot counted in the 2018 election. The Pima County Recorder refused twice, so the ACLU filed a motion to compel compliance with the consent decree in the district court, which had continuing jurisdiction over the matter.[972] The Pima County Recorder finally updated Mr. Cisneros's voter registration and sent his ballot to be counted after the filing of the motion. The court held an expedited hearing on both motions. Because Mr. Cisneros's registration was restored and ballot was counted, the district court

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[966] *See id.* at ¶¶ 40-58.

[967] 570 U.S. at 1 (2013).

[968] Consent Decree, LULAC v. Reagan, No. 2:17-CV-04102 (D. Ariz. June 4, 2018).

[969] *Id.*

[970] Motion to Compel Compliance with Consent Decree at 4-5, LULAC v. Reagan, No. 2:17-CV-04102 (D. Ariz. Nov. 9, 2018).

[971] *Id.* at 5.

[972] *Ibid.*

dismissed his motion as moot, and an order denying the plaintiffs' motion to compel was entered in November 2018.[973]

101. League of Women Voters of N.Y. v. N.Y. State Bd. of Elections – New York 2018

Plaintiffs Nicholas Dinnerstein and the League of Women Voters, an organization whose mission is to increase voter registration and participation, brought this lawsuit challenging New York's 25-day voter registration cutoff for arbitrarily disenfranchising tens of thousands of eligible voters in violation of the state constitution. The complaint argued that, "[a]s a direct result of the Voter Registration Cutoff, many thousands of constitutionally eligible voters in every election cycle are denied their fundamental right to vote."[974] The complaint further charged that the voter registration cut-off, which was established nearly 30 years ago, is no longer necessary given the development of a computerized statewide voter registration database, and needlessly disenfranchises thousands of voters. Thus, "[a]dministrative rationales that may have supported the Voter Registration Cutoff at that time are no longer valid and are fundamentally undermined by the dramatic advancements in technology that have since been made."[975]

The complaint asserted that the disenfranchisement violates the state constitution's guarantee of the fundamental right to vote as well as equal protection. The complaint alleged that "[e]very constitutionally eligible voter who is denied the right to vote in even one election cycle suffers a severe and irreparable harm" and that "[t]his severe deprivation cannot be reconciled with the Constitution's prohibition against disenfranchisement and guarantee of the right to vote to every eligible citizen."[976] With respect to equal protection, the complaint explains that "[t]he Voter Registration Cutoff makes voting more difficult for some eligible voters than others, as it unnecessarily imposes a more burdensome 25-day registration cutoff that applies only to some voters—including the individual Plaintiff in this case—while other classes of voters are permitted to register up to ten days before a general election and still vote."[977]

The defendants filed a motion to dismiss the case on January 28, 2019, alleging that the plaintiffs lacked standing to bring the action.[978] On October 4, 2019, the trial court denied the motion to dismiss.[979] On July 28, 2020, plaintiffs moved for a preliminary injunction

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[973] *LULAC v. Reagan*, No. 2:17-CV-04102, 2018 WL 5983009, at *4 (D. Ariz. 2018).

[974] Complaint for Declaratory and Injunctive Relief at ¶ 5, League of Women Voters of N.Y. v. N.Y. State Bd. Of Elections, No. 160342 (N.Y. Sup. Ct. Nov. 6, 2018).

[975] *Id.* at ¶ 6.

[976] *Id.* at ¶ 30.

[977] *Id.* at ¶ 51.

[978] League of Women Voters of New York State v. New York State Bd. of Elections, No. 160342/2018, 2020 WL 5745625 (N.Y. Sup. Ct. Sep. 25, 2020).

[979] *League of Women Voters of N.Y. v. N.Y. State Bd. of Elecs.*, 189 A.D.3d 409, 132 N.Y.S.3d 771 (2020).

which would prevent the city and state boards of election from enforcing the Voter Registration Cutoff for the November 2020 elections.[980] On September 25, 2020, the motion was denied, which was upheld by an appellate court on December 1, 2020.[981]

102. Gill v. Whitford – Wisconsin 2018

Private plaintiffs filed suit in 2015 challenging Wisconsin's plan for state legislative district boundaries as an unconstitutional partisan gerrymander, claiming the redistricting plan intentionally and systematically diluted Democratic voters' strength in elections for state legislative seats. The plaintiffs claimed the map violated the Equal Protection Clause under the Fourteenth Amendment and rights of free association and speech under the First Amendment.[982]

The U.S. District Court for the Western District of Wisconsin, in a lengthy opinion, held for the plaintiffs, finding that the plan was intended to burden the representational rights of Democratic voters and ensure the Republican Party maintained durable control of the legislature.[983] Relying on social science metrics, which measure the intensity of partisan gerrymandering based on the number of "wasted" votes, the court held that the plan was intended to have and resulted in a discriminatory impact on Democrats to obtain state legislative seats.[984] Among the extensive evidence relied upon by the court was its finding that, despite Republicans winning a minority of the statewide legislative assembly votes in 2012, Republicans won 60 of the 99 assembly seats.[985] The court also rejected the defendants' explanation that the disparate representation in election outcomes was attributable to political geography, finding that no inherent geographic advantage could explain the degree of partisanship in Wisconsin's maps.[986]

In 2017, the defendants requested review by the U.S. Supreme Court. In its amicus brief, the ACLU argued that the Wisconsin legislature committed constitutional violations when it "locked up" the political process for the purpose of disabling competition among partisan viewpoints and that the legislative monopoly attained by the Wisconsin legislature violated the First Amendment and the Equal Protection Clause by putting its thumb on the scale of

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[980] Plaintiffs' Memorandum of Law in Support of a Motion for Preliminary Injunction, League of Women Voters of N.Y. v. N.Y. State Bd. Of Elections, No. 160342 (N.Y. Sup. Ct. July 28, 2018).

[981] *League of Women Voters of N.Y. v. N.Y. State Bd. of Elecs.*, 189 A.D.3d 409 (N.Y. App. Div. 2020).

[982] *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018).

[983] *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

[984] *See id.* at 890-96, 898-910.

[985] *See id.* at 899.

[986] *See id.* at 921.

electoral competition.[987] The Court ultimately bypassed the merits of the case, vacated the judgment, and remanded back to the district court on the issue of standing.[988]

On remand, the district court granted in part the Wisconsin State Assembly's motion to stay the case, allowing discovery to proceed, but postponing the trial and decision on the merits until the Supreme Court issued a decision on two other partisan gerrymandering cases from North Carolina and Maryland.[989] Ultimately, the Supreme Court ruled that partisan gerrymandering claims were nonjusticiable in the North Carolina and Maryland cases.[990] As a result, the Wisconsin case was dismissed for lack of jurisdiction in 2019.[991]

103. Georgia Muslim Voter Project v. Kemp – Georgia 2018

On behalf of the Georgia Muslim Voter Project and Asian Americans Advancing Justice-Atlanta, the ACLU and ACLU of Georgia filed a lawsuit against Georgia Secretary of State Brian Kemp and all Georgia county registrars demanding due process for Georgia voters whose absentee ballots or applications were rejected due to an alleged mismatch of signatures. Under Georgia law, county elections officials were required to reject all absentee ballots—as well as absentee ballot applications— of voters whose signature "[did] not appear to be valid" because the signature allegedly did not match the signature on the voter file, without giving prior notice to the voter or an opportunity to review, contest, or appeal that determination.[992] The plaintiffs argued that signatures of the same person could greatly vary for a variety of reasons, including age, physical and mental condition, disability, medication, stress, accidents, and even inherent differences in a person's neuromuscular coordination and stance.[993] Moreover, signature variants were more prevalent in the elderly, disabled, or limited English proficient speakers.[994] Georgia law effectively put elections officials, which having no such qualifications, in the position of acting as handwriting experts.

The plaintiffs argued that the ballot rejection process violated the procedural due process guarantees of the Fourteenth Amendment and unconstitutionally burdened the fundamental right to vote in violation of the Fourteenth Amendment.[995] The plaintiffs sought a temporary restraining order and preliminary and permanent injunctions requiring

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[987] Brief of the American Civil Liberties Union, the New York Civil Liberties Union, and the ACLU of Wisconsin Foundation as *Amici Curiae*, in Support of Appellees, Gill v. Whitford, No. 1601161 (Sept. 6, 2017).

[988] *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

[989] *Whitford v. Gill*, No. 15-cv-421; 18-cv-763, 2019 WL 294800, at *2 (slip copy) (W.D. Wis. Jan. 23, 2019).

[990] *See Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

[991] *Whitford v. Vos*, No. 19-2066, 2019 WL 4571109, at *1 (7th Cir. Jul. 11, 2019).

[992] Complaint at ¶ 1, Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-04789 (N.D. Ga. Oct. 16, 2018).

[993] *Id.* at ¶ 4.

[994] *Ibid.*

[995] *Id.* at ¶¶ 46-65.

election officials to provide absentee voters notice and an opportunity to confirm their identity or otherwise resolve the alleged discrepancy prior to a ballot being rejected, as well as the opportunity to appeal the election officials' decision to reject a ballot due to an alleged signature discrepancy. Notably, Georgia already provided these due process safeguards for other types of balloting issues, including situations where a voter lacks an acceptable photo ID.[996]

In October 2018, the district court granted a temporary restraining order requiring Georgia to offer notice, an opportunity to cure, and an appeals process to voters with perceived signature mismatches.[997] In reviewing the case, the court cited evidence showing that the ballot rejections were applied disproportionately among racial groups. Nearly three times as many Black voters' ballots were rejected than white voters despite the fact that white voters outnumbered black voters two-to-one, and 25% of the rejected ballots came from Asian and Pacific Islander voters despite comprising only 15% of the mail ballot voters.[998] The district court rejected the state's argument that absentee voting, as a privilege rather than a right, did not require the same due process protections as Election Day voting. The court also found that there would be no unreasonable burden involved in extending substantially similar due process safeguards already in place for other balloting issues and that such safeguards would strengthen, rather than weaken (as the state had argued), the integrity of Georgia elections.[999]

The state appealed to the Eleventh Circuit and filed an emergency motion for a stay of the injunction pending appeal, which was denied.[1000] The Eleventh Circuit dismissed the state's argument that extending the safeguards to signature rejections would be burdensome and cause irreparable harm. The court noted that the chair of the board of registrars of one of Georgia's most populous counties had testified that compliance with the order was "pretty straightforward," "easily doable," and would "not really add any burdens to what we are already doing . . . even with a week left until Election Day."[1001] Shortly after the Eleventh Circuit handed down its decision, the Georgia legislature passed a set changes to its elections laws, which included a revision to the state's absentee ballot laws that largely mirrored the due process safeguards ordered by the district court for absentee ballots and applications with perceived signature mismatches.[1002] These laws were in direct response to this suit and other successful lawsuits addressing voter suppression in Georgia. In light of

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[996] *Id.* at ¶ 7.

[997] *See Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018).

[998] *Id.* at 1331.

[999] *Id.* at 1340.

[1000] *Martin v. Kemp*, 1:18-cv-04789, 2018 WL 7822108, at *1 (11th Cir. Nov. 2, 2018).

[1001] *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1268 (11th Cir. 2019) (Pryor, J. concurring).

[1002] *See* H.R. 316, Section 27, 155th Gen. Assem., Reg. Sess. (Ga. 2019); *see also* Press Release, ACLU of Georgia, ACLU of Georgia Lawsuit Results in Changes to State Law (Apr. 4, 2019), https://www.aclu.org/press-releases/aclu-georgia-lawsuit-results-changes-state-law.

the passage of these new laws, the parties jointly agreed to a voluntary dismissal of the case in April 2019.[1003]

104. New Florida Majority, et al. v. Detzner – Florida 2018

This case involved an action for injunctive and declaratory relief brought by the ACLU, ACLU of Florida, and Lawyers' Committee for Civil Rights Under Law, on behalf of New Florida Majority Education Fund, Common Cause, and Mi Familia Vota Education Fund. Plaintiffs sought a statewide week-long extension of the voter registration deadline as the result of Hurricane Michael and problems with the state's online voter registration system in the final days of the registration period. On October 7, 2018, two days before the voter registration deadline, Florida Governor Rick Scott declared a state of emergency in 35 of Florida's 67 counties based on the threat posed by Tropical Storm Michael and issued mandatory and voluntary evacuation orders throughout the state.[1004] At the time, over 5.6 million people, including nearly 3.7 million registered voters, lived in these 35 counties, accounting for over 28% of registered voters in the state.[1005] These announcements caused residents of affected areas to evacuate, causing a major disruption for the last two days of the voter registration period.

Compounding the problem for Florida voters, the state had recently adopted an online voter registration system, but users had been experiencing a number of difficulties with the system in the weeks prior to the voter registration deadline; the ACLU and other organizations warned government officials about these problems repeatedly, but the state did not take steps to resolve the issue.[1006] The inability of Florida residents to use the online system placed an additional burden on Floridians residing in affected counties that otherwise would have been able to register in person. These disruptions had an outsized impact on the ability of voters to register, especially since the final days of the registration period tend to involve the most activity.[1007] The plaintiffs argued that, under the circumstances, the state's refusal to extend the registration deadline amounted to a denial of critical voter registration opportunities, and that, absent relief, tens of thousands of Floridians would likely be prevented from participating in the November 2018 general election.[1008] Florida officials did not present any rationale for why it refused to extend the voter registration deadline as other states had done due to the hurricane, including North Carolina and South Carolina. Moreover, in 2016 a federal court ordered Florida to extend its voter registration deadline by a week due to disruptions caused by Hurricane Matthew,

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[1003] Joint Stipulation of Dismissal, Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-04789 (N.D. Ga. Apr. 15, 2019).

[1004] Complaint for Emergency Injunctive and Declaratory Relief at ¶ 17, New Fla. Majority Educ. Fund v. Detzner, No. 4:18-cv-00466 (N.D. Fla. Oct. 10, 2018).

[1005] *Ibid.*

[1006] *Id.* at ¶¶ 22-23.

[1007] *Id.* at ¶ 24.

[1008] *Id.* at ¶ 4.

which resulted in an additional 80,000 Floridians being able to register;[1009] this case sought similar accommodations in 2018 due to Hurricane Michael.

Florida Secretary of State Ken Detzner issued a directive expressly refused to extend the October 9, 2018, registration deadline despite authorizing Supervisors of Elections, whose offices were closed on the voter registration deadline due to Hurricane Michael, to accept paper registration forms on the day that their offices reopened.[1010] The plaintiffs sued Detzner asserting that the failure to extend the deadline placed an undue burden on Floridians' right to vote and violated the Equal Protection Clause of the Fourteenth Amendment by failing to uniformly establish an extended voter registration deadline throughout the state. The plaintiffs sought an injunction against enforcement of the October 9 registration deadline and a one-week extension of the deadline throughout the state, including registrations through the online voter registration system.

