OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS

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

MONDAY, AUGUST 16, 2021

Serial No. 117–39

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C O N T E N T S

MONDAY, AUGUST 16, 2021

LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE HEARING

APPENDIX

QUESTIONS AND ANSWERS FOR THE RECORD

OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS

Monday, August 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 10:02 a.m., via Zoom, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

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

Also Present: Representatives Dean, and Scanlon.

Staff Present: Aaron Hiller, Deputy Chief Counsel; David Greengrass, Senior Counsel; John Doty, Senior Advisor; Roma Venkateswaran, Professional Staff Member/Legislative Aide; Cierra Fontenot, Chief Clerk; John Williams, Parliamentarian and Senior Counsel; Keenan Keller, Senior Counsel; Gabriel Barnett, Staff Assistant; Daniel Rubin, Communications Director; Merrick Nelson, Digital Director; James Park, Chief Counsel; Betsy Ferguson, Minority Senior Counsel; Caroline Nabity, Minority Counsel; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. Good morning, everyone. Before we start, I would like to ask each person with us to, in whatever way they feel most appropriate, whether a call to divine inspiration or just a insular thought, to give a moment of silence and think about our soldiers who have fought for us in Afghanistan, who are in Afghanistan now, trying to protect and bring back our State Department staff and other workers that have helped us, Afghanis and Americans, and for their safety. Our thoughts are with them.

Thank you.

The Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, the Chair is authorized to call recesses at any time necessary.

I welcome everyone to today's hearing on oversight of the Voting Rights Act potential legislative reforms. Before we continue, I would like to remind all the Members that we have established an email address that we have previously shared and we have previously reminded you about, that the distribution list to circulate

exhibits or other written materials Members may desire to offer as part of our hearing today.

I also ask unanimous consent that our Judiciary Committee colleagues, Representatives Madeleine Dean and Mary Gay Scanlon, be permitted to join the panel in the limited capacity where they will be allowed to ask questions if yielded time by a Member of the Subcommittee.

Without objection, thank you.

Finally, I would ask all Members and Witnesses to mute your microphones so when you are not speaking. This will help prevent feedback and other technical issues, and you, of course, may unmute yourself any time you seek recognition.

I will now recognize myself for an opening statement.

Throughout his heroic life, our former colleague and friend, the late great John Lewis, often said the right to vote is the most powerful, nonviolent tool we have in a democracy. If we are ever to actualize the true meaning of equality, effective means such as the Voting Rights Act are still a necessary requirement of that democracy.

Last month, we marked the 1-year anniversary of his death. Let us not allow another anniversary to go by without ensuring the enactment of the legislation that bears his name, the John R. Lewis Voting Rights Act, to see that we have carried forth what his life's goal was, which was voting. He gave blood when he started the Selma to Montgomery march, almost killed, risked his life, others did lose their lives in fighting for the right to vote just south of here in Mississippi—I am in Memphis—Schwerner, Cheney, and Goodman were killed in Philadelphia, Mississippi, simply trying to register people to vote.

This problem which existed since my childhood, when I was in Memphis where there were segregated drinking fountains and days to go to the zoo, and days to go to public events, and where all public facilities had color-only sections. Let me tell you, I noticed those were not the good seats. They were the worst seats in the football, the basketball, the theater, you name it.

Vestiges of those days still haunt us, and that is why this is such an important bill because they percolate up so many times in voting.

This Subcommittee has devoted considerable time and resources in taking up John Lewis' call to defend that right to vote. All of us in Congress must rededicate ourselves to protecting this most fundamental right at a time when it is, once again, under severe threat.

The record we have built over the course of 13 hearings in the last 2 years is crystal clear. Voting discrimination against citizens based on race, color, or language minority status is a current and worsening problem that Congress must address through a renewed and strengthened Voting Rights Act.

The tidal wave of voter suppression that the Nation currently faces comes as no surprise. It is an entirely predictable result of the Supreme Court's 2013 decision, known as *Shelby County*, as in *Alabama* v. *Holder*, which effectively gutted the Voting Rights Act's most important enforcement mechanism, section 5, the preclearance provision.

It struck that formula that determined which jurisdictions would be subject to the preclearance requirement. Most of those jurisdictions were in the old South, where discrimination led us to a civil war, led us to Jim Crow, and still haunt us.

Under section 5, States with a history of voting discrimination would require obtaining approval from the Justice Department for any changes to voting rules prior to their taking effect, therefore, giving probable cause or prima fascia case, when certain actions in the past have shown there was reason to be suspect, and the Justice Department can show the need to protect citizens.

In striking down that coverage formula, the court held that to justify States unequally, those that had been listed in the Voting Rights Act and those that hadn't, Congress must create a formula based on current needs.

The court invited Congress to develop a new coverage formula, which is part of our mission today. In the absence of preclearance, States and localities have been implementing measures to further deny or abridge citizens' right to vote on account of race, color, or language minority status, and all after one of the most free and fair and impartial elections in our country's history, the most looked at and reviewed.

Since the 2020 election, several States have proposed or enacted restrictive voting laws in the name, as they call it, of election integrity protection. At a time when we just had the most circumscribed election ever analyzed and unanimously said to be free and fair and accurate.

Not surprisingly, those States include some of those that have previously been subject to the VRA's preclearance requirement because of their history of voting discrimination.

According to the Brennan Center for Justice, as of July 14 of this year, 18 States have enacted 30 laws that restrict the right to vote, including measures that target mail-in and absentee voting.

Let me just remind everybody that five States in our country have mail-in voting for every voter in all their elections, and it started back in Oregon over two decades ago.

They have targeted mail-in voting and absentee voting, increasing the risk of faulty voter purges and opposed stricter voter ID requirements.

We are not going to go into some of the laws that discuss giving powers to State legislative groups to overrule election commissions, because that is just an overall abridgement of voting rights and not necessarily based on race or speech or color. That is simply politics.

At a minimum, these measures disproportionately impact racial and language minority citizens in ways that could result in those citizens being denied the right to vote.

Just last month, the Texas legislature began a special session to pass a new omnibus voting measure that would restrict voting access by creating new ID requirements for voting by mail and clamp down on new voting rules instituted by Harris County, the home of Houston, Texas, the State's most populous county and its most populous city, and one of its most diverse regions. Those laws in Harris County were designed to increase voter access.

The Texas Senate passed its version of its bill just 4 days ago. In the absence of preclearance, plaintiffs have been forced on rely

on litigation under section 2 of the Voting Rights Act, which applies nationwide and prohibits voting rules that results in the denial or abridgement of the right to vote based on race, color, or language minority status to confront these challenges.

Yet, the Supreme Court Supreme Court in its recent decision, just July 1, a little over a month ago in *Brnovich* v. *The Democratic National Committee*, significantly curtailed the ability of Plaintiffs to succeed in claims alleging vote denial under section 2 and burdening yet another of the Act's important enforcement tools.

In the face of this sustained onslaught against voting rights by the States and localities and the erosion of the Voting Rights Act by the Supreme Court, Congress must act, and we have the power to do so.

Our authority to stop race discrimination voting remains expansive even in the terms of the Shelby County decision and the *Brnovich* decisions. The 14th and 15th Amendments to the Constitution, two of the three Civil War Amendments, give Congress explicit legislative power to enforce voting rights and equal protection against purposeful race discrimination.

So, by acting, we are doing what the Constitution in its most farsighted fashion after the Civil War said we needed to do to make us a more perfect union. Those amendments form the basis of Congress' authority to pass the Voting Rights Act in the first place.

When the Voting Rights Act VRA was first challenged just a year after its enactment, after Everett Dirksen and Republicans had the higher percentage of people voting for voting rights than Democrats, the Supreme Court, in *South Carolina* v. *Katzenbach*, upheld the preclearance provision and its coverage formula, holding the congressional authority to enforce the 15th amendment was broad and comprehensive and that implementing legislation needed only to be plainly adapted to a legitimate end.

This rationality test is highly deferential to Congress, and notably, *Shelby County* did not disturb this essential hold.

I also note that the elections clause, which confers ultimate authority on Congress to regulate the time, place, or manner of congressional elections further bolsters Congress' constitutional authority to protect voting rights in its Federal elections, our elections.

Congress' broad power under this law does not implicate that federalism concerns expressed by the court in *Shelby County*. It is important that any new voting rights legislation include a new geographic coverage formula that responds to the court's concerns in *Shelby County*. We are charged to do that.

It should also include a legislative response to the *Brnovich* decision and other measures, such as a practice-based coverage formula, reforms to the available scope of enforcement actions under the Voting Rights Act, greater notice and transparency requirements and expanded authority for bail-in preclearance, and the use of Federal election observers.

I thank Attorney General for Civil Rights, Kristen Clarke, and all of our Witnesses on the second panel for being here today and eagerly await their testimony. Ms. Clarke will be our first panel, but now I recognize the Ranking Member of the Subcommittee, the

gentleman from Louisiana, my friend, Mr. Johnson, for his opening statement.

Mr. Johnson, you are recognized.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. Before I begin, I think all of us on the Judiciary Committee and every Member of Congress must first address the outrageous foreign policy and national security disaster that has taken place over the weekend.

The American people awoke this morning to another incomprehensible and utterly avoidable disaster created by the obviously incompetent Biden Administration. The President is clearly in far over his head.

After 20 years, trillions of dollars and thousands of American lives were spent standing up Afghanistan's army and government, the country has been ceded back to the Taliban in less than a week to a disastrously executed Biden drawdown.

Afghans who helped the United States over the years are being killed along with their families. People are hanging on to the side of B–52s as they evacuate for fear of their lives under Taliban rule.

There should be top-to-bottom accountability at the Pentagon and within the Administration for this disaster. That this stunning failure has been met with silence from President Biden calls into serious question his ability to carry out his duties as Commander in Chief.

While he vacations at Camp David, America's stature in the world has just taken another massive step backwards. It is shameful and it is dangerous, and I hope every one of us will acknowledge that publicly. The American people deserve and demand better.

This morning, we engage, even as all that is going on, in what is your now sixth hearing that this Subcommittee has held on voting rights since April. So, let's go through these motions once again.

Today, we will have more discussion on legislative reforms to the VRA. At the Subcommittee's prior hearings, our witnesses have already discussed, ad nauseam, many of the proposed reforms. As recently as 2 weeks ago, we discussed the overly broad and constitutionally suspect practice-based coverage provision that would require every State and political subdivision to preclear certain election practices.

In June, the Subcommittee held a hearing on other proposed changes to the VRA, such as provisions that would create a new extraordinary legal standard for courts to grant injunctive relief in VRA-related actions and impose burdensome reporting requirements on States and localities.

Today, our Democrat colleagues would like to continue the conversation about how the Federal Government and partisan bureaucrats here in DC should exert control over State election laws.

In 1965, Congress passed the Voting Rights Act to overcome State resistance and barriers that prevented minorities from exercising their right, the right that is guaranteed to vote by the 15th Amendment.

As we have discussed at all the prior hearings, in 2013, the Supreme Court held, in *Shelby County* v. *Holder*, that continuing to require States to preclear election law changes based upon conduct

from decades ago, was an unconstitutional invasion of State sovereignty.

Specifically, the court noted that, quote, "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions," unquote.

We should applaud the court's decision in *Shelby County*, because it acknowledges and recognizes we have come a long, long way from one of the most shameful chapters in this country's history.

However, instead of recognizing that progress this country has made, our Democrat colleagues seek to propagate legislation that would amount to an unconstitutional Federal power grab over local election laws.

For example, H.R. 4, as passed last Congress, would create a new section 4B coverage formula. That new formula would allow a court to retain jurisdiction over a State or a political subdivision for 10 years if a certain amount of voting rights violations have occurred any time in the previous 25 years.

Under that new coverage formula, a State or political subdivision can rack up voting rights violations without a finding of intentional discrimination at all.

Instead, settlement agreements and consent degrees, in addition to court orders and objections by the attorney general, will suffice to trigger Federal coverage.

This new triggering mechanism is troubling, considering the politicization and partisan polarization of the Department of Justice Civil Rights Division.

As one of our witnesses today, Hans von Spakovsky, has noted, the Department has, quote, "a history of filing unwarranted objections under section 5 based on its bias in favor of liberal advocacy groups."

H.R. 4's new coverage formula will incentivize advocacy groups to file a plethora of objections, creating meritless litigation to trigger coverage. One of our prior Republican witnesses noted the formula, quote, "creates something akin to the heckler's veto, to the loudest private interest groups," unquote.

Liberal advocacy groups and Democrats want Federal bureaucrats to have control over election Administration. Now, it appears States will not even be able to re-adopt voting procedures that were in place before the pandemic without input from the Justice Department.

On July 28, the DOJ issued new guidance regarding State efforts to remove temporary emergency voting procedures implemented last year during the unprecedented pandemic.

The Biden Administration's new guidance bizarrely suggests that States may not return to voting laws and procedures that existed before the pandemic, saying those laws and procedures may not, quote, "be presumptively lawful," unquote.

In 2020 State and local governments were tasked with safely administering elections during a once-in-a-lifetime pandemic. It was a once-in-a-lifetime event. Many States adopted temporary voting procedures to reduce public health risk, despite prominent health officials saying that in-person voting was safe.

With this new guidance, the Department takes the position that these temporary emergency measures, some of which were passed

without their States' legislature's approval, in a blatantly unconstitutional violation of article 2, are the new baseline from which to judge compliance with the VRA.

This is contrary to Congress' intention in passing of legislation and a clear example of the left weaponizing the DOJ to do its bidding.

I implore the Department and my colleagues on the other side of the aisle to remember, it is easier for eligible Americans to vote than ever before in America's history. I look forward to the hearing, and these witnesses today will re-hash the same territory once again.

Thank you, and I yield back.

Mr. COHEN. Thank you, Mr. Johnson. I would now like to recognize the Chair of the Full Committee, the gentleman from New York State, who has a long history of championing voting rights, having chaired this Subcommittee before he became the Full Chair, Mr. Nadler, of New York City.

Chair NADLER. Thank you, Mr. Chair. I thank you for convening this important hearing at a critical moment in the life of our Nation, when our democracy itself is under greater threat than it has been in decades because of the sustained assault on the right to vote in States and localities across the country.

The Voting Rights Act of 1965 is rightly regarded by many as among the most sacred texts of our Nation's civic religion. It was in many ways among Congress' crowning achievements, but the Act was really the result of the sacrifices made by many Americans, including our late beloved colleague, John Lewis, who shed their blood or even died to guarantee all citizens the right to vote.

The institutions of government, including this one in which we have the honor of serving, are more truly representative of our country because of the vigorous enforcement of the Voting Rights Act.

Over the course of this year, and during the last Congress, this Subcommittee has held a series of hearings documenting, in exhaustive detail, the myriad ways that the right to vote, the most fundamental right in a democracy, remains under threat for too many Americans.

We have also examined the consequences of the Supreme Court's 2013 *Shelby County* v. *Holder* decision, as well as last month's decision in *Brnovich* v. *Democratic National Committee*, both of which dealt serious blows to the enforcement of the Voting Rights Act.

I appreciate this opportunity to continue our consideration of how we can restore the VRA to its full vitality and protect its most precious right.

Prior to *Shelby County*, the Voting Rights Act had been an unqualified success. It helped to reduce discriminatory barriers to voting, and it expanded electoral opportunities for people of color to Federal, State, and local offices, thereby opening the political process to every American.

Despite decades of evidence of the act's success, however, the Supreme Court in *Shelby County* substituted its own judgment for that of Congress in rejecting Congress' conclusion that a substantial record of continued discrimination in voting supported the act's reauthorization.

This decision effectively gutted the Voting Rights Act's most important enforcement mechanism, in section 5's preclearance provision. Specifically, it struck down the formula for determining which States and localities should be subject to preclearance, effectively rendering the preclearance provision inoperative, there is no longer a basis for subjecting jurisdictions to its requirements.

Before the Voting Rights Act, States and localities implemented a host of voter suppression laws, secure in the knowledge that it could take many years before the Justice Department could successfully challenge them in court, if at all.

As soon as one law was overturned, another would be enacted, setting up a discriminatory game of whack-a-mole. Section 5 broke this legal log jam by requiring States and localities with a history of discrimination against racial and ethnic minority voters to submit changes to their voting laws to the Justice Department for approval or to seek declaratory judgment in court prior to taking effect.

In the absence of preclearance, predictively the game of whack-a-mole has returned with a vengeance. Within 24 hours of the *Shelby County* decision, both Texas's Attorney General and North Carolina's General Assembly announced that they would reinstitute Draconian voter ID laws.

Both States' laws were later held in Federal courts to be intentionally racially discriminatory. During the years between their enactment and the court's final decision, many elections were conducted while the laws remained in place.

Since the *Shelby County* decision, and indeed just since the 2020 election, we have seen a dramatic rise in the number of voter suppression measures being proposed or enacted. Unnecessarily strict voter ID laws, significant scale backs to early voting periods, sharp restrictions on absentee ballots, and laws that make it harder to restore the voting rights of formerly incarcerated individuals are just a small sample of recent voting changes that have a disproportionate impact on minority voters.

According to a July 22nd, 2021, Brennan Center for Justice report, as of July 14th, 18 States have enacted 30 laws that restrict the right to vote since the beginning of the year.

As of August 9th, the nonpartisan organization, Voting Rights Alliance is tracking 473 anti-voter bills in the States.

Of the States that have already enacted new restrictive voting laws, one particularly egregious example that stands out in Congress is Georgia's SB 202. This law proposes numerous new burdens on voting, including onerous identification requirements to absentee voting, restrictions on early voting, and most notoriously, it even imposes criminal penalties for offering food or water to voters waiting in line to vote.

An effort to pass a similarly sweeping and egregious bill is currently under way in Texas. While some Texas State legislators, through their ingenuity and courage, have managed to temporarily halt that effort, the ultimate responsibility lies with us in Congress to fix the Voting Rights Act to ensure that such bills never become law.

In the absence of preclearance, victims of voting discrimination have been forced to turn to litigation under section 2, which applies

nationwide, and which prohibits a voting process or requirement that results in the denial or abridgement of the right to vote.

Yet, the Supreme Court in the *Brnovich* decision has now seriously eroded section 2 as well, as least as it applies to vote denial claims. 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 these claims under these new factors, lower courts could narrow a plaintiff's ability to challenge discriminatory yet facially neutral voting practices, the very practices that Congress broadened the scope of section 2 to confront.

In her 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, and 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. Legislation to revitalize the Voting Rights Act must include a new dynamic coverage formula that is broad enough to accurately capture the extent of ongoing voter discrimination and the current need for preclearance, while being tailored enough to address the court's stated federalism concerns as expressed in *Shelby County*.

Such legislation must also restore a broad understanding of section 2 as applied to vote denial claims and consider other reforms to the act, such as provisions to expand judicial authority, to bail-in jurisdictions into preclearance, provide greater notice and transparency, enhance the ability to assign Federal election observers, and facilitate plaintiff's ability to obtain preclearance injunctions.

I thank Chair Cohen for holding this important hearing to help us examine these critical issues. I look forward to hearing from our esteemed witnesses, including Assistant Attorney General for Civil Rights, Kristen Clarke, and I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler. It is now my pleasure to recognize a fellow Member of the distinguished August class of 2006, the Ranking Member of the Full Committee, Mr. Jordan, from Ohio.

Mr. JORDAN. Thank you, Mr. Chair.

The United States of America is the greatest country in the history of the world. There is no question that our country has done more to advance the cause of liberty and democracy than any other Nation ever. As our Constitution says in its preamble, we are always striving for a more perfect union.

Yes, our country has not always been perfect, and we must acknowledge and learn from our failures. The Democrats would have you believe that we have facing some sort of crisis that requires rapidly changing how we run our Nation's elections. The facts just don't support their arguments as I hope we will hear today.

This is the Subcommittee's sixth hearing on H.R. 4, a bill that the Democrats have yet to re-introduce in this Congress. Even

though this bill hasn't been introduced, the Majority Leader announced that the House may vote on it as early as next week.

So, this is likely the last time the Committee will have a chance to talk about the legislation, and we don't even know what is actually in the bill.

In 1965, Congress passed the Voting Rights Act to overcome State resistance and barriers that prevented some minorities from exercising their right to vote, guaranteed by the 15th amendment. As originally passed by Congress, the VRA, included an extraordinary departure from the principles of Federalism to combat the, quote, "exceptional conditions during a dark time in our Nation's history."

Despite what some Democrats say, the United States has come a long way since then. In 2013, in *Shelby County* v. *Holder*, the Supreme Court struck down the VRA's coverage formula, as outdated. The exceptional conditions from 1965 no longer existed to justify subjecting States to preclearance approval from the Federal Government, as the Ranking Member of the Subcommittee said earlier.

The court's decision in *Shelby* acknowledged the progress this Nation has made since 1960, and thankfully America today is not the same as America was in the 1960s. We should all applaud this progress.

Despite the strides our great country has taken, Democrats like to claim that the Supreme Court has gutted the VRA, and they say that that is why it is urgent to pass H.R. 4, but the facts just don't back that up.

What the Democrats fail to acknowledge is that the court's decision in *Shelby County* did not strike down all of the VRA, not even close. Sections 2 and 3C remain an effective tool to root out intentional discrimination where it might exist. H.R. 4 isn't legislation designed to fix *Shelby County*. It is legislation designed to radically change how we run elections and to politicize enforcement of the Voting Rights Act.

There is no need to amend the VRA and divide certain provisions such as the section 4B coverage formula that unconstitutionally and unjustifiably encroach on State sovereignty.

Also, in another brazen attempt to grab power from State control and give it to partisan bureaucrats in Washington H.R. 4 seeks to institute a practice-based preclearance provision. This provision would not just apply to States with histories of illegal discrimination. It would apply to every State and political subdivision in the entire country.

In other words, every local county or city would have to get approval from unelected people in the Justice Department before changing its election process. That is some scary stuff.

This provision is also designed to target popular voting integrity measures, like voter ID laws, which polling shows most Americans strongly support.

Americans deserve free, fair, and accurate elections. Every legal vote should count, something these voter integrity measures would help to ensure. To justify the unconstitutional Federal overreach of the H.R. 4, Democrats argue that States have enacted allegedly suppressive voting laws.

Democrats ignore one glaring fact, however. It is easier today for eligible Americans to vote than ever before in our Nation's history. It is interesting that Democrats always target Republican-led States like Georgia and Texas for allegedly suppressing the vote when these States actually have more expansive election procedures than Democrat-run States.

Georgia, for example, has 17 days of early voting, President Biden's home State of Delaware only has ten. Georgia has no-excuse absentee voting. Delaware requires an excuse for absentee voting. You don't hear Democrats complaining about Delaware, and you don't see the Biden Administration bringing suit against Delaware in Federal court.

The Biden Administration's Justice Department has unfortunately politicized enforcement of the Voting Rights Act, and to see how, look no further than the guidance issued by Attorney General Garland last month.

In 2020, many States adopted temporary voting procedures to reduce public health risks during a once-in-a-lifetime pandemic. Recognizing the temporary nature of these voting procedures, in 2020, Attorney General William Barr directed the civil rights division to adopt a VRA enforcement policy that would, quote, "presume it lawful for a State to revert to election laws or procedures it had before the pandemic."

On February 3rd, 2021, the Biden Administration abruptly rescinded Attorney General's Barr's guidance, and on July 28th, Attorney General Garland issued new guidance. The new guidance said that the State election laws and procedures that existed prior to the pandemic may not be presumptively lawful.

So, if a State had a lawful election procedure prior to the pandemic, then changed it to something else and now wants to change it back, the Biden DOJ said it can't do that. With this new guidance, the Department takes the position that the temporary emergency measures implemented during the pandemic are the new baseline from which to judge compliance with the Voting Rights Act, contrary to Congress' intention in passing the legislation.

Congressman Johnson and I sent a letter to Attorney General Garland last Thursday strongly urging him to rescind this guidance. We hope we will get a full response from the Attorney General before the House votes on H.R. 4.

Even more dangerous, H.R. 4 expands the role of the Justice Department in election Administration. As Attorney General Garland's actions have shown, the Biden Administration intends to politicize enforcement of the Voting Rights Act. We cannot trust them with these new authorities.

Our Constitution, the backbone of our country, is clear, that States have the primary authority to administer elections, even Federal elections.

H.R. 4, along with the Biden DOJ's politicized enforcement of the Voting Rights Act is a radical effort to Federalize elections. It is not supported by the law. It is not supported by the facts. It is a power grab, pure and simple.

Mr. Chair, thank you. I yield back.

Mr. COHEN. Thank you, Mr. Jordan.

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

At the conclusion of the first panel, we will have questions of General Clarke, and after the conclusion of the second panel, we will have questions of all the panelists.

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

When you get to 4 minutes, you need to be starting to wrap up. When you get to 5 minutes, you should be finished.

Before proceeding with your testimony, I would like to remind all the witnesses that you have a legal obligation to provide truthful testimony in answers to this Subcommittee and that any false statement you may make today, may subject you to prosecution under you section 1001 of title 18 of the United States Code.

The sole witness on our first panel today is the Honorable Kristen Clarke. Ms. Clarke is the Assistant Attorney General for the civil rights division of the United States Department of Justice. In that role, she leads the Department's efforts to enforce a broad array of Federal civil rights laws, including the Voting Rights Act of 1965.

Assistant Attorney General Clarke is a long-time civil rights lawyer, having begun her career as a trial lawyer in the civil rights division through the Department of Justice's Honors Program.

In 2006, she joined the venerable NAACP Legal Defense and Education Fund where she helped lead the organization's work in voting rights and election law.

In 2015, she was named the President and Executive Director of the Esteemed Lawyers' Committee for Civil Rights Under Civil Law. Assistant Attorney General Clarke received her JD from Columbia Law School and her BA from Harvard.

Assistant Attorney General Clarke, you are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE KRISTEN CLARKE

Ms. CLARKE. Chair Cohen, Ranking Member Johnson, and the Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, my name is Kristen Clarke, and I serve as Assistant Attorney General for the civil rights division of the U.S. Department of Justice. I want to thank you for the opportunity to testify today on the Department's work to implement and enforce the Voting Rights Act of 1965, and the need to revitalize and restore the act.

The Voting Rights Act is, as President Johnson said, one of the most monumental laws in the entire history of American freedom. It is a law that has helped to truly transform American democracy.

However, the progress that we have made is fragile, as we watch the current resurgence in attacks on voting rights. We have seen cuts to early voting periods, new and burdensome restrictions to register or vote, racially gerrymandered redistricting plans, polling sites eliminated or consolidated in communities of color, eligible

voters purged from the rolls, restrictions on civic groups seeking to help voters participate in the process, and more.

I am here today to sound an alarm. In 2013, the Supreme Court's decision in *Shelby County* v. *Holder* suspended the preclearance process, the Justice Department's single most powerful and effective fool for protecting the right to vote.

The Department's ability to protect the right to vote has been eroded as a result. For the Justice Department, restoration of the VRA is a matter of great urgency.

Before *Shelby County*, the preclearance process enabled the Department to swiftly review and block the implementation of discriminatory and unconstitutional voting practices in covered jurisdictions.

While section 5 was in place, the Justice Department blocked over 3,000 voting changes, helping to protect the rights of millions of citizens.

Evidence of discriminatory purpose, intentional discrimination, was found in over 60 percent of voting changes blocked by section 5.

In addition to blocking discrimination, the deterrent effect of the preclearance requirement is undeniable. The *Shelby County* ruling has given a green light to jurisdictions to now adopt voting restrictions. Today these laws can only be challenged through long, protracted resource-intensive case-by-case litigation.

The Department knows well the burden that comes with the case-by-case approach by way of cases that we brought recently in States like Texas and North Carolina. This gives to jurisdictions what the Supreme Court memorably called, quote, "the advantage of time and inertia." Before *Shelby County* jurisdictions had to meet their burden of proof by demonstrating that these rules were not adopted with a discriminatory purpose and would not worsen the position of minority voters.

Today discriminatory laws are allowed to take root immediately, impacting voters and corrupting the electoral process.

We are on the cusp of another potentially transformational moment. Redistricting is about to commence. Virtually every jurisdiction that elects its Members, from districts from State legislatures to county commissions, school boards, and town councils will be required to redraw district boundaries.

New 2020 Census numbers show the U.S. is becoming an increasingly diverse Nation with population growth attributable to increases in the number of people of color.

Absent congressional action, this redistricting cycle will be the first without the full protections of the Voting Rights Act. Without preclearance, the Justice Department will not have access to maps and other restricting-related information for many jurisdictions where there is reason for concern.

Even though this kind of information is necessary to assess where voting rights are being restricted and to help inform how the Department directs its limited enforcement resources. In 1965, Congress enacted, and in 1975, 1982, and 2006, reauthorized a statute that provided the strong medicine needed to remedy voting discrimination and enforce our Constitution's commitment to en-

suring that no citizen's right to vote would be abridged on account of race or color.

Congress has broad enforcement powers and must Act now to restore the Voting Rights Act, to prevent us from backsliding into a Nation where millions of citizens, particularly citizens of color, find it difficult to register, cast their ballot, and elect candidates of choice.

We look forward to working with this Congress to revise this bedrock civil rights law. The Justice Department stands ready to support Congress in protecting the voting rights of all eligible Americans. Thank you.

[The statement of Ms. Clarke follows:]

Department of Justice

STATEMENT OF
KRISTEN CLARKE
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING ENTITLED

OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS

PRESENTED

AUGUST 16, 2021

Statement of
Kristen Clarke
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

Before the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
For a Hearing Entitled
"Oversight of the Voting Rights Act: Potential Legislative Reforms"

August 16, 2021

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S House of Representatives Committee on the Judiciary. My name is Kristen Clarke, and I serve as the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice ("Department"). Thank you for the opportunity to testify today on the Department's work to implement and enforce the Voting Rights Act of 1965 and the need for legislation to revitalize and restore the Act.

The Voting Rights Act truly is, as President Johnson said when he signed it into law, "one of the most monumental laws in the entire history of American freedom."[i] It reflected bold action by Congress when bold action was needed to confront the fact that nearly a century after the Reconstruction Amendments, millions of citizens were still denied the ability to register, to vote, and to participate fully in American democracy because of their race. The Act's most innovative provisions—for example, the appointment of federal examiners to put people on the rolls in recalcitrant jurisdictions and the preclearance provision that prevented jurisdictions from adopting new provisions to roll back hard-won gains—transformed American democracy.

In the South, more Black voters were added to the rolls in the two years following passage of the Act than in the previous century. And in places from South Carolina to South Dakota, from Alabama to Alaska, minority voters—Black, Hispanic, Asian, Native American, and Alaska Native—elected officials who used government as a mechanism to make all our lives better. When recalcitrant jurisdictions tried to get around these gains with new tactics, preclearance blocked them from doing so.

The issues of fairness and democracy we face today are different, but equally pressing. If the end of the twentieth century was a period of dramatic expansion in voting rights, the twenty-first century has, so far, been a period of rising attacks on voting rights. We have seen cutbacks to early voting periods; imposition of additional requirements to cast ballots, either at polling places or with respect to absentee ballots; and new restrictions on the right of civic groups to assist citizens in participating fully in the electoral process. Congressional action is necessary to prevent us from backsliding into a nation where millions of citizens, particularly citizens of

color, find it difficult to register, to cast their ballot, and to elect candidates of their choice to offices from the Presidency to members of their local school board

The 2020 Census numbers show that the United States is an increasingly diverse nation. This raises profound questions about how the next redistricting will be conducted, including whether the officials who draw congressional and legislative maps and decide districts for city councils and county commissions draw districts that are fair to *all* voters.

This round of redistricting is the first since the Supreme Court's 2013 decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), severely cut back on the protections the Voting Rights Act provides. It is now time for Congress to respond, by developing legislation that responds to our current situation, with respect to redistricting and otherwise—a situation in which voting rights are under pressure to an extent that has not been seen since the Civil Rights era. The Department looks forward to working with Congress to craft new voting rights legislation that addresses the problems we face today.

In thinking about what new legislation should do, it is important to understand how we got to this point. So in my testimony today, I want to explain the special role the Department has played in protecting the right to vote—particularly in the modern era that began with creation of the Civil Rights Division in 1957.

That story provides several important lessons. First, case-by-case challenges to restrictive voting practices are not enough. That sort of litigation is complex and resource intensive and gives what the Supreme Court memorably called the "advantage of time and inertia" to jurisdictions that are using practices that deny citizens an equal opportunity to participate in the political process and elect representatives of their choice.

That is why Congress adopted the preclearance requirement of Section 5 of the Voting Rights Act in 1965, and amended and extended that requirement, each time with overwhelming bipartisan support in 1970, 1975, 1982, and 2006.

Second, preclearance worked well. Covered jurisdictions knew that if they could not show that a proposed voting change—from moving a polling place, to requiring voters to reregister, to deannexing minority neighborhoods, to diluting minority voting strength—had neither a discriminatory purpose nor a discriminatory effect, the Department would block that change. So most jurisdictions decided not to propose such changes in the first place. But when jurisdictions *did* try those sorts of discriminatory changes, over the half century preclearance was in effect, the Department's 3,000+ objections protected the rights of millions of citizens.

At the same time, preclearance was fair to covered jurisdictions. Changes that improved the electoral process were swiftly approved. And the Department worked cooperatively with jurisdictions to ensure they were able to implement lawful changes without undue delay.

Third, the costs of losing preclearance have been profound. The *Shelby County* decision gave jurisdictions a green light to adopt new restrictive practices and then sit back until costly litigation proves that the new laws have a discriminatory purpose or effect. I will describe for

you how the Department's enforcement efforts over the past eight years have been negatively affected by the current legal landscape—one in which we have lost a key tool at the very time that the United States has experienced a renaissance of restrictive voting laws.

In 1965, Congress enacted a statute that provided creative and effective mechanisms for enforcing our Constitution's commitment to ensuring that no citizen's right to vote would be abridged on account of race or color. We look forward to working with this Congress to complete the task that Congress began.

I. The Department of Justice's Early Role in Enforcing Federal Voting Rights Statutes and the Enactment of the Voting Rights Act of 1965

Many reasons propelled Congress to enact the Voting Rights Act of 1965—in particular the activism of people of color, historically disenfranchised communities, and civil rights heroes such as John Lewis, in Selma, Alabama and elsewhere. Another critical factor was the experience of Department attorneys who had been working since the creation of the Civil Rights Division in 1957 to protect voting rights using the then-existing protections.

A. The Department of Justice's Efforts to Enforce Pre-Voting Rights Act Legislation Were Hampered By Having to Bring Case By Case Litigation

Eight years before the Voting Rights Act was passed, Congress enacted its first major civil rights statute since reconstruction, the Civil Rights Act of 1957, based on a legislative proposal first drafted by the Department. The Civil Rights Act enabled the creation of DOJ's Civil Rights Division and authorized the Attorney General to bring suit to enjoin voter intimidation and racially discriminatory denials of the right to vote.

The first case against a county registrar for violating the act, *United States v. Lynd*, was brought by John Doar, an attorney who began serving in the Civil Rights Division during the Eisenhower administration.[ii] By 1963, the Department had filed 35 suits challenging discrimination or threats against Black registration applicants in individual counties. But as then-Attorney General Robert Kennedy said, that was a "painfully slow way of providing what is after all a fundamental right of citizenship." As the Supreme Court later acknowledged in *South Carolina v. Katzenbach*, the Department's efforts to protect the right to vote were seriously hindered by the burdens inherent in bringing case by case challenges:

> Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and [Black] registration.

South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966).

When considering the legislation that would ultimately become the Voting Rights Act, Congress determined that the existing federal anti-discrimination laws were insufficient to overcome the resistance by some state and local officials to enforcement of the guarantees of the Fifteenth Amendment. Congressional hearings– including by the House Judiciary Committee – showed that the Department of Justice's efforts to eliminate discriminatory election practices by case-by-case litigation had been unsuccessful in opening up the registration process; as soon as one discriminatory practice or procedure was proven to be illegal and enjoined, a new one would be substituted in its place and litigation would have to commence anew.

B. The Voting Rights Act of 1965 Conferred Particular and Unique Authority On the Department of Justice

In the wake of Bloody Sunday and based on a record developed in large part by the Civil Rights Division's litigation, Congress met the moment and, in bipartisan fashion, passed the Voting Rights Act, which President Johnson called "one of the most monumental laws in the entire history of American freedom." The Act was reauthorized and signed by President Nixon in 1970, by President Ford in 1975, by President Reagan in 1982, and by President George W. Bush in 2006.

To address longstanding, rampant discrimination, the Act abolished literacy tests, so-called "good character" tests, and other barriers to voting. It also enacted Section 2, an important and powerful nationwide prohibition against any voting practice or procedure that discriminates on the basis of race or color.

One of the Act's most powerful innovations involved a preclearance requirement, administered by the Department and targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest. Under Section 5, jurisdictions covered by these special provisions could not implement any change affecting voting until the Attorney General or the United States District Court for the District of Columbia determined that the change did not have a discriminatory purpose and would not have a discriminatory effect. The Act authorized the Attorney General to bring civil actions in response to violations of the Act's provisions, including Section 5. The Act also permitted the Attorney General to designate jurisdictions subject to Section 5 preclearance for the deployment of trained federal examiners, who could require qualified persons be added to voter registration lists. Further, in those counties where a federal examiner was serving, the Attorney General could request that trained federal observers monitor activities within polling places. Finally, the Act directed the Attorney General to challenge the use of poll taxes; Virginia's poll tax was struck down by the Supreme Court on constitutional grounds shortly thereafter.[iii]

Of all the tools available to the Department to protect the right to vote and prevent racial discrimination, Section 5 proved to be the most effective. And in the nearly fifty years of implementing Section 5, the Department showed itself to be up to the task of enforcing the statute in a manner that f respected the effective administration of elections by state and local jurisdictions.

C. The Department of Justice's Historical Role in Administering Section 5 of the Voting Rights Act

The Attorney General has historically delegated responsibility for preclearance decisions to the Assistant Attorney General ("AAG") who heads the Civil Rights Division.[iv] Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights, called the "Voting Section," which conducted the factual review for preclearance submissions and made detailed recommendations to the Assistant Attorney General.[v]

Section 5 mandates that all covered jurisdictions seek "preclearance" of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

Under Section 5, covered jurisdictions could not implement their proposed voting changes until they had received preclearance. The two methods for a covered jurisdiction to comply with the preclearance requirement were (1) administrative review requiring the Attorney General to determine within 60 days of submission whether to object to, and thereby block, a voting change because the submitting jurisdiction failed to show the change was nondiscriminatory, or (2) judicial review, by way of a declaratory judgment action filed by the covered jurisdiction in the United States District Court for the District of Columbia.

The administrative route provided a swift, non-costly path to a preclearance determination. By contrast, the declaratory judgment route enabled a jurisdiction that was unsatisfied with the administrative route to obtain a de novo determination, by filing a declaratory judgment action against the United States to be heard by a three-judge district court. Unsurprisingly, and showing covered jurisdictions' confidence in the fairness and efficiency of the Department's process, covered jurisdictions chose the administrative route for over 99 percent of covered changes.

The Attorney General based his or her Section 5 determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any additional investigation conducted by the Department. The submitting jurisdiction had the burden of demonstrating that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race, color or membership in a language minority group.[vi] The effects of proposed voting changes were measured against the previous, or "benchmark," practice to determine whether they would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[vii] The discriminatory purpose analysis was based on a number of factors established by the Supreme Court, including the sequence of events leading up to the adoption of the change, the historical background of the action, the impact of the change, and any deviations from normal procedure.[viii]

The Attorney General would then respond to the submitting jurisdictions in writing to (1) "preclear" the proposed change, allowing the change to be implemented; (2) request more information from the jurisdiction; or (3) object to the proposed change, providing the reasons supporting that decision.[ix] In those instances where the Attorney General interposed an

objection, the submitting jurisdiction had various options, including asking the Attorney General to reconsider its decision, seeking judicial preclearance in the United States District Court for the District of Columbia, abandoning the proposed change and adhering to the benchmark practice, or submitting a new change for review.

The list of impacted jurisdictions was not static, as previously covered jurisdictions could be "bailed out" from the special provisions such as the preclearance requirement if they wished to do so and met certain requirements, such as complying with Section 5 for the previous ten years, laid out in the statute. Dozens of jurisdictions did so successfully while Section 5 remained in effect.[x] Section 4(a) of the Act sets out the requirements for the termination of coverage (bailout) under Section 5.

II. The Attorney General's Section 5 Review Process Had Benefits For Voters and For Covered Jurisdictions

History proved that Section 5 was an effective tool that blocked the implementation of voting changes that had a discriminatory effect or were adopted with a discriminatory purpose. A few of the benefits of the Section 5 preclearance process are discussed below.

A. The Department of Justice Blocked Voting Changes That Were Enacted with A Racially Discriminatory Purpose or Would Have Had A Racially Discriminatory Impact

Through the Section 5 review process, the Attorney General and the United States District Court for the District of Columbia blocked numerous racially discriminatory voting changes before jurisdictions ever implemented them in an election.

The statistical evidence speaks for itself. Although the Attorney General objected to only about one percent of voting changes submitted under Section 5, this meant that more than 3,000 discriminatory voting changes were blocked between 1965 and June 25, 2013, the date of the *Shelby County* decision.[xi] The post-2000 Section 5 objection letters, along with an accompanying chart, are attached as an exhibit to my testimony.

A majority of the Department's objections included findings of discriminatory intent.[xii] Congress found that many of the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process."[xiii]

That said, the vast majority of submitted voting changes were precleared, allowing jurisdictions to institute new voting changes or rules without interference. The Department exercised its authority to object to voting changes (or to ask for additional information) judiciously under Democratic and Republican administrations alike, reserving the use of those tools for instances when the purpose or effect of the voting change was truly problematic or truly in doubt. But when jurisdictions failed to submit changes, the Department and affected voters prevailed in more than 100 "coverage" actions that temporarily enjoined voting changes that jurisdictions had been implementing without obtaining preclearance.[xiv]

By freezing voting procedures in place until the submitting jurisdiction successfully obtained preclearance, Section 5 often saved voters from having to bear the brunt of racially discriminatory voting changes while litigation was pending or while the impact of a jurisdiction's minor changes was being sorted out. Because litigation brought under Section 2 or other federal statutes occurs only after a (potentially illegal) voting scheme has already been put in place, voters have already been burdened or disenfranchised and candidates have already been elected, thereby gaining the advantages of incumbency.[xv] An illegal voting restriction or redistricting plan might be in place for several election cycles before a plaintiff can gather the evidence necessary to challenge it and succeed in litigation.[xvi]

B. A Review of Specific Section 5 Objections Demonstrates the Efficacy of the Section 5 Review Process in Identifying and Blocking Racially Discriminatory Voting Changes

Aggregate nationwide statistics alone do not do justice to the powerful impact that the Department was able to have by protecting the right to vote in localities around the country while the Section 5 preclearance process was in place. I would like to provide a few specific examples in which Department blocked racially discriminatory voting changes by interposing an objection to a Section 5 submission.

One change that preclearance prevented involved McComb, Mississippi.[xvii] A large group of Black residents in the city had long voted at the Martin Luther King Jr. Community Center, which was close to their homes on the east side of railroad tracks that run through the city. In 1997, the city tried to move that group's assigned polling place to the American Legion Hut on the west side of the tracks. To cross those tracks, Black voters on the east side—many of whom lacked transportation—would have had to travel substantial distances to find a safe crossing. Recognizing that increased difficulty that Black voters would encounter in exercising their right to vote, the Department blocked the change.

A similar Section 5 objection prevented the proposed 2007 closure of a voter registration office in Buena Vista Township, Michigan that was used heavily by minority voters; the next closest office was an 18-mile round trip away, which, using public transportation, would take at least one hour and 40 minutes to traverse.[xviii]

Another objection restored a municipal election that had been cancelled in Kilmichael, Mississippi.[xix] After several decades in which no Black candidate had been elected to municipal office due to racially polarized voting, Kilmichael's 2001 general election stood to be a potential watershed moment. Black residents had recently emerged as a majority of the town's registered voters and a number of Black candidates qualified to run for both the mayoral and board positions. White town officials responded by cancelling the election with no notice to the community. The Department denied the city's preclearance request, concluding that the cancellation was motivated by an intent to diminish minority voting strength. The election ultimately went forward and, in a historic moment, the town elected its first Black mayor as well as three Black aldermen.

Other Department objections halted statewide changes. One such objection stopped a 2007 Texas statute, which would have imposed a landownership requirement to be able to run for some elected offices.[xx] The evidence showed that there were Hispanic supervisors who were non-landowning residents of their district who would have been barred from running for reelection if the proposed candidate qualifications were implemented. Moreover, the significant disparity in home and agricultural land ownership rates between white residents and residents of color in Texas meant that a disproportionate number of racial and language minority Texans, many of whom could have been the candidates of choice of racial and language minority voters, would have been barred from running for office in these districts.

Another objection prevented the implementation of a 2009 Mississippi statute that would have imposed a majority-vote requirement for the election of school board candidates in certain school districts, a change that raised substantial concerns regarding a retrogressive effect on racial and language minority voters given the prevalence of racially polarized voting in Mississippi elections.[xxi]

The Department objected to multiple proposed redistricting plans that improperly reduced minority strength before and during the post-2010 redistricting cycle. In 2007, an objection prevented the imposition of discriminatory changes to the method of electing county commissioners sought by Charles Mix County, South Dakota, shortly after successful Section 2 litigation resulted in the election of the first Native American commissioner in county history.[xxii] After that commissioner was elected, the county pursued a referendum measure expanding the size of the board of commissioners and a redistricting plan that, in tandem, would dilute the voting strength of the county's Native American voters. The Charles Mix County sheriff had actively circulated the referendum petition, collecting signatures while in uniform.

In 2011, the Department interposed an objection to a proposed redistricting plan for East Feliciana Parish, Louisiana's police jury—the legislative and executive governing body of the parish.[xxiii] That plan would have cut the Black voting age population in District 5, thereby eliminating minority voters' opportunity to elect a candidate of choice. The cut came after the parish's demographer met separately with a group of four white "police jurors" at the beginning of the redistricting process but failed to invite the Black police jurors. At that closed-door meeting, the demographer and the white police jurors agreed to move overwhelmingly white population from the "Lakeshore" neighborhood into District 5, while excluding nearby Black population from the district. After the Department interposed an objection, the parish adopted a different plan, which increased the Black voting age population in District 5. Today, District 5 is represented by an African-American police juror today.

The Department also blocked a redistricting plan proposed by Nueces County, Texas. That plan would have moved Latino population out of, and Anglo population into, a County Commissioner District, apparently to protect an Anglo incumbent who was not the candidate of choice of the Latino community but had unseated a Latino candidate in the previous election by a very small margin.[xxiv] Similarly, a proposed redistricting plan from Long County, Georgia, sought to dilute the Black population percentage in District 3 by nearly seven percentage points by adding majority-white voting precincts to the district– even though the county could have chosen to maintain the existing percentages by adding different precincts instead.[xxv] Following

the Department's objection, Long County officials adopted a plan that remedied the problem and, today, District 3 is represented by an African-American commissioner.

C. Section 5 Review Deterred Jurisdictions From Even Trying To Adopt Voting Changes That Might Have Had A Racially Discriminatory Purpose Or Effect

Beyond the direct impact resulting from administrative or judicial refusals to preclear certain proposed changes in voting practices or procedures, Section 5 also had prevented some changes that would be certain to raise objections. Out of necessity, the preclearance requirement caused covered jurisdictions to be more prudent in their approach to voting changes or procedures than they otherwise would have been.

Moreover, covered jurisdictions frequently modified or withdrew proposed voting changes after receiving a formal letter from the Department requesting additional information in support of the preclearance submission. If the information subsequently provided by the submitting jurisdiction was insufficient to establish that the voting change was not discriminatory, the Attorney General would often object to the change.

More than 800 proposed changes were altered or withdrawn in the period after 1982.[xxvi] Empirical studies demonstrate that the Department's requests for more information had a significant effect on the degree to which covered jurisdictions complied with their obligation to protect minority voting rights.[xxvii] For example, a study conducted by Luis Ricardo Fraga and Maria Lizet Ocampo of Stanford University found that between 1999 and 2005, more information requests stopped more than six times as many changes as formal objection letters did.[xxviii]

The preclearance process often resulted in jurisdictions deciding to voluntarily mitigate the impact of potentially discriminatory changes even when the Department did not issue a written request for additional information. One example involves a judicial preclearance case filed in the United States District Court for the District of Columbia in which South Carolina officials sought approval for a 2011 voter-identification law. During the trial, South Carolina officials made a major change. They decided to interpret the photo identification requirement in a way that effectively inserted a "reasonable impediment" exception for certain voters who had difficulties obtaining identification, thereby making it "far easier than some might have expected or feared" for South Carolina citizens to cast a ballot.[xxix] A three-judge panel precleared the law after adopting that interpretation as an express "condition of preclearance."[xxx] Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."[xxxi]

D. The Department of Justice Worked Cooperatively With Local Officials To Make the Preclearance Process Speedy and Efficient For Changes That Were Fair To All Voters

To facilitate and expedite the review process, the Attorney General endeavored to make the preclearance process as user-friendly as possible. The "Procedures for the Administration of

Section 5 of the Voting Rights Act of 1965" the Attorney General issued were designed to do this, and informed both submitting authorities and other interested parties of the standards by which the Department would be guided in evaluating proposed changes under Section 5.[xxxii]

Jurisdictions could submit their Section 5 submissions by mail, fax, or, in the internet age, an online portal. Department staff worked cooperatively with local officials to make sure preclearance submissions that had neither a discriminatory purpose nor a discriminatory effect would be approved quickly and efficiently. In fact, attorneys general for various states, including Mississippi and North Carolina, that were covered (at least in part) under Section 5 filed an *amicus* brief filed in the *Shelby* case acknowledging that "DOJ has administered the Section 5 review process with a significant degree of flexibility and latitude, taking into account the unique circumstances and crises that sometimes emerge within the covered jurisdictions."[xxxiii]

The Department's administrative preclearance process did not require covered jurisdictions to have legal expertise or retain a lawyer. Over the course of decades, Department staff established positive relationships with local officials such as city secretaries, town clerks, and county officials who often submitted changes for review. These officials' Section 5 submissions were often brief; simple voting changes that were clearly beneficial in nature could be precleared based on a page or two of documentation. Department staff would only ask for additional information or documentation when it was truly necessary to determine whether or not the change had a racially discriminatory purpose or effect.

The administrative preclearance process operated in a speedy and efficient manner. The Department had sixty days to respond to preclearance requests, which could be extended by an additional sixty days in certain limited circumstances. If the Attorney General failed to interpose an objection within the allotted time period, or provide another appropriate response such as an additional information request, then any pending changes were considered precleared by operation of law and jurisdictions could go forward with implementing them. However, Department staff precleared innocuous voting changes before the 60-day deadline whenever possible. If a submitting jurisdiction asked for expedited consideration – say, for an emergency polling place change that a county adopted shortly before an upcoming election, such the changes for the 2012 elections in the wake of Hurricane Sandy – Department staff would endeavor to facilitate a particularly speedy review so that non-discriminatory changes could be precleared and implemented as soon as possible.

III. The Tools Lost To The Department Of Justice As A Result Of The Supreme Court's Decision In *Shelby County v. Holder*

The Supreme Court's decision in *Shelby County v. Holder* has had a substantial effect on the ability of the Department to respond quickly and effectively to prevent the implementation of discriminatory voting changes. That decision struck down the formula provided by Section 4 of the Act for determining which jurisdictions were covered by the preclearance obligation. Without the protections of Section 5 of the Voting Rights Act, voting changes in jurisdictions with documented histories of discrimination go into effect before they can be challenged, disenfranchising many racial or language minority voters and substantially burdening their exercise of the right to vote. The Department has been forced to bring lengthy, resource-

intensive litigation under Section 2, which has proven no substitute for the critical prophylactic protection afforded by Section 5. The result is that discriminatory policies have been used in elections and remained in effect for years while legal challenges have been litigated. The loss of the right to vote in those elections, even if subsequently vindicated, can never be fully remedied – nor can the results of elections conducted under racially discriminatory redistricting plans.

A. *Shelby County* Had an Immediate Negative Impact

States wasted no time passing laws that had not or would not have survived the preclearance requirement. On June 25, 2013, the very day that the Supreme Court issued the *Shelby County* opinion, Texas officials announced that they would move forward with implementing a discriminatory and burdensome photo identification statute. That particular photo identification requirement had already been stopped twice due to concerns that it violated the Voting Rights Act: once by a Section 5 objection interposed by the Attorney General and again, when the United States District Court for the District of Columbia denied Texas's request for judicial preclearance following a full trial on the merits.[xxxiv]

The loss of preclearance forced the Department, along with private parties, to file a post-*Shelby* Section 2 suit to enjoin the statute. The lawsuit was ultimately successful but took several years to litigate and consumed substantial resources. In the meantime, untold numbers of voters were burdened or disenfranchised because the photo ID requirement remained in place while the case was pending.

The North Carolina Legislature acted with similar haste to enact an omnibus law imposing multiple voting restrictions. At the time *Shelby County* was before the Supreme Court, North Carolina had only been publicly considering a relatively narrow election bill, which included a different voter ID requirement that was much less restrictive than the one that was eventually adopted.[xxxv] However, on June 26, 2013, the day after the Supreme Court issued the *Shelby County* opinion, Senator Tom Apodaca, Chairman of the North Carolina Senate Rules Committee, publicly stated that "I think we'll have an omnibus bill coming out" and that the Senate would move forward with a "full bill."[xxxvi] The legislature then swiftly expanded its 16 page bill into 57 pages of omnibus legislation that cut early voting hours, imposed a burdensome, strict photo identification requirement, eliminated same-day registration during the early voting period, and eliminated provisional voting for out-of-precinct voters, among other restrictions.[xxxvii] The Department, along with private parties, again was forced to bring a Section 2 challenge in the absence of preclearance. During the pendency of the case, the challenged provisions were in effect for at least one major election (and some provisions were in effect for three years), limiting the rights of North Carolina's citizens to participate in the political process.

The Texas and North Carolina examples are not the only instances of troubling and unlawful post-*Shelby* voting changes that have had a discriminatory effect or were enacted with a discriminatory purpose.

B. There Is Reduced Advance Notice of– and Accountability for– Potentially Discriminatory Voting Changes

Section 5 provided indispensable advance notice of those new voting rules, which occurred as a matter of course when jurisdictions submitted proposed changes to the Department for preclearance. One of the underappreciated problems the Department has faced since *Shelby County* is a loss of notice about new voting rules.

There are tens of thousands of jurisdictions, many of them small towns, school districts, or other local jurisdictions, which conduct elections and changes practices and laws in ways that can have a retrogressive effect on minority voters. The Department does not have the resources to constantly monitor these jurisdictions to identify discriminatory or unconstitutional voting changes. Such a monitoring program would be less efficient and effective than preclearance. The Civil Rights Division's investigatory tools are simply insufficient to obtain this information on a broad scale, let alone provide adequate redress for impacted voters. The impossibility of this task means that an assortment of subtle yet critical voting changes made at the local level may be jeopardizing the right to vote of racial and language minority voters in a way that violates the Voting Rights Act. We cannot know the full extent to which local jurisdictions might be making changes that are discriminatory, for example, consolidating polling places to increase wait times and make it more difficult for minority voters to vote, annexing or deannexing territory so as to dilute minority voting strength, drawing election districts in ways that deny minority voters the ability to elect candidates of their choice, curtailing early voting hours that would have restricted access for low-income voters of color, or disproportionately purging minority voters from voting lists under the pretext of "list maintenance."

C. The Election Administration Process Is No Longer Transparent

The notice resulting from the Section 5 preclearance process provided transparency and benefits to voters, election officials, and communities in covered jurisdictions. Before the *Shelby County* decision, the Department published information regarding Section 5 submissions it received on a weekly basis, pursuant to the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act.[xxxviii] This information was posted online and was publicly available. Interested parties could see when changes had been submitted for preclearance, request copies of submissions and provide written or telephonic comments or input to Civil Rights Division staff, and receive notice of the Attorney General's preclearance decisions.

Removing the public's visibility as to voting changes at every level of local and state government has proved to be a massive loss. For each year between 2000 and 2010, for example, the Attorney General published notice of between 4,500 and 5,500 Section 5 submissions, which contained between 14,000 and 20,000 voting changes.

D. The Public Can No Longer Participate In The Review Of Proposed Voting Changes

The Department's Section 5 preclearance process encouraged public participation, allowing voters to assess proposed voting changes before they were implemented. Over the course of conducting reviews, the Department received vital input regarding proposed voting changes and invaluable context regarding the communities in which those changes were to be implemented.

In the absence of a preclearance requirement, jurisdictions have less incentive to involve community contacts in the elections process and the process of considering and adopting voting changes. Local communities also have less insight into the electoral process and the process of making voting changes. Losing this avenue of participation is particularly harmful for minority voters and the organizations representing their interests.

This concern takes on added urgency at the present moment, as redistricting is about to commence following the decennial census. Without congressional action, the upcoming redistricting cycle will be the first without the full protections of the Voting Rights Act. Virtually every jurisdiction—from state legislatures to county commissions, school boards, and town councils—that elects its members from districts will be required to redraw district boundaries. Without preclearance, the Department will not have access to maps and other redistricting-related information from many jurisdictions where there is reason for concern, even though this kind of information is necessary to assess where voting rights are being restricted or inform how the Department directs its limited enforcement resources.

While the preclearance requirement was in place, it provided a structured process by which affected citizens and others could provide information and views on the impact of changes to voting rules before they were implemented. This valuable input from members of impacted communities is often lost without preclearance.

E. The Department Of Justice's Election Monitoring Capacity Has Been Diminished By The *Shelby County* Decision

The Department's election monitoring program has traditionally been one of the important components of its efforts to protect voting rights. The Department's experience over several decades has shown that when trained nonpartisan monitors watch the electoral process and collect evidence about how elections are being conducted, they have a unique ability to help deter wrongdoing, defuse tension, promote compliance with the law and bolster public confidence in the electoral process.[xxxix] The *Shelby County* decision, however, has significantly hampered the Department's ability to perform these critical functions in support of fair of impartial elections.

The Civil Rights Division typically conducts election monitoring for election days around the country each year. Prior to *Shelby County,* much of that monitoring activity involved sending federal election observers to jurisdictions with a need certified by the Attorney General, based in part on the Section 4(b) coverage formula.[xl] Once the Supreme Court struck down the coverage formula in *Shelby County*, the Department stopped deploying federal observers unless they were expressly authorized by a relevant court order under Section 3 of the Voting Rights Act. And there were few such orders in place. As a result, the Department has sent substantially fewer federal observers to watch the voting process in real time since the *Shelby County* decision was issued. The Department looks forward to working with Congress so that it may reinstitute the federal observer program in support of future elections, where appropriate.

IV. The Department of Justice's Experience Confirms That Bringing Affirmative Case-By-Case Litigation Under Section 2 Of The Voting Rights Act Is An Inadequate Substitute For Section 5

The Department's experience during the eight years between the Supreme Court's *Shelby County* decision and today has confirmed that case-by-case litigation is inadequate to protect voting rights. We have seen an upsurge in changes to voting laws that make it more difficult for minority citizens to vote and that is even before we confront a round of decennial redistricting where jurisdictions may draw new maps that have the purpose or effect of diluting or retrogressing minority voting strength.

A. Section 2 Litigation Is Far More Resource-Intensive Than The Administrative Section 5 Review Process

The elimination of Section 5 has increased the cost of protecting voting rights on an order of magnitude similar to the cost of a Ford Fiesta compared to a Boeing 737. Before the *Shelby* decision, the Department was able to review proposed voting changes quickly and efficiently. The vast majority of Section 5 submissions were handled by small teams consisting of a staff analyst or attorney and a reviewer and were completed within 60 days.

Since Section 5 was rendered inoperable as a result of the Supreme Court's *Shelby County* decision, the primary tool available to the Department to thwart racial discrimination in voting is costly case-by-case litigation under Section 2 of the Voting Rights Act. Whereas the Attorney General's Section 5 review process lasts, at most, a few months, Section 2 litigation often lasts years with multiple stages before multiple courts.

The greater costs of protracted litigation also accrue to governmental entities defending against discrimination claims and are ultimately paid by taxpayers, who include those voters who have been discriminated against. North Carolina lawmakers spent more than $10.5 million defending their 2013 voting bill, which the Fourth Circuit found to have been enacted with a racially discriminatory intent. Texas spent more than $3.5 million defending its burdensome photo identification law, which the full Fifth Circuit concluded had a racially discriminatory effect.[xli]

Had Section 5 been in place, Texas's strict photo identification statute likely never would have been implemented because the objections interposed by the Attorney General and the three-judge panel of the United States District Court for the District of Columbia would have remained in place. Similarly, North Carolina legislators unveiled the "full bill" imposing numerous discriminatory voting rights restrictions only after the *Shelby County* decision. A Section 5 objection would have avoided the need for the lengthy litigation that ultimately followed.

A detailed account of the pre-*Shelby* review and the lengthy, protracted post-*Shelby* litigation concerning the Texas and North Carolina statutes shows that even though Section 2 remains an important and potent tool, it is insufficient to combat racially discriminatory voting practices and is not, by itself, an adequate replacement for Section 5.

B. The Protracted, Multi-Stage Dispute Over Texas's Photo Identification Statute

In 2011, the Texas legislature passed a statute severely limiting the number of identifying documents for purposes of voting to six forms of photo identification.[xlii] As described earlier, because Section 5 was then in effect, Texas sought pre-clearance from the Department, which interposed an objection, blocking Texas from implementing the change.[xliii] Texas then sought preclearance from the United States District Court for the District of Columbia. That court also refused to preclear the change, finding that it would have a retrogressive effect on Black and Hispanic voters who would be disproportionately burdened in obtaining the required IDs compared to white voters.[xliv]

Two days after the decision in *Shelby County*, the Supreme Court vacated the district court's judgment because preclearance was no longer required.[xlv] By that time, Texas had already started moving forward with implementing the statute.[xlvi]

The Department filed a Section 2 lawsuit in federal court, which was consolidated with parallel litigation filed by private parties. The parties then embarked on months of discovery. Ultimately, a two-week trial was held in Corpus Christi in September 2014, where dozens of witnesses testified, including 16 experts– many of whom were retained by the Department.[xlvii] Months later, the district court ruled that the photo identification bill violated the "results" prong of Section 2 of the Voting Rights Act, because it had a discriminatory effect.[xlviii] The Court found that Black and Hispanic voters were two to three times less likely to possess the limited forms of identification required by the statute and that it would be two to three times more burdensome for them to get approved IDs than for white voters.[xlix]

But even so, the statute remained in effect, due to a stay of the District Court's injunction pending Texas's appeal to the Fifth Circuit.[l] Subsequently, a three-judge panel and later the *en banc* Fifth Circuit affirmed the district court's holding regarding the Section 2 results claim.[li] In the meantime, voters in all elections in Texas between June 25, 2013 and July 20, 2016 (the date of the Fifth Circuit en banc opinion) were subjected to the discriminatory voter identification statute.

Litigation continued on the merits until September 2018, when the district court entered its final judgment in the matter. Meanwhile, the private plaintiffs' fee petition is still being litigated; their fee award is currently on appeal before the Fifth Circuit.[lii]

Had Section 5 remained enforceable, voters would never have been subjected to the discriminatory ID requirement, and the Department and private litigants would not have been forced to expend tremendous resources to challenge a law that fourteen different federal judges found to be unlawful.

C. The Protracted, Multi-Stage Dispute Over North Carolina's Omnibus Voting Statute

While the *Shelby County* case was pending in front of the Supreme Court, North Carolina legislators asked state officials for racial data regarding the use of a number of voting practices.

Shielded from public view, they were quietly laying the groundwork for a major election bill.[liii] On the day after the Supreme Court effectively eliminated North Carolina's preclearance obligations, a leading state senator suddenly announced an intention to move forward with what he characterized as the "full bill."[liv] Overnight, an essentially single-issue bill was transformed into omnibus legislation that, among other things, imposed a draconian photo identification requirement, eliminated a week of early voting, ended same-day registration, and eliminated out-of-precinct provisional voting.[lv] Each of these restrictions disproportionately affected Black voters.

Shortly thereafter, in September 2013, the United States filed a Section 2 lawsuit against the State, alleging that four provisions of the new law were adopted with the purpose, and had the result, of denying or abridging the right to vote on account of race.[lvi] Prior to the 2014 midterm election, the Department and other plaintiffs moved for a preliminary injunction against several provisions.[lvii] After the district court denied the motion, the Fourth Circuit reversed in part, effectively blocking the elimination of same-day registration and out-of-precinct voting; the Supreme Court then stayed the Fourth Circuit's injunction mandate pending its decision on certiorari, over the dissent of two justices, leaving the law entirely in effect during the 2014 elections.[lviii] On April 6, 2015, the Supreme Court denied certiorari, automatically reinstituting the preliminary injunction, restoring same-day registration and out-of-precinct voting pending the outcome of trial.[lix]

A few weeks before the trial was scheduled to begin on July 13, 2015, the North Carolina Legislature enacted a new statute that changed the photo ID requirement by inserting a provision allowing voters to cast a provisional ballot that would count if they completed an affidavit affirming that they had a reasonable impediment to obtaining ID.[lx] Following the addition of this last-second "reasonable impediment" exception, the district court switched course and held two separate trials.[lxi] The first, in July 2015, dealt with all provisions except the photo ID requirement; the second, in January 2016, addressed the photo ID requirement as modified by the reasonable impediment exception.[lxii] On April 25, 2016, the district court entered judgment rejecting all claims of discrimination.

The Department and the other plaintiffs appealed that decision. On July 29, 2016, nearly three years after the Department had filed its Section 2 lawsuit, the Fourth Circuit held that the challenged provisions 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; the court concluded that the plaintiffs had proved that the legislation was drafted with "surgical precision" to discriminate against minority voters.[lxiii] On May 15, 2017, the Supreme Court denied North Carolina legislative leaders' petition for review.[lxiv]

Conclusion

The right to vote is sacred, particularly to people of color and historically disenfranchised communities for whom voting and participation in the democratic process is a declaration of citizenship and belonging. Their activism in Selma, Alabama and elsewhere was instrumental in animating the passage of the Voting Rights Act of 1965, which transformed American democracy. Ninety-five years after the Fifteenth Amendment's ratification, the Voting Rights

Act breathed life into the Amendment's promise that the right to vote should not be denied because of race, color or previous condition of servitude.

We know that much work remains to be done to achieve fully the goals that motivated Congress's passage of the Voting Rights Act. Unfortunately, many Americans' right to vote remains under threat notwithstanding the progress that we have made.

The Department looks forward to working with Congress to support its renewed consideration of federal legislation that meaningfully and fully protects voting rights. The Department will continue to use its existing tools to enforce the current laws. But that does not change the harsh reality that the *Shelby County* decision eliminated critical mechanisms for protecting voting rights. On behalf of the Attorney General, we ask Congress to pass appropriate legislation that will restore and improve the Voting Rights Act, enhancing the Department's ability to protect the right to vote in the twenty-first century and beyond.

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[i] https://www.congress.gov/116/crec/2020/08/04/modified/CREC-2020-08-04-pt1-PgS4731.htm
[ii] *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962).
[iii] *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).
[iv] Peyton McCrary, Christopher Seaman, & Richard Valelly, *The End Of Preclearance As We Knew It: How The Supreme Court Transformed Section 5 Of The Voting Rights Act*, 11 Mich. J. of Race & Law 275, 281 (2006). For the sake of consistency and simplicity, I refer to enforcement by the "Attorney General" in my testimony today.
[v] *Id.*
[vi] *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52.
[vii] *Beer v. United States*, 425 U.S. 130, 141 (1976).
[viii] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).
[ix] In rare instances, the Attorney General might also make no determination regarding the change (often because the submission was unnecessary or inappropriate for some reason).
[x] For a list of jurisdictions that successfully bailed out from coverage, see Section 4 of the Voting Rights Act, *available at* https://www.justice.gov/crt/section-4-voting-rights-act#bailout. The list includes jurisdictions from Alabama, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Massachusetts, Maine, North Carolina, New Hampshire, New Mexico, Oklahoma, Texas, Virginia, and Wyoming.
[xi] Section 5 Objection Letters, United States Department of Justice, *available at* https://www.justice.gov/crt/section-5-objection-letters.
[xii] *Shelby County, Ala. v. Holder*, 679 F.3d 848, 867 (D.C. Cir. 2012), *rev'd on other grounds*, 570 U.S. 529 (2013).
[xiii] H.R. Rep. 109–478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631.
[xiv] 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary ("Evidence of Continued Need"), 109th Cong., 2d Sess., p. 186, 250 (2006).
[xv] 1 Evidence of Continued Need 97.

[xvi] 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005).
[xvii] DOJ File No. 1997-3795. Ltr. From Acting Ass't Att. Gen. Bill Lann Lee to John H. White, Jr., Esq., June 28, 1999, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/MS-2670.pdf.
[xviii] DOJ File No. 2007-3837. Ltr. From Acting Ass't Att. Gen. Grace Chung Becker to Director of Elections Christopher Thomas & Chief Operating Officer Brian DeBano, December 26, 2007, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_071226.pdf.
[xix] DOJ File No. 2001-2130. Ltr. From Ass't Att. Gen. Ralph F. Boyd, Jr. to J. Lane Greenlee, Esq., Dec. 11, 2001, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/MS-2680.pdf.
[xx] DOJ File No. 2007-5132. Ltr. From Ass't Att. Gen. Thomas E. Perez to Texas Sec'y of State Phil Wilson, Aug. 21, 2008, *available at* https://www.justice.gov/crt/voting-determination-letter-28.
[xxi] DOJ File No. 2009-2022. Ltr. From Ass't Att. Gen. Thomas E. Perez to Special Ass't Att. Gen. Margarette L. Meeks, Mar. 24, 2010, *available at* https://www.justice.gov/crt/voting-determination-letter-19.
[xxii] DOJ File No. 2007-6012. Ltr. From Acting Ass't Att. Gen. Grace Chung Becker to Sara Frankenstein, Feb. 11, 2008, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_080211.pdf. Notably, Charles Mix became subject to the preclearance requirement as a result of the county's having consented to "bail in" under Section 3 as part of a settlement of a separate voting rights case. *See* Consent Decree, *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. Dec. 4, 2007).
[xxiii] DOJ File No. 2011-2055. Ltr. From Ass't Att. Gen. Thomas E. Perez to Nancy P. Jensen, Oct. 3, 2011, *available at* https://www.justice.gov/crt/voting-determination-letter-5.
[xxiv] DOJ File No. 2011-3992. Ltr. From Ass't Att. Gen. Thomas E. Perez to Joseph M. Nixon, Dalton L. Oldham, & James E. Trainor, Feb. 7, 2012, *available at* https://www.justice.gov/crt/voting-determination-letter-31.
[xxv] DOJ File No. 2012-2733. Ltr. From Ass't Att. Gen. Thomas E. Perez to Andrew S. Johnson & B. Jay Swindell, Aug. 27, 2012, *available at* https://www.justice.gov/crt/voting-determination-letter-51.
[xxvi] H.R. Rep. No. 109–478, at 40–41.
[xxvii] 2 Evidence of Continued Need 2555.
[xxviii] Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effects of Section 5*, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power, 65 (Ana Henderson ed., 2007), *available at* http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf.
[xxix] *South Carolina v. United States*, 898 F. Supp. 2d 30, 37 (D.D.C. 2012).
[xxx] *Id.* at 37–38.
[xxxi] *Id.* at 54 (opinion of Bates, J.).
[xxxii] Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended, 28 C.F.R., Part 51, https://www.ecfr.gov/cgi-bin/text-idx?SID=49999f502e2e525507274fa4e433b622&mc=true&node=pt28.2.51&rgn=div5#sp28.2.51.f.

[xxxiii] Brief for the States of New York, California, Mississippi, and North Carolina in Support of Respondents 7, Shelby County, Ala. v. Holder, 2013 WL 432966 (No. 12-96).
[xxxiv] *Texas v. Holder*, 888 F. Supp. 2d 113, 144–45 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013). The U.S. Supreme Court vacated and remanded the decision when it issued *Shelby County*.
[xxxv] *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 227 (4th Cir. 2016).
[xxxvi] *Id.*
[xxxvii] *Id.* at 216-18.
[xxxviii] Part 51 of Title 28 of the Code of Federal Regulations.
[xxxix] Fact Sheet On Justice Department's Enforcement Efforts Following *Shelby County* Decision, *available at* https://www.justice.gov/crt/file/876246/download.
[xl] *Id.*
[xli] 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/.
[xlii] *Veasey v. Abbott*, 830 F.3d 216, 225-26 (5th Cir. 2016) (en banc).
[xliii] *Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013). The U.S. Supreme Court vacated and remanded the decision when it issued *Shelby County*.
[xliv] *Id.*
[xlv] *Texas v. Holder*, 570 U.S. 928 (2013).
[xlvi] *Veasey*, 830 F.3d at 227 & n. 7.
[xlvii] *See*, *e.g.*, *Veasey v. Perry*, 71 F. Supp. 3d 627, 659-67 (2014), *aff'd in part*, *Veasey*, 830 F.3d at 265.
[xlviii] *Id.* at 633.
[xlix] *Id.* at 661.
[l] See *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014) (granting stay).
[li] *Veasey*, 830 F.3d at 265.
[lii] *See Veasey v. Abbott*, No. 2:13-cv-00193, 2020 WL 9888360 (S.D. Tex. May 27, 2020) (awarding attorneys' fees to private plaintiffs). The Fifth Circuit held oral argument on the State's appeal of this award earlier this summer.
[liii] *Id.* at 214-16.
[liv] *Id.* at 216.
[lv] *Id.*
[lvi] *Id.* at 218.
[lvii] *Id.*
[lviii] *League of Women Voters of N.C. v. North Carolina*, 997 F. Supp. 2d 322, 339 (M.D.N.C. 2014), *rev'd in part*, 769 F.3d 224, 248-49 (4th Cir. 2014), *stayed pending appeal*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014).
[lix] *North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (2015).
[lx] 831 F.3d at 219.
[lxi] *Id.*
[lxii] *Id.*
[lxiii] *Id.* at 214.
[lxiv] *North Carolina v. North Carolina State Conference of NAACP*, 137 S.Ct. 1399 (2017).

Documents submitted by the Honorable Kristen Clarke, Assistant Attorney General for Civil Rights, U.S. Department of Justice:

Exhibit 1: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-ClarkeK-20210816-SD001.pdf*
Exhibit 2: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-ClarkeK-20210816-SD002.pdf*
Exhibit 3: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-ClarkeK-20210816-SD003.pdf*
Exhibit 4: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-ClarkeK-20210816-SD004.pdf*
Exhibit 5: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-ClarkeK-20210816-SD005.pdf*
Exhibit 6: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-ClarkeK-20210816-SD006.pdf*

Mr. COHEN. Thank you. We appreciate it. We will now start questioning, and I will begin, as is customary, and I will recognize myself for 5 minutes.

Ms. Clarke, why is section 5 preclearance so crucial to combatting discriminatory voting practices, and do you see a connection between the Supreme Court's decision in *Shelby County* v. *Holder* and the sustained attack on voting rights that we have seen since that decision over the past 8 years.

Ms. CLARKE. Oh, thank you, Chair Cohen. Section 5 of the Voting Rights Act was truly the heart of the act. This is a bedrock provision that provided a unique tool to deal with the problem of voting discrimination.

In the course of our section 5 preclearance process at the Justice Department, we were able to block over 3,000—over 3,000—discriminatory voting changes that would have otherwise taken root.

This prophylactic remedy is without parallel, and section 2 of the Voting Rights Act is no substitute for the important protections that have been provided through the preclearance process. So, we have lost something.

Chair Cohen, since the court's ruling in 2013, we have seen States move swiftly to reinstitute discriminatory changes. We saw it on the day that the court issued its ruling in Texas when it moved forward with a discriminatory voter ID law that had been previously blocked by section 5.

We saw it in North Carolina, when the State moved forward with an omnibus bill that turned the clock back on voting rights in multiple respects, and in a form in which the Fourth Circuit ultimately described as being carried out with almost surgical precision. So, we have lost something, and this matter before Congress is an urgent one.

We need the section 5 preclearance process back in full force and effective. Without it, the Justice Department has lost its most important tool for safeguarding voting rights in our country.

Mr. COHEN. Thank you, General Clarke. Section 5 stands out, I would rate it, if you had to go on a scale of one to ten of importance, it is a nine. Section 2 may be a two. Section 2 was also damaged in the *Brnovich* v. *Democratic National Committee* ruling that denied litigation—is a vote on denial litigation alleging vote denial claims, and it remains to be seen how that will affect section 2, in general.

The consensus from many of our prior witnesses who we have had in prior hearings is that it will make it more difficult to bring such claims. Do you agree with this assessment that section 2 has been damaged and its ability to bring claims in the future?

Ms. CLARKE. Thank you, Chair. The Justice Department is continuing to look closely at the *Brnovich* rulemaking. We observed that the last time that Congress amended section 2 was in 1982. It may be helpful for Congress to use this moment to clarify the factors that litigants should use to establish a section 2 claim, the factors that courts should rely upon.

Section 2 remains a very important tool that applies nationwide, as you observed, for confronting voting discrimination, and we urge Congress to think about ways in which to clarify how section 2 should be applied by courts and by litigants.

Mr. COHEN. Let me ask you this at that point, the guideposts that were announced by the court in *Brnovich*—and they did announce them—had no textual basis and were contrary to the intent of the 82 amendments to section 2 that you mentioned of the Voting Rights Act, which Congress passed to ensure that the Act eliminated discriminatory voting practices in all their forms.

What approach would you suggest Congress take to clarify the scope of section 2 now that the *Brnovich* decision has been issued?

Ms. CLARKE. Well, Chair, the Justice Department recognizes that that choice is ultimately one for Congress to make, but we would urge Congress to look closely at the ruling in *Brnovich*, to look at the ways in which factors identified by the court may run contrary to the factors that Congress intended courts to consider when evaluating section 2 claims.

We have decades of case law interpreting section 2, and so this may be one moment where Congress seizes the moment to make clear those factors that it wants courts to look at and to clarify any confusion of gray area that may have resulted from the *Brnovich* ruling.

Mr. COHEN. Thank you, General Clarke. Some have said this is a Federal takeover of the State's authority to regulate elections. Would the changes—Alabama used to say, you count the number of beans in a jar, where you had to repeat the Shakespeare or something like that before you could get a right to vote. Would those have been, challenging those, a Federal takeover, quote, "of election laws," unquote or would that simply have been preserving voting rights?

Ms. CLARKE. The latter, Chair. I will say from the Justice Department's long experience, implementing section 5, that the Department has always worked cooperatively with jurisdictions. It reviewed changes swiftly. At the most, it took 60 days to review and come up with a determination.

There have been States that have made plain their view that participating in the section 5 preclearance process was one that they were able to carry out with ease. So, we don't deem this a Federal takeover. We deem this a way of complementing Congress' considered judgment that we need the Voting Rights Act to ferret out discrimination and unconstitutional practices that may otherwise infect the electoral process in our country.

Mr. COHEN. Thank you, Ms. Clarke, and my time is over. I now yield to the Ranking Member from Louisiana, Mr. Johnson.

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

Ms. Clarke, on July 28th, the DOJ issued new guidance regarding States' efforts to remove their temporary emergency voting procedures that they implemented last year during the unprecedented COVID–19 pandemic. Did you help draft that July 28th guidance?

Ms. CLARKE. Yes, Ranking Member Johnson. I participated along with other career colleagues inside the Department.

Mr. JOHNSON of Louisiana. So, since the Department no longer presumes that the State election Administration procedures that were in place before the pandemic are lawful, will the DOJ review how States adopted those temporary emergency election procedures during COVID–19 and whether the manner in which those temporary emergency election procedures were adopted was lawful?

Ms. CLARKE. Thank you, Ranking Member Johnson. As the Attorney General has made clear, protecting, and safeguarding the right to vote is an important priority for the department.

Right now, we are looking across the country at States that are making changes to their voting practices and rules. The point that the language that you have seized on simply States that in a State or jurisdiction decides to turn the clock back and revert back to an old practice, that we will want to look at that with fresh eyes and understand what motivated the decision to revert back to a prior rule.

Was the decision one infected with discriminatory purpose, or intended to make it harder for particular groups to vote? So, there is no presumption of validity when jurisdictions decide to turn the clock back.

Mr. JOHNSON of Louisiana. It just seems like a terribly subjective determination on the DOJ's part at a time when everything is super, hyper politicized, and it opens a Pandora's box for a lot of problems.

Let's talk about it objectively, though, and article 2, section 1, clause 2 of the Constitution, obviously it says very clearly, State legislatures are entrusted with the integrity of our unique election system, and they are given the exclusive authority to direct the manner of appointing presidential electors for the electoral college.

So, as the Supreme Court affirmed in *McPherson* v. *Blacker*, that power is, quote, "placed absolutely and wholly with the legislatures, and it can never be taken away nor abdicated," unquote. So, every State's legislature, of course, in accordance with that, has long established, detailed rules and procedures to determine their electors.

In the months preceding the 2020 Presidential election, those rules and procedures were changed in some States, not by the legislatures, but by a variety of other officials—governors, Secretaries of State, election officials, judges, and private parties.

So, does the Department plan to review that since it is, on its face, an obviously clear violation of the plain language of article II?

Ms. CLARKE. Thank you, Ranking Member. We are committed to ensuring that every eligible American has voice in our democracy and can access the ballot box. The elections clause of the Constitution also gives Congress the power to impact, in short, access to Federal elections. So, that elections clause power, along with the enforcement powers that this body has by way of the 14th and 15th Amendment, truly give this Subcommittee and Members of the House, the power to Act now, to ensure that no official, no jurisdiction undertakes action that could make it harder for people to vote, especially historically marginalized people.

Mr. JOHNSON of Louisiana. Let me interrupt you just for a second time. I understand what you are talking about forward, reviewing what happens now. I am talking about what happened last year. Is the DOJ interested in that at all, the fact that is a blatant, on its face, violation of article II of the Constitution, or are you just going to go and look at what you choose to look at? I mean, that is a serious question.

Ms. CLARKE. Well, we conduct very localized examinations of the voting rules in many States across the country. There is no pre-

sumption of validity. We are going to conduct an intense appraisal of the facts on the ground to understand if a particular law or change violates Federal law, Federal laws that the Justice Department has jurisdiction to enforce.

Mr. JOHNSON of Louisiana. Okay. Real quick, the data from recent elections and the DOJ enforcement activity following *Shelby County* suggests that there is no need to amend the VRA. Are you aware that the Census Bureau data concludes that African Americans in Georgia registered to vote and voted in elections at a higher rate than African Americans in the Democrat-controlled States of Illinois, New York, and California?

Ms. CLARKE. Thank you, Ranking Member. I think those registration rates are in important data point for this Subcommittee to study. I think it is also important to look at conditions on the ground. That is what Justice Roberts urged Congress to do. When we look at the current conditions, we see that there are in many places voters of color, Black voters, Latino voters, and others who are subjected to long lines, voters who have difficulty accessing polling sites because polling sites are being shut down in their particular communities.

So, looking comprehensively at the facts, is what can help Congress undertake what the court asks, and that is really truly looking at current conditions.

Mr. JOHNSON of Louisiana. I am out of time, but let's all note that Arizona has a higher voter turnout for minority groups than California. I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Now, to recognize the Chair for 5 minutes, Mr. Nadler.

Chair NADLER. Thank you, Mr. Chair.

Attorney General Clarke, when the Supreme Court struck down section 4B of the Voting Rights Act in *Shelby County*, the court explicitly invited Congress to rewrite a new geographic-based coverage formula. What constitutional guidance should Congress draw from the *Shelby County* decision as it considers a path to devise a geographic-based coverage formula to meet current needs?

Ms. CLARKE. Thank you, Chair Nadler. I think that the work that this body has been doing since 2019, the various hearings that have been held in Congress, the field hearings, this hearing today, are all rising to the task that the court has asked Congress to undertake, really studying carefully and thoroughly and comprehensively current conditions across the country.

It is our view at the Justice Department that careful analysis will yield a picture about where problems are starkest and greatest in our country, about the kinds of policies and barriers and restrictions that jurisdictions are resorting to most frequently make it harder for voters of color to vote.

So, this work that is underway right now is incredibly important in doing what Justice Roberts asked Congress to do.

Chair NADLER. Thank you. In the Department's experience, is section 2 litigation an adequate substitute for section 5 preclearance?

Ms. CLARKE. Absolutely not, Chair Nadler. These cases are incredibly time-intensive and resource-intensive. Just by way of example, in North Carolina, the State spent over $10.5 million de-

fending its discriminatory voting law that came under challenge following *Shelby*.

The State of Texas spent over three and a half million dollars. Section 2 is no substitute for the important, swift, pre-emptive review that was provided by way of the section 5 preclearance process.

Chair NADLER. We have heard testimony from witnesses that an overlooked consequence of the *Shelby County* decision is that it has impaired the DOJ's ability to appoint Federal observers and that the Department has come to rely on Federal monitors who do not have the same authority to require local officials to grant access to the elections process. Do you agree with this assessment, and why or why not?

Ms. CLARKE. We do. For the Justice Department, the Federal observer program has been a critical tool in how we carry out our work of ensuring that all voters have access to the ballot. Federal observers were deployed by the Office of Personnel Management. These were independent, fair, neutral eyes on the ground in places where there may have been reports about voter intimidation or other election-day efforts to make it harder for people to access the ballot box.

So, part of what we hope will come out of this process is restoration of the Department's ability to deploy Federal observers to communities where they may be needed.

Chair NADLER. Thank you. One last question, does the Supreme Court's *Shelby County* decision tell us anything about what kind of evidence the court will accept that demonstrates current needs if and when it reviews a new coverage formula?

Ms. CLARKE. Well, again, Chair Nadler, I think that this work that has started in 2019 and continues today, shows that Congress is leaving no stone unturned in understanding what the problems are today, in understanding what the current, present-day conditions are.

As this work continues and as this effort kind of moves through the Senate, it will be plain to the courts that Congress has answered the call of ensuring that any post-*Shelby* remedy is a remedy that is responsive to the current conditions in the country.

Chair NADLER. Thank you. Lastly, what geographic coverage formula would you recommend to meet the current need, and why would it be constitutional?

Ms. CLARKE. Well, Chair Nadler, the Justice Department's view is that this is ultimately a call for Congress to make, and the Justice Department is proud to aid Congress' understanding of current conditions.

I understand that there has been both a geographic coverage provision that has been discussed and that there has been a practice-based preclearance proposal that aims to look at the particular kinds of voting restrictions and rules that tend to be resorted to as ways to make it harder for voters of color to access the ballot box.

Whatever Congress ultimately decides, we know it must be a record that justify—it must be a remedy that is justified by the record that you are developing. So, the Department is proud to be here helping Congress to kind of understand what that current picture looks like.

Chair NADLER. Thank you. My time is expired. I yield back.

Mr. COHEN. Thank you, Mr. Nadler.

I now recognize the gentleman from Ohio with the nice orange tie, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chair.

Ms. Clarke, let me get this straight. I want to go to where the Ranking Member was. If States attempt to revert to the election law prior to COVID, you are going to come after them, but you are not going to look at the actual changes they made to the election law, changes I think were done in unconstitutional fashion in many States, you are not going to look at that issue?

Ms. CLARKE. Thank you. So, Congressman, we are not coming after any jurisdiction, but we are looking closely to understand why lawmakers are instituting new changes to the rules. If, for example, we learn that a State was motivated by a desire to make it harder for Native American voters to access the ballot, motivated by a desire to make it harder for Black voters to access early voting, motivated by a desire to make it harder for Latino voters to access vote by mail, but those may be important facts that rise to the level of a potential violation of section 2 of the Voting Rights Act or another Federal voting rights law.

Mr. JORDAN. Let me give you an example. Prior to the 2020 election, Pennsylvania election law said that the election ends at 8:00 p.m. on Tuesday. That is what the legislature passed. That is what had been signed by the governor. That was, in fact, the election law.

Democrats in Pennsylvania went to the partisan Supreme Court, State Supreme Court, and sued in the State Supreme Court, and the State Supreme Court said election law doesn't end at 8:00 p.m. Tuesday even though that is what the law said. They said, no, now the election goes until 5:00 p.m. Friday.

It is a total end-run around the legislature, which as Mr. Johnson pointed out, we all know the time, place, and manner of election law is determined by State legislatures. So, are you going to look at that fact? Are you going to examine, was that done in a constitutional—manner consistent with the Constitution? Are you going to look at that, for example?

Ms. CLARKE. Well, I am not familiar with the situation in Pennsylvania, but we are looking across the country to understand why lawmakers are changing the rules.

Our sole goal is not partisan but to make sure that those changes are not motivated by—

Mr. JORDAN. Okay. So, this is a specific question. Will you look at changes made to election law prior to the 2020 election, will you look at that, or are you only looking at States who are going to revert back to where they were prior to the 2020 election?

Ms. CLARKE. We are looking across the country at existing laws, new laws, and laws that have been put on the books recently that are now being taken away. The sole goal is to ensure that all eligible Americans have access to the ballot and that they have access that is free from—

Mr. JORDAN. I share that goal. I think everyone on this Committee here, everyone at this hearing shares that goal. We also are

concerned about making sure election law is done in a constitutionally proper manner and proper fashion.

It sure looks to me like in Pennsylvania, as an example, it wasn't, because when the State legislature passes an election law that says the election ends at 8:00 p.m. Tuesday, but then the State Supreme Court says, "Forget what they said, we are going to now extend the election 3 days," that never went through the legislature, and they extended the election 3 days.

The same thing happened, frankly, with mail-in ballots. Election law in Pennsylvania says that there is supposed to be signature verification for every ballot, but the secretary of State—again, not going through the legislature—said, "You know what? We are not going to have signature verification for the mail-in ballots in Pennsylvania."

Almost 42-point-some millions of those ballots never had signature verification. Are you going to look at those changes, too, and say that is not consistent with the Constitution?

