

THE NEED TO ENHANCE THE VOTING RIGHTS ACT: PRACTICE-BASED COVERAGE

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

TUESDAY, JULY 27, 2021

Serial No. 117-37

Printed for the use of the Committee on the Judiciary



Available via: <http://judiciary.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2022

COMMITTEE ON THE JUDICIARY

JERROLD NADLER, New York, *Chair*
MADELEINE DEAN, Pennsylvania, *Vice-Chair*

ZOE LOFGREN, California	JIM JORDAN, Ohio, <i>Ranking Member</i>
SHEILA JACKSON LEE, Texas	STEVE CHABOT, Ohio
STEVE COHEN, Tennessee	LOUIE GOHMERT, Texas
HENRY C. "HANK" JOHNSON, JR., Georgia	DARRELL ISSA, California
THEODORE E. DEUTCH, Florida	KEN BUCK, Colorado
KAREN BASS, California	MATT GAETZ, Florida
HAKEEM S. JEFFRIES, New York	MIKE JOHNSON, Louisiana
DAVID N. CICILLINE, Rhode Island	ANDY BIGGS, Arizona
ERIC SWALWELL, California	TOM McCLINTOCK, California
TED LIEU, California	W. GREG STEUBE, Florida
JAMIE RASKIN, Maryland	TOM TIFFANY, Wisconsin
PRAMILA JAYAPAL, Washington	THOMAS MASSIE, Kentucky
VAL BUTLER DEMINGS, Florida	CHIP ROY, Texas
J. LUIS CORREA, California	DAN BISHOP, North Carolina
MARY GAY SCANLON, Pennsylvania	MICHELLE FISCHBACH, Minnesota
SYLVIA R. GARCIA, Texas	VICTORIA SPARTZ, Indiana
JOE NEGUSE, Colorado	SCOTT FITZGERALD, Wisconsin
LUCY McBATH, Georgia	CLIFF BENTZ, Oregon
GREG STANTON, Arizona	BURGESS OWENS, Utah
VERONICA ESCOBAR, Texas	
MONDAIRE JONES, New York	
DEBORAH ROSS, North Carolina	
CORI BUSH, Missouri	

PERRY APELBAUM, *Majority Staff Director and Chief Counsel*
CHRISTOPHER HIXON, *Minority Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

STEVE COHEN, Tennessee, *Chair*
DEBORAH ROSS, North Carolina, *Vice-Chair*

JAMIE RASKIN, Maryland	MIKE JOHNSON, Louisiana, <i>Ranking Member</i>
HENRY C. "HANK" JOHNSON, JR., Georgia	
SYLVIA R. GARCIA, Texas	TOM McCLINTOCK, California
CORI BUSH, Missouri	CHIP ROY, Texas
SHEILA JACKSON LEE, Texas	MICHELLE FISCHBACH, Minnesota
	BURGESS OWENS, Utah

JAMES PARK, *Chief Counsel*

C O N T E N T S

TUESDAY, JULY 27, 2021

	Page
OPENING STATEMENTS	
The Honorable Steve Cohen, Chair of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Tennessee	1
The Honorable Mike Johnson, Ranking Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Louisiana	3
The Honorable Jerrold Nadler, Chair of the Committee on the Judiciary from the State of New York	5
WITNESSES	
Thomas A. Saenz, President and General Counsel, Mexican American Legal Defense and Educational Fund	
Oral Testimony	7
Prepared Testimony	9
John C. Yang, President and Executive Director, Asian Americans Advancing Justice	
Oral Testimony	77
Prepared Testimony	80
Luis Ricardo Fraga, Rev. Donald P. McNeill, C.S.C., Professor of Transformative Latino Leadership, Joseph and Elizabeth Robbie Professor of Political Science, Director, Institute for Latino Studies, University of Notre Dame	
Oral Testimony	102
Prepared Testimony	104
Bernard L. Fraga, Associate Professor, Department of Political Science, Emory College of Arts and Sciences	
Oral Testimony	146
Prepared Testimony	148
T. Russell Nobile, Senior Attorney, Judicial Watch, Inc.	
Oral Testimony	176
Prepared Testimony	178
Bryan P. Tyson, Partner, Taylor English Duma LLP	
Oral Testimony	196
Prepared Testimony	198
Franita Tolson, Vice Dean for Faculty and Academic Affairs and Professor of Law, USC Gould School of Law	
Oral Testimony	217
Prepared Testimony	220
LETTERS, STATEMENTS, ETC. SUBMITTED FOR THE RECORD	
An article entitled, "The Texas Election Bill Contains a New Obstacle to Voting That Almost No One Is Talking About," Texas Monthly, submitted by the Honorable Sylvia R. Garcia, a Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties from the State of Texas for the record	254