Shortly after filing, this action was consolidated with *Florida Democratic Party v. Detzner*, a case asserting a similar challenge to Florida's failure to extend the voter registration deadline.[1011] Prior to consolidation, the district court in that case denied the Florida Democratic Party's request for a temporary restraining order against enforcement of the voter registration deadline, finding that there was no justification for a statewide extension of the deadline since Secretary Detzner's directive operated as a mandatory extension of the deadline in counties affected by Hurricane Michael. Following consolidation, the court applied the same reasoning to deny the plaintiffs' request for a preliminary injunction in *New Florida Majority*.[1012] In December 2018, a joint motion to dismiss was filed,[1013] and the court granted the voluntary dismissal with prejudice.[1014]

105. Ohio A. Phillip Randolph Institute v. Ryan Smith[1015]— Ohio 2018

This case involved a constitutional challenge to Ohio's congressional redistricting plan as an unconstitutional partisan gerrymander in violation of the Fourteenth Amendment, the First Amendment, and Article I of the U.S. Constitution. In May 2018, Ohio A. Phillip Randolph Institute, the League of Women Voters of Ohio, along with other civil and political organizations and numerous Ohio citizens filed suit against the leaders of the Ohio General Assembly and the Secretary of State.[1016] The plaintiffs argued that following the 2010 Census, Ohio Republicans, with the support and assistance of the national Republican

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[1009] *See id.* at ¶ 20 (summarizing *Fla. Dem. Party v. Scott*, Case No. 4:16-cv-626, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)).

[1010] *Id.* at ¶ 29.

[1011] *Fla Dem. Party v. Scott*, No. 4:18-cv-463 (N.D. Fla. Oct. 10, 2018).

[1012] *See New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (N.D. Fla. Oct. 16, 2018).

[1013] Joint Motion to Dismiss with Prejudice, New Fla. Majority v. Detzner, No. 4:18-cv-00466 (Dec. 11, 2018).

[1014] Order of Dismissal, New Fla. Majority v. Detzner, No. 4:18-cv-00466 (Dec. 13, 2018).

[1015] Larry Householder was subsequently substituted for Ryan Smith as a party.

[1016] Complaint, Ohio A. Philip Randolph Inst. v. Kasich, No. 1:18-cv-357 (S.D. Ohio Feb. 4, 2019).

Party, used advance computer mapping software to create an unlawful congressional map entrenching a 12-4 Republican to Democratic seat ratio. This ratio was notable because Republicans generally captured between 51% to 59% of the total statewide congressional vote for the decade.[1017] For example, in 2012, even though Republicans received 51% of the congressional vote, the challenged map had consistently given Republicans 75% of the congressional seats.[1018] The plaintiffs raised four primary challenges to the constitutionality of Ohio's electoral map: (1) it violated the First Amendment by purposefully disfavoring individuals based on their political views and violating association rights; (2) it substantially burdened the right vote in violation of the Fourteenth Amendment; (3) it violated the Equal Protection Clause of the Fourteenth Amendment by diluting the plaintiffs' votes based on their political affiliation and did so intentionally; and (4) it exceeded Ohio's powers under Article I of the Constitution.[1019]

In August 2018, the three-judge panel assigned to the case denied the defendants' motion to dismiss.[1020] The defendants argued that the plaintiffs' claims were nonjusticiable, lacked standing, and was barred by laches.[1021] As to justiciability, the court found that all three metrics proposed by the plaintiffs to evaluate the constitutionality of Ohio's map ("efficiency-gap," "mean-median difference," and "partisan bias") were potentially viable at the pleading stage of the litigation, rendering the case justiciable.[1022] The court also found that the individual plaintiffs suffered a constitutional injury for purposes of standing under the First Amendment because the challenged maps specifically disfavored the Democratic Party, thereby creating a tangible associational burden, and diluted their votes to such a degree that it made a practical difference in their ability to achieve electoral success.[1023] Similarly, the court found standing for the plaintiffs' Fourteenth Amendment claims because, as residents (or organizational representatives of residents) of particular "cracked" or "packed" districts, the dilution of the plaintiffs' votes constituted an injury-in fact.[1024] The court summarily dismissed the defendants' laches argument because the plaintiffs only sought prospective declaratory and injunctive relief, which laches did not bar.[1025]

[1017] Second Amended Complaint at ¶ 2-3, Ohio A. Phillip Randolph Inst. v. Smith, 1:18-cv-00357 (S.D. Ohio July 11, 2018).

[1018] *Id.* at ¶¶ 2, 86.

[1019] *Id.* ¶¶ 136-169.

[1020] *Ohio A. Phillip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 993 (S.D. Ohio 2018).

[1021] *Id. at* 994.

[1022] *Id.* at 996.

[1023] *Id.* at 997-98. In addition to finding that the plaintiffs had established standing under two separate tests, the court found that the organizational plaintiffs had alleged injuries-in-fact on their own behalf and of their members.

[1024] *Id.* at 999.

[1025] *Id.* at 1001-02.

Following the court's ruling on the pleadings, the defendants filed a motion for summary judgment in January 2019.[1026] The motion for summary judgment rehashed the justiciability and standing arguments already evaluated by the court.[1027] Relying on the same reasoning as before, the three-judge panel denied the defendants' motion in a lengthy opinion, and the case proceeded to trial.[1028] Following an eight-day bench trial, the court issued another lengthy opinion holding Ohio's "partisan gerrymandering unconstitutional."[1029] The court explained that because the Ohio map created "districts that [were] so skewed toward one party that the electoral outcome [was] predetermined," the map violated the First Amendment, the Fourteenth Amendment, and Ohio's Article I powers to regulate elections.[1030] The defendants appealed the ruling. The Supreme Court stayed the ruling of the district court[1031] before ruling in *Rucho v. Common Cause*, which found partisan gerrymandering claims nonjusticeable.[1032] In light of *Rucho*, the Supreme Court vacated the lower court's judgment and remanded the case.[1033] Plaintiffs filed a motion to dismiss the case due to *Rucho*, and the case was dismissed in October 2019.[1034]

106. League of Women Voters of Arizona, et al. v. Reagan – Arizona 2018

In August 2018, the ACLU, the ACLU of Arizona, Demōs, and the Lawyers' Committee for Civil Rights Under Law, on behalf of the League of Women Voters of Arizona, Mi Familia Vota, and Promise Arizona, filed a lawsuit for declaratory and injunctive relief to remedy Arizona's violations of Section 5 of the National Voter Registration Act (NVRA).[1035] Section 5 requires that when an individual notifies a state motor vehicles agency of a change of address, the agency must automatically update the individual's voter registration information, unless the voter affirmatively indicates that their change of address is not for voter registration purposes.[1036] Contrary to this requirement, the Arizona Secretary of State was failing to automatically update the addresses of individuals who changed their

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[1026] Defendants' Motion for Summary Judgment, Ohio A. Philip Randolph Inst. v. Kasich, No. 1:18-cv-357 (S.D. Ohio Jan. 8, 2019).

[1027] *See* Memorandum in Law in Support of Defendants' Motion for Summary Judgment, Ohio A. Philip Randolph Inst. v. Kasich, No. 1:18-cv-357 (S.D. Ohio Jan. 8, 2019).

[1028] *Ohio A. Phillip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 703 (S.D. Ohio 2019).

[1029] *Ohio A. Phillip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 994 (S.D. Ohio 2019).

[1030] *Id.*

[1031] *Chabot v. Ohio A. Philip Randolph Institute*, 139 S. Ct. 2635 (2019).

[1032] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019).

[1033] *Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101, 205 L. Ed. 2d 1 (2019).

[1034] Order, Ohio A. Philip Randolph Institute v. Householder, No. 1:18-cv-00357 (S.D. Ohio Oct. 29, 2019).

[1035] Complaint, League of Women Voters of Ariz. v. Reagan, No. 18-cv-02620 (D. Ariz. Aug. 18, 2018).

[1036] 52 U.S.C. § 20504.

addresses through the Arizona Department of Transportation.[1037] Because of this failure to comply with federal law, Arizona had been consistently at the top of the list of states issuing and rejecting provisional ballots.[1038] To put this in perspective, almost 70% of Arizonans changed their residential address between 2000 and 2010, making Arizona the state with the second highest rate of residents with address changes.[1039] The U.S. Census Bureau estimated that in 2016, more than 800,000 people in Arizona moved within the same county and more than 126,000 moved to a different county.[1040] The plaintiffs also presented information showing that one of the most frequent reasons provisional ballots in Arizona are rejected is because they are cast out-of-precinct. In the 2008 general election, 14,885 out-of-precinct ballots were not counted, constituting 0.6% of total ballots cast.[1041] In the 2012 general election, 10,979 ballots were cast out-of-precinct and not counted, constituting 0.5% of all ballots cast.[1042] Arizona's process also affected its early vote by mail system because if a voter moves within the state and the state does not automatically update their registration address in accordance with the NVRA, then the voter would not receive their early voting ballot.[1043] In 2016, 75% of Arizona voters utilized vote by mail. Accordingly, the plaintiffs sought an injunction to compel compliance with Section 5 of the NVRA and to count out-of-precinct ballots cast in the 2018 elections for races for which voters were eligible.

Following a hearing for a preliminary injunction, the district court rejected the plaintiffs' request.[1044] While the court indicated there may be a substantive NVRA violation, the court found that the plaintiffs had little chance to prevail on the merits due to the defendants' lack of authority to unilaterally alter voter registration procedures and compel Arizona election officials to count out-of-precinct ballots.[1045] The court also concluded that the plaintiffs were unable to show irreparable harm, citing a lack of evidence indicating that individuals who updated their address with the Arizona Department of Transportation had

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[1037] *See* Complaint at ¶ 32, League of Women Voters of Ariz. v. Reagan, No. CV-18-02620 (D. Ariz. Aug. 18, 2018).

[1038] *Ibid.*

[1039] *Id.* at ¶ 29.

[1040] *Id.* This matters because under Arizona law if a voter moves between counties he or she is unable to vote at either their new or old polling place if their address is not up to date. *See* A.R.S. §§ 16-122, 16-135, 16-584. If a voter moves within the same county and attempts to vote at their old polling location, the voter would still be disenfranchised because Arizona law does not permit any part of an out-of-precinct ballot to count, even for races for which the voter is otherwise eligible, such as statewide or federal offices. *Id.*

[1041] *Id.* at ¶ 32.

[1042] *Ibid.*

[1043] *Id.* at ¶ 33.

[1044] *League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620, 2018 WL 4467891, at *10 (D. Ariz. Sept. 18, 2018).

[1045] *Id.* at *6.

their ballots invalidated.[1046] In January 2020, the parties entered into a settlement agreement wherein Arizona agreed to comply with the NVRA's requirements, including automatically updating voter registration addresses as part of any driver's license address change (unless a voter opts out of such an update).[1047]

107. Rangel-Lopez v. Cox – Kansas 2018

On October 26, 2018, just days before the 2018 general election, the ACLU and ACLU of Kansas, on behalf of the League of United Latin American Citizens and an individual plaintiff, filed a lawsuit challenging the unilateral decision of the county clerk of Ford County, Kansas, to move the only voting site in its county seat of Dodge City to a location outside of the city.[1048] Ford County is a majority-minority county in Kansas, largely due to the demographics of Dodge City. At the time of the filing, Hispanic residents made up approximately 53% of the county's population, five times the percentage of Hispanic residents in Kansas.[1049] Prior to the polling location change, Dodge City's Civic Center had been the only polling location in the city since 1998 and used as recently as August 2018 for the primary election.[1050] The county clerk's decision to move the city's only polling site also came after a year of efforts by voters and civic organizations requesting the clerk to add additional polling locations to better serve the area's Hispanic voters. The new location was over a mile from the nearest bus stop and did not have sidewalks for the majority of the route between the bus stop and new polling location.[1051] A significant number of people in Dodge City were dependent on public transit because of income, age, and disability.[1052] In 2016, Dodge City Public Transportation estimated that approximately 36% of the county had a potential need for public transportation, and 40% of households in Ford County did not own a car or shared a single vehicle among multiple family members.[1053] Additionally, the county's poverty rate was higher than the rest of Kansas, and its Hispanic residents were twice as likely than their white neighbors to be poor.[1054] Given the socioeconomic burdens faced by the city's Hispanic voters, the plaintiffs argued that they would be disproportionately burdened by the polling location change.

The plaintiffs alleged that the county clerk's actions violated the First and Fourteenth Amendments and Section 2 of the Voting Rights Act and sought a temporary restraining order to require the clerk to open an additional polling place in Dodge City for the upcoming

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[1046] *Id.* at *7.

[1047] Joint Motion and Stipulation for Dismissal Pursuant to Settlement Agreement, *League of Women Voters of Arizona v. Reagan*, No. 2:18-CV-02620 (D. Ariz. Jan. 6, 200), Dkt. 67.

[1048] Complaint at ¶ 1, LULAC v. Cox, No. 2:18-cv-02572 (D. Kan. Oct. 26, 2018).

[1049] *Id.* at ¶ 8.

[1050] *Id.* at ¶ 6.

[1051] *Id.* at ¶ 11.

[1052] *Id.* at ¶ 9.

[1053] *Ibid.*

[1054] *Id.* at ¶ 8.

election and a permanent injunction requiring her to open locations accessible by public transportation.[1055] The judge denied the plaintiffs' request for a temporary restraining order on November 1, 2018, after a hearing on the matter, determining a late voting change to revert the polling site back to its original location was not in the public interest because it "likely would create more voter confusion than it would cure."[1056] The court did not come to a determination on whether the plaintiffs would have succeeded on the merits because of the limited record before it, but expressed concern with the facts that had been presented in support of the temporary restraining order.[1057]

After national attention on the issue and increasing pressure, the county clerk announced that she would open two additional polling locations in the city, and the plaintiffs filed a motion to voluntarily dismiss the action without prejudice, which was granted on January 29, 2019.[1058] The county expended approximately $90,000 on legal fees as a result of the lawsuit.

108. Maricopa County Republican Party v. Reagan – Arizona 2018

In 2018, some Arizona county recorders publicly disclosed that they stopped notifying voters that their absentee ballot signatures were deemed mismatched as of 7:00 p.m. on Election Day, effectively denying these voters an opportunity to prove their signatures were genuine even though they had turned their ballots in on time.[1059] This policy was especially arbitrary in light of the fact that Arizona had a process in place that permitted voters who cast provisional ballots up to five business days to cure those ballots.[1060]

To address this issue, the ACLU, ACLU of Arizona, Campaign Legal Center, and others sent a letter to the Arizona Secretary of State and county recorders two weeks prior to the 2018 election warning that this practice violated the due process and equal protection clauses of the Constitution.[1061] The letter informed the Secretary of State that, outside of Pima County, election officials were not providing notice to voters with alleged mismatched signatures if the mail-in ballot was received on or near Election Day. As a result, whether an eligible voter's mail-in ballot would be counted was arbitrary and dependent on which county they resided in and when they turned in their ballot within the allowable window.[1062] The letter also highlighted the arbitrary nature of the signature matching

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[1055] *Id.* at ¶ (a) - (d)

[1056] *Rangel-Lopez v. Cox*, 344 F.Supp.3d 1285, 1290 (D. Kan. 2018).

[1057] *Id.* at 1291.