Ms. CLARKE. So, Congressman, I want to assure you that some of these voting changes that you may be referencing may not trigger a violation of Federal voting rights laws.

The Justice Department does not undertake its work in a partisan manner. Our sole focus is ensuring that lawmakers are not acting with a discriminatory motive or acting in a way that will have a discriminatory effect on protected minority groups. That is it.

Mr. JORDAN. All right.

Thank you, Mr. Chair. I yield back.

Mr. COHEN. Thank you, Mr. Jordan.

I would like to ask for unanimous consent to submit into the record an op-ed by the Council of Economic Advisers entitled "The Importance of Protecting Voting Rights for Voter Turnout and Economic Well-Being." Without objection. Thank you.

I would also like to enter into the record the 2021 report of the House Administration Committee and the Subcommittee on Elections on "Voting in America: Ensuring Free and Fair Access to the Ballot." Without objection, so done.

[The information follows:]

MR. COHEN FOR THE RECORD

BLOG

The Importance of Protecting Voting Rights for Voter Turnout and Economic Well-Being

AUGUST 16, 2021 • ARTICLES

By Chair Cecilia Rouse, Matthew Maury, and Jeffery Zhang

Since January 2021, 18 states have enacted 30 separate laws that many analysts believe will make it more difficult to vote. In addition, over 400 bills that would make voting more difficult are being considered in State legislatures. These enacted and proposed laws include vote-by-mail restrictions, restrictions on early voting, and broader authority for purges of voter rolls. An often-cited reason for these bills and laws is voter fraud, yet voter fraud is extremely rare. Insidiously, these laws disproportionately undermine the ability of people of color to vote. Moreover, voters' waiting times in predominately Black neighborhoods are already 29 percent longer than in predominately white neighborhoods. In this blog post, we outline research that has been done on the impact of voting rights on election turnout and on the economic well-being of Black Americans. As State legislatures consider weakening voter protections and as Congress debates new voting rights laws, we hope that the evidence presented here proves informative for lawmakers.

Research sheds light on this issue by analyzing the historical impact of Section 5 of the Voting Rights Act, which was signed into law on August 6, 1965, by President Johnson. Section 5 requires jurisdictions—determined by a formula in the Act's Section 4(b)—to obtain approval from the U.S. Attorney General or the U.S. District Court for the District of Columbia before changing any election practices. In doing so, Section 5 seeks to ensure that such changes do not have a discriminatory effect—a process known as "preclearance." The purpose of this preclearance process was to stop discriminatory election changes before they could be implemented in jurisdictions with a history of discriminatory treatment of people of color at the polls. In 2013, however, the Supreme Court held in *Shelby County v. Holder* that Section 4(b) was unconstitutional because the data used to justify Section 4(b) were outdated, thus rendering Section 5 toothless in all the jurisdictions it had once covered. While Section 5 is still on the books, the nine states, 53 counties across five states, and two townships once covered are no longer subject to the preclearance requirement.

In particular, the research discussed here assesses the impact of Section 5 on electoral turnout and wages by comparing these outcomes before and after the passage of the Voting Rights Act in covered versus noncovered counties. Recent research also includes analysis of the *Shelby* decision's impact in formerly covered counties.

Voter Turnout

The vast majority of academic research supports the notion that the Voting Rights Act increased voter turnout.[1] One study, by Aneja and Avenancio-León (2020), compares changes in turnout in covered versus noncovered counties before and after the Act's passage in 1965. Crucially, this study compares covered and noncovered counties that share a border, and it provides substantial economic and voter-characteristic data indicating that these neighboring counties were alike. As such, the study compares voter turnout in counties that, apart from variations in Section 5 coverage, were very similar. The authors find that Section 5 increased turnout from 1968 to 1980 by 6.5 to 11.5 percentage points per election, with a jurisdiction's turnout increasing by 2 percent for every 10 percent increase in its population share that was Black.

Another study, by Ang (2019), assesses the impact of Section 5 from 1976 to 2016. This study looks at newly covered versus noncovered counties after the 1975 Voting Rights Act amendment, which expanded protection to include more nonwhite groups. The study shows that Section 5 had a significant and substantially positive impact on voter turnout in each general election from 1976 to 2016.[2] In the 1976 and 1980 general elections, Section 5's coverage increased turnout by 1 to 2 percentage points; and in each general election from 1984 to 2016, its coverage increased turnout by about 4 to 8 percentage points. To put the significance of this impact in perspective, the study's author estimates that Section 5 increased 2012 turnout in covered counties by 8.1 percentage points. That same year, average turnout was 54.9 percent, meaning that about 15 percent of turnout in covered counties was attributable to Section 5. Moreover, the increase of 4 to 8 percentage points was driven entirely by higher nonwhite turnout; coverage had no observable impact on white turnout, but nonwhite turnout grew by 7.5 to 20 percentage points from 1984 to 2016.

While the analysis by Ang (2019) ends with the 2016 election, it provisionally supports the hypothesis that the *Shelby* decision decreased voter turnout. Comparing the 2012–16 change in turnout in covered counties with the 2012–16 change in noncovered counties, the study shows that on average, previously covered counties had a decrease in turnout of 1.5 percentage points. This outcome was the consequence of reduced turnout among nonwhite voters. Turnout did not decrease among white voters from 2012 to 2016 in previously covered counties relative to noncovered counties, but turnout among nonwhite voters decreased by 2.1 percentage points in covered relative to noncovered counties over the same period.

Research has yet to decisively explore the causes of these changes, but there are at least three plausible and non–mutually exclusive explanations for this lower turnout in previously covered counties. First, after the *Shelby* decision,there was a substantial decrease in the number of polling places in previously covered jurisdictions. One study finds that at least 868 polling places in formerly covered counties were shut down in the aftermath of *Shelby*, which amounted to a 16 percent reduction in polling places in the 381 counties analyzed. Because this study only examines data for 381 of the roughly 800 counties once covered by Section 5, the actual number of polling places that closed after *Shelby* could be higher than 868. Indeed, a follow-up study examining over 85 percent of formerly covered counties finds that there were 1,688 polling place closures after *Shelby*.

Before the *Shelby* decision, each of these counties would have needed to obtain approval before closing a polling place. That was because Section 5 required proof that the closure would not have a racially discriminatory effect. Moreover, localities needed to notify voters of polling place closures ahead of time. *Shelby* made it easier to make these closures. Given the close link between distance to a polling place and one's ability to vote, *Shelby*'s adverse impact on voter turnout may have been at least partially due to these closures. Indeed, in a study that makes use of random differences in the distance between eligible voters' homes and their nearest polling place, Cantoni (2020) estimates that increasing distance to the polls by approximately a quarter mile would decrease election turnout by 2 to 5 percent. Moreover, the study finds that distance to the polls has a particularly adverse impact on turnout by people of color and low-income individuals. For example, in nonpresidential elections, the impact of increasing distance to the polls in disproportionately nonwhite areas is three times greater than in predominately white areas.

Second, Section 5's rollback may have increased purges of voters from registration rolls. Since the *Shelby* decision, formerly covered counties have increased the share of voters purged by at least 25 percent relative to noncovered counties. Studies estimate that if this increase had not occurred, there would have been 3.1 million fewer purges from 2013 to 2018. Notably, voter purges have a mixed record of accurately removing voters who should be removed from registration records, with some purge strategies registering an error rate of over 99 percent.

Third, the *Shelby* decision made it easier to pass and implement voting rights restrictions. Within two months of the decision, North Carolina passed a law that reduced early voting, narrowed the voter registration window, and imposed a strict photo ID requirement, among other voting restrictions. While the U.S. Court of Appeals for the Fourth Circuit ultimately struck down this law in 2016 for violating Section 2 of the Voting Rights Act and the Constitution, the law would not have been implemented in the first place pre-*Shelby*. In fact,

the North Carolina legislature waited until after *Shelby* to vote on the legislation; after the ruling, a State Senate committee chair remarked , "So, now we can go with the full bill." More generally, from 1998 until *Shelby* in 2013, Section 5 blocked 86 voting laws from taking effect, and 13 such laws were blocked from 2012 to 2013 alone.

To be sure, economic research indicates that not all potentially restrictive voter laws have the same magnitude of impact. As already noted, increasing distance to the polls has sizable and statistically significant adverse impacts on voter turnout. Evidence further indicates that expansions of early voting and switching to all-mail elections expand turnout. Kaplan and Yuan (2020) use cross-county increases and decreases in the number of days of early voting in Ohio to estimate that each additional day of early voting increases turnout by 0.22 percentage point. Moreover, Gerber, Huber, and Hill (2013) use cross-county variation in implementing Washington State's all-mail elections to estimate that the system boosted turnout by 2 to 4 percentage points. Evidence on voter ID laws is less straightforward. On one hand, some evidence indicates that these laws reduce turnout. Esposito, Focanti, and Hastings (2019) find that a voter ID law in Rhode Island decreased voter registration and turnout for people without driver's licenses by 7.6 and 2.7 percentage points, respectively. Further, GAO (2014) examines voter turnout between the 2008 and 2012 general elections in Kansas and Tennessee, which adopted voter ID laws, and concludes that the measures decreased turnout by 1.9 to 3.2 percentage points. On the other hand, a compelling, systematic study by Cantoni and Pons (2021) finds that voter ID laws have no statistically significant impact on voter turnout. The researchers also find that voter ID laws increase the likelihood that nonwhite voters are contacted by a political campaign by 4.7 percentage points, and theorize that this heightened outreach may have increased nonwhite turnout. The paper concludes that "mobilization against strict ID laws might have offset direct negative effects on the participation of ethnic minorities of about one third of a percentage point."[3]

Economic Status

Multiple studies find that an enhanced ability to vote leads to improved economic status. For example, by examining the impact of Section 5 on the Black/white wage gap from 1950 to 1980, the study by Aneja and Avenancio-León (2020) estimates that Section 5 decreased the wage gap by a statistically significant 5.5 percentage points. In their sample, the Black/white pay gap narrowed from about 55 percent in 1960 to 80 percent in 1980, meaning that the impact of the Voting Rights Act on the pay gap accounted for roughly one-fifth of the narrowing of the Black/white pay gap during that period. A pay increase of this magnitude would be equivalent to the median Black worker's annual income increasing by over $2,700 in 2020.

If we can expect stronger voting rights protections and greater enfranchisement to yield more economic benefits for Black families, then we can also expect Black families to have suffered

economically after the *Shelby* decision. Recent evidence shows this is indeed what occurred. Another study by Aneja and Avenancio-León (2019) finds that for each 1 percentage point increase in the share of a county's population that is Black, the Section 5 rollback increased the private sector Black/white wage gap by 0.49 to 0.59 percentage point, and increased the public sector wage gap by 0.65 to 0.80 percentage point. The authors obtain these results by comparing trends in the Black/white wage gap in pairs of counties that share a border, where one county was previously covered by Section 5 and the other was not. The results imply that for a previously covered county with a 15 percent pre-*Shelby* Black population share that borders a noncovered county, removing coverage decreased private sector wages for Black workers by 7.3 to 8.9 percentage points, relative to wages for white workers.

Due to the relative recency of the *Shelby* decision, specific explanations for this observed backslide are currently understudied. However, research suggests a few potential pathways through which the Voting Rights Act narrowed the Black/white wage gap in the 20th century. First, Section 5 directly increased Black employment in the public sector by about 3.8 percentage points. The combination of this increase with 18 percentage point higher wages for government jobs accounts for about 10 percent of the observed increase in Black wages directly attributable to the Act.

Second, this direct increase in demand and pay boosted competition for Black workers within the private sector. This competition-based impact on private sector wages explains about 29 to 35 percent of the decrease in the private sector Black/white wage gap after the Act's passage.

Third, the Voting Rights Act complemented and strengthened antidiscrimination employment provisions in the Civil Rights Act. Jurisdictions covered by Section 5 saw increased private sector antidiscrimination legal action relative to comparable noncovered jurisdictions. Also, the observed impact of Section 5 on the private sector wage gap was greater in areas with more enforcement action by the U.S. Equal Employment Opportunity Commission.

The Voting Rights Act also may well have raised wages by enhancing school quality and improving the treatment of Black people by law enforcement agencies. Research by Cascio and Washington (2013) shows a link between the Voting Rights Act and improved school quality. Specifically, these researchers demonstrate that for the average county in a State that previously had literacy tests, the Act's increase in Black voter turnout is associated with a 16.4 percent increase in State transfers to local governments. A total of 63 percent of such funds went to education spending, with school quality particularly improving for Black children. Given the evidence that increased school quality leads to higher wages (Card and Krueger 1992), this likely improved subsequent labor market outcomes as well.

In addition, research shows that the Voting Rights Act led to better treatment of Black people by law enforcement agencies. For every increase of 10 percentage points in the share of the population that was Black in counties covered by Section 5, there was a reduction of 17 to 23 percent in the growth rate of arrests of Black people, relative to noncovered counties. There were no corresponding effects for arrest rates of white people. This effect was not attributable to changes in factors that could influence crime rates—such as migration patterns, education levels, and labor market conditions—but was instead due to lower misdemeanor arrests by police departments with elected sheriffs. Due to the close link between misdemeanor offenses and lower wages, the Voting Rights Act may have improved the economic well-being of Black communities through this channel as well.

More generally, evidence suggests that the composition of an electorate affects whether the lawmakers representing it vote in line with the electorate's policy preferences, both by affecting *who* is elected and by making an impact on *how* lawmakers vote once they are in office. As such, a higher share of Black voters will generally increase the likelihood that lawmakers in office promote the interests—including the economic interests—of Black communities.

Conclusion

This blog post has described the benefits of voter protection for improving the ability of people of color to vote, and has outlined the connection of this right to the economic well-being of Black Americans. Expanded voting rights and voting protections have played a crucial role in enhancing voter turnout, particularly for people of color. Further, while voting rights are often examined through a legal, civil rights lens, it is important to also understand the types of economic harm that are inflicted when voting rights are curtailed.

[1] Relatedly, voter registration—a prerequisite for voting—among Black Americans in the South increased markedly after the Voting Rights Act's passage. Comparing 1964 with 1968—that is, before and after passage of the Act—voter registration among Black Americans increased by an average of 19 percent in States that did not have literacy tests before the Act, and by 67 percent in States that had literacy tests before the Act. Literacy tests were employed by local governments to disenfranchise those without access to education.

[2] The study also finds that Section 5 coverage boosted the electoral success of Republican political candidates. The author hypothesizes that the share of the Republican vote increased due to "political backlash among racially conservative whites."

[3] Despite the prevalence of citing voter fraud as a reason for enacting voter ID laws, the study further finds no actual or perceived impact of voter ID laws on voter fraud.

A report entitled "Voting in America: Ensuring Free and Fair Access to the Ballot," House Administration Committee and the Subcommittee on Elections, submitted by the Honorable Steve Cohen, Chair of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Tennessee: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD102.pdf*

Mr. COHEN. I now recognize Mr. Raskin for 5 minutes.

Mr. Raskin, you are muted, or you are mute.

Mr. RASKIN. Thank you very much, Mr. Chair. I appreciate your calling this hearing.

Ms. Clarke, I want to ask you about the potential enhancement of bail-in jurisdiction.

In light of the Department's prior experience administering the preclearance regime, what is your opinion about the necessity of amending section 3(c) to permit courts to bail in jurisdictions for violations of the Voting Rights Act in addition to cases where there have been violations of the 14th and 15th Amendments?

Ms. CLARKE. Thank you for that question, Congressman.

The bail-in and bail-out provisions of the Voting Rights Act are important features of the statute. They allow a way for jurisdictions that may have long and recent histories of voting discrimination to be brought into the preclearance process.

Likewise, bail out allows for jurisdictions that have a clean bill of health for 10 years to be removed or exempt from the preclearance process. We know that there are scores of jurisdiction that availed themselves of the opportunity to bail out when we had the preclearance process in place.

Overall, I think that the bail-in and bail-out features of preclearance make clear that Congress designed a very carefully tailored statute that allows for expansion, allows for restriction based on the records of those jurisdictions.

I encourage Congress to look at those provisions and see if there are ways to perhaps make it even easier for jurisdictions to bail out—or, alternatively, easier to bring jurisdictions, in particularly, those that engage in present day discrimination when it comes to voting rights.

Mr. RASKIN. Yes.

I have heard now from several of my colleagues on the other side of the aisle about this claim that the State of Pennsylvania somehow violated the U.S. Constitution in the 2020 election and that other States had done that before.

My understanding was that 62 different Federal and State courts rejected categorically this claim that there was some violation of article II of the Constitution taking place.

As I understand their line of questioning as directed to you, they are basically saying, would you look at somebody's Voting Rights Act claim that, for example, the extension of hours violated the Voting Rights Act? Is there any reason you wouldn't look at that to determine whether there was an invidious intent or an invidious effect under the Voting Rights Act?

Ms. CLARKE. Thank you.

Again, protecting the right to vote is an important priority for the Justice Department. It is something that Attorney General Garland has made clear repeatedly.

As we look at the picture across the country, our review is a narrow one. It is focused solely on understanding whether jurisdictions are changing the rules, adopting new restrictions in ways that harm protected minority groups, groups who deserve the right to be able to access the ballot free from discrimination.

This is not a partisan exercise. It is a very limited review and limited jurisdictional role that the Justice Department has.

Mr. RASKIN. Yeah. No courts have ever found that there was either a constitutional or a statutory problem with the kinds of changes that they are talking about from the 2020 election, much less that there was a violation of the Voting Rights Act. It is interesting that they began by proclaiming their fealty to federalism, but they are attacking voting practices in particular States, as in Pennsylvania.

I want to thank you for your service, and I want to thank you for very carefully threading the needle to help us come up with a statute that will stand the test of time and vindicate our overwhelming constitutional interest in making sure everybody gets the right to vote.

I yield back to you, Mr. Chair.

Mr. COHEN. Thank you, Mr. Raskin.

Our next questioner will be Mr. McClintock of California.

Is he not on?

He is not on. We will go to—is Mr. Roy available?

Ms. Fischbach?

Mr. Owens?

Ms. Ross of North Carolina, you are recognized.

Technical difficulties.

Ms. ROSS. No. We have got it, Mr. Chair. Sorry. I was being very good about mute.

Thank you, Mr. Chair, for having this hearing.

Thank you, Ms. Clarke, for your testimony. It is very important for our deliberations as we bring the next John Lewis Voting Rights Act forward.

The rise in voter suppression laws across the country has revealed critical gaps in the Voting Rights Act and its ability to protect the right to vote and to allow affected parties to obtain timely relief under the claims that they pursue, and we have certainly seen this in my home State of North Carolina.

I want to bring up the *Thornburg* v. *Gingles* case, which did come from North Carolina, where the Supreme Court outlined a nonexhaustive list of factors that a court should consider in vote dilution section 2 cases.

In any legislative response to the *Brnovich* decision, do you think it is important for Congress to explicitly clarify that section 2(b) continues to apply to vote dilution claims and that courts must apply the *Gingles* decision to those claims? If so, please tell me why.

Ms. CLARKE. Thank you for that question, Congresswoman.

So, the Justice Department thinks that it would be valuable for Congress to look carefully at the *Brnovich* ruling and the factors set forth in the opinion to see whether there is a divergence between the factors that this body had intended courts and litigants to consider in section 2 cases.

Clarity can be very helpful for the Justice Department and for other litigants that pursue section 2 cases going forward.

That said, the *Brnovich* ruling leaves section 2 intact, and it remains an important tool that we are using to safeguard voting rights across the country.

Ms. ROSS. Thank you very much for that answer.

We have also heard testimony this Congress that the lower courts' overreliance on the so-called *Purcell* Principle has made it inordinately difficult for section 2 plaintiffs to obtain equitable relief in cases involving late-breaking changes to voting procedures.

Should Congress consider amending the VRA to address *Purcell*? If so, how?

Ms. CLARKE. Well, again, Congresswoman, Congress bears broad enforcement powers under section 2 of the 15th Amendment, section 5 of the 14th Amendment, the Elections Clause, which gives Congress the power to speak to the time, place, and manner by which voters can access the ballot in Federal elections.

So, all three of these provisions truly give Congress the power to provide clarity about how it intends section 2 to be used.

So, my answer to your question is, yes, this is an area that we would encourage Congress to look at and explore further.

Ms. ROSS. As a follow-up to that question, do you think it is particularly important for us to look at this principle in light of the upcoming redistricting that we will be doing based on the Census results?

Ms. CLARKE. Yes, Congresswoman. The Supreme Court has urged Congress to look at current conditions.

We know over the course of the past decade—over the course of the past few decades—that redistricting is a moment where we see discrimination rear its ugly head. We have seen racially gerrymandered plans. We have seen efforts to pack minority voters into districts in ways that harm their ability to access the ballot. We have seen tracking of minority voters across districts.

So, there is a track record here, and I think that the upcoming redistricting cycle underscores the urgency of Congress resolving this issue now, of speaking to the *Shelby* Court ruling now and ensuring that we have the full protections of the Act back in place before the upcoming decennial redistricting cycle gets fully underway.

Ms. ROSS. Thank you very much.

Mr. Chair, I yield back.

Mr. COHEN. Thank you, Ms. Ross.

I now recognize the gentleman from Georgia, the man that ranks exactly next to me but just a little bit behind me in seniority, Mr. Hank Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

During previous hearings on the VRA this Congress, we have heard testimony documenting the fact that section 2 litigation is a lengthy process, often taking 2—5 years to completion.

By the time a section 2 plaintiff has an enforceable judgment, and the challenged voting practice is blocked or rescinded, multiple election cycles for Federal, State, and local office will have occurred. The result is that untold numbers of minority voters can be disenfranchised while multiple elections are held under laws that are later found to be discriminatory.

The courts can't strike down the results of an election later found to have been conducted in violation of the Voting Rights Act.

Ms. Clarke, would you agree that lengthy but successful section 2 litigation over the course of multiple election cycles without a

final disposition results in grave harm to individual constitutional rights and to the public interest?

If you believe that to be the case, should Congress consider amending the standard for obtaining preliminary injunction relief to ensure that grave harm is prevented? If so, what changes would you recommend?

Ms. CLARKE. Thank you, Congressman.

As I have noted earlier, section 2, indeed, is no substitute for the important prophylactic protections that have been provided by section 5.

In *South Carolina* v. *Katzenbach*, the Supreme Court talked about shifting the advantage of time and inertia away from jurisdictions, and we need Congress to Act now.

As you have observed, the costs and burdens tied to section 2 really make it difficult for section 2 to serve as a substitute for section 5. Section 5 has been a checkpoint on democracy.

You raised the question of whether we should think about amending the preliminary injunction standard for section 2, but the Justice Department would urge Congress to really keep section 5 under its microscope and keep the *Shelby County* ruling front and center as it conducts its review and figure out how we can replace section 5 or put back in a remedy that restores some of those important preemptive protections that have been provided by section 5.

Mr. JOHNSON of Georgia. Thank you.

Currently, the Voting Rights Act only permits the Attorney General to institute an action for preventive relief, including injunctive relief, for a limited set of violations or potential violations.

Does this hinder the Department's ability to protect minority voters before a discriminatory practice goes into effect? If so, how should Congress consider expanding the scope of section 2 to provide the Department with the necessary tools it needs to prevent a discriminatory practice before it disenfranchises voters, notwithstanding, of course, section 5, but section 2?

Ms. CLARKE. Thank you, Congressman.

If I understood your question correctly, you were talking about some of the unique powers that the Justice Department holds under the Voting Rights Act and whether that disadvantages others. That may be a better—

Mr. JOHNSON of Georgia. Well, no. My question is, with the limited relief, including injunctive relief, that the Attorney General must prevent voting rights violations under section 2 from being ongoing while elections are being conducted, do you believe that Congress should consider expanding the scope of section 2 to provide the Department of Justice with the tools necessary to prevent that discriminatory practice or those practices from occurring while elections are being held?

Ms. CLARKE. Yeah. Thank you, Congressman.

We want the opportunity to look at that question carefully. It is my understanding that the constitutionality of section 2 is not in question. This is a nationwide provision that in its current form and shape has served as one important tool for safeguarding voting rights.

The *Brnovich* ruling raises a question about whether Congress might clarify the factors that courts are supposed to consider in determining the validity of a section 2 claim.

Section 5 is the true focus of the work that is underway, and so that is the area that the Department has been focused on. We look forward to supporting this Congress in undertaking work to figure out a way to replace and restore the important protections that have been provided by that unique section 5 preclearance process.

Mr. JOHNSON of Georgia. Thank you. I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Ms. Garcia from the great State of Texas and the County of Harris.

Ms. GARCIA. Thank you, Mr. Chair, for bringing us together for this very, very important hearing. Too bad it is just number six. I wish it was a lucky seven and we could still have one more before we mark up this bill.

Thank you, Madam Assistant Attorney General. First, I really want to congratulate you on your historic nomination and position as the head of the Civil Rights Division. It makes me proud to know that you are the first woman, and of course, particularly, the first woman of color. So much success. It is great to have you with us today. Thank you for all the work you have done in the past in this area.

Time and time again, this Committee has shown the American people why it is so essential to pass both H.R. 1, the For the People Act, and the John Lewis Voting Rights Advancement Act, especially during this critical moment when Republican-led State legislatures—including my very own State of Texas, sadly enough—who have launched all-out assaults to restrict voting rights around the country.

That is why I am proud to have joined many of my colleagues in sending a letter that was led by Members of my class, and particularly Representative Escobar, who sits on the Judiciary Committee. We sent a letter to the Biden Administration and leadership urging the need to immediately pass H.R. 1 and H.R. 4.

With time running out, the American people need Congress to Act and address the threats these efforts present to our democracy. We must Act to protect the vote, we must Act to expand the vote, and we must Act to make sure that our children have the benefit of the right to vote.

With that in mind, Madam Attorney General, I wanted to ask you questions particularly to the recent numbers that were released just last week which show that the first time since 1790 the White population has decreased, and that the largest and most steady gains were among the Latino population. Our Nation is moving closer and closer to becoming a true multi-racial, multi-ethnic society without a clear racial majority.

Do you think this is the kind of condition, do you think this is the kind of reflection of the changing demographics in our States that require us to Act and Act swiftly on the Voting Rights Act?

Ms. CLARKE. Thank you for that question, Congresswoman.

So, what the Justice Department has seen historically is that demographic change can prompt discriminatory voting changes.

One example of this would be out of Kilmichael, Mississippi, where, following the results of a new Census, data showed that the numbers of Black population, the numbers of Black voters in a particular community had grown substantially. There were a number of Black voters who opted to run for seats on the council, and the town voted to cancel, decided to cancel the election once this happened.

That decision was a change that impacted voting. The Justice Department during the Bush Administration reviewed that decision to cancel the election and decided to block the change because it was very clear that the decision to cancel the election was motivated by a discriminatory intent.

The election ultimately went forward, and the town, for the first time, elected a majority of Blacks to the council and to the mayoral seat.

It is an example of the powerful way in which the section 5 preclearance operates. It operates in communities both large and small, communities that may not be on the radar, communities that may be responding to demographic change, the kind of demographic change that we see continuing with the results of the recent Census data.

To me, this underscores the urgency of the moment and the urgent need for Congress to Act now as jurisdictions gear up for the next round of decennial redistricting. No doubt this new round of Census data may prompt the kind of discriminatory changes that we have seen in the past.

Ms. GARCIA. You said that section 5 was the heart of the Voting Rights Act. Do you think we are on a Code Blue? I mean, it is urgent, we must act. I mean, we must Act to ensure that voting rights are protected around the country and the territories?

Ms. CLARKE. Absolutely. It has been 8 years since the *Shelby* ruling. Restoration of the Voting Rights Act is an important priority for the Justice Department, and we look forward to working with you until the very end to help understand what the current conditions are and to help fashion a remedy that is responsive to the problems that we are up against today.

Ms. GARCIA. Thank you, Madam Assistant Attorney General. Again, congratulations on your selection.

Mr. Chair, I yield back.

Mr. COHEN. Thank you, Ms. Garcia.

Now we go to another outstanding Member from Houston, Texas, where they not only sing but they dance, Sheila Jackson Lee.

Ms. JACKSON LEE. Mr. Chair, I am honored, and I am honored for this very historic and important hearing. I wish we were in the other body with 7–10 minutes for each of us. I know, Mr. Chair, that is not the case.

Let me welcome the Assistant Attorney General and thank her for her leadership and her expertise.

In the midst, Attorney General, of the fights around critical race theory, the new Census that, for the first time, would not have the protection of the 1965 Voting Rights Act, and the increasing diversity in this country, and people making this a race question, I believe that this is more crucial than ever before. When I say that, opponents making the question of the voting rights about race.

It is not about race. It is about voting rights. It is not about Black people only or Hispanic only. It is about voting rights. I am saddened by my dear colleagues who have made this a race question. I rebuke that.

The reason why I do, I would ask unanimous consent to put into the record, 1965, 1970, 1975, 1982, 1982 again, and 2006, of the record that shows that every vote on the reauthorization and the authorization of the Voting Rights Act was bipartisan in huge numbers, Republicans and Democrats, Whites and Blacks, Hispanics, African Americans, and other diverse persons in the United States Congress. I ask unanimous consent.

Mr. COHEN. In the spirit of Jim Sensenbrenner, it will be, without objection, done.

Ms. JACKSON LEE. With unanimous consent, I wish to put into the record "Warrants served to Texas Democrats, but holdout continues," my colleagues, brave colleagues who are fighting against voter suppression, and "Analysis: It is Harder to Vote in Texas Than Any Other State." We are 49th. It is harder than 49 other States as evidenced by research in academic institutions.

I ask unanimous consent for that as well, Mr. Chair.

Mr. COHEN. Without objection, it shall be entered into the record.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

VRA REAUTHORIZATION VOTE COUNTS

- 1965 Voting Rights Act (Johnson)
  - House Passed 333-85
    - Yes Votes: 221 Dems, 112 Repubs
  - Senate Passed 77-19
    - Yes Votes: 47 Dems, 30 Repubs

- 1970 Voting Rights Act Reauthorization (Nixon)
  - House Passed 224-183
    - Yes Votes: 165 Dems, 59 Repubs
  - Senate Passed 64-12
    - Yes Votes: 31 Dems, 33 Repubs

- 1975 Voting Rights Act Reauthorization (Ford)
  - House Passed 341-70
    - Yes Votes: 247 Dems, 94 Repubs
  - Senate Passed 77-12
    - Yes Votes: 49 Dems, 27 Repubs

- 1982 Voting Rights Act Reauthorization (Reagan)
  - House Passed 389-24
    - Yes Votes: 227 Dems, 161 Repubs
  - Senate Passed 85-8
    - Yes Votes: 42 Dems, 43 Repubs
    -

- 1982 Voting Rights Act Reauthorization (Reagan)
  - House Passed 389-24
    - Yes Votes: 227 Dems, 161 Repubs
  - Senate Passed 85-8
    - Yes Votes: 42 Dems, 43 Repubs

- 2006 Voting Rights Act Reauthorization (Bush Jr.)
  - House Passed 390-33
    - Yes Votes: 197 Dems, 192 Repubs
  - Senate Passed 98-0
    - Yes Votes: 44 Dems, 53 Repubs, 1 Ind

AP NEWS ›

Warrants served to Texas Democrats, but holdout continues

AUGUST 12, 2021

AUSTIN, Texas (AP) — Officers of the Texas House of Representatives delivered civil arrest warrants for more than 50 absent Democrats on Wednesday as frustrated Republicans ratcheted up efforts to end a standoff over a sweeping elections bill that stretched into its 31st day.

But after sergeants-at-arms finished making the rounds inside the Texas Capitol — dropping off copies of the warrants at Democrats' offices, and politely asking staff to tell their bosses to please return — there were few signs the stalemate that began when Democrats fled to Washington, D.C., in July in order to grind the statehouse to a halt was any closer to a resolution.

The latest escalation threw the Texas Legislature into uncommon territory with neither side showing any certainty over what comes next, or how far Republicans could take their determination to secure a quorum of 100 present lawmakers — a threshold they were just four members shy of reaching.

"I don't worry about things I can't control," said state Rep. Erin Zwiener, one of the Democrats who was served with a warrant and has refused to return to the Capitol. "Nothing about these warrants are a surprise, and they don't necessarily affect my plans."

Democrats, who acknowledge they cannot permanently stop the GOP voting bill from passing because of Republicans' dominance in both chambers of the Texas Legislature, responded to the warrants with new shows of defiance. One turned up in a Houston courtroom and secured a court order aimed at preventing him from being forced to return to the Capitol. In the Texas Senate, Democrat Carol Alvarado tried to delay passage of the voting bill in her chamber by speaking on it indefinitely in the form of a filibuster, although she admitted that was unlikely to stop it from passing.

The NAACP also stepped in on behalf of the Texas Democrats, urging the Justice Department to investigate whether a federal crime was being committed when Republicans threatened to have them arrested.

Refusing to attend legislative sessions is a violation of House rules — a civil offense, not a criminal one, leaving the power the warrants carry to get Democrats back to the chamber unclear, even for the Republicans who invoked it. Democrats would not be jailed. Republican Travis Clardy, who helped negotiate an early version of the voting bill that Democrats first stopped with a walkout in May, told ABC News he believed "they can be physically brought back to the Capitol."

State Rep. Jim Murphy, who leads the Texas House Republican Caucus, said while he has not seen a situation like this play out during his tenure, his understanding is that officers could go to the missing lawmakers and ask them to come back.

"I am hoping they will come because the warrants have been issued and they don't want to be arrested," Murphy said. "It is incredible to me that you have to arrest people to do the job they campaigned for, for which they took an oath of office to uphold the Texas Constitution."

The Texas Department of Public Safety, the state's law enforcement agency, referred questions about the warrants to the House speaker.

The move marks a new effort by the GOP to end the protest over elections legislation that began a month ago with 50 Democrats taking private jets to Washington in a dramatic show of resolve to make Texas the front lines of a new national battle over voting rights.

Republicans are now in the midst of their third attempt since May to pass a raft of tweaks and changes to the state's election code that would make it harder — and even, sometimes, legally riskier — to cast a ballot in Texas, which already has some of the most restrictive election laws in the nation.

Texas is among several states where Republicans have rushed to enact new voting restrictions in response to former President Donald Trump's false claims that the 2020 election was stolen. The current bill is similar to the ones Democrats blocked last month by going to the nation's capital. It would ban 24-hour polling locations, drive-thru voting and give partisan poll watchers more access, among other things.

It was unclear Wednesday how many Democrats remained in Washington, where they had hoped to push President Joe Biden and other Democrats there to pass federal legislation that would protect voting rights in Texas

and beyond. Senate Democrats pledged to make it the first order of business when they return in the fall, even though they don't have a clear strategy for overcoming steadfast Republican opposition.

THE TEXAS TRIBUNE ›
https://www.texastribune.org/2020/09/15/harris-county-mail-in-ballot-applications/

Analysis: It's harder to vote in Texas than in any other state
ROSS RAMSEY

OCTOBER 19, 2020

How hard is it to register to vote and then to vote in Texas?

It's harder than in 49 other states, according to a "cost-of-voting index" compiled by political scientists at Northern Illinois University, Jacksonville University and Wuhan University in China.

Obviously, it's not impossible to vote in Texas; more than 10% of the state's registered voters — about 2 million citizens — had already cast their ballots, either in person or by mail, by Thursday night. That's certainly a sign of enthusiasm, and could either be a signal of a bigger-than-normal turnout or that a lot of Texas were itching to vote and did so as soon as they could.

But the state has erected obstacles throughout the voting system, and when you compare the comfort and convenience of voting in Texas with other states, Texas ends up at the bottom of the list.

Voting and election law is a persistent struggle in Texas between those who want to knock down impediments to voting and those who think more safeguards are needed to secure the process and the results — though the evidence for this is both anecdotal and thin.

That particular battlefield ranges from voter ID to current legal battles over how many drop-offs each county is allowed to provide for voters who would rather not put their absentee ballots in the mail, who's eligible to vote by mail and whether counties with curbside voting are making things too simple.

Here's how the researchers wrote up our state's position on the list: "Texas maintains an in-person voter registration deadline 30 days prior to Election Day, has reduced the number of polling stations in some parts of the state by more than 50% and has the most restrictive pre-registration law in the country, according to the analysis."

States at the top of the list — where it's easiest to vote — have voting conveniences that aren't available here, like online voter registration, automatic voter registration and allowing voters to register as late as Election Day. (The Texas deadline was Oct. 5.)

Some have universal mail-in voting, which the study considers a hallmark of a state where it's easy to vote. In Texas, voting by mail is only available to people ages 65 and older, to eligible voters confined to jail, for voters who are out of their county of residence during voting, and for voters who cite a disability that prevents them from safely going to the polls.

And higher-rated states require only a signature for in-person voting, instead of tight voter photo identification laws like the one in Texas.

Texas has one of the lowest voter turnout rates in the country, turning out 45.6% of its population of eligible voters in 2018, compared with a national average of 49.4%, according to the United States Election Project. In the last presidential race, in 2016, turnout was 51.4% of the state's eligible voters, a number that includes adults eligible to vote whether they registered or not. The national average was 60.1%.

The cost-of-voting index is an update of a study that includes indexes for elections back to 1996. In 2016, Texas was fifth from the bottom of the list, in company with Indiana, Tennessee, Virginia and Mississippi. This time around, Texas is behind every other state, in the bottom of the barrel with Georgia, Missouri, Mississippi and Tennessee.

Maybe the low turnout in Texas is related to the state's restrictive voting laws. Maybe eligible adults in Texas are less interested in voting, and the state's voting laws are just an excuse for the low civic engagement.

There's a way to find out, if state lawmakers' goal is to get more Texans voting. If they wanted more people to vote, they'd make it easier.

Ms. JACKSON LEE. Madam Attorney General, I will give you two questions that I know that you will realize my time.

The *Shelby County* case impaired the ability of the DOJ to employ Federal observers, having relegated us to using local observers.

Would you indicate how important that question of Federal observers, but how that impairs you, and whether that assessment is correct so that Federal observers should be restored? Number one.

Number two, under the *Brnovich* case, tragically undermined section 2, we seem to have the ability to put in a bifurcated test under section 2, one that would deal with assessing voter dilution, like the redistricting, and one that would deal with voter denial claims, such as voter ID. Would you then answer how important that perspective would be?

My last point would be—and I am down to 1.50, almost—is the importance of prospective Federal hearings, field hearings that could ultimately be put into the record as we move forward, both in this body and in the other body.

Thank you, Attorney General. Observers, section 2, and the hearing. Thank you so very much.

Ms. CLARKE. Thank you, Congresswoman.

So, on the first point, the Federal observer program has been an important tool in the Justice Department's work to ensure that all eligible voters, especially voters of color, are able to access the ballot free from discrimination.

The Justice Department had routinely received reports about voter intimidation efforts or other tactics aimed at making it harder for voters of color to vote, and the deployment of Federal observers by way of the Office of Personnel Management allowed the Department to put independent eyes and ears on the ground in those communities.

Those are people who could document and tabulate what was happening. Those are people whose mere presence often helped to neutralize situations that otherwise may have unfolded on the ground.

So, we are very hopeful that this process will help to restore the ability of DOJ to deploy observers, Federal observers, going forward.

Ms. JACKSON LEE. Thank you. Section 2 question, yes.

Ms. CLARKE. With respect to section 2, as Congress well knows, it has broad enforcement authority under the Reconstruction Amendments, but there are also broad powers vested in this body by way of the Elections Clause, which gives this body the ability to ensure access in Federal elections, to institute legislation concerning the time, place, and manner by which voters can access Federal elections.

So, we urge Congress to lean on and use its broad enforcement powers to ensure access to the ballot box.

Ms. JACKSON LEE. Field hearings?

Ms. CLARKE. Field hearings Congresswoman, are another way to further complement the work that you are doing right now. Bringing Members together to kind of debate what is the appropriate remedy to address the problem is key.

Particularly given the pandemic, getting on the ground and giving voters on the ground the opportunity to present to you the story about what they are seeing and what they are experiencing when it comes to voting discrimination could be an important way to further complement the record that you are developing.

Ms. JACKSON LEE. Thank you.

Thank you, Mr. Chair.

Thank you, Assistant Attorney General.

Mr. COHEN. Thank you.

Ms. Garcia, did you have your hand raised for some reason?

Ms. GARCIA. Yes, sir. I would like to ask unanimous consent to enter for the record the letter I referenced, that was signed by about 15 Members, to President Biden and leadership to Act on the Voting Rights Act and H.R. 1 immediately.

Mr. COHEN. Without objection, it will be done.

[The information follows:]

MS. GARCIA FOR THE RECORD

Congress of the United States
House of Representatives
Washington, DC 20515

July 29, 2021

The Honorable Joseph R. Biden Jr.
President of the United States
The White House
Washington, D.C. 20500

The Honorable Kamala D. Harris
Vice President of the United States
The White House
Washington, D.C. 20500

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
H-232, The Capitol
Washington, D.C. 20515

The Honorable Charles Schumer
Senate Majority Leader
U.S. Senate
S-230, The Capitol
Washington, D.C. 20515

Dear President Biden, Vice President Harris, Speaker Pelosi, and Leader Schumer,

We write to you today on an issue we know you care deeply about and which is fundamental to preserving our democracy: protecting the right to vote.

As members of the 2018 freshman class, we were elected with a mandate to focus on those elements of democracy that were under real threat. From moderates to progressives, we feel that the urgency of passing federal voting rights legislation cannot be overstated, particularly as states start to finalize voting laws ahead of the 2022 election. In as little as two weeks, states like Texas can begin redrawing districts and are on the cusp of passing legislation intended to shape the 2022 elections by eroding voters' access to the ballot box. With time running short, our fellow countrymen are looking to us to do all we can to address the threats these efforts present to our democracy in the near term.

We are therefore seeking your help with a strategy that seeks to immediately pass legislation to both affirmatively set national standards for voting under a modified H.R. 1/S. 1 and restore the protections enshrined in the Voting Rights Act in H.R. 4. This "sword and shield" approach can both protect and expand voting rights for all Americans. We believe that these two pieces of legislation, in addition to intensive voter registration and education on the ground, are the three prongs of a robust strategy to protect the integrity of the 2022 election, and beyond.

To be clear, we remain committed to all the components of H.R. 1. But we believe the voting rights provisions of H.R.1, at minimum, can and should be taken up immediately to preempt harmful laws already passing in state houses across the country. Our understanding is that a

group of senators are working on a tailored bill based on the voting provisions of H.R.1 and we are in strong support of such legislation in both chambers.

But we must not stop there. The Voting Rights Act was the crown jewel of the Civil Rights Movement, and it must be restored in this time of unprecedented assaults on the right to vote. The "shield" provided by a restored Voting Rights Act can prevent late changes to state laws, provide for preclearance of laws affecting the right to vote, and give litigants a chance to effectively challenge laws in federal court. With leadership from Representatives Sewell and Butterfield, the House is hard at work on bringing H.R. 4 to the floor for a vote.

Taken together, this "sword and shield" legislation can provide significant opportunities and protections for our democracy -- but we are quickly running out of time. To that end, the undersigned are committed to returning to vote on these bills in August, during the district work period. We respectfully request you bring both of these critical pieces of legislation to the Congress for an up-or-down vote in both chambers, rather than wait for guaranteed success in either vote. Let the American people see with their own eyes who supports their right to vote and who does not.

Thank you for your urgent attention to this matter. We know you are allies in the desire to protect and expand the vote. We look forward to doing whatever we can to get voting rights on the floor of the Congress as soon as possible.

Respectfully,

Elissa Slotkin
Member of Congress

Colin Allred
Member of Congress

Veronica Escobar
Member of Congress

Ed Case
Member of Congress

Mary Gay Scanlon
Member of Congress

Cindy Axne
Member of Congress

Lizzie Fletcher
Member of Congress

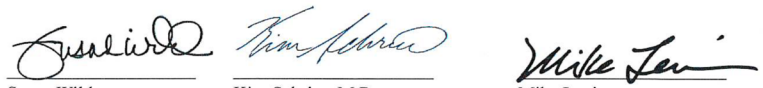
Tom Malinowski
Member of Congress

Abigail D. Spanberger
Member of Congress

Dean Phillips
Member of Congress

Chrissy Houlahan
Member of Congress

Chris Pappas
Member of Congress



Susan Wild
Member of Congress

Kim Schrier, M.D.
Member of Congress

Mike Levin
Member of Congress

David Trone
Member of Congress

Angie Craig
Member of Congress

Antonio Delgado
Member of Congress

Jason Crow
Member of Congress

Lucy McBath
Member of Congress

Sharice L. Davids
Member of Congress

Sylvia R. Garcia
Member of Congress

Madeleine Dean
Member of Congress

Susie Lee
Member of Congress

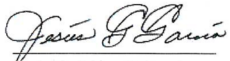
Mikie Sherrill
Member of Congress

Jennifer Wexton
Member of Congress

Sean Casten
Member of Congress

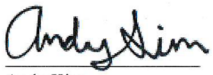
Joe Neguse
Member of Congress

Katie Porter
Member of Congress

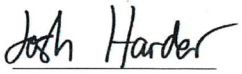


Jesús G. "Chuy" García
Member of Congress

Lori Trahan
Member of Congress



Andy Kim
Member of Congress



Josh Harder
Member of Congress

Greg Stanton
Member of Congress

Steven Horsford
Member of Congress

Ms. GARCIA. Thank you.
Mr. COHEN. [Audio malfunction.]
Ms. GARCIA. Mr. Chair, we can't hear you.
Mr. COHEN. That was good. You win the prize. It was a test.
Ms. GARCIA. I am paying attention. I win the prize.
Mr. COHEN. Thank you. You do.
General Clarke, I want to thank you for your service to our Nation and your testimony today, which was very helpful as we compile a record to propose a bill at some time in the future. With that, you are dismissed and appreciated for your work, and go back to protecting our country, and we will go on to the second panel.
Ms. CLARKE. Chair, thank you for the opportunity to testify today. Very grateful.
Mr. COHEN. You are welcome.
Mr. COHEN. Now, we are at the time for our second panel. We will call up our witnesses for the second panel, and we will give them a few seconds to come up on these virtual panel. They are all appearing. There they are. I think we are all together. Great.
Our first witness on the second panel is Mr. Wade Henderson. Is Mr. Henderson on yet? He is? Great.
Mr. Wade Henderson is an institution. He is one of the, like, you are looking for the Three Wise Men, and he is one of them. He is the interim President and CEO of the Leadership Conference for Civil and Human Rights, having previously led that organization for more than 20 years. The Leadership Conference is a coalition of more than 200 civil and human rights organizations.
He is a graduate of Howard University—a little earlier than Vice-President Kamala Harris was a graduate, and of the Rutgers University School of Law.
Mr. Henderson, you are recognized for 5 minutes.
You have to unmute. Mr. Henderson, you need to unmute.
Wade, nod if you can hear me. You can hear me. Now, you need to unmute yourself so I can hear you.
Mr. HENDERSON. I am sorry, Mr. Chair.
Mr. COHEN. There you go.
Mr. HENDERSON. I thought I was muted by the Committee.
Mr. COHEN. More than likely. That has happened to me, too. You are recognized now, and you are unmuted.

TESTIMONY OF WADE HENDERSON

Mr. HENDERSON. Well, thank you, Mr. Chair. Good morning, Ranking Member Johnson and Members of the Subcommittee. Thank you for the opportunity to testify today. We deeply appreciate your leadership in highlighting the ongoing crisis of racial and other discrimination in our voting system and the urgency in fulfilling the promise for our democracy.
The House Judiciary Committee has taken seriously both its authority and obligation to restore the Voting Rights Act after the devastating decision in *Shelby County* v. *Holder* unleashed a torrent of voting discrimination that continues to this day. Today, I offer critical evidence in support of the John Lewis Voting Rights Advancement Act.
The Court in *Shelby County* held that the formula for imposing preclearance upon States and jurisdictions was, quote, "decades old

and outdated," unquote. The Court instructed that Congress could update such a formula based on, quote, "current conditions," unquote, in voting.

Through several State reports commissioned by The Leadership Conference and prepared by our partner civil rights organizations and allies, we are introducing current conditions of racial discrimination in voting. We offer reports documenting recent voting discrimination in 10 States and plan to introduce additional reports while the record remains open.

These reports powerfully demonstrate that Congress has an urgent imperative to restore the Voting Rights Act. They reveal that voting discrimination after *Shelby County* is pervasive, persistent, and adaptive.

We include the voter restrictions passed this year after the historic voter turnout in 2020 elections, but also include other recent history of these States. This is the current discrimination on which Congress must update the preclearance formula and then make several additional amendments to the Voting Rights Act so voters of color everywhere can fully participate in the political process.

Here is just a sample of what our reports contain.

In North Carolina, before the *Shelby County* ink was dry, lawmakers introduced a monster anti-voter bill that the Fourth Circuit struck down for targeting African Americans, quote, "with almost surgical precision," unquote.

Not to be outdone, Texas began enforcing its own photo ID law previously blocked by the Justice Department and later found by Federal courts to have been motivated by an unconstitutional discriminatory purpose.

In South Carolina, lawmakers adopted a strict photo ID law but then amended it to address its discriminatory impact after an objection was interposed by the Justice Department, leading a court to say, quote, "One cannot doubt the vital function that section 5 of the Voting Rights Act has played here," unquote.

In Alabama, lawmakers packed Black voters into majority Black districts, thereby diluting their vote. The Supreme Court remanded the case on the ground that, quote, "evidence that race motivated the drawing of the particular district lines," unquote, and a three-judge court found the legislature was improperly motivated by race.

For Alaska, we submit a well-developed record of discrimination against the State's Indigenous peoples, which include denying that the 15th Amendment's protections apply to Native voters, providing less information to Native voters because they are Native, and failing to offer language assistance despite court orders requiring it.

In Louisiana, just this year, the Justice Department challenged the at-large method of electing aldermen in the city of West Monroe. Although Black residents comprise nearly 30 percent of the voting age population, no Black candidate has ever been elected.

In Mississippi, where the first lawsuit under the original Voting Rights Act was filed, the Fifth Circuit found that Calhoun County's redistricting plan, quote, "diluted minority voting strength," unquote, in violation of the Voting Rights Act.

Just months ago, in Virginia, a Federal judge enjoined an at-large system for electing city council Members, recognizing that its

discriminatory effects reflect the broader culture of racial discrimination in the city and the State that continues to impact voters of color today.

Just this year, Florida placed restrictions on the ability of organizations to assist with voter registration, a bedrock activity for many groups whose mission is to enhance participation among voters of color.

Last, but not least, in Georgia, a Federal court found that Sumter County's reversion to at-large voting for school board elections was a, quote, "severe infringement of Black voters' right to vote," unquote.

In the wake of the historic 2020 election, which produced the State's first Black U.S. Senator, the legislature passed even more discriminatory restrictions, eliciting eight different lawsuits, including one filed by the Department of Justice.

Earlier this month, we celebrated the 56th anniversary of the Voting Rights Act. Contrary to Chief Justice Roberts' pronouncement in *Shelby County*, our country has not changed fundamentally. Voting discrimination today continues to constitute a stain on our democracy.

We implore Congress to swiftly pass the John Lewis Voting Rights Advancement Act. The future of our democracy hangs in the balance.

Thank you, Mr. Chair.

[The statement of Mr. Henderson follows:]

The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

**STATEMENT OF WADE HENDERSON, INTERIM PRESIDENT AND CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

**U.S. HOUSE OF REPRESENTATIVES
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**

**HEARING ON "OVERSIGHT OF THE VOTING RIGHTS ACT:
POTENTIAL LEGISLATIVE REFORMS"**

AUGUST 16, 2021

Chairman Cohen, Ranking Member Johnson, and members of the subcommittee: Thank you for holding this important hearing today to highlight the ongoing crisis of racial discrimination in our voting system and the urgency to fulfill the promise of our democracy. My name is Wade Henderson, and I am the interim president and CEO of The Leadership Conference on Civil and Human Rights, a coalition of more than 220 national organizations working to build an America as good as its ideals.

The Leadership Conference was founded in 1950 and has coordinated national advocacy efforts on behalf of every major civil rights law since 1957, including the Voting Rights Act of 1965 and subsequent reauthorizations. Much of our work today focuses on making sure that every voter has a voice in key decisions like pandemic relief, access to affordable health care, and policing accountability. At The Leadership Conference, we aim to ensure that every voter can cast a vote and have it counted. We are deeply grateful to this subcommittee for its work to restore the Voting Rights Act and for introducing voluminous evidence of racial discrimination into the record with integrity, deliberation, and due diligence.

In 1965, Congress passed the Voting Rights Act to outlaw racial discrimination in voting. Previously, many states barred Black voters from participating in the political system through literacy tests, poll taxes, voter intimidation, and violence. In the mid-1950s, only 25 percent of African Americans were registered to vote, and the registration rate was even lower in some states. In Mississippi, for example, fewer than 5 percent of African Americans were registered to vote.[1] Those rates soared after Congress enacted the Voting Rights Act. By 1970, almost as many African Americans registered to vote in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as had registered in the century before 1965.[2] The Voting Rights Act became the nation's most effective defense against racially discriminatory voting policies.

Only 15 years ago, this body reauthorized the Voting Rights Act for the fourth time with sweeping bipartisan support. The House of Representatives reauthorized this legislation by a 390-33 vote and the Senate passed it unanimously, 98-0.[3] Given the importance of the Voting Rights Act, Congress undertook

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[1] U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 171 (2018).
[2] *Shelby County v. Holder*, 570 U.S. 529, 562 (2013) (Ginsburg, J., dissenting).
[3] https://www.congress.gov/bill/109th-congress/house-bill/9

that reauthorization with care and deliberation — holding 21 hearings, hearing from more than 90 witnesses, and compiling a record of more than 15,000 pages of evidence of continuing racial discrimination in voting.

Then, in 2013, the U.S. Supreme Court in *Shelby County v. Holder* eviscerated the most powerful provision of the Voting Rights Act: the Section 5 preclearance system.[4] This provision applied to nine states and localities in another six states. These jurisdictions with histories of voting discrimination were required to obtain preclearance from the U.S. District Court for the District of Columbia or the U.S. Department of Justice before implementing any change in a voting practice or procedure. As discussed herein, Section 5 was incredibly successful in blocking proposed voting restrictions in certain states and localities with histories of racial discrimination. It also ensured that changes to voting rules were public, transparent, and evaluated to protect voters against discrimination based on race and language. But, in *Shelby County*, Chief Justice John Roberts, on behalf of the majority, declared that "Our country has changed." The Court held that the formula that decided which jurisdictions were subject to preclearance was based on "decades-old data and eradicated practices." It instructed Congress to assess "current conditions" in order to require states and political jurisdictions to preclear voting changes. Now that this assessment has been conducted, there can be no question of the persistent racial discrimination at the ballot box. Congress must act.

Despite the best efforts of The Leadership Conference and its many member organizations to protect voting rights and promote civic participation, the eight-year impact of the *Shelby County* ruling has been devastating to our democracy. The Supreme Court's invalidation of the preclearance formula released an immediate and sustained flood of new voting restrictions in formerly covered jurisdictions. Without the Voting Rights Act's tools to fight the most blatant forms of discrimination, people of color continue to face barriers to exercising their most important civil right, including voter intimidation, disenfranchisement laws built on top of a system of mass incarceration, burdensome and costly voter ID requirements, and purges from the voter rolls. States have also cut back early voting opportunities, eliminated same-day voter registration, and shuttered polling places. The pattern is familiar: Gains in participation in voting among communities of color are met with concerted efforts to impose new barriers in the path of those voters.

Attached to this testimony are reports covering several states which document the "current conditions" surrounding voting discrimination, the same conditions required by the Supreme Court in *Shelby County* as the basis for Congress to update a coverage formula. Additional reports will be submitted into the congressional record. These reports highlight the pervasiveness and persistence of voting discrimination in its modern-day form. They demonstrate the importance of reinstating Section 5 preclearance to stop discriminatory voting changes from going into effect and thereby ensuring that voters of color can fully participate in the political process and have their voices heard.

Alabama

In reviewing the current state of voting discrimination, it is only appropriate to begin with the State of Alabama, the birthplace of the Voting Rights Act of 1965. From Selma to Shelby County, Alabama has served as ground zero for the struggle by Black voters to exercise the franchise. In 1982, Congress had to explicitly add a results test to Section 2 of the Voting Rights Act after the Supreme Court required proof of intent in a Section 2 case challenging the City of Mobile's at-large voting districts as a dilution of Black voting power in *City of Mobile v. Bolden*.[5] As the report written by the NAACP Legal Defense and Educational Fund indicates, "racial discrimination in voting remains a persistent and significant problem in

[4] *Shelby County v. Holder*, 570 U.S. 529 (2013).
[5] 446 U.S. 55 (1980).

Alabama today."[6] The Southern Poverty Law Center states in its report, also attached to this testimony: "The State of Alabama has never rested in its efforts to undermine its Black citizens' right to vote."[7]

Since the *Shelby County* decision, Alabama is the only state in the nation where federal courts have ordered more than one jurisdiction to submit to preclearance under Section 3(c) of the Voting Rights Act.[8] Plaintiffs in a longstanding school desegregation case, *Stout v. Jefferson County Board of Education*, challenged the hybrid system of electing school board members in Jefferson County under which four were elected at-large from a "multi-member" district and a fifth was elected from a single-member district. No Black person had ever been elected to an at-large seat. A federal court ruled that at-large districts violated Section 2 of the Voting Rights Act, finding that the state legislature created the districts "for the purpose of limiting the influence of Black voters."[9] It ordered that multi-member districts be divided into four single-member districts and the county to submit future voting changes for Section 3(c) preclearance through 2031.[10]

The City of Evergreen became the first jurisdiction in the nation to be subjected to preclearance after *Shelby County*. A lawsuit by Black voters challenged Evergreen's post-2010 Census redistricting plan for five single-member districts, which retained three districts with white majorities even though 62 percent of Evergreen's population is Black. The lawsuit also challenged the city's system for determining voter eligibility, which removed registered voters if their names did not also appear on the list of utility customers, a practice which disproportionately removed Black voters from the voter list. Evergreen failed to obtain preclearance for these changes before the *Shelby County* ruling, and a federal court issued a preliminary injunction against the redistricting plan. After *Shelby County*, the court granted the plaintiffs' motion for summary judgment on their intentional discrimination claims and ordered Evergreen to submit future voting changes relating to redistricting and voter eligibility for preclearance until December 2020.[11]

The Alabama report reveals additional "stunning evidence" of intentional racial discrimination against Black voters by the Alabama state legislature and local jurisdictions.[12] African-American state legislators filed a lawsuit alleging that the Republican-led legislature intentionally sought to dilute the Black vote in violation of the Voting Rights Act and the Fourteenth Amendment by redrawing the state's legislative districts to pack Black voters into majority-Black districts, thereby reducing their influence in other districts.[13] The legislators also claimed that the redistricting plan was an unconstitutional "racial gerrymander," where it deliberately segregated voters into districts based on their race without adequate legal justification. A three-judge district rejected the claims, and the case was appealed to the Supreme Court, which vacated the lower court ruling and remanded the case for reconsideration. The Court concluded that the fact that the legislature "expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State."[14] On remand, one of the Eleventh Circuit's most conservative judges, William Pryor, authored an opinion for the three-judge

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[6] NAACP Legal Defense & Educational Fund, VOTING RIGHTS IN ALABAMA: 2006 TO 2021, August 2021, at 1.
[7] Southern Poverty Law Ctr., SELMA, SHELBY COUNTY, & BEYOND, Alabama's Unyielding Record of Racial Discrimination in Voting, the Unwavering Alabamians Who Fight Back, & The Critical Need to Restore the Voting Rights Act, Aug. 16, 2021.
[8] *Id.*
[9] *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-cv-018121-MHH, 2019 WL 7500528, at *3 (N.D. Ala. Dec. 16, 2019).
[10] *Id.* at **4-5.
[11] *Allen v. City of Evergreen*, No. 1:13-cv-107, 2014 WL 12607819, at *1-3 (S.D. Ala. Jan. 13, 2014).
[12] NAACP Legal Defense & Educational Fund, VOTING RIGHTS IN ALABAMA: 2006 TO 2021, August 2021, at 5.
[13] *Ala. Legis. Black Caucus v. Alabama* ("ALBC I"), 989 F. Supp. 2d 1227, 1236 (M.D. Ala. 2013 (three-judge court).
[14] *Ala. Legis. Black Caucus v. Alabama* ("ALBC II"), 575 U.S. 254, 267 (2015).

court, ruling that 12 of the majority-minority districts were unconstitutional because the legislature relied too heavily on race in drawing their boundaries.[15]

Another glaring example of intentional discrimination by Alabama arose in a federal bribery investigation in which recordings by White Alabama legislators revealed a plot by legislators to stop a gambling referendum from appearing on the ballot because it would increase Black voter turnout. The legislators were overheard calling Black voters "Aborigines" and predicting that the referendum would lead "'[e]very black, every illiterate to be "bussed [to the polls] on HUD financed busses."[16] A district court judge presiding over the bribery trial ruled that these legislators were not credible because they tried to "increase Republican political fortunes by reducing African American voter turnout" and because "the record establishes their purposeful, racist intent."[17] The court concluded that the "recordings represent compelling evidence that political exclusion through racism remains a real and enduring problem" in Alabama, and that overt racism "remain[s] regrettably entrenched in the high echelons of state government."[18]

Finally, Alabama's efforts to enact photo ID laws, which disproportionately burden voters of color, dates back several decades.[19] Although Alabama was required to seek preclearance before enforcing a 2011 law enacted prior to the *Shelby County* ruling, it did not. Instead, it waited until the ruling and then allowed the law to go into effect.[20] The photo ID law was the subject of multiple lawsuits, recounted by both the NAACP Legal Defense Fund and the Southern Poverty Law Center in their reports. A key issue in the litigation was the limited ability of Black voters to obtain photo ID. In 2015, the Alabama governor and a state agency announced the closure of 31 driver's license offices, many in majority Black counties. The U.S. Department of Transportation opened a civil rights investigation under Title VI of the Civil Rights Act of 1964 and concluded that the closures had a disparate impact on Black Alabamians in violation of the law.[21]

Alaska

There is a well-developed record of Alaska's discrimination against the state's indigenous peoples, Alaska Natives, which continues to this day and which was outlined in a 2017 article attached to the testimony.[22] In 1975, the Section 4(b) coverage formula was amended to address the "pervasive" problem of "voting discrimination against citizens of language minorities."[23] Congress identified what it described as "substantial" evidence of discriminatory practices against Alaska Natives.[24] That evidence came in four forms: (1) Alaska Natives suffered from severe and systemic educational discrimination.[25] (2) Alaska Natives suffered from illiteracy rates rivaling and even exceeding rates of Black voters in the South.[26] (3)

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[15] *Ala. Legis. Black Caucus v. Alabama* ("ALBC III"), 231 F. Supp. 3d at 1037-38 (M.D. Ala. 2017) (three-judge court).
[16] NAACP Legal Defense & Educational Fund, VOTING RIGHTS IN ALABAMA: 2006 TO 2021, August 2021, at 6.
[17] *Id.*
[18] *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345 (M.D. Ala. 2011).
[19] *Id.* at 1347.
[20] NAACP Legal Defense & Educational Fund, VOTING RIGHTS IN ALABAMA: 2006 TO 2021, August 2021, at 12.
[21] *Id.*
[22] *See* James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, *"Why Should I Go Vote Without Understanding What I am Going to Vote For?": The Impact of First Generation Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327 (2017).
[23] 52 U.S.C. § 10303(f)(1) (transferred from 42 U.S.C. § 1973b(f)(1)).
[24] S. REP. NO. 94-295 at 31, reprinted in 1975 U.S.C.C.A.N. at 797.
[25] *See* James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, *"Why Should I Go Vote Without Understanding What I am Going to Vote For?": The Impact of First Generation Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327 (2017); JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 235-57 (Dec. 2009).
[26] *See Extension of the Voting Rights Act of 1965: Hearings on S. 407, S, 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Const'l Rts. of the Senate Comm. on the Judiciary* (1975 Senate Hearings), 94th Cong., 1st Sess., at 664 (1975).

The illiteracy of Alaska Natives was exacerbated by their high limited-English proficiency (LEP) rates and need for interpreters to understand even the most basic voting materials written in English.[27] (4) Congress considered evidence of Alaska's constitutional literacy test and its impact on Alaska Native voters.[28]

When Section 4(b) was reauthorized in 2006, Congress considered substantial evidence of the impact of past and present educational discrimination on Native voters. Court decisions found "degraded educational opportunities" for Alaska Natives, resulting in graduation rates that lagged far behind non-Natives.[29] Alaska's continued failure to provide equal educational opportunities profoundly affected the ability of Native voters to read registration and voting materials.[30] Congress determined that because of Alaska's discrimination, Native voters continued "to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates … particularly among the elders."[31] The sad legacy of education discrimination remains. According to the most recent census data from the 2016 language coverage determinations under Section 203, approximately one in five adult citizens of voting age in the Bethel Census Area is Limited English Proficient in the Yup'ik language.[32]

Alaska's record of voting discrimination has exacerbated the continuing effects of its educational discrimination against Alaska Natives. While *Shelby County* was being litigated, Alaska was under a settlement agreement for violating the language assistance provisions in Section 203 of the Voting Rights Act and the voter assistance provisions in Section 208 of the Act.[33] In 2009, a federal court issued a preliminary injunction in *Nick v. Bethel* finding that the State of Alaska had engaged in a wholesale failure to provide language assistance to Yup'ik-speaking voters in the Bethel Census Area.[34] The court noted that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," but their "efforts to overhaul the language assistance program did not begin in earnest until *after this litigation*."[35] At that time, Alaska had been covered under Section 5 for Alaska Natives since 1975. However, state officials had taken no steps "to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections" in 2008,[36] a third of a century later.

Alaska Native villages outside of the Bethel region expected that the fruits of the hard-fought victory in the *Nick* litigation would be applied to other regions of Alaska where language coverage was mandated. However, Alaska officials made a "policy decision" not to do so. The state directed its bilingual coordinator to deny language assistance to other areas. The bilingual coordinator's last day of employment was on December 31, 2012, the very day that the *Nick* agreement ended. That led Alaska Native voters and villages from three covered regions, the Dillingham and Wade Hampton Census Areas for Yup'ik and the Yukon-Koyukuk Census Area for the Athabascan language of Gwich'in, to file suit just a month after *Shelby County* was decided. In *Toyukak v. Treadwell*, Alaska Natives sued the state for again violating Section 203

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[27] *Id.* at 526, 531 (statement of Sen. Gravel).
[28] *Id.*
[29] *See* H.R. Rep. No. 109-478, at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651 (citing Kasayulie v. State).
[30] *See* H.R. Rep. No. 109-478 at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651; *Continued Need*, *supra*, at 1335; *Modern Enforcement of the Voting Rights Act*, *Hearing Before the Senate Comm. on the Judiciary* (*Modern Enforcement*), 109th Cong., 2d Sess., at 79 (2006).
[31] H.R. Rep. No. 109-478, at 45-46, *reprinted in* 2006 U.S.C.C.A.N. 650-51.
[32] *See* U.S. Census Bureau, Section 203 Determinations - Published December 05, 2016, Section 203 Determinations Dataset (Dec. 5, 2016).
[33] *See* Settlement Agreement and Release of All Claims, Nick v. Bethel, No. 3:07-cv-00098-TMB, docket no. 787-2 (D. Alaska Feb. 16, 2010).
[34] Order Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants, Nick v. Bethel, No. 3:07-cv-00098-TMB, docket no. 327 at 7-8 (D. Alaska July 30, 2008).
[35] *Id.* at 8 (emphasis added).
[36] *Id.* at 9.

and for intentional discrimination in violation of the U.S. Constitution because election officials deliberately chose to deny language assistance to other regions of Alaska even while the *Nick* settlement was in effect. Alaska's recalcitrance to comply with the Voting Rights Act is particularly noteworthy because it was the first Section 203 case fully litigated to a decision in 35 years.[37]

In defending the latter claim, Alaska argued that the Fifteenth Amendment was inapplicable to Alaska Native voters.[38] State officials argued that Alaska Natives were entitled to less voting information than English-speaking voters.[39] The Alaska Native voters prevailed, but only after nearly two million dollars in attorneys' fees and costs, the passage of 14 months for the "expedited" litigation, and a two-week trial in federal court.[40] The court concluded that "based upon the considerable evidence," the plaintiffs had established that Alaska's actions in the three census areas were "not designed to transmit substantially equivalent information in the applicable minority… languages."[41] The *Toyukak* decision came just 14 months after *Shelby County*, which refutes the majority's conclusion that "things have changed dramatically" and "[b]latantly discriminatory evasions of federal decrees are rare."[42] The norm in many areas like Alaska in a post-*Shelby* world is defiance and deliberate violations of federal voting rights law to suppress registration and voting by American Indians and Alaska Natives.

Florida

The combination of a large and racially diverse electorate, two different time zones, and a history of razor-thin, contested elections would be enough basis for any state to become a focal point in an examination of voting rights. Florida's place in the ongoing conversation about the need for a renewed Voting Rights Act is well-deserved. Since situating itself at the epicenter of a modern meltdown in the 2000 presidential election, the leaders who run the state's government have been on the wrong side of policy reform opportunities that would protect the right to vote. As a result, communities of color, who comprise nearly half of Florida's population in excess of 21 million voters, remain unable to enjoy the franchise by participating fully in deciding who represents them.

Since the entire nation witnessed its ballot counting meltdown during a presidential election more than two decades ago, Florida has not ceased to find its way into voting rights controversy. The Florida report prepared by the Advancement Project and submitted with this testimony outlines a series of issues that have required careful federal oversight and intervention in support of voting rights.[43] Prior to the *Shelby County* decision, the state had crafted several policies that elicited multiple inquiries and preclearance objections from the Justice Department. For instance, the department interposed objections to Florida's state legislative maps along with subsequence policies purporting to "reform" its election administration system. All of these objections demonstrated threats to voters' ability to access the ballot due to the state's inattention to the effect of language accessibility.[44]

Since *Shelby County*, however, the scope of the loss of voting rights has been exceedingly apparent. Florida has moved quickly to adopt changes in its election system, and challengers now must resort to court

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[37] *See* Apache County High Sch. Dist. No. 90 v. United States, case no. 77-1815 (D.D.C. June 12, 1980).
[38] *See* Tucker, Landreth & Dougherty, *supra*, at 361-62 (2017) (quoting trial transcripts).
[39] Tucker, Landreth & Dougherty, *supra*, at 361.
[40] *Id.* at 361.
[41] *Id.* at 372.
[42] 570 U.S. at 547.
[43] Advancement Project, FLORIDA: 2021 REPORT IN SUPPORT OF CONGRESSIONAL VOTING RIGHTS LEGISLATION, August 2021.
[44] *Id.* at 9-10.

challenges in place of the preclearance administrative review process. For example, Florida's secretary of state was enjoined by the Northern District of Florida from employing a ballot review process based on a flawed signature mismatch examination due to a lack of notice for people to cure perceived issues with their signatures. At the same time, it should be noted that certain policy decisions that had not reached disposition under the preclearance regime slipped through the cracks, like Florida's 2012 voter purge policy where the challenge was dismissed due to the *Shelby County* decision in *Mi Familia Voter Education Fund v. Detzner*.[45]

Florida has sustained its habit of undermining the will of the people, even when it was expressed clearly in a public ballot measure. In 2018, more than 60 percent of Florida voters approved a constitutional mandate to restore the rights of its returning citizens.[46] After moving slowly to even review applications for pardons and clemency before Amendment Four, state officials doubled down by severely curtailing eligibility for rights restoration. Florida Senate Bill 7066, signed into law in 2019, created a new barrier between these citizens and the franchise: a modern-day poll tax.[47] The new rules require these citizens to resolve all fees and costs associated with their prior convictions before becoming eligible to register.

In practice, this policy is arguably worse than the classic poll tax, because Florida acknowledges that it does not keep reliable documentation to allow a person to pay outstanding costs.[48] Further, the impact of this law shows significant racial effects in several counties, meaning that people of color will be less likely than others to pursue the restoration of their rights. While the federal challenge to the law was not successful, the fact that the state still did not understand the likely impact of its fines and fees policy makes clear the work that preclearance review would address; this provision would be more carefully researched and either revised or eliminated due to the significant limits on the franchise.

In multiple ways, Florida impeded efforts to enhance voter accessibility during the 2020 election. Amidst a global pandemic, where voters could not cast ballots in person without risking life and health, the state did precious little to provide more opportunities to vote from home. To the extent the state took affirmative steps, officials made the problems for voters worse, not better. Even though Florida has an established record of allowing citizens to vote by mail, the state limited the number of drop boxes and locations to drop off ballots, and also curtailed the period in which early voting would occur. These policies were compounded by the troubling policy of signature matching for ballots, an arbitrary methodology which placed doubts on many cast ballots. All of this occurred against the backdrop of a well-documented fiasco with delivery times in the U.S. Postal Service. The results placed unnecessary pressures on participation rates in low-income areas of the state, as well as in communities of color.

Finally, Florida adopted S.B. 90 this year, following efforts elsewhere to push back on many of the activities and third party organizations working to address the above problems with voting practices.[49] The new law places restrictions on the ability of organizations to assist with voter registration, a bedrock activity for many groups whose mission is to enhance participation among voters of color.[50] Additionally, the bill directs these organizations to warn citizens who register through their systems that their applications might not arrive in time, which sows doubt and uncertainty into these private efforts to expand the franchise. And focusing on election management by local officials, the bill eliminates ballot drop-offs on Sundays, which

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[45] *Id.* at 11.
[46] *Id. at* 14-15.
[47] *Id.* at 16.
[48] *Id.*
[49] *Id.* at 19.
[50] *Id.* at 21-23.

is widely used by churches in Souls to the Polls programs.[51] It is difficult to see these changes by Florida's leadership as motivated by anything more than a hostile move against threats to their power.[52]

Georgia

Georgia is home to history. In 2021, Black voters in Georgia turned out in record numbers, electing the state's first Black U.S. senator, Reverend Raphael Warnock. These voters were able to make their voices heard despite tremendous obstacles enacted by the state to limit Black Georgians' participation. Their ability to not just overcome, but to triumph, is yet another example of Black Georgians' achievements, including those of storied civil rights leaders like Martin Luther King Jr. and the late Congressman John Lewis. Black and Brown Georgians deserve a democracy that allows for and encourages their full participation. Sadly, the state remains relentless in its pursuit of racial discrimination in voting.

The state has a long and sordid history of relentless efforts to disenfranchise voters of color, beginning with prohibitions against Black voting enshrined in the state's first Constitution in 1777. As Fair Fight Action demonstrates in its report, "Georgia's Enduring Racial Discrimination in Voting and the Urgent Need to Modernize the Voting Rights Act," which is attached to this testimony, there is "an urgent and overwhelming need for Congress to bring the preclearance formula found in the Voting Rights Act ("VRA") of 1965 . . . . into the modern era, to reinstate robust federal oversight over discriminatory voting practices, and to strengthen and protect voting rights—for all eligible voters in Georgia and nationwide."[53]

The glaring examples of current disenfranchisement take many forms and are recounted, chapter and verse, in the Fair Fight Action report. For example, the two recent objections interposed directly against the State of Georgia arose in the five years preceding the *Shelby County* ruling. In both cases, the Department of Justice found that Georgia had attempted to implement new laws that would have a retrogressive and disproportionate impact on voters of color. Most recently, in 2012, Georgia submitted for preclearance an amendment to the Georgia election code that required all nonpartisan elections for members of consolidated governments to be held in conjunction with the July primary, rather than in November. The Department of Justice objected, finding the change would affect Augusta-Richmond County, in which Black voters had just become a majority. Because Black voters were less likely to vote in July, the Department determined the change depressed turnout for voters of color and further, that the state had not sustained its burden of showing a lack of discriminatory purpose or effect.[54]

Three years earlier, in 2009, the Department of Justice lodged an objection to a version of Georgia's voter verification program. It found that the "seriously flawed" program, which improperly removed voters from the rolls, disproportionately affected voters of color. It made this finding based on the "actual results of the state's verification process" because Georgia had violated Section 5 of the Voting Rights Act by not seeking preclearance before implementing the program.[55]

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[51] *Id.*
[52] Advancement Project has captured first-hand accounts and the real impact on voters of color in several reports. *See, e.g.*, We Vote, We Count: The Need for Congressional Action to Secure the Right to Vote for All Citizens (2019); Democracy Rising: The End of Florida's History of Felony Disenfranchisement and Launch of a New Age of Empowerment (2019); Lining Up: Ensuring Equal Access to the Right to Vote (2013).
[53] Fair Fight Action, GEORGIA'S ENDURING RACIAL DISCRIMINATION IN VOTING AND THE URGENT NEED TO MODERNIZE THE VOTING RIGHTS ACT, Aug. 16, 2021.
[54] *Id.* at 26.
[55] *Id.* at 26.

Fair Fight Action has collected the stories of thousands of voters across the state who faced incredible barriers to voting in the 2018 general election and the 2020-21 election cycle. For example, a DeKalb County physician, one of the country's leading infectious disease specialists, was challenged at his polling location because there was a slight discrepancy with the spelling of his last name on his driver's license as compared with his registration information.[56] A Fulton County voter was initially refused a ballot because he was classified as a non-citizen, despite presenting his U.S. passport.[57] Voters across the state expressed frustration at the closing and moving of polling locations, including a voter from Clay County, who was forced to drive an hour to a new polling location because her old polling location down the street closed.[58]

Voter purges have also disenfranchised eligible and properly registered voters whose only mistake was not voting recently enough, like a voter in Warner Robins who has lived at the same address for 50 years but did not vote in recent elections. In 2019, he was placed on the state's purge list impermissibly, with no notice.[59] Georgia voters also experienced unacceptably long lines when trying to vote, such that many voters were forced to leave without voting or experienced other adverse consequences. For example, a voter from Cobb County left her home at 6:30 a.m. to vote on Election Day in 2018. The line was too long, so she left and came back on her lunch break at 2:20 p.m. She was not able to cast her ballot until 5:30 p.m., and lost two hours of pay.[60] In the Fair Fight Action report, there are also powerful examples of how the state abdicated its responsibility to adequately train local officials and poll workers about provisional ballots, which in turn, has resulted in conflicting and incorrect information given to voters.[61]

Despite the high standards applied to voter discrimination claims by federal courts, at least two cases have resulted in a final judgment that a practice within the State of Georgia violated the Voting Rights Act. In a 2018 ruling, a federal court found that Sumter County's redrawn school board district map, which reduced the number of single-member districts and added two new at-large districts, violated Section 2.[62] The plaintiff claimed the new map diluted the voting strength of Black voters. The court agreed, finding that the "infringement of black voters' right to vote in Sumter County is severe."[63] The court specifically found there was a "glaring lack of success for African American candidates running for county-wide office, both historically and recently, despite their plurality in voting-age population."[64] And the low rate of Black turnout was attributable to the indisputable history of discrimination in Sumter County and in Georgia.[65] A court made a similar finding in 1997 after a bench trial on claims challenging the City of LaGrange's at-large city council district plan. Noting that LaGrange and Georgia had a long history of discrimination, the court found the plan violated Section 2 of the Voting Rights Act because it deprived citizens of color of the opportunity to elect candidates of their choice.[66]

For further proof that attacks on voting represent an escalating threat to the rights of Georgians of color, one need look no further than the state's recently enacted Senate Bill 202. Georgia's Republican-led

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[56] *Id.* at 55.
[57] *Id.* at 56.
[58] *Id.* at 61-68.
[59] *Id.* at 74-75.
[60] *Id.* at 76-93.
[61] *Id.* at 97-105.
[62] *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).
[63] Permanent Injunction Order, *Wright v. Sumter Cnty. Bd. of Elections and Registration*, No. 1:14-cv-42-WLS, 2018 WL 7365178, at *3 (M.D. Ga. Mar. 30, 2018).
[64] *Wright*, 301 F. Supp. at 1323.
[65] *Id.*
[66] *Cofield v. City of LaGrange*, 969 F. Supp. 749 (N.D. Ga. 1997).

General Assembly hastily passed S.B. 202 after a historic turnout for the 2020 election and the 2021 Senate runoff, in which record participation among Black and Brown voters led to the election of Senator Warnock, and in response to conspiracy theory-fueled, groundless allegations of voter fraud. Provisions such as the photo ID requirement, reduced minimum early voting for runoff elections, limited access to drop boxes, and prohibition of most out-of-precinct voting will disparately impact voters of color, particularly those with limited resources and time to navigate the complex requirements.[67] Private parties have filed seven suits against Georgia's governor, the secretary of state, the State Election Board and its members, and various county election officials for declaratory and injunctive relief challenging various provisions of S.B. 202. On June 25, 2021, the Department of Justice sued the state, the secretary of state, and the State Election Board, bringing the number of pending lawsuits challenging S.B. 202 to eight.[68]

Louisiana

Louisiana's record of racial discrimination in voting is ever present and well-documented. As the Southern Poverty Law Center demonstrates in its report attached to this testimony, Louisiana officials have consistently developed methods of denying or diluting the votes of Black Louisianans.[69] The tactics may have changed over time, but the outcome is the same: Black voters disproportionately bear the impact and are less able to participate in the political process.[70]

Louisiana's population is nearly one-third Black.[71] Since Reconstruction, however, the state has not elected a Black candidate to statewide office.[72] Louisiana lawmakers continue to reduce the power of Black communities through at-large elections, proposed annexations, incorporation, and redistricting plans.[73] Louisiana currently unnecessarily restricts registration,[74] purges eligible voters from the rolls,[75] and makes registration onerous for people with felony convictions.[76] Since *Shelby County*, Louisiana has also eliminated dozens of polling places, mostly in Black communities.[77] And while the state provides early voting, it limits the number of sites, creating incredibly long lines in the most populous parishes, including those with the most Black residents.[78] The state also banned early voting on Sundays in 2016, which is a well-known tool for increasing Black voter turnout. The state narrowly restricts access to absentee ballots,[79] erects barriers to ensuring that votes are counted,[80] and engages in voter intimidation.[81] Despite myriad barriers to voting placed in their path, Louisiana voters persevere. Southern Poverty Law Center's report recounts more than 70 Louisiana voters' stories demonstrating the personal side of voter suppression.

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[67] Fair Fight Action, GEORGIA'S ENDURING RACIAL DISCRIMINATION IN VOTING AND THE URGENT NEED TO MODERNIZE THE VOTING RIGHTS ACT, Aug. 16, 2021 at 119.
[68] *Id.* at 138.
[69] Southern Poverty Law Center, FIGHT FOR REPRESENTATION: Louisiana's Pervasive Record of Racial Discrimination in Voting, the Steadfast Louisianans Who Battle Onward, & the Urgent Need to Restore the Voting Rights Act, Aug. 16, 2021.
[70] *Id.* at 28-91.
[71] *Id.* at 28.
[72] *Id.*
[73] *Id.* at 19-26, 28-29, 68-72.
[74] *Id. at 35-42.*
[75] Id. at 72-76.
[76] *Id.* at 30-35.
[77] Id. at 42-52.
[78] *Id.* at 52-60.
[79] *Id.* at 42-68.
[80] *Id.*
[81] *Id.* at 76-82.

In 2000, the Department of Justice sued Morgan City, alleging that the at-large system for electing members to the city council violated Section 2.[82] After five private plaintiffs filed a similar action,[83] the cases were consolidated and the parties settled.[84] The court entered a consent judgment, finding "a reasonable factual and legal basis to conclude that under the at-large system for election of City Council in Morgan City, minority voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[85] As a condition of the settlement, the parties agreed that all future elections for the city council would proceed according to a single-member election system.[86]

In 2002, a residents' association sued the St. Bernard Parish School Board under Section 2 to prevent it from adopting a redistricting plan that reduced the board's size and created two at-large seats.[87] The redistricting plan arose from Act No. 173, which required St. Bernard Parish, upon the collection of a sufficient number of petitions, to hold a referendum to transform the parish school board from a body composed of 11 members elected from single-member districts to one composed of seven members, five elected from single-member districts and two elected at-large.[88] Parish voters approved the "5-2" plan.[89] Under the 11-member single-district plan, it had been possible to create a majority-Black district;[90] indeed, prior to the referendum, the school board had tentatively approved doing just that.[91] But the 5-2 plan made a majority-Black district impossible.[92] The court invalidated the plan, finding that it diluted the voting strength of the parish's Black voters in violation of Section 2.[93]

In 2007, Black residents of Jefferson Parish filed suit against the State of Louisiana, alleging that the method for electing judges on an at-large basis to the First District of the Fifth Circuit Court of Appeals diluted Black voting strength.[94] On July 6, 2007, the Louisiana governor signed Act 261,[95] dividing the First District into two single-member "election sections."[96] The court entered a consent judgement, confirming that Act 261 provided a framework for resolving the litigation.[97] The court ordered that the action be dismissed, subject to preclearance and implementation of Act 261.[98]

In 2021, the Department of Justice filed suit against the City of West Monroe under Section 2, challenging the at-large method of electing representatives to the West Monroe Board of Aldermen.[99] Although Black residents comprised nearly 30 percent of the voting-age population in West Monroe, no Black candidate

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[82] Complaint, *United States v. City of Morgan City*, No. 00-cv-1541 (W.D. La. June 27, 2000), ECF No. 1.
[83] Complaint, *Keeler v. City of Morgan City*, No. 00-cv-1588 (W.D. La. July 3, 2000), ECF No. 1.
[84] Consent Judgement, *United States v. City of Morgan City*, No. CV 00-1541, 2000 WL 36743509,(W.D. La. Aug. 17, 2000) decree modified sub nom. *United States v. City of Morgan City*, No. CV 00-1541, 2000 WL 36743510 (W.D. La. Sept. 5, 2000).
[85] *Id.* at *3.
[86] *Id.*
[87] *St. Bernard Citizens For Better Gov't v. St. Bernard Par. Sch. Bd.*, No. CIV.A. 02-2209, 2002 WL 2022589, at *1 (E.D. La. Aug. 26, 2002).
[88] *Id.*
[89] *Id.*
[90] *Id.* at *4.
[91] *Id.*
[92] *Id.*
[93] *Id.* at *10.
[94] Consent Judgment, *Williams v. McKeithen*, No. 05-1180, 2007 WL 9676892 (E.D. La. Oct. 31, 2007).
[95] 2007 La. Sess. Law Serv. Act 261 (S.B. 162) (WEST) (2007).
[96] Consent Judgment, *Williams v. McKeithen*, No. 05-1180, 2007 WL 9676892 at *1 (E.D. La. Oct. 31, 2007).
[97] *Id.*
[98] *Id.*
[99] Complaint, *United States v. City of West Monroe*, Civ. Action No. 3:21-cv-0988 (W.D. La. April 14, 2021), ECF No. 1.

had ever been elected to the board.[100] The court entered a consent judgment adopting a "mixed" election method that provided for three single-member districts and two at-large seats.[101]

As a harbinger of what is to come, in the latest legislative session, state lawmakers passed five bills that would have further restricted voting rights, including a bill that would unnecessarily purge registered voters, a bill that would add additional identification requirements to absentee ballots, and a bill that would ban absentee ballot drop boxes.[102] Only fierce and persistent advocacy from dedicated organizers and a veto from the governor prevented these bills from becoming law. Louisiana's current conditions of racial discrimination in voting are unequivocal. Without federal preclearance, the promise of the Fifteenth Amendment and the Voting Rights Act to guarantee equal voting rights will slip further away.

Mississippi

Home to voting rights heroes like Fannie Lou Hamer and Medgar Evers and the site of Freedom Summer, Mississippi is notorious for its exclusion and suppression of Black voters throughout history. Mississippi enforced white supremacy through explicit legal impediments to Black voting as well as state-sanctioned murder, including more than 650 lynchings from Reconstruction through 1950 —the most of any state in the country.[103] Mississippi was the first state sued by the Department of Justice after the Voting Rights Act was passed. Between 1965 and 2006, the department objected to more than 169 proposed voting changes in Mississippi that disenfranchised voters of color, including redistricting plans, at-large election schemes, polling place changes, candidate qualification requirements, and open primary laws.[104] The state has the highest percentage of Black residents in the country — 38 percent — yet no Black candidate has been elected to statewide office since Reconstruction.

As documented in the Southern Poverty Law Center's report, "Freedom Summer, *Shelby County*, & Beyond: Mississippi's Continued Record of Racial Discrimination in Voting, the Tireless Mississippians Who Push Forward, & the Critical Need to Restore the Voting Rights Act," the state and many of its jurisdictions have made strident and continuous efforts to prevent Black Mississippians from participating in the political process. For example, instead of paying a "poll tax" to vote, Black Mississippians are now required to incur the burdensome expense of having certain absentee ballots and applications notarized. Additionally, instead of being asked to interpret complex legal provisions under the guise of literacy tests, Black Mississippians are now subject to unevenly applied voter ID requirements.