IV

QUESTIONS AND ANSWERS FOR THE RECORD

Page

Response to questions from Thomas A. Saenz, President and General Counsel MALDEF, submitted by the Honorable Jerrold Nadler, Chair of the Com- mittee on the Judiciary from the State of New York for the record	264
--	-----

THE NEED TO ENHANCE THE VOTING RIGHTS ACT: PRACTICE-BASED COVERAGE

Tuesday, July 27, 2021

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to call, at 3:24 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

Members present: Representatives Nadler, Cohen, Raskin, Ross, Johnson of Georgia, Garcia, Bush, Jackson Lee, Johnson of Louisiana, and McClintock.

Staff present: Moh Sharma, Director of Member Services and Outreach & Policy Advisor; Jordan Dashow, Professional Staff Member; Ceirra Fontenot, Chief Clerk; John Williams, Parliamentarian and Senior Counsel; Gabriel Barnett, Staff Assistant; Merrick Nelson, Digital Director; James Park, Chief Counsel; Will Emmons, Professional Staff Member/Legislative Aide; Betsy Ferguson, Minority Senior Counsel; Caroline Nabity, Minority Counsel; and Kiley Bidelman, Minority Clerk.

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

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

I welcome everyone to today's hearing on the Need to Enhance the Voting Rights Act Practice-Based Coverage.

Remind all Members we have established an email address and distribution list dedicated to circulating exhibits, motions, other written materials Members might want to offer. Like to submit materials, send them to email that has already been shared with you and we will distribute them to the Members and staff as quickly as possible.

Finally, I would ask all Members and Witnesses, both those appearing in person and those appearing virtually, remotely, to mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may un-mute yourself any time you seek recognition.

I will now recognize myself for an opening statement.

As part of the Subcommittee's longstanding efforts to revitalize the Voting Rights Act preclearance provisions, today's hearing will focus on known practices coverage.

Known practice coverage is also called practice-based coverage. It is a form of preclearance coverage that applies to certain voting law changes that have historically been associated with racial discrimination. H.R. 4, the John R. Lewis Voting Rights Act, from the 116th Congress contained such a practice-based coverage formula.

Practice-based preclearance is a necessary complement to the traditional geographic coverage formula of the Voting Rights Act addressing a gap potentially left by the traditional formula.

As we will hear from some of our Witnesses today, drawing from historical evidence there's a strong relationship between certain voting laws and policy such as strict voter identification requirements, the consolidation or relocation of polling locations, and changes to district or jurisdictional boundaries, and voting discrimination based on race, color, or language minority status.

Moreover, historical evidence demonstrates that when the percentage of the minority racial or ethnic population of a State or county reaches a certain tipping point, there is an increased likelihood the jurisdiction will engage in a voting right violation.

That is, in areas where there is an emerging minority group that at some point grows large enough to threaten the existing White-dominated power structure of the jurisdiction the risk is greatly heightened that the White-dominated power structure will respond by trying to suppress the ability of the Members of the emerging minority group to vote, or as Machiavelli said, "Power is not given; it's taken."

This can be true even in jurisdictions that may not have a long history of engaging in voting rights violations and therefore would not be subject to preclearance under the traditional geographic coverage formula.

In light of the lessons drawn from the foregoing historical evidence H.R. 4 contained a practice-based preclearance formula that account for certain practices with an historical association with race discrimination and voting while focusing this type of preclearance regime on those jurisdictions where the minority voting age population may be high enough to raise a substantial risk that the jurisdiction would engage in voting rights violations.

Our hearings over the last two years provide an ample record to support the conclusion that certain practices like polling closures, redistricting that reduces minority representation, strict voter ID requirements, and reducing the availability of non-English language voter materials resulting in making minority citizens worse off with respect to their voting rights. These are among the covered practices under H.R. 4.

Practice-based preclearance has the added potential benefit of applying to States and localities nationwide. In this way it avoids picking and choosing a strategic set of jurisdictions to be subject to preclearance and is responsive to the Supreme Court's concern about ensuring the equal sovereignty of the States that this Court expressed when striking down the VRA's former geographic coverage formula in *Shelby County v. Holder*. While a practice-based

coverage formula would be novel, Congress has broad constitutional authority to act.