[1058] Order Granting Voluntary Motion to Dismiss, *LULAC v. Cox*, No. 18-2572 (D. Kan. Jan. 29, 2019).

[1059] *See* Letter from ACLU et al. to Michele Reagan, Secretary of State, Ariz. (Oct. 22, 2018), https://campaignlegal.org/document/letter-arizona-secretary-state-michele-reagan-regarding-signature-matching-process.

[1060] *See id.* at 2.

[1061] *See id.* at 5.

[1062] *Id.* at 7.

requirement, since election officials comparing signatures were not handwriting experts nor did they follow uniform procedures or standards in comparing signatures.[1063] The letter argued that the various practices across the state violated the Fourteenth Amendment in three ways: (1) by depriving voters of procedural due process; (2) by imposing an undue burden on the fundamental right to vote; and (3) by counting votes in an arbitrary manner in violation of the Equal Protection Clause.[1064] Accordingly, the letter urged the Arizona Secretary of State to issue immediate guidance to county recorders requiring that all voters whose ballots were flagged for allegedly mismatched signatures be provided notice and an opportunity to cure before their ballots were rejected. Alternatively, the letter requested all county recorders to independently implement procedures ensuring notice to all voters with "mismatched" signatures to cure their ballots if they were submitted within the allowable timeframe.[1065]

On November 7, 2018, several county Republican parties filed a motion for a temporary restraining order in state court seeking to enjoin the improved practice because several rural counties were not permitting voters the same notice and cure opportunity.[1066] They argued that "certain County Recorders—specifically those of Maricopa and Pima Counties—[would] allow voters to cure non-compliant early ballots for a period of five days after Election Day...[which] threatens to beget an extended period of confusion and uncertainty following the election" and that this practice denied Arizona voters equal protection.[1067]

In response, the ACLU, ACLU of Arizona, and Campaign Legal Center intervened and filed a responsive brief late in the evening on November 8, 2018, two days after the general election, on behalf of the League of United Latin American Citizens, the League of Women Voters, and Arizona Advocacy Network Foundation, seeking an order from the court that *all* Arizona counties offer voters whose signatures were flagged notice and an opportunity to cure through the deadline for resolving provisional ballot issues, which was Wednesday, November 14.[1068] The brief argued that the court should not remedy the failure of some Arizona counties to provide voters with due process by prohibiting *all* Arizona counties from doing so. If the court was inclined to address the uniformity question on an emergency basis, it should order all counties to provide voters with notice and an opportunity to confirm their signatures.[1069] The brief cited data from 2016 showing approximately three-quarters of Arizona's voters voted by mail and that 2,657 mail-in ballots in Arizona were

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[1063] *Ibid.*

[1064] *Id.* at 5.

[1065] *Id.* at 2.

[1066] Verified Complaint for Injunctive and Declaratory Relief, Maricopa Cty. Republican Party v. Reagan, No. CV 2018-013963 (S. Ct. Ariz., Maricopa Cty. Nov. 7, 2018).

[1067] *See id.* at ¶¶ 28-30.

[1068] Defendant-Intervenors LULAC et al.'s Brief in Response to Plaintiffs' Motion for a Temporary Restraining Order, Maricopa Cty. Republican Party v. Reagan, No. CV2018-013963 (Maricopa Cty., Ariz. Nov. 8, 2018).

[1069] *Id.* at 2, 8-10.

rejected because officials determined the ballots' signatures did not match the signatures on record.[1070] The plaintiffs also argued that any administrative burden on the government was insufficient to overcome these voters' interests in due process protection for their fundamental right to vote.[1071]

A hearing was held on November 9, 2018, and the Maricopa County Superior Court, upon agreement of a settlement by the parties, including the state and all fifteen county recorders, ordered all county recorders statewide to permit voters to cure an alleged signature mismatch issue by the provisional ballot cure deadline of Wednesday, November 14, to confirm their vote.[1072]

109. Adams Jones v. Boockvar – Pennsylvania 2018

On November 13, 2018, the ACLU, ACLU of Pennsylvania, and Lawyers' Committee for Civil Rights Under Law filed a lawsuit challenging Pennsylvania's deadline for submitting absentee ballots.[1073] The plaintiffs include nine individuals who applied for an absentee ballot on time but received the ballot either too close to or after Pennsylvania's deadline for returning ballots. For an absentee ballot to count in Pennsylvania, the county board of elections must receive the ballot by 5:00 p.m. on the Friday before the election, four days before Election Day, making it the earliest absentee ballot receipt deadline in the country.[1074] The deadline regularly disenfranchises thousands of Pennsylvania absentee voters due to the unreasonably early deadline.[1075] The Philadelphia Inquirer reported that 86% of Pennsylvania absentee ballots rejected in the 2014 election—2,030 out of 2,374—were rejected solely for missing the Friday 5:00 p.m. return deadline, and 2,162 absentee ballots were rejected for the same reason in 2010.[1076] Voters can comply with every legal deadline for registering to vote and requesting an absentee ballot and still receive their ballot too late to return it on time.[1077]

The burden on these absentee voters is particularly acute because Pennsylvania does not have early in-person voting and Pennsylvania law only permits absentee voting for voters who cannot vote on Election Day for certain specified reasons, so many of these voters have

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[1070] *Id.* at 3.

[1071] *Id.* at 5-8.

[1072] Settlement Order, Maricopa Cty. Republican Party v. Reagan, No. CV 2018-013963 (Maricopa County Sup. Ct., Ariz. Nov. 9, 2018).

[1073] Petition for Review, Adams Jones v. Boockvar, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

[1074] *See* 25 PA. CONS. STAT. § 3146.6(a); *see also* Petition for Review at ¶ 3, Adams Jones v. Boockvar, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

[1075] Petition for Review at ¶ 4, Adams Jones v. Boockvar, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

[1076] *Id.* at ¶ 46.

[1077] *Id.* at ¶ 4.

no other option but to vote absentee.[1078] These voters are effectively deprived of their only available option to cast a ballot.[1079] The problem is only expected to get worse due to cuts to the postal service.[1080] Most of these disenfranchised individuals do not learn that their ballot was rejected.[1081] This problem has persisted for over a decade; post-election data that became public following the filing of the petition confirmed that the problem continued to be an issue in the November 2018 midterm election.[1082]

The plaintiffs seek declaratory relief that Pennsylvania's absentee ballot deadline violates their right to vote under the state and federal constitutions and injunctive relief barring the use of the current absentee ballot deadline in future elections. The respondents filed preliminary objections in motions to dismiss in January 2019, and the petitioners filed their brief in opposition to the preliminary objections in April 2019.[1083] Oral argument on the motions was held on June 5, 2019, and the case is awaiting decision on the preliminary objections. On October 31, 2019, Pennsylvania governor signed a bill expanding absentee ballot access, with provisions for voters to submit their ballot until 8:00 pm on Election Day. On December 11, 2019, the Court issued an order stating that the Pennsylvania legislature's action "has resolved or mooted the claims" of the voters, and therefore dismissed the case.[1084]

110. State of Texas v. Crystal Mason – Texas 2018

The State of Texas prosecuted Crystal Mason for the crime of illegal voting pursuant to Tex. Elec. Code § 64.012(B), which bars someone who "votes or attempts to vote in an election in which the person knows the person is not eligible to vote."[1085] She cast a provisional ballot in the 2016 presidential election while on federal supervised release, which the state claims renders her ineligible to vote under Texas law. Her provisional ballot was never counted. She asserted that she cast the provisional ballot upon the suggestion of a poll worker and did not know that the state considered her ineligible to vote at the time, but she was convicted on March 28, 2018, following a bench trial and sentenced to serve five years in state prison.

The ACLU of Texas, along with the Texas Civil Rights Project, filed an amicus brief in support of Ms. Mason's amended motion for a new trial on May 23, 2018. It argued that Texas' criminalizing of the casting of a provisional ballot when the person mistakenly believes he or she is eligible to vote is inconsistent with federal law. The brief argued that

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[1078] *Id.* at ¶ 6.

[1079] *Ibid.*

[1080] *Id.* at ¶ 48.

[1081] Petitioners' Brief In Opposition to the Preliminary Objections of All Respondents at 2, Adams Jones v. Boockvar, Docket No. 717 MD 2018 (Pa. Commw. Ct. Apr. 8, 2019).

[1082] *Ibid.*

[1083] *Id.*

[1084] Opinion and Order, Adams Jones v. Boockvar, No. 717 MD 2018 (Pa. Commw. Ct. Dec. 11, 2019).

[1085] Tex. Elec. Code § 64.012(B).

the reading of the Texas Election Code to criminalize Ms. Mason is in violation of her protected rights under the Help America Vote Act ("HAVA"), which permits people who believe they are eligible to vote to cast a provisional ballot even when eligibility to vote is uncertain.[1086] It further argues that evidence that an individual cast a provisional ballot based on an apparent mistake about her eligibility is insufficient as a matter of law to demonstrate the requisite criminal intent under the Texas law.

On June 11, 2018, the trial court denied Ms. Mason's amended motion for a new trial as untimely and declined to consider the ACLU's brief.[1087] The trial court also denied Ms. Mason's original motion for a new trial, rejecting her claims of bias, ineffective assistance of counsel, and legal insufficiency.[1088]

Ms. Mason appealed her conviction. On May 10, 2019, the ACLU, ACLU of Texas, and the Texas Civil Rights Project joined the legal team representing Ms. Mason in her appeal. On September 10, 2019, a three judge panel heard oral arguments on appeal, in which Ms. Mason's defense argued that the evidence was neither legally nor factually sufficient to sustain her conviction because the prosecution failed to prove that: (1) Ms. Mason voted in the 2016 election because her provisional ballot was never counted and a counted provisional ballot is not a "vote" under the Texas Election Code, (2) Ms. Mason was ineligible to vote because the conditions of her release from federal prison did not amount to "supervision" under Texas law; and (3) Ms. Mason knew she was ineligible to vote. The defense also argued that (1) the illegal voting statute is unconstitutionally vague as applied to Ms. Mason because what constitutes "supervision" for purposes of rendering someone ineligible to vote is undefined and ambiguous; (2) HAVA preempts the state's interpretation of the Texas Election Code to criminalize Ms. Mason's actions because HAVA creates a system whereby people who believe they are eligible to vote to cast a provisional ballot may do so, even if they turn out to be incorrect; and (3) Ms. Mason received ineffective assistance of counsel at trial. Ultimately, the panel affirmed Ms. Mason's conviction, finding that whether she was aware she was legally ineligible to vote was not relevant to whether she had the requisite mental state for an illegal voting conviction.[1089]

The ACLU and co-counsel filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals, the state's highest court for criminal cases, seeking review of Ms. Mason's conviction and the intermediate appeals court's decision. On March 31, 2021, the petition was granted, and Ms. Mason's legal team and the state have submitted initial briefs to the court.

111. Jarrod Stringer v. Whitley – Texas 2016

[1086] Brief of ACLU et al. as Amicus Curiae, *Texas v. Mason*, No. D 432-1485710-00 (432nd Judicial District Court of Tarrant County, Texas, May 23, 2018).

[1087] Findings of Fact, Conclusions of Law and Order, *Texas v. Mason*, No. D 432-1485710-00 (432nd Judicial District Court of Tarrant County, Texas, June 11, 2018).

[1088] *Id.* at 12-15.

[1089] *See Mason v. State*, 598 S.W.3d 755 (Ct. App. Tex. 2020).

Private plaintiffs filed suit in 2016 alleging that Texas violates the "motor voter" provisions of the National Voter Registration Act of 1993 ("NVRA") and the Equal Protection Clause of the Fourteenth Amendment by failing to provide for simultaneous voter registration with online driver's license renewals and by failing to provide for simultaneous voter registration with online change-of-address forms.[1090]

The district court granted summary judgment to the plaintiffs on May 10, 2018.[1091] The district court ruled that Texas was legally obligated under the NVRA to permit a simultaneous voter registration application with every transaction, and that it violated the NVRA by failing to do so.[1092] It also ruled that Texas violated the Equal Protection Clause of the Fourteenth Amendment.[1093] The plaintiffs obtained declaratory and injunctive relief.

Texas appealed to the Fifth Circuit on May 23, 2018, and the ACLU filed an amicus brief in support of the plaintiffs on September 21, 2018. The brief provided background on the requirements of the NVRA, identified how other states meet their NVRA obligations and provide voter registration services during online driver's license transactions, and explained specific steps Texas could take to enhance its voter registration, change-of-address, and renewal procedures in order to comply with the NVRA.[1094] Oral argument was held on February 5, 2019.

In November 2019, the Fifth Circuit reversed the judgment of the district court, finding that the plaintiffs did not have standing in this case.[1095] The district court then dismissed the suit brought in 2016.[1096] Following the Fifth Circuit's ruling, however, the plaintiffs filed a new complaint arguing that the lack of simultaneous voter registration had continued to impact plaintiffs and other voters.[1097] In January 2020, the district court granted part of a motion for preliminary injunction, ordering change of address forms for updating driver's licenses to also serve as a notification to update voter registration.[1098] In August 2020, the court granted the rest of the preliminary injunction, ordering each online license renewal or change of address application a simultaneous application for voter registration.[1099] The parties are currently engaging in settlement negotiations.

112. Department of Commerce v. New York – New York 2019

[1090] *Stringer v. Whitley*, No. 5:16-cv-00257 (W.D. Tex. Mar. 14, 2016).

[1091] *Stringer v. Pablos*, 320 F. Supp. 3d 862 (W.D. Tex. 2018).

[1092] *Id.* at 888-97.

[1093] *Id.* at 897-900.

[1094] Brief of ACLU et al. as Amicus Curiae, Stringer v. Pablos, No. 18-50428 (5th Cir. Sept. 10, 2018).

[1095] Stringer v. Whitley, 942 F.3d 715 (5th Cir. 2019).

[1096] Order of Dismissal, *Stringer v. Cascos*, No. 5:16-cv-00257 (W.D. Tex. Jan. 21, 2020).

[1097] Complaint, Stringer v. Hughs, No. 5:20-cv-00046 (W.D. Tex. Jan. 14, 2020).

[1098] *Stringer v. Pablos*, No. SA-16-CV-257-OG, 2020 WL 532937 (W.D. Tex. Jan. 30, 2020).

[1099] Stringer v. Hughs, No. SA-16-CV-257-OG, 2020 WL 6875182 (W.D. Tex. Aug. 28, 2020).

The ACLU represented a coalition of civil rights groups, including the New York Immigration Coalition ("NYIC"), in a challenge to the U.S. Department of Commerce's decision to add a citizenship question to the 2020 census, which the department claimed was for the purpose of facilitating enforcement of the Voting Rights Act. The suit alleged that the citizenship question would cause noncitizen households not to respond to the census, leading to an undercounting, and ultimately, underrepresentation, of communities of color. The suit alleged constitutional violations under the Enumeration Clause and the Equal Protection Clause as well as violations of the Census Act and the Administrative Procedures Act (APA). The APA creates a process by which courts can review a government agency's justifications for taking an action and strike down the action if the decision is found to be arbitrary or capricious.