Voting rights litigation during the last 25 years demonstrates the ongoing struggle of voters of color. In 1993, a nonprofit group sued the City of Quitman, Mississippi, arguing that the city violated Section 2 of the Voting Rights Act by electing its five aldermen from at-large districts, thus diluting the voting strength of the city's Black voters.[105] A federal court granted a preliminary injunction, enjoining the upcoming 1993 alderman elections.[106] The court later entered a final judgment, concluding that the city's system of electing

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[100] *Id.*
[101] Consent Judgment & Decree, *United States v. City of West Monroe*, Civil Action No. 3:21-cv-0988, at 4 (W.D. La. Apr. 15, 2021). ECF No. 5.
[102] Southern Poverty Law Center, FIGHT FOR REPRESENTATION: Louisiana's Pervasive Record of Racial Discrimination in Voting, the Steadfast Louisianans Who Battle Onward, & the Urgent Need to Restore the Voting Rights Act, Aug. 16, 2021, at 82-84.
[103] Southern Poverty Law Center, FREEDOM SUMMER, *SHELBY COUNTY*, & BEYOND: Mississippi's Continued Record of Racial Discrimination in Voting, the Tireless Mississippians Who Push Forward, & the Critical Need to Restore the Voting Rights Act, August 16, 2021, at 5.
[104] *Id.* at 22.
[105] *Citizens for Good Gov't v. Quitman*, 148 F.3d 472, 474 (5th Cir. 1998) (per curiam).
[106] *Id.*

its aldermen from at-large districts violated Section 2.[107] In 1996, Black voters challenged Calhoun County's redistricting plan. Rather than drawing a "geographically compact black majority district," the county created a plan that divided Black residents between five districts, where the Black population ranged from 19 percent to 42 percent. A federal appellate court held that the plan "dilute[d] minority voting strength" and therefore violated Section 2 of the Voting Rights Act.[108] In 1997, a federal court found that Chickasaw County's redistricting plan for its justice court judge and constable elections violated Section 2 of the Voting Rights Act. The court concluded that "the lingering effect of the past history of discrimination, the racially polarized voting patterns, the substantial socio-economic differences between black and white citizens, and the lack of success of black candidates in country-wide, county district and city-wide elections in Chickasaw County causes black voters to 'have less opportunity than other members of the electorate in the political process and to elect candidates of their choice.'"[109]

It is harder to vote in Mississippi than in almost any other state. Mississippi ranked 47 out of 50 in the 2020 Cost of Voting Index — which considers election system features that impact voting access, including registration deadlines, availability of pre-registration and early voting, number of polling places, poll hours, and voter ID laws. It was a modest improvement from 2016 when it ranked dead last.[110] There is no online voter registration. No automatic or same-day registration. No early voting. Mississippi has a strict photo ID law for voting in person. One can only vote absentee by qualifying for one of a narrow set of excuses. Even those who qualify to vote absentee must have their absentee ballot application *and* their absentee ballot notarized. During the 2020 election season, the state refused to lift these burdensome requirements even amid a global pandemic, endangering Mississippians wishing to avail themselves of their rights and make their voices heard while keeping themselves and their families safe.

In its report, the Southern Poverty Law Center documented Mississippians' obstacles to cast their votes. On Election Day 2012, a Hinds County resident arrived at the polling location at which she had voted for years, only to be told that her name was not in the register, and she was not able to vote. After the election, she took time off from work to go to the courthouse and ask why her name had been removed from the rolls. She was eventually informed that her name had been removed as part of a redistricting — the first time she had ever been notified of this fact.[111] In the 2016 presidential election, a Grenada County resident and Ole Miss student attempted to vote absentee but was charged $10 for each document she needed to get notarized, for a total of $20. She had to spend her last $20 on the notary and points out that this notarization requirement is "equivalent to charging a poll tax."[112] A Harrison County resident moved in fall 2020 and promptly re-registered to vote at her new address. On Election Day 2020, she was turned away from her nearest polling place and was told she needed to vote at another location 30 minutes away. Once there, however, she was required to vote using a provisional ballot and later received a letter indicating her ballot had not been counted. It ultimately took her three attempts to update her address before she was finally able to receive her voter card.[113] In the 2020 election, a Hinds County resident encountered delays and overcrowding at her polling location, which was located on the corner of two roads with no sidewalks. She and other voters had to wait in line on the side of the road for about an hour, which was difficult for many

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[107] *Id.*
[108] *Clark v. Calhoun County*, 88 F.3d 1393, 1395 (5th Cir. 1996).
[109] *Gunn v. Chickasaw County*, 1997 WL 33426761, at *4 (N.D. Miss. Oct. 28, 1997).
[110] Scot Schraufnagel, Michael J. Pomante II, & Quan Li, Cost of Voting in the American States: 2020, 19 Election L.J. 503, 505 (2020).
[111] Southern Poverty Law Center Report, Exhibit 10.
[112] *Id.* at Exhibit 33.
[113] *Id.* at Exhibit 19.

disabled and elderly voters, including the voter in front of her in line, whose wheelchair broke while waiting in line due to the poor road conditions.[114]

Mississippi officials are relentless in curtailing the right to vote for their constituents of color. Earlier this year, House Bill 586 proposed that Mississippi direct its voter registration system to identify registered voters who may not be U.S. citizens by checking other unspecified "identification databases." Voters flagged as "potential non-citizens" would have faced an immediate challenge to their registrations: The bill "mandated a 30-day period in which flagged voters would have had to provide a birth certificate, passport, or naturalization documents to the relevant authority."[115] Failure to do so would result in an immediate purge from the registered voter roll. Under threat of litigation by advocates, the bill ultimately failed, but it demonstrates that many Mississippi lawmakers remain determined to make it even more difficult to vote.

North Carolina

North Carolina's shameful history of racism in voting includes the only successful violent municipal coup d'état in our nation's history in the Wilmington massacre of 1898; enactment of a literacy test, poll tax, and felony-based disenfranchisement; prohibitions on single-shot voting; and discriminatory multi-member districts of 1982 that led to the landmark *Thornburg v. Gingles* decision.[116] Yet, as documented in Forward Justice's report, "The Struggle for Voting Rights in North Carolina: 2006-2021," North Carolina's recent history demonstrates the effectiveness of the Voting Rights Act prior to *Shelby County* and the urgent need for its reinvigoration.

In the two decades before *Shelby County*, the Voting Rights Act was working in North Carolina. Prior to 2013, 40 out of 100 counties were covered by Section 5, primarily located in Eastern North Carolina.[117] As the report describes, "[w]hile the impact of Section 2 litigation since 1965 cannot be underestimated, Section 5 was the critical legal protection undergirding the fragile, but notable, gains by Black voters in the state."[118] From 1982 to 2013, more than 49 Section 5 objection letters were issued by the Department of Justice to North Carolina and its local jurisdictions. By 2012, African Americans were "poised to act as a major electoral force."[119]

After *Shelby County*, North Carolina became "a national testing ground for modern manifestations of Jim Crow-era voter suppression strategies and epicenter for a renewed voting rights movement to prevent discrimination at the ballot box."[120] In just a matter of hours after *Shelby County* was handed down, leadership of the North Carolina General Assembly announced that because the decision had rid them of the "headache" of the Voting Rights Act's preclearance protections, they could now move forward with the "full bill."[121] H.B. 589 became known as the "monster" voter suppression law — and was more restrictive than bills seen in any other state. Among other changes, the law eliminated same-day registration, pre-

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[114] *Id.* at Exhibit 28,
[115] Southern Poverty Law Center, FREEDOM SUMMER, *SHELBY COUNTY*, & BEYOND: Mississippi's Continued Record of Racial Discrimination in Voting, the Tireless Mississippians Who Push Forward, & the Critical Need to Restore the Voting Rights Act, August 2021.
[116] *Thornburg v. Gingles*, 478 U.S. 30 (1986).
[117] Forward Justice, THE STRUGGLE FOR VOTING RIGHTS IN NORTH CAROLINA: 2006-2021, August 2021, Section II.
[118] *Id.*
[119] *NC NAACP v. McCrory,* 831 F.3d 204 (4th Cir. 2016).
[120] Forward Justice, THE STRUGGLE FOR VOTING RIGHTS IN NORTH CAROLINA: 2006-2021, August 2021, Section I.
[121] Jim Rutenberg, *Disenfranchised: A Dream Undone,* N.Y. Times (July 27, 2009).

registration for 16- and 17-year-olds, out-of-precinct ballots, and the first week of early voting, and instituted one of the nation's most stringent voter ID requirements.[122]

More than three years after H.B. 589's passage, the U.S. Court of Appeals for the Fourth Circuit invalidated the omnibus suppression legislation, holding that the State of North Carolina illegally and intentionally targeted the right to vote of African Americans "with almost surgical precision" in violation of Section 2 and the Fourteenth and Fifteenth Amendments.[123] The Court concluded "in sum, relying on ... racial data, the General Assembly enacted legislation restricting all — and only — practices disproportionately used by African Americans" and "that, because of race, the legislature enacted one of the largest restrictions of the franchise in modern North Carolina."[124]

As described in Forward Justice's report, North Carolinians have labored for close to a decade defending against an all-out attack on voting rights. On top of the "surgical precision" of the omnibus voter suppression legislation, North Carolina's racially discriminatory redistricting following the 2010 decennial census represents some of the most egregious gerrymandering violations in the country to dilute and suppress the power of voters of color. Two federal decisions, *Covington v. North Carolina* and *Cooper v. Harris*, held that, in drawing the state legislative districts, the state manufactured one of the "largest racial gerrymanders ever encountered by a Federal Court" [125] and, in constructing both Congressional District 1 and 12, the General Assembly illegally used a "racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites."[126] These cases are among the most prominent of the state's complex web of voting rights violations since 2013, many documented in state and federal court challenges, which dominated the past decade.

Voting rights litigation, voter outreach and education, and voter protection work over the last decade yielded a detailed body of evidence summarized in the Forward Justice report, including in the form of coordinated third-party challenges to voter eligibility, significant reductions to polling locations and hours available in formerly covered counties, and county-level efforts to change methods of elections from single-member to at-large.[127] As North Carolina's elections developed into a federal battleground the state also experienced continued racial appeals in campaigning, and incidents of harassment and voter intimidation by both third-party groups and partisan actors, particularly heightened in the 2020 election cycle.[128] One shocking incident took place on the last day of early voting on October 31, 2020, when a peaceful "Souls to the Polls" march in Graham, North Carolina, organized by Black clergy, ended with those gathered, including the elderly and children, being pepper-sprayed and prevented from completing their walk to the early voting site in Alamance County.[129]

Without the preventative umbrella of Section 5, North Carolinians were left working overtime to seek after-the-fact remedies, and equal democracy in the state suffered. North Carolina's General Assembly remains in legislative session today, with legislation pending that threatens the right to vote. Following the census

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[122] N.C. Sess. L. 2013-381 (Aug. 12, 2013), *invalidated by NC NAACP v. McCrory,* 831 F.3d 204 (4th Cir. 2016).
[123] *McCrory* at 204. *Supra* note 8 at 11.
[124] *Id.* at 48.
[125] *North Carolina v. Covington*, 198 L. Ed. 2d 110 (U.S. 2017) (per curiam) (affirming lower court holding that 28 state legislative districts were unconstitutional racial gerrymanders). The U.S. Supreme Court also upheld the striking down as unconstitutional racial gerrymandering in North Carolina's congressional districts in *Cooper v. Harris*, 137 S. Ct. 1455 (2016).
[126] *Cooper v. Harris*, 581 U.S. __ (2017).
[127] Forward Justice, THE STRUGGLE FOR VOTING RIGHTS IN NORTH CAROLINA: 2006-2021, August 2021, Section III.
[128] *Id.* at Section IV.
[129] Police used pepper spray to break up a North Carolina march to a polling place." CNN, (November 1, 2020).

data release, the 2021 redistricting process is officially underway. The state produced remarkable leaders in the modern struggle for voting rights, including elders Mother Rosa Eaton and Mother Grace Hardison, who represent the best of America, as they fought under the banner of the Forward Together Moral Mondays Movement to realize the full promise of our democracy. But, as Rev. Dr. William Barber, II, a leading architect of that movement described, "these battles should never have occurred at all."[130] Without urgent congressional action, North Carolinians are bracing for another decade of struggle for the equal ballot, recognizing that the state's past is a harbinger of the scope and scale of voter suppression to come.

South Carolina

South Carolina, where Black residents represent more than one quarter of the state's population, has a long and deep history of racial discrimination in voting. It was the first state to challenge the constitutionality of the Voting Rights Act, in *South Carolina v. Katzenbach*, almost immediately after its passage in 1965.[131] As the South Carolina report by veteran voting rights lawyer Mark Posner makes clear, that legacy of discrimination continues today, both in how the state runs elections and in structural election practices.[132] The state has one of the most restrictive voter registration deadlines in the country; one of the most restrictive systems regarding the opportunity for voters to cast their ballot ahead of Election Day, either by mail or in person; and one of the worst recent records for wait times at the polls.[133]

While some advances have been made in safeguarding the freedom to vote, particularly for Black Americans, they have largely been the result of Section 5 objections and litigation. Between 1996 and the *Shelby County* ruling, the Department of Justice issued 14 objections to voting changes which jurisdictions, including the state itself, were seeking to implement.[134] The glaring example of the challenge to the state's restrictive photo ID law is a case in point. It illustrates the power and the efficacy of the Voting Rights Act to block discriminatory voting changes and to deter jurisdictions from seeking to implement such changes.

In 2011, South Carolina adopted an exceedingly onerous photo ID law for voting in person and for in-person absentee voting. It recognized only five limited forms of ID: a South Carolina driver's license, another form of photo ID issued by the South Carolina Department of Motor Vehicles, a voter registration card with a photograph (issued only by visiting a local board of registration office); a federal military photo ID; and a passport. Voters without ID could cast a provisional ballot by presenting a non-photo voter registration card and signing an affidavit that "the elector suffers from a reasonable impediment that prevents him from obtaining a photo ID."[135]

The Department of Justice blocked the new requirement from being implemented on the basis that it would disenfranchise tens of thousands of voters of color. It concluded that "[n]on-white voters were … disproportionately represented … in the group of registered voters who … would be rendered ineligible to go to the polls and participate in the election."[136] The state filed a Section 5 declaratory judgement seeking

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[130] *What Have We Learned: Lessons from the First Election Post-Shelby County Decision: Congressional Briefing*, Nov. 16, 2016 (statement of Rev. Dr. William Barber II, President of NC NAACP).
[131] 383 U.S. 301 (1966).
[132] Posner, Mark, SOUTH CAROLINA'S RECENT VOTING RIGHTS HISTORY, 1996 to July 2021, August 6, 2021.
[133] *Id.* at 4.
[134] *Id.* at 5.
[135] *Id.* at 14-15.
[136] *Id.* at 15.

preclearance from a three-judge court but failed to demonstrate that the limited roster of acceptable IDs would not have a discriminatory effect.[137]

Facing a likely denial of preclearance, South Carolina reinterpreted the law to liberally construe the "reasonable impediment" exception to the photo ID requirement in an effort to neutralize the discriminatory effect. Under this new subjective test, the reasonableness of the impediment was "to be determined by the individual voter, not by a poll manager or county board."[138] Based on this interpretation, the district court precleared the revised photo ID provision for elections after 2012 but denied preclearance for the 2012 general election on the ground that there was too little time to properly implement the new provision.[139]

In a concurring opinion, U.S. Judge John Bates famously emphasized the key role Section 5 had played in South Carolina ultimately putting forth a nondiscriminatory photo ID provision: "[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here. . . . Congress has recognized the importance of such a deterrent effect. . . . Rather, the history of [the new law] demonstrates the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."[140]

Texas

They say that everything's bigger in Texas. The battle for voting rights is no exception, as documented in the Texas report submitted with this testimony.[141] Last week's census results illustrate that Texas gained more residents than any other state since 2010, with people of color accounting for over 95 percent of this growth.[142] Non-Hispanic White Texans now make up just 39.8 percent of the state's population—down from 45 percent in 2010.[143] Meanwhile, the share of Hispanic Texans has grown to 39.3 percent.[144] The state's growth of Black and Asian populations also significantly outpaced that of the White population since 2010.[145] These changes will no doubt affect the electorate for decades to come. Nearly half of all Texans under age 18 are Latino, and two million more will become eligible to vote in the next decade.[146] Not surprisingly, Texas added a record number of new voters between last two presidential elections.[147]

These dramatic demographic shifts in the electorate coincide with continuing and harmful attacks on voting rights in the state. At the end of last year, researchers examining the time and effort required to vote in different states ranked Texas as the worst for voting.[148] The creation of — in their words — "the state with the most restrictive electoral climate" in light of unparalleled expansion and diversification of the electorate reflects the state's past and foreshadows its future without federal oversight.[149] Indeed, the pattern here is

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[137] *South Carolina v. United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012).
[138] *Id.* at 36.
[139] *Id.* at 48-50.
[140] *Id.* at 53-54.
[141] Adegbile, Debo; Liss, Jason, Baxenberg, Justin; Fischler, Matthew; Gargeya, Medha; Yi, Karis, A VIEW FROM TEXAS: AN ASSESSMENT OF THE VOTING RIGHTS ACT'S IMPACT AND MINORITY VOTER ACCESS, August 2021.
[142] Alexa Ura et al., *People of color make up 95% of Texas' population growth, and cities and suburbs are booming, 2020 census shows*, THE TEXAS TRIBUNE (Aug. 12, 2021).
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Stephania Taladrid, *The Dream of Turning Texas Blue Depends on Latino Voters*, THE NEW YORKER (Mar. 22, 2020).
[147] Nicole Cobler, Texas sets voter registration record after adding 1.8 million voters since 2016 election, Austin-American Statesman (Oct. 13, 2020).
[148] Scot Schraufnagel et al., *Cost of Voting in the American States: 2020*, 19.4 ELECTION L.J. 503 (2020).
[149] *Id.*

familiar one: Gains in minority participation in voting are met with concerted efforts to impose new barriers in the path of those voters. As Justice Kennedy observed in *LULAC v. Perry*,

> "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. … [T]he 'political, social, and economic legacy of past discrimination' for Latinos in Texas may well 'hinder their ability to participate effectively in the political process.'"[150]

Tory Gavito, a minority politics movement builder and founder of the Texas Futures Project and Way To Win, described that: "Texas is where the South meets the West. We have a legacy of slavery in the state. We have a legacy of stealing lands and killing Mexican landowners who lived here from before the state was part of the United States of America."[151] Its shared history demonstrates how the expansion or restriction of voting rights in Texas has implications across the country. In 1944, Thurgood Marshall successfully argued in *Smith v. Allwright* that the Texas Democratic Party's policy of prohibiting Black people from voting in primary elections violated the Fourteenth and Fifteenth Amendments.[152] Black voter registration markedly improved immediately following the Court's ruling in *Smith*, causing Marshall to recognize the case as "a giant milestone in the progress of Negro Americans toward full citizenship."[153] Though the white primary was struck down, several features of vote denial and abridgement in Texas remain: redistricting, the imposition of additional candidate qualifications, new at-large voting arrangements, photo ID laws, onerous voter registration procedures, voter roll purges, relocation, closures and overcrowded polling sites, and hurdles related to mail-in voting.

The wave of new voters of color in Texas have been met with the "most restrictive pre-registration law in the country."[154] In particular, Texas has an in-person voter registration deadline 30 days prior to Election Day and prohibits online voter registration. Voters must print their registration and bring it to the county voter registrar. Texas also does not offer simultaneous registration for the 1.5 million Texans who renew or update their driver's licenses online.[155] In contrast, other states permit an automatic voter registration process, same-day registration during early voting, and online registration options.

These same voters may need to journey to polling places that are distant from minority neighborhoods. A report by The Leadership Conference Education Fund recently noted that Texas "stands out for the volume, scale, and breadth of its polling place closures since *Shelby County*."[156] This study shows that Texas has closed more polling places since *Shelby County* than any other state. The 750 polls closed constituted approximately 50 percent of the state's total polling places, and 590 were closed before the 2016 presidential election — the first presidential election after *Shelby County*.[157] Furthermore, five of the six largest county closers of polling places are in Texas. Unsurprisingly, these counties — Dallas, Harris,

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[150] 548 U.S. 399, 439-40 (2006) (citations omitted).
[151] Taladrid, *supra* note 6.
[152] 321 U.S. 649 (1944).
[153] Schraufnagel, *supra* note 8.
[154] *Id.*
[155] Emily Eby, *Texas Election Protection 2018*, TEXAS CIVIL RIGHTS PROJECT (Mar. 2019).
[156] *Democracy Diverted: Polling Closures and the Right to Vote,* THE LEADERSHIP CONFERENCE EDUCATION FUND (Sept. 2019).
[157] *Id.*

Brazoria, and Nueces — are all majority-minority jurisdictions with significant Latino and Black populations.[158]

Courts have previously found Texas' voting restrictions to bear racial animus and hinder the ability of minorities to effectively participate in the political process. One recent example is from Texas' photo ID law. In 2011, Texas adopted a voter ID law that courts later found to have been passed with discriminatory intent. Senate Bill 14 required voters to present one of the specified types of photo ID when voting at the polls. The Justice Department successfully blocked the implementation of the law in 2012 under its Section 5 preclearance authority. However, Texas began enforcing S.B. 14 shortly after the *Shelby County* decision. Although the bill's proponents asserted that the law was necessary, both the district court and Fifth Circuit held that it violated Section 2 of the Voting Rights Act by intentionally discriminating against Black and Hispanic voters who were less likely to hold a required photo ID.[159]

The Texas House just passed what must be regarded as a voter suppression bill, after Texas Republicans issued civil arrest warrants for 52 of their Democratic colleagues who refused to show up to legislative votes because they oppose the legislation. If enacted, the bill would create stricter vote-by-mail rules, add new requirements to the voting process, ban drive-thru and 24-hour voting, bolster access for partisan poll watchers, and curb local voting options that would make voting easier. These requirements only build on some of the most restrictive voting laws in the nation from the last election cycle. That election night, Jolt Action, a group aimed at building political momentum among Latinos in Texas, held a get together at its headquarters. Artwork of youth of color adorned the walls of the office. One painting showed children holding hands before a wall, with the caption "They tried to bury us. They didn't know we were seeds."[160] The question remains: Will voting restrictions scorch the earth upon which these seeds seek to grow, or will we see a garden of vibrant democracy, one tended to by federal and state protections, over decades to come?

Virginia

The post-*Shelby County* landscape in Virginia is devastated by rollbacks of protections for the right to vote. The Virginia report prepared by Campaign Legal Center details ongoing discrimination exposed through litigation, as well as anti-voter laws, voter intimidation and disinformation campaigns, and other tactics that disproportionately burden and disenfranchise voters of color.[161]

Very recent litigation in Virginia Beach powerfully demonstrates the toll that discrimination in voting takes on communities of color in the state. In March 2021, a federal court held that Virginia Beach's at-large system for electing city council members violates Section 2 of the Voting Rights Act because it dilutes the voting strength of Black, Latino, and Asian American voters.[162] The state's largest city had an 11-member city council, composed of the mayor and 10 councilmembers, each elected at-large for four-year staggered terms.[163] The city had relied upon an at-large system since 1966, but in 50 years, the city's racial composition had changed dramatically: People of color now constitute 31.6 percent of the city's

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[158] *Id.*
[159] *See Veasey v. Perry*, 71 F. Supp. 3d 627, 645 (S.D. Tex. 2014), *aff'd in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh'g en banc*, 830 F.3d 216 (5th Cir. 2016), *and aff'd in part, vacated in part, rev'd in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017).
[160] Taladrid, *supra* note 6.
[161] Campaign Legal Center, VOTING RIGHTS IN VIRGINIA: 2006-2021, August 2021.
[162] See *Holloway, et al. v. City of Virginia Beach*, No. 2:18-CV-69, 2021 WL 1226554 (E.D. Va. Mar. 31, 2021).
[163] *Holloway*, 2021 WL 1226554, at *3.

population.[164] Despite sizable communities of color, only six candidates of color have ever been elected to Virginia Beach's city council, and barring special circumstances triggered by the pendency of litigation under the Voting Rights Act, no Black candidate has ever been re-elected to serve a second term.[165]

In enjoining the at-large system, the federal court recognized that its discriminatory effects reflect a broader culture of racial discrimination in the city and the state that continues to impact residents of color today: "[t]he Commonwealth of Virginia and the City have histories of voter discrimination as it pertains to registration, voter suppression, gerrymandering, and other forms of discrimination."[166] The Campaign Legal Center powerfully documents the many facets of this discrimination and concludes: "The vast evidence of racial discrimination this case has uncovered alone demonstrates the need for preclearance and other means of federal oversight to protect the right of all Americans to vote."[167]

The Campaign Legal Center's report also sets forth discriminatory barriers to in-person voting, such as the closing, consolidating, and relocating of polling places documented in The Leadership Conference Education Fund's reports in 2016 and 2019.[168] These changes no longer require preclearance and disproportionately impact communities of color. Because Virginia law caps the number of registered voters each precinct can serve, localities must create new precincts. But more precincts do not necessarily mean more polling locations in communities of color. Some localities opt for one polling location to serve multiple precincts, increasing the voters assigned to a single polling place. This increases poll wait times and transportation burdens to and from the polls. During the November 2020 election, Henrico County—30.9 percent of which is Black—consolidated four polling places into existing sites. Because state law allows multiple precincts to be assigned to the same polling place, the county maintained separate precincts in the same building: each had their own poll workers and entrances, heightening voter confusion.[169]

The Time Is Now to Pass the John Lewis Voting Rights Advancement Act

When President Lyndon Johnson signed the Voting Rights Act of 1965, he declared the law a triumph and said, "Today we strike away the last major shackle of … fierce and ancient bonds."[170] But 56 years later, the shackles of white supremacy still restrict the full exercise of our rights and freedom to vote.

For democracy to work for all of us, it must include us all. When certain communities cannot access the ballot and when they are not represented in the ranks of power, our democracy is in peril. The coordinated, anti-democratic campaign to restrict the vote targets the heart of the nation's promise: that every voice and every eligible vote count. Congress must meet the urgency of this moment and pass the John Lewis Voting Rights Advancement Act. This bill will restore the essential portion of the Voting Rights Act that blocks discriminatory voting policies before they go into effect, putting a transparent process in place for protecting the right to vote. It will also bring down the barriers erected to silence Black, Indigenous, young, and new Americans and ensure everyone has a voice in the decisions impacting our lives.

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[164] *Id.* at *28.
[165] *Id.* at *6; Pls.' Br. in Opp. to Defs.' Motion for Summ. J., *Holloway, et al. v. City of Virginia Beach*, No. 2:18-CV-69, at 14 n.10 (E.D. Va. Mar. 31, 2021).
[166] *Holloway*, 2021 WL 1226554, at *8.
[167] Campaign Legal Center, VOTING RIGHTS IN VIRGINIA: 2006-2021, August 2021, at 46-53.
[168] The Leadership Conference Education Fund, THE GREAT POLL CLOSURE (Nov. 2016); DEMOCRACY DIVERTED: POLLING CLOSURES AND THE RIGHT TO VOTE, (Sept. 2019).
[169] Campaign Legal Center, VOTING RIGHTS IN VIRGINIA: 2006-2021, August 2021, at 21.
[170] https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act

On March 7, 1965, just a few months before President Johnson would sign the Voting Rights Act into law, then 25-year-old John Lewis led more than 600 people across the Edmund Pettus Bridge to demand equal voting rights. State troopers unleashed brutal violence against the marchers. Lewis himself was beaten and bloodied. But he never gave up the fight. For decades, the congressman implored his colleagues in Congress to realize the promise of equal opportunity for all in our democratic process. Before his death, he wrote: "Time is of the essence to preserve the integrity and promises of our democracy."[171] Members of this body must now heed his call with all the force they can muster.

Thank you for inviting me to testify today. I am pleased to answer any questions you may have, and I look forward to working with you to ensure all of us, no matter race or place, have an equal say in our democracy.

[171] https://web.archive.org/web/20200719053551/https://johnlewis.house.gov/media-center/press-releases/rep-john-lewis-demands-doj-action-anniversary-shelby-v-holder-decision

Documents submitted by Wade Henderson, Interim President and CEO, The Leadership Conference on Civil and Human Rights:

Exhibit 1a: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD009.pdf*

Exhibit 1b: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD020.pdf*

Exhibit 2: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD010.pdf*

Exhibit 3: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD011.pdf*

Exhibit 4: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD021.pdf*

Exhibit 5: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD013.pdf*

Exhibit 6: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD014.pdf*

Exhibit 7: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD015.pdf*

Exhibit 8: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD016.pdf*

Exhibit 9: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD017.pdf*

Exhibit 10: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816-SD018.pdf*

Mr. COHEN. Thank you, Mr. Henderson.

We had a brief technical problem, but we are back. I need to start my video. We are back.

Thank you, Ms. Ross, for being in the on-deck circle. You may be needed again.

Our next witness is Mr. James Peyton McCrary. Mr. McCrary is a professorial lecturer in law at the George Washington University Law School, previously serving as historian in the Civil Rights Division in the Department of Justice. He received his Ph.D. from Princeton and his undergraduate and master's degrees from Penn.

Mr. McCrary, you are recognized for 5 minutes.

TESTIMONY OF JAMES PEYTON McCRARY

Mr. MCCRARY. Chair Cohen, Vice-Chair Ross, Ranking Member Johnson, and distinguished Members, thank you for inviting me to testify before you today.

Although I am retired from 20 years of full-time university teaching and 26 years of government service in the Department of Justice, I still co-teach a course on voting rights law each fall at the George Washington University Law School, where adjunct faculty there are titled professorial lecturer in law.

My testimony today is offered in my personal capacity as a historian, not as a representative of any organization.

My testimony focuses on empirical evidence identifying the jurisdictions that would be covered by a new form of Federal preclearance of voting changes, which I understand is being contemplated by this Chamber.

Representatives of the Brennan Center for Justice and The Leadership Conference Education Fund retained me as a consultant to investigate the geographic provisions in the John Lewis Voting Rights Advancement Act passed by the House of Representatives in December 2019 as H.R. 4.

The VRAA seeks to restore the preclearance provisions of the 1965 Voting Rights Act by revising the coverage formula invalidated by the Supreme Court in *Shelby County* v. *Holder*. Preclearance refers to the process of receiving prior Federal approval before implementing any change affecting voting.

I have identified the jurisdictions that I believe would be subject to preclearance should the 2019 version of the John Lewis Act become law using research methods I have employed over the last four decades. The period under review in the VRAA is the last 25 years.

My conclusions could change if the Congress alters the review period. Entire States could be covered under the VRA. Even if the entire State is not subject to preclearance, any individual political subdivision could be covered if the record of voting rights violations in that subdivision fits the criteria set out in the John Lewis bill.

An entire State would be subject to preclearance if either 15 or more voting rights violations occurred within the State during the previous 25 years or if 10 or more violations occurred in the State, at least one of which was committed by the State itself.

In noncovered States, any individual political subdivision would be covered if it had three or more violations during the previous 25 years.

Under the current version of H.R. 4, violations include (a) final judgments of a voting rights violation by the Federal courts; (b) objections to voting changes by the Attorney General; and (c) a consent decree or other settlement causing a favorable change for minority voting rights, such as consent decrees protecting language-minority citizens.

While I am not testifying as to any approach Congress should take, I note that changes to the formula could lead to different conclusions than those I have reached in my study.

As a university professor in the 1980s, I served as an expert witness in numerous voting rights cases in the South. Beginning in 1990, I joined the Civil Rights Division of the Department of Justice as a social science analyst, retiring in December of 2016.

My responsibilities in the Civil Rights Division included the planning, direction, coordination, and performance of historical research and empirical analysis for voting rights litigation, including the identification of appropriate expert witnesses to appear for the government at trial.

Since retiring from government service, I have served as an expert in several voting rights cases brought by private plaintiffs. The record of my scholarly publications over the last 43 years is set forth in the curriculum vitae attached to my testimony, and my written testimony explains the methodology employed in my investigation.

The eight States that, according to my analysis, are most likely to be subject to preclearance of voting changes under the current formula are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. Exhibit 1 to my testimony identifies the violations in each of those States.

Several of these States could drop out of coverage, depending on how Congress revises the bill. Those States are Alabama, Florida, North Carolina, and South Carolina. Each is close to the minimum threshold set forth in the bill, so minor changes in what counts as a violation could make a difference.

Changes to the definition of violations or shortening the review period could remove some States from preclearance coverage. For example, if the review period were shortened to 20 years, I calculate that only Georgia, Louisiana, Mississippi, and Texas would likely remain covered.

Several States that appear currently not to be covered could be nevertheless covered if certain changes in the preclearance formula were made. Those States I address in exhibit 2 to my testimony.

In my calculation, Virginia currently has only eight violations. Changes in the formula could cause Virginia to meet the threshold of 10 violations, however, because two of the eight violations I have identified were enacted by the State. New York and California are each between 10 and 15 violations, but none were committed by the State.

Mr. COHEN. Professor, we are going to have to—I think my timer says your 5 minutes is up. If it is not, I am sorry, and if it is, we need to wrap up.

Mr. MCCRARY. Thank you.

The bill you are considering can play a key role in confronting current efforts to limit voter registration and voting by minority

citizens as well as diluting minority voting strength. Based on my 41 years of experience in voting rights litigation, I believe that strengthening enforcement of the Voting Rights Act is a critical need for our democracy.

Thank you.

[The statement of Mr. McCrary follows:]

Testimony of Peyton McCrary
Professorial Lecturer in Law
George Washington University Law School

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

Oversight of the Voting Rights Act: Potential Legislative Reforms

August 16, 2021

Chair Cohen, Vice Chair Ross, Ranking Member Johnson, and distinguished Members, thank you for inviting me to testify before you today.

My name is Peyton McCrary. Although I have retired from 20 years of full-time university teaching and 26 years of government service in the U.S. Department of Justice, I still co-teach a course on voting rights law each fall at the George Washington University Law School, where adjunct faculty bear the title Professorial Lecturer in Law. My testimony today is offered in my personal capacity as a historian, not as a representative of any organization.

The focus of my testimony is evidence regarding the jurisdictions that would be covered by a new form of federal preclearance of voting changes, which I understand is being contemplated by this chamber. Representatives of the Brennan Center for Justice and the Leadership Conference Education Fund asked me some months ago to investigate the preclearance coverage formula that is being considered for inclusion in the John Lewis Voting Rights Advancement Act (VRAA). An earlier version of the VRAA passed the House of Representatives December 6, 2019, as HR 4 and is now under consideration in a new Congress.[1] The VRAA is designed to restore the preclearance provisions of the 1965 Voting Rights Act by

[1] For the record, I have performed the analysis as a consultant for these organizations, not as a staff member for either organization.

revising the coverage formula invalidated by the Supreme Court in its 2013 decision in *Shelby County v. Holder*. Preclearance refers to the process of receiving prior federal approval from the Department of Justice or the U.S. District Court for the District of Columbia before implementing any change affecting voting. My task was to identify the jurisdictions that would be subject to preclearance should the VRAA become law. This task required the use of research methods I have employed – both in my scholarly publications and in expert witness testimony – over the last four decades. For example, it calls among other things for methodology I applied in my sworn Declaration filed by the United States in *Shelby County v. Holder* in 2010.[2]

The new formula for determining the jurisdictions that would be subject to preclearance under the VRAA would be triggered by the record of voting rights enforcement. My analysis generally focuses on the last 25 years, currently from 1996 through 2020, although the conclusions would change if the review period changed. Under some circumstances entire states would be covered; even if the entire state is not subject to preclearance, any individual political subdivision within a state could be covered if the record of voting rights violations in that subdivision fits meets the criteria of the VRAA.

My understanding of the current version of the bill's coverage formula is that an entire state would be subject to preclearance if either of two patterns of violations applied: a) if 15 or more voting rights violations occurred within the state during the previous 25 years; or b) if 10 or more violations occurred in the state, at least one of which was committed by the state itself, rather than by local subdivisions within the state. I also understand that even if an entire state were not subject to preclearance, any political subdivision would be covered if it had three or

[2] Declaration of Dr. Peyton McCrary, *Shelby County, Alabama*, C.A. No. 1:10-cv-00651-JDB (D.D.C.), November 15, 2010.

more violations during the previous 25 years. My count of violations includes: a) final judgments of a voting rights violation by the federal courts; b) objections to voting changes by the Attorney General; and c) a consent decree or other settlement causing a change favorable to minority voting rights.

I understand that Congress may consider other specifics for the coverage formula. While I am not testifying as to any approach Congress should take, I note that changes to the formula could lead to different conclusions than those I have reached.

Qualifications

I am an historian by training and taught history at the university level from 1969 until 1990. During the 1980s I served as an expert witness in numerous voting rights cases in the South. I was employed as a social science analyst by the Voting Section, Civil Rights Division, of the U.S. Department of Justice, from 1990 until my retirement in December 2016. My responsibilities in the Civil Rights Division included the planning, direction, coordination, and performance of historical research and empirical analysis for voting rights litigation, including the identification of appropriate expert witnesses to appear for the government at trial. In some instances, I was asked to provide written or courtroom testimony on behalf of the United States. Since retiring from government service, I have served as an expert in several voting rights cases brought by private plaintiffs.

I received B.A. and M.A. degrees from the University of Virginia in 1965 and 1966, respectively, and obtained my Ph.D. from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the South during the 19th and 20th centuries. For 20 years I taught courses in my specialization at the University of Minnesota, Vanderbilt University, and the University of South Alabama. In 1998-99 I took

leave from the Department of Justice to serve as the Eugene Lang Professor of Social Change in the Department of Political Science at Swarthmore College. For the last fourteen years, both during government service and since retiring from the Department of Justice, I have co-taught a course on voting rights law as an adjunct professor at the George Washington University Law School.

I have published a prize-winning book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), six law review articles, seven articles in refereed journals, and seven chapters in refereed books. Over the last three and a half decades my published work has focused on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, and the impact of the Voting Rights Act in the South. One of these studies was made part of the record before Congress regarding the adoption of the 2006 Voting Rights Reauthorization Act.[3] I continued to publish scholarly work in my areas of expertise while employed by the Department of Justice and expect to continue my scholarly writing now that I have retired from government service. A detailed record of my professional qualifications is set forth in the attached curriculum vitae (Attachment 1), which I prepared and know to be accurate.

Although I write about the history of voting rights law in my scholarly publications and teach in a law school, I am not an attorney. However, the findings reflected in court opinions

[3] "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," co-authored with Christopher Seaman and Richard Valelly, *Michigan Journal of Race & Law*, 11 (Spring 2006), 275-323. [An unpublished version was printed in *Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. On the Constitution, H. Comm. On the Judiciary, 109th Cong., 96-181 (2005) (Serial No. 109-69).]*

often provide valuable evidence for investigations by experts. I routinely utilize the factual evidence provided by court decisions in my scholarly writing. As I observed in a recent journal article: "The factual evidence presented in court proceedings – in voting rights cases key evidence often comes in through expert witness testimony by political scientists or historians – is an invaluable resource for historical and social science research."[4]

The Methodology I Have Employed in This Investigation

Identifying final judgments in reported cases – and Section 5 objections interposed by the Attorney General – was my first task. In my files I already had both hard copies and electronic copies of many of the Section 2 cases from 1982 to the present, and of the voting rights cases decided under the 14th Amendment before the amendment of Section 2 in 1982. I utilized the detailed study by Professor Ellen Katz and her students at the University of Michigan Law School, which became part of the record before Congress for the 2006 Reauthorization Act (and subsequently published as a law review article).[5] The website of the Civil Rights Division's Voting Section – where I worked for 26 years – gave ready access to the large number of final judgments and settlement documents in cases involving the United States (under Section 2, Section 4(e), Section 5, Section 11(b), and Section 203). Access to Westlaw through GW Law School facilitated identification of other reported decisions brought on behalf of private plaintiffs that I counted as violations. The Voting Section's website also included links to all the Attorney General's Section 5 objections from the 1960s through the *Shelby County* decision in 2013.

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[4] Peyton McCrary, "The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History*, 26 (No. 4, 2014), 429-58 (quoted sentence at p. 431).

[5] Ellen Katz, et.al., "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982," 39 *U. Mich. J.L. Reform* 643 (2006).

Identifying consent decrees and other settlements in voting rights cases was perhaps the most time-consuming part of the investigation. The library resources of GW Law School gave me access to LexisNexis Court Link, a database with a comprehensive collection of dockets from voting rights litigation. This was the same database I had used to identify settlement documents in my 2010 declaration in *Shelby County v. Holder* (cited in Note 1 above). Many Court Link dockets included links to electronic copies of consent decrees, consent orders, and other settlement documents. Where no links were available through Court Link, I had to pursue further research to locate the needed evidence of violations (for which the internet proved invaluable).[6] Numerous publicly available reports and scholarly publications also helped document court-ordered settlements of voting rights lawsuits.

I expect to finalize a more detailed report to the Brennan Center and the Leadership Conference soon. In my testimony today, however, I will summarize my findings and attach a listing of the key facts regarding each violation. I hope the subcommittee finds this testimony useful in considering how to proceed with the VRAA.

Findings

Let me begin by focusing on the eight states that – according to my analysis – are most likely to be subject to preclearance of voting changes. Recall that under my working understanding of the coverage formula, **an entire state** would be subject to preclearance if either of ***two*** patterns of violations applied: a) if **15 or more voting rights violations** occurred within the state during the previous 25 years; or b) if **10 or more violations** occurred in the state, **at least one of which was committed by the state itself**, rather than by local political subdivisions

[6] Brennan Center staff have also been helpful in locating documentary evidence of settlements, but the assessment of whether any document demonstrated evidence of a violation was entirely my own.

within the state. I consider as a violation: a) a final judgment that a jurisdiction has violated the 14th or 15th Amendments, violated a provision of the Voting Rights Act, or been denied preclearance by a three-judge federal district court in the District of Columbia; b) an objection to voting changes by the Attorney General; or c) a consent decree or other settlement in a lawsuit where the defendants agreed to change the challenged election practice at issue in a manner that was favorable to minority plaintiffs. The following exhibit summarizes the number and type of violations that in my analysis ***would*** require federal preclearance of states if the current version of the coverage formula were enacted into law. Those states are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas. Exhibit 1 identifies the violations in each of these states that I counted.

Although I believe they are likely to be covered, there are several states that could drop out of coverage depending on how Congress drafts the bill. Those states are Florida, North Carolina, and South Carolina. Each is close to the minimum threshold, so minor changes in what counts as a violation could make a difference.

On the other hand, barring wholesale changes to the coverage formula as I applied it, I have concluded that Georgia, Louisiana, Mississippi, and Texas are highly likely to be covered. There are also several states that I do not think will be covered but may be depending on drafting choices or the occurrence of a small number of additional violations.[7] Virginia could meet the threshold of 10 violations with at least one by the state if what counts as a violation is altered, although I currently have it at 8 violations. New York and California are each between 10-15 violations, but none were committed by the State. If either State were to commit one violation, it would likely bring the State into coverage.

[7] Exhibit 2 provides a breakdown of violations in states that I concluded would not be covered.

As I understand the current formula, even if an entire state would not be subject to preclearance, any political subdivision of that state in which three or more violations occurred in the preceding 25 years *would* be covered. The relevant political subdivision under this provision is the governmental unit responsible for voter registration – in most instances a county.[8] Five political subdivisions in non-covered states which have three or more violations – which would therefore need to preclear voting changes – are itemized in Exhibit 3. The five counties are: Los Angeles County, California; Cook County, Illinois; Westchester County, New York; Cuyahoga County, Ohio; and Northampton County, Virginia.

Conclusion

I hope my analysis of the proposed coverage formula is helpful to the subcommittee's current deliberations. My testimony today has focused on empirical analysis of court decisions, Section 5 objections, and consent decrees favorable to minority voters. For a moment, however, I want to emphasize the importance of the challenge Congress currently faces. When the Section 5 preclearance process was still functional – before June 2013 – it was a powerful tool for protecting minority voting rights. The bill you are considering can play a key role in confronting current efforts to limit voter registration and voting by minority citizens, as well as diluting minority voting strength. Based on my 41 years of experience in voting rights litigation, I believe firmly that strengthening enforcement of the Voting Rights Act is a critical need for our democracy.

[8] In Louisiana the equivalent of a county is called a parish. In the state of Virginia independent cities – in addition to counties – conduct voter registration. Virginia's independent cities are geographically separate from counties. All other municipalities are, as in the rest of the country, located *within* a county.

Exhibit 1: States Covered Under the Preclearance Formula in HR 4 If Enacted into Law

Alabama: **14 violations – 3 violations by the state**

Court Decisions: (4)

Ward v. State of Alabama, 31 F. Supp. 2d 968 (M.D. Ala. 1998) **State of Alabama**.

Boxx v. Bennett, 50 F. Supp. 2d (M.D. Ala. 1999), **State of Alabama**.

Allen v. City of Evergreen, Alabama, 2014 WL 12607819 (S.D. Ala.).

Ala. Legislative Black Caucus v. Alabama, 231 F. Supp. 3d 1026 (M.D. Ala. 2017), **State of Alabama**.

Section 5 Objections: (3)

02-06-1998: Tallapoosa County (Redistricting Plan), 97-1021.

08-16-2000: Shelby County (City of Alabaster), Annexations, 2000-2230.

08-25-2009: Shelby County (City of Calera), Annexations and redistricting plan, 2008-1621.

Consent Decrees/Settlements: (7)

Dillard v. City of Greensboro, Ala., 956 F. Supp. 1576 (M.D. Ala. 1997) (consent decree).

Jenkins v. City of Ozark, Alabama, No. 1:97cv1450 (M.D. Ala.), Consent Judgment and Decree, December 10, 1997 (Section 5 enforcement action).

Baker v. Rainbow City, Alabama, No. CV-97-3014 (N.D. Ala.), Consent Judgment and Decree, January 12, 1998.

Wilson v. City of Attalla, Alabama, No. CV-97-AR-3195 (M.D. Ala.), Consent Judgment and Decree, February 25, 1998.

Dillard v. Chilton County Commission, 495 F.3d 1324 (11th Cir. 2007) (consent decree).

Jones v. Jefferson Bd. Of Education, 2019 WL 7500528 (N.D. Ala. 2019) (court-approved settlement).

Ala. State Conf. NAACP v. Pleasant Grove, Ala., 2019 WL 5172371 (N.D. Ala.) (consent decree).

Florida: 10 violations - 3 violations by the state

Court Decisions: (3)

Stovall v. City of Cocoa, Fla., 117 F.3d 1238 (11th Cir. 1997).

U.S. v. Osceola County, Fla., 475 F. Supp. 2d 1254 (M.D. Fla. 2006).

Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012). **State of Florida**.

Section 5 Objections/Settlements: (2)

08-14-1998: **State of Florida.** (Changes in absentee voting certificate & absentee ballot), 98-1919.

07-01-2002: **State of Florida.** (2002 redistricting plan for state house), 2002-2637.

Consent Decrees/Settlements: (5)

U.S. v. Orange County, FL, No. 6:02-cv-787 (M.D. Fla. 2002) (consent decree).

U.S. v. Osceola County, FL, No. 6:02-cv-738 (M.D. Fla. 2002) (consent decree).

U.S. v. School Board of Osceola County, FL, No. 6:08-cv-582 (M.D. Fla. 2008) (consent decree).

U.S. v. Town of Lake Park, FL, C.A. No. 09-80507 (S.D. Fla. 2009) (consent decree).

Perez-Santiago v. Volusia County, No. 6:08-cv-1868 (M.D. Fla. 2010) (court-ordered settlement).

Georgia: 25 violations - 4 violations by the state

Court Decisions: (4)

Cofield v. City of LaGrange, Ga., 969 F. Supp. 749 (N.D. Ga. 1997).

Common Cause v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga., 2005).

Wright v. City of Albany, 306 F. Supp. 2d 1228 (M.D. Ga., 2003).

Wright v. Sumter County Bd. Of Elections, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

Section 5 Objections: (13)

03-15-1996: **State of Georgia** (1995 redistricting plans, state house & senate), 95-3656.

01-11-2000: Webster County (Redistricting plan, county school district), 98-1663.

03-17-2000: Wilkes County (MOE Tignall city council members), 99-2122.

10-01-2001: Turner County (MOE change, Ashburn), 94-4606.

08-09-2002: Putnam County (2001 redistricting plans, county commission & school board), 2002-2987, 2002-2988.

09-23-2002: Dougherty County (2001 Albany city council redistricting plan), 2001-1955.

10-15-2002: Marion County (2002 school district redistricting plan), 2002-2643.

09-12-2006: Randolph County (Change in voter registration & candidate eligibility), 2006-3856.

05-29-2009: **State of Georgia** (Voter verification program), 2008-5243.

11-30-2009: Lowndes County (2009 redistricting plan), 2009-1965.

04-13-2012: Greene County (2011 redistricting of commission & school board), 2011-4687.

08-27-2012: Long County (2012 redistricting of commission & school board), 2011-4687.

12-21-2012: **State of Georgia** (Change of election date), 2012-3262.

Consent Decrees/Settlements: (8)

McIntosh County NAACP v. McIntosh County, Ga., No. 2:77CV70 (S.D. Ga. 1977) (consent decree).

Stafford v. Mayor & Council of Folkston, Ga., No. 5:96CV00111 (S.D. Ga. 1997) (consent decree).

Simpson v. Douglasville, No. 1:96-cv-01174 (N.D. Ga. 1999) (consent decree).

McBride and U.S. v. Marion County, No. 4:99cv151 (M.D. Ga. 2000) (consent decree).

U.S. v. Long County, GA (S.D. Ga. 2006), No. CV206-040 (S.D. Ga. 2006) (consent decree).

Georgia State Conf. NAACP v. Fayette County, Ga., 118 F. Supp. 3d 1338 (N.D. Ga. 2015) (consent decree).

Georgia State Conf. NAACP v. Kemp, N. 2:16CV219 (N.D. Ga. 2017) (settlement agreement). **State of Georgia**.

Georgia State Conf. NAACP v. Hancock County, Ga., No. 5:15-CV-00414 (M.D. Ga. 2018) (consent decree).

Louisiana: 16 – 1 violation by the state

Court Decisions: (2)

St. Bernard Citizens for a Better Govt. v. St. Bernard Parish School Board, 2002 WL 2022589 (E.D. La. 2002).

Guillory v. Avoyelles Parish School Board, 2011 WL 499196 (W.D. La. Feb. 7, 2011).

Section 5 Objections: (13)

10-06-1997: St. Martin Parish (1997 redistricting, St. Martinsville council elections), 97-0879.

04-27-1999: Washington Parish (redistricting plan), 98-1475.

07-02-2002: Webster Parish (2001 Minden city council redistricting plan), 2002-1011.

10-04-2002: Pointe Coupee Parish (2002 redistricting, school district), 2002-2717.

12-31-2002: DeSoto Parish (2002 redistricting plan, school district), 2002-2926.

05-13-2003: Richland Parish (2002 redistricting plan, school district), 2002-3400.

10-06-2003: Tangipahoa Parish (2003 redistricting plan), 2002-3135.

12-12-2003: Iberville Parish (2003 redistricting plan, city of Plaquemine), 2003-1711.

06-04-2004: Evangeline Parish (2003 redistricting plan, city of Ville Platte), 2003-4549.

04-25-2005: Richland Parish (2003 redistricting, city of Delhi), 2003-3795.

08-10-2009: **State of Louisiana** (designating length of time when parish precinct boundaries are frozen during the preparation of the U.S. decennial census), 2008-3512.

Consent Decrees/Settlements: (1)

U.S. v. Morgan City, LA, No. CV00-1541 (W.D. La. 2000) (consent decree).

Mississippi: 18 – 2 violations by the state

Court Decisions: (7)

Teague v. Attala County, MS, 92 F.3d 283 I5th Cir. 1996).

Clark v. Calhoun County, MS, 88 F.3d 1393 (5th Cir. 1996).

Gunn v. Chickasaw County, 1997 WL 1:02CV33426761 (N.D. Miss. 1997).

Citizens for Good Govt. v. Quitman, Ms., 148 F.3d 472 (5th Cir. 1998).

Houston v. Lafayette County, Ms., 20 F. Supp. 2d 996 (N.D. Miss. 1998).

U.S. v. Ike Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007).

Jamison v. Tupelo, 471 F. Supp. 2d 706 (N.D. Miss. 2007).

Section 5 Objections: (8)

09-22-1997: **State of Mississippi** (NVRA implementation plan), 95-0418.

06-28-1999: Pike County (McComb, changing polling place to American Legion), 97-3795.

12-11-2001: Montgomery County (Cancellation of election, Kilmichael), 2001-2130.

03-24-2010: **State of Mississippi** (majority vote requirement for county school boards, etc.), 2009-2022.

10-04-2011: Amite County (2011 redistricting plan for supervisor & election commission), 2011-1660.

04-30-2012: Adams County (2011 Natchez redistricting plan), 2011-5368.

12-03-2012: Hinds County (Redistricting plan, city of Clinton), 2012-3120.

Consent Decrees/Settlements: (3)

Coffee v. Calhoun City, MS., No. 300-cv-00103 (N.D. Miss. 2000) (consent decree).

Thornton v. City of Greenville, No. 4:93CV276 (N.D. Miss. 1998) (settlement agreement).

Tryman v. City of Starkville, No. 1:02-cv-111 (N.D. Miss. 2003) (consent decree).

North Carolina: 11 – 4 violations by the state

Court Decisions: (3)

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

Cooper v. Harris, 137 S. Ct. 1455 (2017), **State of North Carolina**.

Covington v. North Carolina, 138 S. Ct. 2548 (2018), **State of North Carolina.**.

Section 5 Objections: (6)

02-13-1996: **State of North Carolina** prohibits state legislative & congressional districts from crossing precinct lines, absent Section 5 objections, 95-2922.

07-23-2002: Harnett County (2001 redistricting plan for school district), 2001-3769.

07-23-2002: Harnett County (2001 redistricting plan for commissioners), 2001-3768.

06-25-2007: Cumberland County (Change in MOE for Fayetteville city council), 2007-2233.

08-17-2009: Lenoir County (Change to non-partisan election, City of Kinston), 2009-0216.

04-30-2012: Pitt County (Change in MOE, county school district), 2011-2474.

Consent Decrees/Settlements (2)

Wilkins v. Washington County Commissioners, No. 2:93-cv-00012 (E.D.N.C. 1996) (consent decree).

Hall v. Jones County Bd. Of Commissioners, No. 4:17-cv-00018 (ED.N.C. 2017) (consent decree).

South Carolina: 15 – 1 violation by the state

Court Decisions: (1)

U.S. v. Charleston County, SC, 365 F.3d 341 (4th Cir. 2004).

Section 5 Objections: (13)

03-05-1996: Cherokee County (Change in method of electing Gaffney Bd. Of Public Works), 95-2790.

04-01-1997: **State of South Carolina** (1997 senate redistricting plan), 97-0529.

05-20-1998: Horry County (1997 county council redistricting plan), 97-3787.

10-12-2001: Charleston & Berkeley Counties (2012 Charleston council redistricting), 2001-1578.

11-02-2001: Greenville & Spartanburg Counties (2001 redistricting for town of Greer), 2001-1777.

06-27-2002: Sumter County (2001 redistricting plan), 2001-3865.

09-03-2002: Union County (2002 redistricting plan for county school board), 2002-2379.

12-09-2002: Laurens County (Annexations & district assignment, Clinton), 2002-1512, 2002-2706.

06-16-2003: Cherokee County (Reduction in size of school board), 2002-3457.

09-16-2003: Orangeburg County (Annexations by town of North), 2002-5306.

02-26-2004: Charleston County (From nonpartisan to partisan school board elections), 2003-2066.

06-25-2004: Richland & Lexington Counties (MOE change for School District No. 5), 2002-3766.

08-16-2010: Fairfield County (MOE & number of members, county school board), 2010-0970.

Consent Decrees/Settlements: (1)

U.S. v. Georgetown County School District, SC, No. 2:08-889 (D.S.C. 2008) (consent decree).

Texas: 34 – 3 violations by the state

Court Decisions: (5)

LULAC v. Perry, 548 U.S. 399 (2006).

Benevidez v. City of Irving, TX, 638 F. Supp. 2d 709 (N.D. Tex. 2009).

Fabela v. City of Farmers' Branch, 2012 WL 3135545 (N.D. Texas).

Benevidez v. Irving ISD, 2014 WL 4055366 (N.D. Texas).

Patino v. City of Pasadena, TX, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

Section 5 Objections: (18) – 3 violations by the state

01-16-1996: **State of Texas** (Authorizing employees to determine voter eligibility based on Citizenship information in files), 95-2017.

03-17-1997: Harris County (Annexations, town of Webster), 95-2017.

12-04-1998: Galveston County (Adding numbered posts to at-large seats, Galveston), 98-2149.

07-16-1999: Dawson County (De-annexation, city of Lamesa), 99-0270.

06-05-2000: Austin County (Adding numbered posts, Sealy ISD), 99-3828.

09-24-2001: Haskell Consolidated ISD (Cumulative voting with staggered terms), 2000-4426.

11-16-2001: **State of Texas** (2001 redistricting, state house), 2001-2430.

06-21-2002: Waller County (Redistricting plans, commissioners court, constable districts), 2001-2430.

08-12-2002: Brazoria County (MOE, Freeport city council), 2002-1725.

05-05-2006: North Harris Montgomery Community College District (reduction in polling place & early voting locations), 2006-2240.

03-24-2009: Gonzales County (Bi-lingual election procedures), 2008-3588.

03-12-2010: Gonzales County (Bi-lingual election procedures), 2009-3078.

06-28-2010: Runnels County (Bilingual election procedures), 2009-3672.

02-07-2012: Nueces County (Redistricting, county commissioners court), 2011-3992.

03-05-2012: Galveston County (Redistricting, county commissioners court), 2011-4317.

03-12-2012: **State of Texas** (Voter registration & photo id procedures, SB 14), 2011-2775.

12-21-2012: Jefferson County (Beaumont ISD, reduction in single member districts), 2012-4278.

04-08-2013: Jefferson County (Beaumont ISD, change in term of office, qualification procedures), 2013-0895.

Consent Decrees/Settlements: (11)

U.S. v. Ector County, TX, No. M005CV131 (W.D. Tex. 2005) (consent decree).

U.S. v. Brazos County, TX, No. H-06-2165 (S.D. Tex.2006) (consent decree).

U.S. v. Hale County, TX, No. 5:06-CV-43 (N.D. Tex. 2006) (consent decree).

U.S. v. City of Earth, TX, 5:07-CV-144 (N.D. Tex. 2007) (consent decree).

U.S. v. Galveston County, TX, No. 3:07-CV-377 (S.D. Tex. 2007) (consent decree).

U.S. v. Littlefield ISD, TX, No. 5:07-cv-145 (N.D. Tex. 2007) (consent decree).

U.S. v. Post ISD, TX, No. 5:07-CV-146-C (N.D. Tex. 2007) (consent decree).

U.S. v. Seagraves ISD, TX, No. 5:07-CV-147 (N.D. Tex. 2007) (consent decree).

U.S. v. Smyer ISD, TX, No. 5:07-CV-148-C (N.D. Tex. 2007) (consent decree).

U.S. v. Waller County, TX, No. 4:08-cv-3022 (S.D. Texas 2008) (consent decree).

U.S. v. Fort Bend County, TX, No. 4:09-cv-1058 (S.D. Tex. 2009) (consent decree).

Exhibit 2: States Not Covered Under the Current Preclearance Formula in HR 4

Alaska: 2 violations

Consent Decrees/Settlements: (2)

Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska) (consent decree).

Toyukak v. Treadwell, No. 3:13-CV-00137 (D. Alaska) (court-approved settlement).

Arkansas: 2 violations

Court Decisions: (0)

Consent Decrees/Settlements: (2)

Cox v. Donaldson, No. 5:02CV319 (E.D. Ark. 2003) (consent decree)

Townsend v. Watson, No. 1:89-cv-1111 (W.D. Ark. 2013) (consent decree).

Arizona: 4 violations

Section 5 Objections: (2)

05-20-2002: **State of Arizona** (2001 legislative redistricting plan), 2002-0276.

02-04-2003: Coconino County (MOE, Coconino Association for Vocations, Industry, and Technology), 2002-3844.

Consent Decrees/Settlements: (2)

U.S. v. Cochise County, AZ, No. CV 06-304 (D. Ariz. 2006) (consent decree).

Navajo Nation v. Brewer, No. CV 06-1575 (D. Ariz. 2008) (court-approved settlement).

California: 12 violations

Court Decisions: (1)

Luna v. County of Kern, CA, 291 F. Supp. 3d 1088 (E.D. Cal. 2018).

Section 5 Objections: (1)

03-29-2002: Monterey County (MOE, Chualar Union Elementary School District), 2000-2967.

Consent Decrees/Settlements: (10)

U.S. v. San Benito County, CA, No. 5:04-cv-2056 (N.D. Cal. 2004) (consent decree).

U.S. v. Ventura County, CA, No. CV04-6443 (C.D. Cal. 2004) (consent decree).

U.S. v. City of Azusa, CA, No. CV05-5147 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Paramount, CA, No. 05-05132 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Rosemead, CA, No. CV05-5131 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Walnut, CA, No: CV 07-2437 (C.D. Cal. 2007) (consent decree).

U.S. v. Riverside County, CA, CV 10-1059 (C.D. Cal. 2010) (consent decree).

U.S. v. Alameda County, CA, No. 311-cv-3262 (N.D. Cal. 2011) (court-approved settlement agreement).

U.S. v. San Diego County, CA, No. 04cv1273 (S.D. Cal. 2004) (consent decree).

U.S. v. Upper San Gabriel Valley Municipal Water District, No. CV 00-07903 (C.D. Cal. 2000) (consent decree).

Colorado: 2 violations

Court Decisions: (2)

Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996).

Cuthair v. Montezuma-Cortez School District, 7 F. Supp. 2d 1152 (D. Colorado 1998).

Hawaii: 1

Court Decisions: (1)

Arakaki v. Hawaii, 314 F. 3d 1091 (9th Cir. 2002).

Illinois: 4

Court Decisions: (3)

U.S. v. Town of Cicero, Illinois, 2000 WL 34342276 (N.D. Ill. 1996).

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998).

Harper v. Chicago Heights, IL, 223 F.3d 593 (7th Cir. 2000).

Consent Decrees/Settlements: (1)

U.S. v. Kane County, IL, No. 07-v-5451 (N.D. Ill. 2007) (memorandum of agreement).

Massachusetts: 5

Court Decisions: (1)

Black Political Task Force v. Galvin, 300 F. Supp. 2d 291 (D. Mass. 2004).

Consent Decrees/Settlements: (4)

U.S. v. City of Boston, No. 1:05-cv-11598 (D. Mass. 2005) (consent decree).

U.S. v. City of Springfield, MA, No. 06-30123 (D. Mass. 2006) (consent decree).

Huot v. City of Lowell, Mass., No. 1:17-cv-10895 (D. Mass. 2019) (consent decree).

City of Lawrence, No. 98cv12256 (D. Mass. 1998) (settlement agreement).

Michigan: 3

Section 5 Objections: (1)

12-26-2007: Saginaw County (Buena Vista Township, closure of voter registration branch office), 2007-3837.

Consent Decrees/Settlements: (2)

U.S. v. City of Hamtramck, MI, No. 00-73541 (E.D. Mich. 2000) (consent decree).

U.S. v. City of Eastpointe, MI, No. 4:17-CV-10079 (2019) (consent decree).

Missouri: 1

Court Decisions: (1)

Missouri State Conf. NAACP v. Ferguson-Florrissant School District, 201 F. Supp. 3d 1006 (E.D. Mo. 2016).

Montana: 5

Court Decisions: (1)

U.S. v. Blaine County, MT, 363 F.3d 897 (9th Cir. 2004).

Consent Decrees/Settlements: (4)

Matt v. Ronan School District, No. 99-94 (D. Mont. 2000) (settlement agreement).

U.S. v. Roosevelt County, MT, No. 00-50 (D. Mont. 2000) (consent decree).

Alden v. Rosebud County Board of Commissioners, No. 99-148 (D. Mont. 2000) (consent decree).

Blackfeet Nation v. Stapleton, No. 4:20-cv-95 (D. Mont. 2020) (consent decree).

Nebraska: 2

Court Decisions: (1)

Stable v. Thurston County, NE, 129 F. 3d 1015 (8th Cir. 1997).

Consent Decrees/Settlements: (1)

U.S. v. Colfax County, NE, No. 8:12-CV-84 (D. Neb. 2012) (consent decree).

Nevada: 1

Court Decisions:

Sanchez v. Cevaske, 214 F. Supp. 3d 961 (D. Nevada 2016).

New Jersey: 2

Consent Decrees/Settlements: (2)

U.S. v. Salem County and Borough of Penns Grove, N.J., No. 1:08-cv-03276 (D.N.J. 2008) (court-approved settlement).

U.S. v. Passaic City and Passaic County, N.J., No. 99-2544 (D.N.J. 1999) (consent decree).

New Mexico: 3

Consent Decrees/Settlements: (3)

U.S. v. Bernalillo County, N.M., No. CV-98-156 (D.N.M. 1998) (consent decree).

U.S. v. Cibola County, N.M. No. CIV 93 1134 (D.N.M. 2004) (court-approved settlement).

U.S. v. Sandoval County, N.M., No. 88-CV-1457 (D.N.M. 2004) (consent decree).

New York: 12

Court Decisions: (5)

Goosby v. Town of Hempstead, NY, 180 F.3d 476 (2nd Cir. 1999).

New Rochelle Voter Defense v. New Rochelle, NY, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

U.S. v. Village of Port Chester, NY, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

Pope v. County of Albany, N.Y., 94 F. Supp. 3d 302 (N.D.N.Y. 2013).

Molina v. Orange County, NY, 2013 WL 3009716 (S.D.N.Y. 2013).

Objections: (2)

11-15-1996: Temporary replacement of all nine elected board members of Community School District 12 by three appointed trustees and their permanent replacement by five appointed trustees: 96-3759.

02-04-1999: Change in method of election from single transferable vote to limited voting with four votes per voter for community school boards in Bronx, Kings, and New York Counties: 98-3193.

Consent Decrees/Settlements: (5)

U.S. v Suffolk County, NY, No. CV 04-2698 (E.D. N.Y. 2004) (consent decree).

Arbor Hill Concerned Citizens v. Albany County, NY, 281 F. Supp. 2d 456 (N.D.N.Y. 2004) (consent decree).

U.S. v. Westchester County, NY, No. 05 CIV. 0650 (S.D.N.Y. 2005) (consent decree).

U.S. v. Orange County, NY, 12 Civ 3071 (S.D.N.Y. 2012) (consent decree).

Flores v. Town of Islip, NY, No. 2:18-cv-3549 (E.D.N.Y. 2020) (consent decree).

North Dakota: 2

Court Decisions: (1)

Spirit Lake Tribe v. Benson County, N.D., 2010 WL 4226614 (D.N.D. 2010).

Consent Decrees/Settlements: (1)

U.S. v. Benson County, N.D., No. A2-00-30 (D.N.D. 2000) (consent decree).

Ohio: 4

Court Decisions: (1)

U.S. v. City of Euclid, Ohio, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

Consent Decrees/Settlements: (3)

U.S. v. Euclid City School Board, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (court-approved settlement).

U.S. v. Cuyahoga County, OH, No.1:10-cv-1940 (N.D. Ohio 2010) (court-approved settlement).

U.S. v. Lorain County, OH, No. 1:11-cv-02122 (N.D. Ohio 2011) (memorandum of agreement).

Pennsylvania: 2

Court Decisions: (1)

U.S. v. Berks County, PA, 277 F. Supp. 2d 570 (E.D. Pa. 2003).

Consent Decrees/Settlements: (1)

U.S. v. City of Philadelphia, PA, No.2:06cv4592 (E.D. Pa. 2007) (settlement agreement).

South Dakota: 2

Court Decisions: (1)

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

Section 5 Objections: (1)

02-11-2008: Charles Mix County (Increase in size & redistricting of county commission), 2007-6012.

Tennessee: 2

Court Decisions: (1)

Rural West Tenn. v. Sundquist, 29 F. Supp. 2d 448 (W.D. Tenn. 1998).

Consent Decrees/Settlements: (1)

U.S. v. Crockett County, TN, No. 1-01-1129 (W.D. Tenn. 2001).

Virginia: 8 – 2 by State

Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016), **State of Virginia**.

Bethune-Hill v. Va. State Bd. Of Elections, 326 F. Supp. 3d 128 (E.D. Va. 2018), **State of Virginia.**

Section 5 Objections: (6)

10-27-1999: Dinwiddie County (Polling place change), 99-2229.

09-28-2001: Northampton County (MOE & redistricting, board of supervisors), 2001-1495.

04-29-2002: Pittsylvania County (Redistricting, county supervisors & school board), 2001-2026, 2501.

07-09-2002: Cumberland County (Redistricting plan, county supervisors), 2001-2374.

05-19-2003: Northampton County (2002 redistricting plan, county supervisors), 2002-5693.

10-21-2003: Northampton County (2003 redistricting plan, county supervisors), 2003-3010.

Consent Decrees/Settlements: (0)

Washington: 3

Court Decisions: (1)

Montes v. City of Yakima, 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

Consent Decrees/Settlements:

U.S. v. Yakima County, WA, No. CV-04-3072 (E.D. Wash. 2004) (settlement agreement).

Glatt v. City of Pasco, WA, No. 4:16-CV-5108 (E.D. Wash.2017) (consent decree).

Wisconsin:1

Court Decisions:

Baldus v. Wisc. Govt. Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wisc. 2012).

Wyoming: 1

Court Decisions:

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

Exhibit 3: Political Subdivisions Covered Under the Preclearance Formula in HR 4

California:

Los Angeles County: 5 violations

U.S. v. City of Azusa, No. CV05-5147 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Paramount, No. 05-05132 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Rosemead, No. CV05-5131 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Walnut, No. CV 07-2437 (C.D. Cal. 2007) (consent decree).

U.S. v. Upper San Gabriel Valley Municipal Water District, No. CV 00-07903 (C.D. Cal. 2000) (consent decree).

Illinois:

Cook County: 3 violations

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998).

Harper v. Chicago Heights, 223 F.3d 593 (7th Cir. 2000).

U.S. v. Town of Cicero, 2000 WL 34342276 (N.D. Ill. 1996).

New York:

Westchester County: 3 violations

New Rochelle Voter Defense v. New Rochelle, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

U.S. v. Village of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

U.S. v. Westchester County, No. 05 CIV. 0650 (S.D.N.Y. 2005) (consent decree).

Ohio:

Cuyahoga County: 3 violations

U.S. v. Cuyahoga County, No. 1:10-cv-1940 (N.D. Ohio 2010) (court-approved settlement).

U.S. v. Euclid, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

U.S. v. Euclid City School Board, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (court-approved settlement).

Virginia:

Northampton County: 3 violations

09-28-2001: Northampton County (MOE & redistricting, board of supervisors), 2001-1495.

05-19-2003: Northampton County (2002 redistricting plan, county supervisors), 2002-5693.

10-21-2003: Northampton County (2003 redistricting plan, county supervisors), 2003-3010.

Mr. COHEN. Thank you, sir.

Our next witness is Ms. Wendy Weiser. Ms. Weiser is vice president, democracy, at the Brennan Center for Justice at NYU Law School. She focuses on voting rights and elections, money in politics and ethics, redistricting representation, government dysfunction, Rule of law, fair courts, and all other things that are good and fair and just and sweet in America.

She received both her B.A. and her J.D. from Yale. Boola Boola.

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

TESTIMONY OF WENDY R. WEISER

Ms. WEISER. Thank you, Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee.

In *Shelby County* v. *Holder*, the Supreme Court gutted the most powerful and successful provision of the Voting Rights Act—its preclearance requirement, because it found that the formula Congress used to determine which States should be covered by preclearance was outdated.

At the same time, the Court invited Congress to craft an updated formula, one grounded in current conditions and needs and targeting jurisdictions where discrimination is sufficiently pervasive and persistent to justify preclearance. That is precisely what this Congress has done and is now sharpening in the John Lewis Voting Rights Advancement Act.

I will make three points.

First, as many have already noted, our country is emphatically currently facing extensive and persistent race discrimination in voting, the extraordinary conditions that make preclearance both necessary and constitutionally justified. This Committee has already collected reams of evidence on the subject, and through my written testimony I add four new publications to the record.

One key finding I would like to highlight: Turnout among non-White voters is now substantially lower than that among White voters and it has been for at least 25 years. In the 2020 election, despite record overall turnout, roughly 71 percent of White voters cast ballots compared to only 58.5 percent of non-White voters.

In the States likely to be covered under the VRAA, the racial turnout gap is even starker. In virtually every one of those States, the White-Black turnout gap has grown dramatically since *Shelby County*.

In other words, contrary to what the Supreme Court observed in *Shelby County*, the turnout gap has not, in fact, closed for Black voters—that was anomalous—and for other minorities it never had.

Second, targeted geographic coverage remains a necessary and appropriate way to root out intractable discrimination in voting.

Even though discrimination is now widespread, the evidence before this Committee overwhelmingly shows that it is much more prevalent and tenacious in some places than in others.

Third, the geographic coverage formula that Congress is contemplating is eminently sensible, fair, and constitutional. It has been modernized and designed with precision to respond to the Supreme Court's concerns in *Shelby County*.

To ensure that it rationally targets illegal discrimination, the formula relies on the best evidence of discrimination, documented violations of laws prohibiting race discrimination in voting.

To ensure that it targets States with a pattern of persistent discrimination, the formula captures only those States that meet a high numeric threshold of violations over time: As we have heard, either 10 violations, if at least one of them is Statewide, or 15 total violations over the prior 25 years.

To ensure that it targets States where discrimination is current, the formula is not frozen in time but rather rolls forward so that coverage always turns on modern considerations.

The bill also limits the duration of preclearance coverage to 10 years so that jurisdictions without recent violations automatically roll out of coverage and jurisdictions without recent violations can easily bail out before then as well.

In short, the formula is effectively designed to identify those places where voting discrimination is recent, widespread, and persistent. As a factual matter, based on Professor McCrary's research and the record before this committee, the formula succeeds in accomplishing that aim based on the jurisdictions that are covered. These are precisely the circumstances when preclearance is most needed and most legally justified.

So, in conclusion, as Justice Kagan observed in her recent dissent in the *Brnovich* case, "this is a perilous moment for the Nation's commitment to equal citizenship, an era of voting rights retrenchment."

The scale of the current problem of voting discrimination and vote suppression is enormous, and it is about to get much bigger as States and localities across the country begin their redistricting. It is a problem that only Congress can solve by passing the John Lewis Voting Rights Advancement Act and the For the People Act.

Thank you.

[The statement of Ms. Weiser follows:]

BRENNAN CENTER FOR JUSTICE

TESTIMONY OF

WENDY WEISER
VICE PRESIDENT FOR DEMOCRACY AT THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW[1]

HEARING ON OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
IN THE UNITED STATES HOUSE OF REPRESENTATIVES

AUGUST 16, 2021

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act ("VRA"), a law that has played a critical role in safeguarding American democracy against pernicious, persistent threats of discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports this Committee's efforts to restore and revitalize the VRA, through the John Lewis Voting Rights Advancement Act ("VRAA").

The VRA is widely considered the most successful civil rights legislation in our nation's history.[2] Unfortunately, the Supreme Court has seriously hampered its effectiveness. First, in *Shelby County v. Holder*,[3] the Court rendered inoperable the law's preclearance provisions, which had stopped many discriminatory voting practices from ever going into effect in selected jurisdictions with a history of discrimination. More recently, in *Brnovich v. DNC*,[4] the Court sharply limited voters' ability to challenge discriminatory practices under the nationwide protections against voting discrimination in Section 2 of the law. Although these decisions have seriously wounded the VRA, they also make clear that Congress has the power to restore and bolster the law.[5]

The need to strengthen the VRA is especially urgent now, as a decade's worth of efforts

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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 Vice President for Democracy and Director of the Brennan Center's Democracy Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in academic journals and numerous media outlets across the country. I have served as counsel in many voting rights lawsuits, including lawsuits under Sections 2 and 5 of the Voting Rights Act. I have testified previously before Congress, and before several state legislatures, on a variety of issues relating to voting rights and elections, including the Voting Rights Act. My testimony does not purport to convey the views, if any, of the New York University School of Law.
[2] U.S. Department of Justice, "The Effect of the Voting Rights Act," June 19, 2009, https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0.
[3] *Shelby County v. Holder*, 570 U.S. 529, 556-57 (2013).
[4] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).
[5] *Shelby County*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions."); *see generally Brnovich*, 141 S. Ct. 2321 (holding premised on an interpretation of the current text of Section 2).

to restrict voting rights have reached a fever pitch. As I previously testified,[6] states across the country are rapidly passing new laws rolling back voting access—many of them targeting voters of color. These new laws are being implemented on top of a host of other discriminatory voting practices that have been put in place or attempted in recent years. We are also headed into a redistricting cycle, following last week's release of Census data, that is expected to be characterized by racial discrimination and severe gerrymandering targeting communities of color.[7]

The VRAA is designed to address these current problems and meet current needs, while taking account of the concerns the Supreme Court identified with the 2006 reauthorization of the law. I submit this testimony to supplement the record of persistent race discrimination in voting that creates the need for the VRAA, and to explain how the VRAA is an appropriate, carefully tailored exercise of congressional authority to combat that discrimination.

I. New Evidence that Race Discrimination in Voting, and its Effects, Persist

Despite the progress made in the decades following the VRA's initial enactment, race discrimination in voting is still a very real—and in some places a growing—problem. The record this Committee has amassed in recent months, including evidence submitted by the Brennan Center, shows overwhelming evidence of contemporary voting discrimination.[8] While the evidence shows that race discrimination in voting is widespread, it also shows that it is especially powerful and persistent in certain geographic areas, including in a number of states that were previously covered by Section 5 of the VRA because of their past histories of discrimination in voting.

Our recent research provides even more evidence of the impact and persistence of discrimination in voting, underscoring the acute need for the VRAA.

A. Persistent Racial Turnout Gaps

A recently published analysis by the Brennan Center's Kevin Morris and Coryn Grange demonstrates that turnout among nonwhite voters remains significantly lower than that among white voters.[9] Even with record overall turnout in the 2020 election, there was a significant

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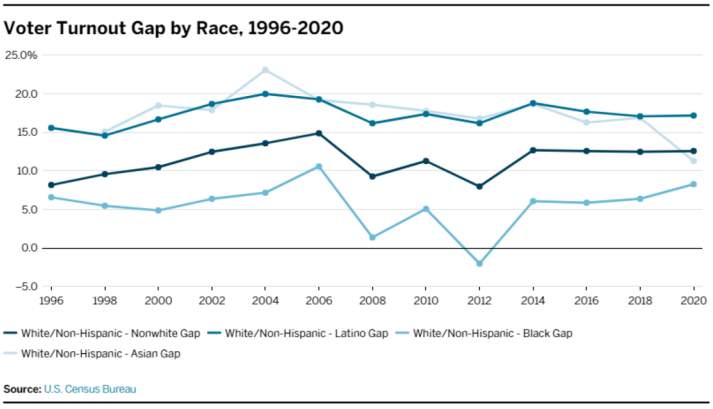
[6] *See Hearing on the Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. On Judiciary, Subcomm. On the Constitution, Civil Rights & Civil Liberties,* 117th Cong. (2021) (testimony of Wendy Weiser, Vice President, Brennan Center for Justice), https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf; *Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Before the H. Comm. On House Administration, Subcomm. On Elections,* 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf.

[7] Michael Li, *The Redistricting Landscape, 2021-22*, Brennan Center for Justice, 2021, https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22.

[8] *See* Michael Waldman, testimony on *Voting in America*; *Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot, Before the Comm. on House Administration, Subcomm. on Elections,* 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf; Wendy Weiser, testimony on *Oversight of the Voting Rights Act*.

[9] Kevin Morris and Coryn Grange, "Large Racial Turnout Gap Persisted in 2020," Brennan Center, August 6, 2021, https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election.

turnout gap between white and nonwhite voters.[10] Overall, 70.9 percent of eligible white voters cast ballots in the 2020 election, compared to only 58.4 percent of nonwhite voters.[11] In fact, as the graph below—reproduced from the Brennan Center's published analysis—demonstrates, the turnout gap between white and nonwhite voters has gone virtually unchanged since 2014, and it has grown since its modern-era lows in 2008 and 2012.[12] And even when the gap between Black and white voters was closing—a trend that has sadly reversed course in recent years—Latino and Asian American voters lagged far behind their white counterparts in participation.[13] (This is true of Native American voters as well, though their numbers are too small for inclusion in the census data.)



While our research does not examine whether or the extent to which voter suppression efforts caused this gap to persist—and at some points, widen—it does demonstrate that the temporary closure of the Black-white voting gap in 2008 and 2012 was anomalous. This is particularly significant in light of the *Shelby County* Court's reliance on evidence that this gap had supposedly closed by 2013 to question Congress's justification for preclearance.[14]

B. Larger Turnout Gaps in Previously Covered Jurisdictions

According to more recent census data, described in a new Brennan Center analysis by Coryn Grange, Peter Miller, and Kevin Morris,[15] the growth in the racial turnout gaps since 2012 is even starker in the states likely to be subject to preclearance under the VRAA. In recent years,

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[10] Morris and Grange, "Large Racial Turnout Gap Persisted."
[11] Morris and Grange, "Large Racial Turnout Gap Persisted."
[12] Morris and Grange, "Large Racial Turnout Gap Persisted." The white-nonwhite turnout gap in 2020 was 12.5 percent in 2020, an increase from a recent low of 8 percent in 2012.
[13] Morris and Grange, "Large Racial Turnout Gap Persisted."
[14] 570 U.S. at 536, 547-49.
[15] Coryn Grange, Kevin Morris, and Peter Miller, "Turnout Gaps in Jurisdictions Previously Covered by Section 5 of the Voting Rights Act," Brennan Center for Justice, Aug. 20, 2021, https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights(hereinafter "Turnout Gaps").

white voter turnout has vastly exceeded nonwhite turnout in virtually every state previously subject to preclearance, and in some areas, the progress made in the decades leading up to *Shelby County* has all but vanished.

Our analysis finds that, after hitting historic lows immediately before *Shelby County* in 2012, the white-Black turnout gap has significantly grown in almost every state previously covered by the VRA.[16] In South Carolina, for example, the white-Black turnout gap has grown by 21 percentage points since 2012, to 15 percent.[17] In Texas and Virginia, the gap has grown by 13 percentage points, to 11 percent and 13 percent, respectively.[18] In Louisiana, the gap has grown by 11 percentage points, to 7 percent.[19] And in North Carolina, which was not covered in its entirety but had a number of covered political subdivisions, the gap has grown by 17 percentage points, to 3 percent.[20] These are dramatic shifts in only eight years. In most of the states mentioned here, the turnout gap between Black and white voters grew from a slight gap *in favor* of Black voters to a significant gap in favor of white voters.

The data also indicates that the post-*Shelby County* racial turnout gaps are more than a Black and white issue.[21] The total white-nonwhite turnout gap has grown since 2012 in all of the eight states likely to be covered under the VRAA.[22] And the racial turnout gap is especially large for Hispanics. In Georgia and Virginia, for example, the non-Hispanic white-Hispanic turnout gap was 26 percentage points in 2020.[23] In Texas, it was 19 percentage points.[24]

C. Discriminatory Voting Barriers in 2020

In addition to a growing turnout gap among white and nonwhite voters, the 2020 election saw a proliferation of discriminatory voting barriers. A new report by the Brennan Center's Will Wilder catalogs the wide range of barriers, disparate burdens, and discrimination voters of color faced during the 2020 election cycle.[25] These included new restrictive voting laws, racially discriminatory voter roll purges, disparities in mail delivery and in mail ballot processing times that were exacerbated by the Covid-19 pandemic, long lines and closed polling places, racially-targeted voter intimidation, and targeted misinformation campaigns.[26]

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[16] The white-Black turnout gap has grown in six states likely to be covered by the VRAA: Alabama, Georgia, Louisiana, South Carolina, Texas, and Virginia. In Florida and Mississippi, the white-Black turnout gap has remained somewhat steady. *See* Grange et al, "Turnout Gaps."
[17] Grange et al, "Turnout Gaps."
[18] Grange et al, "Turnout Gaps."
[19] Grange et al, "Turnout Gaps."
[20] Grange et al, "Turnout Gaps."
[21] Grange et al, "Turnout Gaps."
[22] Grange et al, "Turnout Gaps." There is sufficient data to conclude that the gap has increased for Blacks, Hispanics, and Asians in Florida, Georgia, North Carolina, South Carolina, and Texas. In Alabama, Louisiana, and Mississippi, the sample sizes in the available census data are too small for Hispanic and Asian voters to make an overall white-nonwhite turnout gap estimation that is distinct from the white-Black turnout gap in those states.
[23] Grange et al, "Turnout Gaps."
[24] Grange et al, "Turnout Gaps." In California, which is close to meeting the coverage requirements in the VRAA, the turnout gap was 20 percentage points.
[25] Will Wilder, *Voter Suppression in 2020*, Brennan Center for Justice, Aug. 20, 2021, Parts II – III, https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020.
[26] See generally Wilder, Voter Suppression in 2020.

Perhaps more than in any other year in recent history, elected officials and political operatives were direct about their intentions to shrink the electorate in 2020, at times with explicit or thinly-veiled references to race.[27] These statements of discriminatory intent are important context for the range of discriminatory results seen in 2020.

As we have previously testified, the push to disenfranchise voters of color continued after the election, as the Trump campaign and others filed frivolous lawsuits aimed at tossing out the votes of Black voters in urban centers and other voters of color.[28] This litigation and the lies used to justify it helped spur on violent attacks on the Capitol.[29] The same lies laid the rhetorical groundwork for a new wave of restrictive voting legislation this year unlike anything we have seen since the VRA's enactment in 1965. Our most up-to-date research shows that 18 states enacted 30 new laws restricting access to voting between January 1 and July 14, 2021.[30]

D. Discriminatory Plans to Reduce Representation

The Brennan Center's recent report, "Representation for Some," authored by Yurij Rudensky et al., offers additional evidence of the growing risk of race discrimination in voting.[31] This study analyzes the impact of a voting change that is being pushed in a number of states—namely, the exclusion of non-citizens and children under 18 from the population base used to draw electoral districts. Using data from Texas, Georgia, and Missouri, the report finds that adopting an adult citizen redistricting base would have a substantial and disparate effect on communities of color, particular Latino communities.

While to date no state has adopted an adult citizen redistricting base, these findings are relevant to Congress's inquiry because there is an ongoing effort to adopt such a change, including in states that were previously subject to preclearance and would likely be covered under the VRAA. This change is being pursued with the express knowledge that its principal impact would be to disadvantage communities and voters of color. For example, Thomas Hofeller, a prominent conservative redistricting strategist who helped draw maps after the 2010 census in Alabama, Florida, North Carolina, and Texas that were later struck down by courts as discriminatory, indicated in a memo shared with conservative strategists that changing the apportionment base would be "advantageous to Republicans and non-Hispanic Whites."[32] The substantial risk that states and localities will adopt a discriminatory adult citizen redistricting base further underscores the need for robust protections under the Voting Rights Act.

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[27] Wilder, Voter Suppression in 2020, Part II.
[28] Wilder, Voter Suppression in 2020, Part VII.
[29] Michael Waldman, "Trump's Big Lie Led to Insurrection," Brennan Center for Justice, January 12, 2021, https://www.brennancenter.org/our-work/analysis-opinion/trumps-big-lie-led-insurrection.
[30] Brennan Center for Justice, "Voting Laws Roundup: July 2021," July 22, 2021, https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021.
[31] Yurij Rudensky et al., "Representation for Some," Brennan Center, July 29, 2021, https://www.brennancenter.org/our-work/research-reports/representation-some.
[32] *See* Rudensky et al., Representation for Some.

II. The VRAA's Preclearance Provisions Effectively Target the Problem of Voting Discrimination

The VRAA's preclearance provisions are well designed to target the persistent problem of voting discrimination in a manner consistent with constitutional requirements. The bill includes a coverage formula that will effectively remedy and deter illegal discrimination without casting the net so widely that it imposes burdens on jurisdictions where ordinary litigation is sufficient to stop discrimination.[33] It does so by carefully targeting coverage to jurisdictions and conduct where discrimination is most prevalent, reflecting current conditions and recent historical experience, as the original formula did in 1965.[34] It introduces a geographic coverage formula that triggers only in jurisdictions with recent histories of verifiable voting discrimination. It also establishes limited nationwide preclearance for certain practices that have been used frequently to discriminate against voters of color.

A. The VRA's Preclearance Provisions Are Necessary and Warranted

These preclearance provisions are well justified by the extensive record before Congress.

First, the record before Congress makes clear that preclearance is, unfortunately, still necessary to root out persistent discrimination. As we have previously testified (and as the Supreme Court previously recognized), litigation is emphatically not enough to prevent discrimination where it is repeated; preclearance is necessary. Litigation is costly, slow, and often allows discriminatory rules to govern pending a decision. In some cases, like our recently completed lawsuit challenging Texas's strict voter ID law, multiple elections occur under discriminatory practices before a judicial resolution alters or eliminates them.[35] A favorable decision in such a case cannot un-suppress lost votes, reallocate spent resources, or restore confidence in citizens whose efforts to register and vote were wrongfully denied. Preclearance, by comparison, is a fast process that prevents certain discriminatory measures from taking effect in the first place. The pre-*Shelby* regime showed the effectiveness of cutting off discriminatory laws and practices at the pass rather than leaving citizens to pick up the burden of challenging them.[36] The last eight years have shown the harm that can be done without the specter of

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[33] *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976))).

[34] *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ("The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.").

[35] *See, e.g.*, Brennan Center for Justice, "Texas NAACP V. Steen (consolidated with Veasey v. Abbott)," last modified Sept. 21, 2018, https://www.brennancenter.org/our-work/court-cases/texas-naacp-v-steen-consolidated-veasey-v-abbott. In this case, a voter ID law that went into effect in 2013 governed until a temporary remedy was enacted before the November 2016 election and the legislature altered it in 2017. In the meantime, every court that considered the law found it to be discriminatory.

[36] Between 1998 and 2013, Section 5 preclearance blocked 86 discriminatory changes from going into effect, including 13 in the 18 months before *Shelby County*. Wendy Weiser and Alicia Bannon, *An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice (2018), https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20Solutions%202018.%20Democracy%20Agenda.pdf. For state-by-state chronological listings of Section 5 objections, *see* U.S. Department of Justice, "Section 5 Objection Letters," accessed August 13, 2021, http://www.justice.gov/crt/records/vot/obj_letters/index.php.

preclearance deterring and blocking harmful laws.[37] Indeed, in many jurisdictions, as soon as a discriminatory law or practice was successfully challenged, the legislature or other public officials took steps to put another voting restriction in its place. As voting barriers have proliferated, so have voting rights lawsuits, reaching unprecedented highs in recent years.[38] Without congressional action, this trend shows no signs of abating.

Second, the record before Congress shows the importance of applying preclearance to elections at the federal, state, and local levels. Discriminatory laws and practices do not just plague federal elections. They also exist in school board, county commission, and state house elections, as the extensive testimony compiled by Professor Peyton McCrary shows.[39] These elections have significant consequences; they can determine issues ranging from the educational resources provided to minority voters' children to whether representatives of minority communities are present at the redistricting table. Unless all eligible voters are able to participate in all elections free from discrimination, our society is not achieving the promise of equal justice for all.