The 14th and 15th Amendments give Congress explicit legislative power to enforce voting rights and equal protection against purposeful race discrimination. These amendments form the basis of Congress' authority to pass the VRA, including its preclearance provisions in the first place. The Voting Rights Act was first challenged the first year after its enactment. The Supreme Court in *South Carolina v. Katzenbach* upheld the preclearance provision and its coverage formula holding that congressional authority to enforce the 15th amendment as broad and comprehensive and that implementing legislation must pass only a test of minimum rationality. This broad understanding of Congress' authority under the 15th amendment remains the law.

To the extent any of the covered practices affect Federal elections, the elections clause, which confers ultimate authority on Congress to regulate the time, place, or manner of progression of elections further bolsters Congress' authority to implement a practice-based preclearance regime.

The decision in Shelby County leaves undisturbed the broad understanding of Congress' authority under the reconstruction amendments and the elections clause to protect minority citizens against denial or abridgement of the right to vote on account of race, color, or language minority status. The record that the Subcommittee has built over the last two years continues to build with this hearing, provides ample support for a practice-based preclearance regime.

I thank our Witnesses for being here. I look forward to their testimony.

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

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

This is the Subcommittee's fifth hearing and as many months regarding the Voting Rights Act. Voting rights is an important topic, no one disputes that, but we are wondering when we will take up other important issues under the jurisdiction of this Subcommittee.

So, today's hearing will focus specifically on the practice-based coverage provision in H.R. 4. I am going to put this very simply: This overly-broad and constitutionally-suspect Democratic proposal aims to outlaw common sense voter integrity measures.

Under the practice-based coverage regime every State and political subdivision would have to preclear certain election practices including changes to voter identification requirements and simple changes to voter registration list maintenance processes. This is a draconian step. Let us just be honest here, it is a clear attempt to federalize elections.

As I have noted here many times before, the election clause of the U.S. Constitution gives State legislatures the authority to prescribe, quote, "the times, places, and manner of holding elections."

Voting is a fundamental right in the United States and the 15th amendment requires the States to ensure voting is accessible and available to every American. Congress passed the Voting Rights Act in 1965 to overcome State resistance and barriers that pre-

vented minorities from exercising their right to vote as is guaranteed by the 15th Amendment.

This was during the Jim Crow era. As Chief Justice John Roberts stated in *Shelby County*, in that opinion that we talk about so often in here, the, quote, “exceptional conditions at the time justified the, quote, ‘extraordinary departure from the traditional course of relations between the States and the Federal government.’” That was at that time.

In the same opinion the Court found the Voting Rights Act coverage formula to be outdated finding that, quote, “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions,” unquote.

If the record today does not support a new coverage formula it most certainly does not support the sweeping practice-based coverage preclearance provision found in H.R. 4.

One of our Witnesses today, Mr. Russ Nobile, aptly concluded that if a nationwide registration—if nationwide registration disparities did not justify nationwide preclearance coverage when the Voting Rights Act was originally enacted, it is very difficult to see what data from today supports imposing it now. This legislation is just another example of a politically-motivated power grab that will enable partisan Federal bureaucrats to control State election laws.

We will likely hear from the other side of the aisle this practice-based coverage provision is needed because States have come up with innovative ways to, quote, “suppress minority voters.” That is all we hear about today. That is a false and patently absurd argument.

Today it is easier for eligible Americans to vote than ever before in our nation’s history. To be clear, Republicans want every legally-cast ballot to count, but the only way to make sure legal votes carry the weight they deserve is to prevent casting of illegal votes.

One common sense way for States to do this is through voter ID laws, but under practice-based preclearance states in political subdivisions would have to go to Biden’s Justice Department or the courts to enact a simple voter ID law. Mandatory voter ID is an election integrity proposal that is very popular across the Nation because it follows logic and common sense. A recent Monmouth poll found the overwhelming majority of Americans, 81 percent, support voter identification laws including 62 percent of Democrats who participated in the poll.

Furthermore, 34 States currently have some form of voter ID law on the books, and this includes many liberal States with provisions nearly identical to the ones Democrats are criticizing in the State of Georgia.