The district court found for the NYIC coalition, holding that Commerce Secretary Wilbur Ross violated the APA by acting in a manner that was arbitrary and in spite of overwhelming evidence that the question would cause undercounting of immigrant communities.[1100] The court found that the Secretary "failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices."[1101] The court also found substantial evidence that the reasons given for the decision to include the census question were pretextual, and suggested that discriminatory intent may have been found if the plaintiffs had been permitted to gather additional evidence. Because of the mismatch between the Secretary's stated reasons for adding a citizenship question to the census and the actual evidence on the record, the district court found the ruling to be arbitrary and capicious and vacated it under the APA.

The Trump Administration appealed the ruling to the Supreme Court, which reversed in part and affirmed in part the district court's holding in a June 2019 decision.[1102] The Supreme Court reversed the lower court's finding that the Secretary violated the Census Act, but upheld the ruling that the Secretary violated the APA by providing pretextual justification for the decision. The Court concluded that the Secretary provided a sole reason for including the citizenship question—facilitating enforcement of the Voting Rights Act—yet the record showed that the Voting Rights Act played almost no part in the discussions surrounding the decision and was merely a "distraction."[1103] The Court found that the APA required the Secretary to provide a full and honost account of the justifications for its decision, and that his failure to do so justified the district court's ruling vacating the Secretary's decision to include a citizenship question on the 2020 census.

The Justice Department and Secretary Ross initially announced that they would abandon the citizenship question and begin to print census forms without it, but President Trump later announced a decision to reverse course and pursue a renewed effort to include the

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[1100] *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), aff'd in part, rev'd in part and remanded sub nom. *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

[1101] *Id.* at 516.

[1102] *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

[1103] *Id.* at 2576.

question. In late July, the Trump administration finally abandoned plans to include the citizenship question on the census, a significant victory for voting rights advocates.

113. Texas League of United Latin American Citizens v. Whitley – Texas 2019

In 2019, the ACLU and ACLU of Texas sued the Texas Secretary of State in federal court on behalf of MOVE Texas Civic Fund and other plaintiffs to prevent an unlawful purge of the voting rolls that would target and threaten the voting rights of eligible naturalized citizens and people of color.[1104] Shortly after commencing, this case was consolidated with two other cases.[1105]

The action stemmed from a January 25, 2019, press release from Secretary of State Whitley, announcing that his office had identified approximately 95,000 individuals whom he claimed were possible noncitizens registered to vote. According to the press release, a purge list was created to facilitate counties purging these individuals from the county's voter rolls.[1106] When the list was created, officials failed to account for naturalized citizen who submitted documentation to DPS before registering, despite the large number of Texans who naturalize every month and the amount of time, sometimes years, between DPS transactions. When the purge list was released, it was revealed that the data was seriously flawed, and the Secretary of State retracted individuals from the purge list because they were citizens who had been included due to a "coding error." Some of those citizens had already been sent notices threatening them with removal from the rolls.[1107]

The lawsuit alleged that the purge list was discriminatory and arbitrary in its design, purpose, and effect, violating the U.S. Constitution and the Voting Rights Act of 1965 by targeting naturalized citizens. There are approximately 1.6 million naturalized citizens in Texas, and over 87 % of them are Black or Latino.[1108] With general elections to be held on May 4, 2019, for which the registration deadline was April 4, 2019, eligible voters who were purged through this program would have limited time to re-register before the elections.[1109] In April 2019, the parties agreed to a settlement providing that with the dismissal of all three consolidated cases, the state would rescind its original advisory announcing the purge

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[1104] First Amended Complaint, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 7 (S.D. Tex. Feb. 6, 2019).

[1105] Order of Consol., Tex. League of United Latin Am. Citizens, et al., v. Whitley, No. 5:19-cv-00171-FB (S.D. Tex. Feb. 22, 2019).

[1106] First Amended Complaint at 2, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 7 (S.D. Tex. Feb. 6, 2019).

[1107] *Id.* at 4

[1108] *Id.* at 5

[1109] Pls.' Mot. for Prelim. Injunction, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 10 (S.D. Tex. Feb. 10, 2019).

effort, as well as provide and maintain information regarding the implementation of the process.[1110]

114. Gruver v. Barton – Florida 2019

In June 2019, the ACLU, ACLU of Florida, NAACP Legal Defense and Educational Fund, Inc., and Brennan Center for Justice filed a federal lawsuit on of a set of plaintiffs challenging a new state law that conditions the restoration of the right to vote after a felony conviction on a person's ability to pay court-related fees.[1111] The lawsuit alleges violations of the First, Fourteenth, and Fifteen Amendments; the Twenty-Fourth Amendment; and the Ex Post Facto Clause.

Over five million Floridians supported Amendment 4 in the November 2018 elections, passage of which automatically restored the right to vote of 1.6 million people with past felony convictions, or nearly 25% of the 6.1 million Americans who had been permanently disenfranchised. Florida had been one of only four states who permanently disenfranchised their citizens based on a single felony conviction, causing the highest percentage of felon disenfranchisement in the country. More than 10% of the Florida's voting-age population were ineligible to vote, and of that number, over 20% were Black.

In response, the Florida Legislature quickly passed SB 7066 in response, requiring that returning citizens pay off all court-related fees before their voting rights could be restored. The new law essentially creates two classes of returning citizens: those who are wealthy enough to pay off all court-related fees in order to restore their voting rights and another group who are not. This unconstitutional conditioning of the ability of a returning citizen to vote maintains the harsh racial disparities in the criminal justice system, given longstanding racial disparities in wealth and poverty.

In October 2019, a federal court granted a partial preliminary injunction in the plaintiffs' favor. The court ruled that individual plaintiffs in the case would have their rights restored, and in doing so did not make a definitive decision on the poll tax claim. However, the court held that "Florida cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay the other financial obligations."

In May 2020, the district court ruled in plaintiffs' favor, holding that disenfranchising citizens with a felony conviction who genuinely could not pay fines and fees violated the Equal Protection Clause, and that conditioning voting on the payment of fees and costs constituted a prohibited "tax" under the Twenty-Fourth Amendment.[1112] Under the district court's ruling, those who were otherwise eligible citizens who genuinely could not pay could

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[1110] Settlement Agreement, Tex. League of United Latin Am. Citizens, v. Whitley, No. 5:19-cv-00171 (S.D. Tex. Apr. 26, 2019).

[1111] Complaint for Injunctive and Declaratory Relief, Gruver v. Barton, No. 4:19-cv-00302 (N.D. Fla. June 28, 2019).

[1112] *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla.), hearing en banc ordered sub nom. *McCoy v. Gov'r of Fla.*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020), and rev'd and vacated sub nom. *Jones v. Gov'r of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

not be excluded from the franchise. While the district court first denied a stay pending appeal,[1113] the Eleventh Circuit granted the stay pending appeal in anticipation of an en banc hearing.[1114] Plaintiffs appealed the stay, but the Supreme Court denied the plaintiffs application to vacate.[1115] In September 2020, an en banc Eleventh Circuit reversed the judgment of the district court, holding that the challenged law did not violate equal protection nor the Twenty-Fourth Amendment.[1116]

115. Casey v. Gardner – New Hampshire 2019

On February 13, 2019, the ACLU and the ACLU of New Hampshire filed a federal lawsuit challenging a New Hampshire law that unconstitutionally restricts the right to vote for students, young people, and new residents to the state.[1117] The law, HB 1264, burdens their right to vote and acts as a "poll tax" by intending to require new voters to shift their home state driver's licenses and registrations to New Hampshire — which can add up to hundreds of dollars — solely for exercising their right to vote.

The lawsuit was brought on behalf of two Dartmouth College students who would have been required to pay for New Hampshire driver's licenses if they vote in New Hampshire. If they did not change their licenses and registration, they could face civil penalties. The lawsuit cites a violation of the Twenty-Sixth Amendment, which lowered the voting age to 18 in 1971. The Amendment's aim was not only to allow young people to vote, but also to encourage voting by eliminating obstacles. Laws such as HB 1264 aimed at college students target young people in violation of the purpose of the 26th Amendment.

The state filed a motion seeking to have the case dismissed, which was denied. Subsequently, plaintiffs moved for a preliminary injunction, seeking to prevent voter confusion by preventing the state from enforcing the challenged statute, which was denied. Eventually, the federal court certified five questions of state law that were implicated by the lawsuit to the New Hampshire Supreme Court, essentially asking them to clarify certain points before the lawsuit moved forward. In May 2020, the state supreme court held that state law required college students to shift their driver's licenses and registrations to New Hampshire, and given this interpretation of state law, plaintiffs voluntarily dismissed the case afterward.[1118]

116. League of Women Voters of Tennessee v. Hargett – Tennessee 2019

Even though Tennessee ranks 44th in the U.S. for voter registration, during the 2018 midterm election, the state saw a surge in registrations. Rather than providing greater resources to manage the influx, in response, the Tennessee General Assembly passed a

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[1113] Jones v. DeSantis, No. 4:19CV300-RH/MJF, 2020 WL 5646125 (N.D. Fla. June 14, 2020).

[1114] McCoy v. Governor of Fla., No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020).

[1115] Raysor v. DeSantis, 140 S. Ct. 2600, 207 L. Ed. 2d 1120 (2020).

[1116] Jones v. Gov'r of Fla., 975 F.3d 1016 (11th Cir. 2020) (en banc).

[1117] Casey v. Gardner, No. 1:19-cv-00149-JL (D. N.H. Feb. 13, 2019).

[1118] *See Casey v. New Hampshire Sec'y of State*, 173 N.H. 266 (2020).

measure that creates severe penalties against those who fail to comply with onerous and unnecessary requirements, including one mandating state training, which is the organization's responsibility to administer, and one limiting the ability of groups to follow up with applicants who file incomplete forms.

On May 9, 2019, the ACLU, the ACLU of Tennessee, Campaign Legal Center, and Fair Elections Center filed a federal lawsuit, challenging the Tennessee law.[1119] The lawsuit was filed on behalf of the League of Women Voters of Tennessee, American Muslim Advisory Council, Mid-South Peace & Justice Center, Rock the Vote, and Spread the Vote. The complaint charged the new law violates freedom of speech, freedom of association, due process, and the fundamental right to vote under the First and Fourteenth Amendments. Along with the lawsuit, the groups filed a notice letter to the state citing violations of the National Voter Registration Act.

On September 12, 2019, following the filing of an amended complaint, with additional claims and parties, and an unsuccessful motion to dismiss from the defendants, state officials in charge of elections, the court issued a preliminary injunction against the law.[1120] The court found that the law "creates an onerous and intrusive regulatory structure for problems that, insofar as they are not wholly speculative, can be addressed with simpler, less burdensome tools."[1121] The defendants declined to appeal the preliminary injunction, meaning it would remain in effect through the 2020 elections. On October 26, 2020, with the consent of the plaintiffs, the court ordered that the case be voluntarily dismissed.

117. Georgia NAACP v. Dekalb County Board of Elections – Georgia 2020

On February 26, 2020, the Lawyers' Committee for Civil Rights Under Law, the ACLU of Georgia, and the ACLU filed a federal lawsuit on behalf of the Georgia State Conference of the NAACP and the Georgia Coalition for the People's Agenda.[1122] The lawsuit alleges that DeKalb County election officials are purging eligible voters in violation of federal law and the U.S. Constitution. Counsel sent notice letters in August, September, and October 2019, as required under the federal National Voter Registration Act (NVRA), asking the county to stop the practice. An investigation has revealed that DeKalb County falsely claimed they have been purging voters at the request of Decatur city officials, even though the city never made any such request nor are municipalities permitted to challenge voters' eligibility under state law.

DeKalb County also purged voters registered at the Decatur Peer Support, Wellness, and Respite Center, falsely alleging that no one could vote while living at that location. However, people can stay overnight up to seven days a month and many consider the center to be their "home base" where they receive their mail, receive and apply for services, and

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[1119] *League of Women Voters of Tenn. v. Hargett*, No. 3:19-cv-00385 (M.D. Tenn. May 9, 2019).

[1120] *League of Women Voters v. Hargett*, 400 F.Supp.3d 706 (M.D. Tenn. 2019).

[1121] *Id.* at 733.

[1122] *Georgia State Conf. of the NAACP v. DeKalb Cty. Bd. of Elecs.*, No. 1:20-cv-00879 (N.D. Ga. Feb. 26, 2020).

conduct meetings and other activities. The NVRA's protections are intended to ensure that voter list maintenance programs are administered uniformly and in a non-discriminatory manner. Stable housing is not a legal prerequisite to voting, and Georgians who are homeless or housing insecure are permitted to vote under state and federal law.

The governmental defendants filed a motion to dismiss, which was denied on September 2, 2020.[1123] In July 2021, the parties finalized a settlement agreement.

118. (a) Ohioans for Secure and Fair Elections v. LaRose – Ohio 2020

Ohio, like many states, guarantees its citizens the right to amend their constitution using the ballot initiative process. In 2020, Ohio citizens formed Ohioans for Secure and Fair Elections, proposing the Secure and Fair Elections Amendment to the constitution, which would have safeguarded the right to vote against suppressive voting laws which seek to limit access to the ballot.[1124] As the period for gathering signatures for the November 2020 ballot began, the proponents of this measure submitted it to the Ohio Ballot Board, the entity responsible for the state law requirement that initiatives only cover one subject.

On March 2, 2020, the Board voted to divide the proposed amendment into four separate amendments, arguing that the Ohio constitution's requirement that a ballot measure only cover a single subject required it to do so, even though all of the provisions of the proposed amendment related to single subject of voting.[1125] This imposed serious burdens on the initiative proponents: because of the ruling, they would then have to gather four times as many signatures, effectively denying them access to the ballot with the full proposed amendment.

On March 5, 2020, the ACLU filed a lawsuit directly in the Ohio Supreme Court, challenging Ohio's requirements for signature gathering for upcoming ballot initiatives on behalf of proponents of a proposed constitutional amendment and seeking to have the amendment certified for the ballot.[1126] On April 14, 2020, the state supreme court issued a

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[1123] *Georgia State Conf. of the NAACP v. DeKalb Cnty. Bd. of Reg'n and Elecs.*, 484 F.Supp.3d 1308 (N.D. Ga. 2020).

[1124] *See* Letter from Donald J. McTigue to Hon. Dave Yost, Ohio Attorney General Re: The Secure and Fair Elections Amendment (Feb. 10, 2020), *available at* https://www.ohioattorneygeneral.gov/getattachment/c380e08c-ef3f-4408-bfb6-ad4530339393/The-Secure-and-Fair-Elections-Amendment-(Resubmiss.aspx (submitting amendment summary to state officials for certification).

[1125] March 2, 2020 Letter from Jeff Hobday, Secretary, Ohio Ballot Board to Dave Yost, Ohio Attorney General, Re: Ballot Board Determination that the Secure and Fair Elections Amendment Contains Four Separate Constitutional Amendments, *available at* https://www.acluohio.org/sites/default/files/OhioansForSecureAndFairElectionsEtAl-v-LaroseEtAl-RelatorsComplaint_2020-0305.pdf.