Third, as discussed below, the record before Congress supports the application of a geographic coverage formula to target jurisdictions where voting discrimination is most rampant. And while I do not cover this in my testimony, I believe that the record also supports a practice-based trigger to target practices that are frequently applied to discriminate against minority voters. Requiring preclearance for certain voting practices that are known to be inherently discriminatory is an effective way to target the VRAA as efficiently as possible at the worst forms of discrimination.[40]

B. The VRAA's Geographic Coverage Formula Is Well Designed to Target and Root Out Rampant Discrimination

While discrimination in voting is widespread overall, the record before this Committee shows that certain jurisdictions tend to perpetrate voting discrimination much more than others. It is therefore appropriate for Congress to include a geographic-based trigger for preclearance so as to focus remedial attention on the places where discrimination is persistent and pervasive.

The VRAA's geographic coverage formula is effectively designed to target places where discrimination is recent, widespread, and persistent.

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[37] Michael Waldman, testimony on *Voting in America*.
[38] The Brennan Center maintains a tracker of recent voting rights lawsuits. See Brennan Center for Justice, "Voting Rights Litigation Tracker 2020," https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020; Brennan Center for Justice, "Voting Rights Litigation Tracker 2021," https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021. Professor Richard Hasen has long tracked the growth in voting rights and election-related lawsuits. See, e.g., Richard Hasen, "The Democracy Canon," 62 Stan. L. Rev. 69 (2009).
[39] Peyton McCrary, testimony on *Oversight of the Voting Rights Act.*
[40] *See*, *e.g.*, Terry Ao Minnis *et al*, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes,* AAJC, MALDEF, & NALEO Educational Fund, November 2019, https://www.maldef.org/wp-content/uploads/2019/11/Practice-Based-Preclearance-Report-Nov-2019-FINAL.pdf; *Hearing on the Need to Enhance the Voting Rights Act: Practice-Based Coverage, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Thomas Saenz, President and General Counsel, MALDEF), https://www.maldef.org/2021/07/hearing-on-the-need-to-enhance-the-voting-rights-act-practice-based-coverage/.

i. The formula relies on the best evidence of discrimination. The formula identifies those jurisdictions where the problem of discrimination is the greatest by focusing on the best evidence for determining where there is a problem to remedy: a jurisdiction's recent violations of laws prohibiting race discrimination. Specifically, the VRAA looks to law violations reflected in court orders, DOJ objection letters, or settlements that were either entered by a court or contained an admission of liability and lead to a change in voting practices. The volume of litigation in and of itself is a probative way to identify where persistent discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits.

But the mere filing of a lawsuit is not enough to trigger coverage under the VRAA; there must also be formal findings that a violation occurred. In other words, the bill looks to objective indicia that discrimination actually occurred. Not surprisingly, legal findings of voting discrimination are more common in jurisdictions that were previously covered under the VRA's preclearance regime. As Professors Morgan Kousser and William Kenan testified, more than five out of every six successful voting rights lawsuits between 1957 and 2019 occurred in places that were previously covered, even though for most of that time preclearance prevented the implementation of discriminatory laws in those jurisdictions.[41]

ii. The formula's high numeric threshold for violations over a 25-year review period identifies persistent patterns of discrimination. The VRAA sets numeric thresholds to capture only those states with an established pattern of discriminatory conduct. Specifically, as previously introduced, the bill would capture only those states with 10 violations, at least one of which was statewide, or 15 total violations, over the prior 25 years. These high numeric thresholds mean that the VRAA's geographic coverage for preclearance will apply only to those jurisdictions that continue to exhibit discrimination despite successful litigation. In other words, the preclearance coverage formula is specifically tailored to remedy race discrimination where case-by-case litigation has proven ineffective or inefficient.[42] (While the bill's requirement of 10 separate, independent findings of discrimination is helpful to identify the states where the problem has been most difficult to root out, it also means that some states with quite a bit of discrimination will not be covered unless the discrimination continues over time.[43] In those states, voters will have to rely on the other remedies in the VRA.)

The geographic coverage formula's 25-year review period is necessary to assess which of those jurisdictions with current records of discrimination also exhibit a persistent, longstanding

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[41] *Legislative Proposals to Strengthen the Voting Rights Act*, *Before the House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 116th Cong. 8 (2019) (statement of J. Morgan Kousser, William R. Kenan, Jr. Professor of History and Social Science, California Institute of Technology), https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf.

[42] *Katzenbach*, 383 U.S. at 328 (holding that preclearance "was clearly a legitimate response" by Congress to the fact that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits").

[43] *See Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms*, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School). Peyton McCrary's testimony, discussed further *infra*, demonstrates that states with reasonable records of discrimination such as Montana (five violations) and Virginia (eight violations) are still unlikely to be covered.

pattern of discrimination justifying preclearance. This time period encompasses two redistricting cycles and a sufficient number of electoral cycles to identify patterns of discrimination. The length of the review period justifies the high numeric threshold for violations, and vice versa.

iii. The formula limits coverage to states with recent discrimination. The geographic coverage formula is also designed to ensure that only those states with a continuing, current problem of discrimination are covered. As discussed further below, the 25-year review period works in tandem with other provisions of the bill to ensure that jurisdictions will only be covered if they have committed violations recently. First, states that meet the coverage threshold are only subject to preclearance for 10 years, after which older violations will no longer be considered. Second, as also discussed below, states that do not have any violations within the past 10 years can easily bail out of preclearance, and Congress can streamline the bail-out process even further.

As a factual matter, the formula will not cover jurisdictions that only committed violations a long time ago, nor will it cover jurisdictions that only committed a small number of violations over a short period of time.

Based on Peyton McCrary's testimony submitted for this hearing, the VRAA will likely cover eight states, all of which were covered under the VRA pre-*Shelby County*: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas.[44] Assuming Congress also authorizes coverage of political subdivisions with at least three of their own violations, the following local jurisdictions would also be covered, only one of which was previously covered (because it was within a covered state): Los Angeles County, California, Cook County, Illinois, Westchester County, New York, Cuyahoga County, Ohio, and Northampton County, Virginia.[45] Each of these states and political subdivisions has large minority populations. (Mr. McCrary's testimony also concludes that California, New York, and Virginia are close to coverage.[46] Were California or New York to have one statewide violation, it would bring either state into coverage. While Virginia only has eight violations by Mr. McCrary's count, two statewide, that number could rise to 10 if Congress drafts the bill to count independent findings of violations within one case or objection letter as independent violations.)

Each of the covered states has at least one violation within the past decade, and most have multiple violations. In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 14 years.[47] Each state is treated equally,[48] and each has an equal opportunity to roll out of preclearance if it stops engaging in a pattern of discrimination.

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[44] Peyton McCrary, testimony on *Oversight of the Voting Rights Act*. Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Texas were covered in their entirety. Florida and North Carolina were not covered in their entirety, but contained numerous political subdivisions that were covered.
[45] Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.
[46] Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.
[47] Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.
[48] It would be helpful for the legislation to correct for a difference that arises in states that have areas without any organized local government or local election administration units but rather administer nearly all elections at the state level—currently only Alaska. These states would fare differently than other states under the current VRAA coverage formula with respect to certain violations. Specifically, if multiple unorganized Census areas in Alaska fail to provide adequate language materials or assistance in the same election, that would count as only one violation against Alaska, whereas in other states it would constitute multiple independent violations—one against each local

iv. The formula appropriately targets local jurisdictions where discrimination is prevalent. The VRAA's geographic coverage formula is designed to cover states with consistent patterns of discrimination. Some have argued that subjecting political subdivisions within states to preclearance based on violations committed by the state itself and by other subdivisions is not fair. However, as I explain here, doing so is both reasonable on principle and consistent with past practice.

Local jurisdictions do not exist in isolation. They are embedded within larger communities and larger jurisdictions, including states. From a legal standpoint, as I discuss further below, political subdivisions are "mere creatures of the State"; as one court noted, "no legal distinction exists between State and local officials" for the purpose of preclearance.[49] Our electoral system distributes election administration responsibility between local and state election officials. When a person votes, their selections for local, state, and federal offices are often recorded on the same ballot, and they are subject to the same policies and burdens when casting each of these votes. Perhaps more importantly, when a voter casts their ballot, they are participating in and affected by a political culture that does not necessarily stop at their town or county's borders. When this political culture has a demonstrated record of discrimination, it is not unreasonable to presume that all jurisdictions within it should be subject to preclearance.[50] Indeed, state officeholders that engage in discriminatory practices are elected by people within each of the state's political subdivisions.

Past practice under the VRA demonstrates that state coverage is a reasonable way to identify local jurisdictions where discrimination is prevalent. The VRA previously subjected states and all their political subdivisions to preclearance based on statewide turnout figures and the use of tests and devices, regardless of the specific figures and practices within each subdivision. In practice, this successfully identified those jurisdictions where discrimination was most likely to occur. A quick review of the Justice Department's objections to voting policies demonstrates that the vast majority of objections were to local-level policies in covered states.[51] For example, the Department of Justice objected to at least 104 voting changes in Alabama while preclearance was in effect in that state; all but 18 of these objections were to local- and county-level policies spread across a wide variety of political subdivisions.[52]

Peyton McCrary's analysis of the states likely to be covered under the VRAA shows that it is fair to conclude that discrimination pervades the local jurisdictions in those states as well. According to his testimony, every jurisdiction likely to be covered by the VRAA has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the entire 25-year period.[53] Take Georgia for example. Professor

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jurisdiction. To ensure that each state is treated similarly, we propose correcting for that difference, perhaps via a provision that provides, in states that administer nearly all local elections at the state level, that independent violations in each subdivision will count as independent violations.

[49] *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).
[50] I use the word "presumptively" because, as I discuss further *infra*, jurisdictions with no actual record of recent discrimination will be able to avoid preclearance through the VRAA's bailout process.
[51] U.S. Department of Justice, "Section 5 Objection Letters," accessed August 14, 2021, https://www.justice.gov/crt/section-5-objection-letters.
[52] Department of Justice, "Section 5 Objection Letters."
[53] Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards.[54] In other words, the formula captures geographic areas where discrimination is widespread, persistent, and continues to the present day, regardless of the political subdivisions.

v. *The VRA's bail-out provisions prevent over-inclusion.* The bail-out provisions in Section 4(a) of the VRA ensure that local jurisdictions where discrimination is not prevalent will not be unfairly subject to coverage. Political subdivisions that have not engaged in discriminatory conduct for ten years can petition for relief from the preclearance process even if the state as a whole and its other subdivisions are still covered.

The VRA's bail-out process is easy and efficient. Since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice.[55] All but one of these jurisdictions (the Northwest Austin Municipal Water District No. 1) did so via a consent decree with the Department of Justice, without contested litigation.[56] Since the 1982 amendments to the VRA, every jurisdiction that requested bailout succeeded.[57] According to election law expert Gerry Hebert, who represented the majority of jurisdictions that bailed out between the implementation of the 1982 amendments and *Shelby County*, the bailout process became more efficient over time as more jurisdictions used it.[58]

Congress has an opportunity to make the bailout process even more efficient by creating an administrative bailout process that largely circumvents judicial review. We recommend that Congress create an administrative process for jurisdictions to seek bailout without having to file an action in court. Political subdivisions without recent violations could file requests directly with the Department of Justice. If the Department of Justice agrees that the jurisdiction qualifies for bailout under the VRA's criteria, the Attorney General could publish a Federal Register Notice that the jurisdiction is eligible for administrative bailout. If there are no objections within a specified time period, the jurisdiction could be bailed out automatically via a second Federal Register Notice, without any judicial action. Jurisdictions that are denied or face local opposition to bailout would still be able to use the existing bailout mechanism by filing an action in the District Court for the District of Columbia. Because the objective bailout criteria from the 1982 amendments closely mirror the preclearance criteria in the VRAA, Congress could also automatically "grandfather in" all jurisdictions that bailed out under the 1982 amendments pre-*Shelby County* out of coverage, unless they commit the requisite number of new violations to subject them to future coverage.

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[54] Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.
[55] U.S. Department of Justice, "Section 4 of the Voting Rights Act," accessed August 13, 2021, https://www.justice.gov/crt/section-4-voting-rights-act.
[56] *Id*. The exception was a utility district in Texas, which was ultimately bailed out after a Supreme Court ruling in Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).
[57] Brief for Jurisdictions That Have Been Bailed Out as Amici Curiae Supporting Respondents at 14, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).
[58] J. Gerald Hebert, "An Assessment of the Bailout Provisions of the Voting Rights Act," in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*, ed. Ana Henderson (Berkeley: Berkeley Public Policy Press, 2007), https://www.law.berkeley.edu/files/ch_10_herbert_3-9-07.pdf.

III. The VRAA's Geographic Coverage Formula Is a Constitutional Exercise of Congress's Powers

The VRAA's geographic coverage formula, updating Section 4(b) of the VRA, is constitutional under Supreme Court precedent. As an initial matter, the Supreme Court has repeatedly held that the preclearance regime in Section 5 of the VRA is constitutional[59]—and it remains constitutional today. The Court has upheld preclearance under the Fourteenth and Fifteenth amendments, which give Congress significant leeway to craft broad remedial legislation to protect against racial discrimination in voting. These amendments permit Congress to remedy and to deter voting rights violations by prohibiting conduct that is not itself strictly unconstitutional.[60] Although the Court has recognized that preclearance is an extraordinary legislative approach that stretches ordinary principles of federalism,[61] it has also affirmed that such "strong medicine"[62] is necessary and constitutionally justified to address pervasive and persistent race discrimination in voting.[63]

As I discuss above and as the record before Congress makes clear, such discrimination remains pervasive today, especially in the jurisdictions that would likely be covered under the VRAA. In expressing doubt about the continued need for preclearance roughly a decade ago, the Supreme Court observed that "[v]oter turnout and registration rates now approach parity," "[b]latantly discriminatory evasions of federal decrees are rare," and "minority candidates hold office at unprecedented levels."[64] Simply put, these observations no longer hold true. Today, the registration and turnout gaps between white voters and voters of color are substantial and persistent, especially in jurisdictions likely to be covered.[65] Indeed, the gaps between Hispanic and Non-Hispanic white voters rivals the registration and turnout gaps between Black and white voters from 1965.[66] It is not rare to see states pile voting restriction after voting restriction, even as earlier restrictions are struck down by the courts in what amounts to judicial whack-a-mole.[67] And while there are more minority candidates than ever before, minorities are still dramatically underrepresented relative to their population in the halls of congress, state legislatures, and state courts, with some states trending toward less, not more, minority representation.[68] In short, the justification for preclearance remains powerful.

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[59] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of the 1965 preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the constitutionality of the 1970 preclearance regime); *City of Rome v. United States*, 446 U.S. 156 (1980) (upholding the constitutionality of the 1975 preclearance regime); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999) (upholding the constitutionality of the 1982 preclearance regime).

[60] *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 223–224 (2009).

[61] *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 211.

[62] *Shelby County*, 570 U.S. at 535.

[63] *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

[64] *See Nw. Austin Municipal Util. Dist. No. One*, 557 U.S. at 202; *see also Shelby County*, 570 U.S. at 535.

[65] Morris and Grange, "Large Racial Turnout Gap Persisted."

[66] Morris and Grange, "Large Racial Turnout Gap Persisted."

[67] *See, e.g.*, Brennan Center, "Voting Laws Roundup."

[68] *See* Katherine Schaeffer, "The Changing Face of Congress in 7 Charts," Pew Research Center, March 10, 2021, https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress/; Renuka Rayasam et al., "Why State Legislatures Are Still Very White — and Very Male," Politico, Feb. 22, 2021, https://www.politico.com/interactives/2021/state-legislature-demographics/; Janna Adelstein and Alicia Bannon, "State Supreme Court Diversity — April 2021 Update," Brennan Center, April 20, 2021, https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-april-2021-update.

The VRAA's primary mode of imposing preclearance—its geographic coverage formula—is likewise constitutional. In *Shelby County*, the Supreme Court explained that there are constraints on when and how Congress can adopt preclearance. Most significantly, the Court said that any attempt to target states for preclearance coverage "must be justified by current needs"[69] and the formula rationally related to the problem it is trying to address.[70] Relying on this principle, the *Shelby County* Court struck down the prior geographic coverage formula, finding that it was improper for Congress to rely on obsolete practices, such as literacy tests, along with outdated information, such as 1960s- and 1970s-era voter registration rates, rather than current conditions and voting rights violations.[71] The old coverage formula, the Court observed, bore no "no logical relation to the present day."[72] And the record of voting discrimination before Congress, according to the Court, "played no role in shaping" the coverage formula.[73] But even as the Court struck down the prior coverage formula, it invited Congress to craft an updated coverage formula responding to these concerns.[74] Under the Court's recent precedents, therefore, a formula that is justified by current needs and is sufficiently related to the problem it targets should pass constitutional muster.

The VRAA's updated coverage formula clearly meets that test. It is "rational in both practice and theory," as the *Shelby County* Court explained was required, and its remedies are "aimed at areas where voting discrimination has been most flagrant."[75] The VRAA's preclearance regime draws on *recent* history of racial discrimination in voting. The updated formula looks to voting discrimination over the past 25 years, and it ensures that only states that have violations in the past 10 years will be covered. This 25-year time period, which covers two redistricting cycles and up to five presidential elections, is tailored to identify those jurisdictions with a persistent record of discrimination—precisely what the Court requires to justify disparate geographic coverage. A shorter period of review would not be long enough to identify a sustained pattern of misconduct and could risk subjecting to preclearance states and jurisdictions with only sporadic violations. Indeed, as discussed above, all the potentially covered jurisdictions have a steady and consistent stream of violations, showing that the formula is in fact well-tailored.[76]

Critical features of the coverage formula, moreover, ensure that the VRAA captures only current violators, not just jurisdictions that had problems 25 years ago. Two particular features of the VRAA make that so. First, the VRAA covers jurisdictions for only ten years at a time. After ten years of coverage, jurisdictions are automatically freed from preclearance, unless their continuing violations merit renewed coverage. So, jurisdictions that improve their recent records of discrimination will systematically drop out of coverage, while jurisdictions that have increased instances of discrimination will enter it. Thus, the VRAA has an implicit sunset

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[69] *Shelby County*, 570 U.S. at 536; *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.
[70] *Shelby County*, 570 U.S. at 546 (citing *South Carolina v. Katzenbach*, 383 U.S. at 330 (concluding that original geographic coverage formula was "rational in both practice and theory" in 1966)).
[71] *Shelby County*, 570 U.S. at 531.
[72] *Shelby County*, 570 U.S. at 554.
[73] *Shelby County*, 570 U.S. at 554.
[74] *Shelby County*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions.").
[75] *Shelby County*, 570 U.S. at 546.
[76] This 25-year window is also shorter than that previously upheld by the Supreme Court. For example, the Supreme Court upheld the 1982 coverage formula that subjected jurisdictions to 25 years of preclearance based on data from 1972, meaning that certain jurisdictions were covered in 2007 based on conditions that existed more than 35 years earlier, no matter what happened in the interim. *See Lopez v. Monterey Cty.*, 525 U.S. 266, 284-85 (1999).

provision: when a jurisdiction no longer engages in a pattern of discrimination in voting, it will no longer be subject to coverage. And should the day come when voting discrimination no longer plagues our country, the VRAA will become dead letter, no longer subjecting any states or localities to preclearance. In addition to the ten-year coverage period, the VRAA's bail-out regime ensures that any jurisdiction without violations over the past decade will be able to quickly and efficiently escape preclearance. And the proposed modifications to the bail-out regime that I discuss above would further ensure that the coverage formula is laser-focused on present-day discrimination. This responsive focus on current conditions is exactly what the Court asked for in *Shelby County*.

The VRAA modernizes the coverage formula and, as the *Shelby* Court requested, uses a "narrowed scope" to reflect both current problems and progress made to date.[77] While the states that are likely to be covered under the VRAA's updated formula were all previously covered, some states that were previously covered—Alaska, for example—will likely not be covered.[78] And it is not surprising that the list of states with a past history of discrimination overlaps substantially with the list of states with current problems of persistent discrimination. On the other hand, the local jurisdictions that will be captured by this formula are largely jurisdictions that were not previously covered. They are all jurisdictions with large and growing minority populations. This shows that Congress has indeed updated the law to be dynamic and responsive to modern conditions. Clearly, the record before this Congress is playing a substantial "role in shaping the statutory formula" that will be included in the VRAA.[79]

The VRAA also tracks discrimination more directly than the coverage formula struck down in *Shelby County*. The VRAA's coverage formula "limit[s] its attention to the geographic areas where immediate action seem[s] necessary"—specifically, areas where there is actual "evidence of actual voting discrimination," that are "characterized by voting discrimination 'on a pervasive scale.'"[80] To that end, the VRAA's touchstone is not registration and turnout numbers—it is actual, proven acts of discrimination. Such acts are self-evidently "relevant to voting discrimination."[81] By linking coverage to objective findings of discrimination, the VRAA targets only those places where proven discrimination against voters of color persists. In this regard, the VRAA's coverage formula is similar to the uncontroversial bail-in provision found in Section 4 of the VRA: covering those states and localities where there are, in the words of the 1965 House Report, "pockets of discrimination."[82]

Concerns regarding the coverage formula's potential overbreadth are misplaced. As noted above, the coverage formula effectively targets geographic areas where discrimination is prevalent, and the bail-out regime would enable any political subdivision without discrimination to escape preclearance. The prior geographic coverage formula that the Supreme Court repeatedly upheld subjected all political subdivisions to preclearance based on a statewide inquiry. In any event, the Supreme Court has made clear time and again that the benefits of state

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[77] *Shelby County*, 570 U.S. at 546.
[78] Peyton McCrary, testimony on *Oversight of the Voting Rights Act.*
[79] *Shelby County*, 570 U.S. at 554.
[80] *Shelby County*, 570 U.S. at 546 (quoting *Katzenbach*, 383 U.S. at 328).
[81] *Shelby County*, 570 U.S. at 546.
[82] H.R. Rep. No. 89-439, at 13 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2444.

sovereignty do not extend to its political subdivisions.[83] This is because "the law ordinarily treats municipalities as creatures of the State."[84] On this basis, one district court held it reasonable to bring all subdivisions and a state itself into preclearance based on a pattern of violations by some of its subdivisions.[85] In reviewing a request to bail the state of Arkansas and all its subdivisions into coverage for certain electoral processes, that court found that because "[c]ities, counties, and other local subdivisions are mere creatures of the State" that the State may "create or abolish . . . at will," "no legal distinction exists between State and local officials" for the purpose of preclearance.[86] The court also found that because the use of the relevant voting practice was clearly a "pattern" and a "systematic and deliberate attempt to reduce black political opportunity," it was reasonable to hold all other jurisdictions in the state to the preclearance requirement.[87] The Supreme Court has never questioned this approach to sub-state preclearance.

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Although not the focus of my testimony, there are two other points relevant to the VRAA's constitutionality. First, in addition to the geographic coverage formula, the VRAA also features a practice-based preclearance regime with nationwide application. This practice-based preclearance regime singles out often discriminatory practices—such as changes in methods of election, annexations, polling place relocations, and interference with language assistance—for federal oversight. Because it has no specific geographic scope and does not impose continuing coverage, it does not implicate, much less offend, the principle of equal sovereignty articulated in the *Shelby* County opinion.

Second, separate and apart from the Fourteenth and Fifteenth Amendments, Congress has extremely strong powers under the Elections Clause to set the "times, places and manner" of federal elections—powers the Supreme Court has said include "authority to provide a complete code for congressional elections."[88] Congress has invoked those powers to enact 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."[89] And just a few years ago, the Supreme Court approvingly discussed how Congress has used the Elections Clause to "enact[] a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections."[90] The Elections Clause, therefore, independently justifies the VRAA to the extent that it regulates federal elections. The Supreme Court's concerns in *Shelby County*—which were based on Court's interpretation of the Fourteenth and Fifteenth Amendments—have no bearing on the constitutionality of the VRAA as it pertains to federal elections.

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[83] *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state sovereign immunity does not extend to political subdivisions).
[84] *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 365 (2009) (Breyer, J., concurring in part and dissenting in part).
[85] *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990).
[86] *Jeffers*, 740 F. Supp. at 591.
[87] *Jeffers*, 740 F. Supp. at 594-95.
[88] *Smiley v. Holm*, 285 U.S. 355, 366 (1932).
[89] *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1, 4 (2013).
[90] *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

IV. Congress Should Restore and Strengthen Section 2 of the VRA in the Wake of the Supreme Court's Recent *Brnovich* Decision

As my colleague Sean Morales-Doyle recently testified at length,[91] we also strongly urge Congress to use this opportunity to restore Section 2 of the Voting Rights Act in the wake of the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*.[92] Section 2 is critical for fighting voting discrimination in jurisdictions not subject to preclearance (and for fighting certain forms of voting discrimination in covered jurisdictions as well). The *Brnovich* decision seriously diminished Section 2's strength, making it much less effective a tool for rooting out modern discriminatory voting laws and practices.[93] In doing so, it undermined Congress's clear intent in 1982 to create a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process.[94]

There are a number of approaches to restoring Section 2 to its full strength, but they all share two basic features. First, they would codify the so-called "Senate Factors" that courts have long used to assess whether a voting law or practice results in unlawful discrimination under Section 2, and make clear that courts should consider those factors in both vote dilution (redistricting) and vote denial (vote suppression) cases.[95] Second, they would disclaim the artificial limitations the *Brnovich* opinion placed on courts considering Section 2 claims—such as the suggestion that voting practices that were in place in 1982 should be treated as presumptively valid under Section 2, and the suggestion that unequal access to one method of voting can be excused if other methods of voting are freely available. These two fixes would ensure that Section 2 comports with both Congress's original intent in amending Section 2 in 1982 and with prior practice in federal courts. The Supreme Court was clear in *Brnovich* that its ruling was based in statutory interpretation.[96] Congress can therefore easily correct the Court's misinterpretation and restore Section 2 to its intended strength.

While the Brnovich decision applies only to "vote denial" claims, it is important that any statutory fix address "vote dilution" or redistricting claims as well. Section 2 has long been a vital tool for ensuring fair electoral maps. According to a recent Brennan Center analysis, Section 2 has played a critical role in addressing discrimination in redistricting, as evidenced by the more than 20 successful redistricting cases since the 2006 reauthorization of the VRA.[97]

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[91] *Hearing on the Implications of* Brnovich v. Democratic National Committee *and Potential Legislative Responses, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Right and Elections Program, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-07/2021-07-15%20Morales-Doyle%20-%20Testimony.pdf

[92] 141 S. Ct. 2321 (2021).

[93] *See* Morales-Doyle testimony.

[94] *See* Morales-Doyle testimony.

[95] S. Rep. No. 97-417, at 28–29; *see also* Thornburg v. Gingles, 478 U.S. 30, 44–45 (1986)

[96] *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. ___, slip. op. at 14 (2021) ("Today, our statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here.").

[97] *The Use of Section 2 to Secure Fair Representation*, Brennan Center for Justice (Aug. 13, 2021), https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation.

The VRAA would work in tandem with another piece of legislation, the For the People Act (H.R.1). H.R.1 sets national standards for fair, secure, and accessible elections; the VRAA targets jurisdictions and practices with a history of discrimination. H.R.1 would override existing discriminatory state laws and practices and replace them with a fair alternative; the VRAA would establish preclearance for future such laws and practices. Both are vitally needed to strengthen our democracy.

V. Conclusion

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The VRAA's preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now. We strongly urge Congress to enact the VRAA, as well as the For the People Act, into law.

Mr. COHEN. Thank you, Ms. Weiser.

Our next witness is Maureen Riordan. Ms. Riordan is a litigation counsel for the Public Interest Legal Foundation. She joined that group in 2021 after serving 20 years as an attorney in the Civil Rights Division of the Department of Justice. During the Trump Administration, she became Senior Counsel to the Assistant Attorney General for Civil Rights.

She received her J.D. from St. Mary's, her B.S. from Seton Hall.

Ms. Riordan, you are recognized, and welcome back.

TESTIMONY OF MAUREEN RIORDAN

Ms. RIORDAN. Thank you. Good afternoon or morning, Mr. Chair, Ranking Members, and Members of the Subcommittee. Thank you again for your invitation to speak with you.

I am an attorney currently with the Public Interest Legal Foundation. It is a nonpartisan charity that is devoted to promoting election integrity and preserving the constitutional mandate that States administer their own elections.

As you said, for over 20 years, I served in the Civil Rights Division, 18 of those years as a Voting section attorney, as well as senior counsel to the AG for Civil Rights.

From 2000 until the Supreme Court's decision in *Shelby County* v. *Holder*, my primary responsibility was to review changes that were submitted for section 5 preclearance.

In my June 2021 testimony, I shared with you first-hand observations of the unethical conduct that occurred on a daily basis within the section.

This conduct included instances of twisted racialism, blatant political violations of the Hatch Act, the leaking of protected work product to media sources, targeting of African American colleagues not deemed to have acted "Black enough," disdain for the equal protection of civil rights laws for all Americans, and the impermissible collaboration with many of the advocacy groups scheduled to testify today.

You don't have to take my word for it. You can read the DOJ Inspector General's report on this point and the letter from the Justice Department to Representative Sensenbrenner.

The fact is that the Voting section attorneys have been sanctioned millions of dollars for bad behavior in section 5 enforcement. When you finish reading the report from the Inspector General, you will rightfully wonder if it is a good idea to give this office so much power over every election.

Section 5 was a temporary provision for a reason that no longer exists, and the Supreme Court made clear in *Shelby* that only certain conditions would ever justify a formula for section 5 coverage today.

Some of the touchstones listed by the Court are blatantly discriminatory evasions of Federal decrees, a lack of minority office holding, and voting discrimination on a pervasive scale.

Federal intrusion into the powers reserved by the Constitution to the States must relate to empirical circumstances if they presently exist. In *Shelby*, the Court rejected the defense notion that the preclearance requirement of section 5 would be constitutional into the future when there is never any evidence of an unconstitutional

action by a State, yet that is exactly what Congress is attempting to do through H.R. 4.

As proposed, H.R. 4 would subject jurisdictions to the rigors of section 5 for violations of the act, section 5 violations, section 2 violations, and consent decrees. It reaches back years ago—25 years, to be exact—for findings that would trigger coverage. I would ask all of us here on the panel to go back 25 years and ask yourselves if you think that was recent. I do not believe that it is.

Section 2 findings that used the "disparate impact" theory that the Supreme Court now says were not justified in the *Brnovich* case would also trigger preclearance.

The use of section 5 previous objections to trigger coverage singles out again only those States that were previously subjected to section 5 preclearance.

Those that were never subjected to section 5 have no section 5 history. As Mr. McCrary testified, those States would be Alabama, Florida, Georgia, Louisiana, Mississippi, North and South Carolina, and Texas. This is exactly the targeting of certain States that the Court in *Shelby* found to be unconstitutional.

Now, section 2 of the Voting Rights Act forbids intentional discrimination and processes that result in a discriminatory electoral outcome and in its infancy was mostly confined to vote dilution. Since 2013, which of course was the year that the *Shelby* case was decided, plaintiffs began filing section 2 vote denial claims against electoral procedures such as voter ID requirements, trying to persuade the courts to reduce the standard of evidence required for a section 2 violation.

However, based upon this misuse of section 2, there was a split in the circuit courts, and that gave the Supreme Court in the *Brnovich* case an opportunity to enunciate a true constitutional standard for courts to evaluate these claims.

Although many of my colleagues might not like the result in *Brnovich*, it was their improper use of section 2 as a replacement for section 5 that necessitated the *Brnovich* decision. If you look at the disparate impact theory, it is almost identical to the retrogression theory enunciated in section 5.

There are permanent provisions of the Voting Rights Act today that provide the tools necessary for the Department to root out intentional—

Mr. COHEN. Thank you, Ms. Riordan. Your time is up. If you want to close, you have got 5 seconds.

Ms. RIORDAN. Sure.

These tools target current discrimination and are consistent with allowable Federal oversight that was enunciated in *Shelby*.

Thank you.

[The statement of Ms. Riordan follows:]

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

Hearing on

Oversight of the Voting Rights Act: Potential Reforms

August 16, 2021

Maureen S. Riordan
Litigation Counsel
Public Interest Legal Foundation
32 E. Washington Street, Suite 1675
Indianapolis, IN 46204-3594
(317) 203-5599
mriordan@publicinterestlegal.org

Good morning Mr. Chairman, Ranking Members, and Members of the Subcommittee. Thank you for your invitation to speak with you again today. I am an attorney with the Public Interest Legal Foundation, a non-partisan charity devoted to promoting election integrity and preserving the constitutional decentralization of power so that states may administer their own elections. I have been an attorney for approximately 35 years. For over twenty years, I served in the Civil Rights Division of the Department of Justice. Eighteen of those years were spent both as a Voting Section attorney as well as Senior Counsel to the Attorney General for Civil Rights.

From August 2000 until the Supreme Court's decision in *Shelby v Holder*, my sole responsibility was to review changes in voting submitted for preclearance under Section 5. I also participated frequently in the Section's monitoring of elections throughout the country and was very often the lead attorney coordinating the monitoring exercise. During my tenure at the Department, I have been the recipient of numerous awards. I retired from the Department in January 2021.

If passed H.R. 4 will give tremendous power over the election procedures of every state and local election to extreme partisan bureaucrats within the Voting Section.

In my June 2021 testimony I shared with you my firsthand observations of the unethical conduct that occurred on a daily basis within the Voting Section. This outrageous conduct included instances of twisted racialism, blatant political violations

of the Hatch Act; destroying the reputations of colleagues hired under any Republican administration through on line blogs, the leaking of protected work product to media sources, the targeting of African American colleagues not deemed to have acted "black enough", disdain for the equal protection of civil rights laws for all Americans, the targeting of jurisdictions that staff disagree with ideologically and the impermissible collaboration with many of the advocacy groups scheduled to testify today. But don't just take my word, read the DOJ Inspector General's Report on this point, and read what the Justice Department itself has admitted in a letter to Representative Sensenbrenner. The fact is that the Voting Section attorneys have been sanctioned millions of dollars for bad behavior in Section 5 reviews and other court cases. I have attached the letter to my testimony. I would urge every member here to read the DOJ Inspector General Report entitled "A Review of the Operation of the Voting Section of the Civil Rights Division."[1]It provides instance after instance of bad behavior – often racially motivated – among section staff. When you finish reading the report, you will rightfully wonder if it is such a good idea to give this office so much power over every election.

[1] U.S. Department of Justice, Office of the Inspector General, Oversight and Review Division, A Review of the Operations of the Voting Section of the Civil Rights Division, March 2013, https://oig.justice.gov/reports/2013/s1303.pdf (accessed August 15, 2021).

Preclearance is not necessary in 2021

Sections 4 and 5 of the Voting Rights Act were intended to be temporary; they were set to expire after five years. In *South Carolina* v. *Katzenbach*, the Supreme Court upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale" and indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U.S., at 334, 335 (1966). Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e.g., Northwest Austin v. Holder*, 129 S. Ct. 2504, (2009).

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

to these empirical circumstances. Triggers that are built around political or partisan goals will not withstand Constitutional scrutiny.

According to information received from the DOJ through a FOIA request, from 2000 through 2013, (when Shelby was decided) the Voting Section received and reviewed 222,132 submissions and issued 81 objections. An objection by the Attorney General does NOT require a finding of discrimination, and in my experience, the clear majority are not based upon purposeful discrimination. The lack of objections since 2000 is very enlightening, since in 1982 Congress expanded §5 to prohibit any voting law "that has the purpose of or will have the effect of *diminishing* the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." This diminished evidentiary standard made it quite easy for the Attorney General to issue an objection. Yet, between the year 2000 and 2013, the Attorney General issued objections in less than .30 of one percent of all submissions reviewed by the Department for preclearance. Do you think that number represents massive discrimination?

Furthermore, in *Shelby*, the Court rejected the dissent's notion that the preclearance requirement of the VRA would be constitutional into the future until there is no evidence of unconstitutional action by States. Yet, that is exactly what Congress is attempting to do through H.R. 4.

Proposed Coverage Formula is Unconstitutional under Shelby

H.R. 4 would subject a jurisdiction to the rigors of Section 5 for violations of H.R. 4, previous violations of Section 5, previous Section 2 violations, and Consent decrees. Previous Section 2 findings that used a "disparate impact" theory, would fail today based upon the recent decision in the *Brnovich* case. Yet, under the proposed formula such faulty findings would be used to justify subjecting a jurisdiction to preclearance. Furthermore, the proposed formula's use of previous Section 5 objections to trigger coverage would single out, only those states previously subjected to Section 5 preclearance. Clearly, this results in the same unequal treatment of these States which was condemned by the Court in *Shelby*. As the Supreme Court cautioned in *Shelby,* the Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command, **but** the Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, 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. Yet the proposed formula does just that by reaching back years ago to bring a jurisdiction within the coverage formula. Furthermore, the use of previous Section 5 objections to trigger coverage unconstitutionally targets the same States that were subject to preclearance under the last Section 4 formula. States not previously subject to Section 5 will have no history to

trigger coverage. Such disparate treatment will again render the proposed formula unconstitutional.

Any formula must be forward looking to be consistent with *Shelby.* Any strict "geographic formula" could never pass constitutional muster, regardless of a practiced based coverage formula that could accompany it. Quite simply, the proposed formula will never pass constitutional muster.

No need for a Statutory Standard for Vote Denial Claims under Section 2

Claims that the *Brnovich* decision "gutted Section 2" are absolute nonsense. In *Brnovich,* the Supreme Court set forth a list of considerations by which vote denial claims should be evaluated. The list is not exclusive and does not prevent courts from considering additional factors when evaluating a vote denial claim

Section 2 of the Voting Rights Act forbids intentional discrimination. It also proscribes processes that "result" in a discriminatory electoral outcome. The Act provides in relevant part that a state or jurisdiction's civil liability for a "denial or abridgement of the right to vote is established, if based upon the totality of the 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 class of citizens…in that it's members have less opportunity than other members of the electorate to participate in the right to vote. In its infancy, Section 2

"results" cases typically involved a claim of "vote dilution" and targeted at-large or multi-member electoral systems that deprived a racial minority of effective representation. Seminal cases in vote dilution under Section 2 include *Thornburg v Gingles*, 478 U.S. 30, (1986) and *White v. Register*, 412 U.S. 755, (1973), and provided the appropriate analysis to evaluate a "results" claim based upon vote dilution. However, prior to the recent *Brnovich* case, the Supreme Court had not resolved the legal basis by which courts should evaluate a "results" claim based upon vote denial. That is because vote denial claims were rarely made prior to 2013.[2] If the date seems familiar it is because the Shelby case was decided in 2013.

After Shelby plaintiffs began filing Section 2 "vote denial" claims against electoral procedures such as voter identification requirements, trying to persuade courts to lower the Section 2 evidentiary standard to a "disparate impact" standard, almost identical to the retrogression standard of Section 5.[3] This standard would make it almost impossible for a state to ever make changes to its election laws, and has been recognized for what it is… an attempt to use vote denial cases to challenge voter integrity reforms

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[2] 997 F. Supp. 2d 322, 346 (M.D.N.C. 2014)

[3] *See* Adams, J. Christian (2015) "Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not," *Touro Law Review*: Vol. 31 : No. 2 , Article 8.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol31/iss2/8

using Section 2 as a substitute for Section 5.[4] The use of this theory of liability created a conflict among the circuit courts. *Brnovich* presented the Supreme Court with an opportunity to enunciate a constitutional standard for courts to evaluate a vote denial claim moving forward. Claims that the *Brnovich* decision "gutted Section 2" are absolute nonsense. In *Brnovich,* the Supreme Court set forth a list of considerations by which vote denial claims should be evaluated. The list is not exclusive and does not prevent courts from considering additional factors when evaluating a vote denial claim.

While the Department and many of my colleagues here may not like the result in *Brnovich*, it was their improper use of Section 2 as a replacement for Section 5 that necessitated the *Brnovich* decision.[5]

Practice Based Preclearance:

H.R 4's practice-based preclearance triggers will require most electoral changes to be submitted for preclearance, no matter how inconsequential the change may be. For example, a polling place change does not just include a change in physical address. It

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[4] Memorandum #119 (2014), http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act. *But see* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143 (2015).

[5] Noel H. Johnson, Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?, 12 *Duke Journal of Constitutional Law & Public Policy* 1-21 (2017)
Available at: https://scholarship.law.duke.edu/djclpp/vol12/iss3/1

includes ANY change to the polling place. If a polling place moved from the school gym to the school cafeteria, the lawyers in the Voting Section would have to review and approve or reject the change. Voter registration changes include office hour openings from 8:30 to 8:25 would have to be approved. Any change in polling place signage font would have to be approved. Any change in location of the office of the Registrar from the old city hall to the new city hall literally across the street, changes in the numbering of precinct numbers that do not affect location, all of these would have to be approved. Additionally, every local town annexation must be submitted and approved. These types of changes represent the majority of those reviewed. The Attorney General does not have the burden of establishing a discriminatory purpose or effect to issue an objection under Section 5. The burden is on the jurisdiction submitting the change to prove that the proposed change does not have a discriminatory purpose or discriminatory effect. In essence, the submitting jurisdiction must prove a negative.

Present Tools Exist to Stop Discrimination

Permanent provisions of the Voting Rights Act such as Section 2 still prohibit discrimination and provide the Justice Department with the ability to challenge election procedures. In June of this year DOJ announced was suing the State of Georgia. Yet the Department has only brought 5 Section 2 cases since the *Shelby* decision in 2013. If rampant discrimination in voting actually exists why hasn't the DOJ brought hundreds of cases challenging these ills?

Language minority provisions such as Section 203 and Section 4(3) were not affected by the Shelby decision. Section 3(c) the "bail in provision", allows a judge to order a state or subdivision to submit to the preclearance provisions, if it finds that the jurisdiction intentionally discriminated against minority voters. It is also consistent with the *Shelby* mandate that federal oversight of state or local elections be closely matched by need. However, as proposed, H.R. 4 would also allow a jurisdiction to be subjected to the rigors of Section 3 (c) for violations of H.R. 4, violations of Section 5, or when a jurisdiction has agreed to settle a case through a consent decree. None of the new allowable triggers require a showing of intentional discrimination and are inconsistent with permissible federal oversight as outlined in the *Shelby* decision. Lastly, but of great importance is Section 11(b), which prohibits intimidation, threats, or coercion directed towards voters or those aiding voters. This section is also available post Shelby, yet there has not been a case brought by the Department through 11(b) since the case against the New Black Panther Party in 2009.

Twisted Injunction Standards

The new "evidentiary standard" for obtaining a preliminary injunction proposed in H.R. 4 sets federal law on its head. This is an intrusion into the exclusive province of the courts. The Supreme Court has held that a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in

his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20, (2008). The Court further noted that because a preliminary injunction is such an extraordinary remedy, it is NEVER awarded as a right., and that courts should pay particular regard for the public interest. *Winter* at 24. The new standard contained in H.R. 4 not only disregards the public interest held by the State, H.R. 4 actually prohibits the court from considering the interest of the State in any application for the preliminary injunction.

Thank you for your time and attention.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 12, 2006

The Honorable F. James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter dated February 28, 2006, requesting information about the Civil Rights Division. You first requested information about the Division's procedures in Voting Rights Act cases.

The Voting Section of the Civil Rights Division employs a consistent and straightforward decision-making process. Regardless of the type of decision to be made – whether to file a lawsuit, to make a determination under Section 5, or to provide legal arguments -- the decision-making process begins with a careful analysis of the facts and the legal elements at issue. Justice Department attorneys have great legal skill and knowledge. They are expected to identify all of the relevant facts, legal issues and other concerns that bear upon a law enforcement decision. This process often begins with a search for relevant and reliable evidence. Voting Section attorneys interview potential witnesses; locate, authenticate and review documents; corroborate potential facts; and track back from the many second- and third-hand allegations, regularly received by the Section, in order to identify trustworthy evidence. After identifying and obtaining evidence that bears upon a particular course of action, Section attorneys identify and explore potential defenses. They are responsible for making recommendations that follow the law as written by the Congress and interpreted by the judiciary. Varied and sometimes contradicting views are encouraged. Only after this careful process, does a matter move forward for decision.

Each stage of the decision-making process is interactive. The activity of Department attorneys is guided and encouraged at every step by more senior attorneys, typically Special Litigation Counsel and Deputy Section Chiefs, as well as by the Chief of the Voting Section. Each of these supervisors is a career attorney, as well, with significant experience in civil rights and voting rights litigation. The current Voting Section Chief has been with the Civil Rights Division for over 30 years. The Section Chief is responsible for presenting the Section recommendation to Division leadership. Under 28 C.F.R. 51.3, the Chief of the Voting Section

has the authority to preclear state voting redistricting plans submitted under Section 5 of the Voting Rights Act.

The Department of Justice rightly expects the highest standards and strict adherence to the law by its attorneys. Nowhere is such fidelity more important than when addressing the sensitive areas touched on by the Voting Section, where we strive to maintain the highest standards of professionalism.

Citing *Johnson v. Miller,* 864 F. Supp. 1354 (S.D. Ga. 1994); *Miller v. Johnson,* 515 U.S. 900 (1995); *Abrams v. Johnson,* 521 U.S. 74 (1997); and *United States v. Jones,* 125 F.3d 1418 (11th Cir. 1997), you also requested information of any "instances, past or present, where the Civil Rights Division's legal work was either admonished in a court opinion or where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit." The following cases arguably contain "admonish[ments]" similar in degree to those in the cases that you cited or involve the payment of attorneys' or settlement fees for purportedly unfounded litigation. While the Department fully respects and accepts the court rulings, judicial statements, dispositions and payments in these matters, we do not concede by listing them here that each was warranted.

1. *Johnson v. Miller.* In 1992, the Voting Section of the Civil Rights Division precleared a legislative redistricting plan in Georgia, after rejecting two previous plans because there were only two majority black districts. In 1994, voters challenged the constitutionality of the state's Eleventh Congressional District, contending that it was a racial gerrymander, and sought to enjoin its use in congressional elections. Shortly after the case was filed, the Voting Section intervened as a defendant. The plaintiffs prevailed. 864 F. Supp. 1354 (S.D. Ga. 1994) (Copy of opinion enclosed as Attachment A). As relevant to your request, the court stated, "[d]uring the redistricting process, [the ACLU attorney] was in constant contact with . . . the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. . . . The Court was presented with a sampling of these communiques, and we find them disturbing. It is obvious from a review of the materials that [the ACLU attorney's] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." *Id.* at 136; *see also id.* (Voting Section attorneys' "professed amnesia [about their relationship with the ACLU attorney] less than credible"); *id.* at 1364 ("Though counsel for the United States objected to Plaintiffs' 'characterization that the Justice Department "suggested things" [to the General Assembly],' it is disingenuous to submit that DOJ's objections were anything less than implicit commands.") (citation omitted); *id.* at 1367-68 ("the Department of Justice had cultivated a number of partisan 'informants' within the ranks of the Georgia

legislature". . . ."We find this practice disturbing."); *id.* at 1368 ("the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment"); *id.* ("It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.").

In 1994, the United States appealed *Johnson v. Miller* to the U.S. Supreme Court, arguing that evidence of a legislature's deliberate use of race in redistricting is insufficient to establish a racial gerrymander claim. The Court found for the plaintiffs-appellees. *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (Copy of opinion enclosed as Attachment B). As relevant to your request, the Court stated, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy and seems to concede its impropriety, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans." *Id.* at 924-25 (citations omitted). *See also id.* at 926 ("The Justice Department's maximization policy seems quite far removed from [Section 5 of the VRA]'s purpose."); *id.* at 927 ("the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under [Section] 2 of the Fifteenth Amendment into tension with the Fourteenth Amendment.") (citation omitted). In 1995, the Department agreed to pay $202,000 to settle plaintiffs' interim claims for attorneys' fees. In 1997, the Department agreed to pay an additional $395,000 to settle plaintiffs' remaining claims for attorneys' fees, expenses and costs.

2. *Hays v. State of Louisiana.* In 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan for Louisiana. The same year, voters sued Louisiana, contending, among other things, that the plan constituted impermissible gerrymandering in violation of the Equal Protection Clause. The Voting Section initially participated as *amicus curiae* in September 1992 and subsequently intervened as a defendant in July 1994. The district court held the plan to be unconstitutional. 839 F. Supp. 1188 (W.D. La. 1993) (Copy of opinion enclosed as Attachment C). As relevant to your request, the court stated, "neither Section 2 nor Section 5 of the Voting Rights Act justify the [U.S. Attorney General's Office's] insistence that Louisiana adopt a plan with two safe, black majority districts." *Id.* at 1196 n.21; *see also id.* (DOJ's position was "nothing more than...'gloss' on the Voting Rights Act – a gloss unapproved by Congress and unsanctioned by the courts."); *id.* ("[the Assistant Attorney General's Office] arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies.").

Louisiana enacted a new redistricting plan. The district court struck down the revised plan. 936 F. Supp. 360 (W.D. La. 1996) (*per curiam*) (Copy of opinion enclosed as Attachment D). As relevant to your request, the court stated, "the Justice Department impermissibly encouraged -- nay, mandated -- racial gerrymandering." *Id.* at 369. The court also noted that "the Legislature succumbed to the illegitimate preclearance demands of the Justice Department." *Id.* at 372; *see also id.* at 363-64, 368-70. In 1999, the Department agreed to pay $1,147,228 to settle claims for attorneys' fees, expenses, and costs.

3. *Scott v. Department of Justice.* On August 12, 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan in Florida. In 1994, voters sued the Department and the State of Florida, contending that the state's configuration for a certain Senate district violated the Equal Protection Clause. After the Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), and *United States v. Hays*, 515 U.S. 737 (1995), the parties agreed to proceed by mediation. The district court approved the mediated settlement (which did not address attorneys' fees) in March 1996. *Scott v. Department of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996). In 1999, the Department and plaintiffs settled plaintiffs' claims for attorneys' fees, expenses and costs for $95,000.

4. *United States v. City of Torrance.* In 1993, the Employment Litigation Section of the Civil Rights Division brought suit, alleging that the City of Torrance, California, had engaged in a pattern or practice of discrimination in its hiring of new police officers and firemen. The defendant prevailed. The district court concluded that the Division's actions violated Rule 11 of the Federal Rules of Civil Procedure, or alternatively 42 U.S.C. 2000e-5(k), and awarded attorneys' fees. The Ninth Circuit affirmed the district court. 2000 WL 576422 (9th Cir. May 11, 2000) (Copy of opinion enclosed as Attachment E). The court stated that attorneys' fees may be awarded in a Title VII case when the plaintiff's action is "frivolous, unreasonable, or without foundation." *Id.* at *1 (citation quotation marks omitted). As relevant to your request, the court stated, "[i]n this case, the record amply supports the district court's determination that this standard was satisfied, that is, 'that the Government had an insufficient factual basis for bringing the adverse impact claim' and 'that the Government continued to pursue the claim . . . long after it became apparent that the case lacked merit.'" *Id.* The Ninth Circuit affirmed the district court's award, in 1998, of $1,714,727.50 in attorneys' fees.

5. *United States v. Jones.* In 1993, the Voting Section of the Civil Rights Division sued county officials in Dallas County, Alabama, under Section 2 of Voting Rights Act and the Fourteenth and Fifteenth Amendments. The Division alleged that at least fifty-two white voters who did not reside in a black-majority district

were improperly permitted to vote in that district. The defendants prevailed and the district court ordered the government to pay attorneys' fees under the Equal Access to Justice Act ("EAJA"), 22 U.S.C. 2412(d)(1(A). The Eleventh Circuit affirmed. As relevant to your request, the court stated that a "properly conducted investigation would have quickly revealed that there was no basis for the claim that the Defendants were guilty of purposeful discrimination against black voters. . . . The filing of an action charging a person with depriving a fellow citizen of a fundamental constitutional right without conducting a proper investigation of its truth is unconscionable. . . . Hopefully, we will not again be faced with reviewing a case as carelessly instigated as this one." 125 F.3d 1418, 1431 (11th Cir. 1997) (Copy of opinion enclosed as Attachment F). In 1995, the district court ordered the Department to pay $73,038.74 in attorneys' fees and expenses. In 1998, the appellate court ordered the Department to pay an additional $13,587.50 in attorneys' fees.

6. *Motoyoshi v. United States.* In 1993, the Office of Redress Administration of the Civil Rights Division denied compensation to a Japanese-American man relocated during World War II. He filed suit challenging the denial. The district court granted the plaintiff's motion for summary judgment. As relevant to your request, the court stated that the Department's "failure to consider and determine plaintiff's eligibility for compensation . . . was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 33 Fed. Cl. 45, 52 (1995) (Copy of opinion enclosed as Attachment G). In 1995, the court ordered the Department to pay $8,437 in attorneys' fees under the EAJA.

7. *United States v. Tucson Estates Property Owners Association, Inc.* In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought suit alleging that an owners' association in Tucson violated the Fair Housing Act. The defendants prevailed on summary judgment. *United States v. Tucson Estates Prop. Owners Ass'n, Inc.* No. 93-503, slip op. (D. Ariz. Nov. 7, 1995) (Copy of order is enclosed as Attachment H). As relevant to your request, the court stated, "it is not a reasonable *legal* basis that the United States lacked in this case; it was the *factual* basis upon which its legal theory rested that was unreasonable. Based on the totality of the circumstances present prior to and during litigation, this Court finds that the United States' position was not substantially justified." *Id.* at 5 (emphasis in original) (citation and quotation marks omitted). In 1995, the court ordered the Department to pay $150,333.07 in attorneys' fees and expenses under the EAJA.

8. *United States v. Laroche.* In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought a Fair Housing Act suit in federal district court in Oregon. The defendants prevailed on summary judgment. The court awarded

defendants $17,885.78 in attorneys' fees and costs. The United States appealed. During the pendency of the appeal, the parties entered into a settlement and filed a joint stipulation of dismissal on April 24, 1995. The district court withdrew and rendered void its rulings on summary judgment and attorneys' fees and dismissed the case on December 28, 1995.

9. *Smith v. Beasley* and *Able v. Wilkins* (consolidated cases). In 1994, the Voting Section of the Civil Rights Division precleared South Carolina State House districts, and then precleared State Senate Districts in 1995. Voters challenged the constitutionality of South Carolina House and Senate districts created by the state legislature in two separate actions, which were consolidated. The Voting Section intervened as a defendant in the House action on May 3, 1996. On September 27, 1996, the court found that six of nine House districts and all three Senate districts were unconstitutional as they were drawn with race as the predominant factor. As relevant to your request, the court stated, "[t]he Department of Justice's advocacy position is evidenced in many memoranda, letters and notes of telephone conversations, but most particularly by the apparent epidemic of amnesia that has dimmed the memory of many DOJ attorneys who were involved with South Carolina's efforts to produce a reapportionment plan that would pass preclearance." 946 F. Supp. 1174, 1190-91 (D.S.C. 1996) (Copy of opinion enclosed as Attachment I); *see also id.* at 1208 ("[t]he Department of Justice in the present case, as it had done in *Miller*, misunderstood its role under the preclearance provisions of the Voting Rights Act. Here, Department of Justice attorneys became advocates for the coalition that was seeking to maximize the number of majority [black voting age population] districts in an effort to achieve proportionality. . . . It is obvious that the Voting Section of the Department of Justice misunderstands its role in the reapportionment process."). In 1996, the Department settled plaintiffs' claims for attorneys' fees and costs for $282,500.

10. *United States v. Weisz.* In 1994, the Housing and Civil Enforcement Section of the Civil Rights Division initiated a religious discrimination suit under the Fair Housing Act. The district court granted defendant's motion for judgment on the pleadings. 914 F. Supp. 1050, 1055 (S.D.N.Y. 1996). In 1997, the Department settled the issue of attorneys' fees and costs for $7,857.50.

11. *Abrams v. Johnson.* In 1996, the United States appealed a later proceeding in *Johnson v. Miller* to the Supreme Court, alleging that the district court's plan did not defer to the legislative preferences of the Georgia Assembly because it had only one majority-black district when all previous Assembly plans had two, and that it diluted minority voting strength by not adequately representing the voting interests of Georgia's black population, in violation of the Voting Rights Act. The Court found for the plaintiffs-appellees. 521 U.S. 74 (1997) (Copy of opinion

> enclosed as Attachment J). As relevant to your request, the court made a number of statements. *E.g., id.* at 90 ("Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan; the unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged upon the trial court in the remedy phase were flawed by evidence of predominant racial motive in their design."); *id.* at 93.

In total, the Division was ordered to pay or agreed to pay $4,107,595.09 from 1993 to 2000 in the eleven cases specified above. In searching for instances where the "Division's legal work" has been "admonished in a court opinion," we have diligently searched through both published and unpublished judicial decisions available on electronic databases. In searching for instances "where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit," we also have diligently searched through financial records maintained by the Division for such expenditures of government funds. We note that these records are only complete for the past thirteen fiscal years. Consistent with your request, our summary does not include cases where the Department was only assessed costs pursuant to Fed. R. Civ. P. 54(d)(1), which provides for the prevailing party in an action to be awarded costs other than attorneys' fees by the losing side "as of course." Please be aware, however, that the amounts paid by the Division in seven of the eleven cases listed above may include such costs because those settlement agreements or court orders did not separate costs from attorneys' fees. In the event that we discover any additional information responsive to your February 28, 2006, letter, we will supplement this letter in a timely manner.

Thank you for the opportunity to address the work of the Civil Rights Division. Please do not hesitate to contact the Department of Justice if we can be of further assistance in this or any other matter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Attachments

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Excerpts about Voting Section partisan bias in 1990's Voting Rights matters.

I. Federal District Court Opinions

"During the redistricting process, Ms. Wilde [of the ACLU] was in constant contact with both Keith Borders and Thomas Armstrong, the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. See Tr. IV, at 39, 231. [transcript of testimony] There were countless communications, including notes, maps, and charts, by phone, mail and facsimile, between Wilde and the DOJ team; those transactions signified close cooperation between Wilde and DOJ during the preclearance process. The Court was presented with a sampling of these communiqués, and we find them disturbing."

- Johnson v. Miller, 864 F.Supp. 1354, at 1361-2 (SD Ga. 1994).

"It is obvious from a review of the materials that Ms. Wilde's [of the ACLU] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities. *See, e.g.,* Pltf.Exh. 57H, 57I. DOJ was more accessible--and amenable--to the opinions of the ACLU than to those of the Attorney General of the State of Georgia. *See* Pltf.Exh. 52, 54, 57, 57A-M, 165; Tr. V, at 3-4. It is clear from our proceedings that Ms. Wilde discussed with DOJ lawyers the smallest details of her plan, constantly sending revisions, updates, and data throughout the period from October, 1991 to April, 1992; she occasionally sent documents to DOJ lawyers 'per your request.'"

- Johnson v. Miller, 864 F.Supp. 1354, at 1362 (SD Ga. 1994).

"Ms. Wilde [of the ACLU] worked with DOJ in other ways: During the reapportionment process for Georgia's House districts, DOJ attorney Nancy Sardison told Mark Cohen, the Senior Assistant Attorney General for Georgia, to meet with Ms. Wilde to revise a majority-black House district. Mr. Cohen had presumptuously thought the district satisfactory, but was dutifully informed by Ms. Sardison that Ms. Wilde was 'still having some problems with it.' Tr. V, at 3."

- Johnson v. Miller, 864 F.Supp. 1354, at 1362 (SD Ga. 1994).

"*Contrary to Mr. Armstrong's [a Department of Justice attorney] claims at trial,* the max-black proposal was not merely 'one of the alternatives DOJ considered,' and Ms. Wilde was not simply one of various advocates. Her work was of particular importance to DOJ lawyers, whose criteria for and opinions of Georgia's submissions were greatly influenced by Ms. Wilde [of the ACLU] and her agenda.

- Johnson v. Miller, 864 F.Supp. 1354, at 1362 (SD Ga. 1994)(emphasis added).

"Alas, it is true that none of the DOJ attorneys testifying at trial admitted to the influence of Ms. Wilde and her max-black plan on their preclearance deliberations. *This Court finds it distressing that Messrs. Borders and Armstrong lacked any significant memory of important elements of the 1991-92 preclearance saga.* Both of them--especially Mr. Borders--intimately involved with the redistricting for months, just "don't recall" basic details of either important meetings or the preclearance process. *See, e.g.,* Tr. IV, at 8-51; 145-150. Those in far more peripheral roles had no great difficulty remembering the events central to our inquiry. [FN3] Frankly, based on the factual record and trial testimony, the Court finds Borders' and Armstrong's professed amnesia less than credible. Luckily, the surrounding evidence speaks quite clearly.

FN3. The Court finds it particularly difficult to believe that Borders simply "doesn't remember" why the Voting Section would have told the General Assembly to extend the Eleventh District all the way down to Chatham County."

- Johnson v. Miller, 864 F.Supp. 1354, at 1362 (SD Ga. 1994)(emphasis added).

"No one in the General Assembly doubted that any revised submission must include the changes 'suggested' by DOJ. Though counsel for the United States objected to Plaintiffs' 'characterization that the Justice Department 'suggested' things,' Tr. IV, at 120, *it is disingenuous to submit that DOJ's objections were anything less than implicit commands.* No one in the General Assembly--including the Black Caucus--thought so, and DOJ lawyers did nothing to dissuade legislators of that notion. [FN8]
FN8. In order to further improve the chances of preclearance, Georgia legislators and staff met with DOJ officials in Washington on at least one occasion. At one such meeting, after the first DOJ rejection and while the second submission was pending, the legislators were informed that their economic and political rationales for the proposed districts were "pretextual," and told to subordinate their economic and political concerns to the quest for racial percentages."

- Johnson v. Miller, 864 F.Supp. 1354, at 1364 (SD Ga. 1994)(emphasis added).

"During our hearings it became clear that the Department of Justice had cultivated a number of partisan 'informants' within the ranks of the Georgia legislature, including at least one State Senator--a congressional candidate no less--and an aide to Lieutenant Governor Howard. *See* Response of United States To Plaintiffs' Statement Concerning Confidential Informants, July 7, 1994. DOJ regularly received from them information on the General Assembly's redistricting sessions. DOJ apparently read federal regulations as condoning this behavior, but misconstrued the spirit of those provisions.

See 28 C.F.R. § 51.29. They were intended to facilitate outside notification to DOJ of impending changes in voting procedure in jurisdictions covered by section 5, since DOJ could not closely monitor all such areas on a continual basis. The regulations require DOJ to respect requests for anonymity, in order to encourage individuals to report. The events in this case do not reflect the regulations' intended purpose. Politicians and other parties in interest found a discrete forum. Here, 'whistleblowers' became 'secret agents.' They reported to DOJ throughout the section 5 review process. DOJ used that information even to question the integrity of State legislators who could not know their accusers.

- Johnson v. Miller, 864 F.Supp. 1354, at 1367 (SD Ga. 1994).

"Keith Borders testified that 'allegations are brought to our attention and then we go back and ask individuals about those allegations.' Tr. IV, at 9. One of DOJ's informants informed Mr. Borders that State Senator Eugene Walker was a 'quintessential Uncle Tom,' and 'the worst friend of blacks in Georgia. Tr. IV, at 27. During the first meeting between a Georgia delegation and Voting Section lawyers, there was a confrontation involving Borders and Walker, although Borders 'doesn't recall' whether he challenged Senator Walker with those unattributable comments. However, either these anonymous "allegations" or some other suggestion so offended Senator Walker that he refused to attend further meetings with DOJ staff. *1368 DOJ's agents provided an irrebuttable source of intelligence of which the General Assembly was completely unaware. *We find this practice disturbing.*"

- Johnson v. Miller, 864 F.Supp. 1354, at 1367-8 (SD Ga. 1994)(emphasis added).

"It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear: the close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in Mr. Dunne's objection letters, and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared, bespeak a direct link between the max-black plan formulated by the ACLU and the preclearance requirements imposed by DOJ. *Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment.*"

- Johnson v. Miller, 864 F.Supp. 1354, at 1368 (SD Ga. 1994)(emphasis added).

"A poignant example: in a notable *faux pas,* DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press. DOJ had notified the ACLU of its

impending objection; the ACLU then notified the Black Caucus. This unfortunate spate of gossip created the impression that the ACLU and the Black Caucus wielded significant influence with DOJ's Civil Rights Division and significant control over Georgia's redistricting efforts. The State's leaders were understandably nonplussed. The ACLU was exuberant. Georgia officials and citizens were mystified. *We are simply troubled by the result. It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.*"

- Johnson v. Miller, 864 F.Supp. 1354, at 1368 (SD Ga. 1994)(emphasis added).

II. United States Supreme Court Opinions

"A majority of the District Court panel agreed that the Eleventh District was invalid under *Shaw*, with one judge dissenting. 864 F. Supp. 1354 (SD Ga. 1994). After sharp criticism of the Justice Department for its use of partisan advocates in its dealings with state officials and for its close cooperation with the ACLU's vigorous advocacy of minority district maximization, the majority turned to a careful interpretation of our opinion in *Shaw*."

- Justice Kennedy in Miller v. Johnson, 515 U.S. 900, 909 (1995), describing the District Court opinion in Johnson v. Miller.

"In *Miller*, we found that when the Georgia Legislature yielded to the Justice Department's threats, it also adopted the Justice Department's entirely race-focused approach to redistricting--the max-black policy. 515 U.S., at 917-918, 115 S.Ct., at 2488-2489. Using the precleared plan as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting."

- Justice Kennedy in Abrams v. Johnson, 521 U.S. 74, 85-6 (1997).

"Against these assertions, appellees point to the testimony of Ms. Meggers, Director of Reapportionment Services for the Georgia General Assembly, that the second majority-black district was originally designed as a concession to the Justice Department's max-black policy. After being presented with a proposed map of the Eleventh District, 'the initial response in our office was that's ridiculous.' "It was said that it doesn't make any sense and I said maybe not, but ... we may get in trouble with the Justice Department if we don't draw it ... like that and I think that was ... the main reason" it was originally drawn. Tr. 431-432 (Oct. 30, 1995). Ms. Meggers referred to an 'understanding' between the leadership in the legislature and the black caucus that a second majority-black district would be created. *Id.*, at 431. The testimony of several legislators indicated that any such understanding was arrived at in the shadow of the

Justice Department's max-black goal, and that all other policies were to give way to this racial consideration."

- Justice Kennedy in Abrams v. Johnson, 521 U.S. 74, 86-7 (1997).

" There is strong support, then, for finding the second majority-black district in Georgia's 1991 unprecleared plan resulted in substantial part from the Justice Department's policy of creating the maximum number of majority-black districts. It is not Justice Department interference *per se* that is the concern, but rather the fact that Justice Department pressure led the State to act based on an overriding concern with race."

- Justice Kennedy in Abrams v. Johnson, 521 U.S. 74, 87-8 (1997).

"Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan; the unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged upon the trial court in the remedy phase were flawed by evidence of predominant racial motive in their design. In these circumstances, the trial court acted well within its discretion in deciding it could not draw two majority-black districts without itself engaging in racial gerrymandering."

Justice Kennedy in Abrams v. Johsnson, 521 U.S. 74, 90 (1997).

Mr. COHEN. You are welcome.

Our next witness is Tom Saenz. Mr. Saenz is President and General Counsel of the Mexican American Legal Defense and Education Fund, the acronym MALDEF, a position he has held since August of 2009. He was also with MALDEF for 12 years and for 8 years he taught civil rights litigation as an adjunct professor at the University of Southern California School of Law.

He received his B.A. and his undergraduate degree both from Yale, both with honors.

We are honored to have you. You are recognized for 5 minutes.

TESTIMONY OF THOMAS A. SAENZ

Mr. SAENZ. Thank you, Mr. Chair, Ranking Member, and Members of the Subcommittee. I am President and general counsel of MALDEF, which for 53 years has worked to promote the civil rights of all Latinos living in the United States.

An essential part of pursuing that mission has always been seeking to protect the voting rights of Latinos in this country. As a result, MALDEF has ample experience in enforcing the Voting Rights Act, section 2, section 5, and section 203.

We have done well over 100 cases under the Voting Rights Act. I have to say that as often as not that has been against the critically important State of Texas or one of its subdivisions.

Our experience tells us that it is imperative that Congress Act to restore the use of preclearance as a vigorous tool in enforcing the voting rights of Latinos in this country.

As you will readily understand, given last week's news from the Census Bureau indicating the incredible vote of the Latino community, and in particular, the Latino voting community across the country, where more than half of this country's total population growth in the last decade emanated from the Latino community, you can understand why we anticipate extreme challenges in enforcing voting rights for Latinos throughout the country in years to come.

The simple fact is rapid and significant demographic change ongoing in this country means that too many jurisdictions will hit a tipping point, as you, Mr. Chair, characterized it, where they will perceive the growth in the Latino vote as a threat to those currently in power.

That necessitates a tool that is efficient and effective in preventing those who hit that tipping point from reacting by seeking to restrict the voting rights of ascendant minority voting groups, including in particular the Latino community.

It is essential that we again use preclearance effectively to address this challenge.

Now, there are some who have previously expressed the view or the preference that the Supreme Court should strike down the entirety of the preclearance regime. As in *Shelby County* it did not do that. It struck down a coverage formula and invited the reintroduction of preclearance through a new and invigorated coverage formula.

Today, I urge that Congress move forward in enacting a two-part coverage formula, one that includes geographic coverage for those jurisdictions, including many in and including the State itself of

Texas, which the Latino community, as I mentioned previously, has often had to challenge in its attempts to restrict the right to vote of Latinos and other minority voters.

That geographic coverage ensures that those who have been recalcitrant—and often crafty—in seeking to prevent minorities from exercising their right to vote would be subject to a very effective and efficient preclearance process to determine whether those new proposals can comply with the Voting Rights Act.

I urge the Congress to also include the complementary practice-based coverage on which this Subcommittee voted a few weeks ago. This would permit ensuring that new jurisdictions, without having had the opportunity to acquire a history of violating voting rights but that adopt practices that history shows have frequently been used in the past in other jurisdictions precisely to stem the growth of minority voting power, would also be subject to preclearance.

I have stated previously MALDEF's extensive experience tells us conclusively that section 2, while critically important, is not an adequate substitute by itself for the use of preclearance. Section 2 litigation is expensive. It is time consuming. It too often cannot put in place a remedy prior to the occurrence of one or more elections despite challenged voting changes being in place for those elections.

Preclearance is critically important as a device for alternative dispute resolution, or ADR. Like all good ADR, it ensures that our Federal courts are not inundated with too many cases under the Voting Rights Act by putting in place an efficient alternative decisionmaker in the preclearance process.

It is one of the great ironies that political forces that support ADR, mandatory ADR, and other circumstances have failed to embrace it sooner. I embrace it and urge Congress to recognize how important ADR in the form of preclearance is to ensuring that challenges presented by rapidly changing demography and the reaction to unprecedented participation in the last election in the form of new attempts to suppress the vote can be answered effectively and efficiently under our Constitution.

Thank you.

[The statement of Mr. Saenz follows:]

Testimony of Thomas A. Saenz
President and General Counsel, MALDEF

Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary

Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms.

August 16, 2021

Good morning. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which has, for 53 years now, worked to promote the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where we were founded; and Washington, D.C. We will soon open a new regional office in Seattle. I appear before you remotely today from the city of Los Angeles.

MALDEF focuses its work in five subject-matter areas: education, employment, immigrant rights, voting rights, and freedom from open bias. Since its founding, MALDEF has worked diligently to secure equal voting rights for Latinos, and to promote increased civic engagement and participation within the Latino community, as among its top priorities. MALDEF played a leading role in securing the full protection of the federal Voting Rights Act (VRA) for the Latino community through the 1975 congressional reauthorization of the 1965 VRA. In court, MALDEF has, over the years, litigated numerous cases under section 2, section 5, and section 203 of the VRA, challenging at-large systems, discriminatory redistricting, ballot access barriers, undue voter registration requirements, voter assistance restrictions, and failure to provide bilingual ballot materials. We have litigated numerous significant cases challenging statewide redistricting in Arizona, California, Illinois, and Texas, and we have engaged in pre-litigation advocacy efforts, as well as litigation related to ballot access and local violations, in those states, as well as in Arkansas, Colorado, Georgia, Nevada, and New Mexico.

Comparative rates of voter registration and voter participation among racial groups, including Latinos, continue to demonstrate that voter suppression – through vote denial, as well as vote deterrence – remains a salient flaw of our democracy. It is one of the unexplained ironies of our national discourse that an election -- the 2020 presidential general election -- that showed

unprecedented numbers of voters participating and rates of eligible participation unseen in a century, has not been universally celebrated as a milestone in reducing voter suppression, but has instead been used to justify increased efforts to reduce minority voter participation in future elections.

The fact that one presidential candidate has refused to date to accept the legitimacy of his own substantial defeat at the polls is currently being used to justify new voter suppression proposals in too many states across our country. The unprecedented egotism of Donald Trump, despite positive past examples from presidents of both parties in graciously accepting electoral defeat, has led to an attempted insurrection and is currently catalyzing too many legislative attempts at suppression of minority voters.

Unfortunately, this continues a recent pattern of increasing voter suppression efforts. This longer-term increase stems from ongoing demographic changes, including in particular the unprecedented growth of the Latino voting community. These changes are perceived as threatening to the long-term privilege of those currently in power who have not garnered support among ascendant minority voter groups. The reaction of too many is not to change policy positioning to appeal to the voter groups in ascendance, but to engage in expanded efforts at voter suppression. These suppression efforts have taken the form both of new mechanisms to obstruct, such as restricting access to food and water while waiting in line to vote, as well as through the proliferation of longstanding mechanisms to suppress meaningful participation, such as targeted voter purges, creation of at-large elected positions, and precinct changes that do not respond to recent elections experience. The expected continued national demographic change, affecting more and more parts of the country, does not present reason for optimism that voter suppression will diminish nationwide in ensuing years.

While litigation, by private parties and by the Department of Justice, under Section 2 of the Voting Rights Act remains a powerful means to stop voter suppression that has significant effects on minority voters, such litigation is not sufficient to face the current and future potential for elections changes tied to voter suppression. As I have explained in previous testimony to this subcommittee, litigation under Section 2 is costly – in direct resources and opportunity costs – and time-consuming. Pre-clearance review benefits jurisdictions by dramatically reducing their costs in defending potential elections changes, and benefits voting rights by yielding more timely resolution of voting rights disputes. Litigation under Section 2 is too often unable to secure resolution before any election moves forward with the taint of voting rights violations attached.

Resources are simply insufficient to challenge all voter suppression measures under Section 2. When resources are insufficient, too many jurisdictions will gamble that they can violate voting rights without ever being restrained or at least not until numerous elections have occurred, with the attendant damage of voter suppression affecting the outcomes. Such gaming of the system, catalyzed by inadequate resources to challenge all instances of voter suppression

nationwide, would undermine confidence in our democracy and present a clear constitutional crisis.

In the aftermath of the 2013 Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), MALDEF originated the idea of practice-based pre-clearance coverage as a limited complement to a geographic, history-based formula for broader pre-clearance coverage. Practice-based coverage was proposed as a means to address the increasing introduction and enactment of voter suppression measures precisely in response to the growth of the local Latino community to a level viewed as a threat to the political powers that be. Most often, where the Latino community reaches that "tipping point" where they are perceived as a political threat, it is the first minority community to reach such a point, meaning that the jurisdiction involved had no reason to engage in race-targeted voter suppression – or to be challenged for such acts – previously in the jurisdiction's history. This means that building a record of adjudications against race-targeted voter suppression sufficient to invoke geographic coverage would take many years and involve substantial cost to plaintiffs and, even more so, to the jurisdiction. The result could well be a severely budget-challenged city (or other jurisdiction) just as the numerically ascendant minority group is provided sufficient voter protection to enable it to exercise controlling political power in the city.

Moreover, the simple fact of ongoing United States demographic change, highlighted again last week in the many headlines surrounding the first release of detailed data from the 2020 Census, predicts that more and more local and state jurisdictions will face that "tipping point" of perceived political threat from an ascendant minority group -- likely Latino in the next many years, but joined by Asian Americans in a similar position down the line. With so many jurisdictions coming to that tipping point, we cannot reasonably expect that expensive and time-consuming litigation under Section 2 of the Voting Rights Act – and the distant prospect of sufficient successful litigation to trigger geographic pre-clearance coverage – will remotely suffice to meet the scope of the nationwide challenge. Failure to meet the challenge would permit entrenched powers across the nation to sacrifice democracy to their own retention of authority. It is no exaggeration to characterize such widespread abuses of authority as an existential threat to our democracy and a constitutional crisis of major proportion.

An adequate response demands recourse to the powerful and effective alternative dispute resolution (ADR) mechanism in pre-clearance review under the VRA. As I have previously testified to this subcommittee, like the best ADR, pre-clearance saves time and money, efficiently addressing potential violations of voting rights without overburdening the courts and parties with burdensome volumes of litigation under Section 2 of the VRA, with its time-consuming and resource-intensive "totality of the circumstances" test. The greatest benefit from

the ADR of pre-clearance inures to the elections-administering jurisdictions themselves, which face massive costs in losing Section 2 litigation because of fee-shifting under the VRA. Under pre-clearance, by contrast, the jurisdictions receive timely and protective approvals of their covered elections changes without facing the daunting prospect of lengthy and costly defense of a Section 2 lawsuit.

Of course, the benefits of pre-clearance as effective ADR extend beyond the specific circumstances of practice-based coverage and the demography-driven "tipping point" phenomenon that is becoming increasingly widespread in the United States. These benefits also inure to geographies that may be covered under a geographic formula for pre-clearance grounded in recent historical patterns of voting rights violations. Here, the pre-clearance formula steps in, as almost a tripped fuse or breaker box, to stop jurisdictions with a pattern of race-targeted vote suppression from continuing to engage in such behavior and from perpetuating the expensive prospect of successful challenges to that vote-suppressive behavior. Instead, the geographic formula substitutes the ADR of pre-clearance in place of costly litigation.

In other ways, the two pre-clearance coverage formulas are symbiotic to one another. That is to say, practice-based coverage is a complement to, not a substitute for, a geographic pre-clearance formula. As I have said colloquially, the two formulas together allow us to use the powerful pre-clearance mechanism to target both serial vote killers and copycat vote killers. By focusing on jurisdictions with a longstanding, yet recent, pattern of race-targeted, vote-suppressive conduct, the geographic formula does the former. By targeting jurisdictions using practices employed in the past by many other jurisdictions to suppress votes, practice-based coverage accomplishes the latter.

Changing metaphors, no one in their right mind would have suggested in the face of a dangerous pandemic that science focus solely on finding successful treatment for infected persons, without also seeking a vaccine to prevent serious infection from occurring among others. Conversely, no one with any humanity would have suggested that science only seek to develop a vaccine, while allowing those already infected to simply suffer and possibly die with no scientific efforts to find effective treatments. Here, the geographic coverage formula addresses jurisdictions already showing signs of severe infection with the disease of voter suppression, while practice-based coverage uses the science of pre-clearance to prevent serious infection among those jurisdictions showing susceptibility to it.

Neither coverage formula can address all legitimate voting rights concerns; both are needed. For example, because practice-based coverage only reaches specified changes in elections-related practices, it cannot work to prevent proliferation of any new and crafty mechanisms devised to limit the right to vote of voters of color. By contrast, geographic

coverage, in reaching all elections-related changes, does have the ability to stem any new or obscure means of accomplishing voter suppression. Moreover, this distinction is rational because serial vote suppressers, having unsuccessfully tried other means of vote suppression (indeed, it is past challenges to discriminatory vote suppression that triggers pre-clearance coverage under the geographic formula), are those most likely to seek out and attempt to implement craftier means of suppressing and deterring voter participation. The jurisdictions covered by practice-based coverage are less likely to seek to devise new means of vote suppression because they can just copy mechanisms used elsewhere to swiftly stem the perceived threat from an ascendant minority voter group.

Of course, over time, any jurisdiction – including those initially engaged in changes triggering practice-based coverage – that engages in successive and different means of attempting to suppress minority votes will ultimately find itself subject to the broader geographic pre-clearance coverage. In this way, the two formulas are complementary as well. Neither is a substitute for the other. The worst rights-violating jurisdictions may start with facing pre-clearance of certain known practices, but ultimately face pre-clearance for all elections-related changes under geographic coverage. While practice-based coverage may delay triggering coverage under the geographic formula for some of the jurisdictions most tenaciously-committed to vote suppression, that is all to the good because the delay occurs because specified practices with a discriminatory intent or effect will have been blocked through practice-based coverage. Finally, the use of practice-based coverage to efficiently prevent certain rights-violating changes from being implemented, will also enable scarce enforcement resources – in both the Department of Justice and in the private sector – to be marshalled toward Section 2 litigation challenging the more innovative means of vote suppression that may be attempted in the future. It is in these novel and knotty cases that court adjudication of the totality of the circumstances is most appropriate.

Ultimately, of course, practice-based coverage may have the effect of deterring jurisdictions from engaging in the targeted practices at all. If we reach that point, many years from now, we can celebrate the highly effective deterrent of pre-clearance. In the meantime, practice-based coverage is needed to sufficiently address the challenge of voter suppression through historically established practices, especially as we face today's suppression proposals and as we look to a future of substantial demographic change that will challenge the ability of many officeholders and political leaders nationwide to cede power voluntarily without attempting to manipulate democracy through suppression of electoral participation by ascendant minority voter groups.

Practice-based coverage is constitutionally sound, within the plain authority of Congress. There is no more important goal, no goal more central to our national existence, than to prevent race-targeted voter suppression. Our history demonstrates the ongoing harm from such suppression. Practice-based coverage, grounded in demonstrated history of use of these practices to suppress the votes of minority groups growing in population, is an appropriate and measured response to the challenge facing a nation of rapid demographic change.

There are numerous constitutional bases of authority to enact practice-based coverage. The most important of these are the congressional implementation provisions of the Fourteenth and Fifteenth Amendments of the Constitution, and the Elections Clause of the Constitution. The Elections Clause plainly would support practice-based pre-clearance in application to federal elections.

Under its Fourteenth and Fifteenth Amendment authority, Congress may enact practice-based coverage because the formula responds directly to the federalism and equal sovereignty concerns expressed in the Supreme Court decision in *Shelby County v. Holder*. By restricting the pre-clearance obligation to specified changes – changes that have historically correlated with efforts at suppression of growing groups of minority voters -- rather than to all elections-related changes, practice-based coverage limits the intrusion on state policymaking and elections administration, answering the *Shelby County* majority's federalism concerns.

In addition, by applying to all jurisdictions, rather than to specifically identifiable states or other jurisdictions, practice-based pre-clearance coverage responds to the equal sovereignty concerns expressed by Chief Justice Roberts in *Shelby County*. No stigma would even theoretically attach to any state based on its history or previous policymaking. The only threshold for coverage rests on demography, which is largely beyond the scope of historical or ongoing policymaking of the jurisdictions that meet the threshold for coverage of specified changes in elections practice. This threshold is a necessary bow to efficiency and cost. It rationally relates to where voter suppression is more likely by excluding jurisdictions that are overwhelmingly comprised of a single racial group. From a constitutional perspective, the threshold supports the congruence and proportionality of the response, in practice-based coverage, to the danger of race-targeted vote suppression. Because vote suppression that is not targeted at race, or with disproportionate effect by race, lies beyond the scope of the Fourteenth and Fifteenth Amendments, requiring jurisdictions without a history of discrimination that are nearly all white (or increasingly likely, nearly all comprised of some other single race) would be incongruent with the Amendments and disproportional to the actual danger of race-targeted vote suppression.

Some have recently raised concerns about this threshold because it relies on measures of population by race. These concerns are unwarranted; our Constitution does not require ignorance of matters like racial differences and their correlation with differences in voting preferences. Indeed, the Supreme Court has acknowledged this correlation in its Voting Rights

Act Section 2 jurisprudence. Unlike in that context, however, no liability rests in whole or in part on any assumption (versus proof) of that correlation; it merely triggers the application of pre-clearance review, a less costly and more efficient means of addressing potential vote suppression.

Moreover, the threshold does not distinguish among the races; all that is required is the presence of any two racial groups, each comprising a significant proportion of those potentially eligible to vote in the near future in the jurisdiction. Although today, one of those two groups, in virtually every jurisdiction, is most likely to be whites, that will almost certainly change over time. Eventually, the threshold will be satisfied by other combinations of two racial groups in a jurisdiction, like Latino-Native American (in New Mexico, perhaps), or Asian American-Latino (in Hawaii, perhaps), or Black-Latino (in Georgia perhaps), or Black-Asian American (in Virginia, perhaps) in specific states or sub-state jurisdictions.

Indeed, it is unlikely that the Supreme Court would see the demographic threshold as a race-based classification at all. Jurisdictions, not people, face a legislative consequence from the demographic threshold, such that racially mixed jurisdictions are treated differently from racially isolated jurisdictions. As pointed out above, that distinction is rationally grounded in the constitutional legislative purpose of targeting race-targeted vote suppression. Not without reason, some would assert that the *Shelby County* decision itself, through the "equal sovereignty" notion, anthropomorphized states to an extent never seen before, focusing on human emotions like stigma with respect to states. Nonetheless, it would be hard to conclude that the Court is prepared to anthropomorphize jurisdictions to the point of asserting that they have a "race."

Indeed, the Congress and President have for many years, through the Higher Education Act and its reauthorizations, provided funding and support targeted to HBCUs (historically Black colleges and universities) and HSIs (Hispanic-serving institutions). This is an award of support to colleges and universities based primarily on how racially-mixed their enrollments have been historically and are today. This has occurred without credible challenge through an assertion that these colleges and universities each have their own "race" and are being benefitted unconstitutionally because of their specific "race" through an improper racial classification.

The recent Supreme Court decision in *Schuette v. BAMN*, 572 U.S. 291 (2014), may also be instructive. There, in a plurality opinion announcing the Court judgment, Justice Anthony Kennedy essentially rejected the notion that issues or policy areas could be judicially determined to have a "racial focus" because they inure to the primary benefit of a specific race or races. He cautioned against assumptions about how different racial groups feel about a particular issue or policy, and about classifying the issues themselves on that basis. This suggests that, whatever the Supreme Court's tendency toward anthropomorphizing entities – closely-held businesses, states – it is not yet prepared to extend that trend to the peculiarly human attribute of "race."

Because the demographic threshold does not distinguish among the races, does not impose consequences on people (as opposed to jurisdictions) of any specific race or on the basis of race, and does not assign a "race" to jurisdictions but distinguishes based solely on racial isolation, MALDEF does not believe the Supreme Court would characterize the threshold as a constitutionally suspect racial classification. Moreover, without belaboring the point, MALDEF also believes that, even were it so characterized, the threshold would survive strict scrutiny as necessary and tailored sufficiently to serve the compelling government purpose of preventing and deterring race-targeted voter suppression.

I should also note that some have recently questioned – whether from concerns of constitutionality or practical utility – why the demographic threshold established in the proposed practice-based coverage utilizes voting-age population (VAP), rather than citizen, voting-age population (CVAP). Because practice-based coverage is grounded in perceived threat from a growing group of minority voters, something other than total population is appropriate because large numbers of children, particularly younger children, are not an electoral threat to the political powers that be. Indeed, this may be why so many young people of all races believe elected officials to be inattentive to their concerns. Using CVAP instead of VAP would also exclude another set of current non-voters – immigrants not yet naturalized. Initially, I note that VAP data from the Census is more accurate than CVAP data, which comes only from American Community Survey (ACS) estimates, normalized over several years.

But, more important is the fact that the powers that be in jurisdictions hitting the "tipping point" of perceived political threat are forecasting future electoral threats to their perpetuation in office. This generally means that they are looking four years out – to their next potential re-election – assuming a four-year term of office. The vast majority of immigrants not yet naturalized are lawful permanent residents. All lawful permanent residents, except the small number disqualified from naturalizing, are three to five years or less from eligibility to naturalize and to vote. Thus, political-threat perception projected four years to the next election should include immigrants not yet naturalized; therefore, VAP is the better measure of the potential for perceived political threat by those in power. Indeed, because of the likely four-year time horizon, it would be best to include also those from age 14 to 17, but doing so would be unduly cumbersome to implement. VAP is the best, most readily available measure for these purposes. Professor Bernard Fraga's recent testimony and report demonstrates strong empirical support for this conclusion.

As explained above, practice-based pre-clearance coverage was conceived many years ago in response to *Shelby County*. It has been continually refined since. Most recently, voting

rights advocates have proposed some important modifications since the version of practice-based coverage passed in the last Congress.

First, with respect to the redistricting practice, which only triggers pre-clearance coverage where there is a significant minority population that has experienced substantial growth in the decade since the previous redistricting, the proposed amendment ensures that these demographic triggers (which may apply to any racial group, including whites, that is the second-largest racial group in the jurisdiction) are expressed only in percentage, not numerical, terms. This change is to prevent triggering coverage in very heavily populated jurisdictions based on high numerical changes that are not significant in percentage terms. The change is consistent with the "political-threat perception" rationale described above.

The second proposed amendment would change the description of the voter identification practice that is subject to pre-clearance. The change would align the description with other pending voting-related congressional legislation and would make clear that all changes made to voter identification changes after enactment of this bill would be subject to pre-clearance review. This amendment also ensures that undue voter registration requirements are also subject to pre-clearance review.

The third proposed amendment would ensure that pernicious new attempts to prohibit providing sustenance to voters waiting in line to vote do not proliferate. This amendment would make such requirements put in place after enactment of this bill subject to pre-clearance review.

The fourth proposed amendment would limit pre-clearance review of voter purges to those with a disparate impact on any racial or language-minority group. This amendment would thus exempt from pre-clearance review all evenhanded purges necessary to adequate maintenance of voter rolls.