H.R. 4 is wildly out of step with the facts, and the grounds, and with public opinion, and we should be considering ways to empower States to secure their elections rather than subjecting them to the whims of President Biden’s radical bureaucrats.

I do thank your Witnesses for appearing today. We look forward to your testimony. I see we have students or interns here; we are glad you’re here as well.

Thank you, Mr. Chair. I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Mr. Nadler has an opening statement, and Mr. Nadler is coming in just a second.

While we are waiting for Mr. Nadler, could you name us some of those bureaucrats?

Mr. JOHNSON of Louisiana. Yes, I can. How much time will you yield? It's the apparatus, Mr. Chair.

Mr. COHEN. The Chair of the Full Committee, Mr. Nadler of New York, is recognized for his opening statement.

Chair NADLER. Thank you, Mr. Chair. Mr. Chair, over the last few years the Subcommittee has focused much of its consideration of voting rights on the critical question of how Congress can revitalize the Voting Rights Act's section 5, Geographic-Based Preclearance Regime. This remains the central challenge before us. Today's hearing gives us the opportunity to consider how requiring practice-based preclearance could serve as an additional means of achieving this end.

The Supreme Court's decision eight years ago in *Shelby County v. Holder* gutted the Act's geographic coverage formula which determined which jurisdictions would be subject to preclearance. In striking it down the Court effectively rendered the preclearance provision inoperative. As has been documented by several of the Witnesses who have appeared previously before the Subcommittee there remains a current need to remedy ongoing and widespread discrimination against minority citizens in voting.

Voter discrimination did not simply disappear with the enactment of the Voting Rights Act. Indeed, discriminatory voting practices evolved in response to the Voting Rights Act, a process that has only accelerated over the past eight years since the Shelby County decision.

Thanks to the Voting Rights Act overtly discriminatory devices like the literacy test or poll taxes of the Jim Crow era are now gone. In their place jurisdictions have sought to enact less-overtly discriminatory voting practices that nonetheless target minority voters with surgical precision.

These seemingly neutral voting practices in fact suppress minority voters resulting in the denial of their right to an equal opportunity to participate in the electoral process and to elect the candidate of their choice.

The currently defunct section 5 preclearance coverage formula is geography-based; that is, it applies to jurisdictions with a history of voter discrimination. Updated geographic coverage formula that applies to jurisdictions with a documented history of voting rights violations would likely subject to preclearance many of the jurisdictions responsible for this new wave of voter suppression laws. As we will hear from our Witnesses today this may not be enough to remedy the discrimination endemic to this new age of voter suppression brought on by the Shelby County decision.

As our Witnesses will describe many jurisdictions with significant emerging minority populations do not have a documented history of voting rights violations, yet these jurisdictions engage in certain specific practices with a proven historical association with discrimination such as changing their electoral systems from single-member districts to at-large elections to limit the growing political influence of minority voters.

One drawback of the history-based geographic formula is that it would not subject jurisdictions like these to preclearance even though these specific practices result in discrimination against minority voters. A practice-based preclearance regime could address this gap in coverage by subjecting any jurisdiction that engaging in these specific practices to preclearance nationwide.

Indeed, I would note that H.R. 4, the aptly-named John R. Lewis Voting Rights Act, which passed the House last Congress, contains both geography-based and practices-based coverage formulas.

I would also point out that such a practice-based preclearance regime would be in keeping with the Supreme Court's reasoning in Shelby County which struck down the current coverage formula party because in the Court's view the old coverage formula did not sufficiently justify the VRA's unequal treatment of the States. A practice-based coverage regime would avoid that constitutional concern by treating every jurisdiction equally nationwide.

Moreover, as our Witnesses today will testify, even under the Court's decision in Shelby County Congress still retains broad authority under the 14th and 15th Amendments, as well as the often overlooked elections clause to pass a preclearance regime that reflects current conditions.

As we consider ways to reinvigorate the Voting Rights Act it is important to remember that the VRA reflects Congress' recognition that voting discrimination presents a unique harm that requires a powerful remedy. Decades of history since the Reconstruction era has taught us that despite our nation's progress threats to minority voting rights remain ever-present.

The VRA's purpose has always been to thwart these constantly-evolving threats to the right to vote and Congress has amended the VRA on several occasions in the decades since its enactment to further adapt it to that purpose.

The current attack on voting rights demands that Congress again take action to ensure that the Voting Rights Act continues to protect every American's right to vote.