[1126] Original Action in Mandamus, State ex rel. Ohioans for Secure and Fair Elections v. LaRose, No. 2020-0327 (Oh. Mar. 5, 2020).

writ of mandamus against the Ohio Ballot Board, compelling it to certify the initiative petition as containing only one subject.[1127]

(b) Thompson v. Dewine – Ohio 2020

Shortly afterward, on April 27 2020 – as the COVID-19 pandemic spread across the country, and states, including Ohio, issued stay at home orders – three individuals who wished to circulate petitions for ballot initiatives in municipal elections filed a lawsuit in federal court.[1128] On April 30, the ACLU and the ACLU of Ohio moved to intervene, with our own complaint and motion for preliminary relief, on behalf of Ohioans for Secure and Fair Elections.[1129] Both the plaintiffs and our clients argued that with the restrictions on gatherings and the risks of face-to-face contact necessary to gather petition signatures, Ohio's signature requirements for ballot initiatives, as applied during the COVID-19 pandemic, burdened citizens' right to participate in the political process.

On May 19, 2020, the court partially granted the motions for injunctions.[1130] Specifically, it ordered the state to accept electronic signatures on petitions, and extended the deadline for signature gathering from July 1 to July 31. The next day, the state defendants appealed the ruling to the Sixth Circuit on an emergency basis, seeking a stay of the order. In an unusual move, the state also asked the Sixth Circuit to take the case en banc initially, rather than having a three-judge panel make a decision, as is the norm. On May 26, the appeals court granted the stay, meaning that despite stay-at-home orders, proponents of ballot initiatives would, somehow, still have to gather the usual number of signatures in a month's time.[1131] After the stay was issued, plaintiffs filed a motion in the U.S. Supreme Court, seeking an order vacating the stay, even partially, though these efforts were unsuccessful.[1132] Therefore, on August 20, we moved to be dismissed from the appeal, as the deadline had passed and our position had become moot.

119. Western Native Voice v. Stapleton – Montana 2020

Due to the great distances between people and places in Montana, the majority of voters in the state vote by mail. Rural tribal communities, including those on Native reservations, work with get-out-the-vote organizers to collect and transport ballots to election offices that would otherwise be inaccessible. This is of particular importance for Native American communities, given the disproportionate lack of access to vehicles and vast distances between voters and post offices on reservations. In 2018, the Ballot Interference Prevention Act (BIPA), a legislatively-referred ballot initiative, became law.[1133] BIPA imposed severe

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[1127] State ex rel. Ohioans for Secure & Fair Elections v. LaRose, 159 Ohio St.3d 568 (2020).

[1128] *Thompson v. Dewine*, No. 2:20-cv-02129 (S.D. Oh. Apr. 27, 2020).

[1129] Motion to Intervene, *Thompson v. Dewine*, No. 2:20-cv-02129 (S.D. Oh. Apr. 30, 2020), Dkt. 13.

[1130] *Thompson v. Dewine*, 461 F.Supp.3d 712 (S.D. Oh. 2020).

[1131] *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020).

[1132] *See Thompson v. Dewine*, No. 19A1054, 2020 WL 3456705 (2020) (denying motion to vacate stay).

[1133] Mont. Code Ann. § 13-35-701, *et seq.*

restrictions on ballot collection efforts that are vital to Native American voters, particularly those who live on rural reservations, by limiting who could return a voted ballot and the total number of ballots any one person could return. This directly targeted efforts to boost turnout within tribal communities, who rely heavily on ballot collection efforts.

On March 20, 2020, the ACLU, the ACLU of Montana, and the Native American Rights Fund sued in Montana state court, representing Western Native Voice and Montana Native Vote, two organizations that promote political engagement in the Native American community.[1134] On average, the two plaintiff organizations would collect over 85 ballots per organizer, while BIPA limited each organizer to only six ballots. The lawsuit challenged BIPA with violating the voting and due process rights of individuals living on reservations, as well as the free speech and association rights of Western Native Voice and Montana Native Vote as they engage in ballot collection on reservations.

On May 20, 2020, the court issued a preliminary injunction, blocking BIPA in advance of a June 2 primary election, and setting the matter for a hearing. On July 7, 2020, the court granted the plaintiffs' request for preliminary relief, finding that "BIPA serves no legitimate purpose; it fails to enhance the security of absentee voting; it does not make absentee voting easier or more efficient; it does not reduce the costs of conducting elections; and it does not increase voter turnout."[1135]

The case went to trial in September 2020, and on September 25, the court issued its ruling, finding that plaintiffs presented "cold, hard data" about the impact on Native Americans, and how the costs of BIPA are "simply to[o] high and to[o] burdensome to remain the law of the State of Montana."[1136]

120. Texas Democratic Party v. DeBeauvoir – Texas 2020

Texas election law requires that to vote by mail, a voter must have "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of ... injuring the voter's health."[1137] On March 20, 2020, as the COVID-19 pandemic began its initial spread across the country, several registered voters and the Democratic National Committee sued the Texas Secretary of State, seeking a declaration that the public health emergency constituted a qualifying disability for purposes of absentee voting.

On April 2, 2020, the ACLU, the ACLU of Texas, and the Texas Civil Rights Project moved to join the case on behalf of an individual voter, the League of Women Voters of Texas, MOVE Texas, and other plaintiffs to determine whether Texas law allowed all registered

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[1134] *Western Native Voice v. Stapleton*, No. DV-2020-377 (Mont. Dist. Ct. Mar. 20, 2020).

[1135] Order Granting Plaintiff's Motion for Preliminary Injunctive Relief, *Western Native Voice v. Stapleton*, No. DV-2020-377, at 9 (Mont. Dist. Ct. July 7, 2020).

[1136] Courts Findings of Fact, Conclusions of Law and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

[1137] Tex. Elec. Code. § 82.002(a).

voters to request a mail-in ballot.[1138] After a hearing in which the court heard testimony concerning COVID-19 and arguments from both sides, the court ruled for the plaintiffs and ordered that all Texans be allowed to vote by mail due to the COVID-19 pandemic for elections held in July 2020.[1139] The court scheduled further hearings to determine how to handle the November elections, while the state appealed the court's ruling governing the July elections. On May 27, 2020, in a separate case, the Texas Supreme Court ruled that voters could not vote absentee solely due to the risk of COVID-19, but elections officials could take individual circumstances, including heightened risk of COVID-19, into account when processing absentee ballot applications.[1140] Following this ruling, plaintiffs voluntarily dismissed their case.

121. Black Voters Matter v. Raffensperger – Georgia 2020

Arising in the context of the COVID-19 pandemic, this lawsuit challenged Georgia's practice of requiring voters to buy postage stamps when submitted mail-in absentee ballots and absentee ballot applications.[1141] The legal claim was straight-forward: The Constitution bans poll taxes, and postage costs money. Requiring Georgia voters to pay postage when submitting mail-in absentee ballots amounts to a poll tax. Plus, because the COVID-19 pandemic made it unrealistic for most, if not all, voters to cast ballots in-person, the state is essentially forcing voters to pay in order to participate in our democracy. In addition to poll tax claims, the lawsuit also alleged that the requirement was an unconstitutional burden on the right to vote.

On April 8, 2020, the ACLU and the ACLU of Georgia filed the lawsuit, seeking a preliminary injunction to require election officials to provide prepaid returnable envelopes for absentee ballots and absentee ballot applications.[1142] Notably, this requested relief would not be burdensome: the law requires election officials to provide postage prepaid returnable envelopes for other purposes. In May 2020, the court denied the motion for a preliminary injunction with respect to the June elections, and in August 2020, the court dismissed the remainder of the motion for a preliminary injunction and the poll tax claim.[1143] Plaintiffs appealed the decision in September 2020, and the case is still pending in the Eleventh Circuit.[1144]

[1138] Petition in Intervention, *Texas Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610 (Tex. Dist. Ct. Apr. 2, 2020).

[1139] Order on Application for Temporary Injunctions and Plea to the Jurisdiction, *Texas Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610 (Tex. Dist. Ct. Apr. 17, 2020).

[1140] *In re State of Texas*, 602 S.W.3d 549 (Tex. 2020).

[1141] *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489 (N.D. Ga. Apr. 8, 2020).

[1142] Motion for Preliminary Injunction, *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489 (N.D. Ga. Apr. 8, 2020), Dkt. 2.

[1143] *See Black Voters Matter Fund v. Raffensperger*, 478 F.Supp.3d 1278 (N.D. Ga. 2020).

[1144] *Black Voters Matter Fund, Inc. v. Raffensperger*, 478 F.Supp.3d 1278, *appeal docketed*, No. 20-13414 (11th Cir. Sept. 9, 2020).

122. Missouri NAACP v. Missouri – Missouri 2020

On April 17, 2020, the ACLU, the ACLU of Missouri, and the Missouri Voter Protection Coalition filed a lawsuit in state court, representing the NAACP of Missouri, the League of Women Voters of Missouri, and several individual voters.[1145] The lawsuit sought to protect the right to vote by mail in the context of the COVID-19 pandemic: even though the state legislature had recently expanded access to vote by mail to all voters due to the pandemic, it had left in place the requirement that voters needed a notary seal on their absentee ballot. The suit argued that this requirement conflicted with Missouri statutes, as well as the state constitution's guarantee of equal protection, given different counties' policies on expanding access to absentee ballots resulted in wildly different opportunities to vote.

On May 5, the defendants submitted a motion to dismiss, which was granted 13 days later. However, the plaintiffs immediately appealed this ruling, and the Missouri Supreme Court unanimously ruled in favor of the plaintiffs – allowing their lawsuit to proceed – on June 23, 2020.[1146] On remand, the trial court denied a motion for a preliminary injunction on July 10, 2020,[1147] and after a trial in September 2020, entered judgment against plaintiffs on all counts.[1148] This decision was affirmed by the Missouri Supreme Court on October 9, 2020, ending the case.[1149]

123. League of Women Voters of Virginia v. Virginia State Board of Elections – Virginia 2020

Under Virginia law, any voter who submits an absentee ballot by mail must open the envelope containing the ballot in front of another person, fill out the ballot, and then have that other person sign the outside of the ballot envelope before it is mailed back. In the context of the COVID-19 pandemic, these requirements may place voters at risk, particularly those who live alone and cannot risk contact with others outside their household.

On April 17, 2020, the ACLU and the ACLU of Virginia sued in federal court to protect the rights of Virginia voters.[1150] The lawsuit, brought on behalf of the League of Women Voters and several individual voters, argued that enforcing the witness requirement in the pandemic burdened the fundamental right to vote and due to Virginia's long history of

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[1145] *Missouri Conf. of the NAACP v. Missouri*, No. 20AC-CC00169 (Mo. Cir. Ct., Cole Cnty. April 17, 2020).

[1146] *Missouri Conf. of the NAACP v. Missouri*, 601 S.W.3d 241 (Mo. 2020).

[1147] Order Denying Request for Preliminary Injunction, *Missouri Conf. of the NAACP v. Missouri*, No. 20AC-CC00169-01 (Mo. Cir. Ct., Cole Cnty. July 10, 2020).

[1148] Findings of Facts, Conclusions of Law, and Final Judgment, *Missouri Conf. of the NAACP v. Missouri*, No. 20AC-CC00169-01 (Mo. Cir. Ct., Cole Cnty. Sept. 24, 2020).

[1149] 607 S.W.3d 728 (Mo. 2020).

[1150] *League of Women Voters of Virginia v. Virginia Board of Elections*, No. 6:20-cv-00024-NKM (W.D. Va. 2020).

discrimination would disproportionately impact Black voters, a violation of the Voting Rights Act.

Shortly after the lawsuit was filed, the plaintiffs and state defendants, as well as six voters who wished to intervene in the litigation, reached a consent decree which would govern the June 2020 primaries.[1151] Under the decree, the state agreed to waive the witness requirement.[1152] Following the primaries, in July 2020, plaintiffs moved for a preliminary injunction seeking essentially the same relief, and again, the parties came to an agreement that the state would waive the witness requirement for the November general election. This second consent decree was approved on August 21, 2020.[1153] The plaintiffs subsequently dismissed their case voluntarily.

124. Thomas v. Andino – South Carolina 2020

To cast an absentee ballot, South Carolina requires voters to fall into certain categories of eligibility, including inability to vote in person "because of injury or illness."[1154] It further falls within a minority of states that requires voters to find a witness to sign their absentee ballot envelope. During the COVID-19 pandemic, state officials took the view that self-isolating due to the pandemic did not qualify voters under the "injury or illness" language. Therefore, on April 22, 2020, the ACLU, the ACLU of South Carolina, and the NAACP Legal Defense and Educational Fund filed a lawsuit in federal court challenging these requirements.[1155] Brought on behalf of individual voters and The Family Unit, a non-profit charitable organization, the lawsuit argued that as applied to voters during the pandemic, these provisions violated the Constitution and the Voting Rights Act.

Shortly after the suit was filed, on May 13, 2020, the governor of South Carolina signed a law allowing voters to cite the COVID-19 pandemic as a valid reason to vote with an absentee ballot, though the law preserved the witness requirement.[1156] On May 25, the court issued an order granting the plaintiffs' request for a preliminary injunction, barring elections officials from enforcing the witness requirement.[1157] Both the law and the court's order covered only the June 2020 primaries.

On July 13, the plaintiffs amended their complaint, adding the South Carolina conference of the NAACP as a plaintiff and a claim that the witness requirement violates the Americans with Disabilities Act.[1158] In September, shortly before a trial on the claims was

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[1151] *League of Women Voters of Virginia v. Virginia State Bd. of Elecs.*, 458 F.Supp.3d 442 (W.D. Va. 2020).

[1152] *Id.*

[1153] 481 F.Supp.3d 580 (W.D. Va. 2020).

[1154] S.C. Code Ann. § 7-15-310.

[1155] *Thomas v. Andino*, No. 3:20-cv-01552-JMC (D.S.C. Apr. 22, 2020).

[1156] S.J. Res. 635, 123rd Gen. Assemb. (S.C. 2020).

[1157] *Thomas v. Andino*, No. 3:20-cv-01552, 2020 WL 2617329 (D.S.C. May 25, 2020).

[1158] First Amended Complaint, *Thomas v. Andino*, No. 3:20-cv-01552-JMC (D.S.C. July 13, 2020).

set to being, the state legislature passed another bill removing the excuse requirement for the November election, meaning the trial would cover only the witness requirement. Then, on September 18, four days before trial was set to begin, the court stayed the case in light of a parallel lawsuit which functionally rendered some of the claims moot. In that suit, *Middleton v. Andino*, the court issued an injunction against the witness and excuse requirements.[1159]

This injunction was then appealed to the Fourth Circuit, which stayed the injunction on September 24.[1160] The following day, the full Fourth Circuit voted to vacate the stay, allowing the lower court's injunction to go back into effect.[1161] Shortly thereafter, on October 5, the Supreme Court reinstated the Fourth Circuit's stay, meaning the absentee ballots would need witness signatures.[1162] The Court's order did carve out those absentee ballots already received and those in the mail at the time they ruled, to honor those voters' interests.