Our changing nation faces significant challenges in the future with the growing presence of minority voters, and in particular the unprecedented growth of the Latino voting population. These significant changes present an opportunity to ensure that our democracy thrives based on real, core values of fairness and non-discrimination. Unfortunately, we have already seen a tendency among some political leaders, including the disgraced former president, Donald Trump, to resist those demographic changes through lies around election integrity that catalyze attempts at further race-targeted voter suppression. We can only hope to effectively counter these threats and to seize the opportunity to build a thriving democracy by including practice-based coverage, together with geographic coverage, to reinvigorate the powerful pre-clearance mechanism, in the John Lewis Voting Rights Advancement Act. Thank you.

Mr. COHEN. Thank you.

Our next witness is Ms. Sophia Lin Lakin. She is the Deputy Director of the ACLU Voting Rights Project—and if my fingers can do me better than this, there we go—and assists the planning, strategy, and supervision of the ACLU's voting rights litigation nationwide, including service as the lead counsel on the ACLU's Federal lawsuit challenging multiple provisions of Georgia's new law, SB 202.

Ms. Lakin received her J.D. from Stanford. She received an M.S. and a B.A. from Stanford. She is a true Stanford Cardinal.

Ms. Lakin, you are recognized.

TESTIMONY OF SOPHIA LIN LAKIN

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

The VRA is one of the most successful pieces of civil rights legislation in our history. Eight years ago, in *Shelby County* v. *Holder*, the Supreme Court gutted the VRA's most powerful provision, the section 5 preclearance system. My colleagues have testified powerfully about the importance of restoring the system.

After *Shelby*, the principal means to protect against discrimination in voting is section 2 of the VRA, which authorizes challenges that can be brought only after a law has been passed or a policy implemented. Section 2 itself has been under attack in recent years in at least three ways.

First, the Supreme Court in *Shelby* based its ruling, in part, on the assumption that plaintiffs would be able to obtain preliminary relief before an election to guard against elections going forward under regimes that are later struck down as discriminatory.

The theoretical availability of such relief has proven to be inadequate. The current standard for obtaining a preliminary injunction, including a showing of a likelihood of success on the merits, is a particularly high bar to relief in voting cases, given their complexity and fact-intensive nature.

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

My prior written testimony describes 15 cases in which voting rights plaintiffs who ultimately succeeded were unable to obtain preliminary relief while their cases were pending, with numerous elections taking place, millions of voters casting ballots, and hundreds of elected officials taking office under regimes courts ultimately find are discriminatory or are abandoned.

Second, this problem has only worsened due to the metastasizing of the so-called *Purcell* Principle. This is the idea that courts should be cautious changing election rules if an election is imminent.

What began as a commonsense warning to consider potential voter confusion and administrative burdens now operates as almost a per se bar against intervening as an election draws near.

The use of *Purcell* to block relief has exploded in recent years, from 6 times in 2012, to 11 in 2016, to 58 in 2020, and the doctrine is continuing to expand well beyond the commonsense warning in the Supreme Court decision that is the *Purcell* doctrine's namesake.

Purcell is invoked today even when there is no risk of voter confusion, little to no administrative burden, and where plaintiffs have acted as quickly as they can, or there are unforeseen emergencies, like an unprecedented pandemic. It has taken over the analysis of whether to order relief even when there has been a strong finding that the election Rule being challenged likely violates the Constitution or the VRA.

Worse yet, all too frequently *Purcell* is wielded inconsistently, in one direction only, to undermine efforts to ensure that discriminatory practices are blocked before they can taint an election. My written testimony for today and earlier this summer highlight numerous examples.

Left unchecked, *Purcell* threatens to kneecap voting rights litigation nationwide.

Third, compounding all these challenges, the Supreme Court's recent decision in *Brnovich* v. *Democratic National Committee* has further undermined section 2 as the robust weapon to combat voting discrimination this body intended it to be.

The decision raises the bar for voting rights plaintiffs to show an actionable burden on voters while at the same time dramatically lowers the bar for government defendants, allowing the mere specter of voter fraud, without any evidence, to justify discriminatory practices.

Fortunately, for all these issues Congress has the power to Act to protect voting rights. Congress has the clear authority to set standards for the issuance of preliminary relief and injunctions in voting rights cases and the clear ability to correct the misinterpretation of the VRA contained within *Brnovich*.

Not only does Congress have the power to act, but it also has the responsibility. Racial discrimination in voting continues to threaten the health of our democracy. Section 2 is an important and necessary tool to combat that threat, and its continuing vitality is critical.

Thank you.

[The statement of Ms. Lakin follows:]

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

For a Hearing on

Oversight of the Voting Rights Act: Potential Legislative Reforms

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

Hearing on August 16, 2021

Submitted on August 14, 2021

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Committee, thank you for the opportunity to testify before you on the critical issue of legislative reforms to restore and strengthen the Voting Rights Act.

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 350 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 omnibus legislation restricting voting rights in states like Georgia and Montana.

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 recently argued successfully before the U.S. Court of Appeals for the Seventh Circuit in *League of Women Voters of Indiana v. Sullivan*,[3] a case that challenged an Indiana purge program that failed to follow the procedural safeguards mandated by the National Voter Registration Act. 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*,[4] a challenge to Georgia's sweeping voter suppression law enacted in the wake of the 2020 elections; *Thomas v. Andino*,[5] 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*,[6] a challenge to a discriminatory purge program in Texas; *Missouri State Conference of the NAACP v. Ferguson-Florissant School District*,[7] a challenge to the discriminatory at-large method of electing school board members; *Frank v. Walker*,[8] a challenge to Wisconsin's voter ID law; and *North Carolina*

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

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

[3] Nos. 20-2815 & 20-2816, 2021 WL 3028816, --- F.4th ---, (7th Cir. July 19, 2021).

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

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

[6] No. 5:19-cv-00171 (W.D. Tex. filed Feb. 4, 2019).

[7] 894 F.3d 924 (8th Cir. 2018).

[8] 768 F.3d 744 (7th Cir. 2014).

State Conference of the NAACP v. McCrory,[9] a challenge to North Carolina's monster voter suppression law passed in the immediate aftermath of *Shelby County v. Holder*.[10]

More than a century ago, the Supreme Court famously described the right to vote as the one right that is preservative of all others.[11] As Chief Justice John Roberts has explained, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders."[12] 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.

The landmark Voting Rights Act ("VRA"), one of the signature achievements of the Civil Rights Movement, has been critical in the efforts to combat this enduring blight. Passed initially in 1965, and reauthorized and amended (with bipartisan support) in 1970, 1975, 1982, 1992, and 2006,[13] it is one of the most effective pieces of federal civil rights legislation. But eight years ago, in *Shelby County v. Holder*,[14] the Supreme Court struck down the formula used to determine which jurisdictions were covered by a federal preclearance regime. This meant that the heart of the VRA—the requirement that jurisdictions with a long record of voter suppression submit proposed changes to election laws to federal officials *before* they went into effect—functionally ended. After *Shelby County*, the main protection afforded by the VRA is Section 2, which imposes a nationwide ban on 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 provides only post-enactment relief, *i.e.*, it authorizes challenges that can be brought only *after* a law has been passed or a policy implemented.

The inadequacy of Section 2 post-enactment relief as the principal means to protect against discrimination in voting cannot be overstated, and the ACLU and other civil rights organizations have discussed the need for the restoration of the prophylactic preclearance regime

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[9] 831 F.3d 204 (4th Cir. 2016) ("*North Carolina NAACP v. McCrory*").

[10] 570 U.S. 529 (2013).

[11] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[The right to vote] is regarded as a fundamental political right, because [it is] preservative of all rights.").

[12] *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.").

[13] See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982); Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; 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, as amended, 52 U.S.C. § 10301 *et seq.*

[14] 570 U.S. 529 (2013).

[15] 52 U.S.C. § 10301.

innumerable times.[16] Even if not sufficient on its own, however, Section 2 remains an important and necessary tool to protect voting rights, and its continuing vitality is critical. My written testimony[17] will focus on three issues that have substantially weakened the force of post-enactment relief as a bulwark against discrimination: the standard for obtaining preliminary injunctive relief in voting rights cases, the use of the so-called *Purcell* principle as an additional barrier to relief, and the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*.[18]

The Supreme Court's reasoning in *Shelby County* in dismantling preclearance was premised in part on the idea that plaintiffs could still challenge discriminatory voting laws under Section 2 and win relief, including preliminary relief, before an election occurs with a discriminatory practice in effect.[19] Unfortunately, this premise was deeply mistaken. Section 2 cases are expensive, difficult to bring, and frequently take years to litigate to completion—to say nothing of the meritorious cases that are never brought at all due to these costs. Theoretically, plaintiffs can win preliminary relief while a case is being litigated—freezing the status quo, while the court determines whether an election practice violates federal law—but this too works better in theory. In practice, the standard for winning a preliminary injunction, which includes proving a substantial likelihood of success on the merits, poses a particularly high bar to relief in voting rights cases, due to their complexity and fact-intensive nature. This means that elections proceed under regimes ultimately found to be discriminatory, with no way to compensate voters for that harm, and with the victors of those tainted elections enacting policy and accruing the benefits of incumbency.

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[16] *See, e.g.*, *The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-In Coverage, Election Observers, and Notice: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 117th Cong. (2021) (statement of Sophia Lin Lakin, Deputy Director of the ACLU's Voting Rights Project) ("June 2021 Lakin Testimony"); *Continuing Challenges to the Voting Rights Act Since* Shelby County v. Holder*: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 116th Cong. (2019) (statement of Leah Aden, Deputy Director of Litigation of the NAACP Legal Defense and Education Fund, Inc.); *Discriminatory Barriers to Voting: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 116th Cong. (2019) (statement of Jon Greenbaum, Chief Counsel, Lawyers' Committee for Civil Rights Under Law); *Current Conditions: Evidence of Continued Discrimination in Voting and the Need for Preclearance*, *Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 116th Cong. (2019) (statement of Myrna Pérez, Director, Voting Rights and Elections Program, Brennan Center for Justice at NYU School of Law); *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, *Hearing Before the H. Subcomm. on Elections*, 116th Cong. (2019) (statement of Thomas A. Saenz, President and General Counsel, Mexican-American Legal Defense and Education Fund).

[17] This written statement incorporates my prior oral and written testimony before this subcommittee on June 29, 2021. *See* June 2021 Lakin Testimony, *supra* note 16. I am also indebted to my ACLU Voting Rights Project colleagues who contributed to the preparation of this statement, in particular William Hughes, who provided invaluable support, as well as ACLU Voting Rights Project Director Dale Ho and Brett Schratz.

[18] 141 S. Ct. 2321 (2021).

[19] 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.").

Compounding the problem is the metastasization of the so-called *Purcell* principle. Named after a short, unsigned Supreme Court order from 2006,[20] which reminded courts to consider the potential confusion that may ensue if court orders, especially conflicting ones, issue close to an election, this restatement of common sense has grown into an almost *per se* bar used to deny relief in voting cases. Over the past decade, federal courts have applied *Purcell* ever more aggressively, even when the putative concerns of voter confusion or administrative burden on elections officials that originally animated the doctrine are wholly absent, and in a way that tends to work in one direction: against voters and voting rights. Compounding the issue is the frequent lack of explanation of a court's reasoning: applications of *Purcell* often appear in the form of unsigned orders, leaving the parties and the voting public with little clarity. In short, the expansion of *Purcell* has made the already difficult task of halting a discriminatory regime *before* it can taint an election even harder, blocking relief even where voting rights plaintiffs are ultimately successful—and even when they have demonstrated as much early in their case.

Finally, the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*[21] will make it significantly more difficult for voters to bring successful lawsuits to block discriminatory voting laws under Section 2. Under the guise of interpreting the statute, the Supreme Court articulated five "guideposts" that will inevitably make showing a discriminatory burden more difficult for Plaintiffs, while putting a thumb on the scale for government defendants by allowing for the mere specter of voter fraud—without any evidence—to justify discriminatory practices.[22]

Fortunately, for all three of these issues, Congress has the power to act to protect voting rights. It has the clear authority to set standards for the issuance of preliminary relief and injunctions in voting rights cases, and the clear ability to correct the misinterpretation of the VRA contained within *Brnovich*. Not only does Congress have the power to do so, it also has the responsibility. Under both the Fourteenth and Fifteenth Amendments, which promise equal protection under the law and the right to vote free of racial discrimination, respectively, Congress is expressly authorized—and given the duty—to make these guarantees real.[23] The John Lewis Voting Rights Advancement Act ("JLVRAA"),[24] which passed the House of Representatives in the116th Congress, with additions to address the explosive growth of *Purcell* in the 2020

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[20] *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

[21] 141 S. Ct. at 2321.

[22] *Id.* at 2336 ("[W]e think it sufficient for present purposes to identify certain guideposts that lead us to our decision.").

[23] U.S. Const. amends. XIV, XV; *see also 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.").

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

election cycle and repair the damage to Section 2 wrought by the recent *Brnovich* decision, would fight the serious threats to voting rights that we see today.

I. The Standard for Obtaining Preliminary Injunctive Relief

Following *Shelby County*, Section 2 of the VRA is the heart of federal protections for the right to vote. Unlike the VRA's preclearance regime, 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. In the paradigm course of civil litigation, plaintiffs will file a lawsuit, and then after a trial on the merits, a court will impose money damages or issue an injunction, *i.e.*, an order to take or forebear from taking some action. Commonly in civil rights litigation, these injunctions bar a government actor from enforcing a law found to violate civil rights law or the U.S. Constitution. Thus, under Section 2 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. In the context of voting rights litigation, this means multiple elections involving hundreds of elected officials may be irrevocably tainted by taking place under a discriminatory regime.

In some circumstances, however, plaintiffs can move for a preliminary injunction, which is an order that preserves the status quo while the lawsuit plays out. But these are particularly difficult to win in voting rights cases. One prong of the standard for the issuance of a preliminary injunction is a showing of substantial likelihood of success on the merits.[25] This standard makes sense in many contexts: before a court acts, prior to a full hearing of the evidence at trial or a settlement, it should be confident that it has a good basis to do so. But the difficulties in obtaining preliminary relief under this standard in the voting rights context have imperiled the ability to protect voters from being irrevocably harmed by discriminatory electoral regimes.

Voting rights cases are extremely complex and fact intensive, which is reflected in the significant expense in money and time required to litigate these cases successfully.[26] And courts have required voting rights plaintiffs to make a substantial showing of this full panoply of proof in order to meet the likelihood of success on the merits standard before it will grant preliminary relief. This is incredibly difficult to do in a truncated time period, not least because voting rights cases frequently involve extensive statistical analysis of voting patterns and practices and plaintiffs have limited access to the information necessary to meet this showing.[27] As a result, regimes that are ultimately found to be discriminatory can irrevocably taint an election even where plaintiffs do whatever they can to prevent that from happening.

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[25] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

[26] *See* June 2021 Lakin Testimony, *supra* note 16, at 5–9 (detailing the time and resource intensive nature of Section 2 cases).

[27] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143, 2155–56 (2015) (describing the forms of evidence required in VRA cases).

My prior written testimony before this subcommittee identifies 15 Section 2 cases, brought after the *Shelby County* decision, where plaintiffs sought a preliminary injunction unsuccessfully—only to go on to win at trial or reach a favorable settlement.[28] On average, those cases took 27 months to litigate to the grant of relief (to say nothing of unsuccessful appeals and disputes over attorneys' fees).[29] In the interim, multiple elections took place, millions of voters cast ballots, and hundreds of elected officials took office, under regimes courts ultimately found were discriminatory or that were abandoned.[30] For example, in a case the ACLU and partners brought challenging an omnibus voter suppression bill, *North Carolina NAACP v. McCrory*, despite plaintiffs moving as quickly as possible and seeking a preliminary injunction, voters in North Carolina chose 188 federal and state elected officials under election rules that would be subsequently struck down.[31]

The deficiencies of litigation, with the difficulty of securing preliminary relief, are particularly acute in the voting rights context because voting is different than other civil rights litigation. In cases 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 conducted 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 to violate the VRA.

The JLVRAA appropriately addresses these particular challenges by creating a standard for the issuance of preliminary relief in voting rights cases. First, plaintiffs must "raise[] a serious question" as to whether the challenged practice violates the VRA or the U.S. Constitution.[32] This standard appropriately seeks to balance the needed prophylactic measures to protect the right to vote without inviting frivolous litigation. Then, the court must find that the hardship imposed on the defendant (generally a government actor) is less than the hardship imposed on the plaintiff (the voter), giving "due weight to the fundamental right to cast an effective ballot."[33] This further ensures that courts are not compelled to issue injunctions at the drop of the hat: they must keep in mind, in addition to whether the claims are meritorious, whether the relief would be burdensome on the defendant.

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[28] *See* June 2021 Lakin Testimony, *supra* note 16, at 10–12 (listing these cases).

[29] *Id.* at 12.

[30] *Id.*

[31] *Id.* (citing *NC SBE Contest Results*, North Carolina State Board of Elections, https://er.ncsbe.gov (giving 2014 election results)).

[32] JLVRAA, *supra* note 24, § 8(b)(4).

[33] *Id.*

Congress has the clear power to act here. The general standard for issuing preliminary injunctions is a judicial creation, which over time has developed from equitable principles into a four-pronged test familiar to lawyers and judges.[34] However, the Supreme Court has made it clear—repeatedly and unequivocally—that Congress has the authority to alter the considerations for granting equitable relief, which includes the issuance of injunctions.[35] The Court has further explicitly recognized that this reasoning covers preliminary relief,[36] and that Congress can even make the issuance of certain injunctions automatic—an extreme measure compared to the much more modest one contained in the JLVRAA.[37] In other words, "Congress may intervene and guide or control the exercise of the courts' discretion"—as long as it does so clearly.[38] This reasoning has been applied in federal court cases acknowledging—and upholding—the legislatively modified standard for the issuance of preliminary injunctions. These cases interpret federal laws such as the Petroleum Marketing Practices Act,[39] Endangered Species Act,[40] National Labor Relations Act,[41] Federal Trade Commission Act,[42] and the Securities Exchange Acts of 1933 and 1934.[43] All of which is to say: there is a long-running history and unambiguous precedent blessing Congress' ability to specify the conditions under which a preliminary injunction issues.

II. The *Purcell* Principle

The current standard for obtaining a preliminary injunction makes it difficult enough for plaintiffs to ensure that discriminatory regimes are blocked before they can taint an election. But the problem has worsened due to the expansion of the so-called "*Purcell* principle."[44] As described in more detail in my prior testimony, the *Purcell* principle stood at one point for the commonsense idea that courts should be cautious in issuing orders which change election rules in

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[34] *See* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2948 (3d ed. 2021) (describing "[a] formulation that has become popular in all kinds of cases"); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (setting out the standard).

[35] *See, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is … for the courts to enforce them when enforcement is sought."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

[36] *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

[37] *See Tenn. Valley Auth.*, 437 U.S. at 153 (holding that Congress required in the Endangered Species Act that a final injunction automatically issues once a merits violation is shown).

[38] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

[39] *See* 15 U.S.C. § 2805(b); *Mac's Shell Serv., Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175 (2010).

[40] *See* 16 U.S.C. § 1536; *Tenn. Valley Auth.*, 437 U.S. 153; *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782 (9th Cir. 2005); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987), *abrogated on other grounds as recognized in Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088-91 (9th Cir. 2015).

[41] *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).

[42] *See* 15 U.S.C. 53(b); *F.T.C. v. Inc. 21com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal 2010).

[43] *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 Props, L.P.*, 2009 WL 5173685 (C.D. Cal. Dec. 18, 2009); *SEC v. Schooler*, 902 F. Supp. 2d 1341 (S.D. Cal. 2012).

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

the period right before an election.[45] In recent years, however, the use of *Purcell* to block relief has skyrocketed[46] and the doctrine has become something much broader, bearing little resemblance to the guidance given in the brief, unsigned order that is its namesake.[47] The *Purcell* of today displaces the case-specific analysis required for injunctions and operates as an almost *per se* bar on granting relief in voting rights cases, in some (nebulously defined) period before an election. This has real effects: as outlined in my prior testimony, injunctions are frequently blocked by *Purcell,* even in cases where plaintiffs ultimately to go on—after the lengthy process of litigation—to win relief.[48] The use of *Purcell* is only expanding, and left unchecked, it threatens to kneecap voting rights litigation nationwide.

***First*, *Purcell* today is invoked even when there is no risk of voter confusion, zero or minimal administrative burden, and where plaintiffs have acted quickly.** An illustrative example is *Republican National Committee v. Democratic National Committee*.[49] As the COVID-19 pandemic spread, Wisconsin saw a last-minute deluge of absentee ballot applications for primary elections held April 7, 2020, and elections officials struggled to process them quickly. Finding that the requirement for a witness signature as applied to a subset of voters and the absentee ballot receipt deadline were likely unconstitutional under the circumstances, the court preliminarily enjoined the witness requirement for those voters and extended the absentee ballot receipt deadline by six days, requiring the state to count ballots so long as they were received by April 13th (even if postmarked after Election Day).[50] Although elections officials did not contest the injunction, private intervenors won partial stays of the injunction at the Seventh Circuit (as to the witness signature) and the Supreme Court (as to the postmark requirement), with both courts relying on *Purcell*.[51] There was, however, no risk of voter confusion: voters were merely waiting to receive their ballot, and the district court's order would merely allow it to be counted. Nor was there risk of administrative burden: instead, elections officials had a few extra days to process an unprecedented number of absentee ballot applications. Indeed, the two applications of *Purcell* themselves imposed additional burdens on elections officials—during the first weeks of an unprecedented, deadly pandemic—and created the chaotic, confusing dynamic that *Purcell* theoretically counsels against. My prior written testimony includes several other examples that, taken together, show how the *Purcell* principle has been used to block relief frequently in cases where the stated concerns of the *Purcell* decision itself—the need to avoid

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[45] *See* June 2021 Lakin Testimony, *supra* note 16, at 13-29.

[46] In presidential election years, courts used *Purcell* to deny or stay injunctive relief only six times in the 2012 elections – and 58 times in 2020. 2020 was an exceptional year for many reasons, but the pattern holds for midterm election years: in 2014, courts applied *Purcell* to deny or stay injunctive relief five times, while in 2018, this grew to ten instances.

[47] *See id.* at 13-14 (discussing original order in *Purcell*).

[48] *See id.*16 at 14-19 (listing such cases).

[49] *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952 (W.D. Wis. 2020), *rev'd sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

[50] *See id.* at 972, 976, 980.

[51] *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) (per curiam).

confusing voters and imposing burdens on election officials and the election system—are not present.[52]

***Second*, the use of the *Purcell* principle appears to apply primarily in one direction only: to bar efforts to expand access to the ballot.** Here, the cases in which *Purcell* does not apply can be just as revealing as the situations in which it does. For example, in Minnesota in the lead-up to the 2020 general election, voting rights plaintiffs and state officials entered into a consent decree in state court that allowed all ballots postmarked on or before Election Day, and received within seven days after, to be counted.[53] In *Carson v. Simon*, a new set of plaintiffs sued, seeking a preliminary injunction blocking implementation of the consent decree on September 24—almost eight weeks after the decree was entered—which was denied on October 12.[54] On appeal, the Eighth Circuit reversed, enjoining the state court order and therefore moving up the absentee ballot deadline, in an opinion issued *five days* before the general election.[55] 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. Nevertheless, the court declined to apply *Purcell*.[56] Other examples demonstrating this one-directional application are described in my prior written testimony.[57]

***Third,* in some instances, too, appeals courts invoking *Purcell* to stay relief granted by a district court (and the increasing regularity of such stays) create the very voter confusion and administrative burdens that the *Purcell* principle in theory aims to avoid.** For example, in *Frank v. Walker*,[58] the district court issued a preliminary injunction against Wisconsin's voter ID law, and nearly 12,000 absentee ballots were mailed to voters without instructions on providing identification, hundreds of which were cast without the required documents. The Seventh Circuit stayed this order, without any mention of the voters who were merely following instructions given to them by the state; fortunately, the Supreme Court lifted the stay.[59] But as elections have become increasingly litigated, and *Purcell* has become an increasingly prominent doctrine, these situations will reoccur. Most concerningly, in a 2020 challenge to South Carolina's absentee ballot witness requirement, the Supreme Court stayed an

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[52] *See* June 2021 Lakin Testimony, *supra* note 16, at 20-23 (giving examples of cases where the requested relief was explicitly supported by elections officials and where the requested relief would meaningfully reduce confusion caused by last-minute changes by government actors).

[53] *See LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. 2020).

[54] *Carson v. Simon*, 494 F.Supp.3d 589 (D. Minn. 2020).

[55] 978 F.3d 1051 (8th Cir. 2020).

[56] *Id.* at 1061 ("[T]he *Purcell* principle does not preclude an injunction under the present facts.").

[57] *See* June 2021 Lakin Testimony, *supra* note 16, at 24-26. In another egregious example, the Eighth Circuit stayed an injunction blocking a voter ID law in North Dakota (an injunction which had been in place for months) less than a week before voting began. *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018). The court then explicitly stated "the courthouse doors remain open" to those affected by the change, *id.* at 561, such as Native American voters with tribal IDs or IDs listing a P.O. box as an address—both invalid under the law—only for the subsequent case to be blocked by *Purcell*. *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665 (D.N.D. Nov. 1, 2018).

[58] 17 F. Supp. 3d 837 (E.D. Wis. 2014), r*ev'd* 768 F.3d 744 (7th Cir. 2014).

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

injunction that had been affirmed by the en banc Fourth Circuit, with three members of the Supreme Court expressing the view that any votes that had already been cast in reliance on the injunction should not be counted.[60] It should be beyond debate that voters who merely relied in good faith on instructions from elections officials in casting their ballots should not be disenfranchised due to *Purcell*.

***Finally*, all these problems are exacerbated by the fact that in *Purcell*-based orders, courts have frequently failed to explain their decisions**;[61] instead, the parties and the public are made to guess at basic parameters of the doctrine, such as how long the relevant period is, what counts as an election rule, and how to factor in voters' reliance interests. Typically, orders in federal courts follow full briefing, oral argument (as need be), and judicial research and drafting, a process which can often take months. The product of this is a reasoned opinion that assures the parties that their arguments got a fair hearing and provides guidance as to the rules of the road going forward. *Purcell* departs sharply from this practice, and in fact, the development of the principle occurred almost entirely in a series of four unsigned orders in the 2014 election.[62] These brief orders provide little guidance to voters or litigations—and feed speculation that decisions are based on political concerns. While the exigent nature of election cases may sometimes leave courts with little time to craft a lengthy opinion, courts can always issue an order and follow up with an opinion explaining their reasoning. Instead, the lack of written opinions means there is no way to ensure the *Purcell* principle is being applied consistently—or even define what the *Purcell* principle is.

As with the preliminary injunction standard, Congress' ability to act here is clear. The manner under which injunctions issue, the concerns courts should take into consideration (and those they should not), and the way to weigh competing interests are all matters within Congress' power to define. In the context of *Purcell*, this could look like defining a specific, measurable period in which changes are disfavored, for legitimate reasons—to avoid the *Purcell* window growing ever larger and even more unmoored from its foundations. Congress could also clearly state the public's interest in ensuring free and fair access to the ballot, and how that interest should be weighed against administrative concerns. It could specify exactly what forms of voter confusion courts should keep in mind and how to best minimize that confusion. Finally, it could provide guidance to courts reflecting the reality that sometimes, unforeseen events—whether an unprecedented pandemic or the actions of elections officials—occur and that this is no reason to abdicate their responsibility to safeguard the constitutional right to vote.

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[60] *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (mem.) (noting that Justices Thomas, Alito, and Gorsuch would grant the application for a stay of the injunction in full, rather than just prospectively).

[61] *See, e.g.*, *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 Or.*, 141 S. Ct. 206 (2020) (mem.); *Republican Nat'l Comm. v. Common Cause RI*, 141 S. Ct. 206 (2020) (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*, No. 19A1054, 2020 WL 3456705, --- S. Ct. --- (June 25, 2020) (mem.); *Moore v. Circosta*, 141 S. Ct. 46 (2020) (mem.); *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28 (2020) (mem.).

[62] *See Frank v. Walker*, 574 U.S. 929 (2014) (mem.); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (mem.); *Husted v. Ohio State Conf. of the NAACP,* 573 U.S. 988 (2014) (mem.); *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (mem.).

III. *Brnovich v. Democratic National Committee* and Potential Fixes

On July 1, 2021, the Supreme Court released its decision in *Brnovich v. Democratic National Committee*,[63] and in doing so, weakened federal protections for voting rights even further. The case concerned two Arizona restrictions that had a disproportionate impact on Native American and other communities of color, and which the plaintiffs challenged as violating Section 2: a ban on the collection of early ballots and a rule mandating that ballots cast in person at the wrong precinct be discarded entirely, rather than counted for the offices for which that voter is eligible to vote.[64] In the decision, reversing an en banc panel of the Ninth Circuit striking down the two requirements under Section 2, the Supreme Court set out five so-called "guideposts"—untethered to the actual text of the statute—in assessing Section 2 claims.[65] The decision and these guideposts will make it harder to bring successful Section 2 claims.

The Court's decision in *Brnovich* undermines the purpose of Section 2 to provide a powerful tool to root out discrimination in voting—no matter how blunt or subtle—in numerous ways.[66] But broadly speaking, the Court's decision did two things to make it harder to bring successful Section 2 claims.

First, the Court ratcheted up the bar for plaintiffs to establish a discriminatory burden on the right to vote. Section 2 calls for an inquiry based on "the totality of the circumstances," into whether "political processes … are not equally open" to people of color[67] —or, in other words, whether a practice imposes a burden on voters of color. *Brnovich* introduced into this inquiry whether the burden imposed by a challenged practice is, in a court's view, akin to the "usual burdens of voting," finding those to be essentially per se permissible under Section 2.[68] Absent from the analysis is a discussion of whether the so-called "usual" burdens of voting are equally burdensome to all voters, particularly to voters of different racial groups. Though the decision refers to "mere inconvenience," the difficulty of, say, driving to a mail box is very different on a

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[63] 141 S. Ct. 2321 (2021).

[64] *Id.* at 2330.

[65] *See id.* at 2338-40.

[66] *See, e.g.*, *Hearing on the Implications of* Brnovich v. Democratic National Committee *and Potential Legislative Responses*, *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program) ("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."); *id.* (statement of Ezra Rosenberg, Co-Director, Voting Rights Project, Lawyers Committee for Civil Rights Under Law) ("[*Brnovich*] unnecessarily and unreasonably makes it more difficult for civil rights plaintiffs to win Section 2 actions … . 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."); *Hearing on Restoring the Voting Rights Act after* Brnovich *and* Shelby County, *Hearing Before the Subcomm. on the Constitution of the S. Committee on the Judiciary*, 117th Cong. (2021) (statement of Janai Nelson, Associate Director Counsel, NAACP Legal Defense and Educational Fund, Inc.) ("The [*Brnovich*] decision improperly and illogically departs from the plain text of Section 2, ignores settled precedent, and curtails the broad application of Section 2 that Congress intended, thus making it more difficult and burdensome to ensure that every eligible citizen is able to freely exercise their right to vote.").

[67] 52 U.S.C. § 10301(b).

[68] 141 S. Ct. at 2338 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008)).

remote Native American reservation where residents do not receive postal service at their doors, and are also much less likely to have access to cars than it is for other voters.[69] The Court also found relevant "the degree to which a voting rule departs from what was standard practice … in 1982."[70] But this ignores that the reauthorization of the VRA in 1982, just as in 1965, was motivated by a desire to *change* state election rules and eradicate the racially discriminatory measures that remained—not grandfather them into law.[71] By introducing these irrelevant considerations into the Section 2 analysis, *Brnovich* will make it more difficult for plaintiffs to prove their cases.

Second, the Court also ratcheted down the bar for jurisdictions to defend restrictions on voting with a disparate impact. In particular, *Brnovich* imports into this inquiry—without any grounding in text or history—a state's asserted interest in preventing election fraud, even when wholly unsubstantiated with actual evidence, which it gratuitously referred to as "strong and entirely legitimate," before concluding that rules justified with reference to these interests are "less likely to violate § 2."[72] The lower court in *Brnovich* found the offered justification of voter fraud for the ban on ballot collection—particularly important to Native American communities, who often lack adequate transportation or regular postal service—to be tenuous, due to the utter absence of voter fraud in Arizona.[73] On this point, the Supreme Court again disagreed, and went further: holding that states are under no obligation to provide any evidence of an actual history or risk of fraud within their borders, or to show how a challenged rule actually would prevent election fraud.[74]

Fortunately, *Brnovich* was a decision based on a statutory interpretation, rather than a constitutional holding. This means Congress can correct the Court's misinterpretation of Section2 and restore the VRA's full protections against discrimination in voting. We urge Congress to add such a legislative response to the JLVRAA.

At a minimum, any efforts to respond to *Brnovich* should make clear that any voting practice that interacts with historical and socioeconomic factors to result in discrimination against voters of color runs afoul of Section 2. This is the case whether or not the practice existed or was widespread in 1982, or any other year. Further, whether or not a court finds a burden to be one of the so-called "usual" burdens of voting should not factor into the analysis. A voting practice could well be a mere inconvenience for some voters, but a serious burden for others, to the point where they cannot meet it and are thus disenfranchised.

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[69] *Id.*

[70] *Id.*

[71] S. Rep. No. 97-417, 54 & n.184 (1982) (describing the widespread use of practices such as "restrictive registration, multi-member and at-large districts with majority vote-runoff requirements, prohibitions on single-shot voting and others" in covered jurisdictions and characterizing them as "tend[ing] to [be] discriminatory in the particular circumstances").

[72] *Brnovich*, 141 S. Ct. at 2340.

[73] *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1035 (9th Cir. 2020) (en banc) ("No one has ever found a case of voter fraud connected to third-party ballot collection in Arizona. This has not been for want of trying.").

[74] *Brnovich*, 141 S. Ct. at 2348.

Any statutory language addressing *Brnovich* should also directly give courts guidance on how to weigh racially discriminatory burdens against state arguments that a measure is necessary to protect election integrity. Congress must establish that jurisdictions must do more than simply articulate unsubstantiated fears to justify discriminatory restrictions on voting. If a law imposes a discriminatory burden on voters of color, jurisdictions should, at a minimum, be required to submit evidence that the restriction actually advances a particular and important governmental interest. But the analysis should not end there: voters should also be allowed to prove how the challenged measure is pretextual or how there are alternative means to get at the same goal—without imposing the same racially discriminatory burden.

There are different ways Congress can do this. Congress could, for example, adopt an approach that codifies the relevant factors (*e.g.*, the practice's interaction with historical and socioeconomic factors), and non-relevant factors (*e.g.*, whether the practice existed in 1982). It could also adopt a burden-shifting approach modeled on the frameworks for addressing employment discrimination in Title VII of the Civil Rights Act of 1965[75] or housing discrimination in the Fair Housing Act,[76] which could give guidance to courts as to what evidence a state needs to support an asserted interest, and how to weigh that interest against evidence of a discriminatory result. But Congress should act to restore Section 2 to the powerful weapon to combat discrimination that it was intended to be.

Conclusion

For each of these three issues—the difficulty winning preliminary relief, the aggressive expansion of *Purcell*, and the misinterpretation of Section 2 in *Brnovich*—there is a common thread: Congress has the power to act. Congress has clear authority to set the standards for the issuance of preliminary relief and has repeatedly done so in numerous federal statutes to address different contexts. The JLVRAA would make preliminary injunctions available if plaintiffs raise "a serious question" as to the merits, which would act as a prophylactic to safeguard the right to vote, and is appropriate given the impossibility of remedying voting discrimination after the fact.[77] Congress further has the power to define the public interest to include the public's interest in representative government, elected by the broadest swath of eligible voters possible, and to provide guidance to federal courts on the period in which election-related injunctions can be issued. And finally, Congress has the unquestioned authority to clarify its intent and fix erroneous interpretations of its laws, such as the recent *Brnovich* decision. In fact, the current version of Section 2 was enacted by Congress in 1982 to respond directly to a Supreme Court case that similarly misgauged Congress' meaning.[78] The 1982 amendments to Section 2 thus

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[75] *See* 42 U.S.C. § 2000e-2(k).

[76] *See* 42 U.S.C. § 3601 *et seq.*; 24 C.F.R. § 100.500.

[77] JLVRAA, *supra* note 24, § 8(a)(4).

[78] *Compare* Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982), *with City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality); *see also* S. Rep. No. 97-417, 2 (1982) (clarifying purpose of the amendments was to restore the legal test in effect for Section 2 claims from the interpretation given by the Supreme Court in *Bolden*).

provides a model for Congress to act again to ensure that voting rights are subject to robust protections consistent with this body's intent.

These amendments to the VRA are not merely within Congress' power—they are its responsibility. The Fourteenth and Fifteenth Amendments, which respectively guarantee the right to due process and equal protection under the law and the right to vote without discrimination based on race, expressly give Congress the power to enforce their guarantees.[79] This is no accident: the Reconstruction Amendments were passed in the wake of a Civil War which was in part precipitated by a Supreme Court decision. The drafters of the amendments were well aware that the responsibility to protect voting rights could not be left entirely with the court system, and therefore purposely gave this duty to Congress.[80] Although this country has made incredible progress since the enactment of those amendments, this obligation is ongoing. When other institutions tasked with protecting constitutional rights, such as courts and state governments, fail to do so, this body has the responsibility to intervene.

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

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

[80] *See* Eric Foner, *The Second Founding* xx (2019) ("All three [Reconstruction] amendments end with a clause empowering Congress to enforce their provisions, guaranteeing that Reconstruction would be an ongoing process, not a single moment in time. … The Bill of Rights said nothing about how the liberties it enumerated would be implemented and protected").

Mr. COHEN. Thank you, Ms. Lakin.

Our next witness is Hans von Spakovsky. Mr. von Spakovsky is the mMnager of the Election Law Reform Initiative and Senior Legal Fellow at the Meese Center for Legal and Judicial Studies at the Heritage Foundation. He previously worked for the Justice Department as Counsel to the Assistant Attorney General for Civil Rights, providing help with the Voting Rights Act and Help America Vote Act of 2002, and served on President Trump's Presidential Advisory Commission on Election Integrity.

He received his law degree from Vanderbilt University School of Law—arguably the finest law school in the South, in Memphis, arguably the second-best law school in the State of Tennessee, and his undergraduate degree from MIT.

Mr. von Spakovsky, you are recognized for 5 minutes.

TESTIMONY OF HANS A. von SPAKOVSKY

Mr. VON SPAKOVSKY. Thank you, Mr. Chair. I do want to say I am testifying today in my personal capacity, based on my own research, and not on behalf of the Heritage Foundation.

The answer to the question of whether there is a need for legislative reforms to the Voting Rights Act is a straightforward "no." After the Supreme Court's correct decision in *Shelby County*, the Voting Rights Act, through its various provisions, including section 2, remains a very powerful statute whose remedies are more than sufficient to protect all Americans.

With the latest guidance from the Court on the proper application of section 2 in the *Brnovich* case, the Justice Department and private parties have the legal means at their disposal to stop those increasingly rare instances of voting discrimination when they occur.

The claim that there is a wave of voter suppression going on across the country that requires expansion of the VRA is simply false. Efforts to enhance the integrity of the election process through reforms, such as voter ID requirements and improvements in the accuracy of Statewide voter registration lists, are not voter suppression and, frankly, protect all voters, no matter what their color or ethnic background.

This is evidenced by steady increases in registration and turnout in States that have implemented such reforms, as well as the enforcement record of the Justice Department, which has seen a steady decrease in the number of enforcement cases due to a decreasing number of violations of Federal law even after the *Shelby* County decision.

During the entire 8 years of the Obama Administration, the Civil Rights Division filed only four cases to enforce section 2. The Trump Administration filed two section 2 enforcement cases. Thus, there was no upsurge in section 2 cases after the Shelby County decision. In fact, the Obama Administration filed far fewer section 2 enforcement cases than the Bush Administration.

That record does not support the claim that there are widespread, unlawful voter suppression actions being taken against minority voters.

The Census Bureau's 2020 election survey also clearly demonstrates that there was no wave of voter suppression keeping

Americans from registering or voting that requires amending the VRA and expanding the power of the Justice Department.

Instead, the Census Bureau reports that the turnout in last year's election was 66.8 percent, just short of the record turnout of 67.7 percent in the 1992 elections. In fact, the turnout was higher than the turnout in President Barack Obama's first election, which was reported by the Census Bureau at 63.6 percent.

The Census survey shows there was higher turnout among all races in 2020 when compared to the 2016 election. Black Americans turned out at 63 percent compared to only 60 percent in 2016; 59 percent of Asian Americans voted in 2020, a 10-percentage point increase from 2016; and the Census Bureau reports that voter registration in 2020 reached 72 percent, which is higher than the 70 percent who were registered in 2016 after 8 years of the Obama-Biden Administration. Not only that, but voter registration in 2020 was higher than in the 2000, 2004, 2008, and 2012 elections.

The Hispanic share of the vote was just behind that of Black Americans, who had 12 percent of the total vote in 2020, the same percentage of the total vote by Black Americans in the 2016 election at the end of the Obama-Biden Administration.

The bottom line of the Census Bureau survey is that Americans are easily registering, and they are turning out to vote when they are interested in the candidates who are running for office. In fact, in an election year in which we were dealing with an unprecedented shutdown of the country due to a pandemic, we had, according to the Census Bureau, quote, "the highest voter turnout of the 21st century."

The proposed amendments are almost certainly unconstitutional because they don't satisfy what the Supreme Court said is required to justify continuing, much less expanding, the preclearance requirement.

As the Court made clear, any requirement that States obtain Federal pre-approval of any proposed election changes could be imposed only if Congress can show blatantly discriminatory evasions of Federal court decrees, lack of minority office holding, voting tests and devices, voting discrimination on a pervasive scale, and flagrant or rampant voting discrimination. None of those conditions are anywhere to be found in 2020.

With the availability of section 3, which has not been much discussed here today, a judge, if presented with evidence, can put a particular jurisdiction under preclearance coverage and continue it if necessary. That makes much more sense than a broad, uncustomized preclearance requirement.

Thank you.

[The statement of Mr. von Spakovsky follows:]

The Heritage Foundation

CONGRESSIONAL TESTIMONY

"Oversight of the Voting Rights Act: Potential Legislative Reforms"

Testimony before the
Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

United States House of Representatives

August 16, 2021

Hans A. von Spakovsky
Senior Legal Fellow
Center for Legal and Judicial Studies
The Heritage Foundation

Introduction

My name is Hans A. von Spakovsky.[1] I appreciate the invitation to be here today. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation or any other organization.

I am a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years. Before that I spent

[1] The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2020, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2020 operating income came from the following sources: Individuals 66%, Foundations 18%, Corporations 2%, Program revenue and other income 14%. The top five corporate givers provided The Heritage Foundation with 1% of its 2020 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights (2002-2005), where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act, the National Voter Registration Act, the Help America Vote Act, and the Uniformed and Overseas Citizens Absentee Voting Act.[2]

There Is No Need for Legislative Reforms

The answer to the question of whether there is a need for legislative reforms to the Voting Rights Act of 1965 ("VRA") is a straightforward "no." The VRA is one of the most important – and most successful – statutes ever passed by Congress to guarantee the right to vote free of discrimination. After the U.S. Supreme Court's correct decision in *Shelby County v. Holder,*[3] the VRA through its various provisions, including Section 2, remains a powerful statute whose remedies are more than sufficient to protect all Americans.

With the latest guidance by the U.S. Supreme Court on the proper application of Section 2 to discriminatory practices in *Brnovich v. DNC,*[4] both the U.S. Justice Department and private parties have the legal means at their disposal to stop those increasingly rare instances of voting discrimination when they occur.

There Is No Wave of "Voter Suppression" Occurring

The claim that there is a wave of voter suppression going on across the country that requires expansion of the VRA is simply false. Efforts to enhance the integrity of the election process through reforms such as voter identification requirements and improvements in the accuracy of statewide voter registration lists are not voter suppression. This is evidenced by steady increases in registration and turnout in states that have implemented such reforms, as well as the enforcement record of the Justice Department, which has seen a steady decrease in the number of enforcement cases due to a decreasing number of violations of federal law, even after the 2013 *Shelby County* decision.

I explained this in greater detail in a recent law review article, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," which is attached to, and

[2] I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981. I am the coauthor of *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (2012) and *Obama's Enforcer – Eric Holder's Justice Department* (2014).

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

[4] Brnovich v. Democratic National Committee, 594 U.S. ___ (2021).

incorporated into, this testimony.[5] For example, during the entire eight years of the Obama administration, the Civil Rights Division of the Justice Department filed only four cases to enforce Section 2 of the VRA. The Trump Administration filed two Section 2 enforcement actions.

Thus, there was no upsurge in Section 2 cases after the *Shelby County* decision; in fact, the Obama Administration filed far *fewer* Section 2 enforcement actions than the Bush Administration, which filed 16 such cases. That record over the past two decades, and particularly in the last ten years, provides no evidence to support the claim that there are widespread, unlawful, voter suppression actions being taken against minority voters by state and local jurisdictions, as has been falsely claimed since at least 2013.

The Census Bureau's recent release of its 2020 election survey of voter turnout also clearly demonstrates that there is no wave of "voter suppression" keeping American voters from registering and voting or that requires amending the VRA and expanding the power of the Justice Department.[6]

Instead, the Census Bureau reports that the turnout in last year's election was 66.8 percent – just short of the record turnout of 67.7 percent of voting-age citizens for the 1992 election. This was higher than the turnout in President Barack Obama's first election, which was reported as 63.6 percent by the Census Bureau.

The Census survey shows that there was higher turnout among all races in 2020 when compared to the 2016 election. Black Americans turned out at 63 percent, compared to only 60 percent in 2016. Fifty-nine percent of Asian Americans voted in 2020, a 10-percentage point increase from 2016 when 49 percent turned out to vote.

The Census Bureau reports that voter registration in 2020 reached 72.7 percent, which is higher than the 70.3 percent who registered in 2016 after eight years of the Obama-Biden administration. Not only that, but voter registration in 2020 was higher than in the 2000, 2004, 2008 and 2012 elections.

Fifty-four percent of Hispanics reported turning out to vote in 2020 according to the Census Bureau, compared to only 50 percent of Hispanics who voted in 2008 when Barack Obama was elected. Hispanics made up 11 percent of the total turnout in the 2020 election, up from only nine percent in 2016. The Hispanic share of the vote was just behind that of Black Americans, who had 12 percent of the total vote in 2020 – the same percentage of the total vote by Black Americans in the 2016 election at the end of the Obama-Biden administration.

[5] Hans A. von Spakovsky, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," 49 U. Mem. L. Rev. 1447 (2018-2019).
[6] "2020 Presidential Election Voting and Registration Tables Now Available," U.S. Census Bureau, Press Release (April 29, 2021).

The bottom line of the Census Bureau's survey is that Americans are easily registering – when they want to – and they are turning out to vote when they are interested in the candidates who are running for office. In fact, in an election year in which we were dealing with an unprecedented shutdown of the country due to a pandemic, we had, according to the Census Bureau, "the highest voter turnout of the 21st century."

The Proposed Amendments to the VRA Are Unnecessary and Unconstitutional

The amendments to the VRA that have been proposed in prior sessions are contained in H.R. 4, The John Lewis Voting Rights Advancement Act. I explain the problems with this bill in-depth in a recent *Heritage Foundation* analysis, "Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act. (H.R. 4)," which is also attached to, and incorporated into, this testimony.[7]

There is no need for new legislation reimposing and actually expanding the onerous preclearance requirements of Section 5 of the VRA, and no evidence that the permanent provisions of the VRA such as Section 2 are not adequate to protect voters' rights. The proposed amendments are also almost certainly unconstitutional because they do not satisfy what is required by the Supreme Court's *Shelby County* decision to justify continuing, much less expanding, the preclearance requirement. As the Court made clear in that decision, the 1965 standards were obsolete, and any requirement that states obtain federal pre-approval of any proposed election changes before they can be implemented could be imposed only if Congress found "blatantly discriminatory evasions of federal decrees;" lack of minority office holding; voting tests and devices; "voting discrimination 'on a pervasive scale;'" or "flagrant" or "rampant" voting discrimination. These conditions are nowhere to be found in any state in 2021.

Additionally, Section 3 of the VRA already allows a federal court to impose a preclearance requirement in a particular jurisdiction for as long as necessary where the court determines that there is intentional misconduct and preclearance is required to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments."[8] With the availability of the customized preclearance requirement of Section 3 that can be imposed on a recalcitrant jurisdiction based on the specific evidence of wrongdoing uncovered in a specific enforcement action, there is no need for a broad, general, and expanded preclearance requirement as proposed in H.R. 4.

If H.R. 4 is enacted, the lawyers inside the Voting Section of the Civil Rights Division would be given veto authority over state election laws and regulations; when it comes to exercising that powerful discretion and initiating unbiased enforcement actions, the attorneys in that section have a very checkered record. This was perhaps best captured in 1994 in *Johnson v. Miller*, where a federal court issued a scathing opinion in a preclearance case charging that "the considerable

[7] Issue Brief No. 6082 (May 24, 2021).
[8] 52 U.S.C. § 10302.

influence of ACLU advocacy on the voting rights decisions of the United States attorney general is an embarrassment" and that the "dynamics" between the DOJ and American Civil Liberties Union lawyers "were that of peers working together, not of an advocate submitting proposals to higher authorities." The judge was "surprised" that DOJ "was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."[9] The judge also found the "professed amnesia" of the DOJ lawyers about their relationship with ACLU attorneys "less than credible."

In another case involving preclearance, a federal court ruled against DOJ, holding that it "had arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies."[10] In fact, using its power under the VRA, DOJ "impermissibly encouraged – nay, mandated – racial gerrymandering."[11] The public was forced to pay the state of Louisiana over $1.1 million in attorneys' fees and costs due to DOJ's wrongdoing in that case.

As the Judiciary Committee should be aware from a letter sent to it in 2006 by the Justice Department, these were just two of 11 cases involving the Civil Rights Division from 1993 to 2000 in which courts admonished the Division for its misbehavior and awarded over $4.1 million in attorneys' fees and costs to defendants abusively targeted by the Division.[12]

In 2013, the Inspector General of the Justice Department issued a critical report on the operations of the Voting Section of the Civil Rights Division that cited numerous examples of inappropriate and biased behavior by its staff.[13] No one who reads that report could possibly think that giving the partisans who work in the Voting Section the regal power to decide what the election rules are for each state could possibly be a good idea.

The VRA is race-neutral – it protects *all* voters from discrimination. But that is decidedly not the view of the Voting Section staff. The Inspector General found "relevant evidence" demonstrating the staff "disfavored" cases where victims of discrimination were white.[14] This resulted in their ignoring discrimination against white voters even in the most egregious of circumstances.

For example, the Voting Section failed to take action against a Guam law that used a blood ancestry test – the same kind used in the South during the Jim Crow era to exclude blacks – to prevent white and Asian residents of Guam from being able to register and take part in a plebiscite. It took an expensive private lawsuit to end Guam's bigoted treatment of its residents, which the

[9] Johnson v. Miller, 864 F.Supp. 1354 (S.D. Ga. 1994).
[10] Hays v. State of Louisiana, 839 F. Supp. 1188 (W.D. La. 1993).
[11] 936 F.Supp. 360 (W.D. La. 1996).
[12] Letter of April 12, 2006, from William E. Moschella, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Hon. F. James Sensenbrenner, Chairman, Committee on the Judiciary, U.S. House of Representatives.
[13] "A Review of the Operations of the Voting Section of the Civil Right Division," Office of the Inspector General, U.S. Department of Justice (March 2013) (hereinafter "OIG Report").
[14] OIG Report, p. 179.

Ninth Circuit U.S. Court of Appeals found violated the Fifteenth Amendment in *Davis v. Guam* in 2019.[15]

In 2006, according to the Inspector General, staff members assigned to file a lawsuit under the VRA against black officials in Noxubee County, Mississippi, for discriminating against white voters were subjected to written and verbal abuse from peers. The team leader was called a "Klansman" in official email correspondence. A black intern who requested to join the team was repeatedly taunted as a "token" and when the intern's mother paid a visit to the office, career employees complained that her son was acting as a racial "turncoat."[16]

A federal court in 2007 found that the defendants in Noxubee County had engaged in "blatant" racial discrimination in a case that the majority of career staff not only did not want to bring, but in which they attempted to intimidate and harass those involved in working on the case.[17]

The Inspector General also found that career employees, identifying themselves as DOJ employees, published "highly offensive and potentially threatening statements" about colleagues on prominent liberal-leaning news websites, including posting comments about one person's "Yellow Fever" – a demeaning reference to that person's presumed sexual attraction to a person who "look[s] Asian."[18]

Another staff employee confessed to being the organizer of a three-person "cyber-gang" that published comments falsely asserting that a supervisor was a racist after hanging a noose in the supervisor's office (p. 128-129). This employee, who adopted an online avatar of a black literary character who becomes a killer, made further online comments, including stating his desire to "choke" colleagues with whom he disagreed (p. 130).

The Inspector General found other conduct by staff in the Voting Section to be "disturbing," including posting messages on liberal news sites disparaging administration officials and Section managers, and using extremely bigoted, racial language towards anyone they believed did not share their liberal views. When confronted with the Internet postings about conservative co-workers, one member of the "cyber bullying" group initially lied under oath to the Inspector General's staff about her participation.[19]

Lying to an Inspector General employee conducting an investigation is federal crime, just as it is to lie to an FBI agent. Yet no adverse actions of any kind were taken against this Section staffer. In fact, a source inside the Voting Section told me she was treated as a "hero" by other employees.

[15] Davis v. Guam, 932 F.3d 822 (9th Cir. 2019).
[16] OIG Report, p. 121-123.
[17] U.S. v. Brown, 494 F.Supp.2d 440 (S.D. Miss. 2007), affirmed 561 F.3d 420 (5th Cir. 2009).
[18] OIR Report, p. 127.
[19] OIG Report, p. 127-129.

Relevant to the finding by a federal court in the *Miller* case, the Inspector General also criticized Voting Section management for specifically reaching out only to progressive organizations, such as the ACLU, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense and Education Fund, and the Lawyers' Committee for Civil Rights under Law, to fill job openings, while ignoring the resumes of other qualified professionals.[20] As a result, only applicants whose views were slanted dramatically to the left on the ideological spectrum, many of whom endorsed questionable views of the law, were given serious consideration.[21]

One can already see this bias and abuse of authority in some of the latest actions taken by the Civil Rights Division. DOJ threatened Arizona over the forensic post-election audit it is conducting in a May 5 letter and issued "guidance" on July 28 purporting to outline "Federal Law Constraints on Post-Election Audits."[22]

This "guidance" wrongly exaggerates the reach of 52 U.S.C. §§ 20701-20706. The purpose of these federal statutes, which require the preservation of federal election records, is investigatory in nature. They exist to help the Attorney General in determining the advisability of commencing possible investigations of federal election offenses. But if there is no underlying potential voting rights violation, any exercise of this power is not authorized and is a brazen abuse of power.

Contrary to the assertions made by DOJ, conducting an audit of a past election does not violate the VRA or any other federal election law. In fact, the Justice Department has never – in the entire history of the existence of the Civil Rights Division – interfered with or investigated an election audit, because its past leadership has understood it has no legal authority to do so. There is also no basis for DOJ to assert, as it does in the guidance, a possible violation of Section 11b of the VRA, which prohibits the direct intimidation, threat or coercion of individuals "for the purpose of interfering" with the ability to vote given that Arizona *voters have already voted!* The Justice Department' assertion that an audit could violate Section 11b is a highly implausible, if not outright absurd, interpretation of the law.

The same is true of the Justice Department's July 28 "Guidance Concerning Federal Statutes Affecting Methods of Voting."[23] In this "guidance," DOJ says that it does not "consider a jurisdiction's re-adoption of prior voting laws or procedures to be presumptively lawful," and instead will review the changes "for compliance with" federal law. In other word, DOJ will use the emergency procedures as the new baseline for reviewing a state's election laws under the VRA.

Not only is such a standard not contemplated by the text and legislative history of Section 2 of the VRA, which defines the Department's authority to assert violations of the law, it certainly is not in accord with the clear guidance provided by the U.S. Supreme Court on the application of Section 2 in the *Brnovich v. Democratic National Committee* decision. It is another example of the

[20] OIG Report, p. 198.
[21] OIG Report, p. 219-222.
[22] "Federal Law Constraints on Post-Election 'Audits'," U.S. Department of Justice (July 28, 2021).
[23] "Guidance Concerning Federal Statutes Affecting Methods of Voting," U.S. Department of Justice (July 28, 2021).

Division's abuse of its authority. Instead, the Department is trying to intimidate states to prevent them from returning to their election rules that were in place prior to the health emergency caused by the COVID-19 pandemic.

Conclusion

Existing federal voting laws, including the VRA and other statutes such as the National Voter Registration Act and the Help America Vote Act, are more than sufficient to protect voters and ensure that they can easily and securely practice their franchise without discrimination, fear, or intimidation. Americans today have an easier time registering and voting securely than at any time in our nation's history. Voter registration and turnout data, as well as the enforcement record of the U.S. Justice Department, show that there is no widespread, systematic discrimination by state or local election officials to prevent citizens from registering and voting. The permanent, nationwide provisions of the VRA such as Section 2 and Section 3 that apply across the country – not just to formerly covered jurisdiction under Section 5 – are powerful tools and are more than adequate to protect voting rights in those increasingly rare instances where discrimination does occur.

There is simply no need to resuscitate the outdated and obsolete preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5, which in addition to bringing back preclearance for covered jurisdictions, would add a "practice-based" preclearance requirement that applies to every city, county, and state in the country.

It is not 1965 and there is no longer any justification for giving the federal government the ability to veto the election laws and regulations that citizens and their elected representatives choose to implement in their respective states.

The Heritage Foundation

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Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act (H.R. 4)

Hans A. von Spakovsky

KEY TAKEAWAYS

It is easier today than ever before in our nation's history for eligible Americans to participate in the electoral process.

The permanent, nationwide provisions of the Voting Rights Act are more than adequate to protect voting rights in the rare instances where discrimination occurs.

H.R. 4 is a politically motivated federal power grab designed to thwart necessary election reform and manipulate redistricting decisions made by the states.

H.R. 4, the John Lewis Voting Rights Advancement Act, would give liberal bureaucrats in the Department of Justice (DOJ) the power to veto changes of polling place locations, voter ID and registration requirements, and the boundary lines in redistricting in *every single state*. It would also change legal standards to make it almost impossible for states to defend themselves against meritless litigation.

Supreme Court Ruling in *Shelby County v. Holder*

H.R. 4 is intended to overturn the decision by the Supreme Court of the United States in *Shelby County v. Holder* (2013),[1] which struck down the coverage formula for Section 5 of the Voting Rights

Act (VRA). Section 5 was intended to be a temporary provision that required covered jurisdictions to get approval (preclearance) from the DOJ or a federal court in Washington, DC, before making any changes in their voting laws.

The 1965 coverage formula was based on low voter registration and turnout in presidential elections, which the Court found to be unconstitutional because the 2006 renewal of Section 5, which would have extended that provision for another 25 years, was based on 40-year-old data that did not reflect contemporary conditions. Census Bureau data show that black voter turnout today is on par with or exceeds that of white voters in many of the formerly covered states and that there are no disparities traceable to discriminatory behavior by states.

This decision did not affect other provisions of the VRA that protect voters, such as Section 2. There is no need for new legislation reimposing (and expanding) the onerous preclearance requirement and no evidence that the permanent provisions of the VRA are not adequate to protect voter rights.

The proposed legislation is almost certainly unconstitutional because it does not satisfy what the Supreme Court said was required for coverage: The 1965 standards were obsolete, and any requirement that states obtain federal approval of election changes could be imposed only if Congress found "blatantly discriminatory evasions of federal decrees;" lack of minority office holding; voting tests and devices; "voting discrimination 'on a pervasive scale;'" or "flagrant" or "rampant" voting discrimination. Those conditions are nowhere to be found in 2021.

In the entire eight years of the Obama Administration, the Justice Department filed only four enforcement cases under Section 2 of the VRA, and there was no rise in enforcement actions by the department after the *Shelby County* decision.[2] According to a recent study, the decision "did not widen the Black–White turnout gap in states subject to the ruling."[3] In fact, the U.S. Census Bureau survey of the 2020 election reports "the highest voter turnout of the 21st century."[4]

What the VRA Already Provides

Section 2 is a permanent, nationwide ban on discrimination in voting based on race, color, or membership in a language minority group.[5] It prohibits intentional discrimination as well as discriminatory "results" based on a court's review of the "totality of the circumstances" under which it occurred.

Section 3 allows a court to impose a preclearance requirement in a particular jurisdiction for as long as necessary where the court determines that there is intentional misconduct and preclearance is required to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments.[6]

What the Proposed Act Would Do

H.R. 4's stated purpose is to prevent racial discrimination, but it would force racial gerrymandering, make race the predominant factor in the election process, advance the partisan interests of one political party, and prevent common-sense election reforms like voter ID.

It would change Section 3 from requiring a showing of intentional discrimination to allowing other violations of the VRA—most of which require only a showing of "disparate impact" (i.e., a statistical disparity)—to count toward triggering preclearance coverage.

New Coverage Formula for Section 4 of the VRA

Under a new coverage formula, a state government and all of its political subdivisions would be placed under Section 5 preclearance for 10 years if the DOJ determines that 15 "voting rights violations" by local jurisdictions occurred during the "previous 25 calendar years," even though there were no violations by the state or by the majority of local governments.

Alternatively, entire states would be placed under Section 5 preclearance for 10 years if the DOJ determines that 10 "voting rights violations" occurred during the "previous 25 calendar years" if one of those violations was by the state government.

A political subdivision within a state would be placed under preclearance coverage if it has just three "voting rights violations" during the "previous 25 calendar years." That trigger is so low that it could end up covering almost any city, county, or town in the country.

"Voting rights violations" include not just final court judgments that a jurisdiction has violated the VRA or the Fourteenth and Fifteenth Amendments, but also settlement agreements, consent decrees, and any preclearance objections made by the Attorney General. Such objections do not require *any* finding of intentional discrimination; a discriminatory effect based on statistical disparity is sufficient. Such "disparate impact" liability has been misused in many different areas besides voting.

This is especially troubling given the DOJ's history of filing unwarranted objections under Section 5 based on its bias in favor of liberal advocacy

groups. In 2012, a federal court overturned the DOJ's objection to South Carolina's voter ID law—but it cost the state millions of dollars to win.[7] In 1994, in a Georgia redistricting case, a federal court ruled against the DOJ and wrote a scathing opinion charging that "the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment" and expressing the court's "surprise[]" that the DOJ was "so blind to this impropriety."[8]

This bias has not changed. A 2013 report from the DOJ Inspector General criticized the Voting Section of the Civil Rights Division for hiring a majority of its lawyers from only five advocacy organizations: the American Civil Liberties Union (ACLU); National Council of La Raza; NAACP; the Lawyers' Committee for Civil Rights Under Law (LCCR); and Mexican American Legal Defense and Education Fund (MALDEF).[9]

Most jurisdictions do not have the resources to fight the DOJ even when its objections are meritless.

Because tallying up court rulings against a jurisdiction, including settlement agreements and consent decrees, will trigger coverage, the DOJ and outside groups will have an incentive to file as many objections as possible and to manufacture litigation. Even settlements of meritless litigation that a state enters into to avoid the cost of litigation would count as "voting rights violations" for purposes of triggering preclearance coverage.

Practice-Based Preclearance Coverage

H.R. 4 also has a new, unprecedented provision that did not exist in the VRA before the *Shelby County* decision that would vastly expand the DOJ's power and reach. It creates a "practice-based preclearance" requirement that would apply to *every single political jurisdiction in the country,* regardless of whether that jurisdiction is covered under the new 10-year coverage formula or ever had a history of discrimination.

Specifically, *all* state legislatures and local governments would have to get preclearance from the DOJ for any new "law, regulation, or policy" that:

- Adds "elected at-large" seats where two or more racial/language minority groups represent 20 percent of the voting age population (VAP);

- Adds "elected at-large" seats where a single language minority group represents 20 percent of the VAP on Indian lands within the political subdivision;

- Changes political boundaries that reduce by three percentage points the VAP of a single racial/language minority group where two or more racial/language groups represent 20 percent of the VAP or where a single language minority groups represents 20 percent of the VAP on Indian lands;

- Changes the political boundaries of a district where a racial/language minority group has experienced an increase in its population over the past decade of at least 10,000 or 20 percent of the VAP in the district;

- Changes the "documentation or proof of identity" needed to register or vote that is stricter than Section 303(b) of the Help America Vote Act[10] or stricter than what existed in state law on the day H.R. 4 is enacted;

- Reduces or alters the distribution of "multilingual voting materials";

- "Reduces, consolidates, or relocates voting locations," including for early and absentee voting, or reduces the "days or hours of in person voting on any Sunday" in any census tract where two or more racial/language minority groups represent 20 percent of the VAP or on Indian lands represent 20 percent of a language minority group; and

- Changes state voter registration procedures for removing ineligible registered voters if two or more racial/language minority groups represent 20 percent of the VAP.

These "practices" are so broad and cover such a wide spectrum of election administration and procedures that election changes made by state legislatures and local governments in virtually every state would now be within federal control. This is a startling invasion of state sovereignty that would likely be held unconstitutional by the U.S. Supreme Court, particularly since it allows the DOJ to object based purely on statistical disparities without any showing of any discriminatory purpose or intent.

New Disclosure Requirements

H.R. 4 imposes burdensome and impractical public information disclosure requirements on local officials, such as providing detailed demographic analysis of every single precinct, as well as on state officials with respect

to redistricting and other election changes. These changes must be posted within 48 hours, despite the fact that much of the information that must be disclosed, such as the number of registered voters in each precinct, is constantly changing up until Election Day.

Changing Legal Standards and Procedures

While Section 5 of the VRA could be enforced only by the Attorney General, which means that only the DOJ could file an enforcement action against any covered jurisdiction that failed to comply with the preclearance requirement, H.R. 4 would expand enforcement to allow "any aggrieved citizen" to file an enforcement action. This would open the floodgates to litigation by advocacy groups, particularly because the act would allow them to file a federal lawsuit if they disagreed with the DOJ's preclearance of a voting change.

H.R. 4 creates a novel legal standard for injunctive relief that is unknown in modern jurisprudence and far less stringent that the legal standard used for all other cases in the federal courts. The usual standard for whether a preliminary injunction is appropriate requires a court to determine whether the plaintiff has shown a substantial likelihood of succeeding on the merits, the plaintiff is likely to suffer irreparable harm without the injunction, the balance of equities and hardships is in the plaintiff's favor, and an injunction is in the public interest.[11]

However, under H.R. 4, if a plaintiff such as the ACLU simply "raise[s] a serious question" about a voting change and the "hardship" imposed on the state by enjoining the change is less than the "hardship" that would be experienced by the plaintiff if an injunction is not issued, the court must grant an injunction. This weaker standard favors plaintiffs' lawyers; reverses the principle that the burden of proof is on a plaintiff, not a defendant; and dramatically increases the odds that an injunction will be granted against state and local governments.

In another unprecedented move, H.R. 4 also severely restricts the ability of courts of appeal, including the U.S. Supreme Court, to issue stays of such injunctions. In a section entitled "Grounds for Stay or Interlocutory Appeal," the act states that the inability of a state to enforce its own voting laws and regulations shall not "constitute irreparable harm to the public interest," overriding the fundamental democratic principle that the public interest is best served by courts enforcing the laws under which citizens choose to govern themselves through the representational process.

Finally, the Act would *dramatically* expand the Attorney General's power to challenge "any act prohibited by the 14th or 15th Amendment" of the U.S. Constitution. Under current law, the Attorney General can bring civil rights claims only under specific federal statutes such as the VRA that authorize the Justice Department to enforce the law. Only private plaintiffs can file lawsuits alleging violations of the Fourteenth or Fifteenth Amendment. This change would allow the Attorney General to become involved in a whole range of constitutional cases unrelated to race discrimination, such as highly partisan, politically charged election disputes like the *Bush v. Gore* decision of 2000.

Conclusion

Americans today have an easier time registering and voting than at any other time in our nation's history. Moreover, both the enforcement record of the U.S. Department of Justice and voter registration and turnout data show that there is no widespread, systematic discrimination by state legislators and election officials to prevent citizens from registering and voting. The permanent, nationwide provisions of the Voting Rights Act, such as Section 2 and Section 3, are powerful provisions and more than adequate to protect voting rights in those increasingly rare instances where discrimination does occur.

There is simply no need to bring back the preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5. It is not 1965, and there is no longer any justification for giving the federal government the ability to veto the election laws and regulations that citizens and their elected representatives choose to implement in their respective states.

H.R. 4 is nothing less than a federal power grab designed to thwart election reform and manipulate redistricting decisions made by the states.

Hans A. von Spakovsky is a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation.

Endnotes

1. *Shelby County v. Holder*, 570 U.S. 529 (2013).
2. Hans A. von Spakovsky, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," *University of Memphis Law Review*, Vol. 49, Book 4 (2019), p. 1147, https://www.memphis.edu/law/documents/07_von_spakovsky.pdf (accessed May 24, 2021).
3. Kyle Raze, "Voting Rights and the Resilience of Black Turnout," February 7, 2021, p. 1, https://kyleraze.com/files/shelby_county_voting.pdf (accessed May 24, 2021).
4. Press release, "2020 Presidential Election Voting and Registration Tables Now Available," U.S. Department of Commerce, U.S. Census Bureau, April 29, 2021, https://www.census.gov/newsroom/press-releases/2021/2020-presidential-election-voting-and-registration-tables-now-available.html (accessed May 24, 2021).
5. 52 U.S.C. § 10301.
6. 52 U.S.C. § 10302.
7. *South Carolina v. Holder*, 898 F.Supp.2d 30 (D. D.C. 2012).
8. *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), affirmed, 515 U.S. 900 (1995).
9. U.S. Department of Justice, Office of the Inspector General, Oversight and Review Division, *A Review of the Operations of the Voting Section of the Civil Rights Division*, March 2013, p. 209, https://oig.justice.gov/reports/2013/s1303.pdf (accessed May 24, 2021).
10. 52 U.S.C. § 21083(b).
11. See *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

The Myth of Voter Suppression and the Enforcement Record of the Obama Administration

HANS A. VON SPAKOVSKY*

I. INTRODUCTION

The progressive Left's leadership, including former President Barack Obama, former Secretary of State Hillary Clinton, and former

* Hans A. von Spakovsky is a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies and Manager of the Election Law Reform Initiative at The Heritage Foundation. He is a former member of the Federal Election Commission and was a career Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice from 2002–05. The opinions expressed in this Essay are those of the author and do not necessarily represent those of the Heritage Foundation.

Attorney General Eric Holder,[1] created a false hue and cry about a supposed loss of voting rights in recent years. They claim that state legislatures', and particularly Republicans', including President Donald Trump, support for reforms intended to improve the election process's integrity, such as voter identification requirements and the maintenance procedures of statewide voter registration lists, amounts to widespread, systemic "voter suppression" of minority voters.[2]

In fact, there is no "voter suppression" epidemic, as demonstrated by, among other things, the enforcement record of the Voting Section of the Civil Rights Division of the U.S. Department of Justice (the "Civil Rights Division"). The Civil Rights Division is responsible for enforcing all federal voting rights laws that prohibit discrimination,

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1. *See, e.g.*, Attorney General Eric Holder, Attorney General Eric Holder Addresses the NAACP Annual Convention (July 16, 2013), https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-naacp-annual-convention; President Barack Obama, Remarks by the President at the National Action Network's 16th Annual Convention (Apr. 11, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/04/11/remarks-president-national-action-networks-16th-annual-convention; Jamelle Bouie, *Hillary Clinton Hits the GOP on Voter Suppression*, SLATE (June 4, 2015, 9:29 PM), https://slate.com/news-and-politics/2015/06/hillary-clinton-speaks-out-on-voting-rights-the-democratic-frontrunner-condemns-republicans-for-attempting-to-suppress-the-vote.html.

2. The progressive Left seems to label almost any election rule or regulation they dislike as "voter suppression." *See generally* Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (July 11, 2018, 12:01 AM), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/ ("Furthermore, states must have in place affirmative voter registration and voting policies in order to ensure that eligible voters who want to vote are able to and are not blocked by *unnecessary and overly burdensome obstacles* such as *arbitrary voter registration deadlines* and *inflexible voting hours*.") (emphasis added). That includes voter ID laws; not counting ballots cast outside of an assigned precinct; any steps taken by states to maintain the accuracy of voter registration rolls by removing ineligible voters; and even the requirement that has been in place for decades in the overwhelming majority of states that requires an individual to register prior to election day. *See id.* According to the founder of iVote, a partisan "advocacy group that campaigns to elect Democratic secretaries of state," "[v]oter registration itself is a voter-suppression tool." Ellen Kurz, *Registration Is a Voter-Suppression Tool. Let's Finally End It*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-it/2018/10/11/e1356198-cca1-11e8-a360-85875bac0b1f_story.html?utm_term=.92b2beaaf1af.

intimidation, and other efforts intended to prevent individuals from voting, as well as federal requirements imposed on the states for offering voter registration opportunities and maintaining those records' accuracy.[3]

These new state regulations and laws addressing the security of our elections, such as requiring voter identification or participation in programs that compare state voter registration lists, cannot be validly termed as "voter suppression" because they comply with existing federal voting laws, particularly given the evidence that such reforms have not hurt turnout or prevented eligible individuals from being able to vote.[4] Moreover, the U.S. Department of Justice ("DOJ") has seen a steady decrease in the number of enforcement cases due to decreasing violations of federal law.[5]

"Voter suppression" isn't even a legitimate, defined legal term under the statutes that protect voters, including the Voting Rights Act of 1965 ("VRA") and the National Voter Registration Act of 1993 ("NVRA").[6] "Voter suppression" is a faux term artificially created to unfairly condemn any election reform with which critics disagree, including perfectly legal reforms. The term is a linguistic trick designed to lump reasonable, legal, and common-sense actions by states meant to safeguard the integrity of the election process with illegal activities like poll taxes and literacy tests, thereby tainting legal actions taken by states to protect voters and elections.

The critics of these reform efforts allege that maintaining accurate voter registrations rolls to ensure that only eligible individuals cast ballots, prosecuting actual cases of election fraud, and implementing basic security reforms such as voter identification requirements that the American people overwhelmingly support is somehow "voter suppression."[7] Nothing could be further from the truth.

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3. *Voting Section*, U.S. DEP'T JUST., https://www.justice.gov/crt/voting-section (last visited May 13, 2019).

4. *See* discussion *infra* Parts III & IV.

5. *See* discussion *infra* Part IV.

6. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified as amended in scattered sections of 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

7. *See supra* note 1.

This Essay will explain, in Part II, the need for election reform that addresses the vulnerabilities in our voter registration and election system and increases the security and integrity of the election process. Part III will demonstrate that these reforms do not constitute "voter suppression" and that there have been no widespread, systemic efforts to implement discriminatory legislation, including since the Supreme Court's 2013 decision that lifted the Section 5 preclearance requirements from certain jurisdictions. Part IV will show that the DOJ's recent enforcement record of applicable federal voting rights laws demonstrates that there is no ongoing voter suppression campaign. Part V will explain why a new Section 5 is not needed to protect voting rights across the country. Part VI concludes.

II. THE NEED FOR REFORM TO PREVENT ELECTION FRAUD

The United States has a long history of election fraud, and preventing it remains a legitimate state interest, contrary to those who claim that it doesn't exist. As the U.S. Supreme Court observed when it upheld Indiana's voter ID law, states have "a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient."[8] Unfortunately, with regard to election fraud, it remains true, as the Supreme Court stated:

> [T]hat flagrant examples of such fraud . . . have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting . . . demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.[9]

Most states utilize an "honor" system for the voter registration and voting process that does a poor job of guarding against election fraud. The Heritage Foundation maintains the only database in the country of recent cases of election fraud, and as of May 2019, the database contained 1,199 proven instances of voter fraud, including over

8. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008).

9. *Id.* at 195–96 (footnotes omitted).

a thousand criminal convictions and other cases in which a court ordered new elections because of fraud.[10] This database is not a comprehensive list of all the fraud that has occurred in American elections, but it is a sampling of the many different types of fraud that have occurred and serves as a sobering reminder of the need for election safeguards.[11]

This catalog of cases does not include other evidence of election fraud. For example, the Government Accountability Institute ("GAI") discovered that thousands of individuals had illegally cast votes in multiple states in the 2016 election.[12] GAI obtained voter rolls and voter histories from twenty-one states, representing 17% of all possible state-to-state combinations.[13] GAI performed a data comparison of registered voters using a rigorous matching methodology that relied on names, birthdates, and full social security numbers.[14] As GAI said in its report, "[t]he probability of correctly matching two records with the same name, birthdate, and social security number is close to 100 percent. Using these match points will result in virtually zero false positives from the actual matching process."[15]

GAI found almost 8,500 individuals who had voted illegally in more than one state.[16] That included 2,200 duplicate voters in Florida, where George W. Bush's 2000 election margin of victory was only 537 votes, and the 2018 election had several extremely tight races including for governor and U.S. senator.[17] Despite this clear evidence of fraud

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10. *Election Fraud Cases from Across the Country*, HERITAGE FOUND., https://www.heritage.org/voterfraud (last visited May 13, 2019).

11. *Id.*; *see, e.g.*, JOHN FUND & HANS VON SPAKOVSKY, WHO'S COUNTING?: HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK 33–44 (2012); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 274–301 (1996).

12. GOV'T ACCOUNTABILITY INST., AMERICA THE VULNERABLE: THE PROBLEM OF DUPLICATE VOTING 2–3 (2017) [hereinafter AMERICA THE VULNERABLE], http://g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf.

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 2–3.

17. PowerPoint, Ken Block, Presidential Advisory Commission on Election Integrity, Data Mining for Potential Voter Fraud: Findings and Recommendations, Slide 8 (Sept. 12, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-ken-block-

by thousands of voters, there is no indication that a single election official in any of the states examined by GAI made any effort to obtain the names of any of these duplicate voters to initiate investigations and possible prosecutions. GAI estimated that extending its conservative matching formula to all 50 states "would indicate an expected minimum of 45,000 high-confidence duplicate voting matches."[18]

The Public Interest Legal Foundation ("PILF"), a non-profit public interest law firm dedicated to improving election integrity,[19] has also obtained official registration records from several states including Virginia, Michigan, and New Jersey. These records showed that thousands of noncitizens were removed from voter rolls after the noncitizens contacted officials and asked to be removed, but not before many of them had cast ballots in multiple elections.[20] What is most concerning about this is the fact that these noncitizens registered and cast illegal votes without detection by any election officials, which demonstrates the vulnerability of the current "honor" system most states have in the election process. The fact that these noncitizens were removed only after they voluntarily notified election officials of the problem begs the question: how many other undetected noncitizens are illegally registered and voting across the nation?

Just as with GAI's findings, there is no indication that election officials forwarded the names of any of the noncitizens reported by

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presentation.pdf; *Florida State Results*, FOX NEWS, https://www.foxnews.com/midterms-2018/state/florida (last visited May 13, 2019).

18. AMERICA THE VULNERABLE, *supra* note 12, at 3.

19. The author serves on the board of the Public Interest Legal Foundation. *About Us: Board of Directors*, PUB. INT. LEGAL FOUND., https://publicinterestlegal.org/about-us/board-of-directors/ (last visited May 13, 2019).

20. *See* PUB. INTEREST LEGAL FOUND., ALIEN INVASION II: THE SEQUEL TO THE DISCOVERY AND COVER-UP OF NON-CITIZEN REGISTRATION AND VOTING IN VIRGINIA 2 (May 2017), https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf; PUB. INTEREST LEGAL FOUND., GARDEN STATE GOTCHA: HOW OPPONENTS OF CITIZENSHIP VERIFICATION FOR VOTING ARE PUTTING NEW JERSEY'S NONCITIZENS AT RISK OF DEPORTATION 1 (Sept. 2017), https://publicinterestlegal.org/files/Garden-State-Gotcha_PILF.pdf; PUB. INTEREST LEGAL FOUND., MOTOR VOTER MAYHEM: MICHIGAN'S VOTER ROLLS IN DISREPAIR 1 (Oct. 2018), https://publicinterestlegal.org/files/Motor-Voters_Michigan-Report_FINAL_MediumQuality.pdf; PUB. INTEREST LEGAL FOUND., SAFE SPACES: HOW SANCTUARY CITIES ARE GIVING COVER TO NONCITIZENS ON THE VOTER ROLLS 1 (Aug. 2018), https://publicinterestlegal.org/files/Safe-Spaces_Final.pdf;

PILF to law enforcement officials for investigation and possible prosecution.

Our voter registration and election system desperately needs reforms intended to address these types of vulnerabilities, and these reforms are not, as some claim, "voter suppression."

III. THE FALSE CLAIMS ABOUT SECTION 5, *SHELBY COUNTY*, AND VOTER SUPPRESSION

The supposed voter suppression epidemic is often blamed[21] on the U.S. Supreme Court's decision in *Shelby County v. Holder*, in which the Court struck down the coverage formula of Section 5 of the VRA.[22] The claim is that once certain states were no longer covered under Section 5, their state legislatures rushed to pass laws intended to suppress minority voters and keep them from registering and casting their ballots.[23] Critics say these discriminatory laws would have been stopped by the DOJ under preclearance requirements of Section 5.[24] That is also a false claim.

Passed in 1965, Section 5 was originally an emergency five-year provision that required covered jurisdictions to get approval of any changes in their voting laws from the U.S. Department of Justice ("DOJ") or a three-judge panel in federal court in Washington, D.C., a process known as preclearance.[25] It was renewed for an additional five years in 1970; for an additional seven years in 1975; for an additional twenty-five years in 1982; and finally an additional twenty-five years in 2006.[26] At the time of the *Shelby County* decision in 2013, Section 5 covered nine states and parts of six others.[27]

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21. *See, e.g.*, Vanita Gupta, President & CEO, The Leadership Conference on Civil & Human Rights, Statement of Vanita Gupta at the DPCC Forum on Voting Rights 1 (Sept. 19, 2017), http://civilrightsdocs.info/pdf/testimony/vg_dpcc_statement_9_19_17.pdf.

22. Shelby County v. Holder, 570 U.S. 529, 556–57 (2013).

23. *See, e.g.*, Gupta, *supra* note 21, at 1–2.

24. *Id.*

25. 52 U.S.C. § 10304 (2012); *Shelby County*, 570 U.S. at 538.

26. *Shelby County*, 570 U.S. at 538–39.

27. *See Jurisdictions Previously Covered by Section 5*, U.S. DEP'T. JUST., https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 (last updated Aug. 6, 2015) [hereinafter *Jurisdictions Previously Covered by Section 5*].

Critics point to the *Shelby County* decision as the genesis of the voter suppression movement despite the fact that voter ID requirements were implemented in places like Georgia, Indiana, and Arizona years before the Court decided *Shelby County*.[28] In fact, both Georgia and Arizona were covered under Section 5, and their ID laws were not only precleared and approved by the U.S. Department of Justice under Section 5 but also survived court challenges under Section 2 of the VRA.[29]

The Court ruled that the coverage formula contained in Section 4, which determined which states and jurisdictions were subject to Section 5, was unconstitutional because it had not been updated to reflect modern conditions when it was renewed by Congress in 2006: "[H]istory did not end in 1965 . . . . [Y]et the coverage formula that Congress reauthorized in 2006 . . . ke[pt] the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."[30]

Congress specifically designed the coverage formula of Section 4 to capture those states that were engaging in blatant discrimination by taking into account black voters' low registration and turnout caused by discriminatory practices.[31] Thus, coverage under Section 4 was based on a jurisdiction maintaining a test or device as a prerequisite[32] to voting as of November 1, 1964, and registration or turnout of *all* voters of less than 50% in the 1964 election.[33] Registration or turnout of less than 50% in the 1968 and 1972 elections was added in successive renewals of the law, the latest in 1975.[34] That was the last time the coverage formula was revised, and the Section 4 formula did not utilize more current information when Section 5 was renewed in 2006.

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28. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185–86 (2008); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1346 (11th Cir. 2009), *cert. denied*, 556 U.S. 1282 (2009); Gonzalez v. Arizona, 485 F.3d 1041, 1046 (9th Cir. 2007).

29. *See, e.g.*, Common Cause/Ga. v. Billups, 554 F.3d at 1357; Gonzalez v. Arizona, 485 F.3d at 1052; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

30. *Shelby County*, 570 U.S. at 552–53.

31. 52 U.S.C. § 10303(b) (2012).

32. A test or device referred to a practice such as a literary test that was used by local election officials to deny or abridge the right to an individual. *See id.* § 10303(c).

33. *Id.* § 10303(b).

34. *Id.*

As the Court pointed out, the original conditions that justified the preclearance requirements no longer existed; in fact, the turnout of minority voters in the covered jurisdictions was higher than in the rest of the nation, and black turnout exceeded white turnout in "five of the six States originally covered by Section5, with a gap in the sixth State of less than one half of one percent."[35]

Section 5 was needed in 1965. But as the Court recognized, time has not stood still, and "[n]early 50 years later, things have changed dramatically."[36] Systematic, widespread discrimination against black voters has long since disappeared. As the Court recognized in the *Northwest Austin* case in 2009: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[37]

The Census Bureau's May 2013 report on the 2012 election showed that blacks voted at a higher rate than whites nationally (66.2% vs. 64.1%).[38] That same report shows that black voting rates exceeded that of whites in Virginia, South Carolina, Georgia, Alabama, and Mississippi, all of which were covered in whole by Section 5, and in North Carolina and Florida, portions of which were covered by Section 5.[39] Louisiana and Texas, which were also covered by Section 5, showed no statistically significant disparity between black and white turnout.[40] Overall, the black voting rate is consistently higher than the white voting rate in the formerly covered jurisdictions than in most of the nation.[41]

Looking at long-term trends, in the 2014 congressional elections, black turnout was slightly above the black turnout rate in 1978 (40.6% vs. 39.5%) while white turnout in the same period had declined

35. *Shelby County*, 570 U.S. at 535.

36. *Id.* at 547.

37. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (citation omitted).

38. THOM FILE, U.S. CENSUS BUREAU, THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 3 (2013).

39. *Id.* at 9 fig.5.

40. *Id.*

41. *Id.* at 8.

by about five percentage points (50.6% vs. 45.8%).[42] By comparison, there has been a steep downward trend in the overall turnout rate in congressional elections from 48.9% in 1978 to only 41.9% in 2014.[43] This turnout data does not support the claim that the turnout of black voters is somehow being "suppressed." In fact, minority turnout has bucked the overall long-term downward trend in general turnout.[44]

No one can reasonably claim that there is still widespread, official discrimination in any of the previously covered states, or that there are any marked differences between states such as Georgia, which was covered, and states such as Massachusetts, which was not covered.[45] As the Supreme Court approvingly noted and as Judge Stephen F. Williams pointed out in his dissent in the *Shelby County* decision in the District of Columbia Court of Appeals, jurisdictions covered under Section 4 before *Shelby County* had "*higher* black registration and turnout" than uncovered jurisdictions.[46] Covered jurisdictions also "ha[d] *far more* black officeholders as a proportion of the black population than do uncovered ones."[47] In a study that looked at lawsuits filed under Section 2 of the VRA, Judge Williams found that the "five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions."[48]

Arizona and Alaska, which were covered under Section 5, had no successful Section 2 lawsuit ever filed against them in the 24 years

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42. THOM FILE, U.S. CENSUS BUREAU, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014, at 4 fig.3 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf.

43. *Id.* at 4 fig.2.

44. The 2018 congressional election saw an increase in turnout. The turnout of the voting eligible population was 50.3%. *2018 November General Election Turnout Rates*, U.S. ELECTION PROJECT, http://www.electproject.org/2018g (last updated Dec. 14, 2018).

45. Georgia and Massachusetts had almost identical turnout of their voting eligible populations in the 2018 congressional election: 55% in Georgia and 54.6% in Massachusetts. *Id.*

46. Shelby County v. Holder, 570 U.S. 529, 541 (2013); Shelby County v. Holder, 679 F.3d 848, 891 (D.C. Cir. 2012) (Williams, J., dissenting) (emphasis added).

47. 679 F.3d at 892.

48. *Id.* at 897.

reviewed by that same study cited by Judge Williams.[49] The increased number of current black officeholders throughout the covered jurisdictions provides additional assurance that official, systemic discriminatory actions are highly unlikely to recur.

Without evidence of widespread voting disparities among the states, continuing the coverage formula unchanged in 2006 was irrational. As the Supreme Court said in *Shelby County*, Congress "did not use the record it compiled to shape a coverage formula grounded in current conditions."[50] Instead, it reenacted Section 4 "based on 40-year-old facts having no logical relation to the present day."[51] It would be no different than if Congress in 1965 had based the coverage formula not on what had happened in the prior year's election in 1964, but had instead opted to base coverage on registration and turnout from the Hoover era in 1928 or the Roosevelt election in 1932.

The *Shelby County* decision did not affect the viability of other portions of the VRA, including its most powerful tool. Section 2 of the VRA is a nationwide, permanent prohibition on the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees" that protect language minorities.[52]

IV. THE RECENT ENFORCEMENT RECORD OF THE DOJ

If there really had been a flood of laws passed by state legislatures to suppress the votes of minority voters, particularly after *Shelby County*, there is no question that there would have been an increase in the enforcement activities of the DOJ under the various federal voting rights laws it is tasked with enforcing. Yet not only did that not occur, enforcement actually decreased during the Obama administration when compared to the prior Bush administration.

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49. *Id.*

50. *Shelby County*, 570 U.S. at 554.

51. *Id.*

52. 52 U.S.C. § 10301(a) (2012). Under Section 203 of the VRA, language minorities are individuals who are not literate in English and "have suffered a history of exclusion from the political process: Spanish, Asian, Native American, and Alaskan Native." *Section 203 of the Voting Rights Act*, U.S. DEP'T. JUST., https://www.justice.gov/crt/language-minority-citizens (last updated Feb. 26, 2018).