I thank Chair Cohen for holding today's hearing as it is another step toward that important goal. I look forward to the testimony from our Witnesses and I yield back the balance of my time.

Mr. COHEN. Thank you, Mr. Nadler.

Mr. Jordan does not have a statement, so we'll go the Witnesses. We welcome our Witnesses and thank them for participating in today's hearing.

I will now introduce each of the Witnesses and after each introduction will recognize that Witness for his or her oral testimony. Please note that each of your written statements will be entered into the record in its entirety. Summary your testimony in five minutes. Most of you know the lights: The green, the yellow. You have all been with us before; you are veterans. To help stay within limits you have got your lights. For our Witnesses testifying remotely there is a timer in the Zoom view that should be visible on your screen.

Before proceeding to testimony, I remind you to tell the truth, nothing but the truth, the whole truth. If you don't tell the truth, then you are in big trouble. If you give a false statement, you could

be subject to prosecution under section 1001 of title 18 of the United States Code, so be sure and tell the truth.

Our first Witness is Mr. Thomas Saenz. Mr. Saenz is the President and General Counsel of the Mexican-American Legal Defense and Education Fund, otherwise known as MALDEF, a position he has held since August 2009.

Prior to that he served as counsel for then-Los Angeles Mayor Antonio Villaraigosa.

Prior to that Mr. Saenz was a litigator for MALDEF for 12 years, and for 8 years he taught civil rights litigation as an adjunct lecturer at University of Southern California Law School.

He achieved his J.D. degree with honors from Yale, undergraduate degree summa cum laude from Yale, later served as a law clerk to the Honorable Harry Hupp of the U.S. District Court of the Central District of California, the Honorable Steven Reinhardt of the 9th Circuit in California.

I believe you were with us in Houston. Were you at Houston with us?

Mr. SAENZ. No.

Mr. COHEN. It was somebody else from MALDEF then. You have been with us before. You are now recognized for five minutes.

STATEMENT OF THOMAS SAENZ

Mr. SAENZ. Thank you, Mr. Chair, Ranking Member, Members of the Committee. I am the President and General Counsel of MALDEF. Throughout MALDEF's 53-year history we have engaged in litigation on behalf of voting rights. Since 1975 that litigation has primarily been under the Voting Rights Act, since in 1975 it was extended to protect the Latino community throughout the United States.

Based on that long experience, protecting the voting rights of Latinos in the country, I can tell you that practice-based coverage is a much needed, essential complement to geographic coverage particularly for the Latino community given our ongoing and projected growth.

Practice-based coverage is a complement. As you've stated, Mr. Chair, to the geographic formula each of them performs a different but essential role in ensuring that nationwide we can guarantee that voting rights are protected from intentional suppression and from suppression that has discriminatory effects. Each of them plays a role by ensuring that we are nationwide guaranteeing the right to vote provided in the 14th and 15th Amendment.

Practice-based coverage is essential to the Latino community because of our ongoing growth and dispersion throughout the country. The simple fact is that section 2 litigation under the Voting Rights Act, whether it's engaged by the Department of Justice or by private parties, is incredibly costly and time-consuming.

The very name of the applicable court test, totality of the circumstances, gives a sense of how costly and time-consuming such litigation can be. If we were left with section 2 as the only or primary means of addressing vote suppression in this country, we would fail as a Nation in guaranteeing the voting rights under our constitution. This is why we must supplement section 2 litigation with preclearance.

Preclearance has been justly recognized as the most powerful civil rights enforcement tool in our history, but it should also be recognized as an early and important form of alternative dispute resolution incorporated in Federal law. Like all good ADR, it saves time and money.

I should note that the primary benefit of those savings has been to cover jurisdictions themselves because if those jurisdictions faced successful section 2 litigation, they would not only have to absorb their own costs of defense because of cost shifting and fee shifting; they would have to absorb the costs of the plaintiffs as well. That means that the primary savings from preclearance has and will continue to pertain to the covered jurisdictions themselves.

Preclearance as ADR means that it can be invoked to address significant threats to voting rights across the country. You described it as a tipping point, Mr. Chair, and that is what the Latino community faces today and in the future. As our community grows, we will reach critical mass in jurisdiction after jurisdiction across the country, hundreds of them at a time.

Now, many of those jurisdictions will react appropriately to the growth in the Latino population and not take steps to suppress votes, but too many of them will perceive a threat to those currently in power by the growth of the Latino community and will engage in vote suppression measures. We have to as a Nation be able to address those threats effectively.