125. Judicial Watch v. Commonwealth of Pennsylvania – Pennsylvania 2020

Voter purges are a serious threat to the right to vote. Although list maintenance, when done responsibly, is appropriate and necessary for election administration, improper purges remove eligible voters, which can result in them being turned away from the polls. States and counties have sometimes engaged in overzealous or sloppy list maintenance which erroneously remove voters, and frequently, these practices disproportionately sweep in voters of color. Unfortunately, there are groups that attempt to compel state entities to conduct these purges, claiming they help protect against voter fraud.

In one such lawsuit, Judicial Watch, an organization well known for its efforts to disenfranchise voters, attempted to compel three counties around Philadelphia to conduct such a purge.[1163] The suit sought to remove thousands of voters from the rolls, based on Judicial Watch's unverified, self-generated data, similar to litigation it brought around the country. Notably, the group sued on April 29, 2020, as the defendants, elections officials, were attempting to respond to the COVID-19 pandemic, and if the lawsuit had been successful, such a purge program would have siphoned off resources from more pressing matters.

After the suit was filed, on May 11, the ACLU, the ACLU of Pennsylvania, Lawyers' Committee for Civil Rights Under Law, and Simpson Thacher & Bartlett LLP moved to intervene in the case, representing Common Cause Pennsylvania and the League of Women Voters of Pennsylvania.[1164] After briefing on the topic, the motion to intervene was granted

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[1159] 488 F.Supp.3d 261 (D.S.C. 2020).

[1160] *Middleton v. Andino*, No. 20-2022, 2020 WL 5739010 (4th Cir.).

[1161] 976 F.3d 403 (4th Cir. 2020) (en banc).

[1162] *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Mem.).

[1163] *See Judicial Watch v. Commonwealth of Pennsylvania*, No. 1:20-CV-708 (M.D. Pa. Mar. 8, 2021).

[1164] Motion to Intervene as Party Defendants, *Judicial Watch v. Commonwealth of Pennsylvania*, No. 1:20-CV-708 (M.D. Pa. Mar. 8, 2021), Dkt. 4.

in November 2020, and the case continued.[1165] On March 8, 2021, the court dismissed Judicial Watch's claims against the three counties that they improperly failed to meet their list-maintenance and disclosure obligations under federal law.[1166]

126. Fitisemanu v. United States – American Samoa 2020

On May 12, 2020, The ACLU filed an amicus brief in connection with a case addressing the constitutionality of the federal law designating persons born in American Samoa as "non-citizen U.S. nationals."[1167] The brief supports the district court's judgment that the Fourteenth Amendment's Citizenship Clause applies to American Samoa and "Congress has no authority" to deny the plaintiffs citizenship as a result. The brief focuses on core rights and benefits inherent to U.S. citizenship that have been wrongfully denied to persons born in American Samoa — particularly, to those residing in the fifty states or District of Columbia. On June 15, 2021 the Tenth Circuit reversed the district court, finding that persons born in American Samoa were not birthright citizens.[1168]

127. Lay v. Goins – Tennessee 2020

Most states allow any eligible voter to cast an absentee ballot, but Tennessee requires that voters provide an excuse to do so. The state has a very narrow set of criteria to qualify for absentee voting, meaning the vast majority of voters would be forced to vote in person — or avoid voting at all for fear of becoming ill during the COVID-19 pandemic, disenfranchising thousands. As part of its efforts to ensure safe access to the ballot, on May 15, 2020, the ACLU, together with the ACLU of Tennessee and Dechert LLP, filed a lawsuit seeking to make absentee voting available to all eligible Tennessee voters during the pandemic.[1169]

The lawsuit, filed in Tennessee state court, requested an order blocking the state from enforcing the excuse requirement for the 2020 election calendar while COVID-19 transmission is occurring; issue guidance instructing local election officials to issue absentee ballots to all eligible voters; and conduct a public information campaign informing voters about the elimination of the excuse requirement at this time. On June 3, the court held a hearing on the impact of expanded absentee voting, because the state argued expanding it as requested would pose logistical hurdles, and the next day, the court granted the requested injunction. In an order issued shortly afterward, the court required the state to waive the excuse requirement and mail an absentee ballot to any Tennessee voter who requested one.[1170]

[1165] *Id.* at Dkt. 50.

[1166] *Judicial Watch v. Pennsylvania*, 2021 WL 858865 (M.D. Pa. Mar. 8, 2021).

[1167] *Fitisemanu v. United States*, No. 20-4017 & 20-4019, 2021 WL 2431586 (10th Cir. 2021).

[1168] *Id.*

[1169] *Lay v. Goins*, No. M2020-00832-SC-RDM-CV (Tenn. Chanc. Ct. May 15, 2020).

[1170] June 4, 2020 Memorandum And Order Granting Temporary Injunction To Allow Any Tennessee Registered Voter To Apply For A Ballot To Vote By Mail Due To COVID-19, Lay v. Goins, No. M2020-00832-SC-RDM-CV (Tenn. Chanc. Ct. June 4, 2020).

Remarkably, defendants then instructed local election officials not to send absentee ballots, despite the court's order. On June 8, plaintiffs submitted a motion to enforce the order, while defendants submitted an appeal seeking a stay of the order. On June 11, the court issued a ruling that defendants had to comply with the order immediately, while the appeal remained pending in the state supreme court.

On June 24, the Tennessee Supreme Court declined to block the lower court ruling ordering the state to make absentee voting available to every eligible voter for all elections in 2020.[1171] Subsequently, on August 5, 2020, the Tennessee Supreme Court issued a final decision, holding that the state must permit every eligible voter with an underlying health condition that makes them vulnerable to COVID-19, as well as any voter who is a caretaker for such individuals, to vote by mail in all elections in 2020.[1172]

128. League of Women Voters of Michigan v. Benson – Michigan 2020

In 2018, Michigan voters overwhelmingly approved Proposal 3, a ballot initiative that gives voters a constitutional right to submit an absentee ballot, including by mail, at any point in the 40 days before an election. Despite this, in the spring of 2020, Michigan elections officials announced they would require ballots to be received by Election Day, as opposed to postmarked by Election Day and contradicting the plain text of the initiative. According to data from the Michigan Secretary of State, 1.75% of absentee ballots were rejected for the May 5, 2020 election because they arrived after 8:00 pm on Election Day. On May 22, 2020, the ACLU, the ACLU of Michigan, Goodman Acker, and Arnold & Porter filed a lawsuit in Michigan state court, seeking a writ of mandamus compelling election officials to count ballots received with a postmark on or before Election Day.[1173] Brought on behalf of individual voters and the League of Women Voters of Michigan, the suit argued that the Election Day deadline violated various provisions of Michigan law, including the state constitution's guarantee of the right to vote via absentee ballot.

On July 14, 2020, the Michigan Court of Appeals upheld the policy, meaning that absentee ballots must be received by the day of the primary.[1174] Plaintiffs promptly appealed to the Michigan Supreme Court, which declined to review the judgment below on July 31, 2020.[1175] Justice Bernstein dissented from the denial of review, stating that "[t]he people of Michigan deserve nothing less" than full review of the claims, given the "undoubtedly ... significant role in the upcoming general election" that absentee ballots would play.[1176] The plaintiffs moved for reconsideration of the July 31 order, which the state supreme court

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[1171] Order, Lay v. Goins, No. M2020-0823-SC-RDM-CV (Jun. 24, 2020) (per curiam).

[1172] *Fisher v. Hargett*, 604 S.W.3d 281 (Tenn. 2020).

[1173] *League of Women Voters of Michigan v. Benson*, No. 353654 (Mich. Ct. App. May 22, 2020).

[1174] *League of Women Voters of Michigan v. Benson*, 333 Mich.App. 1 (Mich. Ct. App. 2020).

[1175] *League of Women Voters of Michigan v. Sec'y of State*, 506 Mich. 886 (2020).

[1176] *Id.* at 308 (Bernstein, J., dissenting).

denied on September 11, 2020.[1177] Therefore, the November election went forward with a requirement that ballots be received, rather than postmarked, by Election Day.

129. Collins v. Adams – Kentucky 2020

On May 27, 2020, the ACLU, the ACLU of Kentucky, Lawyers' Committee for Civil Rights Under Law, and the law firm Covington & Burling filed a lawsuit in federal court, on behalf of the League of Women Voters of Kentucky, the Louisville Urban League, and the Kentucky NAACP, as well as individual voters.[1178] The suit challenged various provisions of Kentucky election law, including the narrow list of permissible reasons to vote by mail and a photo ID requirement for voting in person and applying for a mail-in ballot. The latter burdens the right to vote, because obtaining the proper photo ID would force voters to visit ID-issuing offices in person – a huge issue because many of the offices that issue IDs were closed due to the pandemic,

On July 10, 2020, plaintiffs moved for a preliminary injunction, seeking to enjoin state defendants from enforcing the voter ID and excuse requirements – in other words, ordering the state to continue its procedures from the June 23, 2020 election.[1179] On August 20, 2020, the state Board of Elections voted to adopt regulations allowing anyone with a fear of contracting COVID-19 to vote by mail. The regulations further stated that the Board would not be enforcing the new photo ID law for mail-in ballots, and would be offering an exception for those voting in person who were unable to get a photo ID due to the pandemic. Due to these regulations, on August 27, 2020, the parties jointly agreed to dismiss the case.[1180]

130. NAACP Minnesota-Dakotas Area State Conference v. Simon – Minnesota 2020

In May 2020, as part of its adaptation to the COVID-19 pandemic, the Minnesota legislature passed a bill allocating money for sanitizing polling places and granting more flexibility for polling place locations. However, it declined to expand voting by mail, over the objections of Democratic Farmer-Labor lawmakers.[1181]

On June 4, 2020, the ACLU, the ACLU of Minnesota, and Faegre Drinker LLP sued the Minnesota Secretary of State, representing the state conference of the NAACP as well as

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[1177] *League of Women Voters of Michigan v. Sec'y of State*, 506 Mich. 905 (2020).

[1178] *Collins v. Adams*, No. 3: 20-cv-00375 (W.D. Ky. May 27, 2020).

[1179] Motion for Preliminary Injunction, *Collins v. Adams*, No. 3: 20-cv-00375 (W.D. Ky. May 27, 2020), Dkt. 30.

[1180] Joint Stipulation of Dismissal, *Collins v. Adams*, No. 3: 20-cv-00375 (W.D. Ky. May 27, 2020), Dkt. 58.

[1181] *See* Brian Bakst, *Legislature Agrees on Measures to Make Voting Safer*, MPR News (May 7, 2020 8:33 PM), https://www.mprnews.org/story/2020/05/07/legislature-agrees-on-measures-to-make-voting-safer.

individual voters, seeking to make voting safer in the middle of the pandemic.[1182] The suit sought an order that the state mail absentee ballots to all registered voters, and the requirement that voters have a witness sign their ballot envelope be suspended due to the risks of COVID-19 under the protections of the Minnesota constitution, including its guarantee of the fundamental right to vote.

On July 2, 2020, plaintiffs moved for a preliminary injunction, requesting the same relief, and on July 17, representatives from the Trump presidential campaign and Republican party moved to intervene. In an August 3 order, the court denied the preliminary injunction and allowed the interventions; however, it did allow the original parties to settle the witness signature issue.[1183] After further discussions, on September 17, state officials agreed to mail absentee ballot applications to registered voters for the November election.[1184]

131. Connecticut NAACP v. Merrill – Connecticut 2020

On April 20, 2020, as the COVID-19 pandemic spread across the country, Connecticut Governor Ned Lamont issued an executive order mandating the expansion of absentee ballot access for the primary election, rescheduled to August. However, this was not extended to cover the November general election, meaning that the vast majority of voters would have to vote in-person – or choose not to vote at all, for fear of becoming ill – due to Connecticut's narrow list of eligibility criteria to vote by mail.

On July 2, 2020, the ACLU and the ACLU of Connecticut filed a lawsuit in federal court, on behalf of the Connecticut State Conference of the NAACP and the League of Women Voters of Connecticut, as well as an individual voter who required alternatives to voting in person due to being in a risk group from COVID-19.[1185] The suit alleged a violation of Section 2 of the Voting Rights Act, due to the disproportionate impact this would have on Black voters, and the constitutional right to vote. The parties reached a favorable settlement in September 2020, with the state agreeing to allow all voters to vote by mail without an excuse, and the lawsuit was dismissed on September 25, 2020.[1186]

132. People First of Alabama v. Merrill – Alabama 2020

On May 1, 2020, the NAACP Legal Defense and Educational Fund, the Southern Poverty Law Center, and the Alabama Disabilities Advocacy Program sued state officials, challenging three provisions of Alabama law: the requirement that an absentee ballot be

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[1182] *NAACP Minnesota-Dakotas Area State Conf. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. Jun. 4, 2020).

[1183] Order, *NAACP Minnesota-Dakotas Area State Conf. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. Aug. 3, 2020).

[1184] *See* Plaintiffs' and Defendant's Joint Motion to Dismiss Counts III & IV, *NAACP Minnesota-Dakotas Area State Conf. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. Aug. 3, 2020).

[1185] *Connecticut Conf. of the NAACP v. Merrill*, No. 3:20-cv-909 (D. Conn. July 2, 2020).

[1186] Notice of Voluntary Dismissal, *Connecticut Conf. of the NAACP v. Merrill*, No. 3:20-cv-909 (D. Conn. Sept. 25, 2020).

signed by a notary or two adult witnesses, the requirement that absentee ballots include copies of a valid photo ID, and the ban on counties offering curbside voting.[1187] It argued that these provisions, as applied to voters in the context of a deadly pandemic, unconstitutionally burdened the right to vote and violated the Voting Rights Act and Americans with Disabilities Act.

On May 12, 2020, plaintiffs moved for a preliminary injunction barring the enforcement of all three provisions, which, on June 15, the court granted, though only with respect to the upcoming July 14 elections.[1188] The state promptly applied for a stay of the injunction, which the Eleventh Circuit denied on June 25.[1189] The state appealed to the Supreme Court, which did grant the stay on July 2 – twelve days before the run-off elections.[1190] This meant that all three of the challenged provisions were in effect for those elections.

On July 6, the ACLU and the ACLU of Alabama joined the case, filing an amended complaint that further challenged the limits on eligibility to vote with an absentee ballot, as well as the three other provisions, seeking to prevent their enforcement for the November general election.[1191] The case went to trial for two weeks in September 2020, and after hearing from witnesses and weighing the evidence, on September 30, the court issued its decision.[1192] It found that the challenged provisions deprived voters of their constitutional right to vote and violated the Voting Rights Act and Americans with Disabilities Act, as applied during the pandemic. Accordingly, it issued a preliminary injunction preventing the enforcement of the witness requirement, photo ID requirement, and curbside voting ban.

The state appealed, and on October 13, the Eleventh Circuit issued an order reinstating the witness and photo ID bans, while maintaining the lower court order that allowed counties to implement curbside voting.[1193] The state further appealed, and on October 21, the U.S. Supreme Court granted a stay of the remainder of the injunction.[1194] Therefore, all three provisions were in effect for the November 2020 elections.