A. The Recent Enforcement Record of the DOJ Under Section 2

Tom Perez (2009–13) and Vanita Gupta (2014–17), two political appointees who headed the Civil Rights Division during the Obama administration, have made similar claims that so-called voter suppression is an ongoing issue.[53] Gupta claims that voting rights "in America are under assault" and that the "*Shelby County* decision emboldened states to pass voter suppression laws, such as those requiring photo identification."[54] Perez claims he investigated "voter suppression" and spent "much of [his] time" as head of the Civil Rights Division "suing states that tried to block eligible voters from the ballot box."[55]

Given the very clear statements of members of the Obama administration, including the two heads of the Civil Rights Division who were responsible for enforcing the VRA, there is little doubt that if a state were to have engaged in voter suppression—abridging the right to vote in a discriminatory manner—the Obama administration would have filed suit to stop it. In fact, Attorney General Eric Holder announced on July 16, 2013, only one month after the *Shelby County* decision, that he was directing the Civil Rights Division "to shift resources to the enforcement of Voting Rights Act provisions that were not affected by the Supreme Court's ruling—including Section 2."[56]

Yet a review of the litigation record of the Voting Section of the Civil Rights Division after *Shelby County* shows no sharp increase in enforcement actions that would correlate with a widespread (or even isolated) "voter suppression" effort.[57] In fact, the Obama administration's enforcement record, contrary to the claims of Perez and Gupta, shows an overall substantial *downward* trend in the number of enforcement actions filed in comparison to the Bush administration under the

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53. *See* Gupta, *supra* note 21; Tom Perez, *Trump Administration's Voter Suppression Attempts Ahead of Midterms Are Not Only 'Morally Wrong,' They're Illegal*, CNBC (Sept. 11, 2018, 10:44 AM), https://www.cnbc.com/2018/09/11/trump-voter-suppression-attempts-are-morally-wrong-and-illegal.html.

54. Gupta, *supra* note 21.

55. Perez, *supra* note 53.

56. Holder, *supra* note 1.

57. *Voting Section Litigation*, U.S. DEP'T JUST., https://www.justice.gov/crt/voting-section-litigation (last updated Apr. 26, 2019) [hereinafter *Voting Section Litigation*].

various provisions of the VRA from 2001 to 2016, including after 2013, the year *Shelby County* was decided.[58]

The Voting Section's litigation list shows that the Bush administration filed sixteen cases to enforce Section 2 of the VRA in the administration's eight years.[59] Four of those cases were in three jurisdictions covered by Section 5: South Carolina, Georgia, and Mississippi.[60]

The Obama administration filed only four cases to enforce Section 2 in that administration's eight years, three of which were filed after the *Shelby County* decision.[61] Those three cases were in jurisdictions covered by Section 5: two in Texas (covered in whole) and one in North Carolina (where only part of the state was covered).[62]

There was no upsurge in Section 2 cases after the 2013 *Shelby County* decision; in fact, the Obama administration filed far fewer Section 2 enforcement actions than the prior administration. The number of Section 2 cases filed in Section 5 jurisdictions by the Bush administration prior to *Shelby County* and the number of Section 2 cases filed in former Section 5 jurisdictions by the Obama administration after *Shelby County* was exactly the same—three.

So again, there was no sudden rise in enforcement actions filed to stop voting discrimination (or so-called voter suppression) in jurisdictions formerly covered by Section 5. Thus, despite its rhetoric, the Obama administration was not able to discern any widespread voter suppression efforts or else it would have filed many more Section 2 enforcement actions. Instead, it filed only one-third the number of cases of the prior Republican administration.

An examination of those Section 2 cases filed against Texas and North Carolina by the Obama administration also raises serious doubts about the "voter suppression" claim.

One of those Texas cases was a typical redistricting case, similar to many other redistricting cases that the Civil Rights Division filed

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58. *Id.* The official DOJ list of cases and settlement agreements under the VRA and the NVRA is available on the webpage of the Voting Section of the Civil Rights Division. *Id.* The settlement agreements listed are in enforcement matters that were settled without suit being filed. *Id.* That webpage provides the numbers of enforcement cases cited in this article.

59. *Id.*

60. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

61. *Voting Section Litigation*, *supra* note 57.

62. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

over the long history of the VRA against both Democratic and Republican state legislatures.[63] Such cases often come down to a dispute over relatively small differences in the percentages of minority voters in particular districts and the effects those differences may or may not have on the ability of voters to elect their candidates of choice.[64] Those "effects" are often based on speculation by competing experts on whether candidates preferred by minority voters have the ability to get elected.[65] The "voter suppression" claim can't be made against the Texas case given the Supreme Court's conclusion that there was no evidence of intentional discrimination.[66]

The other Texas enforcement action was against the state's voter ID law,[67] while the case filed against North Carolina by the DOJ attacked not only the state's voter ID law but also its changes in early voting, termination of same-day registration, and its reinstatement of a requirement for voting in a voter's assigned precinct.[68]

In *North Carolina State Conference of the NAACP v. McCrory*, a three-judge panel of the Fourth Circuit overruled a district court finding that none of these reforms were discriminatory in either purpose or

63. For the long, complicated history of the most recent redistricting dispute in Texas, see Abbott v. Perez, 138 S. Ct. 2305 (2018). The Supreme Court held that there was no evidence of bad faith or intentional discrimination when Texas adopted an interim redistricting plan; rejected claims that one congressional and two state house districts violated the VRA; and held that one state house district that had been turned into a Latino opportunity district by moving in Latino voters at the request of counsel for a plaintiff was an impermissible racial gerrymander. *Id.* at 2327, 2313–14, 2335. Texas was trying to make it easier to elect a Hispanic candidate, not harder.

64. In redistricting cases, Section 2 requires that protected groups have the same ability as other voters "to elect representatives of their choice." 52 U.S.C. § 10301(b) (2012 & Supp. 2018) (originally codified at 42 U.S.C. § 1973(b)).

65. This is because Section 2 provides that the "extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" when determining if a legislative district violates Section 2. *Id.*

66. *See Perez*, 138 S. Ct. at 2327.

67. Veasey v. Abbott, 888 F.3d 792, 795 (5th Cir. 2018). As discussed in detail later in this Section, the amended Texas voter ID law is in place today after being upheld by the Fifth Circuit.

68. *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

effect.[69] Instead, it held that all these reforms, including the state's voter ID law, were discriminatory and violated the VRA.[70]

The Fourth Circuit panel's decision regarding the North Carolina law, however, is an outlier that is not in accord with the findings and holdings of other courts. The Fourth Circuit panel accused the district court judge of having "missed the forest in carefully surveying the many trees" in finding that the North Carolina election reform law was not discriminatory.[71] However, it is the Fourth Circuit panel that seems to have missed both the trees and the forest because the district court judge presented a detailed analysis of the factual evidence and the expert's opinion that demonstrated that the various reforms were not enacted with any discriminatory intent and would not have a discriminatory effect on voters.[72]

As just one example, the panel assigned great weight (and assigned nefarious motives) to the fact that the state legislature requested racial data relevant to its proposed changes in election laws.[73] But the panel was seemingly ignorant of the DOJ's practices under the VRA. A portion of North Carolina had long been covered under the preclearance procedures of Section 5 until the *Shelby County* decision.[74] The state legislature was well aware that, because of that coverage, the DOJ

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69. *Id.* at 214. On the denial of certiorari, Chief Justice Roberts noted that there was a dispute over the petition filed with the Court. North Carolina v. N.C. State Conf. of the NAACP, 137 S. Ct. 1399, 1399–1400 (Roberts, C.J., concurring). It had been filed by the state, its governor (a Republican), and the state board of elections prior to the 2016 election. *Id.* The newly elected Democratic attorney general moved to dismiss the petition on behalf of the state and the new Democratic governor. *Id.* The North Carolina legislature objected, claiming the attorney general had no authority under state law to dismiss the petition on behalf of the state. *Id.* According to Roberts:

> Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case."

Id. at 1400.

70. *McCrory*, 831 F.3d at 215.

71. *Id.* at 214.

72. *See* N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 351–412 (M.D.N.C. 2016).

73. *McCrory*, 831 F.3d at 216–17.

74. *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

always demanded such racial data from jurisdictions filing preclearance submissions.[75] While Section 5 was no longer in effect when this law was being considered by the state legislature, North Carolina was simply following the same procedures it had been following for 40 years as required under Section 5 practices.

Except for the voter ID requirement, all the other changes made by the North Carolina legislature at issue in the 2016 decision were actually in effect in the 2014 primary and general elections.[76] As the district court pointed out, "the greatest increase in turnout in the 2014 midterm primary was observed among African American voters, despite the implementation of [the election reform bill];" similarly, "[n]ot only did African American turnout increase more than other groups in 2014 . . . but that general election saw the smallest white-African American turnout disparity in any midterm" since 2002.[77] Thus, contrary to the panel's speculation, there was actual evidence that these reforms did not have a discriminatory effect in depressing minority turnout.

The Fourth Circuit panel also threw out the voter ID portion of the election reform law.[78] But a different panel of the same Fourth Circuit upheld Virginia's voter ID requirement in 2016, finding that it was not discriminatory under the VRA.[79] Virginia's law requires a photo ID to vote but has an exemption that allows individuals to vote who don't have an ID just as the North Carolina law did, which the Fourth Circuit said was discriminatory despite that exemption.[80]

The Fourth Circuit's decision in *NAACP v. McCrory* that not allowing voters to cast a ballot outside of their assigned precinct is discriminatory and amounts to voter suppression is not consistent with the law and decisions from other jurisdictions. As the Sixth Circuit said in *Sandusky County Democratic Party v. Blackwell*, requiring individuals

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75. The author is the former Counsel to the Assistant Attorney General for Civil Rights and Coordinated Enforcement of Section 5 of the VRA when he was at the DOJ from 2001 to 2005.

76. *N.C. State Conf. of the NAACP*, 182 F. Supp. 3d at 332–37, 348–49.

77. *Id.* at 349–50.

78. *McCrory*, 831 F.3d at 219.

79. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 608 (4th Cir. 2016).

80. *Lee*, 843 F.3d at 594; *McCrory*, 831 F.3d at 219. Under the Virginia law, "if a voter does not possess an acceptable form of photo identification, Virginia's Board of Elections must provide one to the voter free of charge and without any requirement that the voter present documentation." *Lee*, 843 F.3d at 594.

to vote in an assigned precinct is an "aspect common to elections in almost every state" and did not violate federal law.[81] There are rational and reasonable grounds for such a requirement:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.[82]

A panel of the Ninth Circuit recently held that "Arizona's longstanding requirement that in-person voters cast their ballots in their assigned precinct" is not a violation of Section 2 of the VRA or the First, Fourteenth, and Fifteenth Amendments.[83] Such a requirement imposes "only a minimal burden on voters" and serves "Arizona's important regulatory interests."[84]

There cannot be a violation of the law when there is no discrimination present that prevents individuals from voting in their assigned precincts even though it may be more "convenient" to vote outside of an assigned precinct.

The Sixth Circuit also disagreed with the Fourth Circuit panel's distorted view of early voting and same day registration and issued a warning to courts about getting "entangled, as overseers and micromanagers, in the minutiae of state election processes."[85] The Fourth Circuit held that North Carolina's elimination of same day registration (which the majority of states do not allow)[86] and its reduction in the

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81. 387 F.3d 565, 568 (6th Cir. 2004) (per curiam).

82. *Id.* at 569.

83. Democratic Nat'l Comm. v. Reagan, 904 F.3d 686, 696–97 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (2019).

84. *Id.* at 697.

85. Ohio Democratic Party v. Husted, 834 F.3d 620, 622–23 (6th Cir. 2016), *application for stay denied*, 137 S. Ct. 28 (2016).

86. As of January 2019, only 17 states and the District of Columbia allow same day (or election day) registration. *Same Day Voter Registration*, NAT'L CONF. ST.

number of early voting days from seventeen to ten (although the number of hours the polls stayed open remained the same) was also discriminatory.[87] But the claim that making changes in early voting or not offering same day registration is somehow discriminatory is not only not true, it amounts to a court micromanaging the state's election process.

As the Sixth Circuit pointed out in *Ohio Democratic Party v. Husted*, the "Constitution does not require *any* opportunities for early voting."[88] The plaintiffs in that case claimed that the Ohio legislature's decision to reduce the number of early voting days from thirty-five to twenty-nine days before Election Day was discriminatory under Section 2 of the VRA and unconstitutional.[89] According to the Sixth Circuit, which ruled against the plaintiffs, this was "an astonishing proposition":

> Nearly a third of the states offer no early voting. Adopting plaintiffs' theory of disenfranchisement would create a "one-way ratchet" that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances. Further, while the challenged regulation may slightly diminish the convenience of registration and voting, it applies even-handedly to all voters, and, despite the change, Ohio continues to provide generous, reasonable, and accessible voting options to all Ohioans.[90]

Those who argue that not allowing same day registration or early voting amounts to voter suppression and a violation of federal law because such opportunities might benefit some voters are making the wrong inquiry. As the Sixth Circuit laid out:

LEGISLATURES (Apr. 17, 2019), http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

87. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

88. *Ohio Democratic Party*, 834 F.3d at 623.

89. *Id.*

90. *Id.*

> The issue is not whether some voter somewhere would benefit from . . . early voting or from the opportunity to register and vote at the same time. Rather, the issue is whether the challenged law results in a cognizable injury under the Constitution or the Voting Rights Act. We conclude that it does not.[91]

If all voters in a state, regardless of their racial or ethnic background, have the same opportunity to register and exercise their right to vote, it is not voter suppression of minority voters if they are not given a certain number of days of early voting or are not allowed to register and vote on Election Day. As the Sixth Circuit in *Ohio Democratic Party* stated, it is as if the critics want to "disregard the Constitution's clear mandate that the states (and not the courts) establish election protocols, instead reading the document to require all states to maximize voting convenience."[92] Under that legal theory:

> [L]ittle 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).[93]

Similarly, in 2012, a federal judge rejected a challenge to the State of Florida's reduction of early voting from twelve to eight days, concluding it was not a violation of the VRA or the Constitution.[94] The fact that more minority voters might prefer early voting did "not demonstrate that the changes will deny minorities equal access to the polls."[95] The court pointed out that many states do not have early voting at all, yet under the theory being pushed by the plaintiffs, the "next logical step" would be a claim:

> [T]hat if a state with a higher percentage of registered African-American voters than Florida did not implement

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91. *Id.*

92. *Id.* at 629.

93. *Id.*

94. *See* Brown v. Detzner, 895 F. Supp. 2d 1236, 1255–56 (M.D. Fla. 2012).

95. *Id.* at 1246.

> an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida. It would also follow that a Section 2 violation could occur in Florida if a state with a lower percentage of African-American voters employed an early voting system . . . that lasts three weeks instead of the two week system currently used in Florida. This simply cannot be the standard for establishing a Section 2 violation.[96]

Contrary to the Fourth Circuit panel's view about early voting, although some voters may find it more convenient, turnout data show that early voting seems to actually *decrease* turnout. For example, a 2013 study released by professors from the University of Wisconsin that compared turnout in early voting states to those without early voting showed that "early voting lowers the likelihood of turnout by three to four percentage points."[97]

Even the experts retained by the challengers in *NAACP v. McCrory* admitted that early voting does not increase turnout. The district court pointed out that one of the experts opined, in a peer reviewed publication, that the "research thus far has already disproved one commonly made assertion, that early voting increases turnout. It does not."[98] In fact, the longer the window of early voting, the greater the effect on lowering turnout.[99] The reasons that early voting hurts turnout have not been conclusively determined. But a reasonable inference is that allowing voters to vote over an extended period of time diffuses the effectiveness of mobilization activities by candidates and political parties.

In addition to the North Carolina voter ID law that was challenged by the DOJ, a Section 2 lawsuit was also filed by the Obama

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96. *Id.* at 1254 (quoting Jacksonville Coal. for Voter Prot. v. Hood, 351 F. Supp. 2d 1326, 1335–36 (M.D. Fla. 2004)).

97. Barry C. Burden, et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 102 (2014); *see also* Memorandum, Hans A. von Spakovsky, The Heritage Found., Legal Memorandum No. 218: The Costs of Early Voting (Oct. 3, 2017), https://www.heritage.org/sites/default/files/2017-10/LM-218.pdf.

98. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 383 (M.D.N.C. 2016) (emphasis omitted).

99. Hans A. von Spakovsky, The Costs of Early Voting, *supra* note 97, at 3.

administration against Texas in *Veasey v. Abbott*.[100] Despite the frequently asserted claim that all ID laws are intended to suppress votes, they have been upheld as nondiscriminatory, an intangible burden on voters, and constitutional in court decisions in numerous states including Georgia, Indiana, Tennessee, South Carolina, Virginia, Wisconsin, and Alabama, among others.[101]

The end result of *Veasey* is that, with minor modifications, the voter ID law is in place in Texas.[102] This litigation resulted in a series of decisions by the Southern District of Texas and the Fifth Circuit. In an *en banc* decision, the Fifth Circuit found the ID requirement had a disparate impact on minority voters but reversed the district court's finding that the ID requirement was enacted with a discriminatory purpose and remanded the case for further consideration.[103] The Fifth Circuit said that the district court's finding was "infirm" and that the court had "relied too heavily on the evidence of State-sponsored discrimination dating back hundreds of years" instead of more contemporary examples.[104] Furthermore, said the Fifth Circuit, "[n]o one questions the legitimacy" of the concerns of the state legislature in passing this law that "centered on protection of the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting process."[105]

It should be noted that actual voter turnout contradicted the claims that the Texas voter ID law would have a disparate impact on minority voters in Texas, reflecting that the *en banc* court's conclusion

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100. *See* Veasey v. Abbott, 888 F.3d 792 (5th Cir. 2018).

101. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016); Frank v. Walker, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); Common Cause/Ga. v. Billups, 554 F.3d 1340 (11th Cir. 2009), *cert. denied*, 129 U.S. 2770 (2009); Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253 (N.D. Ala. 2018); Green Party of Tenn. v. Hargett, 194 F. Supp. 3d 691 (M.D. Tenn. 2016); Nashville Student Org. Comm. v. Hargett, 155 F. Supp. 3d 749 (M.D. Tenn. 2015); South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012).

102. *See Veasey*, 888 F.3d 792. The original Texas statute required a Texas driver's license, non-driver's license ID, or "Election Identification Certificate" issued by the Texas Department of Public Safety, a Texas concealed carry permit, a U.S. passport, or military ID. Veasey v. Abbott, 830 F.3d 216, 225 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

103. *See Veasey*, 830 F.3d at 272.

104. *Id.* at 230–31.

105. *Id.* at 231.

on the effect of the law was wrong.[106] Before the ID law was preliminarily enjoined, it was in effect for the 2013 state elections in Texas in which there were state constitutional amendments on the ballot, as well as candidates and other ballots issues in individual counties.[107] Turnout went up with the ID law in place when compared to the 2011 state election, including in counties that are heavily minority counties.[108]

On remand from the Fifth Circuit, the district court issued a permanent injunction against the ID law.[109] This was later reversed as an abuse of discretion by a panel of the Fifth Circuit, which held that an amendment to the original law that had been approved by the state legislature ameliorated the problems claimed by the plaintiffs.[110] That amendment allowed any voter without one of the free photo IDs issued by the state to vote after completing a "Declaration of Reasonable Impediment" form and presenting a specified form of non-photo ID.[111]

Election officials could not question the reasonableness of the voter's explanation in the declaration of why the voter was not able to obtain the free photo ID.[112] The form of non-photo ID that had to be presented with the declaration included a valid voter-registration or birth certificate, a current utility bill, bank statement, government check, paycheck, or other government documents with the voter's name and address.[113]

Contrast the Obama administration's position in the *Veasey* case with its position in *NAACP v. McCrory*. When *Veasey* was on remand, the DOJ filed a joint pleading with Texas prior to the 2016 election in which the DOJ agreed that an appropriate interim remedy would be a "reasonable impediment" exemption—the very same exemption that

106. Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 4146: Lessons from the Voter ID Experience in Texas (Feb. 11, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4146.pdf. In fact, turnout in the 2013 election doubled from turnout in 2011. *Id.* at 2.

107. *Id.* at 1.

108. *Id.* at 2.

109. Veasey v. Abbott, 265 F. Supp. 3d 684, 700 (S.D. Tex. 2017).

110. Veasey v. Abbott, 888 F.3d 792, 795–96 (5th Cir. 2018).

111. *Id.* at 796.

112. *Id.*

113. *Id.*

the Texas legislature then adopted in 2017, which the Fifth Circuit subsequently held ameliorated the plaintiffs' claims.[114] This submission was made by Vanita Gupta, who was the principal deputy (and thus acting) attorney general for the Civil Rights Division.[115]

Significantly, the DOJ's position in *Veasey* was inconsistent with the position it took in *McCrory*. The North Carolina voter ID law challenged by the DOJ (that was eventually thrown out by the Fourth Circuit Court of Appeals panel)[116] in *McCrory* had been similarly amended by the state legislature to add a reasonable impediment exemption.[117] The North Carolina law allowed an individual to vote after completing a declaration of reasonable impediment form, *without* the second requirement of showing an identification document such as a valid voter-registration or birth certificate, a current utility bill, bank statement, government check, paycheck, or other government documents with the voter's name and address.[118] Thus, the North Carolina law was less "burdensome" than the Texas law that the Civil Rights Division had previously approved.

Yet, contrary to the position it took in *Veasey*, the DOJ claimed, and a panel of the Fourth Circuit agreed, that even with the reasonable impediment exemption, the North Carolina ID law was discriminatory.[119] The Fourth Circuit's view was not only out of step with the Fifth Circuit in *Veasey*, it was also not in accord with a three-judge panel decision in the District of Columbia.

In 2012, when Section 5 of the VRA was still in effect, South Carolina filed a lawsuit in the District of Columbia seeking preclearance of its new voter ID law, which had a reasonable impediment exemption.[120] Individuals would still be able to vote without a photo ID

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114. *Id.*; Joint Submission of Agreed Terms at 2, Tex. State Conf. of NAACP Branches v. Cascos, No. 2:13-cv-291 (S.D. Tex. Aug. 3, 2016) & Taylor v. Texas, No. 2:13-cv-348 (S.D. Tex. Aug. 3, 2016) [hereinafter Joint Submission of Agreed Terms].

115. Joint Submission of Agreed Terms at 4, *supra* note 114.

116. *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

117. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 344–345 (M.D.N.C. 2016).

118. *McCrory*, 831 F.3d at 243.

119. *See id.* at 240.

120. South Carolina v. United States, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

by signing "an affidavit at the polling place" that listed "the reason that they have not obtained a photo ID" provided by the state for voting without a fee.[121]

In an opinion written by then-District of Columbia Circuit Court Judge (now Associate Justice) Brett Kavanagh, the panel held that South Carolina's voter ID law did not violate the VRA.[122] The court stated that the South Carolina law "does not have a discriminatory retrogressive effect" and "was not enacted for a discriminatory purpose."[123] That law has been in place since 2013 without any reported problems.

The idea that it is a violation of the VRA if there is some slight disparity between racial groups in the percentage of black and whites who already have a photo ID is simply not credible nor reasonable. When the Seventh Circuit upheld Wisconsin's voter ID law against claims that the law was discriminatory because, it was alleged, there was a slight disparity between the percentage of whites and blacks who already possess photo IDs, the court articulated a common sense argument that disrupts the voter-ID-is-voter-suppression mantra:

> Plaintiffs describe registered voters who lack photo ID as "disenfranchised." If the reason they lack photo ID is that the state has made it impossible, or even hard, for them to *get* photo ID, then "disfranchised" might be an apt description. But if photo ID is available to people willing to . . . stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time.[124]

The numbers often put forward by those who claim that large numbers of Americans don't have photo ID are, as the Seventh Circuit correctly noted, "fanciful" in a:

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121. *Id.*

122. *Id.*

123. *Id.* Under Section 5, no voting change could be approved if it would have a retrogressive effect, i.e., putting voters in a worse position than before the change. *See id.*

124. Frank v. Walker, 768 F.3d 744, 748 (7th Cir. 2014).

> [W]orld in which photo ID is essential to board an airplane, enter Canada or any other foreign nation, drive a car (even people who do not own cars need licenses to drive friends' or relatives' cars), buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal.[125]

Thus, the DOJ's recent record of enforcement of Section 2 of the VRA provides little evidence to support the claim that there are widespread, unlawful, voter suppression actions being taken against minority voters by states and local jurisdictions. The Texas voter ID litigation in *Veasey* resulted in only minor changes to its election procedures, and the court's decision in the North Carolina case, *NAACP v. McCrory*, is inconsistent with both the law and what actually happened in North Carolina when the law was in effect.

B. The Recent Enforcement Record of the DOJ Under Section 11(b)

Another provision of the VRA that could be used to go after actual voter suppression is Section 11(b), which provides that "[n]o

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125. *Id.* Voter ID laws have not been shown to depress turnout, and turnout has increased in many states that implemented voter ID law. *See* Justin Grimmer et. al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, J. POL. 80, No. 3 (July 2018): 1045–51; Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 3451: Lessons from the Voter ID Experience in Georgia (March 19, 2012); Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 3679: Lessons from the Voter ID Experience in Kansas (July 25, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/ib3679.pdf (detailing that only 0.002% of registered voters requested an ID); Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 4180: Lessons from the Voter ID Experience in Tennessee (Mar. 25, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4180.pdf; Memorandum, Hans A. von Spakovsky, The Heritage Found., Legal Memorandum No. 70: Voter Photo Identification: Protecting the Security of Elections (July 13, 2011), https://thf_media.s3.amazonaws.com/2011/pdf/lm0070.pdf; *see also* Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008–2016*, at 1 (Nat'l Bureau Econ. Research, Working Paper 25522, 2019) ("[Voter ID] laws have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation."), https://www.nber.org/papers/w25522?utm_campaign=ntwh&utm_medium=email&utm_source=ntwg22.

person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote . . . ."[126] Part (a) of the same statutory provision prohibits failing or refusing to permit someone to vote who is entitled to vote or to otherwise refuse to "tabulate, count, and report such person's vote."[127]

Yet during its entire eight years in office, the Obama administration *did not file a single case* to enforce this provision of the VRA. In contrast, the Bush administration filed two cases to enforce Section 11(b), including *United States v. New Black Panther Party* in Pennsylvania and *United States v. Brown* in Mississippi.[128] Regardless, this record provides no evidence of any widespread, recent voter suppression efforts that would violate this provision of the VRA.

C. The Recent Enforcement Record of the DOJ Under Section 208

Section 208 of the VRA requires local governments to allow "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write [to] be given assistance by a person of the voter's choice . . . ."[129] Although this may sound like an

126. 52 U.S.C. § 10307(b) (2012).

127. *Id.* § 10307(a).

128. *See Cases Raising Claims Under Section 11(B) of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/cases-raising-claims-under-section-11b-voting-rights-act#philadelphia (last updated Aug. 6, 2015) [hereinafter *Cases Raising Claims Under Section 11(B) of the Voting Rights Act*]. The mishandling by the Obama administration of the New Black Panther Party lawsuit filed by the Bush Administration just before it left office was very controversial. The complaint alleged that members of the New Black Panther Party, dressed in black, paramilitary-style uniforms and carrying nightsticks, threatened and intimidated individuals at a polling place in Philadelphia. The case in large part was dismissed with a watered-down injunction even though the DOJ could have obtained a default judgment when the defendants failed to answer the lawsuit. FUND & VON SPAKOVSKY, *supra* note 11, at 139–47. *U.S. v. Brown* was the first case ever filed by the DOJ against local black officials for discriminating against white voters. The district court judge concluded that the VRA protects all voters and that the defendants engaged in racially-motivated manipulation of the electoral process to dilute the votes of white voters. *See* United States v. Brown, 494 F. Supp. 2d 440, 486–87 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

129. 52 U.S.C. § 10508 (2012).

innocuous provision, the DOJ has used it in the past to go after jurisdictions that were refusing to allow voters to be assisted or who were allowing improper assistance—assistance that was intimidating or involved threats to voters to make them vote for particular candidates.[130]

Yet the Obama administration filed only one enforcement action utilizing this provision in its entire eight years in office, and that case was filed in 2009,[131] four years before *Shelby County*. In comparison, the Bush administration filed ten cases to enforce Section 208.[132] Only two of those cases were filed in a jurisdiction covered by Section 5, both in Texas.[133]

Again, the record of the last ten years of enforcement of Section 208 shows no widespread voter suppression effort that prevents voters from getting the assistance they need to vote.

D. The Recent Enforcement Record of the DOJ Under the National Voter Registration Act

Often claims of "voter suppression" relate to registration list maintenance procedures that remove voters who have died, moved away, or otherwise become ineligible to vote. The NVRA[134] sets out strict standards that specify the rules governing such maintenance procedures (which the law requires to be utilized on a regular basis)[135] and the conditions under which registrants can be removed from the voter rolls. Compliance with the NVRA cannot reasonably be termed "voter suppression."

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130. *See, e.g.*, Consent Decree, Judgment, and Order, United States v. Fort Bend Cty., No. 4:09-cv-1058 (S.D. Tex. April 13th, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/ftbend_cd.pdf.

131. *Voting Section Litigation*, *supra* note 57.

132. *Id.*

133. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

134. 52 U.S.C. § 20501 (2012). There are also requirements governing statewide voter registration lists as well as voter registration in general in the Help America Vote Act of 2002. *See id.* § 20901; *see also id.* § 21083 (entitled "Computerized statewide voter registration list requirements and requirements for voters who register by mail").

135. States must "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters . . . ." *Id.* § 20507(a)(4).

Violations of the NVRA by, for example, removing eligible voters from statewide voter registration lists, could, on the other hand, be considered voter suppression. Yet the enforcement records of the Voting Section of the Civil Rights Division show a sharp *downturn* in the number of enforcement actions filed under the NVRA over the past decade, including since *Shelby County*.[136] While the Bush administration filed ten lawsuits to enforce the NVRA and entered into two settlement agreements, for a total of 12 enforcement actions, the Obama administration filed only four cases to enforce the NVRA and entered into two settlement agreements, for a total of six enforcement matters in the eight years it was in office, less than one per year.[137]

That hardly constitutes evidence of widespread "voter suppression" given the number of election jurisdictions across the United States, which includes thousands of counties and individual townships in addition to the fifty states and the District of Columbia. In total, there are over 10,000 election administration jurisdictions in the United States.[138] And that record certainly does not support the claim of the former head of the Civil Rights Division, Tom Perez, that he spent most of his time "suing states that tried to block eligible voters from the ballot box."[139]

Two of the NVRA lawsuits filed by the Obama administration, against Rhode Island and Louisiana, claimed that the states were not offering "voter registration opportunities in [state] public assistance offices and offices that provide state-funded programs primarily serving persons with disabilities."[140] One enforcement action against Florida

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136. *See Cases Raising Claims Under the National Voter Registration Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#rhodeisland (last updated Mar. 27, 2019) [hereinafter *Cases Raising Claims Under the National Voter Registration Act*].

137. *See id.*; *see also Voting Section Litigation*, *supra* note 57. The Obama administration initiated an action against New York by letter dated January 6, 2017, but the case was ultimately settled by the Trump administration. *See Memorandum of Understanding*, U.S. DEP'T JUST. (June 20, 2017), https://www.justice.gov/crt/case-document/memorandum-understanding.

138. *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (June 15, 2016), http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx.

139. Perez, *supra* note 53.

140. *Cases Raising Claims Under the National Voter Registration Act*, *supra* note 136.

asserted it was conducting a list-maintenance program within 90 days of a federal election, which is prohibited under the NVRA.[141] A fourth lawsuit against the City of New York, which is not exactly known as a Republican stronghold, was over the city's list maintenance procedures.[142] The DOJ claimed New York's flawed procedures included not removing voters from the registration list who had died or moved away, as well as removing some voters for a failure to vote without using the notice procedures mandated in the NVRA.[143] Although these cases all involved technical violations of the NVRA, none of them showed intentional, partisan conduct aimed at suppressing minority voters.

Both of the settlement agreements entered into between the Obama administration and the states of Connecticut and Alabama concerned the development of an electronic voter registration system for driver's license applicants to replace the states' paper-based systems.[144] While that may certainly be a more efficient method of ensuring voter registration at DMV offices, the NVRA has no requirement for an electronic-based system.[145] While the Obama administration persuaded these states to agree to implement new procedures not required under federal law, these settlement agreements cannot even remotely be classified as correcting any type of voter suppression, systemic or otherwise.

A relatively recent Supreme Court decision, *Husted v. A. Philip Randolph Institute*,[146] lays to rest the claim that complying with the NVRA's requirement of removing voters who have moved, died, or otherwise become ineligible to vote to improve the accuracy of statewide voter registration rolls constitutes "voter suppression." As that decision pointed out, registration lists in this country are very unreliable and inaccurate: "24 million voter registrations in the United

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141. *See id.*

142. *Id.*

143. Complaint in Intervention at 14–15, Common Cause N.Y. v. Bd. of Elections in N.Y., No. 1:16-cv-06122-NGG-RML (E.D.N.Y. Jan. 18, 2017).

144. *See Voting Section Litigation*, *supra* note 57.

145. See 52 U.S.C. § 20504 (2012), which requires states to provide applicants for a driver's license with a voter registration form. There is no mention of an electronic form being required versus a paper form.

146. Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).

States—about one in eight—are either invalid or significantly inaccurate. And about 2.75 million people are said to be registered to vote in more than one State."[147]

Husted dealt with Ohio's list maintenance procedures.[148] Ohio uses the precise method outlined in the NVRA to maintain the accuracy of its voter rolls, procedures that the plaintiffs claimed violated both the NVRA and the Help America Vote Act ("HAVA") of 2002.[149] As the Supreme Court summarized:

> Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.[150]

According to the Court, Congress anticipated that some voters would not return the prepaid card to confirm they have not moved, and the NVRA treats that failure as non-dispositive evidence that they no longer reside at their registered address.[151] The NVRA then allows states to remove that voter from the registration list if the voter fails to vote in two federal elections *after* the date the notice was sent out.[152]

The plaintiffs' challenge, claiming that states cannot remove registrants for a failure to vote under any circumstances, "not only second-guesses the congressional judgment embodied in [the NVRA's] removal process, but it also second-guesses the judgment of the Ohio Legislature as expressed in the State's [removal process]."[153] States that comply with the NVRA therefore cannot be engaged in "voter suppression."

Finally, it should be noted that the Obama administration filed one enforcement action under HAVA, which supplements the NVRA,

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147. *Id.* at 1838 (citation omitted).
148. *See id.*
149. *Id.* at 1838–41.
150. *Id.* at 1838.
151. *Id.* at 1839.
152. *Id.* at 1839–40.
153. *Id.* at 1846.

and entered into one settlement agreement.[154] The DOJ settlement agreement was in regard to Palm Beach County, Florida's failure to use voting machines that were fully compliant with Section 301 of HAVA, which requires at least one voting machine in each precinct that can used by blind or disabled voters.[155]

The HAVA enforcement action was filed against Fort Bend County, Texas, for not providing provisional ballots as required under Section 302 of HAVA, and the case settled through a consent decree.[156] HAVA's provisional ballot provision allows any individual to vote after asserting that she is eligible and registered, even if her name does not appear on the list of registered voters in her precinct or if an election official challenges her eligibility.[157] The voter casts a provisional ballot that is forwarded to election officials at the end of Election Day.[158] Those officials determine if the individual was entitled to vote.[159] If so, the vote must be counted, and the voter must be notified of the election officials' decision, and if it is not counted the reasons for the decision.[160]

Thus, if an eligible voter is removed from the registration list due to an administrative error or some kind of intentional misconduct by election officials, that voter will still be able to vote through the provisional balloting process. That is why claims of so-called voter

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154. *See Voting Section Litigation*, *supra* note 57.

155. 52 U.S.C. § 21081(a)(3) (2012 & Supp. 2014) (originally codified as 42 U.S.C. 15482(a) (2012)); *see MOA- Palm Beach County FL HAVA*, U.S. DEP'T JUST., https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava. Gov. Ron DeSantis removed the supervisor of the Palm Beach Elections Department, Susan Bucher, a Democrat, in January 2019 for incompetence, neglect of duty, and malfeasance for violating state election laws. Steve Bousquet & Skyler Swisher, *Gov. DeSantis Replaces Palm Beach Elections Chief After 2018 Election Woes*, SUNSENTINEL (Jan. 18, 2019, 2:30 PM), https://www.sun-sentinel.com/news/politics/fl-ne-ron-desantis-suspends-susan-bucher-20190118-story.html.

156. 52 U.S.C. § 21082(a); *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. DEPT. JUSTICE, https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act#ftbend (last updated Oct. 16, 2015).

157. *See* 52 U.S.C. § 21082(a).

158. *Id.* § 21082(a)(3).

159. *Id.* § 21082(a)(4).

160. *Id.* § 21082(a)(4)–(5).

suppression over the supposedly unfair efforts to remove ineligible individuals from voter registration rolls should ultimately fail—because HAVA's provisional balloting requirement acts as a failsafe to ensure that every individual who complies with his or her state's registration requirement will be able to vote. And in its entire eight years in office, the Obama administration found only one instance from anywhere across the nation in which a political jurisdiction was violating the provisional balloting requirement.[161]

The overall enforcement record of the DOJ under the VRA, the NVRA, and HAVA does not support the claim that there is widespread, unlawful "voter suppression" of minority voters going on across the country, either before or after the *Shelby County* decision. In fact, there has been a sharp downturn in the number of enforcement actions filed by the DOJ to enforce federal voting rights laws, particularly during the Obama administration.

Those who still claim there is a "voter suppression" epidemic cannot blame a lack of resources or personnel at the Civil Rights Division to pursue such claims either because the DOJ retained the lawyers and staff who worked full-time on Section 5 matters after the 2013 *Shelby County* decision.[162] As directed by Eric Holder, that staff was reassigned to enforce the other provisions of the VRA and the NVRA (and HAVA).[163] And appropriations from Congress for the Civil Rights Division have steadily increased from $136 million in FY 2013, the year *Shelby County* was decided, to $147.2 million in FY 2018.[164]

Given that no one questions the Obama administration's willingness to enforce provisions of the VRA, the NVRA, and HAVA, the

161. Consent Decree, Judgment, and Order, United States v. Fort Bend Cty., Tex., No. 4:09-cv-1058 (S.D. Tex. April 13, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/ftbend_cd.pdf; *Voting Section Litigation*, *supra* note 57.

162. Holder, *supra* note 1.

163. *See id.*

164. CIVIL RIGHTS DIVISION, U.S. DEP'T JUSTICE, FY 2019 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/jmd/page/file/1033091/download; CIVIL RIGHTS DIVISION, U.S. DEP'T JUSTICE, FY 2016 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/16_bs_section_ii_chapter_-_crt.pdf.

downturn in enforcement actions most likely reflects a reduction in discriminatory actions by states and localities that would otherwise be sufficient to justify the DOJ filing a lawsuit.

V. A NEW SECTION 5?

Proponents of the "voter suppression" myth have called upon Congress to reinstate Section 5 of the VRA.[165] The enforcement record, however, demonstrates that there is no need for Congress to reinstate Section 5. While Section 5 might have been a necessary measure at the time it was enacted, it constituted an unprecedented and extraordinary intrusion into state sovereignty, requiring covered states to get the federal government's approval for voting changes made by state and local officials. No other federal law presumes that states cannot govern themselves and that they must obtain the federal government's approval before they implement any changes to their own laws. As the Supreme Court said, Section 5 "employed extraordinary measures to address an extraordinary problem."[166]

Today, six years after *Shelby County*, as the DOJ's enforcement record shows, there is still no evidence of widespread, systemic, official discrimination by any of the formerly covered jurisdictions (or any other state) that would justify re-imposing the onerous Section 5 preclearance requirement. In the relatively few jurisdictions where a Section 2 violation has been found, there is no evidence that those political bodies have evaded the court-imposed remedies to implement further discriminatory practices.

That is a key point because the fundamental reason that Section 5 was implemented in 1965 as an adjunct to Section 2 was to stop efforts by local jurisdictions to evade court-ordered remedies. As the Supreme Court said in 1966 in *Katzenbach v. South Carolina*, in which it upheld the constitutionality of Section 5, the preclearance requirement was tailored to stop such "obstructionist tactics."[167] But in 2013, the Supreme Court in *Shelby County* reiterated its earlier observation

165. Mike Lillis, *Dems Vow Quick Action to Bolster Voting Rights upon Taking Power*, THE HILL (Nov. 30, 2018, 4:08 PM), https://thehill.com/homenews/house/419187-dems-vow-quick-action-to-bolster-voting-rights-upon-taking-power.

166. Shelby County v. Holder, 570 U.S. 529, 534 (2013).

167. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

in *Northwest Austin* that nearly half a century later, "[b]latantly discriminatory evasions of federal decrees are rare."[168]

Moreover, it would be fundamentally unfair to impose preclearance requirements on states or other political jurisdictions because of discriminatory actions—if they occur—that are committed by political subdivisions over which they have no control.

To meet the requirements of the Constitution and justify federal supervision of state and local government, a new coverage formula for Section 5 would have to identify those jurisdictions for which Section 2 would not be effective because of systemic racial discrimination and evasion of federal court decrees. That will not be possible because there is no evidence of such behavior in voting either in the states formerly covered under Section 5 or anywhere else.[169]

The absence of Section 5 does not mean jurisdictions can never be subject to federal oversight and a preclearance requirement. Critics of *Shelby County* seem to ignore another provision of the VRA, Section 3, which can be used to supervise any jurisdiction that has a proven pattern of discriminatory conduct.[170] While the Supreme Court struck down the coverage formula of Section 4 that triggered Section 5 preclearance requirements, Section 3 was not at issue in *Shelby County*. Although Section 3 has rarely been used, if a jurisdiction has engaged in repeated discrimination and a court finds it is necessary to prevent future problems, Section 3 provides that the court can essentially place the jurisdiction into the equivalent of Section 5 coverage.[171]

If that happens, then "no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless" the court or the Attorney General has precleared the change and found that it "does not have the purpose and will not have the effect of denying or abridging the right to vote."[172]

The point here is that while the Supreme Court in *Shelby County* found that the general conditions in covered states today do not justify their continued exception from general constitutional principles and

168. *Shelby County*, 570 U.S. at 531 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

169. *See supra* Part IV.

170. 52 U.S.C. § 10302(c) (2012).

171. *Id.*

172. *Id.*

structures, a court can still appoint federal examiners and place a particular jurisdiction into the equivalent of federal receivership—Section 5 preclearance—if it finds sufficient evidence of current, repeated discrimination and a recalcitrant defendant.

Section 5 was also unprecedented in the way it violated fundamental American principles of due process: it shifted the burden of proof of wrongdoing from the government to the covered jurisdiction.[173] Unlike all other federal statutes that require the government to prove a violation of federal law, covered jurisdictions were put in the position of having to prove a negative—that a voting change was not intentionally discriminatory and did not have a discriminatory effect.[174] While such a reversal of basic due process principles may have been constitutional at the time it was enacted, given the extraordinary circumstances present in 1965, it cannot be justified today.

Section 3 does not present this constitutional due process problem because it does not shift the burden of proof for preclearance to covered jurisdictions *until* the government or a private plaintiff has *proven* that the jurisdiction has engaged in discrimination.[175] Thus, it remains a valuable, case-specific tool for those jurisdictions that a court finds should have a preclearance requirement.

And this powerful tool to combat attempts to suppress the votes of eligible, legitimate voters by recalcitrant jurisdictions has been successfully employed in two relatively recent cases in Alabama and Texas.[176] The fact that there have only been two cases since *Shelby County* in which a political jurisdiction was ordered to be covered un-

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173. *Id.* § 10304(a). Section 5 required a jurisdiction to prove that its voting change would not have "the purpose nor will have the effect of denying or abridging the right to vote." *Id.*

174. *Id.*

175. *Id.* § 10302(c).

176. *See* Patino v. Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017); Allen v. City of Evergreen, No. 13-0107-CG-M, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014). These are the only two cases in which a federal court has found evidence sufficient to warrant imposition of the preclearance regime of Section 3 since *Shelby County*. This is another indication of how rare the circumstances are that would warrant preclearance. In the Texas voter ID case, Section 3 was not imposed on the state because the Fifth Circuit held that the district court not only had "no legal or factual basis to invalidate" the Texas ID law, but that "its contemplation of Section 3(c) relief accordingly fails as well." Veasey v. Abbott, 888 F.3d 792, 801 (5th Cir. 2018).

der Section 3, though, also shows that there is no evidence of widespread, voting discrimination or voter suppression anywhere in the country. It seems obvious that this claim is a myth created for partisan political purposes to scare voters.

VI. CONCLUSION

Americans today have an easier time registering and voting than at any time in our nation's history. The DOJ's enforcement record under the VRA, the NVRA, and the HAVA demonstrates that there is no widespread, systemic voter suppression effort by state legislatures to discriminate against minority voters and deny them (or any other citizens) the ability to vote.

In fact, the substantial reduction in enforcement actions during the eight years of the Obama administration demonstrates that the opposite is true—we have less discriminatory conduct today than ever before. The data on turnout in recent elections also provides no evidence that state laws and regulations governing registering to vote, casting ballots, or maintaining voter rolls are suppressing the ability of any American to cast ballots and participate in the electoral process.

This record also shows that there is no reason to reinstate the preclearance requirements of Section 5 of the VRA to, in essence, place certain states in the equivalent of federal receivership when it comes to their laws and regulations governing voting. In fact, Congress would have a difficult time coming up with any kind of coverage formula that would withstand constitutional scrutiny and justify imposing such an extraordinary requirement on state and local governments.

To ensure fair elections that accurately reflect the will of the voters, states must have the ability to maintain the accuracy of voter registration rolls. In fact, federal law requires that they do so.[177] Furthermore, states have an obligation to address the vulnerabilities in the honor system in place by implementing reforms that help improve the integrity of the democratic process, from the casting of votes to the counting of ballots.

Manufacturing false claims of voter suppression when states try to improve the security and integrity of the election process or when

177. 52 U.S.C. § 20507(a)(4) (2012).

they make routine changes such as moving a polling place is a disservice to our democratic system. Not only does it damage public confidence, but also it clogs the judicial system with meritless claims in an attempt to persuade judges to, as the Sixth Circuit said, "become entangled, as overseers and micromanagers, in the minutiae of state election processes."[178] That is a serious error that federal judges should avoid.

It is also not a violation of the Constitution and it is not a discriminatory violation of the VRA to require voters to: vote on Election Day, as opposed to weeks before that day; register prior to the election;[179] vote in the precinct where they reside; show some proof of identity; or verify that they still reside in a jurisdiction when election officials receive evidence that they may have moved out of state and thus have become ineligible to vote. This is not voter suppression.

A common refrain when it comes to voting rights and election administration is that we want to ensure that every eligible American citizen can vote and that fraud or administrative errors do not dilute his vote. That requires states to take reasonable, common sense actions that impose minimal burdens on voters and do not constitute "voter suppression." Any claims to the contrary are wrong.

178. Ohio Democratic Party v. Husted, 834 F.3d 620, 622–23 (6th Cir. 2016), *application for stay denied*, 137 S. Ct. 28 (2016).

179. Although, states cannot require registration more than 30 days before Election Day. Dunn v. Blumstein, 405 U.S. 330, 360 (1972). James F. Blumstein, the plaintiff, is the University Professor of Constitutional Law at the Vanderbilt University School of Law. *Id.* at 331.

Mr. COHEN. Thank you, sir, and your timing was better than Michael Jordan's.

Our next witness is Jon Greenbaum. Mr. Greenbaum is the Chief Counsel and Senior Deputy Director for the Lawyers Committee for Civil Rights Under Law, where he is responsible for managing the Committee's work to seek racial justice and previously headed its Voting Rights Project. He is also the Co-Chair of the Voting Rights Task Force of The Leadership Conference on Civil and Human Rights.

He received his J.D. from the UCLA School of Law and his undergraduate degree from Cal Berkeley.

Mr. Greenbaum, you are recognized for 5 minutes.

TESTIMONY OF JON M. GREENBAUM

Mr. GREENBAUM. Chair Cohen, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to testify today on ways in which Congress can remedy the damage to voting rights caused by the Supreme Court's decisions in *Shelby County* v. *Holder* and *Brnovich* v. *Democratic National Committee*.

For my oral statement, I am going to focus on two suggested sets of modifications to H.R. 4, the John Lewis Voting Rights Advancement Act, which the House passed in 2019.

The first set is to address the Shelby County decision beyond what is in H.R. 4. I recommend that the United States or an aggrieved party be granted the right to bring an action anywhere nationally if a voting change is retrogressive—in other words, voting changes that worsen the voting opportunities of persons of color. This would be in addition to the geographic and "known practices" preclearance provisions in H.R. 4.

The retrogression cause of action provides an additional reasonable and necessary weapon in the fight against suppressive and discriminatory voting practices. It responds to current needs which are not limited to those States and political subdivisions that may be subject to geographic coverage or known practices coverage.

To accompany the retrogression cause of action, I recommend expanding the existing transparency requirement in H.R. 4 that requires States and political subdivisions to provide notice of any voting changes.

In addition, I would recommend a relatively modest waiting period of 30 days after jurisdictions give notice before changes may be implemented. The 30 days would begin after the administrative preclearance period where applicable. This would allow plaintiffs to seek preliminary relief to stop retrogressive voting changes before they are implemented.

I believe that these modifications, individually and collectively, are constitutional under the current framework set forth in Shelby County that current needs for a law must outweigh the law's burdens.

Regarding the current needs of voters these modifications would serve, we have seen a proliferation of retrogressive voting changes that are often difficult and time consuming to challenge otherwise.

By the way, the Lawyers Committee itself, one organization, was involved in 50 lawsuits in 2020.

Conversely, the constitutional burden on jurisdictions is modest. Retrogression is a concept that the Supreme Court has found to be constitutionally acceptable and permitting plans to prove the case of discriminatory effect is standard under civil rights laws. The notice and waiting provisions create little additional constitutional burden.

Because the law would be national in application, the equal sovereignty principle set forth by the Supreme Court in Shelby County would not come into play.

My second recommendation is that Congress address the *Brnovich* decision and restore vote denial "results" claims under section 2 of the Voting Rights Act to the pre-*Brnovich* standard that several courts of appeals have adopted.

When Congress amended section 2 in 1982 to explicitly allow for discriminatory results claims, it did so as part of a legislative scheme to eradicate discrimination in voting.

In a 1982 Senate report, Congress stated that section 2 was intended to capture 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.

In 1986, in *Thornburg* v. *Gingles*, the Supreme Court said that the essence of a section 2 claim is that a certain law, practice, or structure interacts with social and historical conditions to cause an inequality in the voting opportunities enjoyed by Black and White voters.

Since *Gingles*, four different Circuit courts addressing vote denial cases 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; and
2. that burden must be caused by the challenged voting practice because the practice interacts with the social and historical conditions of racial discrimination.

In answering the second question, the courts have used factors identified in the Senate's 1982 Committee Report.

The Supreme Court decision in *Brnovich* provided guidelines for future treatment of section 2 vote denial "results" claims that were not only new but also contrary to the decades-long accepted standards.

My written testimony sets forth the various ways that the *Brnovich* decision runs contrary to Congress' intent that the VRA eliminate discrimination in voting and how Congress should go about restoring section 2 claims to the pre-*Brnovich* standard.

The 8 years since the Supreme Court's decision in *Shelby County* v. *Holder* have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared: That without section 5, voting discrimination would increase substantially.

The *Brnovich* decision, by creating new hurdles for section 2 claimants to overcome, raises the stakes appreciably. Congress must act.

Thank you for providing the opportunity to testify today. I look forward to your questions.

[The statement of Mr. Greenbaum follows:]

STATEMENT OF JON GREENBAUM

CHIEF COUNSEL

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

U.S. HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES
HEARING ON
"OVERSIGHT OF THE VOTING RIGHTS ACT:
POTENTIAL LEGISLATIVE REFORMS"

AUGUST 16, 2021

Introduction

Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House of Representatives Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on ways in which Congress can remedy the damage to racial equality in voting caused by the Supreme Court's decisions in *Shelby County v. Holder*,[1] and *Brnovich v. Democratic National Committee*.[2]

In 2013, the *Shelby County* decision effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional. The more recent *Brnovich* decision, 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 Voting Rights Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. The weakening of Section 2 protections by the Court in *Brnovich* is particularly and sadly ironic, as the Court in *Shelby County* had pointed to the continued existence of Section 2's "permanent, nation-wide ban on racial discrimination" when it eviscerated the Section 5 protections.[3]

The harm caused by *Shelby County* has been well-documented. The effects of *Brnovich* remain to be seen. However, it is not too late for Congress to act. The full protections of the Voting Rights Act are desperately needed today, particularly given the steps already taken—or about to be taken—by legislatures in states such as Georgia, Florida, 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. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, as they were by the decision in *Shelby*, and view it as a signal from the Court to take even more suppressive action. Congress should immediately reassert its intention to fully protect the voting rights of voters of color in Sections 2 and 5 of the Voting Rights Act.

I come to this conclusion based on twenty-four years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 5, on behalf of the United States. In the eighteen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, when I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to pursue racial justice through mobilization of the private bar. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, among other things, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County* and its predecessor case *Northwest Austin Municipal Utility District No. 1 v. Holder*. I also staffed the National Commission on the Voting Rights Act, which issued a report entitled *The National Commission on*

[1] 570 U.S. 529 (2013).
[2] 2021 WL 2690267 (2021).
[3] 570 U.S. at 556.

the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005 (2006). The report and record of the National Commission on the Voting Rights Act, which was submitted to the House Judiciary Committee at the Committee's request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("2006 VRA Reauthorization").

Our recommended responses to the *Shelby County* and *Brnovich* decisions stem from the different scope and rationales of the decisions themselves. The complete evisceration of Section 5 wrought by the *Shelby County* decision necessitates a comprehensive remedy, but one that is instructed by the reasoning of that decision and therefore considers both the unfortunate history of discrimination in voting in particular states and the current need for prophylactic measures to ensure that no state or sub-jurisdiction can implement a change in voting practices that discriminates against voters of color. The more limited impact of the *Brnovich* decision calls for a correspondingly focused response, one that zeroes in on the specific deviations of the Court from the clear intent of Congress in its 1982 amendments to Section 2.

Thus, our recommended response to the *Shelby County* decision starts with our support for provisions similar to those in the bill passed by the U.S. House of Representatives in the previous session of Congress: H.R. 4, 116th Congress, the John Lewis Voting Rights Advancement Act, i.e., a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8, and a transparency provision that requires all jurisdictions – irrespective of any coverage formula – to provide public notice of changes in voting practices. But, we have an additional recommendation, tied to the transparency provision: the creation of a "retrogression cause of action," that allows the Attorney General or private parties an opportunity to stop changes in voting practices anywhere in the country before they diminish the voting rights of voters of color. As I will discuss more fully in my testimony, the retrogression cause of action would meet the current need to stop suppressive laws that discriminate against voters of color, using a tried and true standard, with limited interference with state sovereignty, and without implicating issues relating to differentiation among the states.

Our recommended congressional response to *Brnovich* is more limited, as Congress does not have to completely rewrite Section 2. It simply has to remove any ambiguity in the statute caused by the *Brnovich* opinion, which gave short shrift to a substantial legislative record and decades of jurisprudence which run counter to the *Brnovich* majority's constricted view of this remedial statute. Congress originally enacted and later 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 this purpose, 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 not only that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly—but also 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.[4]

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[4] *Gingles v. Thornburg*, 478 U.S. 30, 47 (1986); *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.*

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. Why and How Congress Must Respond to *Shelby County*

A. The State of Affairs Prior to the *Shelby County* decision

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided an effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide.[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.[6] From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.[7]

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.[8] 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.[9] 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.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ

Washington, 338 F.3d 1009, 1011–12 (9th Cir. 2003).
[5] 52 U.S.C. § 10301.
[6] 52 U.S.C. §§ 10303(b),10304.
[7] 52 U.S.C. § 10303(b).
[8] 52 U.S.C. § 10304(c).
[9] 52 U.S.C. § 10304(b), (d).

precleared the change or did not act in 60 days, the covered jurisdiction could implement the change.[10] The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period if the submitted information materially supplemented the submission.[11] DOJ could extend the 60 day period once by sending a written request for information to the jurisdiction.[12] This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ using Section 5 Procedures,[13] seeking preclearance from the federal court,[14] and modifying the change and resubmitting it.

In the nearly seven years I worked at DOJ, I witnessed first-hand how effective Section 5 was at preventing voting discrimination and how efficiently DOJ administered the process to minimize the burdens to its own staff of attorneys and analysts, and to the covered jurisdictions. The Section 5 Procedures cited above provided transparency as to DOJ's procedures and gave covered jurisdictions guidance on how to proceed through the Section 5 process. Internal procedures enabled DOJ staff to preclear unobjectionable voting changes with minimal effort and to devote the bulk of their time to those changes that required close scrutiny.

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.[15]

In addition to the changes that were formally blocked, Section 5's effect on deterring

[10] 52 U.S.C. § 10304(a).
[11] *Id.* Procedures for the Administration of Section 5 of the Voting Rights Act ("Section 5 Procedures"), 28 C.F.R. § 51.37.
[12] Section 5 Procedures, 28 C.F.R. § 51.37.
[13] 28 C.F.R. § 51.45
[14] 52 U.S.C. § 10304(a)
[15] 2014 National Commission Report at 56.

discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the burden of demonstrating that they were non-discriminatory. By the time I began working at DOJ, Section 5 had been in effect for several decades and most jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory – like moving a polling place in a majority black precinct to a sheriff's office. In the post-*Shelby County* 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.[16] 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.[17] 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,[18] 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.[19]

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.'"[20] 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.[21] 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.[22] The majority made clear that "[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions."[23]

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

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[16] Section 5 Procedures, 28 C.F.R. § 51.32-51.33.
[17] *Id.* at 28 C.F.R. § 51.38(b).
[18] *Id.* at 28 C.F.R. § 51.28(h).
[19] *Id.* at 28 C.F.R. § 51.29.
[20] *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203) 2009.
[21] *Shelby County*, 557 U.S. at 545-54.
[22] *Id.* at 560 (Ginsberg, J. dissenting).
[23] *Id.* at 556.

subject to Section 3(c) coverage since the *Shelby County* decision are Pasadena, Texas and Evergreen, Alabama.[24] In the case of Pasadena, the only changes subject to preclearance relate to the method of election and redistricting.[25]

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 voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

C. The Effect of the *Shelby County* Decision

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. We identified the following impacts:

- Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;
- Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:
    - The statutes are not identical but were instead intended to complement one another;
    - Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;
    - Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;
    - Section 2 is less likely to prevent discrimination than Section 5 because:
        - Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;
        - Section 2 has a complicated multi-factor test that provides numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test.
- The *Shelby County* decision, and DOJ's interpretation that it also bars use of the coverage formula for sending federal observers, has left voting processes vulnerable to discrimination.[26]

The subsequent years have demonstrated that all of the negative impacts we anticipated have come to pass.

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[24] *See Patino v. City of Pasadena*, 230 F. Supp. 667, 729 (S.D. Tex. 2017).
[25] *Id.*
[26] 2014 National Commission Report at 12, 55-64.

D. Voting Rights Discrimination has Proliferated Since *Shelby County*, Particularly in the Areas Formerly Covered by Section 5

The Lawyers' Committee's Voting Rights Project has never been busier than in the post-*Shelby County* years, where we have participated as a counsel to a party or as amici in more than 100 voting rights cases. Because the Lawyers' Committee has a specific 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.

In my 2019 testimony before this Subcommittee, I did a deeper dive into the 41 post-*Shelby County* voting rights cases the Lawyers' Committee had filed up to that time. My testimony reflected that voting discrimination remains alive and well, particularly in the states formerly covered by Section 5. The findings included the following:

- In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3%) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that had were not covered but had a substantial percentage of the population covered locally (North Carolina and New York).

- We achieved substantial success. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation – either on Election Day or shortly before – where achieving success is most difficult.

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.

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.[27] This 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.

E. Why Section 2 is an inadequate substitute for Section 5

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still stop

[27] Preliminary Report on Voting Discrimination Against Racial and Ethnic Minorities 1994-2019, https://lawyerscommittee.org/wp-content/uploads/2019/11/LC_VOTER_DISCRIM_RPT_H.pdf

discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its "decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2."[28]

During the *Shelby County* litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate substitute. Eight years of experience demonstrate this.

This is hardly a surprise given that Section 5 and Section 2 were designed by Congress to complement one another as part of a comprehensive set of tools to combat voting discrimination. Section 5 was designed to prevent a specific problem – to prevent jurisdictions with a history of discrimination from enacting new measures that would undermine the gains minority voters were able to secure through other voting protections, including Section 2. The Section 5 preclearance process was potent, but also efficient and surgical in its limited geographic focus and sunset provisions. It was also relatively easy to evaluate because the retrogressive effect standard – whether minority voters are made worse off by the proposed change – is simple to determine in all but the closest cases. Section 5 is designed to protect against discriminatory changes to the status quo.

Section 2 is quite different. It evaluates whether the status quo is discriminatory and thus must be changed. The test for liability should be, and is, rigorous because it is a court-ordered change. Although Section 2 (results) and Section 5 (retrogression) both have discriminatory impact tests, they are distinct. As discussed above, the Section 5 retrogression test is quite straightforward in determining whether a jurisdictional-generated change should be blocked — will minority voters be worse off because of the change?

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. As will be discussed in greater detail below in the context of the *Brnovich* decision, 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 circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).[29] On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,[30] before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, courts have also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this "burden must be in part caused by or linked to social conditions that have

[28] *Shelby County*, 570 U.S. at 556.
[29] *See e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).
[30] *Id.* at 50-51.

or currently produce discrimination against members of the protected class."[31]

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*,[32] which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment,[33] and needed to litigate only the totality of circumstances in the district court.

Four specific examples from the Lawyers' Committee's litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the *Shelby County* decision.[34] The afternoon that *Shelby County* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.[35] 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 ultimately all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts — half 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.[36] Subsequently, a three-judge panel and later an *en banc* panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.[37] As a result, 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 $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.[38] Even with no published information from DOJ, more than $10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*,[39] the Arizona legislature passed a law that applied only to the

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[31] *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina,* 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015)); see also, Ohio State Conference for the NAACP v. Husted, 786 F.3d 524, 554 (6th Cir. 2014).
[32] 316 F. Supp. 2d 268 (D.S.C. 2003), aff'd, 365 F.3d 341 (4th Cir.), *cert denied*, 543 U.S. 999 (2004).
[33] *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).
[34] *Veasey*, 830 F.3d at 227 n.7.
[35] *Id.* at 227.
[36] *Id.* at 227-29, 250.
[37] *Id.* at 224-25.
[38] 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/.
[39] 236 Ariz. 84, 336 P.3d 717 (2014).

Maricopa County Community College District and added two at-large members to what was previously a five-member single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a more information letter based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

Third, 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.[40] Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that would 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.

The fourth matter is ongoing and reflects the significant present-day impact of the *Shelby County* decision and the loss of Section 5. 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. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers' Committee is counsel in the one of these suits.

The litigation will unquestionably be resource intensive even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It will require numerous experts and extensive fact discovery. There will be elections – and possibly multiple cycles of elections -- that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass.

But for the *Shelby County* decision, there would be no SB 202, at least not in its current form, because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. This is perhaps most clearly demonstrated by Georgia

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

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.[41]

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 (25.3%) voters.[42] Given this seemingly disproportionate impact on voters of color, I believe that if Georgia were subject to Section 5, these provisions would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time and resource intensive litigation under complex legal standards.

F. The Impact of *Shelby County* on the Loss of Observer Coverage

A less discussed impact of the *Shelby County* decision is on the loss of federal observer coverage. Under Section 8 of the Voting Rights Act,[43] the federal government had the authority to send federal observers to monitor any component of the election process in any Section 4(b) jurisdiction provided that the Attorney General determined that the appointment of observers was necessary to enforce the guarantees of the 14th and 15th Amendments.[44] A federal district court can

[41] *Georgia State Conference of the NAACP, et al. v. Raffensperger*, et al., N.D. GA, no. 1:21-cv-1250-JPB, First Amended Complaint, Doc. 35, ¶¶ 134-158.
[42] *Id.*, ¶¶ 92-100.
[43] 52 U.S.C. § 10305.
[44] 52 U.S.C. § 10305(a)(2).

also authorize the use of observers when the court deems it necessary to enforce the guarantees of the 14th or 15th Amendments as part of a proceeding challenging a voting law or practice under any statute to enforce the voting guarantees under the 14th or 15th Amendment.[45]

In the 2014 National Commission report, we determined that the Attorney General had certified 153 jurisdictions in eleven states for observer coverage and that the Department of Justice had sent several thousand observers to observe several hundred elections from 1995 to 2012.[46]

While officially not stating this, the practice of the Department of Justice has been to apply the Supreme Court's finding that the Section 4(b) coverage formula is unconstitutional not just to preclearance, but to observer coverage. The *Shelby County* decision has reduced observer coverage to a trickle. The Department of Justice has instead employed what it calls "monitors."[47]

The difference between federal observers and monitors is dramatic. Under the Voting Rights Act, "Observers shall be authorized to- (1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated." Monitors have no such rights: a jurisdiction does not need to provide any access to the voting process to any monitor.

It is not difficult to see the difference in how this plays out in practice. In a year where legislatures in formerly covered states like Arizona[48] and Texas[49] are conducting audits of election results or considering restricting the ability of election officials to limit the conduct of partisan poll watchers, it becomes vitally important for the federal government to have discretion to send observers to places with a history of voting discrimination for the purpose of ensuring that processes are fair and that voters of color are not disenfranchised.

G. Proposed Congressional Response to *Shelby County*

In 2019, the House passed H.R. 4, also known as the John Lewis Voting Rights Advancement Act, named after one of the true giants of our lifetimes, a person who literally put his life on the line so that others could vote free of discrimination on the basis of the color of their skin. Now is the time for Congress to honor his memory with passage of a bill that resuscitates Section 5.

H.R. 4 contains many beneficial provisions. It creates a new formula that determines which states would be subject to the preclearance provisions of Section 5, based on clearly defined incidents of voting rights violations; it creates a practice-based preclearance process applicable nationwide, based on clearly defined covered practices that have been shown to be particularly susceptible to use in a discriminatory fashion; it clarifies the authority of the Attorney General to assign observers to enforce constitutional and statutory protections of the right to vote; and it creates a "transparency"

[45] 52 U.S.C. §§ 10302(a), 10305(a)(2).
[46] 2014 National Commission Report at 180-82.
[47] See e.g., Press Release, U.S. Dep't. of Justice, "*Justice Department Again to Monitor Compliance with the Federal Voting Rights Laws on Election Day*," (Nov. 2, 2020), https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day.
[48] Arizona Rev. Stat. § 16-602.
[49] Texas Senate Bill 7 (online at https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00007E.pdf#navpanes=0).

requirement for all states and political subdivisions to provide public notice of any change in voting practices or procedures.

We respectfully suggest that more is needed, and that the "transparency" requirement provides the appropriate vehicle for our recommendation. The "transparency" provision in the prior H.R. 4, requires that any State or political subdivision that makes any change in a voting practice or procedure in any election for Federal office that results in a difference with that which has been in place 180 days before the date of the Federal election must provide reasonable and detailed public notice of the change within 48 hours. Additional, specific requirements for notice are provided as for polling place changes for Federal elections and for the changes in the constituency that will participate in any election through redistricting or reapportionment.[50]

We agree that notice by any state or political subdivision of changes in voting practices or procedures and to any prerequisite to voting is essential to any effective response to the *Shelby County* decision, but we see no reason to limit the notice requirement to changes affecting Federal elections.[51]

Second, while notice is of overarching importance, more is needed. There must be an opportunity for voters, and those statutorily charged with protecting the civil rights of voters, to analyze the proposed change, and, if necessary, seek judicial relief if it appears that the change will be discriminatory. Thus, we propose a relatively modest waiting period of 30 days after notice is given before the change may be implemented. This leads to our third, and most important, recommendation. As is implicit in the creation of a waiting period before a change in voting practices may take effect, there must be the concomitant creation of a cause of action that allows for a determination as to whether the change may be implemented. For that, we recommend consideration of a standard that has been time-tested in the context of the pre-*Shelby County* Section 5 litigation: the retrogression standard. We recommend that the United States or an aggrieved party be granted the right to bring an action if the voting change would have the effect of diminishing the ability to vote of any citizens of the United States on account of race or color on in contravention of the guarantees set forth in the language minority provisions of the Voting Rights Act. It has long been settled that "'the purpose of §5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral [process].'"[52] However, compared with Section 5, which requires the state to prove a lack of discriminatory purpose or effect, the cause of action we recommend would require the Attorney General or an aggrieved party to prove retrogression.

The "retrogression cause of action" provides an additional, reasonable, and necessary weapon in the fight against suppressive and discriminatory voting practices. First, and most important, it responds to current needs, which are not limited to those states and political sub-divisions that may be subject to geographic coverage or which attempt to implement practices known to be susceptible to discriminatory applications. As of July 14, 2021, at least 18 states had enacted laws this year that made it harder to vote.[53] These laws were passed not only in states like Georgia and Arizona, that were previously covered by Section 4 of the Voting Rights Act, but also by states not previously

[50] See H.R. 4, 116th Congress, Sec. 6.
[51] *See*, *e.g.*, *Katzenbach*, 383 U.S. at 310–15.
[52] *City of Rome v. United States*, 446 U.S. 156, 185 (1980), quoting *Beer v. United States*, 425 U.S. 130, 141 (1976).
[53] "Voting Laws Roundup: July 2021," www.brennancenter.org, Aug. 12, 2021.

covered, such as Indiana, Idaho, Kansas, Montana, Nevada, Oklahoma, Utah, and Wyoming,[54] and included provisions not captured in the "known practices" category, including those that make mail voting and early voting more difficult.[55]

We believe that these amendments, individually and collectively, are constitutional under the current constitutional framework under the Fourteenth and Fifteenth Amendments. These amendments would respond to the current problems of jurisdictions enacting retrogressive voting changes that may be difficult to challenge under other provisions. In comparison to the needs addressed under this proposal, the burdens created under this proposal are relatively modest. The requirement of providing notice of changes provides almost no burden, as it would take little effort to provide notice. The concept of a stand-still period before a jurisdiction can implement a change is not unknown in our laws, and is required when interests that have less or no constitutional protection as compared with the right to vote, are at stake.[56] Given that most voting changes are not instituted – and should not be instituted – too close to an election, the 30-day stand-still would have limited adverse impact on states and political subdivisions, but would provide the substantial benefit of allowing voters time to assess the potential effect of the change.

Furthermore, the burden of creating a cause of action prohibiting retrogressive voting changes is constitutionally acceptable under the circumstances. The Supreme Court has stated that Congress has the enforcement authority to address voting changes that have a discriminatory effect.[57] In addition, because numerous other civil rights laws allow for discriminatory effect causes of action, including Title VII of the Civil Rights Act of 1964,[58] involving employment discrimination, and the Fair Housing Act of 1968, [59] permitting such a cause of action is hardly unusual.

Finally, creating a cause of action for retrogression nationally does not implicate the concerns about the equal sovereignty of the States, expressed by the majority in the *Shelby County* decision.[60] The retrogression cause of action should not be a threat to those jurisdictions whose proposed voting practices changes are intended to make it easier for voters to vote, because a party would have to successfully bring suit in order to stop the change, which seems implausible under the circumstances. The burden is placed on the party challenging the change. Proving retrogression is not as complicated as proving discriminatory results under Section 2, but it is a high standard, and history has taught us that it is perfectly suitable to assess the discriminatory effects of proposed changes in voting practices.

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[54] *Id.*
[55] *Id.*
[56] *See*, *e.g.*, 42 C.F.R. §431.408 (implementing regulations for Medicaid and CHIP demonstration projects under the Social Security Act require that a state must provide at least a 30-day public notice and comment period regarding applications for a demonstration project or an extension of an existing demonstration project that the State intends to submit to the Centers for Medicare & Medicaid Services); 29 U.S.C. §2100 *et seq* (the Worker Adjustment and Retraining Notification Act requires that certain employers provide notification 60 calendar days in advance of plant closings and mass layoffs). 16 C.F.R. 803.10; 11 U.S.C.§363(b)(2) (the Hart-Scott-Rodino Act contains pre-merger notification requirement and a waiting period of 15 days for reportable acquisitions of a cash tender offer, and 30 days for all other types of reportable transaction); SEC Financial Reporting Manual, Section 14100.3 (requirement that tender offers remain open for 20 business days while SEC staff has the opportunity to review them).
[57] *City of Rome*, 446 U.S. at 173-79.
[58] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)
[59] *Texas Dept., of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015).
[60] *Shelby County*, 570 U.S. at 544-45.

II. Why and How Congress Must Respond to *Brnovich*

A. 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."[61] 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[,]"[62] prior to the VRA's passage, this language proved largely aspirational.[63]

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."[64] The Act "reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting."[65] 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."[66]

Notwithstanding Section 2's broad language, jurisdictions sought to evade its reach by placing "heavy emphasis on facially neutral techniques."[67] 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."[68] In one Mississippi county, voters were forced to "travel 100 miles roundtrip to register to vote."[69] In one Alabama county, "the only registration office in the county [was] closed weekends, evenings and lunch hours."[70] These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they "particularly handicap[ped] minorities."[71]

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,[72] 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

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[61] *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).
[62] *Lane v. Wilson*, 307 U.S. 268, 275 (1939)
[63] *See, e.g.*, *Katzenbach*, 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).
[64] Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).
[65] *Katzenbach*, 383 U.S. at 315.
[66] Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.
[67] *Right to Vote*, *supra* at 552.
[68] *Id.* at 557–58.
[69] 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).
[70] *Id.* at 93–94.
[71] *Id.* at 96.
[72] 446 U.S. 55, 62 (1980).

or color."[73] 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."[74] 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."[75]

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."[76]

Thirty-five years ago, in *Gingles v. Thornburg*, [77] 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,"[78] that accounts for the "totality of [the] circumstances."[79]

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."[80] Recognizing Section 2's command that courts consider the "totality of circumstances," the *Gingles* Court looked to the Senate Report

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[73] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).
[74] *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).
[75] S. Rep. No. 97-417, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 ("Senate Report").
[76] *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.
[77] 478 U.S. 30, 47 (1986).
[78] *Id.* at 79 (quotation marks omitted).
[79] 52 U.S.C. § 10301(b).
[80] 478 U.S. at 47.

accompanying the 1982 amendments to compile a list of relevant "circumstances."[81] 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).[82]

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.[83] No other Circuit has put forth an alternative formulation.

B. The Facts of *Brnovich*

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);[84] confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,[85]); and high rates of residential mobility.[86] 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

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[81] 478 U.S. at 36.
[82] *Id.* at 36–37 (citing Senate Report at 28–29).
[83] *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).
[84] *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).
[85] *Id.* at 592.
[86] *Id.* at 594.

white voters.[87]

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 return their early ballots with the assistance of third parties.[88] 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.[89]

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.[90]

C. The *Brnovich* 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 prevail. 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."[91] 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.[92] 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

[87] *Id*. at 595-96.
[88] *Id*. at 597.
[89] *Id*. at 598.
[90] Id. at 681.
[91] *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *8 (2021).
[92] *Id*. at n. 6.

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,[93] 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 "guideposts," most prominently suggesting 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 purported 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.[94] 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."[95] 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.[96]

Some of these "important circumstances" seem fairly innocuous on their face: e.g., the size of the burden, the size of the disparity. Others not so much: e.g., the degree of departure of the challenged practice from practices standard when Section 2 was amended in 1982 or which are widespread today, and the opportunities provided by the electoral process as a whole. Another has never been deemed relevant to Section 2 analysis: the strength of the state's justification for the practice – except in connection with assessment of the tenuousness of that justification. Overall, however, the devil 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."[97] The application of this "guidepost" 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

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[93] *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 the devious, state regulations which have the effect of denying citizens their right to vote"); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction).
[94] *Brnovich v. Democratic National Committee,* 2021 WL 2690267, at *12; 52 U.S.C. § 10301.
[95] *Brnovich,* 2021 WL 2690267, at *12 (emphasis in original).
[96] *Id.*
[97] *Id.*

adequate transportation or conflicting obligations).[98] 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.[99]

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 relief - 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.[100]

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 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.[101] 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. <u>1982 Standards and Widespread Practice Are Not Important</u>

Second, Justice Alito said that other relevant factors included the degree of departure of the challenged practice from the "standard practice when §2 was amended in 1982," a choice which is

[98] *Id.*
[99] *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc).
[100] 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, 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.
[101] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 44.

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."[102] 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 (25.3%) voters.[103] 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.

Further, Justice Alito also observed that the "widespread" present day acceptance of the voting practice could justify its use. But it was precisely because certain discriminatory practices were "widespread" that the Voting Rights Act was necessary. It seems incongruous, if not irrational, to justify discrimination by the majority population against minority populations on the basis of "widespread" acceptance.

5. <u>So-called "small differences" can be important.</u>

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that "small differences should not be artificially magnified,"[104] again dealing obliquely with the consequences of the differences being caused by differences in wealth – which may themselves be the result of historic racial 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 out of precinct. 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.[105]

The Court neglected to note that the discriminatory out of precinct 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.

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[102] 2021 WL 2690267, at n.15.
[103] *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 47.
[104] 2021 WL 2690267, at *13.
[105] *Id.* at *4.

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.[106] 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 Wisconsin to 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, for example, access to absentee ballots may be curtailed, as long as the voter can still vote in person.[107] But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it make 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."[108] 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 hundreds 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

[106] *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).
[107] 2021 WL 2690267, at *13.
[108] *Id.*

superficially.[109]

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."[110] Further, *Gingles* recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue.[111] The *Gingles* Court's statement that the Senate Factors will "often be pertinent to *certain types* of § 2 violations," such as dilution,[112] cannot be reconciled with a conclusion that the Factors "*only*" inform one specific type of Section 2 claim.

D. The Growing Present Need

As with the need for the resuscitation of Section 5, recent events reflect the significant present-day need for an immediate response to *Brnovich*. As detailed throughout this testimony, for example, the recently enacted Georgia voter suppression law, 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 not for the decision in *Shelby County*. 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 making of these arguments demonstrates 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."[113]

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.

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[109] *Id.*
[110] 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).
[111] *See id.* at 45.
[112] *Id* (emphasis added).
[113] *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff'd and reversed on other grounds*, *Veasey v. Abbott*, 830 F. 3d 216 (5th Cir. 2016) (en banc).

The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.[114]

E. The Appropriate Congressional Response

The impact of *Brnovich* has 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 a 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 entails an intensely local appraisal.

- Clarify that "totality of the circumstances" may include any or all of the factors deemed relevant by *Gingles*, including the Senate Factors, and that no factors are exclusively pertinent to "results" claims or "dilution" claims. These include Factors 1 and 5, which are important, not for the back-of-the-hand reading given them by Justice Alito, but because they go to the core issue of the interaction between historic socio-economic discrimination and the voting practice in question.

- Clarify that, in determining the extent to which a challenged voting rule burdens minority voters, the absolute number or the percent of voters affected or the presence of non-minority voters in the affected area will not be dispositive.

- Clarify that in determining whether the policy underlying the use of a voting rule is tenuous – one of the Senate factors – the court should consider whether the voting rule in question was actually designed to advance and in fact materially advances a valid and substantiated state interest. That preventing voter fraud may be a valid state interest should not lead to a determination that any voting practice alleged to have been enacted to protect fraud is valid, particularly if the instances of voter fraud are rare, if not virtually non-existent, and the means chosen to combat the alleged fraud scarcely further that aim, and, further, do so at the expense of preventing eligible voters from voting.

- 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

[114] *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).

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 the availability of other methods of voting not impacted by the voting rule at issue cannot weigh against finding a violation.

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

I am not in favor of employing a burden-shifting approach because I believe that Section 2 vote denial claims should be restored to their pre-*Brnovich* state and burden-shifting has not been part of the Section 2 inquiry. In addition, burden-shifting places the state's interest at the center of the inquiry in the second and third prongs in the three-prong analysis, whereas the focus should be on the impact on voters.

III. **Conclusion**

The eight years since the Supreme Court's decision in *Shelby County v. Holder* have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared – that without Section 5, voting discrimination would increase substantially. The *Brnovich* decision – by creating new hurdles for Section 2 claimants to overcome – raises the stakes appreciably. Congress must act.

Mr. COHEN. Thank you, Mr. Greenbaum. As the TV show "Beat the Clock," you are Bud Collyer.

Our final witness is Samuel Spital. Mr. Spital is Director of Litigation for the NAACP Legal Defense and Education Fund. Prior to joining the Legal Defense Fund, he practiced over a decade at two national firms, working with the Legal Defense Fund as Co-Counsel on numerous cases involving capital punishment and voting rights. He also served as a Law Clerk for Justice John Paul Stevens, one of the great Justices in our Nation's history.

Mr. Spital received his law degree and his undergraduate degrees from Harvard. He liked Harvard, and Harvard liked him.

Mr. Spital, you are recognized for 5 minutes.

TESTIMONY OF SAMUEL SPITAL

Mr. SPITAL. Thank you very much, Chair Cohen. Good afternoon to Chair Cohen, Ranking Member Johnson, and the Members of the Committee. Thank you for inviting me to testify today.

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the struggle to secure and protect voting rights for Black Americans and other people of color in this country.

Today, our Nation is at a critical juncture in that struggle, and we are here, in no small part, because of the two Supreme Court decisions that a number of other witnesses have talked about already which have weakened the Voting Rights Act of 1965.

The Voting Rights Act of 1965 has long been recognized to be the most transformative of the civil rights laws passed in the 1960s. It has aptly been called the crown jewel of the civil rights movement.

For over 30 years, as you heard Assistant Attorney General Clarke say, the preclearance mechanism was at the heart of that act, and that language is from a Supreme Court opinion describing the Voting Rights Act.

What preclearance did was it required jurisdictions with particular histories of voting discrimination to submit proposed changes in their voting laws to either the Department of Justice or a Federal court to ensure that those changes did not continue to worsen discrimination against voters of color.

Preclearance was so essential because it blocked discrimination before elections could be held under discriminatory laws and because it prevented the continuing evasion, the continuing circumvention of favorable decrees that were achieved through litigation that blocked certain kinds of discrimination, but then a jurisdiction would just turn around and circumvent that decree with some sort of new kind of discrimination.

If you look at the brief that LDF filed in the Supreme Court in the *Shelby County* case, which we have submitted as an exhibit to my testimony, you will see example after example where, very recently, in the years leading up to the *Shelby County* case, section 5 continued to prevent jurisdictions from circumventing the successful decrees that were achieved through litigation, showing just how essential section 5 remains in modern times.

In 2013, as we have discussed, a sharply divided Supreme Court decided the *Shelby County* case which rendered preclearance inoperative. In response to that decision, in jurisdiction after jurisdic-

tion formerly covered by section 5, there was an unleashing of new kinds of voter suppression laws.

If you look, for example, in Justice Kagan's *Brnovich* dissent, she identifies State after State, sometimes within days, sometimes within a few years after the *Shelby County* decision, which went to a new voter suppression law, that in many cases had previously been stopped by section 5.

As devastating as the Shelby County decision has been, the court made clear in that decision, that Congress has the authority to create a new preclearance mechanism that is grounded in current conditions.

After all, the 14th and 15th amendments assigned to Congress, not the Supreme Court, the authority to determine in the first instance, what measures are necessary to enforce the right to vote free from racial discrimination. LDF has testified on multiple occasions to our experiences monitoring elections and litigating some of these voter suppression measures.

While LDF and other civil rights organizations have successfully responded to some of these new discriminatory measures with litigation, litigation is not sufficient to address the persistent and adaptive nature of discrimination against Black voters at both the State and local level.

It is, therefore, essential that Congress restore section 5, consistent with the court's guidance in Shelby County. H.R. 4, as passed by the 116th Congress, would do precisely that. Its geographic coverage provision identifies those States and political subdivisions with documented, continuing patterns of discrimination against voters of color, thereby making clear that preclearance remains needed in those parts of the country.

In addition to restoring preclearance, Congress must also now address the Supreme Court's recent decision in *Brnovich* v. *Democratic National Committee* that which curtailed the other key provision of the Voting Rights Act, section 2. The *Brnovich* decision is divorced from the plain text of section 2 and flatly inconsistent with Congress' clear and broad purpose in enacting and amending that law.

Unless Congress responds by restoring the full intent, the intended intent of section 2, *Brnovich* will embolden States and localities to impose new voting restrictions that abridge the right to vote for Black voters and other voters of color. Just as Congress in 1982 overrode the Supreme Court's cramped interpretation of section 2 in the *City of Mobile* v. *Bolden* case, today Congress must override the *Brnovich* decision to restore the full power of the Voting Rights Act.

In 1965, Congress passed the Voting Rights Act in response to the heroism of John Lewis, Amelia Boynton Robinson, Fannie Lou Hamer, and so many other Black organizers and activists who risked and, who in some cases, lost their lives to secure for every American the right to vote and to make real the promise of a multiracial democracy that had been denied for a century.

Their accomplishments were remarkable. Today those accomplishments and American democracy itself are in grave danger. This Congress must honor the legacy of these extraordinary Americans and safeguard our democracy by establishing a new

preclearance framework and restoring section 2's prohibition on all forms of discrimination that burden, that abridge, that deny the right to vote, based on race or color. Thank you very much. I look forward to your questions.

[The statement of Mr. Spital follows:]

Written Testimony of Samuel Spital

Director of Litigation

NAACP Legal Defense and Educational Fund, Inc.

Before the United States House of Representatives

Subcommittee on the Constitution, Civil Rights and Civil Liberties

"Oversight of the Voting Rights Act: Potential Legislative Reforms"

August 16, 2021

Good morning, Chairman Cohen, Ranking Member Johnson, and members of the Committee. My name is Samuel Spital, and I am the Director of Litigation at the NAACP Legal Defense and Educational Fund, Inc. ("LDF"). Thank you for inviting me to testify on the Oversight of the Voting Rights Act and Potential Legislative Reforms.

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color. LDF was launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial discrimination in every area of life. Through litigation, public policy, and public education, LDF's mission has remained focused on seeking structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. In advancing that mission, protecting the right to vote for African Americans has been at the center of our work. Beginning with *Smith v. Allwright*,[1] LDF's successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active participation of Black voters.

The importance of the right to vote to the integrity of our democracy cannot be overstated. Indeed, Thurgood Marshall—who litigated LDF's watershed victory in *Brown v. Board of Education*,[2] which set in motion the end of legal segregation in this country and transformed the direction of American democracy—referred to *Smith v. Allwright* as his most consequential case. He held this view, he explained, because he believed that the vote, and the opportunity to access political power, are critical to fulfilling the guarantee of full citizenship promised to Black people in the Fourteenth Amendment to the Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for over 80 years—representing Martin Luther King Jr. and marchers in Selma, Alabama in 1965, litigating seminal cases interpreting the scope of the Voting Rights Act, and working in communities in the South and elsewhere to strengthen and protect the ability of Black citizens to participate in the political process free from discrimination.

Despite the guarantees of the Fourteenth and Fifteenth Amendments, the Voting Rights Act, and other federal voting rights statutes, racial discrimination and suppression targeting Black voters persist today. Indeed, in the years since the

[1] 321 U.S. 629 (1994).
[2] 347 U.S. 483 (1954).

Supreme Court's 2013 decision in *Shelby County v. Holder*,[3] which effectively invalidated Section 5 of the Voting Rights Act, methods of voter suppression have metastasized in States formerly covered by that provision. LDF litigated the *Shelby County* case, including presenting argument in the Supreme Court in defense of the constitutionality of Section 5 of the Voting Rights Act of 1965 ("VRA"). In that decision, Chief Justice John Roberts invited Congress to update Section 5 coverage based on recent conditions. In 2019, this House did precisely that by passing the Voting Rights Advancement Act of 2019 (H.R.4), but the Senate refused even to consider that law. Until such critical legislation is enacted, voters of color—and our democracy—remain unprotected.

Today, Congress must also address a new Supreme Court decision undermining the VRA. In *Shelby County*, the majority stressed that its decision did not affect the VRA's other key provision: the nationwide ban on racial discrimination in Section 2 of the Act.[4] This summer, however, a divided Court decided *Brnovich v. Democratic National Committee*.[5] By misinterpreting and weakening Section 2, *Brnovich* threatens to embolden States and localities in unleashing new voting restrictions that burden Black voters' ability to participate equally in the political process. This latest decision underscores the urgent need for Congress to take action to restore the Voting Rights Act and to do so swiftly.

The Need for Congress to Legislate

Today, our nation is at a crucial juncture in the decades-long struggle to create and maintain equality of voting rights for all citizens. The proliferation of state anti-voting laws across the country[6] demonstrates the urgent need for Congress to restore the VRA to its full strength, reinstate federal oversight over

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[3] 570 U.S. 529 (2013).
[4] 570 U.S. at 557.
[5] 594 U.S. ___ (2021).
[6] According to the Brennan Center, as of May 14, state legislators in the most recent legislative cycle alone have introduced 389 bills with restrictive provisions in 48 States. Brennan Center for Justice, "Voting Laws Roundup: July 2021" (updated as of Jul. 22, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021. *See also* Theodore Johnson & Max Feldman, "The New Voter Suppression," Brennan Center (Jan. 16, 2020), https://www.brennancenter.org/our-work/research-reports/new-voter-suppression; Democracy Diverted: Polling Place Closures and the Right to Vote, The Leadership Conference Education Fund (Sept. 2019), http://civilrightsdocs.info/pdf/reports/DemocracyDiverted.pdf; Wendy R. Weiser and Max Feldman, "The State of Voting 2014," Brennan Center (June 17, 2014), https://www.brennancenter.org/our-work/research-reports/state-voting-2014; "Election 2016: Restrictive Voting Laws by the Numbers," Brennan Center (Sep. 28, 2018), https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers; Wendy R. Weiser and Max Feldman, "The State of Voting 2018," Brennan Center for Justice, (June 5, 2018), https://www.brennancenter.org/our-work/research-reports/state-voting-2018.

discriminatory voting practices in States and localities where voting discrimination is concentrated, and protect voting rights wherever suppression occurs.

LDF continues to monitor how formerly covered States and localities respond to the *Shelby County* decision and has been keeping a detailed account of post-*Shelby County* voting changes in its regularly updated report "Democracy Diminished."[7] In "Democracy Diminished," LDF attempts to capture a fraction of the thousands of voting changes that would have been scrutinized by the federal government for their harm to minority voters via preclearance.

Also, as part of our annual Prepared to Vote initiative, LDF has been on the ground for major primary and general elections to conduct non-partisan poll monitoring and to assist voters primarily in certain States formerly covered by Section 5 of the VRA. On election day, LDF staff and volunteers visit polling sites to educate voters about their State's voting requirements and engage in rapid response actions when problems arise to ensure eligible voters are able to cast a ballot. During the 2020 election, LDF virtually monitored polling sites in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, New York, South Carolina, Texas, Virginia and Wisconsin, and published an account of the issues voters faced in its report "Democracy Defended."[8] The 2020 election did not, as numerous news reports suggested, "go smoothly."[9] What we saw on November 3, 2020, and in the weeks before and after, confirmed what we already knew: Discrimination against Black voters is an overwhelming and growing problem that demands immediate legislative action.

The celebrated turnout and registration rates among Black voters in November 2020 occurred despite a litany of obstacles, and only because of the Herculean efforts by civil-rights groups, organizers, and activists—and because of the sheer determination and resilience of Black voters.[10] This model is not sustainable. Nor is it lawful. Black voters' ability to overcome unequal burdens does not diminish the fact that those burdens exist. Nor does our Constitution countenance two systems of voting in this country—one in which Black and other

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[7] "Democracy Diminished: State and Local Threats to Voting Post-*Shelby County v. Holder*," NAACP Legal Defense and Educational Fund, Inc. (Jun. 22, 2021), https://tminstituteldf.org/wp-content/uploads/2017/08/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf.

[8] "Democracy Defended: Executive Summary," NAACP Legal Defense Fund Thurgood Marshall Institute (Feb. 10, 2021), https://www.naacpldf.org/wpcontent/uploads/LDF_02102021_DemocracyDefendedPreview11.pdf?_ga=2.209659025.2082701624.1617629692-217316157.1616678028.

[9] Sherrilyn Ifill, "No, This Election Did Not Go 'Smoothly'," Slate (Nov. 9, 2020), https://slate.com/newsandpolitics/2020/11/2020-election-voting-did-not-go-smoothly.html.

[10] *Id.*

marginalized voters require an independent, non-governmental apparatus to exercise the fundamental right to vote while white voters do not. To be clear, even with these extraordinary efforts, participation rates for Black, Asian American, and Latino voters remained well below those of white voters in the 2020 election.[11]

Moreover, in 2020, efforts at voter suppression continued beyond Election Day. A number of States witnessed unprecedented attempts to discount ballots cast in areas with large numbers of Black voters.[12] The 2020 election—and the wave of racially targeted voter suppression measures enacted and proposed by States since then—highlight the need for new federal legislation to prevent voter suppression at all stages of the electoral process: from registration, to turnout, to the counting and canvassing of ballots.

The extensive record of discriminatory voting practices enacted since *Shelby County* demands that Congress fulfill its constitutional obligation to protect voters from new and "ingenious methods"[13] of voter discrimination by restoring the Voting Rights Act to its full strength after both *Shelby County* and the recent decision in *Brnovich*.

Grassroots Movements in Support of Voting Rights

The passage of the VRA was spurred by the grassroots activism of thousands across the country, and especially in the South, who faced down billy clubs, police dogs and vitriol from white mobs to secure the unencumbered right to vote. It was the result of the tremendous sacrifice of those beaten on the Edmund Pettus Bridge, including the late Congressman John Lewis, the martyrdom of Medgar Evers, Jimmie Lee Jackson, Viola Gregg Liuzzo, Andrew Goodman, James Cheney,

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[11] William H. Frey, "Turnout in 2020 election spiked among both Democratic and Republican voting groups, new census data shows," Brookings Institute (May 5, 2021), https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/

[12] Jeff Amy, Darlene Superville, & Jonathan Lemire, "GA election officials reject Trump call to 'find' more votes," Associated Press (Jan. 4, 2021), https://apnews.com/article/trump-raffensperger-phone-call-georgia-d503c8b4e58f7cd648fbf9a746131ec9; Bill Bostock, "Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan," Business Insider (Nov. 5, 2020), https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11; Jake Lahut, "Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted," Business Insider (Nov. 4, 2020), https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T; Maura Ewing et al., "Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions", Washington Post (Nov. 6, 2020), https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/.

[13] U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20-Apr. 1, 1965.

Michael Schwerner, and so many others,[14] which proved crucial in ensuring the federal government take seriously its duty to enforce the right to the franchise. In short, the right to vote that we enjoy today was forged by courageous people who demanded the protection and expansion of the franchise. Congress saw the tumult and desire for change across the nation and ultimately responded with the Voting Rights Act of 1965.

It is that same heroism of the average American to speak out, protest and demand change when faced with injustice, that we see again today in the calls for federal legislation to protect the right to vote. It is the obligation of this generation of lawmakers to respond to these calls and ensure that the hard-won gains of the past are not lost. People and institutions across the country have decried the onslaught of voting restrictions, from grassroots organizers and activists,[15] to influential Black executives in corporate America, corporations like Coca Cola and Delta Airlines,[16] sports associations like Major League Baseball,[17] film industry icons,[18] religious leaders,[19] and more.

The people have called on Congress once again to use the power enshrined in the Constitution, and entrusted to this body, to ensure the franchise for all citizens

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[14] Marty Roney, "Remembering the Martyrs of Bloody Sunday," USA Today (Mar. 7, 2015), https://www.usatoday.com/story/news/nation/2015/03/03/bloody-sunday-martyrs/24344043/; Deborah Barfield Berry, "'Bloody Sunday' pilgrimage to move through Miss.," USA Today (Feb. 10, 2014), https://www.usatoday.com/story/news/nation/2014/02/10/civil-rights-pilgrimage/5376225/.

[15] Jane C. Timm, "Progressive groups unite to oppose Texas GOP's voting restrictions," NBC News (Jun. 28, 2021), https://www.nbcnews.com/politics/elections/progressive-groups-unite-oppose-texas-gop-s-voting-restrictions-n1272459; "Georgia-Based Disability Rights Groups Join Fight Against Georgia's Anti-Voter Law S.B. 202," The Arc (May 2, 2021), https://thearc.org/georgia-disability-groups-join-fight-voter-law/.

[16] Andrew Ross Sorkin & David Gelles, "Black Executives Call on Corporations to Fight Restrictive Voting Laws," New York Times (March 31, 2021), https://www.nytimes.com/2021/03/31/business/voting-rightsgeorgiacorporations.html; David Gelles, "Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition," New York Times (March 31, 2021), https://www.nytimes.com/2021/03/31/business/delta-coca-colageorgia-voting-law.html; Andrew Ross Sorkin & David Gelles, "Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain," New York Times (Apr. 14, 2021), https://www.nytimes.com/2021/04/14/business/ceoscorporate-america-votingrights.html?smtyp=cur&smid=tw-nytimes.

[17] Kevin Draper et. al., "M.L.B. Pulls All-Star Game From Georgia in Response to Voting Law," New York Times (Apr. 6, 2021), https://www.nytimes.com/2021/04/02/us/politics/mlb-all-star-game-moved-atlanta-georgia.html.

[18] Kimberly Chin, "Will Smith Movie Pulls Production Out of Georgia Over GOP Voting Law," Wall Street Journal (Apr. 12, 2021), https://www.wsj.com/articles/will-smith-movie-emancipation-pulls-production-out-of-georgiaovergop-voting-law-11618257076.

[19] Lakisha Lemons, "Faith leaders fight back against what they call voter suppression bills," Spectrum News 1 (Apr. 14, 2021), https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/14/faith-leaders-fight-backagainst-voter-suppression-laws.

and to build a 21st century democracy that is representative of, and responsive to, our growing, and diverse nation. Congress must seize this moment to take action. It is the obligation of this body to continue to uphold the principles of democracy—and to continue the great tradition of perfecting our union by protecting the right to vote.

Congress's Constitutional Authority to Enact Voting Rights Laws

It was not until after the end of the Civil War that the United States undertook efforts to amend our Constitution to provide Congress with affirmative power to enforce the fundamental principles that ***all*** are created equal, and that access to the franchise is the cornerstone of citizenship and democracy. The Fourteenth and Fifteenth Amendments, ratified in 1868 and 1870 respectively, are clear. The Fourteenth Amendment forbids States from discriminating on the basis of race:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty of property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.[20]

The Fifteenth Amendment, even more specifically, prohibits the denial or abridgement of the "right of citizens of the United States to vote . . . by any State on account of race, color, or previous condition of servitude."[21] And importantly, both Amendments provided new authority for Congress to defend equal rights, stating that: "Congress ***shall*** have power to enforce this article by appropriate legislation [emphasis added]."[22] There is no question, and there can be no question, that these amendments give Congress the power to enforce the guarantee of equal protection and the constitutional protection against voting discrimination based on race.[23]

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[20] U.S. Const. amend. XIV.
[21] U.S. Const. amend. XV.
[22] *Id.*
[23] As the Supreme Court has recognized, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment]." *South Carolina v. Katzenbach*, 383 U.S. at 326. The Constitution "empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it." *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193, 205 (2009); *see also Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (where "Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments").

Yet the collective promise of equality for Black Americans was blatantly obstructed for nearly 100 years after the ratification of those Amendments. Undermined by the courts[24] and ignored by Congress, Black voters were left susceptible to State-sanctioned campaigns of racial terrorism. With the Supreme Court's refusal to intervene, white people in the South terrorized Black voters, disenfranchised them and enacted State laws to codify their place at the bottom of a racial hierarchy.[25] While Black people were systematically disenfranchised by poll taxes,[26] literacy tests,[27] threats,[28] and lynching,[29] Congress likewise abdicated its duty to use its enforcement powers to protect the right to vote.

Almost a century after the Civil Rights Amendments were ratified, Congress finally took its constitutional duty seriously by passing the Voting Rights Act of 1965 ("VRA"). The VRA fulfilled the promise of the Fifteenth Amendment that the right to vote must not be denied because of race, color or previous condition of servitude, as well as the Fourteenth Amendment's guarantee of equal protection under the law. It enshrined our most fundamental values by guaranteeing to all citizens the right to vote, which the Supreme Court has called "preservative of all rights."[30] The VRA was intentionally responsive to the scourge and proliferation of voter suppression that had long existed in many States. It afforded the Department of Justice new authority to prohibit suppressive laws ***before*** they went into effect. Previously, when the Department of Justice obtained favorable decisions striking down suppressive voting practices, States and localities often enacted new discriminatory schemes to restrict Black people from voting. In establishing the preclearance framework of the VRA, Congress, therefore, "had reason to suppose that these States might try similar maneuvers in the future in order to evade the

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[24] *See Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1889); *United States v. Cruikshank*, 92 U.S. 542 (1876); and *United States v. Reese*, 92 U.S. 214 (1875).

[25] Referring to a white mob that murdered more than 100 Black voters: "It does not appear that it was their intent to interfere with any right granted or secured by the constitution." *United States v. Cruikshank*, at 556 (1876).

[26] Richard M. Valelly, "The Two Reconstructions: The Struggle for Black Enfranchisement: (Chicago: University of Chicago Press, 2004).

[27] Jason Morgan Ward, "Hanging Bridge: Racial Violence and America's Civil Rights Century" (New York: Oxford University Press, 2016).

[28] Michael Fellman, "In the Name of God and Country: Reconsidering Terrorism in American History" (New Haven, CT: Yale University Press, 2010); U.S. Commission on Civil Rights, "Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report: Chapter 3, Voting Rights and Political Representation in the Mississippi Delta" (last accessed Aug. 12, 2021), https://www.usccr.gov/pubs/msdelta/ch3.htm.

[29] Brad Epperly, et. al., "Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South," (Mar. 1, 2016), https://ssrn.com/abstract=3224412.

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

remedies for voting discrimination contained in the [Voting Rights Act] itself."[31] Section 5 of the VRA was designed to remedy not only then-existing discriminatory voting schemes but also to address the "ingenious methods"[32] that might be devised and used in the future to suppress the full voting strength of African Americans. In many ways, the VRA and its preclearance provisions made the promise of the Civil Rights Amendments a reality and made our country a true democracy for the first time in our history.[33]

The Supreme Court's *Shelby County* Decision and Invitation for Congress to Act

For nearly 50 years, Section 5 of the VRA required jurisdictions with a record of chronic racial discrimination in voting to submit proposed voting changes to the U.S. Department of Justice or a federal court in Washington, D.C. for pre-approval. These provisions of the VRA were considered by Congress—and the courts—to be an efficient and essential mechanism for detecting and redressing the many forms of discrimination before elections take place. When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority upholding the constitutionality of Congress's informed judgement that the VRA and its preclearance requirement were a necessary and appropriate way of halting discriminatory voting changes before they were implemented, thus safeguarding the right to vote.[34]

Congress reauthorized the VRA on four separate occasions since 1965, each time with overwhelming bipartisan support.[35] The Supreme Court upheld the first three reauthorizations, including Congress's decision in 1982 to reauthorize Section

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[31] "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures." *South Carolina*, at 309.
[32] U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20- Apr. 1, 1965.
[33] Nikole Hannah Jones, "Our democracy's founding ideals were false when they were written. Black Americans have fought to make them true," New York Times Magazine (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-americandemocracy.html.
[34] *See Lopez v. Monterey County*, 525 U.S. 266, 282-285 (1999); *City of Rome v. United States*, 446 U.S. 156, 177-178 (1980); *Georgia v. United States*, 411 U.S. 526, 534-535 (1973); *South Carolina v. Katzenbach*.
[35] The VRA was reauthorized by Congress and signed into law by Republican Presidents in in 1970, 1975, 1982, and most recently in 2006. "History of Federal Voting Rights," United States Department of Justice (last accessed Aug. 12, 2021), https://www.justice.gov/crt/history-federal-voting-rights-laws.

5 for 25 years.[36] In 2006, the VRA reauthorization passed by a unanimous vote in the Senate of 98-0 and by 390-33 in the House.[37]

In the 2013 *Shelby County* decision, the Supreme Court nonetheless held that the 2006 reauthorization was unconstitutional. The Court reasoned that Section 4(a)'s formula for identifying jurisdictions subject to coverage, which on its face was based on data from the 1964, 1968, and 1972 presidential elections, no longer responded to current conditions.[38] In reaching this conclusion, the Court failed to meaningfully engage with the 10,000-plus page record accumulated by Congress in 2006,[39] which demonstrated that Section 4(a) continued to identify the jurisdictions where voting discrimination was concentrated, and that preclearance was still necessary to ensure full political participation for minority voters. Predictably, days[40]—and in one case hours[41]—after the Supreme Court invalidated the VRA's preclearance provisions, jurisdictions announced their intention to implement aggressive and restrictive voting laws previously blocked by Section 5. Since the *Shelby County* decision, federal courts have struck down voting changes as violative of the Constitution, and the Voting Rights Act. Indeed, there have been at least eight judicial decisions finding that States or localities ***intentionally*** discriminated

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[36] "We upheld each of these reauthorizations against constitutional challenges, finding that circumstances continued to justify the provision." *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193, 205 (2009).

[37] H.R.9 - Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 109th Congress (2005-2006), https://www.congress.gov/bill/109th-congress/house-bill/9/actions.

[38] *Shelby Cnty*, at 557.

[39] H. R. Rep. No. 109-478, at 21 (2006), https://www.congress.gov/109/crpt/hrpt478/CRPT-109hrpt478.pdf.

[40] Kim Changler, "Alabama photo voter ID law to be used in 2014, state officials say," Alabama Media Group (June 25, 2013), https://www.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html; Lizette Alvarez, Florida Defends New Effort to Clean Up Voter Rolls, N.Y. TIMES, Oct. 9, 2013, http://www.nytimes.com/2013/10/10/us/florida-defends-new-effort-to-clean-up-voter-rolls.html?_r=0; Steve Bousquet & Michael Van Sickler, "Renewed 'scrub' of Florida voter list has elections officials on edge," Tampa Bay Times (Aug. 3, 2013), https://www.tampabay.com/news/publicsafety/crime/renewed-scrub-of-florida-voter-list-has-elections-officials-on-edge/2134695/; Mark Joseph Stern, "North Carolina's 'Monster' Voter-Suppression Law Is Dead," Slate (May 15, 2017), https://slate.com/news-and-politics/2017/05/north-carolinas-voter-suppression-law-was-apparently-tooracist-for-the-supreme-court.html; David A. Graham, "North Carolina's Deliberate Disenfranchisement of Black Voters," The Atlantic (July 29, 2016), https://www.theatlantic.com/politics/archive/2016/07/north-carolina-voting-rights-law/493649/.

[41] Ed Pilkington, "Texas rushes ahead with voter ID law after supreme court decision," The Guardian (June 25, 2013), https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-courtdecision.

against Black voters and other voters of color in States formerly covered by Section 5.[42]

Despite the devastating effects of the *Shelby County* decision, the Court's opinion does not prevent Congress from enacting a new preclearance provision. Instead, the Court in *Shelby County* held that the VRA's preclearance coverage formula was unconstitutional because it had not been updated since 1972 and was not based on "current conditions."[43] Indeed, as noted above, Chief Justice Roberts expressly invited Congress to establish a new framework for preclearance: "Congress may draft another formula based on current conditions."[44]

Restoring Preclearance

Our experience litigating against discriminatory practices at every stage of the voting process since *Shelby County* demonstrates the need for Congress to take up the Court's invitation with a new preclearance mechanism grounded in current conditions. Voting discrimination has proliferated since *Shelby County*. While LDF and other civil rights organizations have successfully responded to some of these new discriminatory measures with litigation, litigation is a blunt instrument. The parties often spend millions litigating these cases.[45] The cases take up significant judicial resources.[46] And the average length of Section 2 cases is two to five years.[47] But, in the years during a case's pendency, thousands—and, in some cases, millions—of voters have their right to vote abridged or denied.

It is therefore essential that Congress restore Section 5, which the Supreme Court recognized is at the "heart"[48] of the Act, by identifying those jurisdictions where voting discrimination remains the most prevalent, thereby requiring

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[42] *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *Holmes v. Moore*, 840 S.E.2d 244 (N.C. App. 2020); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821-MHH, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019); *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017); *Perez v. Abbott*, 250 F.Supp.3d 123 (S.D. Tex. 2017); *Perez v. Abbott*, 253 F. Supp. 3d 864 (S.D. Tex. 2017); *Allen v. Evergreen*, No. 13-107, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014).

[43] *Shelby Cnty*, at 557.

[44] *Id.*

[45] "The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation," NAACP Legal Defense and Educ. Fund, Inc. (Feb. 14, 2019), https://www.naacpldf.org/wp-content/uploads/Section-2-costs02.14.19.pdf.

[46] Federal Judicial Center, "2003-2004 District Court Case-Weighting Study," Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed).

[47] 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).

[48] *South Carolina,* at 315.

preclearance to block discriminatory voting schemes before they are implemented. The approach to geographic coverage in H.R.4 as passed by the House during the 116th Congress would do that, by identifying those States and localities where recent conditions show a pattern of continued discrimination against voters of color.

This geographic-coverage based approach is also supported by Supreme Court precedent. As eight Justices explained in *Northwest Austin*, "'[t]he doctrine of equality of States does not bar remedies for local evils which have subsequently appeared.'"[49] A statute's disparate geographic coverage will be upheld so long as it is "sufficiently related to the problem that it targets."[50] H.R. 4 easily satisfies this standard. By limiting geographic preclearance to those States and localities with recent patterns of discrimination in voting, the statute ensures that the preclearance remedy is implemented in places where the evil of voting discrimination is most prevalent.

Moreover, by focusing on evidence of voting discrimination within the past 25 years on a rolling basis—and by limiting coverage to 10 years absent new discriminatory voting measures—H.B. 4 properly considers "current conditions" within the meaning of *Shelby County*. Indeed, this look-back window is clearly consistent with Supreme Court precedent about the time period Congress, and courts, may consider in evaluating the propriety of enforcement legislation under the Fourteenth and Fifteenth Amendments.

In 1999, the Supreme Court in *Lopez v. Monterey County* upheld the constitutionality of Section 5 at that time, and rejected a challenge brought by a jurisdiction that was covered based on conditions in the jurisdiction in 1968.[51] *Lopez* thereby recognizes that evidence of voting discrimination from 30 years ago may justify preclearance, and that Congress, in 1982, acted properly in subjecting jurisdictions to preclearance for 25 additional years based on evidence of voting discrimination from 1968. Similarly, in *Tennessee v. Lane*, the Court upheld Title II of the Americans with Disabilities Act ("ADA") as applied to court access by looking to evidence of discrimination dating back to 1972—32 years before the Court's decision in *Lane*, and 18 years before Congress enacted the ADA in 1990.[52] By contrast, in *City of Boerne v. Flores* (1997), the Court held that Congress had exceeded its enforcement authority under the Fourteenth Amendment in enacting part of the Religious Freedom Restoration Act of 1990 when "the history of persecution in this country detailed in [congressional] hearings mentions no

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[49] *Northwest Austin*, at 205.
[50] *Id.*
[51] 525 U.S. 266, 282-285 (1999).
[52] *Tennessee v. Lane*, 541 U.S. 509, 525 & nn. 12, 14 (2004).

episodes occurring in the past 40 years."[53] Similarly, in *Shelby County* itself, the Court held that Congress in 2006 failed to consider "current conditions"[54] by implementing preclearance for 25 additional years based on a coverage formula tied to evidence of voting discrimination from 34 to 42 years earlier.

H.R. 4, which considers evidence of voting discrimination over the last 25 years on a rolling basis for a 10-year preclearance period, is similar to the look-back windows that the Court recognized as probative of current conditions in *Lopez* and *Lane* and is not comparable to the longer look-back windows at issue in *City of Boerne* and *Shelby County*. It is therefore well within Congress's authority to consider such evidence.

The 25-year look-back proposed by H.R. 4 is also essential to determine whether States and political subdivisions are engaged in a pattern of voting discrimination that warrants preclearance. Voting discrimination is often concentrated during redistricting, and a 25-year look-back allows consideration of two redistricting cycles—including the post-redistricting litigation that may span several years before a court adjudication that a redistricting plan illegally discriminated against voters of color.

In addition, in its *Shelby County* Supreme Court brief, LDF identified numerous jurisdictions that had a pattern of discrimination that was fully visible only if one looked back approximately 25 years, including:

- The City of Calera in *Shelby County*, which, in 2008, attempted to circumvent a consent decree from 1990 that prohibited discriminatory methods-of-election against Black voters;[55]
- The City of Alabaster in *Shelby County*, which had attempted discriminatory annexations in 2000 after having been blocked by Section 5 from doing so in 1975 and 1977;[56]
- Dallas County, Alabama, which repeatedly attempted various measures to discriminate against Black voters through methods of election, voter purges, and discriminatory redistricting in the 1980s and early 1990s, after the notorious and violent discrimination that gave rise to the VRA in Selma—the county seat—in 1965;[57]

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[53] 521 U.S. 507, 530 (1997).
[54] *Shelby Cnty*, at 557.
[55] Brief for Respondent-Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines and William Walker, at 19-20 *Shelby v. Holder*, 570 U.S. 529 (2013). https://www.naacpldf.org/wp-content/uploads/12-96-bs-Earl-Cunningham-et-al.pdf.
[56] *See id.* at 20; *see also Voting Determination Letters for Alabama,* U.S. Dept. of Justice, *available at* https://www.justice.gov/crt/voting-determination-letters-alabama.
[57] Brief for Respondent-Intervenors at 20-21.

- The State of Texas, which attempted to enact racially discriminatory redistricting plans after the 1980 census, 1990 census, 2000 census, and 2010 census;[58]
- The City of Seguin, Texas, which was forced to abandon discriminatory methods of election in response to three lawsuits between 1978 and 1993, but then proposed a new discriminatory districting plan and manipulated a candidate filing period to prevent any Latino candidate from competing after the 2000 census;[59]
- The State of Louisiana, which sought to implement discriminatory redistricting plans for its State House after every census between 1970 and 2000;[60]
- The City of Augusta, Georgia, which had a history of discriminatory voting-related measures from 1987 to 2012—the most recent involving the State of Georgia's pretextual rationale for rescheduling an election to a date when low Black turnout was anticipated.[61]

These examples highlight the importance of a 25-year look back for geographic coverage in identifying those jurisdictions where voting discrimination is most prevalent, and therefore geographic preclearance most necessary.

H.R. 4 as passed by the House in the 116th Congress contains another important measure to remedy and deter discrimination against racial and language minority voters nationwide: practice-based preclearance. This provision would require federal preclearance of "known discriminatory practices," such as the creation of at-large districts, inadequate multilingual voting materials and cuts to polling place. Practice-based preclearance is also a reasonable, flexible response to the standards articulated by the Supreme Court. It is responsive to, and necessitated by, the "current conditions" of voting discrimination in the nation.

Moreover, practice-based preclearance is supported by a long line of Supreme Court precedent recognizing Congress's authority to outlaw practices that are not *per se* unconstitutional but are known to perpetuate racial discrimination. In *South Carolina v. Katzenbach*,[62] for example, the Court upheld Congress's decision to suspend the use of literacy tests in the VRA of 1965 even though such tests were not

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[58] *See id.* at 23-24.
[59] *See id.* at 25.
[60] *See id.* at 28.
[61] *See id.* at 31-32; *see also Voting Determination Letters for Georgia,* U.S. Dept. of Justice, available at https://www.justice.gov/crt/voting-determination-letters-georgia.
[62] 383 U.S. 301 (1966).

categorically unconstitutional. The Court recognized that such tests had frequently been used to discriminate against Black voters, and it was therefore reasonable for Congress to suspend them entirely, as Congress "may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[63] In 1975, Congress amended the VRA to make the suspension on literacy tests a permanent ban.

Similarly, in *City of Rome v. United States*,[64] the Court found it permissible for Congress to prohibit changes to voting processes that have racially discriminatory effects even absent proof of intentional discrimination that would itself violate the Fifteenth Amendment. The Court explained that "even if [Section 1 of the Fifteenth Amendment] prohibits only purposeful discrimination," its prior decisions "foreclosed any argument that Congress may not, pursuant to [its enforcement authority under Section 2 of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect." Since *City of Rome*, the Court has continued to reaffirm the proposition that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States."[65] Because it identifies practices known to be especially susceptible to discrimination in voting, practice-based preclearance represents an exercise of congressional authority supported by this well-established line of precedent.

Together, geographic preclearance and practice-based preclearance hold the promise of both addressing the discriminatory voting schemes we see proliferating today, and also preventing "ingenious methods" that might be devised to suppress votes in the future.[66] The genius of preclearance, and the VRA, was creating a mechanism to prevent such mutations in voting discrimination and suppression. The late-Justice Ginsburg, in her *Shelby County* dissent, compared this mission to "battling the Hydra."[67] According to Greek mythology, for every head cut off the Hydra, a mythical and monstrous creature, two more would grow in its place.[68] Preclearance was designed to address the Hydra problem—to eliminate

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[63] *South Carolina*, at 324.
[64] 446 US 156 (1980).
[65] *See City of Boerne*, at 518; *see also Tennessee v. Lane* and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).
[66] U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25 (Apr. 1, 1965)
[67] *Shelby Cnty*, at 590 (Ginsburg, J., dissenting).
[68] "Hydra: Greek Mythology," Britannica.com (last accessed May 24, 2021), https://www.britannica.com/topic/Hydra-Greek-mythology.

discriminatory voting practices that have proven to be as adaptive as they are unrelenting. Indeed, the Hydra problem is what we see unfolding in many States today, with a resurgence of new laws and policies restricting equal access to the ballot for Black, Latino, Asian American and Pacific Islander, and Native American communities.

During the House debate to reauthorize the VRA in 2006, the late Congressman John Lewis commented on the continued need for a preclearance framework: "Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act."[69] Congressman Lewis's observation remains equally true today.

LDF and others have long warned that increased voter suppression would be the consequence of the *Shelby County* decision. Despite our vigorous litigation and advocacy efforts to fend off voter suppression, the current VRA can only get us so far. Faced with an extensive record of racial discrimination in voting practices, Congress must act swiftly, deliberately, and boldly to restore the now-defunct preclearance provision.

Amending Section 2 to Address *Brnovich*

Just eight years ago in *Shelby County*, the Supreme Court stated that its decision "in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in [Section] 2."[70] Indeed, the Court emphasized in the *Shelby County* decision that "Section 2 is permanent, applies nationwide," and broadly "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.'"[71] Yet, this Summer, six Supreme Court justices dealt a substantial blow to Section 2 and the democratic ideals it was designed to protect. By weakening Section 2 of the Voting Rights Act based on its own views of how much discrimination is acceptable, a majority of the Supreme Court has once again diminished our democracy.

In *Brnovich*, the Court's majority created five new factors—or "guideposts," in Justice Alito's terminology—to uphold a pair of Arizona laws that the *en banc* Ninth

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[69] 152 Cong. Rec. H5164 (daily ed. July 13, 2006) (statement of Rep. Lewis).
[70] *Shelby Cnty*, at 557.
[71] *Id.* at 536–37 (quoting 52 U.S.C. § 10301(a)).

Circuit had found discriminatory in violation of Section 2.[72] The decision disregards the plain text of Section 2, ignores settled precedent, and severely curtails the broad application of Section 2 that Congress intended, thus making it more difficult to ensure that every eligible citizen is able to freely exercise their right to vote.

By design, Section 2's language is sweeping in scope—as Justice Kagan explained in her *Brnovich* dissent, "to read it fairly . . . is to read it broadly. And to read it broadly is to do much that the majority is determined to avoid."[73] As Justice Kagan further explained:

> The Court always says that it must interpret a statute according to its text—that it has no warrant to override congressional choices. But the majority today flouts those choices with abandon. The language of Section 2 is as broad as broad can be. It applies to any policy that "results in" disparate voting opportunities for minority citizens. It prohibits, without any need to show bad motive, even facially neutral laws that make voting harder for members of one race than of another, given their differing life circumstances. That is the expansive statute Congress wrote, and that our prior decisions have recognized. But the majority today lessens the law—cuts Section 2 down to its own preferred size. The majority creates a set of extra-textual exceptions and considerations to sap the Act's strength, and to save laws like Arizona's. No matter what Congress wanted, the majority has other ideas. This Court has no right to remake Section 2.[74]

Justice Kagan further explained that the majority opinion's guideposts "all cut in one direction—toward limiting liability for race-based voting inequalities" and shielding discriminatory laws from Section 2 challenges.[75] One of the majority's newly-created guideposts in *Brnovich* instructs courts to compare a challenged voting restriction to the burdens of voting as they existed in 1982, when Section 2 was amended by Congress. This "guidepost" contravenes the text and purpose of Section 2, which is to prohibit racial discrimination in voting, not to impose 1982 as a reference point for evaluating whether today's laws are discriminatory. As Justice Kagan observes, "Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber."[76] The

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[72] *Brnovich*, at 13 (opinion of the Court).
[73] *Id.* at 41 (Kagan, J., dissenting).
[74] *Id.* at 40–41.
[75] *Id.* at 21-22 (Kagan, J., dissenting).
[76] *Id.* at 25 (Kagan, J., dissenting).

majority's guidepost, has no basis in the text or purpose of Section 2.[77] Consider, for example, a State that expands access to voting by mail after 1982, but does so in a way that favors white voters by making drop boxes more available in predominately white communities. Notwithstanding this new *Brnovich* guidepost, the State's approach would violate both the letter and spirit of Section 2.

Another "guidepost" the *Brnovich* decision created is to consider the size of the discriminatory burden established by a voting restriction in absolute terms. Applying this guidepost, the majority asserted that "[a] policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open."[78] This guidepost, too, is inconsistent with the spirit and letter of Section 2. If a voting restriction abridges the rights of 0.5 percent of white voters and 1.5 percent of Black voters, it can mean thousands of Black voters have their voting rights abridged because of a discriminatory restriction. Such an action cannot be dismissed because 98.5 percent of Black voters are able to vote. Congress has an interest and responsibility to rid the country of racial discrimination in voting, not only to reduce it. In her dissent, Justice Kagan explained that a voting law may violate Section 2 if it results in racially discriminatory outcomes, regardless of the size of the burden it imposes it absolute terms.

Yet another "guidepost" enumerated in the *Brnovich* decision suggests that States may erect roadblocks to voting that disproportionately harm historically disenfranchised racial groups and engage in voter suppression so long as that State has raised a theoretically legitimate—albeit unsubstantiated—interest, such as abstract concerns about potential for fraud. This guidepost threatens to restore our nation to the time before the Voting Rights Act's enactment, when States adopted facially neutral voting laws under the pretense of "purity of the ballot" but with the intent of excluding Black voters from the political process. This guidepost, too, finds no support in the VRA's text and lacked any basis in the factual record before the Court in *Brnovich*. Indeed, the majority decision repeatedly refers to a supposed risk of voter fraud, even though Arizona could not point to any fraud to justify its

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[77] Nicholas Stephanopoulos, "The Supreme Court showcased its 'textualist' double standard on voting rights," The Washington Post (July 1, 2021), https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/; David Gans, "Selective originalism and selective textualism: How the Roberts court decimated the Voting Rights Act," SCOTUSBlog (July 7, 2021), https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/.

[78] *Brnovich*, at 28 (opinion of the Court).

challenged laws.[79] This guidepost, thus, rests on phantom fears about voter fraud, a phenomenon that is almost nonexistent. A study of the 834 million ballots cast in the elections between 2000 and 2014 found only 35 credible allegations of in-person voter fraud.[80] By contrast, there are voluminous examples of persistent and proliferating racial discrimination in voting during the same time period.[81] While the Fifteenth Amendment and the Voting Rights Act clearly demand the eradication of racial discrimination in voting as a national imperative,[82] the *Brnovich* opinion sends a false message that voter fraud, not racial discrimination, is the real threat to our democracy.

In short, the *Brnovich* decision is antithetical to the core constitutional principles of equality and anti-discrimination and is a major departure from nearly four decades of judicial interpretation of Section 2. Just as Congress in 1982 overrode the Court's cramped interpretation of Section 2 in *City of Mobile v. Bolden*,[83] today Congress must override the *Brnovich* and restore the full power of one of our nation's most important and successful civil rights laws: the Voting Rights Act of 1965.

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[79] Richard Hansen, "The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems," Slate (July 8, 2021), https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html?via=rss.

[80] German Lopez, "The case against voter ID laws, in one chart," Vox.com (August 6, 2015), https://www.vox.com/2015/8/6/9107927/voter-id-election-fraud; *See also*, Quinn Scanlan, "'We've never found systemic fraud, not enough to overturn the election': Georgia Secretary of State Raffensperger says," ABC News (Dec. 6, 2020), https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956; "Debunking the Voter Fraud Myth," Brennan Center for Justice (Jan. 31, 2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf.

[81] J. Morgan Kousser, "Facts of Voting Rights 3" (cataloguing currently 4,173 "voting rights events" after 1982, including many after 200); H. R. Rep. No. 109-478, at 40–43 (2006) (reciting numerous Department of Justice objections to proposed voting laws under Section 5 in the relevant time period, as well as several voting laws that were withdrawn or amended voting changes were withdrawn or amended after the DOJ requested more information); U.S. Commission on Civil Rights, "An Assessment of Minority Voting Rights Access in the United States" (Sept. 12, 2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (identifying successful Section 2clitigation between the 2006 reauthorization and the *Shelby* decision in 2013); *see generally* Ellen D. Katz et al, "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982," 39 U. Mich. J. L. Reform 643 (2006).

[82] U.S. Const. amend. XV; 52 U.S.C. § 10301; *South Carolina*, at 308 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century").

[83] 446 U.S. 55 (1980).

Conclusion

Congress's power to legislate remains undiminished. Congress maintains the constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race today just as it did in 1965. The Supreme Court's *Shelby County* decision rendered preclearance inoperative, making Section 5 of the VRA unenforceable only until Congress enacts a new, modern preclearance provision to identify covered jurisdictions. The *Brnovich* decision threatens the efficacy of the other core provision of the Voting Rights Act, Section 2, at a moment when its protections could not be more critical. This Congress should not retreat from establishing a new preclearance framework that reflects the current conditions of the nation, and from restoring Section 2's prohibition on all forms of voting discrimination that result in unequal opportunities to participate in the political process based on race.

Brief for respondent-intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines, and William Walker in *Shelby County* v. *Eric Holder*, January 25, 2013, submitted by Samuel Spital, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc., *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-SpitalS-20210816-SD008.pdf*

Mr. COHEN. Thank you, Mr. Spital, and I appreciate your remembering and recognizing the civil rights heroes who did so much to bring about the right to vote. Ms. Viola Liuzzo was maybe missing from that. She lost her life during the Selma to Montgomery, Dr. King march.

Now, we are in the time for 5-minute Rule of questions, and I will begin by recognizing myself for 5 minutes.

For Ms. Lakin, I would like to ask what approach would you suggest Congress take to address the Court's flawed reading of section 2 and to further protect voters from discrimination?

Ms. LAKIN. Thank you for that question. There are a number of things that Congress could do to rein in *Purcell*, but any legislative response should ensure that voting rights claims get a full hearing while still leaving room for real cases where injunctive relief shouldn't be issued. It should also ensure that proximity to an election alone shouldn't be the reason to deny relief.

This could look like defining a specific, measurable period in which election changes are disfavored for legitimate reasons. This would help to prevent the window that *Purcell* is invoked from growing even larger and even more unmoored from its foundations.

Congress could also clearly State the public's interest in assuring free and fair access to the ballot and provide guidance as to how that interest should be weighed against administrative concerns.

Congress could also clarify that in deciding whether to stay a court order issued close to an election, that the interest of any voters who have relied on that court order are taken into account and protected.

Mr. COHEN. Ms. Lakin, let me ask—I appreciate your remarks on *Purcell,* but I was really concerned about *Brnovich*.

Ms. LAKIN. Oh, yes, my apologies. *Brnovich* ratcheted up the bar for plaintiffs to establish a discriminatory burden, so any response in our view would, at a minimum, do two things.

First, it should make clear that any voting practice that interacts with historical and socio-economic factors to result in discrimination against voters of color, run afoul of section 2, and that certain considerations are irrelevant to this analysis, such as whether the practice was common in 1982.

Second, it should ensure that State defendants provide some evidence that the restrictive practice actually advances some particular and important government interest, rather than relying on unsubstantiated fears.

There are different ways that Congress can do this. Congress could, for example, adopt an approach that codifies relevant and nonrelevant factors as General Clarke testified about earlier today. It could also adopt a burden-shifting approach modeled on the frameworks for addressing discrimination in title 7 or the Fair Housing Act. This could give guidance to courts as to what evidence a State needs to support and assert its interest and how to weigh that interest against evidence of a discriminatory result.

Mr. COHEN. Thank you, Ms. Lakin.

Mr. Greenbaum, section 2 precludes—should Congress just amend section 2 to preclude courts from considering one or of the more—*Brnovich* guideposts when considering voting denial claims?

Do you think the courts should be required to consider, when evaluating vote denial claims under section 2 and why?

Mr. GREENBAUM. So, Chair Cohen, I do think that Congress is going to need to step in and amend section 2 to address *Brnovich*. I think what you have in front of you, just like in 1982 Congress had a lot of decisions that it could rely on with respect to how to amend section 2 to provide for results claims. You can look at the decisions that have come down in various years, in various circuits, like the Fourth, Fifth, and Sixth Circuits that have looked at these claims and have looked at what factors are relevant.

Going back to the fact of having this two-part test about their being a disparate burden, plaintiffs have to prove a disparate burden, and they have to show that burden is caused by a challenged voting practice within the way that practice interacts with social and historical conditions on racial discrimination.

In all these cases, the courts, among other things, have looked at the Senate factors report.

Mr. COHEN. Thank you, Mr. Greenbaum.

Mr. Henderson, what is your response to those who would argue that the Voting Rights Act and specifically section 5's preclearance requirement is no longer necessary because minority voting registration and turnout are much higher than it was compared to where it was during the Jim Crow era, or what President Trump might be like and voted in higher numbers in 2020 to see that there wasn't a President Trump, Part 2. Would you agree with the late assessment of the court's decision that such an agreement was the equivalent of throwing your umbrella away in the middle of a rainstorm because you are not getting wet?

Mr. HENDERSON. Yes, and yes about the prophylactic role that the section 5 of the Voting Rights Act has played. First, let me say that as the Census Bureau pointed out with the 2020 analysis, our population has grown.

The fact that we have seen a significant growth in population would also suggest that we would see some growth in voter participation based on an extended population.

That voter participation in and of itself does not suggest, however, there are not problems, as the reports submitted by the leadership conference in the 10 States with additional States to follow have demonstrated.

In each instance, there are recent and current instances of voter discrimination that belie the notion that indeed our country is operating with full equality when it comes to the right to vote.

I certainly think the prophylactic role of section 5 of the Voting Rights Act is key to ensuring that everyone in our country, not just racial minorities, but others as well, enjoy the right to vote as was intended under the Constitution. This extra, additional protection is necessary and has been borne out, Mr. Chair, by what we have seen at the individual State level and that has been documented by our reports.

Mr. COHEN. Thank you, Mr. Henderson, for all of your good work and you appearing today.

Next, we will recognize the Ranking Member, Mr. Johnson, who is recognized for 5 minutes.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. First question for Mr. von Spakovsky, but thank you again for your expertise and for appearing before our Committee once more. Isn't it true that Congress' July 28 guidance regarding State efforts to remove the temporary assistance is now using those same temporary measures as the new guidance from which to judge compliance with VRA?

Mr. VON SPAKOVSKY. Well, that does appear to be what their guidance is doing, which is not a proper interpretation of section 2, and notice that in the prior testimony, it was made very clear, for example, that they had no interest in looking at all the changes that were made by State government officials violating State laws.

That would normally be something that the Justice Department, particularly the voting section, would look at, because when a State official that has no authority in the election area, changes or does not abide by a law that the State legislature has passed that would be something you should look at to see if there was potentially a discriminatory reason for doing that, and I don't quite understand why that is not something that is being examined.

Mr. JOHNSON of Louisiana. Well, I would venture to guess it looks like selective enforcement or at least selective analysis, but we will let the facts speak for themselves.

Do you think it is credible for anybody to argue that Congress intended for the DOJ to use temporary emergency voting measures adopted during a once-in-a-lifetime pandemic to judge compliance with the VRA?

Mr. VON SPAKOVSKY. No, I don't think so in particular because the changes were made—many changes were made all over the country. They were done, as you say, because of a once-in-a-lifetime emergency measure. Going back to the rules that were in place before that can't be seen, I don't think, as somehow discriminatory. The laws that were in place at that time were not being investigated, were not being sued by the Justice Department.

So, clearly at the time, they didn't think there was a problem with those rules, and now suddenly they think there are. That doesn't make sense from a commonsense point of view or from a proper interpretation of section 2.

Mr. JOHNSON of Louisiana. Thank you. Just quickly, restating the obvious, does the DOJ have the constitutional authority to reinterpret the statute?

Mr. VON SPAKOVSKY. No, I don't think so. I think they have got to apply Supreme Court precedent. That certainly is the way it has always been done at the Department. You do what the courts tell you, particularly the Supreme Court, when it comes to how you apply the statute.

I just have to say also very quickly, I think the *Brnovich* decision correctly interpreted the law. They took the explicit language of section 2, the Senate factors which everyone has agreed on for years, is the proper way to apply it.

In the past, because of the *Thornburg* v. *Gingles* decision, those Senate factors were only applied because all the cases that came up were vote dilution cases, really redistricting cases. What they did in this decision for the first time was say, well, here is how you take these Senate factors, and how here is how you apply them to a vote denial case.

I don't see anything in the decision that is outside what they have previously done or outside the language of the statute.

Mr. JOHNSON of Louisiana. Thank you so much.

Ms. Riordan, thank you I would like to repeat and reiterate what we have shared before. Let me just ask you to summarize quickly, I am running out of time, but is the VRA still working today without sections 4B and 5?

You may be muted. Check the mute button there. Sorry.

Ms. RIORDAN. Okay. Sorry about that. I do believe that the permanent tools that are provided already with the permanent provisions of the Voting Rights Act are more than sufficient to target any type of bad State action or local jurisdiction action.

Section 2, I hear a lot of complaints about section 2, that it is expensive, and it takes people, like a long time to come forward with the case because it is a civil matter.

Bottom line is, many of the times that people have said, oh, well, you didn't get our preliminary injunction ahead of the election, for example, those particular laws that they were challenging actually went forward, and what it showed was that the increase in voter participation by non-White voters in North Carolina increased under the laws that they were attacking.

So, it may not be perfect in every way, but it certainly provides the Department, as well as private plaintiffs through the 14th and 15th Amendment, to bring these types of actions if they find that a State or jurisdiction is intentionally discriminating against voters.

Mr. JOHNSON of Louisiana. Thank you very much. I am out of time. I would just say that I don't think there is any perfect legislation. I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

I believe next on our list will be Ms. Ross of North Carolina.

Ms. ROSS. Thank you, Mr. Chair, and thanks so much to all the witnesses for testifying. It is very, very helpful.

Since the passage of the Voting Rights Act in 1965, Congress has played a fundamental role in protecting the right to vote. Your testimony has highlighted critical avenues for legislative reform that would provide proactive protections for vulnerable voting populations.

Ms. Lakin, I am going to give you an opportunity to talk about *Purcell*, particularly in North Carolina, where the date for the primary was moved up, and it is much earlier than it was 10 years ago. So, *Purcell* will be particularly important for any challenge to redistricting.

We have heard your testimony that in practice the Federal courts' application of *Purcell* principle contributes to, rather than reduces, confusion among voters and elected officials.

Should the proximity of the election be a decisive factor for a court when determining whether to grant equitable relief in section 2 cases, and why or why not?

Ms. LAKIN. Thank you for that question, for the opportunity to weigh in here. The proximity to an election should not be the decisive factor in denying or granting relief in the context of voting rights litigation. At issue is the fact that you might be subjecting voters to discriminatory regime that—and the fact that voters who

may rely on an order, who need an injunction where there has been a showing of the fact that that election Rule might be unconstitutional, very likely is constitutional, that violates the VRA, and that Rule may be subjecting voters—that Rule may be, in effect, to subject voters to a discriminatory regime in voting.

So, the fact alone that of election rules happening close to an election shouldn't be sufficient because you should be taking into account all the different aspects of equities, including the public interest in expanding access to free and fair elections.

Ms. ROSS. Thank you very much. I would now like to yield the balance of my time to the esteemed Vice-Chair of the Committee, Congresswoman Dean.

Ms. DEAN. Well, thank you very much to my colleague and friend, Representative Ross, for yielding to me, and I thank both our Chair for putting on this very important hearing today, and thank you to the testifiers.

For the record, I would like to just note that Mr. Jordan misrepresented actually the legality of the elections in Pennsylvania. They were found to be free and fair by all courts.

Ms. Lakin, I would like to follow-up with you. You remember that Professor Nick Stephanopoulos who appeared at our Subcommittee hearing held on July 16, 2021, proposed using or importing the disparate impact standard used in other areas of civil rights law for vote denial claims. What are the pros and cons of that approach?

Ms. LAKIN. Thank you for that question, Representative Dean. There are some virtues of this kind of burden-shifting approach. For example, it provides some guidance to courts on how to weigh the different interests against each other—the interests that plaintiffs have in protecting voting rights, and the interest that the State has in terms of advancing or protecting elections and so forth.

It also provides the plaintiffs an opportunity to come back and say, no, there is a better way, there is a less restrictive way to protect both interests—voting rights and the State's interest. So, that is one of the advantages of providing some tools for the courts here in a burden-shifting framework that is familiar, but at the same time, there is a familiar test that the courts have already used under section 2 in protecting voting rights under that framework, and codifying factors that are or are not relevant, restoring the section 2 two-step test that courts are very familiar with, also has its advantages as well.

Ms. DEAN. Thank you so much for that and my time is running short.

Mr. Greenbaum, if I could ask you just quickly, we know that Congress must address the *Brnovich* decision narrowing section 2 scope. Even if we do amend it successfully to respond to *Brnovich*, to respond to the decision, would section 2 litigation alone be enough for adequate substitute for section 5?

Mr. GREENBAUM. No, it wouldn't be, Congresswoman Dean. Retrogression is a completely different issue than what section 2 covers.

Ms. DEAN. I thank you very much. I see my time is expired. Again, thank you, Representative Ross, and I yield back.

Mr. COHEN. Thank you. Our next question panelist Member will be the distinguished Hank Johnson from Georgia, 5 minutes.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

Mr. Henderson, in *Shelby County* v. *Holder*, the court invited Congress to draft another coverage formula based on, quote, "current conditions." Do current conditions, specifically the deluge of State laws making it more difficult to vote since the *Shelby County* decision, justify the need for a new coverage formula?

Mr. HENDERSON. Thank you, Mr. Johnson, for that question, and the answer is yes. I certainly think the court did open the door to invite Congress to provide an assessment of current conditions that affect the right to vote.

Under section 5 of the 14th Amendment, Congress does have the power to respond to issues regarding discrimination in voting, and the effort to quantify how these changes in State election laws are impacting the right to vote is certainly within the scope of Congress.

Mr. JOHNSON of Georgia. Thank you, Mr. Henderson.

Ms. Weiser, how does the data your organization and others have provided to the Subcommittee document that racial discrimination in voting remains a persistent, widespread problem, and how does it demonstrate the current need to protect voting rights?

Ms. WEISER. Thank you very much for the question, Representative Johnson. We have actually submitted multiple pieces of evidence and studies that demonstrate ongoing race discrimination in voting, from discriminatory voter purges that are concentrated in jurisdictions that are likely to be covered by the amended Voting Rights Act, to discriminatory actions across the country in the 2020 election, to discriminatory impacts of some of the voting restrictions that are being introduced across the country and passed to date. So, there is an overwhelming—

Mr. JOHNSON of Georgia. Thank you.

Ms. WEISER. Thank you.

Mr. JOHNSON of Georgia. What geographic coverage formula would you recommend meeting this current need, and why would it be constitutional?

Ms. WEISER. Well, thank you again for that question. I think that the approach that this Congress has been taking in the John Lewis Voting Rights Advancement Act is an appropriate one, and it is well tailored to actually identify those jurisdictions where the problem is most persistent and most widespread, and where the remedy of discrimination is most needed.

The geographic formula looks over a period of time to jurisdictions that have had multiple violations, and it also has provisions in place to make sure it also covers jurisdictions that are also currently discriminating on the basis of race.

Mr. JOHNSON of Georgia. Okay. Thank you.

Mr. McCrary, when striking down the coverage formula in *Shelby County*, Chief Justice Roberts relied largely on the proposition that minority voter registration and turnout has significantly improved in many parts of the country. Should Congress look at other indicators in addition to registration and turnout to measure the pervasiveness or persistence of race discrimination in the voting process?

Mr. McCrary? You must have frozen, but while he is frozen, let me ask Mr. Spital, how has the public's ability to monitor voting changes been affected now that covered jurisdictions do not have to notify the attorney general of voting changes, and has the lack of notice impacted the ability of private plaintiffs to block changes through legislation?

Mr. SPITAL. Thank you very much for the question, Congressman Johnson. Absolutely, especially at the local level, we see this as a real issue. So, without section 5, it is very difficult to be even aware of the full range of voting changes, potentially discriminatory voting practices, that are occurring at the local level, which has been a significant impediment to private civil rights organizations bringing litigation, potentially to challenge those practices.

Mr. JOHNSON of Georgia. Well, let me ask you the question I asked Mr. McCrary. When striking down the coverage formula in *Shelby County*, Chief Justice Roberts relied largely on the proposition that minority voter registration has significantly improved in many parts of the country.

Should Congress look at other indicators in addition to registration and turnout to measure the pervasiveness or persistence of race discrimination in the voting process?

Mr. SPITAL. So, absolutely. The answer is absolutely yes. I do want to first note, as Ms. Weiser said earlier, if you actually look at turnout, the data has been going in the wrong direction since *Shelby County*. So, even on that score, it suggests that the court was declaring victory too soon in terms of improvements to turnout.

There are so many other types of voting discrimination, so many ways in which a voter may have an opportunity to cast a ballot, but if a jurisdiction changes in a way that they change the method of election, and if they redistrict, there are so many ways that they can sort of cancel out the impact that that voter can have on the political process. Those are equally unconstitutional and absolutely the types of evidence that Congress should be considering as well.

Mr. JOHNSON of Georgia. Thank you. With that—

Mr. COHEN. Thank you, Mr. Johnson.

Professor McCrary, can you hear us?

Mr. MCCRARY. Yes.

Mr. COHEN. Yeah. I think Mr. Johnson asked you a question and you weren't able to respond.

Mr. Johnson, would you like to re-ask that question?

Mr. JOHNSON of Georgia. Thank you, I will.

When striking down the coverage formula in the *Shelby County* decision, Chief Justice Roberts relied largely on the proposition that minority voter registration and turnout has significantly improved in many parts of the country.

Should Congress look at other indicators in addition to registration and turnout to measure the pervasiveness or persistence of race discrimination in the voting process?

Mr. MCCRARY. Yes, Representative Johnson. I agree with what Mr. Spital just testified, and I would point to the geographic coverage formula in H.R. 4, as the House passed it in 2019, as an improvement over participation rates, as a way of identifying the appropriate jurisdictions to cover under preclearance. Thank you.

Mr. JOHNSON of Georgia. Thank you.

I yield back, Mr. Chair. Thank you for the consideration.

Mr. COHEN. You are very welcome.

Ms. Garcia, you are recognized for 5 minutes.

Ms. GARCIA. Thank you, Mr. Chair, and thank you to all the witnesses. Everyone had great presentations and, Mr. Chair, thank you for the selection of such a wide, diverse panel.

I would like to start my question with Mr. Saenz from MALDEF. You noted accurately that there has been a population growth among Latinos different than other groups in the country.

In fact, in Texas, 95 percent of the population growth that has led to perhaps getting two seats additional to a congressional delegation was 95 percent people of color, primarily more Latinos.

So, in Texas, about half of all the people under 18 are Latino, and the numbers were changing dramatically more in the next decade. You have had a long history of defending and litigating Latino issues in our State.

How does historical evidence demonstrate that the growth in population among a racial minority, or language minority group as Latinos, catalyze changes in the growing practices of a particular jurisdiction to limit their voting strength.

Mr. SAENZ. Thank you, Ms. Garcia. I think the history is quite clear and was presented two weeks ago by Professor Bernard Fraga about how this Nation is at a tipping point when you do get to a point of a growth in a minority voting community it is often when a those in power seek to deter further participation, and unfortunately, the State of Texas is an example of that. The very same predominance of minority population growth yielding additional seats occurred a decade ago, but in response to that, the Texas legislature drew initial lines under which none of the three new seats earned by the State of Texas went to minority voters.

It took court intervention under section 2, it was four additional seats—to secure two of the new four seats with a growing population. Indeed the court, in ruling on that section 2 case concluded that it was not only vote dilution, but it was intentional discrimination on the basis of race against the Black and Latino voters in the State of Texas.

That is an example on a statewide basis of where this tipping point phenomenon has acted in the past to catalyze behaviors that violate voting rights.

I simply have to add that even though that work found intentional discrimination and followed another court in Washington, DC, that concluded the same, it still exercised its discretion to deny preclearance coverage for the State of Texas. It is another indication in my view why we must step in with congressionally enacted coverage for preclearance.

Ms. GARCIA. Well, thank you. Mr. Chair, I yield now to our former Vice-Chair of our Committee, Ms. Scanlon, for my remaining 2 minutes to ask any questions that she may have.

Ms. SCANLON. Thank you so much. Thank you, Congresswoman Garcia, for yielding your time, and I would also like to extend my thanks to the Chair and the Members of the Subcommittee for allowing me to join you today.

Mr. Spital, I had a specific question. The VRA contains express authorization for the Attorney General to seek preventative relief, including preliminary injunctions.

Federal courts, including the Supreme Court, have long accepted that the VRA provides an implied private cause of action. Now, recently in a brief concurring opinion in the *Brnovich* case, Justice Gorsuch expressed doubt about whether such a cause of action exists. Should Congress explicitly provide for private right of action under the VRA?

Mr. SPITAL. Thank you very much for the question, Representative Scanlon. I think the answer is yes. I should make clear that I think the precedent is overwhelming that there is a private right of action under both section 2 and other aspects of the VRA, but in the abundance of caution, Congress should absolutely make that explicit.

Ms. SCANLON. Thank you.

Ms. Weiser from the Brennan Center, as a Representative from PA, which is north of the Mason-Dixon Line, but nevertheless we have seen a whole raft of legislation over the past decade and particularly since the last redistricting, a series of laws that burden the right to vote.

Whether it is through gerrymandering, voter ID laws that would have disallowed voting by over half a million eligible voters. Why is it important to a State like Pennsylvania that we enact H.R. 4?

Ms. WEISER. Well, the bill as Congress is currently contemplating it, would both strengthen section 5 of the Act and section 2. Section 2 applies nationwide, and so that would ensure that even if Pennsylvania is not covered for preclearance, the voters would still have robust protections against voting discrimination that they could enforce.

That said, the dynamic coverage formula that this Congress is considering actually moves forward. New States that engage in discrimination repeatedly can become subject to preclearance going forward. So, that should Act as a deterrent to ongoing and repeated discrimination in States like Pennsylvania and other States around the country, where there is a new push for discriminatory voting changes.

Ms. SCANLON. Thank you. I appreciate that.

I yield back to my gracious colleague from Texas. Representative Garcia.

Mr. COHEN. Ms. Scanlon, without objection, if you have another question, you have been kind enough to be with us and spend several hours.

Ms. SCANLON. No. It is an abiding fascination of mine, this whole field. I would just ask then if any of the other panelists have anything they would like to add with respect to the question about whether we need to explicitly provide for a private right of action?

Mr. SAENZ. Congressmember, I would simply echo what you have heard. It is clearly established there is a private right of action but given the ongoing assault on voting rights that we have seen, I think it would be helpful to make that clear as Congressional intent.

There is no question that the Department of Justice, even the most well-resourced Department of Justice cannot do this alone.

Even with preclearance in place, the Department of Justice cannot do it alone.

I have the great pleasure of administering a consortium of 12 nonprofit organizations nationwide engaged in private enforcement of the Voting Rights Act, and I can tell you, based on our monthly conversations that the work that they do is absolutely essential.

Mr. COHEN. Thank you. Thank you, Ms. Scanlon. You and Ms. Dean, for showing up, it shows your interest in the issue, and that is important, that people show their respect for the issue, regardless, by appearing, and I thank you for doing that, Ms. Dean as well.

Ms. Jackson Lee, you are recognized for 5 minutes, more or less.

Ms. JACKSON LEE. Mr. Chair, thank you, and I would add my appreciation to you as well as Congresswoman Scanlon and all my colleagues who have.

Mr. Chair, I wish to set for the record the current conservative Supreme Court that we now have, the current majority has simply never understood or refuses to accept the fundamental importance of the right to vote, free of discriminatory hurdles and obstacles.

May I share the view that were it not for the 24th amendment, I believe this conservative majority on the court would subject poll taxes and literacy tests to the review standard enunciated in *Brnovich*.

There lies the importance of following in the words of John Lewis, that we must get into good trouble. Today, I wear his pin that exemplifies and recognizes his spirit in this room today. "Good trouble" means that we are saving the democratic principal voting rights of all Americans.

With that in mind, let me, as I begin, simply acknowledge the brave men and women in Afghanistan, our military, who is doing the work of this Nation in saving the lives of all those who are now impacted. I thank them for their service and those who served before.

I spoke this morning to Representative Ron Reynolds who is steadfast that remaining Members of the Texas delegation that are continually not going into this then which is the special session in Texas. I want to thank them personally on the record for this.

With that in mind, Mr. Henderson, the sacrifice that they are making, and I know the work that you have done. So, I want to just go right to the *Shelby County* opinion, and I have a question for Mr. Saenz and I know my time is waning.

That deals with the addressing of the concentration in the jurisdiction singled out for preclearance, that Roberts asserts that the evil of section 5 is meant to address may no longer be concentrated in jurisdictions singled out for preclearance.

Could you quickly, Mr. Henderson, answer these questions. Has your organization found that there is a concentration of voting rights violations in certain jurisdictions which justify geographic-based coverage?

Has the COVID–19 crisis like in Harris County exacerbated, and does this illustrate the need for Congress to reinstate section 5? If you could remember those questions. I would like to let Mr. Saenz know that I have questions for him regarding known practices, re-

garding voting law changes and known practices, regarding the historical association discrimination.

Mr. Saenz will be, what is the constitutional basis for practice-based preclearance, and how is practice-based preclearance responsive to the Supreme Court's concerns expressed in *Shelby*?

Finally, as it relates to section 2, this question of diminution of the vote, doesn't that negatively impact redistricting, which Texas is getting ready to go through, and how important after remedies are with section 2. I fear the restricting that will be coming up in Texas.

Mr. Henderson, if you would, I know my time, you will do a very good job quickly. Thank you for your leadership.

Mr. HENDERSON. Thank you for your question. In response, the answer is yes to all three. Our reports have documented the increase in voter difficulties in States that have been covered by section 5. We have documented that to a great degree for Congress to review. I completely agree with all three of your questions, and I will stop there and turn it over to Mr. Saenz.

Ms. JACKSON LEE. Okay. Thank you, Mr. Henderson.

Mr. Saenz?

Mr. SAENZ. Thank you, this responds directly to the federalism and all sovereignty concerns expressed in the *Shelby County* decision by ensuring that preclearance only applies to practices that have historically and in recent history been used to restrict the right to vote of minority voters, particularly those who are growing inside—in response to equal sovereignty by ensuring it applies virtually nationwide.

There is a demographic trigger and a voter suppression measure. The other applies not just to specific States or specific regions. It applies across the country.

With regard to your second question, certainly I share your concerns about redistricting. That is why the vote dilution cause of action under section 2 is so critical. It has, as you know, preserved the rights of Black and Latino voters time after time, decade after decade, in the State of Texas, and around the country. That practice-based coverage would also ensure that once more we have the ability to use preclearance, to get an initial view about whether it is being proposed in States like Texas would be acceptable under the Voting Rights Act.

Ms. JACKSON LEE. So, then finally, the importance of fixing section 5 and section 2, because of *Brnovich*, how crucial is that?

Mr. SAENZ. I would say it is absolutely crucial. If you fail to do both, then we fail to Act in the other regard away from the way the Congress is acting. *Brnovich* is an indication—exercise its authority of the 14th and 15th amendment to respond. It is dealing with vote denial the way the court has previously been very much like *Mobile* v. *Bolden*. This is an indication for Congress to Act in the vote denial context, as it did in 1982 in response to *Mobile* v. *Bolden* as you know, Congressman.

Mr. COHEN. Thank you, and I want to thank you all our Members who attended today, and particularly our Witnesses who were spectacular. This concludes today's hearing. I want to thank all our Witnesses—did somebody have a request?

Ms. JACKSON LEE. Yes. I have an unanimous consent.

Mr. COHEN. Ms. Jackson Lee?

Ms. JACKSON LEE. Thank you, Mr. Chair, I'm so sorry. Unanimous consent to put into the record a Texas Monthly article, "Greg Abbott's Voter Suppression Methods Have Become More Subtle—But They're Still Transparent." I ask unanimous consent then from NBC News, "'Racist voter suppression': Texas laws keep Latinos from ballot box," as evidenced by this article and groups that are helping to empower all voters to vote. I ask unanimous consent that these articles be placed into the record.

Mr. COHEN. Without objection, so done.

[The information follows:]

MS. JACKSON LEE FOR THE RECORD

TEXAS MONTHLY ›
https://www.texasmonthly.com/news-politics/abbott-ballot-drop-offs-vote-suppression

Greg Abbott's Voter Suppression Methods Have Become More Subtle—But They're Still Transparent

CHRISTOPHER HOOKS

OCTOBER 03, 2020

As lawsuits by Democrats proceed against Governor Greg Abbott's order limiting Texas counties to one mail-in ballot collection location, the state's lawyers will rely on a plausible-sounding justification for the action: to improve the "security" of the mail-in ballot process. The state will also surely argue that the order is limited in scope. Most of Texas's 254 counties already had only one drop-off location. The rule affects mainly a few populous counties, including Harris, home of Houston, which had set up twelve collection spots for its 2.4 million registered voters. The order doesn't technically keep anyone from voting—voters are, of course, still ostensibly able to mail in their ballots.

But put Abbott's order in the proper context—a high-stakes battle for control of the Texas House that might be decided by razor-thin margins in races in large counties such as Harris and Bexar and Dallas, along with other contested races for the U.S. House—and it becomes transparent. Abbott's long history of imaginative acts of voter suppression means he doesn't deserve the benefit of the doubt. And the governor's order raises the question of what else he might do to limit the vote by the time in-person early voting is scheduled to start on October 13.

Voter suppression comes in many flavors but varies in heavy-handedness. On one side of the spectrum, you have the government using the threat of force or punishment to bar individuals from exercising their rights. Many Americans can identify this kind of behavior as wrong. Call that the "steel-toe boot" school of voter suppression.

Texas still sees plenty of the boot. One of its most vigorous practitioners over the past two decades was Attorney General Greg Abbott, before he became governor, who was happy to give a firm kick in the kidneys to a wide range of

folks who set about registering new voters and helping them cast ballots. In 2004, Gloria Meeks, a 69-year-old Black woman from Fort Worth, helped a housebound 79-year-old neighbor fill out a mail-in ballot. Because Meeks didn't sign the envelope properly, her home was staked out in 2006 by Abbott's investigators, whom she repeatedly saw peeping through her window at bath time. During the course of Abbott's investigation, she had a stroke, which her friends blamed partly on the stress. She was never convicted of anything.

Around the time of the Meeks investigation, a PowerPoint presentation Abbott's office used to brief officeholders on "electoral fraud" included a picture of Black voters in line under the heading "Poll Place Violations." Fraud detectives, the slideshow said, should look out for "unique stamps" accompanying mail-in ballots. The example given was a 2004 stamp with the words "Test Early for Sickle Cell" over a picture of a Black woman kissing an infant. (Sickle cell anemia is disproportionately common among those of African ancestry.)

A half decade later, in 2010, Abbott's office sent armed agents to confiscate the equipment and paperwork of a voter registration drive in Harris County called Houston Votes, then the target of a local tea party group, which accused Houston Votes of perpetuating voter fraud. Houston Votes suffocated, unable to raise funds while under investigation. Though Abbott's office quietly concluded that the group had broken no rules, it destroyed everything it had confiscated, in an episode that would not have been out of place in Belarus.

On the other side of the spectrum, you have the "calculator" school of voter suppression, whose adoptees don't try to bar voters from casting ballots with the threat of force but rather change rules and tweak the way elections are conducted in ways that give themselves advantages that accumulate. Some of these rule changes are large and easily recognizable, as when elected officials draw districts in ways that favor their party. But many tweaks are small, and their impact can be hard to define or easy to dismiss, not least because they come with the perfectly sensible-sounding justification of promoting election security. (Never mind that Republicans who raise alarms about such security, often by hyping simple clerical errors, have never presented evidence, including in court cases, that it's a significant problem.)

The key to this strategy is that the constituencies of the Democratic party—the young, the working class, racial minorities—are, generally speaking, harder to register and to turn out to vote. So rules that make it just a little harder and more inconvenient to cast a ballot can usually be counted on to benefit the Republican party. The "calculator" vote suppressors enact laws such as voter ID and changes to the election code, which make lines longer at polling places. They might, say, gum up the postal system so that fewer mail-in ballots are delivered in time to be counted—as President Trump has stated he is working to do, or tighten rules that allow elections clerks to throw out more mail-in ballots from those who didn't follow an arcane and unnecessary set of rules, as in the case of Gloria Meeks.

Changes like these might not make the difference in a high-profile statewide race, but they have potentially enormous impacts on smaller ones, including elections for the state House, which can be decided by dozens of votes. It's the state House that Republican leaders like Abbott care the most about right now. They're laser-focused on it. In 2018 Democrats won 67 seats in the Lege's lower body. They need 9 more to win the majority this year, giving them some influence over the redistricting process and the drawing of legislative districts.

Democrats may well win a majority with 76 or 77 seats, which means there's a huge incentive to pull just 1 or 2 seats over into the R column. In 2018 fourteen state House races were decided by margins of fewer than 5 percentage points. Two state House races in Harris County were decided by a margin of 0.2 percent or less: Republican Dwayne Bohac won reelection by 72 votes, and Democrat Gina Calanni beat a Republican incumbent by 97 votes.

Calanni lives in Katy, which is on the western border of Harris County. Because of Abbott's order, there is now only one ballot collection place in the county, at NRG Stadium, which is a 45-minute drive from parts of Katy in clear traffic—of course a rare sight in Houston. That means some of Calanni's constituents now face a drive of one and a half hours to turn in a mail-in ballot to the proper officials if they don't want to give it to a postal service that has been intentionally slowed down by political appointees favorable to the president.

It's easy to imagine a couple dozen Harris County residents putting off the drive until it's too late. Maybe they drop their ballot in the mail instead, and

maybe they miss that deadline too. It's likewise easy to imagine that the margin of Calanni's reelection, or loss, is a few dozen votes. And when you add the impact of Abbott's order to the many other small ways state leaders have fought to make voting harder than it needs to be in this state—and add to *that* the impact of the general sense of confusion and demoralization that many Texans feel about the integrity of the Democratic process—you have considerably more than a few dozen votes.

Republicans have done this kind of "calculator" vote suppression for many years, including those in which they were far ahead in the polls and didn't need the help at all. But this year, the incentive to peel away Democratic margins a few dozen votes at a time is much higher. And with weeks left before the election, it's safe to assume there are more changes coming.

https://outline.com/JhpXMN

NBC NEWS ›
https://www.nbcnews.com/news/latino/racist-voter-suppression-texas-laws-keep-latinos-ballot-box-groups-n1241862

'Racist voter suppression': Texas laws keep Latinos from the ballot box, groups say

OCTOBER 03, 2020

SAN ANTONIO — The coronavirus pandemic could challenge Latino voter turnout this year, and voting advocates say it just adds to the barriers intentionally enacted to keep Latinos and voters of color from casting their ballots.

“Texas has a long history; it’s the state that has the most pronounced, overt, racist voter suppression tactics that we know of,” said Lydia Camarillo, president of the Southwest Voter Registration Education Project, formed in 1974 when Mexican Americans still were being kept from voting.

Latinos are almost 40 percent of the population and are on track to be the state's largest population group by next year. Latino turnout has been rising, but those trying to ramp up the bloc's voting in the state must each year overcome laws and measures that play a role in keeping them from voting.

Of more than 15,000 Covid-19 deaths in Texas so far, 56.1 percent are Hispanics and 30.1 percent are whites.

But Texas Republican Gov. Greg Abbott has refused to expand its mail-in voting to accommodate people concerned about being exposed to the virus when they go to the polls.

Abbott did expand early voting by six days, but others in his party are suing to prevent that expansion.

Abbott went further by announcing the shutdown of satellite locations for Texans allowed to vote by mail. He is allowing one drop-off box per county — a move, he said, that would protect the integrity of the elections and stop illegal voting.

The announcement drew immediate criticism and a lawsuit filed by the League of United Latin American Citizens.

The governor's decision will have a big impact in Texas' large urban counties, where Democrats have been winning, including in Harris County, the nation's third most populous county.

Harris County Judge Lina Hidalgo slammed the governor's decision, noting that the county for which she serves as the chief elected official is bigger than the state of Rhode Island. "This isn't security, it's suppression," she said in a tweet.

Harris County is bigger than the state of Rhode Island, and we're supposed to have 1 site? This isn't security, it's suppression. Mail ballot voters shouldn't have to drive 30 miles to drop off their ballot, or rely on a mail system that's facing cutbacks.

If Texas wanted to facilitate broad participation, it would ensure remote and early voting were widely available, along with multiple, convenient and broadly available polling places, said Thomas Saenz, president and general counsel for Mexican American Legal Defense and Educational Fund.

"That is not what Texas is doing," Saenz said. "That's for a reason. Texas authorities know they are suppressing the vote."

Texas' history of disenfranchising voters — from holding whites-only primaries, to barring people from voting based on whether they speak English, to outright intimidation and closing voting locations in minority locations — was so notorious that for years the state had to get Department of Justice approval for any election changes under Section 5 of the Voting Rights Act.

There's no question that Latinos' youth and the population's disparities in education and income are factors in voter turnout. Younger people are less likely to show up at the polls. Voters who do, often are more educated and have higher incomes, Saenz said.

But Texas Latinos' voter registration is lower than that of Hispanics in other parts of the country, so demography and disparities aren't the only explanation. "Given Texas' history, you have to believe some of that is obviously linked to race," he said.

In 2013, the Supreme Court gutted the Voting Rights Act, and within hours, Texas imposed a strict Voter ID law. As an example, it allows only certain

forms of ID — such as a gun permit — but not a college identification card, which is what many young voters have. An early version of the law was found to deliberately discriminate against Blacks and Latinos.

"For 144 years, Texas has perfected the science of suppressing voters at the ballot box," Beto O'Rourke, a former presidential candidate and former congressman, said in a recent virtual Democratic event. Its preference for gun permits over college IDs is part of an "infrastructure of suppression," he said.

Without the federal government oversight, the state became a national leader in reductions of polling sites, according to a study by The Leadership Conference Education Fund.

Last year, the state tried to purge its rolls of tens of thousands of voters based on flawed Texas drivers' license data. The attempted purging followed a year in which Latinos had doubled their turnout at the polls. Although the state was stopped, the tactic may have terrorized some voters fearful of doing the wrong thing into skipping voting, Saenz said.

After Monday, Oct. 5, it will be too late to register to vote in Texas.

The state has one of the earliest deadlines for registering — while it also spurns online registration. Federal law requires states to allow people to register to vote when they apply for a driver's license. The state finally began to comply this week, after a federal judge ordered it. Texas now allows people who update or renew their licenses to also get on the voter rolls. Otherwise, people must fill in an application, print out the completed form and mail it in or drop it off.

Texas has also made it tough to register voters, requiring people to be deputized by taking training and passing an exam. The person registering must be able to vote in Texas and can only register voters in the county where they are deputized, for a limited time. There are 254 counties in Texas.

In 2017, the Republican-led Texas Legislature ended straight ticket voting — when a person votes for all candidates of a single party by checking or clicking on one box.

It came as more Democrats were straight ticket voting. Democrats won a reinstatement of straight ticket voting, but a three-judge panel of the 5th

Circuit Court of Appeals overturned the decision this week after Republicans appealed.

Jason Villalba, a former Republican state representative who formed the Texas Hispanic Policy Foundation, said his Republican colleagues in the Legislature never intentionally diminished or limited the ability of Latinos to vote.

But there was a big concern among Republicans that Democrats would “game the system” and “harvest votes” among constituencies that do not historically vote, are economically disadvantaged and are people of color, said Villalba, now an independent voter. He acknowledged “exceptional ignorance to our community” exists.

The nonprofit Move Texas has been working since January to register voters, especially young people of color. It has mailed out 400,000 applications with stamped return envelopes.

The pandemic stalled the work that involved going to campuses and other places with clipboards and registering people — and underscored how difficult it is to register in Texas, said Drew Galloway, Move Texas executive director.

"Voter suppression is alive and well and we've known this since Move Texas started in 2013. We really had to help young people overcome these barriers set up by the state," Galloway said. He said 41 percent of the state is under age 30 and 63 percent of that group are young people of color, mostly Latino.

Despite the tougher registration rules, Latino voting has grown simply because of numbers. Albert Morales, senior political director for Latino Decisions polling firm, said 730,000 Latino Texans have turned 18 since Hillary Clinton ran in 2016.

Camarillo's Southwest Voter Registration Education Project had planned to visit high school classrooms to register at least 140,000 students who will be old enough to vote by Election Day.

Texas law requires schools to offer registration twice in a school year, but Camarillo said compliance is not enforced. The closure of schools by the pandemic hurt Camarillo's plans and now the group is relying on principals encouraging students to reach out to her group.

The state's secretary of state announced last month that 16,617,436 million Texans registered to vote, a record.

There are 5.6 million Latinos eligible to vote this year. But as of 2018, only 2.7 million were registered to vote and 1.9 million voted that November in the midterms.

Camarillo said she expects 2 to 2.1 million Latinos still will make it to the polls despite the obstacles.

Mary Moreno is the spokeswoman for the Texas Organizing Project, which is working to turn out 800,000 Latinos in November. The governor takes pride in Texas being first in everything, but not when it comes to voter participation, she said. “Everything he’s done has effectively suppressed the vote," she said. Abbott's latest limits on ballot drop-off locations "is the latest example.”

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Mr. COHEN. Thank you, Ms. Jackson Lee. Once again, now we have concluded our hearing, and I thank all our witnesses for appearing today, all of whom have been important in the process that we have to undergo to get a voting rights law to a vote.

Without objection, all Members have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

With that, once again, we are experiencing great trauma, our Nation and our world and Afghanistan and keep all the soldiers in your thoughts and prayers and all the Afghanis who helped us in your thoughts and prayers, and this hearing is adjourned.

[Whereupon, at 1:08 p.m., the Subcommittee was adjourned.]

APPENDIX

Consulting Report for the Brennan Center for Justice
And the Leadership Conference Education Fund

Peyton McCrary

Purpose of the Report

I was asked by attorneys at the Brennan Center for Justice and the Leadership Conference Education Fund to undertake an empirical analysis of the impact of the geographic coverage formula of a bill passed by the United States House of Representatives in 2019, then designated HR 4. Among other provisions of HR 4, the geographic coverage formula would identify jurisdictions in the United States with sufficient violations of the Voting Rights Act, the Fourteenth Amendment, or the Fifteenth Amendment to reach the bill's well-defined threshold to require federal preclearance of future voting changes. That bill is now entitled the John Lewis Voting Rights Advancement Act (VRAA). The VRAA would revise the coverage formula invalidated by the Supreme Court in its 2013 decision in *Shelby County v. Holder*.[1] Preclearance refers to the process of receiving prior federal approval from the Department of Justice or the U.S. District Court for the District of Columbia before implementing any change affecting voting. The research I was asked to perform required the use of research methods I have employed – in my scholarly publications, my work as a social scientist in the Civil Rights Division of the Department of Justice, and in expert witness testimony – over the last four decades. For example, it calls among other things for methodology I applied in my sworn Declaration filed by the United States in *Shelby County v. Holder* in 2010.[2]

[1] 133 S.Ct. 2612 (2013).
[2] Declaration of Dr. Peyton McCrary, *Shelby County, Alabama*, C.A. No. 1:10-cv-00651-JDB (D.D.C.), November 15, 2010.

The Geographic Coverage Formula in HR 4

The new formula for determining the jurisdictions that would be subject to preclearance under the VRAA would be triggered by the record of voting rights enforcement over the 25 years preceding enactment of its provisions into law. My analysis focuses on the last 25 years, currently from 1996 through 2020, although the conclusions would change if the review period changed. Under HR 4 entire states would be subject to preclearance if the number of voting rights violations in that state met the specific threshold for statewide coverage specified in the bill. Even if the entire state were not subject to preclearance, any individual political subdivision within a state could be covered if the record of voting rights violations in that subdivision fits the definition of violations under the VRAA.

My understanding of the current version of the bill's coverage formula is that an entire state would be subject to preclearance if either of two patterns of violations applied: a) if 15 or more voting rights violations occurred within the state during the previous 25 years; or b) if 10 or more violations occurred in the state, at least one of which was committed by the state itself, rather than by local subdivisions within the state. I also understand that even if an entire state were not subject to preclearance, any political subdivision would be covered if three or more violations occurred within the subdivision during the previous 25 years. Under HR 4, violations are defined as: a) final judgments of a voting rights violation by the federal courts, including denial of preclearance pursuant to Section 5 of the Voting Rights Act; b) objections to voting changes by the Attorney General; and c) a consent decree or other settlement causing a change favorable to minority voting rights. Of course, changes to the formula enacted later than House passage of HR 4 in 2019 could lead to different conclusions than those I have reached in this analysis.

Qualifications

I am an historian by training and taught history at the university level from 1969 until 1990. In my view – a view shared by numerous historians – the discipline of history is among the social sciences. We use hypothesis testing, quantitative analysis, and interdisciplinary methods.[3] During the 1980s I served as an expert witness in numerous voting rights cases in the South. I was employed as a social science analyst by the Voting Section, Civil Rights Division, of the U.S. Department of Justice, from 1990 until my retirement in December 2016. My responsibilities in the Civil Rights Division included the planning, direction, coordination, and performance of historical research and empirical analysis for voting rights litigation, including the identification of appropriate expert witnesses to appear for the government at trial. In some instances, I was asked to provide written or courtroom testimony on behalf of the United States. Since retiring from government service, I have served as an expert in several voting rights cases brought by private plaintiffs.

I received B.A. and M.A. degrees in History from the University of Virginia in 1965 and 1966, respectively, and obtained my Ph.D. in History from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the

[3] In my Ph.D. program at Princeton, among the courses that I took were: Interdisciplinary Approaches to History, and Quantitative Methods. My first scholarly publication was "Class and Party in the Secession Crisis: Voting Behavior in the Deep South, 1856-1861," co-authored with Clark Miller and Dale Baum, *Journal of Interdisciplinary History*, VIII (Winter 1978), 429-57, in which we used ecological regression analysis and multiple regression analysis. I also published "Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *Social Science History*, 14 (Winter 1990), 507-31, an interdisciplinary journal founded by numerous historians and political scientists.

South during the 19th and 20th centuries. For 20 years I taught courses in my specialization at the University of Minnesota, Vanderbilt University, and the University of South Alabama. In 1998-99 I took leave from the Department of Justice to serve as the Eugene Lang Professor of Social Change in the Department of Political Science at Swarthmore College. For the last fourteen years, both during government service and since retiring from the Department of Justice, I have co-taught a course on voting rights law as an adjunct professor at the George Washington University Law School.

I have published a prize-winning book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), six law review articles, seven articles in refereed journals, and seven chapters in refereed books. Over the last three and a half decades my published work has focused on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, and the impact of the Voting Rights Act in the South. One of these studies – which examined the operation of the preclearance requirements set forth in Section 5 of the Act – was made part of the record before Congress regarding the adoption of the 2006 Voting Rights Reauthorization Act.[4] I continued to publish scholarly work in my areas of expertise while employed by the Department of Justice and expect to continue my scholarly writing now that I have retired from government service. A detailed record of my

[4] "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," co-authored with Christopher Seaman and Richard Valelly, *Michigan Journal of Race & Law*, 11 (Spring 2006), 275-323. [An unpublished version was printed in *Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. On the Constitution, H. Comm. On the Judiciary, 109th Cong., 96-181 (2005) (Serial No. 109-69).]

professional qualifications is set forth in the attached curriculum vitae (Attachment 1), which I prepared and know to be accurate.

Although I write about the history of voting rights law in my scholarly publications and teach in a law school, I am not an attorney. However, the findings reflected in court opinions often provide valuable evidence for investigations by social scientists. I routinely utilize the factual evidence provided by court decisions in my scholarly writing, as well as many types of documents that were part of the record in voting rights cases, including expert reports by other social scientists. As I observed in a recent journal article: "The factual evidence presented in court proceedings – in voting rights cases key evidence often comes in through expert witness testimony by political scientists or historians – is an invaluable resource for historical and social science research."[5]

The Methodology I Have Employed in This Investigation

Identifying final judgments in reported cases – and Section 5 objections interposed by the Attorney General – was my first task.[6] The website of the Civil Rights Division's Voting Section – where I worked for 26 years – gave ready access to the large number of final judgments and settlement documents in cases involving the United States (under Section 2, Section 4(e), Section 5, Section 11(b), and Section 203). Westlaw facilitated identification of other reported decisions brought on behalf of private plaintiffs that qualified as violations under

[5] Peyton McCrary, "The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History*, 26 (No. 4, 2014), 429-58 (quoted sentence at p. 431).

[6] A particularly useful study I have relied on since its initial publication, in addition to my prior research, is Ellen Katz, et.al., "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982," 39 *U. Mich. J.L. Reform* 643 (2006).

HR 4. The Voting Section's website also included links to all the Attorney General's Section 5 objections from the 1960s through the *Shelby County* decision in 2013.

Identifying consent decrees and other settlements in voting rights cases that qualified as violations under HR 4 – in addition to those in cases filed by the United State – was perhaps the most time-consuming part of the investigation. LexisNexis Court Link, a database with a comprehensive collection of dockets from voting rights litigation, was the starting point in my identification and analysis of consent decrees and other settlements approved by the courts. This is the same database I had used to identify settlement documents in my 2010 declaration in *Shelby County v. Holder* (cited in Note 2 above). Many Court Link dockets include links to electronic copies of consent decrees, consent orders, and other settlement documents. Where no links were available through Court Link, I had to pursue further research to locate the needed evidence of HR 4 violations (for which the internet proved invaluable).[7] Numerous publicly available reports and scholarly publications also helped document court-ordered settlements of voting rights lawsuits.

As a social scientist identifying violations as defined under HR 4, I used a series of decision rules. Some of my decision rules in this study are simple: where a federal court makes a judicial finding that the challenged practice violates Section 2 of the Voting Rights Act, the Fourteenth Amendment, or the Fifteenth Amendment. Similarly, a denial of preclearance under Section 5 of the Act, whether by a three-judge court in the District of Columbia or by the Attorney General constitutes a violation. I likewise counted a decision by a three-judge court in a Section 5 enforcement action that a voting change adopted by a state or subdivision covered by

[7] Brennan Center staff have also been helpful in locating documentary evidence of settlements, but the assessment of whether any document demonstrated evidence of an HR 4 violation was entirely my own.

the preclearance requirements of the Act has not been submitted for preclearance – compelling the state or subdivision to submit the change for federal review – as a violation under HR 4.[8]

Consent decrees or other litigation settlements approved by a federal court are also considered violations under the VRAA. In the case of violations of Section 203, Section 4(e), and Section 208 – provisions of the Act protecting the right of language minority citizens to language assistance in the electoral process – there is virtually no case law: this led me to rely primarily on consent decrees in which jurisdictions covered by Section 203 agree that they are not in compliance with the requirements of the Act. Many of these consent decrees are extended several times by the court that approved the initial settlement, because the jurisdiction agrees that it is still not in compliance with the Act. I have considered all such consent decrees as violations as defined by the VRAA.

Many of the consent decrees identified in my report arose in lawsuits brought under Section 2 of the Act. To provide evidence of a violation under HR 4, a settlement must have been approved by a federal court – whether entitled a Consent Decree, a Consent Order and Judgment, of other terms – and the settlement must have produced a favorable outcome for the minority plaintiffs. Some consent decrees are available on Westlaw. I located many others

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[8] As a technical mater, the issues in a Section 5 enforcement action are *only* whether the voting change is covered by Section 5 of the Act, whether the change is covered by Section 5, whether the change has been clearly submitted for preclearance by the jurisdiction, and whether the submitted change has been precleared. See *Ward v. State of Alabama*, 31 F. Supp. 2d 968, 31 F. Supp. 2d 988 (M.D. Ala. 1998); *Boxx v. Bennett*, 50 F. supp. 2d (M.D. Ala.1999). A concurring opinion in *Boxx v. Bennett* by District Judge Myron Thompson, however, explains that there is often evidence of a "potential for discrimination" in such Section 5 enforcement actions. Judge Thompson cites the evidence from a state court decision, *Eubanks v. Hale,* No. CV 98-7033 (Jefferson County Cir. Ct. Jan. 4, 1999), where the state judge found that "supporters of the losing candidate for sheriff of Jefferson County had specifically targeted black voters and precincts in a questionable investigation of fraud and malfeasance." 30 F. Supp. 2d 1219, at 1232.

through the use of Court Link, the LexisNexis database, or through citations in published articles or reports found through internet research. Yet no search using these tools can assure identification of all qualifying cases and I have no doubt that my search has failed to identify some court-approved settlements that would qualify as violations.

Findings

Let me begin by focusing on the eight states that – according to my analysis–are most likely to be subject to preclearance of voting changes. Recall that under my working understanding of the coverage formula, **an entire state** would be subject to preclearance if either of ***two*** patterns of violations applied: a) if **15 or more voting rights violations** occurred within the state during the previous 25 years; or b) if **10 or more violations** occurred in the state, **at least one of which was committed by the state itself**, rather than by local political subdivisions within the state. I consider as a violation: a) a final judgment that a jurisdiction has violated the 14th or 15th Amendments, violated a provision of the Voting Rights Act, or been denied preclearance by a three-judge federal district court in the District of Columbia; b) an objection to voting changes by the Attorney General; or c) a consent decree or other settlement in a lawsuit where the defendants agreed to change the challenged election practice at issue in a manner that was favorable to minority plaintiffs. Exhibit 1 summarizes the number and type of violations that in states my analysis shows ***would*** require federal preclearance if the current version of the coverage formula were enacted into law. Those states are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina. South Carolina, and Texas.

Barring wholesale changes to the coverage formula as I applied it, I have concluded that Alabama, Georgia, Louisiana, Mississippi, and Texas are likely to be covered. Florida, North Carolina, and South Carolina appear to be subject to preclearance under the current formula but

were close enough to the violation threshold that they could drop out of coverage, depending on how Congress revises the bill. There are also several states that I do not think will be covered under the existing formula, but they could be – depending on future revisions of the bill or the discovery of a small number of additional violations.[9] I currently have identified only 8 violations in Virginia, but two were violations by the state. If the definition of a violation is altered through a revision of the bill, Virginia might become a covered state. New York and California are each between 10 and 15 violations, but no violations were committed by the State. Both states could become subject to preclearance, should the period of review under the bill be altered, for example.