133. Chambers v. North Carolina – North Carolina 2020

North Carolina law requires that voters who submit an absentee ballot by mail have at least one other witness sign their ballot envelope. In the context of the COVID-19 pandemic, this requirement poses a particular threat to people who live alone and those with underlying conditions that place them at higher risk of developing serious

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[1187] *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK (N.D. Ala. June 15, 2020).

[1188] 467 F.Supp.3d 1179 (N.D. Ala 2020).

[1189] 815 Fed.Appx. 505 (11th Cir. 2020).

[1190] 141 S. Ct. 190 (2020) (Mem.).

[1191] First Amended Complaint, *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK (N.D. Ala. Jul. 6, 2020).

[1192] 491 F.Supp.3d 1076 (N.D. Ala. 2020).

[1193] *People First of Alabama v. Sec'y of State*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. 2020).

[1194] 141 S. Ct. 25 (2020) (Mem.)

complications from COVID-19. Although normally, the state requires two witnesses, the legislature enacted a law that temporarily reduced the requirement to only one witness for purposes of "an election held in 2020." However, this still placed voters at risk, as they would have to identify a witness and break self-isolation to attain the required ballot signature.

On July 10, 2020, the ACLU, the ACLU of North Carolina, and the law firm Sullivan and Cromwell filed a lawsuit in North Carolina state court challenging the absentee ballot witness requirements.[1195] The lawsuit argued that enforcing the witness signature requirements violated the state constitution's guarantees of free elections, assembly, speech, and equal protection.[1196] Along with several other voters, Barbara Hart, age 73, served as a plaintiff. Ms. Hart lives alone, and has a history of breast and lung cancer; chemotherapy for her breast cancer damaged her heart, leaving her particularly at risk of severe illness if she contracts COVID-19. Because of this, she had been self-isolating since March 2020, when the pandemic began. She has voted in every election since she was old enough to vote, and sought to vote with an absentee ballot in the November election to protect her health.

On July 21, 2020, the plaintiffs moved for a preliminary injunction to prevent North Carolina officials from enforcing the witness requirement. On September 3, 2020, the court denied the motion, finding that the administrative burden of mailing out absentee ballots with the corrected instructions that plaintiffs requested, namely that the voter did not need to find a witness, was so burdensome on election officials that it counseled against granting relief.[1197] The case was subsequently dismissed on January 11, 2021.

134. (a) Donald J. Trump for President v. Boockvar – Pennsylvania 2020

As part of its response to the COVID-19 pandemic, Pennsylvania legislatively implemented a mail-in voting plan open to all voters for the November 2020 general election. In response, on June 29, 2020, the Trump presidential campaign and the Republican National Committee, and other Republican candidates, sued various state officials in federal court, focusing on the state's use of drop boxes for mail-in ballots and the procedures used to count ballots with certain procedural defects.[1198] In short, the plaintiffs argued that the challenged procedures would result in vote dilution, because they insufficiently guarded against fraud. Shortly after the complaint was filed, on July 15, 2020, the ACLU, the ACLU of Pennsylvania, Lawyers' Committee for Civil Rights Under Law, Public Interest Law Center, and WilmerHale moved to intervene in the case, on behalf of the NAACP Pennsylvania State Conference, Common Cause Pennsylvania, the League of Women Voters of Pennsylvania, and several individual voters.

[1195] *Chambers v. North Carolina*, No. 20-CVS-500124 (N.C. Sup. Ct. Jul. 7, 2020).

[1196] *See* N.C. Const. Art. 1, §§ 10, 12, 14, 19.

[1197] Order on Injunctive Relief, *Chambers v. North Carolina*, No. 20 CVS 500124 (N.C. Sup. Ct. Sept. 3, 2020).

[1198] *Donald J. Trump for President v. Boockvar*, No. 2:20-cv-00966-NR (W.D. Pa. June 29, 2020).

At the urging of the state defendants and various intervenors, including the ACLU's clients, the court decided to abstain from deciding the case due to a parallel case making its way through state court.[1199] The plaintiffs nevertheless moved for preliminary relief (and a lift of the stay), which was denied.[1200] On September 17, 2020, the Pennsylvania Supreme Court issued its decision in the parallel state case, clarifying some of the provisions of state election law and making clear that the underlying basis of the Trump campaign's lawsuit was not meritorious.[1201] Therefore, the court in the federal case dismissed all claims against the state officials and entered judgment in their favor.[1202]

(b) Pennsylvania Democratic Party v. Boockvar – Pennsylvania 2020

In 2019, Pennsylvania enacted a law allowing all qualified voters the opportunity to vote by mail, without needing to prove some form of special eligibility. On July 10, 2020, the Pennsylvania Democratic Party filed a petition for review, seeking to clarify certain provisions of the law, including the placement of drop-boxes, the ballot receipt deadline, the process for curing potential defects in ballots that would result in them being excluded from the canvass, the handling of secrecy envelopes meant to cover ballots, and the ability to poll watchers to observe elections.[1203] While these issues would have been important in the first year of implementation regardless, due to the COVID-19 pandemic and record participation in absentee balloting – as well as various hotly contested races in Pennsylvania – they took on new importance.

Following the filing of the initial complaint, the ACLU, the ACLU of Pennsylvania, Lawyers' Committee for Civil Rights, the Public Interest Law Center, and the law firm WilmerHale moved to intervene in the case. Together, we represented three individual voters, the Black Political Empowerment Project, Common Cause Pennsylvania, the League of Women Voters of Pennsylvania, and Make the Road Pennsylvania. The court denied this request, but allowed these clients to file briefs before it as amici curiae, or friends of the court. Ultimately, on September 17, 2020, the Pennsylvania Supreme Court issued its decision, largely agreeing with the positions we argued.[1204] Specifically, the court held that county boards of elections could set up drop boxes for ballots, and ruled that because of well-documented issues with the postal service, any ballots that arrive by 5:00 pm on the Friday after Election Day would be counted, rather than by Election Day itself.

(c) Trump for President v. Boockvar – Pennsylvania 2020

On November 9, 2020, President Trump's campaign filed a federal lawsuit against Pennsylvania Secretary of State Kathy Boockvar and the boards of elections of six

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[1199] *See Donald J. Trump for President, Inc. v. Boockvar*, 481 F.Supp.3d 476 (W.D. Pa. 2020).

[1200] *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966-NR (W.D. Pa. June 29, 2020), Dkt. 414, 444, 445.

[1201] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

[1202] *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331 (W.D. Pa. 2020).

[1203] *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa. July 10, 2020).

[1204] *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

counties.[1205] In their lawsuit, the Trump campaign claims that their election observers were unable to stand close enough to watch the count of mail and absentee ballots in several counties. The campaign also asserts that it is illegal and unconstitutional for only some counties to notify and allow voters to correct mistakes with the declarations on the envelopes of their mail and absentee ballots. The lawsuit asked the court to issue an order to prohibit the commonwealth from certifying its presidential election results.

On November 10, the ACLU, the ACLU of Pennsylvania, and co-counsel filed a motion to intervene in the case on behalf of eight impacted voters, Black Political Empowerment Project, Common Cause PA, League of Women Voters of PA, and NAACP Pennsylvania State Conference, which the judge granted on November 12. [1206] We then filed a motion to dismiss the lawsuit, arguing that the Plaintiffs' claims about technical irregularities could and should have been brought in state court earlier in the process, when they could have been cured, and that even if there were minor technical problems the Plaintiffs have produced no evidence of fraud or ineligible voters casting ballots to justify disenfranchising a single voter, much less 6.8 million.[1207]

On November 21, Judge William Brann dismissed the lawsuit, saying, "(T)his Court has been presented with strained legal arguments without merit and speculative accusations...unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state."[1208] On November 27, the Third Circuit upheld the district court's decision.[1209]

135. Common Cause Rhode Island v. Gorbea – Rhode Island 2020

Rhode Island is in the minority of states in requiring mail-in ballot envelopes to be signed by either two lay witnesses or one notary. Although this requirement can be burdensome in normal times, in the context of COVID-19, it poses public health risks for voters, particularly those who are at high risk of serious complications from COVID-19. Governor Gina Raimondo waived this requirement for the June 2020 presidential primary, but failed to do so for the September primary and November general elections.

On July 23, 2020, the ACLU, the ACLU of Rhode Island, the Campaign Legal Center, and Fried, Frank, Harris, Shriver & Jacobson sued state officials in federal court, challenging the state's witness and notary requirements for voting by mail.[1210] We represented Common Cause Rhode Island and the League of Women Voters of Rhode Island, as well as three individual voters with disabilities who would have difficulty obtaining two witnesses for

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[1205] Donald J. Trump for President v. Boockvar, No. 20-cv-3384 (M.D. Pa. Nov. 9, 2020).

[1206] Motion to Intervene by NAACP Pa. State Conf., et al, Donald J. Trump for President v. Boockvar, No. 20-cv-3384 (M.D. Pa. Nov. 9, 2020).

[1207] Motion to Dismiss for Failure to State a Claim, Donald J. Trump for President v. Boockvar, No. 20-cv-3384 (M.D. Pa. Nov. 9, 2020).

[1208] Donald J. Trump for President v. Boockvar, 502 F.Supp.3d 899 (M.D. Pa. 2020).

[1209] 830 Fed.Appx. 377 (3d Cir. 2020).

[1210] *Common Cause Rhode Island v. Gorbea*, No. 1:20-CV-00318-MSM (D. R.I. July 23, 2020).

their ballot. The lawsuit requested an order preventing state officials from enforcing the witness requirement for the duration of the COVID-19 pandemic.

Shortly after the lawsuit was filed, the parties came to an agreement.[1211] In the decree, Rhode Island agreed to forgo enforcing the witness and notary requirement for ballots sent by mail. Meanwhile, the Republican National Committee and the Republican Party of Rhode Island moved to intervene in the case, which the court denied, instead entering the consent decree. The Republican entities appealed the denial of their motion to intervene, and the entry of the consent decree, and further sought a stay of the judgment. The First Circuit rejected the application for a stay, though it reversed the order denying intervention.[1212] In other words, the Republican entities were permitted to appeal the underlying order further, but the First Circuit upheld the consent decree. The Republican entities then sought a stay in the U.S. Supreme Court, which was denied.[1213]

136. New York Immigration Coalition v. Trump – New York 2020

On July 21, 2020, President Donald Trump issued a Memorandum addressed to Secretary of Commerce Wilbur Ross, declaring plans to exclude undocumented immigrants from the apportionment base for purposes of congressional representation.[1214] Under the terms of the Memorandum, the President requested two sets of numbers: the total population of each state, and the total population of each state minus the number of people not in lawful immigration status. Notably, the Memorandum provided no guidance on how to determine citizenship status, given that previous attempts to ask Census respondents about their citizenship had been defeated in *Department of Commerce v. New York*.[1215]

On July 24, 2020, the ACLU, the New York Civil Liberties Union, the ACLU of Texas, and Arnold & Porter filed a lawsuit in federal court challenging the policy.[1216] Brought on behalf of the New York Immigration Coalition, Make the Road New York, CASA, American-Arab Anti-Discrimination Committee, ADC Research Institute, and FIEL Houston, the suit alleged the Memorandum violated the statutes governing the census and apportionment, as well as the Constitution. Shortly afterwards, the case was consolidated with another similar lawsuit brought by a coalition of governmental entities, including twenty-two states and the District of Columbia.[1217] The parties in the consolidated case then moved for summary judgment, or in the alternative, a preliminary injunction declaring the Memorandum unlawful. On September 10, 2020, a three-judge panel of the District Court

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[1211] Consent Judgment and Decree, *Common Cause Rhode Island v. Gorbea*, No. 1:20-CV-00318-MSM (D. R.I. July 30, 2020).

[1212] *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020).

[1213] *Republican National Committee v. Common Cause Rhode Island*, 141 S. Ct. 206 (2020) (Mem.).

[1214] Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

[1215] 139 S. Ct. 2551 (2019).

[1216] *New York Immigration Coalition v. Trump*, No. 1:20-cv-05781-JMF (S.D.N.Y. July 24, 2020).

[1217] *New York v. Trump*, No. 1:20-cv-05770-JMF (S.D.N.Y. July 24, 2020).

declared that the Memorandum was unlawful, and ordered the Secretary of Commerce not to include any information on the number of undocumented immigrants in each state.[1218] The government promptly appealed to the U.S. Supreme Court (an option available in a narrow class of cases, including those concerning the census), and sought a stay of the lower court's order, which was denied.[1219]

At the Supreme Court, the parties first submitted briefs as to whether the case should be resolved on an expedited basis, in light of statutory deadlines concerning the transmission of information from the Secretary of Commerce to the President. On October 16, 2020, the Court issued an order setting the case for a full hearing on the merits on an expedited basis, with oral arguments to occur in late November.[1220] On December 18, 2020, the Supreme Court issued its opinion, finding the case not ripe for review, reasoning that future events – including the extent to which undocumented people could and would be excluded from the apportionment count, and whether this exclusion would in fact shift congressional representation – were too speculative to allow for court adjudication.[1221] Therefore, the Supreme Court vacated the lower court's order. On January 21, 2021, the day he took office, President Biden issued an executive order rescinding the prior Memorandum.[1222]

137. League of Women Voters of Ohio v. LaRose – Ohio 2020

As part of the absentee voting process, some states impose a requirement of signature matching with a signature on file, claiming these programs preventing fraud and ensure that the actual voter filled out the ballot. In practice, often election officials – who have no handwriting analysis expertise – reject absentee ballots or absentee ballot applications on the basis of a signature mismatch, and even worse, do not always notify voters when their ballot is rejected because of a potential mismatch. Ohio is one of the states that conducts signature matching, and within the state, counties differ as to the standards they use to analyze signature matching, the procedures they follow to reject perceived mismatches, the notice they provide to voters whose applications are rejected, the opportunity they give to cure absentee ballot applications that have been rejected on the basis of signature mismatch, and the record-keeping they do to document this activity. While every legitimately-cast ballot should be counted, the problem is particularly pernicious because signature match programs disproportionately affect certain groups, including people with disabilities, older people, and people for whom is English is a second language, all of whom are more likely to have fluctuating handwriting.

On July 31, 2020, the ACLU, the ACLU of Ohio, and Lawyers' Committee for Civil Rights filed a lawsuit in federal court, challenging Ohio's system of matching signatures on

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[1218] *New York v. Trump*, 485 F.Supp.3d 422 (S.D.N.Y. 2020).

[1219] *New York v. Trump*, 490 F.Supp.3d 736 (S.D.N.Y. 2020).

[1220] *Trump v. New York*, 141 S. Ct. 616 (2020) (Mem.).

[1221] *Trump v. New York*, 141 S. Ct. 530 (2020).

[1222] Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, 86 Fed. Reg. 7015 (Jan. 25, 2021).

absentee ballots and absentee ballot applications.[1223] The case was brought on behalf of the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and other plaintiffs in preparation for the November 2020 election. The lawsuit argued that Ohio's inconsistent signature matching program violated the constitution by burdening the fundamental right to vote, creating an unequal system for voters depending on which county they lived in, and denied them due process through inadequate procedural safeguards.

On August 24, plaintiffs moved for a preliminary injunction that would order election officials to set up a consistent notice and cure process when they perceive a signature mismatch.[1224] Such a process would provide adequate time for the voter to remedy the mismatch, and obligate officials to contact voters by telephone and email with enough time to correct any ballot issues. On September 27, the court denied the motion for a preliminary injunction.[1225] Following the 2020 elections, the plaintiffs subsequently dismissed their case.[1226]

138. Oppenheim v. Watson – Mississippi 2020

As discussed, many states allow any voter to cast an absentee ballot, while a minority of jurisdictions require voters to meet certain eligibility criteria, including the state of Mississippi. In Mississippi, one of the allowable reasons for casting an absentee ballot is "temporary or permanent physical disability."[1227] During summer 2020, the state legislature amended the law to include within "temporary physical disability," any voter who is "under a physician-imposed quarantine due to COVID-19 ... or is caring for a depending who is under a physician-imposed quarantine due to COVID-19.

As part of the ACLU's efforts to ensure access to the ballot in the context of COVID-19, the ACLU, the ACLU of Mississippi, and the Mississippi Center for Justice filed a lawsuit on August 11, 2020, seeking to ensure that absentee voting is accessible to all Mississippians.[1228] The lawsuit sought a ruling clarifying that those voters who were following public health guidance to avoid contracting or spreading COVID-19 would qualify under the new definition.

On September 2, the court issued a ruling.[1229] First, it agreed that the existing excuse requirement covered any voter with an underlying physical condition that placed them at a

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[1223] *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. July 7, 2020).

[1224] Motion for a Preliminary Injunction, *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. Aug. 24, 2020).

[1225] Opinion and Order Denying Plaintiffs' Motion for a Preliminary Injunction, *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. Sept. 27, 2020).

[1226] Stipulation of Dismissal Without Prejudice, *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. May 21, 2021).

[1227] Miss. Elec. Code. § 23-15-713.

[1228] *Oppenheim v. Watson*, 2020-CA-00983-SCT (Miss. Chan. Ct. 2020).

[1229] *See id.*

higher risk of severe COVID-19, including those who were under a recommended quarantine from their doctor. However, it denied relief for a broader class of voters, reasoning that people following public health guidance and social distancing protocols were not under a "physician-imposed" quarantine. However, after appeals to both rulings, the Mississippi Supreme Court limited the ruling.[1230] It found that having a preexisting condition that could cause more severe symptoms or cases of COVID-19 was insufficient to qualify under the absentee ballot rule, and further, that a "recommended" quarantine was not a "physician-imposed" quarantine.[1231]

139. Ocasio v. Comisión Estatal de Elecciones – Puerto Rico 2020

On August 20, 2020, the ACLU, the ACLU of Puerto Rico, and Paul, Weiss filed a lawsuit challenging the Puerto Rico Election Commission's failure to implement steps to ensure voters over 60 can safely cast a ballot in the November general election in the midst of the COVID-19 pandemic. The government of Puerto Rico gave the commission powers to implement accommodations to keep older voters safe for the elections, including access to early and absentee voting, through a joint resolution of the Legislative Assembly for the primaries and an updated election code applicable to the November election.

The lawsuit, which sought certification as a class action, sought a court order requiring the Puerto Rico Election Commission to implement policies that will allow older voters to access early and absentee voting. The lawsuit estimates 800,000 voters over the age of 60 could benefit. Shortly after the lawsuit was filed, the court issued a preliminary injunction granting elderly voters the right to vote by mail and extending the deadline to apply for early voting, which was eventually converted into a permanent injunction.[1232]

140. Arctic Village Council v. Meyer – Alaska 2020

Alaska requires that eligible voters who wish to cast an absentee ballot by mail sign their ballots in the presence of a witness, who must also sign the ballot. In the context of the COVID-19 pandemic, this requirement posed a particular threat to people who are immunocompromised who entered self-isolation as the pandemic spread across the nation. More generally, it burdened those who live alone or with people under the age of 18, who would have to potentially expose themselves to the virus to track down an eligible witness to cast their ballot.

As part of the adaptation to the COVID-19 pandemic, on September 8, 2020, the ACLU brought suit in Alaska state court to challenge this requirement as applied to the November 2020 general election.[1233] In the litigation, the Native American Rights Fund (NARF) and Lawyers' Committee for Civil Rights Under Law represented plaintiff Tribe Arctic Village; the American Civil Liberties Union, ACLU of Alaska, and Lawyers' Committee represented individual voters as well as the League of Women Voters of Alaska. The lawsuit alleged

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[1230] *Watson v. Oppenheim*, 301 So.3d 37 (Miss. 2020).

[1231] *Id.* at 43, ¶ 23.

[1232] *See Ocasio v. Comisión Estatal de Elecciones*, 486 F.Supp.3d 478 (D.P.R. 2020).

[1233] *Arctic Village Council v. Meyer*, No. 3AN-20-07858 (Alaska Sup. Ct. Sept. 8, 2020).

that enforcing the witness requirement in the pandemic imposed significant burdens on the Alaska constitution's guarantee of the right to vote.

On October 5, 2020, the court granted a preliminary injunction, finding that the witness requirement for absentee ballots is unconstitutional during the COVID-19 pandemic.[1234] Although the state was quick to appeal the decision, the Alaska Supreme Court quickly affirmed that Alaskans would not need a witness to sign their absentee ballots, upholding the lower court ruling on October 13, 2020.[1235]

141. Hotze v. Hollins – Texas 2020

In advance of the early voting period in Texas, Harris County, which includes Houston, the state's largest city, approved the development of drive-thru voting, where ten polling sites would be constructed using large movable tents, and voters could cast their ballot while remaining in the car. Unlike curbside voting, reserved for certain voters and available at all polling sites, all voters could use drive-thru voting. By the end of early voting, more than 127,000 Texans had done so.

On October 28, 2020, a Republican activist and three candidates for election filed a lawsuit in federal court seeking to disqualify the ballots cast with drive-thru voting.[1236] They argued the program violated the Texas Election Code – despite the Texas Supreme Court denying a writ of mandamus based on this argument, from the same plaintiff, only *six days previously*.[1237] Remarkably, the lawsuit did not only seek to shut down drive-thru voting on election day – it also sought to discard the more than 127,000 ballots already cast.

The ACLU and the ACLU of Texas moved to intervene in the lawsuit, representing the League of Women Voters of Texas and several individuals who voted using the drive-thru option. On November 2, 2020, the court held a hearing, and the same day, dismissed the case because the plaintiffs lacked standing, or a sufficiently particularized legal injury, to sue.[1238] However, the court also held that if the plaintiffs did have standing to sue, it would find the drive-thru voting program illegal. Therefore, the court said, if its decision on standing was reversed on appeal, the program could not operate on election day, though votes already cast using the program would be counted. The Fifth Circuit affirmed the ruling later that day.[1239] However, because appeals were inevitable – and in fact, were already filed at the time of its decision – Harris County chose not to operate nine out of its ten drive-thru voting sites on Election Day, out of fear an adverse court decision would

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[1234] Order Granting Plaintiffs' Motion for Preliminary Injunction (Case Motion #1) and Denying Defendants' Motion to Dismiss (Case Motion #3), Arctic Village Council v. Meyer, No. 3AN-20-07858 (Alaska Sup. Ct. Oct. 5, 2020).

[1235] Order, Alaska v. Arctic Village Council, No. S-17902 (Alaska Oct. 12, 2020).

[1236] *Hotze v. Hollins*, No. 4:20-cv-03709 (S.D. Tex. 2020).

[1237] *In re Hotze*, 610 S.W.3d 909 (Tex. 2020) (Mem.)

[1238] *Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668 (S.D. Tex. 2020).

[1239] *Hotze v. Hollins*, No. 20-20574, 2020 WL 6440440 (5th Cir.).

cause those ballots not to be counted.[1240] The case is pending on appeal, and it set to be argued in the Fifth Circuit on August 4, 2021.

142. Sixth District of the African Methodist Episcopal Church v. Kemp – Georgia 2021

The 2020 and 2021 runoff elections in Georgia saw record voter turnout, particularly among people of color. Rather than celebrating this as a victory for democratic participation, Georgia legislators passed a sweeping omnibus bill, S.B. 202, in March 2021, that limits access to the ballot in many ways. In response, on March 30, 2021, the ACLU, the ACLU of Georgia, the NAACP Legal Defense and Educational Fund, the Southern Poverty Law Center, and the law firms WilmerHale and Davis Wright Tremaine sued Georgia officials over the law, on behalf of the Sixth District of the African Methodist Episcopal Church, the Georgia Muslim Voter Project, Women Watch Afrika, the Latino Community Fund Georgia, and Delta Sigma Theta Sorority, Inc., all groups who are involved in protecting voting rights in Georgia.[1241]

The lawsuit targeted several provisions of S.B. 202, including its ban on mobile voting, strict new identification requirements for requesting and casting an absentee ballot, compressed time frame for requesting a ballot, restrictions on secure drop boxes, disqualification of provisional ballots cast out-of-precinct, and reductions on early voting. Finally, the lawsuit challenged the ban on line relief, wherein volunteers would provide water and snacks to Georgia voters waiting in needlessly long lines to vote. Plaintiffs argued that these provisions, individually and cumulatively, burden the right to vote, in violation of the constitution, the Voting Rights Act, and other federal civil rights laws.

On May 26, 2021, three disability-rights groups, the Arc Georgia, Georgia ADAPT, and the Georgia Advocacy Office, as well as the Southern Christian Leadership Conference, joined the lawsuit.[1242] In addition to burdens placed on voters of color, S.B. 202 also makes it significantly harder for people with disabilities to access the ballot, in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

In June 2021, the state and county officials separately moved to dismiss the case, while plaintiffs submitted briefing in opposition.[1243] Discovery has been stayed pending resolution of these motions.[1244]

[1240] Zach Despart, *Reversing Course, Harris County Shuts Down 9 of 10 drive-thru Election Day Voting Sites*, Houston Chron. (Nov. 3, 2020), https://www.houstonchronicle.com/news/houston-texas/houston/article/Reversing-course-Harris-County-shuts-down-9-of-15696434.php.

[1241] *Sixth District of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. Mar. 29, 2021).

[1242] *See* First Amended Complaint, Sixth District of the African Methodist Episcopal Church v. Kemp, No. 1:21-cv-01284-JPB (N.D. Ga. May 24, 2021), Dkt. 83.

[1243] *See* State Defendants' Motion to Dismiss, *id.*, at Dkt. 87; County Defendants' Joint Motion to Dismiss, *id.* at Dkt. 90.

[1244] *See id.* (June 14, 2021 ECF Order).

143. Western Native Voice v. Jacobsen – Montana 2021

Like many states following the 2020 election, Montana enacted new laws that limit access to the ballot. In Montana, these laws are frequently aimed at and have disproportionate effects on Native American voters, hindering their participation in the electoral process. Two of these bills are particularly pernicious. One, HB 176, ends same-day voter registration, which reservation voters have relied upon to cast votes in Montana since 2005.[1245] The second, HB 530, blocks organized ballot collection on rural reservations, which is particularly burdensome, given the long distances separating people from post offices and the limited access to vehicles on the reservation.[1246] Organized ballot collection is frequently used by Native American organizers to ensure Native voters are able to exercise the franchise.

On May 17, 2021, the ACLU, the ACLU of Montana, and the Native American Rights Fund sued in Montana state court in Yellowstone County, representing Western Native Voice and Montana Native Vote, two Native lead grass roots organizations who engage in get-out-the-vote (GOTV) work in Montana's Native communities and several Tribal communities.[1247] The complaint asserts that the new laws violate Native American right to vote in the state and violate equal protection under Montana's constitution because they disparately impact Native Americans and were enacted in full awareness of this effect. Plaintiffs further argue that the ban on organized ballot collection significantly inhibits communication with voters about proposed political change, limiting freedom of speech, and exceptions to the fines imposed for violating the collection ban were void for vagueness.

144. Hervis Rogers – Texas 2021

The ACLU, the ACLU of Texas, and Nicole DeBorde Hochglaube are representing Hervis Rogers, a Houston man facing charges for voting while ineligible to vote. The charges come a year and a half after Rogers, who is Black, waited more than six hours in line to cast his ballot in March 2020.[1248] The state claims that Rogers voted while he was still on parole. Rogers was arrested in July 2021, and has since been released on bail, which was set at $100,000. He faces up to 40 years in prison, despite believing that he was simply fulfilling his civic duty.

[1245] H.B. 176, 67th Legis. 1st Sess. (Mont. 2021) (*codified at* Mont. Code Ann. §13-2-304).

[1246] H.B. 530, 67th Legis. 1st Sess. (Mont. 2021).

[1247] *Western Native Voice v. Jacobsen*, No. DV 21-0560 (Mont. Dist. Ct. May 17, 2021).

[1248] Paul J. Weber, *Houston Voters Who Waited 6 Hours Arrested for Illegal Voting*, Wash. Post (July 9, 2021), https://www.washingtonpost.com/national/houston-voter-who-waited-6-hours-arrested-for-illegal-voting/2021/07/09/57dbb2f2-e103-11eb-a27f-8b294930e95b_story.html.

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

Introdnction

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

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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).

is no right more basic in our democracy than the right to participate in electing our political 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.

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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 William Hughes, Brett Schratz, Madison Perez, and Alton Wang who contributed to the preparation of this statement.

[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.

Section 2 litigation is expensive, complex, and time-consuming, even compared to the baseline 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 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—

[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).

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 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

[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.").

of elected officials, racial appeals in campaigns, and the like.[19] As a result, the cost of these 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

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[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).

[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).

> 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]

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

[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.

[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.

Frank v. Walker	768 F.3d 744 (7th Cir. 2014)	Voter ID	12/13/11	3/23/15	1197[33]	N
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

[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.

[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.

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
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)	Connty 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 nnder 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

[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.

[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 & Arnaud 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.").

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 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**

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

[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.

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
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

[48] 906 F. Supp. 2d 1083 (D. Mont. 2012) (preliminary injunction denied), *aff'd* 544 Fed.Appx. 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).

[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),

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
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 may be elected under regimes that are later found to be discriminatory or are 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.

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https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county.

[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).

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.

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.

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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).

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 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. 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

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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.

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 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 African-American 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,

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

[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.

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 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

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[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.

[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.

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 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

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[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: 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).

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 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

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

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

[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.'").

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 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]

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[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.

[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.

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 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

[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).

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 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

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[97] *Id.* at 4–5.

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

[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.

"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 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]

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[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).

[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).

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 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

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[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.

[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.").

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 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

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[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).

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

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 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

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[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).

[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).

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 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]

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[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).

[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)).

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 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

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[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.).

[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.).

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 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

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[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).

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

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 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.

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[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).

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.

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.

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

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 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.

Materials from Ezra Rosenberg, Co-Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law, submitted by the Honorable Steve Cohen, Chair of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Tennessee, available at *https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-20210716-SD001.pdf*.

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