As I understand the current formula, even if an entire state would not be subject to preclearance under the current version of HR 4, any political subdivision of that state with three or more violations in the preceding 25 years *would* be covered. The relevant political subdivision under this provision is the governmental unit responsible for voter registration – in most instances a county.[10] Five political subdivisions in non-covered states which have three or more violations – which would therefore need to preclear voting changes – are itemized in Exhibit 3. The five counties are: Los Angeles County, California; Cook County, Illinois; Westchester County, New York; Cuyahoga County, Ohio; and Northampton County, Virginia.

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[9] Exhibit 2 provides a breakdown of violations in states that I concluded would not be covered.
[10] In Louisiana the equivalent of a county is called a parish. In the state of Virginia independent cities – in addition to counties – conduct voter registration. Virginia's independent cities are geographically separate from counties. All other municipalities are, as in the rest of the country, located *within* a county.

Exhibit 1: States Covered Under the Preclearance Formula in HR 4 If Enacted into Law

Alabama: **14 violations – 3 violations by the state**

Court Decisions: (4)

Ward v. State of Alabama, 31 F. Supp. 2d 968 (M.D. Ala. 1998) **State of Alabama**.

Boxx v. Bennett, 50 F. Supp. 2d (M.D. Ala. 1999), **State of Alabama**.

Allen v. City of Evergreen, Alabama, 2014 WL 12607819 (S.D. Ala.).

Ala. Legislative Black Caucus v. Alabama, 231 F. Supp. 3d 1026 (M.D. Ala. 2017), **State of Alabama**.

Section 5 Objections: (3)

02-06-1998: Tallapoosa County (Redistricting Plan), 97-1021.

08-16-2000: Shelby County (City of Alabaster), Annexations, 2000-2230.

08-25-2009: Shelby County (City of Calera), Annexations and redistricting plan, 2008-1621.

Consent Decrees/Settlements: (7)

Dillard v. City of Greensboro, Ala., 956 F. Supp. 1576 (M.D. Ala. 1997) (consent decree).

Jenkins v. City of Ozark, Alabama, No. 1:97cv1450 (M.D. Ala.), Consent Judgment and Decree, December 10, 1997 (Section 5 enforcement action).

Baker v. Rainbow City, Alabama, No. CV-97-3014 (N.D. Ala.), Consent Judgment and Decree, January 12, 1998.

Wilson v. City of Attalla, Alabama, No. CV-97-AR-3195 (M.D. Ala.), Consent Judgment and Decree, February 25, 1998.

Dillard v. Chilton County Commission, 495 F.3d 1324 (11th Cir. 2007) (consent decree).

Jones v. Jefferson Bd. Of Education, 2019 WL 7500528 (N.D. Ala. 2019) (court-approved settlement).

Ala. State Conf. NAACP v. Pleasant Grove, Ala., 2019 WL 5172371 (N.D. Ala.) (consent decree).

Florida: 10 violations - 3 violations by the state

Court Decisions: (3)

Stovall v. City of Cocoa, Fla., 117 F.3d 1238 (11th Cir. 1997).

U.S. v. Osceola County, Fla., 475 F. Supp. 2d 1254 (M.D. Fla. 2006).

Florida v. United States, 885 F. Supp. 2d 299 (D.D.C. 2012). **State of Florida**.

Section 5 Objections/Settlements: (2)

08-14-1998: **State of Florida.** (Changes in absentee voting certificate & absentee ballot), 98-1919.

07-01-2002: **State of Florida.** (2002 redistricting plan for state house), 2002-2637.

Consent Decrees/Settlements: (5)

U.S. v. Orange County, FL, No. 6:02-cv-787 (M.D. Fla.) (consent decree).

U.S. v. Osceola County, FL, No. 6:02-cv-738 (M.D. Fla. 2002) (consent decree).

U.S. v. School Board of Osceola County, FL, No. 6:08-cv-582 (M.D. Fla. 2008) (consent decree).

U.S. v. Town of Lake Park, FL, C.A. No. 09-80507 (S.D. Fla. 2009) (consent decree).

Perez-Santiago v. Volusia County, No. 6:08-cv-1868 (M.D. Fla.) (court-ordered settlement).

Georgia: 25 violations - 4 violations by the state

Court Decisions: (4)

Cofield v. City of LaGrange, Ga., 969 F. Supp. 749 (N.D. Ga. 1997).

Common Cause v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga., 2005).

Wright v. City of Albany, 306 F. Supp. 2d 1228 (M.D. Ga., 2003).

Wright v. Sumter County Bd. Of Elections, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

Section 5 Objections: (13)

03-15-1996: **State of Georgia** (1995 redistricting plans, state house & senate), 95-3656.

01-11-2000: Webster County (Redistricting plan, county school district), 98-1663.

03-17-2000: Wilkes County (MOE Tignall city council members), 99-2122.

10-01-2001: Turner County (MOE change, Ashburn), 94-4606.

08-09-2002: Putnam County (2001 redistricting plans, county commission & school board), 2002-2987, 2002-2988.

09-23-2002: Dougherty County (2001 Albany city council redistricting plan), 2001-1955.

10-15-2002: Marion County (2002 school district redistricting plan), 2002-2643.

09-12-2006: Randolph County (Change in voter registration & candidate eligibility), 2006-3856.

05-29-2009: **State of Georgia** (Voter verification program), 2008-5243.

11-30-2009: Lowndes County (2009 redistricting plan), 2009-1965.

04-13-2012: Greene County (2011 redistricting of commission & school board), 2011-4687.

08-27-2012: Long County (2012 redistricting of commission & school board), 2011-4687.

12-21-2012: **State of Georgia** (Change of election date), 2012-3262.

Consent Decrees/Settlements: (8)

McIntosh County NAACP v. McIntosh County, Ga., No. 2:77CV70 (S.D. Ga. 1977) (consent decree).

Stafford v. Mayor & Council of Folkston, Ga., No. 5:96CV00111 (S.D. Ga.) (consent decree).

Simpson v. Douglasville, No. 1:96-cv-01174 (N.D. Ga.) (consent decree).

McBride and U.S. v. Marion County, No. 4:99cv151 (M.D. Ga.) (consent decree).

U.S. v. Long County, GA (S.D. Ga. 2006), No. CV206-040 (S.D. Ga.) (consent decree).

Georgia State Conf. NAACP v. Fayette County, Ga., 118 F. Supp. 3d 1338 (N.D. Ga. 2015) (consent decree).

Georgia State Conf. NAACP v. Kemp, N. 2:16CV219 (N.D. Ga.) (settlement agreement). **State of Georgia**.

Georgia State Conf. NAACP v. Hancock County, Ga., No. 5:15-CV-00414 (M.D. Ga. 2018) (consent decree).

Louisiana: 16 – 1 violation by the state

Court Decisions: (2)

St. Bernard Citizens for a Better Govt. v. St. Bernard Parish School Board, 2002 WL 2022589 (E.D. La. 2002).

Guillory v. Avoyelles Parish School Board, 2011 WL 499196 (W.D. La. Feb. 7, 2011).

Section 5 Objections: (13)

10-06-1997: St. Martin Parish (1997 redistricting, St. Martinsville council elections), 97-0879.

04-27-1999: Washington Parish (redistricting plan), 98-1475.

07-02-2002: Webster Parish (2001 Minden city council redistricting plan), 2002-1011.

10-04-2002: Pointe Coupee Parish (2002 redistricting, school district), 2002-2717.

12-31-2002: DeSoto Parish (2002 redistricting plan, school district), 2002-2926.

05-13-2003: Richland Parish (2002 redistricting plan, school district), 2002-3400.

10-06-2003: Tangipahoa Parish (2003 redistricting plan), 2002-3135.

12-12-2003: Iberville Parish (2003 redistricting plan, city of Plaquemine), 2003-1711.

06-04-2004: Evangeline Parish (2003 redistricting plan, city of Ville Platte), 2003-4549.

04-25-2005: Richland Parish (2003 redistricting, city of Delhi), 2003-3795.

08-10-2009: **State of Louisiana** (designating length of time when parish precinct boundaries are frozen during the preparation of the U.S. decennial census), 2008-3512.

Consent Decrees/Settlements: (1)

U.S. v. Morgan City, LA, No. CV00-1541 (W.D. La. 2000) (consent decree).

Mississippi: 18 – 2 violations by the state

Court Decisions: (7)

Teague v. Attala County, MS, 92 F.3d 283 I5th Cir. 1996).

Clark v. Calhoun County, MS, 88 F.3d 1393 (5th Cir. 1996).

Gunn v. Chickasaw County, 1997 WL 1:02CV33426761 (N.D. Miss. 1997).

Citizens for Good Govt. v. Quitman, Ms., 148 F.3d 472 (5th Cir. 1998).

Houston v. Lafayette County, Ms., 20 F. Supp. 2d 996 (N.D. Miss. 1998).

U.S. v. Ike Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007).

Jamison v. Tupelo, 471 F. Supp. 2d 706 (N.D. Miss. 2007).

Section 5 Objections: (8)

09-22-1997: **State of Mississippi** (NVRA implementation plan), 95-0418.

06-28-1999: Pike County (McComb, changing polling place to American Legion), 97-3795.

12-11-2001: Montgomery County (Cancellation of election, Kilmichael), 2001-2130.

03-24-2010: **State of Mississippi** (majority vote requirement for county school boards, etc.), 2009-2022.

10-04-2011: Amite County (2011 redistricting plan for supervisor & election commission), 2011-1660.

04-30-2012: Adams County (2011 Natchez redistricting plan), 2011-5368.

12-03-2012: Hinds County (Redistricting plan, city of Clinton), 2012-3120.

Consent Decrees/Settlements: (3)

Coffee v. Calhoun City, MS., No. 300-cv-00103 (N.D. Miss.) (consent decree).

Thornton v. City of Greenville, No. 4:93CV276 (N.D. Miss.) (settlement agreement).

Tryman v. City of Starkville, No. 1:02-cv-111 (N.D. Miss.) (consent decree).

North Carolina: 11 – 4 violations by the state

Court Decisions: (3)

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

Cooper v. Harris, 137 S. Ct. 1455 (2017), **State of North Carolina**.

Covington v. North Carolina, 138 S. Ct. 2548 (2018), **State of North Carolina.**.

Section 5 Objections: (6)

02-13-1996: **State of North Carolina** prohibits state legislative & congressional districts from crossing precinct lines, absent Section 5 objections, 95-2922.

07-23-2002: Harnett County (2001 redistricting plan for school district), 2001-3769.

07-23-2002: Harnett County (2001 redistricting plan for commissioners), 2001-3768.

06-25-2007: Cumberland County (Change in MOE for Fayetteville city council), 2007-2233.

08-17-2009: Lenoir County (Change to non-partisan election, City of Kinston), 2009-0216.

04-30-2012: Pitt County (Change in MOE, county school district), 2011-2474.

Consent Decrees/Settlements (2)

Wilkins v. Washington County Commissioners, No. 2:93-cv-00012 (E.D.N.C. 1996) (consent decree).

Hall v. Jones County Bd. Of Commissioners, No. 4:17-cv-00018 (ED.N.C. 2017) (consent decree).

South Carolina: 15 – 1 violation by the state

Court Decisions: (1)

U.S. v. Charleston County, SC, 365 F.3d 341 (4th Cir. 2004).

Section 5 Objections: (13)

03-05-1996: Cherokee County (Change in method of electing Gaffney Bd. Of Public Works), 95-2790.

04-01-1997: **State of South Carolina** (1997 senate redistricting plan), 97-0529.

05-20-1998: Horry County (1997 county council redistricting plan), 97-3787.

10-12-2001: Charleston & Berkeley Counties (2012 Charleston council redistricting), 2001-1578.

11-02-2001: Greenville & Spartanburg Counties (2001 redistricting for town of Greer), 2001-1777.

06-27-2002: Sumter County (2001 redistricting plan), 2001-3865.

09-03-2002: Union County (2002 redistricting plan for county school board), 2002-2379.

12-09-2002: Laurens County (Annexations & district assignment, Clinton), 2002-1512, 2002-2706.

06-16-2003: Cherokee County (Reduction in size of school board), 2002-3457.

09-16-2003: Orangeburg County (Annexations by town of North), 2002-5306.

02-26-2004: Charleston County (From nonpartisan to partisan school board elections), 2003-2066.

06-25-2004: Richland & Lexington Counties (MOE change for School District No. 5), 2002-3766.

08-16-2010: Fairfield County (MOE & number of members, county school board), 2010-0970.

Consent Decrees/Settlements: (1)

U.S. v. Georgetown County School District, SC, No. 2:08-889 (D.S.C.) (consent decree).

Texas: 34 – 3 violations by the state

Court Decisions: (5)

LULAC v. Perry, 548 U.S. 399 (2006).

Benavidez v. City of Irving, TX, 638 F. Supp. 2d 709 (N.D. Tex. 2009).

Fabela v. City of Farmers' Branch, 2012 WL 3135545 (N.D. Texas).

Benavidez v. Irving ISD, 2014 WL 4055366 (N.D. Texas).

Patino v. City of Pasadena, TX, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

Section 5 Objections: (18) – 3 violations by the state

01-16-1996: **State of Texas** (Authorizing employees to determine voter eligibility based on Citizenship information in files), 95-2017.

03-17-1997: Harris County (Annexations, town of Webster), 95-2017.

12-04-1998: Galveston County (Adding numbered posts to at-large seats, Galveston), 98-2149.

07-16-1999: Dawson County (De-annexation, city of Lamesa), 99-0270.

06-05-2000: Austin County (Adding numbered posts, Sealy ISD), 99-3828.

09-24-2001: Haskell Consolidated ISD (Cumulative voting with staggered terms), 2000-4426.

11-16-2001: **State of Texas** (2001 redistricting, state house), 2001-2430.

06-21-2002: Waller County (Redistricting plans, commissioners court, constable districts), 2001-2430.

08-12-2002: Brazoria County (MOE, Freeport city council), 2002-1725.

05-05-2006: North Harris Montgomery Community College District (reduction in polling place & early voting locations), 2006-2240.

03-24-2009: Gonzales County (Bi-lingual election procedures), 2008-3588.

03-12-2010: Gonzales County (Bi-lingual election procedures), 2009-3078.

06-28-2010: Runnels County (Bilingual election procedures), 2009-3672.

02-07-2012: Nueces County (Redistricting, county commissioners court), 2011-3992.

03-05-2012: Galveston County (Redistricting, county commissioners court), 2011-4317.

03-12-2012: **State of Texas** (Voter registration & photo id procedures, SB 14), 2011-2775.

12-21-2012: Jefferson County (Beaumont ISD, reduction in single member districts), 2012-4278.

04-08-2013: Jefferson County (Beaumont ISD, change in term of office, qualification procedures), 2013-0895.

Consent Decrees/Settlements: (11)

U.S. v. Ector County, TX, No. M005CV131 (W.D. Tex. 2005) (consent decree).

U.S. v. Brazos County, TX, No. H-06-2165 (S.D. Tex.2006) (consent decree).

U.S. v. Hale County, TX, No. 5:06-CV-43 (N.D. Tex. 2006) (consent decree).

U.S. v. City of Earth, TX, 5:07-CV-144 (N.D. Tex. 2007) (consent decree).

U.S. v. Galveston County, TX, No. 3:07-CV-377 (S.D. Tex. 2007) (consent decree).

U.S. v. Littlefield ISD, TX, No. 5:07-cv-145 (N.D. Tex. 2007) (consent decree).

U.S. v. Post ISD, TX, No. 5:07-CV-146-C (N.D. Tex. 2007) (consent decree).

U.S. v. Seagraves ISD, TX, No. 5:07-CV-147 (N.D. Tex. 2007) (consent decree).

U.S. v. Smyer ISD, TX, No. 5:07-CV-148-C (N.D. Tex. 2007) (consent decree).

U.S. v. Waller County, TX, No. 4:08-cv-3022 (S.D. Texas 2008) (consent decree).

U.S. v. Fort Bend County, TX, No. 4:09-cv-1058 (S.D. Tex. 2009) (consent decree).

Exhibit 2: States Not Covered Under the Current Preclearance Formula in HR 4

Alaska: 2 violations

Consent Decrees/Settlements: (2)
Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska) (consent decree).

Toyukak v. Treadwell, No. 3:13-CV-00137 (D. Alaska) (court-approved settlement).

Arkansas: 2 violations

Court Decisions: (0)

Consent Decrees/Settlements: (2)

Cox v. Donaldson, No. 5:02CV319 (E.D. Ark. 2003) (consent decree)

Townsend v. Watson, No. 1:89-cv-1111 (W.D. Ark.) (consent decree).

Arizona: 4 violations

Section 5 Objections: (2)

05-20-2002: **State of Arizona** (2001 legislative redistricting plan), 2002-0276.

02-04-2003: Coconino County (MOE, Coconino Association for Vocations, Industry, and Technology), 2002-3844.

Consent Decrees/Settlements: (2)

U.S. v. Cochise County, AZ, No. CV 06-304 (D. Ariz.) (consent decree).

Navajo Nation v. Brewer, No. CV 06-1575 (D. Ariz.) (court-approved settlement).

California: 12 violations

Court Decisions: (1)

Luna v. County of Kern, CA, 291 F. Supp. 3d 1088 (E.D. Cal. 2018).

Section 5 Objections: (1)

03-29-2002: Monterey County (MOE, Chualar Union Elementary School District), 2000-2967.

Consent Decrees/Settlements: (10)

U.S. v. San Benito County, CA, No. 5:04-cv-2056 (N.D. Cal. 2004) (consent decree).

U.S. v. Ventura County, CA, No. CV04-6443 (C.D. Cal. 2004) (consent decree).

U.S. v. City of Azusa, CA, No. CV05-5147 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Paramount, CA, No. 05-05132 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Rosemead, CA, No. CV05-5131 (C.D. Cal. 2005) (consent decree).

U.S. v. City of Walnut, CA, No: CV 07-2437 (C.D. Cal. 2007) (consent decree).

U.S. v. Riverside County, CA, CV 10-1059 (C.D. Cal. 2010) (consent decree).

U.S. v. Alameda County, CA, No. 311-cv-3262 (N.D. Cal. 2011) (court-approved settlement agreement).

U.S. v. San Diego County, CA, No. 04cv1273 (S.D. Cal. 2004) (consent decree).

U.S. v. Upper San Gabriel Valley Municipal Water District, No. CV 00-07903 (C.D. Cal.) (consent decree).

Colorado: 2 violations

Court Decisions: (2)

Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996).

Cuthair v. Montezuma-Cortez School District, 7 F. Supp. 2d 1152 (D. Colorado 1998).

Hawaii: 1

Court Decisions: (1)

Arakaki v. Hawaii, 314 F. 3d 1091 (9th Cir. 2002).

Illinois: 4

Court Decisions: (3)

U.S. v. Town of Cicero, Illinois, 2000 WL 34342276 (N.D. Ill. 1996).

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998).

Harper v. Chicago Heights, IL, 223 F.3d 593 (7th Cir. 2000).

Consent Decrees/Settlements: (1)

U.S. v. Kane County, IL, No. 07-v-5451 (N.D. Ill.) (memorandum of agreement).

Massachusetts: 5

Court Decisions: (1)

Black Political Task Force v. Galvin, 300 F. Supp. 2d 291 (D. Mass. 2004).

Consent Decrees/Settlements: (4)

U.S. v. City of Boston, No. 1:05-cv-11598 (D. Mass. 2005) (consent decree).

U.S. v. City of Springfield, MA, No. 06-30123 (D. Mass. 2006) (consent decree).

Huot v. City of Lowell, Mass., No. 1:17-cv-10895 (D. Mass. 2019) (consent decree).

City of Lawrence, No. 98cv12256 (D. Mass. 1998) (settlement agreement).

Michigan: 3
Section 5 Objections: (1)

12-26-2007: Saginaw County (Buena Vista Township, closure of voter registration branch office), 2007-3837.

Consent Decrees/Settlements: (2)

U.S. v. City of Hamtramck, MI, No. 00-73541 (E.D. Mich. 2000) (consent decree).

U.S. v. City of Eastpointe, MI, No. 4:17-CV-10079 (2019) (consent decree).

Missouri: 1

Court Decisions: (1)

Missouri State Conf. NAACP v. Ferguson-Florrissant School District, 201 F. Supp. 3d 1006 (E.D. Mo. 2016).

Montana: 5

Court Decisions: (1)

U.S. v. Blaine County, MT, 363 F.3d 897 (9th Cir. 2004).

Consent Decrees/Settlements: (4)

Matt v. Ronan School District, No. 99-94 (D. Mont.) (settlement agreement).s.

U.S. v. Roosevelt County, MT, No. 00-50 (D. Mont.) (consent decree).

Alden v. Rosebud County Board of Commissioners, No. 99-148 (D. Mont.) (consent decree).

Blackfeet Nation v. Stapleton, No. 4:20-cv-95 (D. Mont.) (consent decree).

Nebraska: 2

Court Decisions: (1)

Stable v. Thurston County, NE, 129 F. 3d 1015 (8th Cir. 1997).

Consent Decrees/Settlements: (1)

U.S. v. Colfax County, NE, No. 8:12-CV-84 (D. Neb. 2012) (consent decree).

Nevada: 1

Court Decisions:

Sanchez v. Cevaske, 214 F. Supp. 3d 961 (D. Nevada 2016).

New Jersey: 2

Consent Decrees/Settlements: (2)

U.S. v. Salem County and Borough of Penns Grove, N.J., No. 1:08-cv-03276 (D.N.J. 2008) (court-approved settlement).

U.S. v. Passaic City and Passaic County, N.J., No. 99-2544 (D.N.J. 1999) (consent decree).

New Mexico: 3

Consent Decrees/Settlements: (3)

U.S. v. Bernalillo County, N.M., No. CV-98-156 (D.N.M.) (consent decree).

U.S. v. Cibola County, N.M. No. CIV 93 1134 (D.N.M.) (court-approved settlement).

U.S. v. Sandoval County, N.M., No. 88-CV-1457 (D.N.M.) (consent decree).

New York: 12

Court Decisions: (5)

Goosby v. Town of Hempstead, NY, 180 F.3d 476 (2nd Cir. 1999).

New Rochelle Voter Defense v. New Rochelle, NY, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

U.S. v. Village of Port Chester, NY, 704 F. Supp. 2d 411 (S.D.N.Y. 2010).

Pope v. County of Albany, N.Y., 94 F. Supp. 3d 302 (N.D.N.Y. 2013).

Molina v. Orange County, NY, 2013 WL 3009716 (S.D.N.Y. 2013).

Objections: (2)

11-15-1996: Temporary replacement of all nine elected board members of Community School District 12 by three appointed trustees and their permanent replacement by five appointed trustees: 96-3759.

02-04-1999: Change in method of election from single transferable vote to limited voting with four votes per voter for community school boards in Bronx, Kings, and New York Counties: 98-3193.

Consent Decrees/Settlements: (5)

U.S. v Suffolk County, NY, No. CV 04-2698 (E.D. N.Y. 2004) (consent decree).

Arbor Hill Concerned Citizens v. Albany County, NY, 281 F. Supp. 2d 456 (N.D.N.Y. 2004) (consent decree).

U.S. v. Westchester County, NY, No. 05 CIV. 0650 (S.D. N.Y. 2005) (consent decree).

U.S. v. Orange County, NY, 12 Civ 3071 (S.D.N.Y. 2012) (consent decree).

Flores v. Town of Islip, NY, No. 2:18-cv-3549 (E.D.N.Y. 2020) (consent decree).

North Dakota: 2

Court Decisions: (1)

Spirit Lake Tribe v. Benson County, N.D., 2010 WL 4226614 (D.N.D. 2010).

Consent Decrees/Settlements: (1)

U.S. v. Benson County, N.D., No. A2-00-30 (D.N.D. 2000) (consent decree).

Ohio: 4

Court Decisions: (1)

U.S. v. City of Euclid, Ohio, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

Consent Decrees/Settlements: (3)

U.S. v. Euclid City School Board, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (court-approved settlement).

U.S. v. Cuyahoga County, OH, No.1:10-cv-1940 (N.D. Ohio) (court-approved settlement agreement).

U.S. v. Lorain County, OH, No. 1:11-cv-02122 (N.D. Ohio 2011) (memorandum of agreement).

Pennsylvania: 2

Court Decisions: (1)

U.S. v. Berks County, PA, 277 F. Supp. 2d 570 (E.D. Pa. 2003).

Consent Decrees/Settlements: (1)

U.S. v. City of Philadelphia, PA, No.2:06cv4592 (E.D. Pa.) (settlement agreement).

South Dakota: 2

Court Decisions: (1)
Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976 (D.S.D. 2004).

Section 5 Objections: (1)

02-11-2008: Charles Mix County (Increase in size & redistricting of county commission), 2007-6012.

Tennessee: 2

Court Decisions: (1)

Rural West Tenn. v. Sundquist, 29 F. Supp. 2d 448 (W.D. Tenn. 1998).

Consent Decrees/Settlements: (1)

U.S. v. Crockett County, TN, No. 1-01-1129 (W.D. Tenn. 2001).

Virginia: 8 – 2 by State

Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016), **State of Virginia**.

Bethune-Hill v. Va. State Bd. Of Elections, 326 F. Supp. 3d 128 (E.D. Va. 2018), **State of Virginia.**

Section 5 Objections: (6)

10-27-1999: Dinwiddie County (Polling place change), 99-2229.

09-28-2001: Northampton County (MOE & redistricting, board of supervisors), 2001-1495.

04-29-2002: Pittsylvania County (Redistricting, county supervisors & school board), 2001-2026, 2501.

07-09-2002: Cumberland County (Redistricting plan, county supervisors), 2001-2374.

05-19-2003: Northampton County (2002 redistricting plan, county supervisors), 2002-5693.

10-21-2003: Northampton County (2003 redistricting plan, county supervisors), 2003-3010.

Consent Decrees/Settlements: (0)

Washington: 3

Court Decisions: (1)

Montes v. City of Yakima, 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

Consent Decrees/Settlements:

U.S. v. Yakima County, WA, No. CV-04-3072 (E.D. Wash. 2004) (settlement agreement).

Glatt v. City of Pasco, WA, No. 4:16-CV-5108 (E.D. Wash.2017) (consent decree).

Wisconsin:1

Court Decisions:

Baldus v. Wisc. Govt. Accountability Bd., 849 F. Supp. 2d 840 (E.D. Wisc. 2012).

Wyoming: 1

Court Decisions:

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

Exhibit 3: Political Subdivisions Covered Under the Preclearance Formula in HR 4

California:

Los Angeles County: 5 violations

U.S. v. City of Azusa, No. CV05-5147 (C.D. Cal. 2005).

U.S. v. City of Paramount, No. 05-05132 (C.D. Cal. 2005)

U.S. v. City of Rosemead, No. CV05-5131 (C.D. Cal. 2005)

U.S. v. City of Walnut, No. CV 07-2437 (C.D. Cal. 2007),

U.S. v. Upper San Gabriel Valley Municipal Water District, No. CV 00-07903 (C.D. Cal.), Stipulation and Order, June 13, 2003

Illinois:

Cook County: 3 violations

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998), Section 2 redistricting decision

Harper v. Chicago Heights, 223 F.3d 593 (7th Cir. 2000), Section 2 violation.

U.S. v. Town of Cicero, 2000 WL 34342276 (N.D. Ill. 1996)

New York:

Westchester County: 3 violations

New Rochelle Voter Defense v. New Rochelle, 308 F. Supp. 2d 152 (S.D.N.Y. 2003), Section 2 violation

U.S. v. Village of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), Section 2 violation

U.S. v. Westchester County, No. 05 CIV. 0650 (S.D.N.Y.), Section 203 consent decree, 2005

Ohio:

Cuyahoga County: 3 violations

U.S. v. Cuyahoga County, No. 1:10-cv-1940 (N.D. Ohio), Section 4(e) violation, Agreement, Judgment, and Order, September 3, 2010

U.S. v. Euclid, 580 F. Supp. 2d 584 (N.D. Ohio 2008), at-large election plan violated Section 2.

U.S. v. Euclid City School Board, 632 F. Supp. 2d 740 (N.D. Ohio 2009), at-large election plan violated Section 2 (cumulative voting adopted as a remedy).

Virginia:

Northampton County: 3 violations

09-28-2001: Northampton County

05-19-2003: Northampton County

10-21-2002: Northampton County

Conclusion

I hope my analysis of the proposed coverage formula is helpful in assessing the likely impact on preclearance coverage under the geographic formula in the VRAA. My report has focused on empirical analysis of court decisions, Section 5 objections, and consent decrees favorable to minority voters – as defined in HR 4 when it passed the House in 2019. For a moment, however, I want to emphasize the importance of the challenge Congress currently faces. When the Section 5 preclearance process was still functional – before June 2013 – it was a powerful tool for protecting minority voting rights. The bill under consideration as I write can play a key role in confronting current efforts to limit voter registration and voting by minority citizens, as well as diluting minority voting strength. Based on my 41 years of experience in voting rights litigation, I believe firmly that strengthening enforcement of the Voting Rights Act is a critical need for our democracy.

Items submitted by the Honorable Steve Cohen, Chair of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Tennessee:

A report entitled "Voter Suppression in 2020," Brennan Center for Justice: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD204.pdf*.

A report entitled "Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act," Brennan Center for Justice: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD205.pdf*.

A report entitled "Large Racial Turnout Gap Persisted in 2020 Election," Brennan Center for Justice: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD206.pdf*.

A report entitled "Representation for Some," Brennan Center for Justice: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD207.pdf*.

Statement of Virginia Kase Solomón, Chief Executive Officer, League of Women Voters of the United States: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD208.pdf*.

A report entitled "2020 Election Impact Report," League of Women Voters: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD209.pdf*.

A letter from Marc H. Morial, President and Chief Executive Officer, National Urban League: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD210.pdf*.

A report entitled "Democracy Defended," LDF Thurgood Marshall Institute: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD211.pdf*.

A report entitled "How Judicial Action Has Shaped the Record of Discrimination in Voting Rights," J. Morgan Kousser, Professor of History and Social Science Emeritus, California Institute of Technology: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD212.pdf*.

A report entitled "The Legacy of Voting Discrimination and the Continued Need for the Voting Rights Act in Arizona," submitted by The Leadership Conference on Civil and Human Rights: *https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-20210816-SD213.pdf*.

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:
2160 Rayburn House Office Building
Washington, DC 20515
(202) 225-3816

DISTRICT OFFICE:
1919 SMITH STREET, SUITE 1180
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING
HOUSTON, TX 77002
(713) 655-0050

ACRES HOME OFFICE:
6719 WEST MONTGOMERY, SUITE 204
HOUSTON, TX 77019
(713) 691-4882

HEIGHTS OFFICE:
420 WEST 19TH STREET
HOUSTON, TX 77008
(713) 961-4070

FIFTH WARD OFFICE:
4300 LYONS AVENUE, SUITE 200
HOUSTON, TX 77020
(713) 227-7740

Congress of the United States
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CONGRESSWOMAN SHEILA JACKSON LEE OF TEXAS

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

VIRTUAL HEARING ON:
"OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS"

CISCO WEBEX
MONDAY, AUGUST 16, 2021
10:00 A.M. (EDT)

- Thank you, Chairman Cohen and Ranking Member Johnson, for convening this hearing on the *"Oversight of the Voting Rights Act: Potential Legislative Reforms."*

- Let me welcome our witness:

- **FIRST PANEL**

- The Honorable Kristen Clarke, Assistant Attorney General for Civil Rights, United States Department of Justice (DOJ).

- **SECOND PANEL**

  - Wade Henderson, Interim President and CEO, Leadership Conference for Civil and Human Rights;

  - Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Educational Fund, Inc.;

  - Wendy Weiser, Vice President, Democracy, Brennan Center for Justice, New York University Law School;

  - Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School;

  - Jon Greenbaum, Chief Counsel and Senior Deputy Director, Lawyers' Committee for Civil Rights Under Law;

  - Sophia Lin Lakin, Deputy Director, Voting Rights Project, American Civil Liberties Union;

  - Samuel Spital, Director of Litigation, NAACP Legal Defense and Educational Fund.

  - *[Minority Witness] Hans von Spakovsky, Senior Legal Fellow, Heritage Foundation;*
  - *[Minority Witness] Maureen Riordan, Litigation Counsel, Public Interest Legal Foundation.*

- Thank you for your participation and I look forward to discussing with you potential legislative reforms to restore protections around the right to vote to undo the serious damage to the precious right to vote occasioned by decades of right-wing attacks, including by the conservative majority on the Supreme Court.

- The Supreme Court majority has simply never understood, or refuses to accept, the fundamental importance of the right to vote, free of discriminatory hurdles and obstacles.

- Mr. Chairman, were it not for the 24th Amendment, I venture to say that this conservative majority on the Court would subject poll taxes and literacy tests to the review standard enunciated in *Brnovich v. DNC*.

- Their predecessors on the Court understood this, going back at least as far as 1938, when the Supreme Court held in Chief Justice Hughes' famous *Footnote 4* in *United States v. Carolene Products, 304 U.S. 144 (1938),* that government action alleged to discriminate against "discrete and insular minorities" would be subject to "strict scrutiny" by reviewing courts.

- Mr. Chairman, you might be asking who are these 'discrete and insular minorities' about whom the Court was referring?

- The answer is they were and are persons "excluded from "those political processes ordinarily to be relied upon to protect" them, racial and language minorities, and aliens, all of whom were denied the single most important tool for protecting and advancing one's interests in a democracy: the right to vote.

- That is why is the concept of "practice-based" preclearance coverage is such an attractive addition to needed modifications and amendments to the Voting Rights Act.

- From its inception, the Voting Rights Advancement Act targeted those states with a long, deep, and documented history of using virtually any means necessary, including terrorism and violence, to prevent African Americans, racial, and language minorities from exercising the right to vote guaranteed by the 15th Amendment to the Constitution.

- Because of the then-national consensus in support of strengthening and expanding voting rights, there was not then a need to target for prohibition practices that could be used to disenfranchise and discriminate against newly emerging minority populations in states and localities with no prior history of voting rights violations.

- But now there is.

- As we have discussed in our prior hearings on the VRA, an alarming number of jurisdictions that do not have a documented history of voting rights violations have nonetheless responded to surges in the minority population by turning to practices historically utilized to discriminate against or disenfranchise minority voters, practices like changing single-member to at-large districts, redistricting, photo ID laws, and consolidating or relocating polling places.

- Mr. Chairman, we must address these attacks on our democracy and introduce legislation that will include:
    - A broad geographic coverage formula to determine which jurisdictions should be subject to the VRA's preclearance requirement;
    - A practice-based coverage formula to complement the geographic coverage formula in order to cover jurisdictions where, because of demographic changes, the risk of voting discrimination is heightened even in the absence of a history of voting discrimination and to cover practices that are historically associated with voting discrimination;
    - A statutory standard for vote denial claims under Section 2 of the VRA in light of the Supreme Court's recent decision in *Brnovich v. Democratic National Committee*;
    - The inclusion of a non-retrogression standard in Section 2;
    - The creation of an explicit private right of action under the VRA;
    - The expansion of the causes of action available under the VRA to include violations of a broader spectrum of voting discrimination-related constitutional and statutory provisions;
    - A revision of the preliminary injunction standard applicable to actions under the VRA to make it easier for plaintiffs to obtain such relief;
    - A fix for federal courts' misapplication of the *Purcell* doctrine, which counsels courts against granting preliminary injunctions or making other changes to election rules too close to an election;
    - Greater notice and transparency requirements;
    - Expanded bases for the assignment of federal election observers; and
    - Expanded bail-in preclearance jurisdiction for federal courts.

- I ask unanimous consent to include in the record of this hearing, a June 26, 2021 op-ed authored by me entitled *"A Strong Voting Rights Act Is Needed Now More Than Ever."*

- It is useful, Mr. Chairman, to recount how we arrived at this day.

- Fifty-six years ago, in Selma, Alabama, hundreds of heroic souls risked their lives for freedom and to secure the right to vote for all Americans by their participation in marches for voting rights on "Bloody Sunday," "Turnaround Tuesday," or the final, completed march from Selma to Montgomery.

- Those "foot soldiers" of Selma, brave and determined men and women, boys and girls, persons of all races and creeds, loved their country so much that they were willing to risk their lives to make it better, to bring it even closer to its founding ideals.

- The foot soldiers marched because they believed that all persons have dignity and the right to equal treatment under the law, and in the making of the laws, which is the fundamental essence of the right to vote.

- On that day, Sunday, March 7, 1965, more than 600 civil rights demonstrators, including our beloved former colleague, the late Congressman John Lewis of Georgia, were brutally attacked by state and local police at the Edmund Pettus Bridge as they marched from Selma to Montgomery in support of the right to vote.

- "Bloody Sunday" was a defining moment in American history because it crystallized for the nation the necessity of enacting a strong and effective federal law to protect the right to vote of every American.

- No one who witnessed the violence and brutally suffered by the foot soldiers for justice who gathered at the Edmund Pettus Bridge will ever forget it; the images are deeply seared in the American memory and experience.

- On August 6, 1965, in the Rotunda of the Capitol and in the presence of such luminaries as the Rev. Dr. Martin Luther King, Jr. and Rev. Ralph Abernathy of the Southern Christian Leadership Conference; Roy Wilkins of the NAACP; Whitney Young of the National Urban League; James Foreman of the Congress of Racial Equality; A. Philip Randolph of the Brotherhood of Sleeping Car Porters; John Lewis of the Student

Non-Violent Coordinating Committee; Senators Robert Kennedy, Hubert Humphrey, and Everett Dirksen; President Johnson addressed the nation before signing the Voting Rights Act:

> *"The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men."*

- The Voting Rights Act of 1965 was critical to preventing brazen voter discrimination violations that historically left millions of African Americans disenfranchised.

- In 1940, for example, there were less than 30,000 African Americans registered to vote in Texas and only about 3% of African Americans living in the South were registered to vote.

- Poll taxes, literacy tests, and threats of violence were the major causes of these racially discriminatory results.

- After passage of the Voting Rights Act in 1965, which prohibited these discriminatory practices, registration and electoral participation steadily increased to the point that by 2012, more than 1.2 million African Americans living in Texas were registered to vote.

- In 1964, the year before the Voting Rights Act became law, there were approximately 300 African-Americans in public office, including just three in Congress.

- Few, if any, African Americans held elective office anywhere in the South.

- Because of the Voting Rights Act, in 2007 there were more than 9,100 black elected officials, including 46 members of Congress, the largest number ever.

- Mr. Chairman, the Voting Rights Act opened the political process for many of the approximately 6,000 Hispanic public officials that have been elected and appointed nationwide, including more than 275 at the state or federal level, 32 of whom serve in Congress.

- Native Americans, Asians and others who have historically encountered harsh barriers to full political participation also have benefited greatly.

- As I indicated, the crown jewel of the Voting Rights Act of 1965 is Section 5, which requires that states and localities with a chronic record of discrimination in voting practices secure federal approval before making any changes to voting processes.

- Section 5 has protected minority voting rights where voter discrimination has historically been the worst.

- Between 1982 and 2006, Section 5 stopped more than 1,000 discriminatory voting changes in their tracks, including 107 discriminatory changes right here in Texas.

- Passed in 1965 with the extraordinary leadership of President Lyndon Johnson, the greatest legislative genius of our lifetime, the Voting Rights Act of 1965 was bringing dramatic change in many states across the South.

- But in 1972, change was not coming fast enough or in many places in Texas.

- In fact, Texas, which had never elected a woman to Congress or an African American to the Texas State Senate, was not covered by Section 5 of the 1965 Voting Rights Act and the language minorities living in South Texas were not protected at all.

- But thanks to the Voting Rights Act of 1965 and the tireless voter registration work performed in 1972 by Hillary Clinton in Texas, along with hundreds of others, including her future husband Bill, Barbara Jordan was elected to Congress, giving meaning to the promise of the Voting Rights Act that all citizens would at long last have the right to cast a vote for person of their community, from their community, for their community.

- Mr. Chairman, it is a source of eternal pride to all of us in Houston that in pursuit of extending the full measure of citizenship to all Americans, in 1975 Congresswoman Barbara Jordan, who also represented this historic 18th Congressional District of Texas, introduced, and the

Congress adopted, what are now Sections 4(f)(3) and 4(f)(4) of the Voting Rights Act, which extended the protections of Section 4(a) and Section 5 to language minorities.

- During the floor debate on the 1975 reauthorization of the Voting Rights Act, Congresswoman Jordan explained why this reform was needed:

> "There are Mexican-American people in the State of Texas who have been denied the right to vote; who have been impeded in their efforts to register and vote; who have not had encouragement from those election officials because they are brown people.
>
> "So, the state of Texas, if we approve this measure, would be brought within the coverage of this Act for the first time."

- When it comes to extending and protecting the precious right vote, the Lone Star State – the home state of Lyndon Johnson and Barbara Jordan – could be the leading state in the Union, one that sets the example for the nation.

- But to realize that future, Texas must turn from and not return to the dark days of the past.

- By embracing the discriminatory Texas SB7 and the 'Big Lie' that the 2020 election, by all accounts adjudged the most secure and inclusive in American history, was riven by voter fraud, Texas Republicans are making the wrong choice to their eternal shame.

- Texans must remain ever vigilant and oppose all schemes that will abridge or dilute the precious right to vote, like the odious Texas SB7 recently passed by the Texas State Senate but killed, but not yet permanently, by the unity and courage of Democrats in the Texas State House of Representatives.

- Mr. Chairman, I applaud the House Democrats of the Texas General Assembly for being on the front lines, fighting in opposition to Texas SB7 on the House floor and I join with them in calling upon the U.S. Senate to eliminate the filibuster and to bring voting rights legislation to the floor for debate and vote.

- We must all do our part to preserve this most important heritage because it was earned with the sacrifices and the lives of our ancestors.

- The right to vote is a "powerful instrument that can break down the walls of injustice" and must be protected against attack from all enemies, foreign and domestic, using all the legal tools at our disposal.

- I look forward to the discussion of these matters with our witnesses.

- Thank you, Mr. Chairman, I yield back my time.

Background on Voter Roll Bifurcation

During the 87th Regular Legislative Session, Texas Republicans filed bills that would create separate voter registration systems for federal races and for state and local races. H.B. 4507 (Schofield) and H.B. 4366 (Jetton) were identical bills that "split the voter rolls," or "bifurcated" voter registration in the state.

Under either bill, the Texas Secretary of State would be required to create a federal election voter registration system that complies with federal election law. Those voters who register to vote under this system would only be eligible to vote in federal elections, with their voter registration certificates denoting the phrase "Valid for federal elections only." To be eligible to vote in state and local races, eligible voters would be required to register under a separate state registration system that would likely impose registration requirements on top of federal law. The SOS would potentially have to change elections dates and deadlines so that federal races and state and local races do not coincide—depending on the nature and scope of the differences.

There is precedent among states that have successfully bifurcated voter rolls or attempted to bifurcate voter rolls. Most notably, Arizona has a bifurcated voter registration system currently in place, although legal challenges have chipped away at the differences between the federal system and the state and local system. Kansas fought during the first half of the 2010s to bifurcate its voter rolls, but state courts finally ruled in 2016 that a bifurcated voter registration system violates Kansas election law.

While Alabama and Georgia have not bifurcated their voter registration rolls, both states have passed, but not implemented, legislation that imposes voter registration requirements in direct conflict with federal law. It remains to be seen whether either state will follow the model of Arizona and Kansas, who chose to pursue voter roll bifurcation after having similar conflicting voter registration requirements struck down by the courts.

Proof of Citizenship and Bifurcation

The overwhelming reason states have considered voter roll bifurcation is that federal and state courts have consistently ruled against proof of citizenship requirements for voter registration. Arizona, Kansas, Georgia, and Alabama have each passed legislation, at varying degrees of enforcement and implementation, that require voters to provide documented proof of their citizenship status in order to be eligible to vote in federal, state, and local races. **Table 1** is a timeline of the efforts by these states to enact, and the associated legal challenges against, proof of citizenship requirements and subsequent bifurcation pushes.

In summary, these states have attempted to pass proof of citizenship requirements under the reasoning that such requirements protect "the integrity of the election process" and ensure "votes will not be diluted by non-citizens," as then-Arizona Attorney General Tom Horne said in 2011.[1] In response, courts have overwhelmingly struck down proof of citizenship requirements on the grounds that federal election law, as laid out by the National Voter Registration Act of 1993 (NVRA), makes such requirements unnecessary and burdensome.[2] Specifically, the NVRA *preempts* any state-led effort to require proof of citizenship in voter registration because the NVRA already requires applicants to attest that they are citizens of the United States on the voter registration form. **Appendix 1** summarizes how the NVRA determines citizenship requirements in voter registration.

For Arizona and Kansas, voter roll bifurcation has been the solution to this conflict. In 2004, Arizona residents passed Proposition 200, or the "Arizona Taxpayer and Citizen Protection Act," which required all Arizonans to provide physical copies of proof of citizenship to register to vote in all elections, among other provisions.[3] Parties including the League of Women Voters sued the state, resulting in a final decision on the matter by Supreme Court of the United States in *Arizona v. Intertribal Council of Arizona (ITCA) (2013)*. In *ITCA*, the Supreme Court ruled that Arizona's proof of citizenship requirements are preempted by the NVRA.[4]

Following SCOTUS's ruling in *ITCA*, Arizona's Attorney General issued a ruling in 2013 that Arizona law does not prohibit a bifurcated voter registration system, wherein voters must submit proof of citizenship to "vote in state and local elections and to sign candidate, initiative, referendum, or recall petitions."[5] The Arizona Secretary of State published guidance for and enforced a bifurcated voter registration system beginning in 2014, with proof of citizenship required to register to vote in state and local elections.[6]

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[1] https://web.archive.org/web/20110930142035/http://www.azag.gov/press_releases/june/2011/citizenship%20to%20vote%206-21-11.html
[2] https://lawprofessors.typepad.com/files/08-17094-arizonavotercitizenship.pdf
[3] https://ballotpedia.org/Arizona_Taxpayer_and_Citizen_Protection,_Proposition_200_(2004)
[4] https://www.supremecourt.gov/opinions/12pdf/12-71_7l48.pdf
[5] https://www.azag.gov/opinions/i13-011-r13-016
[6] https://azsos.gov/sites/default/files/election_procedure_manual_2014.pdf

This system remained in place until 2018, when a settlement was reached in *LULAC v. Reagan (2017)*, which was heard in the U.S. District Court for the District of Arizona, that required the Arizona Secretary of State to accept all voter registration applications for federal elections. For voters who do not provide proof of citizenship, the SOS must coordinate with the Motor Vehicles Division (MVD) to check citizenship status, with some exceptions, in order to determine eligibility for state and local elections.[7]

Kansas is the only other state to pursue bifurcation. In 2011, the Kansas State Legislature passed H.B. 2067, an omnibus election bill that required voters to provide proof of citizenship in order to vote in federal, state, and local elections, among other provisions.[8] This proof of citizenship requirement became active in 2013. Following this, and in response to the Supreme Court's ruling in *ITCA*, Kansas Secretary of State Kris Kobach unilaterally declared later in 2013 that Kansas would employ a bifurcated voter registration system wherein voters must provide proof of citizenship to register to vote in only state and local elections.[9]

In 2015, the District Court of Shawnee County, Kansas ruled in *Belenky v. Kobach (2013)* that Kansas SOS Kris Kobach had no "legislative authority" to create a bifurcated voter registration system.[10] This ruling was later reiterated in *Brown v. Kobach (2016)*, when the same District Court permanently prohibited Kobach from creating a bifurcated voter registration system on the grounds that he "simply lacks the authority to create a two-tiered system of voter registration."[11] There have been no successful attempts to create a bifurcated voter registration system in Kansas since then.

[7] https://campaignlegal.org/sites/default/files/Consent%20Decree.pdf
[8] https://www.kssos.org/other/news_releases/PR_2011/PR_2011-04-18_on_SAFE_Act_Signing.pdf
[9] https://www.aclu.org/legal-document/belenky-v-kobach-petition
[10] https://www.aclu.org/legal-document/belenky-v-kobach-defendant-summary-judgment-motion-denied
[11] https://www.aclu.org/legal-document/brown-v-kobach-memorandum-decision-and-order

Legal Avenues at the State Level

Through Arizona and Kansas's efforts, courts have indicated possible paths forward for states seeking to bifurcate voter rolls or impose voter registration requirements on top of federal law. Specifically, in *Gonzalez v. Arizona (2012)*, the U.S. Ninth Circuit Court of Appeals permitted that "the [National Voter Registration Act of 1993] allows Arizona to include a proof of citizenship requirement on its State Form," but this "would not mean that Arizona has authority to add this requirement to the Federal Form."[12]

Additionally, courts have recognized that voter registration requirements in state and local elections fall under the legal purview of state courts and are not necessarily preempted by the NVRA. In *Kobach v. U.S. Election Assistance Commission (2014)*, the U.S. Tenth Circuit Court of Appeals stated that "the NVRA does not require preclearance of state election laws. The NVRA therefore leaves Arizona and Kansas free to choose whether to impose a documentary evidence of citizenship requirement on voters in state elections." Therefore, it is up to an individual state's statutes and courts to determine whether voter registration requirements such as proof of citizenship are legal for state elections.[13]

[12] http://cdn.ca9.uscourts.gov/datastore/opinions/2012/04/17/08-17094.pdf
[13] https://casetext.com/case/kobach-v-us-election-assistance-commn-7

Texas and the Cost of Bifurcation

Texas does not currently require voters to provide proof of citizenship for voter registration, but other states' efforts provide a possible blueprint to follow, as well as common hurdles to avoid, should Texas pursue voter roll bifurcation toward this end.[14] In fact, Texas Attorney General Ken Paxton has joined legal efforts by other states' attorneys general in support of proof of citizenship requirements in the past.[15]

Under a bifurcated voter registration system, there are likely to be additional costs to both the state and to counties, which are most often the entities responsible for administering Texas' elections. The official fiscal note for H.B. 4507 (Schofield) as provided by the Legislative Budget Board could not determine the fiscal implications of voter roll bifurcation without knowing exactly how the federal and state systems would differ.[16] However, we can estimate the following costs at the state level and county level:

State Level[17]

- The cost of running separate primaries for each election system is likely to be between $15,000,000 and $18,000,000
- Annual updates to the Texas Election Administration Management (TEAM) system used to collect and gather voter registration documents in the state, are likely to be roughly $500,000
- Depending on any changes to state election law, there would probably be added costs associated with meeting new voter registration requirements

County Level

- The anticipated costs of running separate elections could double costs for individual counties, especially so for the elections held in even-numbered years—Williamson County, a midsize county, places these costs at roughly $2.2 million[18]
- If separate elections have to be held, counties could face hard costs such as purchasing additional election equipment to facilitate

[14] https://texasscorecard.com/state/state-still-cant-require-voters-to-prove-citizenship-federal-court-rules/
[15] https://law.justia.com/cases/federal/appellate-courts/ca10/18-3133/18-3133-2020-04-29.html
[16] https://capitol.texas.gov/tlodocs/87R/fiscalnotes/pdf/HB04507I.pdf#navpanes=0
[17] Per 6/24/21 meeting with the Secretary of State's office
[18] Chris Davis, Elections Administrator, Williamson County, Texas

Conclusion

Texas Republicans have shown an interest in voter roll bifurcation, or the splitting of voter rolls between federal elections and state and local elections. It is likely that Texas Republicans' push to file bifurcation bills, most recently with H.B. 4507 (Schofield), is to prepare for possible federal voting rights expansions such as H.B. 1, or the "For The People Act."[19] According to Rep. Schofield, H.B. 4507 simply specifies that Texas is in charge of its own elections. Or, as he told an April 14th meeting of the House State Affairs Committee: "Congress has the right to set the time, place, and manner of their elections, but not for ours."[20]

Precedent from other states indicates that bifurcation is a necessary step for states looking to require proof of citizenship requirements in voter registration. While federal courts have consistently ruled that proof of citizenship requirements violate the National Voter Registration Act of 1993 (NVRA), the U.S. Tenth Circuit Court of Appeals has specified that this prohibition only applies to federal elections. In a 2014 court case, the Tenth Circuit stated that voter registration requirements in *state* elections are up to the determination of *state* courts and statutes. Arizona's and Kansas's pursuits of voter roll bifurcation, albeit to varying degrees of success, seem to recognize this exception.

Still, it is not clear how Texas Republicans will choose to proceed with voter roll bifurcation. Nor is it clear what the impact of bifurcation will be on Texas elections and voter registration. If a bill like H.B. 4507 is signed by the Governor, there is likely to be a considerable fiscal impact to the state and to counties in order to administer new voter rolls, separate elections, and all associated maintenance. But the extent of this impact will not be clear until such legislation becomes law.

In addition to the fiscal implications, voter roll bifurcation and separating federal elections from state and local elections in Texas will undoubtably contribute to misinformation and voter confusion. The inevitable byproducts of that are increased barrier to voter participation and lower voter participation. Texas is already the hardest state to vote in the country, ranking 50th for ease of voting, according to the *Cost of Voting in the American States: 2020*.[21] Bifurcation of the voter rolls and Texas' elections would only serve to exacerbate this further.

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[19] https://www.mic.com/p/texas-republicans-are-plotting-to-create-a-two-tier-election-disenfranchisement-system-73381622
[20] https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=20318
[21] https://www.liebertpub.com/doi/pdf/10.1089/elj.2020.0666

Table 1: Timeline of State Bifurcation Efforts and Legal Challenges		
Date	**State(s)**	**Action(s)**
February 1995	Mississippi	In response to the passage of the National Voter Registration Act of 1993 (NVRA), which requires states to simplify voter registration procedures in federal elections, Mississippi bifurcates its voter registration.[22]
March 1997	Mississippi	In *Young v. Fordice (1997)*, SCOTUS tosses out Mississippi's bifurcated voter registration system, on the grounds that Mississippi's plan must first pass preclearance as required by the Voting Rights Act.[23]
November 2004	Arizona	Arizona residents pass Proposition 200, or the "Arizona Taxpayer and Citizen Protection Act," 56% to 44%. Proposition 200 requires that all Arizonans must provide physical copies of proof of citizenship to register to vote in all elections, among other provisions.[24] The new law is initially approved under the preclearance provision of the Voting Rights Act by President George W. Bush's Department of Justice.[25]
October 2006	Arizona	A month before the first election to take place in Arizona under the new citizenship requirements, the U.S. Ninth Circuit Court of Appeals suspends the citizenship requirements enacted by Proposition 200. Two weeks later, in *Purcell v. Gonzalez (2006)*, SCOTUS issues a stay on the Court of Appeals' ruling on the grounds that "the Court of Appeals offered no explanation or justification for its order."[26] As a result of SCOTUS's ruling, Arizona can continue to require proof of citizenship in voter registration.

[22] https://www.oyez.org/cases/1996/95-2031
[23] https://supreme.justia.com/cases/federal/us/520/273/
[24] https://ballotpedia.org/Arizona_Taxpayer_and_Citizen_Protection,_Proposition_200_(2004)
[25] https://www.facingsouth.org/2009/05/georgia-becomes-2nd-state-to-require-proof-of-citizenship-to-vote.html
[26] https://www.supremecourt.gov/opinions/06pdf/06A375.pdf

January 2009	Georgia	The Georgia State Assembly passes S.B. 86, which requires voters to provide proof of citizenship when registering to vote.[27] However, this law is not implemented.[28]
October 2010	Arizona	In *Gonzales v. Arizona (2010)*, a follow-up effort to *Purcell v. Gonzalez (2006)* on behalf of plaintiffs including the Intertribal Council of Arizona and the League of Women Voters, the Ninth Circuit Court of Appeals preempts Arizona's citizenship requirements based on the NVRA.[29] In other words, proof of citizenship for voter registration is not determined to be necessary given that the NVRA already requires applicants to attest that they are citizens of the United States on the voter registration form.[30]
2011	Alabama	Alabama passes a law similar to S.B. 86 in Georgia, which requires voters to provide proof of citizenship when registering to vote.[31] Like Georgia, Alabama does not implement its law, possibly believing it will not pass the preclearance requirements of the Voting Rights Act as determined by the Obama administration's Department of Justice.[32]
April 2011	Arizona, Kansas	Arizona petitions the Ninth Circuit Court of Appeals' ruling in *Gonzales v. Arizona (2010)* against the citizenship requirements.[33] Then-Arizona Attorney General Tom Horne argues that citizenship requirements will ensure that "Arizona voters will not have their votes diluted by non-citizens." The Kansas State Legislature passes H.B. 2067, an omnibus election bill that requires voters to submit proof of citizenship in order to vote in federal, state, and local races.[34] This provision is scheduled to become active on January 1, 2013.

[27] https://legiscan.com/GA/text/SB86/id/442358
[28] https://www.brennancenter.org/our-work/court-cases/league-women-voters-v-newby
[29] https://lawprofessors.typepad.com/files/08-17094-arizonavotercitizenship.pdf
[30] https://www.cga.ct.gov/2016/rpt/2016-R-0323.htm
[31] Relevant Alabama election law is under Section 31-13-28 on "Voter registration eligibility and requirements": https://law.justia.com/codes/alabama/2012/title-31/chapter-13/section-31-13-28
[32] https://www.brennancenter.org/our-work/court-cases/league-women-voters-v-newby
[33] https://web.archive.org/web/20110930142035/http://www.azag.gov/press_releases/june/2011/citizenship%20to%20vote%206-21-11.html
[34] https://www.kssos.org/other/news_releases/PR_2011/PR_2011-04-18_on_SAFE_Act_Signing.pdf

April 2012	Arizona	In *Gonzalez v. Arizona (2012)*, the Ninth Circuit Court of Appeals upholds its October 2010 ruling.[35] Arizona's citizenship requirements are preempted by the NVRA. The Ninth Circuit Court's majority opinion does state, however, that "the NVRA allows Arizona to include a proof of citizenship requirement on its State Form," but this "would not mean that Arizona has authority to add this requirement to the Federal Form."
June 2012	Arizona	SCOTUS denies a stay in *Gonzalez v. Arizona (2012)*.[36] Arizona's citizenship requirements are preempted by the NVRA.
July 2012	Arizona	Arizona submits a writ of certiorari petition in opposition to the Ninth Circuit Court of Appeals' ruling in *Gonzalez v. Arizona (2012)* that the NVRA preempts Arizona's citizenship requirements.[37]
June 2013	Arizona	In *Arizona v. Intertribal Council of Arizona (ITCA) (2013)*, SCOTUS rules 7-2 that Arizona's proof of citizenship requirements are preempted by the NVRA.[38] Under the Elections Clause, Congress has the power to preempt state laws concerning when, where, and how federal elections are held, including registration procedures.[39] If Arizona wants to require proof of citizenship, they may petition the Election Assistance Commission (EAC) to add this information to their Federal Form. Following that, Arizona could seek judicial review under the federal Administrative Procedure Act to "establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form."

[35] http://cdn.ca9.uscourts.gov/datastore/opinions/2012/04/17/08-17094.pdf
[36] https://www.supremecourt.gov/orders/courtorders/062812zr.pdf
[37] http://sblog.s3.amazonaws.com/wp-content/uploads/2012/08/12-71-Gonzalez-S-Ct-Pet-for-Cert-2012.pdf
[38] https://www.supremecourt.gov/opinions/12pdf/12-71_7l48.pdf
[39] https://www.cga.ct.gov/2016/rpt/2016-R-0323.htm

July 2013	Kansas	Following the passage and effective date of H.B. 2067 on January 1, 2013, and SCOTUS's ruling in *Arizona v. ITCA (2013)*, Kansas Secretary of State Kris Kobach provides guidance that Kansas will employ a bifurcated voter registration system wherein voters must provide proof of citizenship to register to vote in state and local elections.[40] Voters are otherwise eligible to vote in federal races without proof of citizenship.
October 2013	Arizona	Following SCOTUS's ruling in *Arizona v. ITCA (2013)*, Arizona's Attorney General issues a ruling that Arizona law does not prohibit a bifurcated voter registration system, wherein voters must submit proof of citizenship to "vote in state and local elections and to sign candidate, initiative, referendum, or recall petitions."[41]
November 2013	Kansas	In *Belenky v. Kobach (2013)*, the ACLU challenges Kansas's bifurcated voter registration system on the grounds that it violates state law and disenfranchises Kansas voters.[42]
January 2014	Arizona, Kansas, Georgia	The Election Assistance Commission (EAC) denies petitions by Arizona, Georgia, and Kansas requesting that proof of citizenship be required to vote in federal elections.[43] EAC cites the following reasons for denying the petitions: ● When deliberating on the NVRA prior to its passage in 1993, Congress already determined that a proof of citizenship requirement was unnecessary, inconsistent, and burdensome ● EAC has determined in the past that an oath of citizenship under penalty of perjury is sufficient for a voter registration applicant to prove citizenship; therefore, to permit these states' requests contradicts prior guidance ● EAC already denied nearly the exact same request from Arizona in 2005, and these new requests fail to

[40] https://www.aclu.org/legal-document/belenky-v-kobach-petition
[41] https://www.azag.gov/opinions/i13-011-r13-016
[42] https://www.aclu.org/legal-document/belenky-v-kobach-petition
[43] https://www.eac.gov/sites/default/files/eac_assets/1/28/20140117%20EAC%20Final%20Decision%20on%20Proof%20of%20Citizenship%20Requests%20-%20FINAL.pdf

		offer a more compelling case than the one previously denied ● SCOTUS's decision in *Arizona v. ITCA (2013)* makes it clear that the NVRA preempts state election law, so EAC is only obligated to grant the states' requests if it determines that it is necessary to do so for states to enforce voter qualification requirements ● The states in question failed to present evidence that noncitizen voting is seen at a level any higher than human error would suggest ● States already have multiple means of assessing a voter's citizenship that do not require voters to submit forms while registering to vote, such as during criminal prosecution investigations, while coordinating with other state agencies as needed during REAL ID verification -- for example, during the oath made in jury service -- through the U.S. Citizenship and Immigration Services database, and using the National Association for Public Health Statistics and Information Systems birth records database ● The citizenship requirements would undermine the goal of the NVRA to increase the number of eligible citizens who register to vote in federal races and would hurt organized voter registration efforts ● This request for proof of citizenship is not comparable to Louisiana's approved request in 2012 to adjust its requirements on the Federal Form, which involved identification requirements already accounted for under HAVA ● A decision made under the Federal Voting Assistance Program in support of Arizona's Prop 200 has no bearing on the NVRA; and ● EAC's regulatory authority does not mean it must consider a state's request to change the Federal Form for the purpose of state and local elections.
June 2014	Arizona	In response to the Arizona Attorney General's ruling that Arizona law does not prohibit a bifurcated voter registration

		system, the Arizona SOS publishes rules and guidance for the bifurcated voter registration system going forward.[44]
November 2014	Arizona, Kansas	In *Kobach v. U.S. Election Assistance Commission (2014)*, Arizona and Kansas challenge EAC's ruling and seek judicial review through the Administrative Procedure Act.[45] The case makes it to the U.S. Tenth Circuit Court of Appeals, who denies the appeal on the grounds that *Arizona v. ITCA (2013)* already decided the issue and that neither state has demonstrated sufficient evidence of fraud in the absence of proof of citizenship requirements. However, the Tenth Circuit Court states: "the NVRA does not require preclearance of state election laws. The NVRA therefore leaves Arizona and Kansas free to choose whether to impose a documentary evidence of citizenship requirement on voters in state elections." In other words, it is up to an individual state's statutes and courts to determine whether requirements such as proof of citizenship are legal for state elections.
June 2015	Arizona, Kansas	SCOTUS denies writ of certiorari petitions from Arizona and Kansas to hear *Kobach v. U.S. Election Assistance Commission (2014)*. The Tenth Circuit Court of Appeals' ruling that a state may not require proof of citizenship documents on the Federal Form stands.[46]
August 2015	Kansas	The District Court of Shawnee County, Kansas rules in *Belenky v. Kobach (2013)* that Kansas SOS Kris Kobach had no "legislative authority" to create a bifurcated voter registration system.[47]
January 2016	Alabama, Kansas, Georgia	The Election Assistance Commission, under new Executive Director Brian Newby, reverses on prior guidance and approves proof of citizenship requirements for Alabama, Kansas, and Georgia.[48] Newby does not offer specific reasoning for approving the states' requests.

[44] https://azsos.gov/sites/default/files/election_procedure_manual_2014.pdf
[45] https://casetext.com/case/kobach-v-us-election-assistance-commn-7
[46] https://www.brennancenter.org/our-work/court-cases/league-women-voters-v-newby
[47] https://www.aclu.org/legal-document/belenky-v-kobach-defendant-summary-judgment-motion-denied
[48] https://www.brennancenter.org/our-work/court-cases/league-women-voters-v-newby

		The Kansas District Court reiterates its ruling in *Belenky v. Kobach (2013)* that Kansas SOS Kris Kobach had no "legislative authority" to create a bifurcated voter registration system.[49]
June 2016	Kansas	A Kansas District Court denies Kansas SOS Kobach's motion to dismiss the Court's previous decision in *Belenky v. Kobach (2013)*.[50]
July 2016	Kansas	Kansas SOS Kobach issues a "Temporary Regulation" that formalizes Kansas's bifurcated voter registration, in direct conflict with the District Court's ruling in *Belenky v. Kobach (2013)*.[51] In *Brown v. Kobach (2016)*, plaintiffs challenge the "Temporary Regulation" and Kansas's bifurcated voter registration system on the grounds that it violates state election law and disenfranchises Kansas voters.[52]
September 2016	Alabama, Kansas, Georgia	In *League of Women Voters v. Newby (2016)*, the League of Women Voters files suit in opposition to EAC's ruling. The D.C. Circuit Court of Appeals temporarily prohibits EAC from permitting Alabama, Kansas, and Georgia to require proof of citizenship on the Federal Form, on the grounds that "Newby never made the necessity finding required by [statute]."[53] The D.C. Circuit Court also remands the decision back to district court.
November 2016	Kansas	In *Brown v. Kobach (2016)*, the Kansas District Court permanently prohibits Kansas SOS Kobach from creating a bifurcated voter registration system.[54] The Court rules that Kobach "simply lacks the authority to create a two-tiered system of voter registration."[55]
June 2017	Alabama, Kansas,	After the District Court remands the *League of Women Voters v. Newby (2016)* decision to be settled by the Election

[49] https://www.aclu.org/legal-document/belenky-v-kobach-summary-judgment
[50] https://www.aclu.org/cases/belenky-v-kobach
[51] https://www.kansascity.com/news/politics-government/article89057102.html
[52] https://www.aclu.org/legal-document/brown-v-kobach-petition
[53] https://casetext.com/case/league-of-women-voters-of-us-v-newby
[54] https://www.aclu.org/press-releases/court-permanently-blocks-kansas-dual-voter-registration-system
[55] https://www.aclu.org/legal-document/brown-v-kobach-memorandum-decision-and-order

	Georgia	Assistance Commission, the EAC is unable to determine whether Newby acted in his authority to permit the states' requests to require proof of citizenship.[56] Given this indecision, the September 2016 prohibition on the proof of citizenship requirement stands.
November 2017	Arizona	In *LULAC v. Reagan (2017)*, plaintiffs in Arizona file suit against the state's bifurcated voter registration system, on the grounds that it disenfranchises Arizona voters for the following reasons:[57, 58] ● While under the system, voters do not need to submit proof of citizenship using the Federal Form to be eligible for federal elections, voters that fail to submit proof of citizenship using the State Form are not registered for state *or* federal elections. ● The Arizona Secretary of State (SOS) already has the necessary information to verify a voter's citizenship by comparing registration information with records from the Arizona Motor Vehicles Division (MVD), so the proof of citizenship requirement is burdensome. ● There is considerable evidence that many Arizona voters have had their registrations rejected due to this policy. Furthermore, few of these voters have been able to successfully re-register after having their initial registration rejected.
June 2018	Arizona	Parties in *LULAC v. Reagan (2017)* agree to the following settlement:[59] ● For voters submitting State Forms or Federal Forms, the Arizona Secretary of State (SOS) must accept these forms and register these voters for federal elections even without proof of citizenship. ● For voters that do not provide proof of citizenship, the SOS must automatically check these voters against Arizona's Motor Vehicles Division (MVD) database to verify citizenship.

[56] https://www.brennancenter.org/our-work/court-cases/league-women-voters-v-newby
[57] https://campaignlegal.org/cases-actions/lulac-v-reagan
[58] https://campaignlegal.org/sites/default/files/lulacvreagancomplaint.pdf
[59] https://campaignlegal.org/sites/default/files/Consent%20Decree.pdf

		• If a voter holds an "F-Type License," denoting a non-citizen in the database, this voter is determined to be ineligible to vote in all elections. The SOS must notify these voters that they must submit proof of citizenship to be eligible to vote in all elections. • If a voter does not have an "F-Type License," but still does not have verified citizenship, the SOS must notify these voters that they must submit proof of citizenship to be eligible to vote in state elections, but will remain eligible for federal elections regardless.
April 2020	Kansas	In *Fish v. Schwab (2020)*, the 10th Circuit Court of Appeals rules that Kansas may not require proof of citizenship for voter registration, on the ground that such requirements violate the NVRA and the Equal Protection Clause.[60, 61] Alongside other states' attorneys general, Texas Attorney General Ken Paxton files an amicus brief in support of Kansas.
Present	Mississippi, Arizona, Alabama, Kansas, Georgia	**Mississippi**: According to their Secretary of State's website, Mississippi does not appear to bifurcate its voter registration process.[62] **Arizona**: The Arizona SOS website does not currently appear to comport with the settlement reached in *LULAC v. Reagan (2017)*. Under that settlement, voters who do not submit proof of citizenship will instead have their citizenship checked against records maintained by the Arizona Motor Vehicles Division (MVD). However, this step is not mentioned on the Arizona SOS website. Per the website: "A person who submits valid proof of citizenship with his or her voter registration form (regardless of the type of form submitted) is entitled to vote in all federal, state, county and local elections in which he or she is eligible...failure to [submit proof of citizenship] means the person will only be eligible to vote in federal elections. A "federal only" voter will become eligible to vote a "full ballot" in all federal, state, county and local

[60] https://law.justia.com/cases/federal/appellate-courts/ca10/18-3133/18-3133-2020-04-29.html
[61] http://www.emporiagazette.com/free/article_9c128de4-8a4f-11ea-befd-fb9c54a305bd.html
[62] https://www.sos.ms.gov/voter-id/register

		elections if he or she later provides valid proof of citizenship to the appropriate County Recorder's office."[63] **Alabama**: According to the voter registration form on their SOS website, Alabama does not appear to bifurcate its voter registration process.[64] **Kansas**: According to the voter registration form on their SOS website, Kansas does not appear to bifurcate its voter registration process.[65] **Georgia**: According to the voter registration form on their SOS website, Georgia does not appear to bifurcate its voter registration process.[66]

[63] https://azsos.gov/elections/voting-election/proof-citizenship-requirements
[64] https://www.sos.alabama.gov/sites/default/files/voter-pdfs/nvra-2.pdf?_ga=2.196203180.1013626710.1624471715-992443022.1623263784
[65] https://www.sos.ks.gov/forms/elections/voterregistration.pdf
[66] https://sos.ga.gov/admin/files/GA_VR_APP_2019.pdf

Appendix 1: Federal Election Law and Proof of Citizenship Requirements in Voter Registration[67]

The National Voter Registration Act (NVRA) prescribes three methods for registering voters in federal elections:

- By an application made simultaneously with an application for a driver's license.
- By a mail-in application using the Federal Form designed by the Election Assistance Commission (EAC)—an agency created during the Help America Vote Act of 2002 (HAVA).
- By an in-person application at state voter registration agencies.

The NVRA creates two forms: the "Motor Voter" form and the "Federal Form:"

- The "Motor Voter" form is used to simultaneously complete voter registration and driver's license applications.
- The "Federal Form" is created by the Election Assistance Commission as a nationally uniform voter registration application that can be used to register by mail and in-person at designated locations.[68] The top of the Federal Form asks applicants if they are citizens of the United States and if they will be 18 years old on or before Election Day. Applicants that indicate "yes" to both questions must then:
    - Supply personal information, including an identification number as required by the state. According to the Federal Form, this identification number is used only for election administration purposes: "Federal law requires that states collect from each registrant an identification number. If you have neither a driver's license nor a social security number, please indicate this on the form and a number will be assigned to you by your state."[69]
    - Sign that they are a citizen of the United States, meet their state's voting eligibility requirements, and attest that they have provided information that is true to the best of their knowledge under penalty of perjury.
- States do not have to use the Federal Form exactly, but must meet the following criteria in creating their own "State Form:"
    - The State Form may only require identifying information as is necessary to enable a state election official to assess voter registration eligibility and allow other election processes. This includes the applicant's signature; data relating to previous registrations; and a statement that specifies all eligibility requirements; as well as an attestation that the applicant meets each requirement. It also requires a signature from the applicant under penalty of perjury.

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[67] http://cdn.ca9.uscourts.gov/datastore/opinions/2012/04/17/08-17094.pdf
[68] Form can be found here: https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf
[69] https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf

  - The State Form may not require notarization or other formal authentication.
  - The State Form must list the voter eligibility requirements and penalties for false applications set forth in the attestation portion of the form; a statement that, if an applicant declines to register to vote, this will remain confidential and only be used for voter registration purposes; and a statement that if an applicant registers to vote, the office where they submit a voter registration application will remain confidential and only be used for voter registration purposes.
- States may petition the Election Assistance Commission to change/update information on the Federal Form, but they may not require additional information on their State Form unless this information is approved on the Federal Form.
- States are exempt from the NVRA if they do not require voter registration or if they allow for same-day registration at polling places. As of this memo, these states are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming.[70]

[70] https://www.justice.gov/crt/national-voter-registration-act-1993-nvra

QUESTIONS AND ANSWERS FOR THE RECORD

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

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QUESTIONS

VIRTUAL HEARING ON:

"OVERSIGHT OF THE VOTING RIGHTS ACT: POTENTIAL LEGISLATIVE REFORMS"

Panel I – The Honorable Kristen Clarke, Assistant Attorney General for Civil Rights, United States Department of Justice (DOJ).

Topic: Section 3(a) and 8 – Appointment of Federal Observers

- [Background]
  - **Section 3(a) of the VRA** provides that a federal court may authorize the appointment of federal election observers by the Director of the Office of Personnel Management (OPM) to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments in the context of an enforcement proceeding.

- **Section 8 of the VRA** allows DOJ to certify the need for federal election observers to covered jurisdictions where the Attorney General has received "meritorious complaints" from residents, local officials, or organizations that violations of the VRA are likely to occur, or where the Attorney General determines that assignment of observers is "otherwise necessary" to enforce the Fourteenth or Fifteenth Amendment. These observers must be authorized to enter polling places to observe whether people who are entitled to vote are being permitted to do so, and to observe the processes in which votes are tabulated.

1. Given the fact that federal observers appointed under both Section 3(a) and Section 8 of the VRA play an important role in enforcing voting rights and deterring voting discrimination:

   a. QUESTION: Should Congress consider expanding the appointment of federal observers to include instances where there is a violation of the VRA and not just violations of the Fourteenth or Fifteenth Amendments?

   b. QUESTION: Should the duty to control the appointment and termination of federal election observers be given to the Attorney General, rather than Director of the Office of Personnel Management? If so, why?

   c. QUESTION: What is your response to the argument that providing DOJ with control over the observer program may call the impartiality of such observers into question?

Panel II

QUESTIONS FOR Wade Henderson, Interim President and CEO, Leadership Conference for Civil and Human Rights ("LCCR");

Topic: Geographic-Based Coverage

- [Background]

- H.R. 4 from the 116th Congress proposed a geographic coverage formula that would cover jurisdictions as follows: A state and all political subdivisions in that state would be covered for 10 years if, looking back 25 years, there were 15 or more violations in that state, or if there were 10 or more violations in that state if at least one of those violations was committed by the state itself (as opposed to a political subdivision). Separately, a political subdivision could be covered for 10 years if it committed 3 or more violations in the preceding 25 years.

1. In the *Shelby County* opinion, Justice Roberts asserts that that "The evil that Section 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."

    a. QUESTION: Has your organization found that there is a concentration of voting rights violations in certain jurisdictions which justify geographic-based coverage?

    b. QUESTION: How has the COVID-19 crisis exacerbated the ongoing problem of voter discrimination?

    c. QUESTION: Does this illustrate the need for Congress to reinstate Section 5 preclearance?

QUESTIONS FOR Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Educational Fund, Inc.:

Topic: Constitutional Authority – Practice- Based Coverage

- [Background]
    - "Known practices coverage," also known as practice-based preclearance, is a form of preclearance coverage formula that applies to certain voting law changes that have historically been associated with racial discrimination.
    - Practice-based preclearance addresses subjects certain specific practices with a proven historical association with discrimination to preclearance. Moreover, a practice-based

coverage formula could be limited in some instances to those jurisdictions that, based on demographic changes, are most likely to engage in voter suppression efforts. Unlike the VRA's currently defunct preclearance coverage formula, practice-based preclearance would apply to states and localities nationwide and not just to a certain states and political subdivisions.

1. QUESTION: What is the constitutional basis for practice-base preclearance?

2. QUESTION: How is practice-based preclearance responsive to the Supreme Court's concerns expressed in *Shelby County v. Holder*?

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

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VIRTUAL HEARING ON:

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QUESTIONS FOR Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Educational Fund, Inc.:

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- [Background]
    - "Known practices coverage," also known as practice-based preclearance, is a form of preclearance coverage formula that applies to certain voting law changes that have historically been associated with racial discrimination.
    - Practice-based preclearance addresses subjects certain specific practices with a proven historical association with discrimination to preclearance. Moreover, a practice-based coverage formula could be limited in some instances to those jurisdictions that, based on demographic changes, are most likely to engage in voter suppression efforts. Unlike the VRA's currently defunct preclearance coverage formula, practice-based preclearance would apply to states and localities nationwide and not just to a certain states and political subdivisions.

1. QUESTION: What is the constitutional basis for practice-base preclearance?

   The primary constitutional basis for practice-based preclearance is the congressional power to enforce the Fourteenth and Fifteenth Amendments to the United States Constitution. Through section 5 of the former and section 2 of the latter, Congress has the constitutional authority to enforce the amendments through appropriate legislation. By focusing on practices that historically have had a discriminatory effect on voters of color and have in many cases been grounded in an attempt to suppress participation by voters from particular racial groups, the requirement of pre-clearance for these

practices is a measured and appropriate attempt to deter and prevent the implementation of racial discrimination in voting – the denial of the right to vote on the basis of race – and to preserve equal protection in our elections systems.

Another constitutional basis for practice-based preclearance lies in the Elections Clause. Under Article I, section 4 of the Constitution, Congress has broad authority to control the process of elections of its own members, including the authority to override contrary state laws. Pre-clearance is a constitutional requirement because of that broad Elections Clause authority with respect to federal elections.

There may be additional constitutional bases for enacting practice-based preclearance in other provisions of Article I and its delineation of congressional power. We are currently in the process of reviewing these other possibilities in the context of previous applications of congressional authority in other areas.

2. QUESTION: How is practice-based preclearance responsive to the Supreme Court's concerns expressed in *Shelby County v. Holder*?

   Under its Fourteenth and Fifteenth Amendment authority, Congress could enact practice-based coverage because the formula responds directly to the federalism and equal sovereignty concerns expressed in the Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013). By restricting the pre-clearance obligation to specified changes – changes that have historically correlated with efforts at suppression of minority voters – rather than to all elections-related changes, practice-based coverage limits the intrusion on state policymaking and elections administration, answering the *Shelby County* majority's federalism concerns.

   In addition, by applying to all jurisdictions, rather than to specifically identifiable states or other jurisdictions, practice-based pre-clearance coverage responds to the equal sovereignty concerns expressed by Chief Justice Roberts in *Shelby County*. No stigma would even

theoretically attach to any state based on its history or previous policymaking. The only limitation of coverage is based upon demography, which is largely beyond the scope of voluntary policymaking of the jurisdictions that meet the threshold for coverage of specified changes in elections practice. This threshold is a necessary response to concerns of efficiency and cost. It rationally relates to where voter suppression is more likely, by excluding jurisdictions that are overwhelmingly comprised of a single racial group.

Some have raised concerns about this threshold because it relies on measures of population by race. These concerns are unwarranted; our Constitution does not require ignorance of matters like racial differences and their correlation with differences in voting preferences; indeed, the Supreme Court has acknowledged this correlation in its Voting Rights Act Section 2 jurisprudence. Unlike in that context, however, no liability rests in whole or in part on any assumption (versus proof) of that correlation; it merely triggers the application of pre-clearance review, a less costly and more efficient means of addressing potential vote suppression. Preventing implementation of any practice would only follow a well-supported determination that the practice in the particular jurisdiction would constitute racial discrimination in voting.

Moreover, the threshold does not distinguish among the races; all that is required is two racial groups each comprising a significant proportion of those potentially eligible to vote in the near future in the jurisdiction. Although today, one of those two groups, in virtually every jurisdiction, is most likely to be whites, that will almost certainly change over time. Eventually, the threshold will be satisfied by other combinations of two racial groups in a jurisdiction, like Latino-Native American (in New Mexico, perhaps), or Asian American-Latino (in Hawaii, perhaps), or Black-Latino (in Georgia perhaps), or Black-Asian American (in Virginia, perhaps) in specific states or sub-state jurisdictions.

Rep. Cori Bush – Questions

Hearing on "Oversight of the Voting Rights Act: Potential Legislative Reponses"
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

August 16, 2021

Panel I – Assistant Attorney General Kristen Clarke

1. Assistant Attorney General Clarke, the Fourteenth and Fifteenth Amendments are often referred to as the Reconstruction Amendments because they were ratified in the aftermath of the Civil War. For a moment, multi-racial democracy flourished in the 1860s and 70s in certain places of the former Confederacy until Congress and the rest of the federal government lost the political will to enforce these constitutional guarantees. It took nearly another 100 years and the Civil Rights Movement, which is often referred to as the Second Reconstruction, to push Congress to act again and pass the Voting Rights Act. Would you agree that American history has shown that only an active federal government has kept the persistent and widespread problem of voting discrimination at bay?

2. Assistant Attorney General Clarke, the last time Congress reauthorized the Voting Rights Act was in 2006, when President Bush was in office and Congress was controlled by our Republican colleagues. It was reauthorized for 25 years and passed by an overwhelming vote in the House and by unanimous vote in the Senate. Is it not true that the Voting Rights Act has historically been supported on a bipartisan basis, and what is your response to the argument we hear today that the Voting Rights Act is a partisan federal power grab?

Panel II – Jon Greenbaum (Lawyers' Committee), Sophia Lin Lakin (ACLU), Samuel Spital (LDF)

Section 2 – Brnovich Fix

1. Mr. Greenbaum, in your written testimony you indicated that you are not in favor of a burden-shifting approach to address the *Brnovich* decision's flawed reading of Section 2 of the Voting Rights Act. Can you briefly elaborate again as to why not?

Section 2 – Purcell Fix

1. Ms. Lakin, can you elaborate further on why Congress should address lower courts' unnecessary expansion of the *Purcell* principle in Section 2 litigation and what Congress should do to address this problem?

Congress' Constitutional Authority to Devise Voter Protections

1. Mr. Spital, we've heard a lot today about the need for Congress to address the Supreme Court's disastrous ruling in *Shelby County* and its flawed decision in *Brnovich*. But just to be clear, have either of these decisions diminished Congress' constitutional authority to pass strong voting rights protections to remedy the persistent problem of voter discrimination?

Rep. Cori Bush – Questions

Hearing on "Oversight of the Voting Rights Act: Potential Legislative Reponses" Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

August 16, 2021

Panel II – Jon Greenbaum (Lawyers' Committee)

Section 2 – Brnovich Fix

1. Mr. Greenbaum, in your written testimony you indicated that you are not in favor of a burden-shifting approach to address the *Brnovich* decision's flawed reading of Section 2 of the Voting Rights Act. Can you briefly elaborate again as to why not?

Let me start off by reiterating what I said in my testimony that it is vitally important for Congress to address the United States Supreme Court's decision *in Brnovich v. Democratic National Committee* because it weakens the scope of vote denial claims under Section 2 of the Voting Rights Act in a way inconsistent with Congress's intent when it amended Section 2 in 1982.

My preferred approach would be for Congress to address the *Brnovich* decision to the state of Section 2 jurisprudence pre-*Brnovich*. Unlike some other civil rights statutes, Section 2 jurisprudence did not contain a burden shifting approach. With burden-shifting, after the plaintiff demonstrates a discriminatory effect (step 1), the defendant's justification for the law becomes the centerpiece of the inquiry, first by the defendant having the burden of proving that the law had a legitimate purpose(s) (step 2), and if that is proven, the plaintiff then needing to prove that there are alternative practices that may be comparably effective with less discriminatory impact (step 3).

Under the pre-*Brnovich* jurisprudence, plaintiffs could prevail in a Section 2 results case without getting into the issue of whether there are legitimate justifications for the law at issue. Plaintiffs had the option of putting forth evidence that the policy behind the challenged practice was tenuous (which is similar to assessing the justification for the law) but did not need to, and defendants could not avoid liability based on the reasons they passed a law. The center of the inquiry was the discriminatory result. My concern with a burden-shifting approach is that it will affect the focus of the inquiry. That being said, I would prefer a *Brnovich*-fix that includes burden-shifting to not addressing *Brnovich* at all.

Rep. Cori Bush – Questions

Hearing on "Oversight of the Voting Rights Act: Potential Legislative Reponses" Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties

August 16, 2021

Panel II – Sophia Lin Lakin (ACLU)

Section 2 – Purcell Fix

1. Ms. Lakin, can you elaborate further on why Congress should address lower courts' unnecessary expansion of the *Purcell* principle in Section 2 litigation and what Congress should do to address this problem?

The expansion of the *Purcell* doctrine has made the already difficult task of halting a discriminatory voting regime *before* it can taint an election even harder. The *Purcell* principle of today displaces the case-specific analysis required for injunctions and operates as an almost *per se* bar on granting relief in voting rights cases—no matter the strength of the claim or the depth of the harm that would done—in some (nebulously defined) period before an election. The use of *Purcell* is only expanding, and left unchecked, it threatens to kneecap voting rights litigation nationwide. Congress can and should take steps to address this increasingly pernicious problem.

This metasticization of the *Purcell* principle has real effects: as outlined in my written testimony before this Subcommittee, injunctions are frequently blocked by *Purcell,* even in cases where plaintiffs ultimately to go on—after the lengthy process of litigation—to win relief.[1] Over the past decade, federal courts have applied the *Purcell* principle ever more aggressively, even when the putative concerns of voter confusion or administrative burden on elections officials that originally animated the doctrine are wholly absent,[2] in a way that tends to work in one direction: against voters and voting rights.[3] In fact, in some cases, appeals courts invoking *Purcell* to stay relief granted by a district court (and the increasing regularity of such stays) create the very voter

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[1] *See Oversight of the Voting Rights Act: Potential Legislative Reform: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 117th Cong. 9-10 (2021) (written statement of Sophia Lin Lakin, Deputy Director of the ACLU's Voting Rights Project) ("August 2021 Lakin Testimony"); *see also The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-In Coverage, Election Observers, and Notice: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary*, 117th Cong. 14-19 (2021) (written statement of Sophia Lin Lakin, Deputy Director of the ACLU's Voting Rights Project) ("June 2021 Lakin Testimony") (listing cases).

[2] *See* August 2021 Lakin Testimony, *supra* note 1, at 9-10; June 2021 Lakin Testimony, *supra* note 1, at 20-23 (giving examples of cases where the requested relief was explicitly supported by elections officials and where the requested relief would meaningfully reduce confusion caused by last-minute changes by government actors).

[3] *See* August 2021 Lakin Testimony, *supra* note 1, at 16 (providing examples); June 2021 Lakin Testimony, *supra* note 1, at 24-26 (providing examples).

confusion and administrative burdens that the principle in theory aims to avoid.[4] Compounding the issue is the frequent lack of explanation of a court's reasoning: applications of *Purcell* often appear in the form of unsigned orders, leaving the parties and the voting public with little clarity.[5]

Purcell is a judicially created doctrine based on policy considerations regarding the public interest, not a matter of constitutional interpretation, and may therefore be overridden by Congress through legislation. 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 and has both the authority[6] and the responsibility to address this metasticization of *Purcell*. Any legislative response should address at least four areas:

First, any legislative response should state explicitly that proximity to an election alone is not a reason to deny relief and ensure that voting rights claims get a full hearing, while still leaving room for real cases where injunctive relief should not be issued. It is, of course, possible that issuing an injunction when an election is imminent could cause confusion or impose unreasonable burdens on elections officials, but those concerns should be proven, with specific evidence.

Second, Congress should give guidance to litigants as how close to an election you can be before a potential *Purcell* problem is triggered. For example, Congress could define a "safe harbor," *i.e.*, a period before which—as a rebuttable presumption—proximity to the election will be presumed not to harm the public interest or burden elections officials. The safe harbor could also be pinned to a short period of time after a policy is enacted or announced: this would ensure that an unlawful policy can be challenged without immediately running afoul of *Purcell*, even if it is announced last minute, as long as people move quickly.

Third, any legislative response should underscore the public's interest in free and fair elections and give courts (and voters and litigants) guidance on how to weigh that interest against proven concerns about voter confusion and administrative burdens.

Fourth, Congress should clarify that appellate courts deciding whether to stay a lower court order issued close to an election should also not wield *Purcell* automatically to block relief and should consider and protect the interests of any voters who relied on that lower court order. This would reflect the reality that sometimes, unforeseen events—whether an unprecedented pandemic or the actions of elections officials—occur and that this is no reason to abdicate their responsibility to safeguard the constitutional right to vote.

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[4] *See* August 2021 Lakin Testimony, *supra* note 1, at 16-17 (providing examples); June 2021 Lakin Testimony, *supra* note 1, at 26-27 (providing examples).

[5] *See* August 2021 Lakin Testimony, *supra* note 1, at 11 (providing examples); *see* also June 2021 Lakin Testimony, *supra* note 1, at 27-29 (providing examples and further explanation).

[6] *See* August 2021 Lakin Testimony, *supra* note 1, at 7-8, 11 (describing Congress' clear authority to act to address the expansion of the *Purcell* principle).