We cannot address so many threats across the country with a growing Latino community reaching that tipping point in hundreds of jurisdictions successfully if section 2 is the only tool available. That is why preclearance is essential as we face this future where not just the Latino community, but other communities reach critical mass and are perceived as a threat in jurisdiction after jurisdiction.

The fact is that the ADR preclearance ensures that we can as a Nation effectively not just prevent this vote suppression from occurring, but provide a clear message to other jurisdictions that it is not worth their taking a gamble of engaging in vote suppression hoping that they won't be targeted for litigation under section 2. The availability of preclearance ensures that they will understand that's not a gamble worth taking, so it will also deter vote suppression in other circumstances.

In closing, I assert what I have said publicly about this all along: Geographic coverage and practice-based coverage go together. If you want to address successfully vote suppressors across the country and prevent them from engaging in vote suppression you have to target not just the serial vote suppressors as a geographic coverage formula does, those with an established history of voting rights violations, but also the copycat vote suppressors, those new jurisdictions that have crossed that tipping point and react to that tipping point by engaging in vote suppression measures long-established in other jurisdictions to violate voting rights. 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 the Need to Enhance the Voting Rights Act: Practice-Based Coverage.

July 27, 2021

Good afternoon. 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 regional office in Seattle.

MALDEF focuses its work in four subject-matter areas: education, employment, immigrant rights, and voting rights. 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 Colorado, Georgia, Nevada, and New Mexico.

As the growth of the Latino population expands, our work in voting rights increases as well. There is little question that the growth nationally of the Latino community and its potential voting impact is salient in the strategy and concerns of many in the United States political elite. The Latino community has comprised the nation's largest racial/ethnic minority community since 2003, according to the Census Bureau – almost 20 years. The 2020 Census should – absent some overwhelming, disparate undercount – confirm the continued significant growth of the Latino population. Although we will not have decennial Census data by racial/ethnic subpopulation until August, the Census Bureau's American Community Survey (ACS) estimates show that Latinos, who are currently about 19 percent of the nation's total population, accounted



for just over half of the entire nation's population growth between 2010 and 2019. And, with respect to potential voting power, ACS data estimates that Latinos made up over 44 percent of the entire nation's growth in citizen, voting-age population (CVAP), a suitable proxy for eligible voters, between 2009 and 2019.

Our nation's history confirms, through multiple empirical examples, that growth of the population of a racial minority group, such as Latinos, frequently catalyzes attempts to limit and delay the growth in political and voting power that should accompany population growth in any democracy. Latinos and their demographic growth remain to this day a perceived "threat" to those who have exercised apical political power over long periods of time in many jurisdictions. This perception has a correlative in the "demographic fear" carried by many members of the general public – at bottom a concern that demographic change and the ascendance of non-white racial groups will change the fundamental familiarity of the United States and its national culture. More irresponsible political aspirants have exploited this demographic fear by engaging in dog-whistle and even more explicit political appeals to target members of specific racial minority groups in exclusionary public policies.

In the realm of voting, negative actions in response to the perceived threat of growing Latino political power have included attempts to render much more difficult voter participation by new, and increasingly Latino, eligible electoral participants. Examples lie in policies to impose new barriers to voter registration, only for new registrants, and to complicate the voting process by restricting alternative voting mechanisms – such as remote voting and ballot drop-off – and by permitting or facilitating the creation of intimidating features around the traditional in-person, election-day voting experience.

In general, race-based and race-motivated discrimination in voting coincides with an interest by those in power to delay or prevent political ascendance for growing minority groups. The size and continued growth of the Latino population in the United States as a whole, unprecedented in our national history, thus presents a particular challenge to those charged with protecting our democracy and the hallmark right to voter participation regardless of race or ethnicity. This challenge led to the proposal of a practice-based coverage formula for pre-clearance under the VRA, to serve as a complement to the updated and still-needed, traditional coverage formula focused on jurisdictions with an established history of adjudicated violations of voting rights.

For the Latino community, in particular, two well-supported conclusions undergird the need for a practice-based pre-clearance coverage formula: 1) the relatively rapid growth of the Latino voting population in so many different jurisdictions across the country – and the expected backlash against that growth in voter suppression measures – would overtax the Department of



Justice and the private non-profit organizations, such as MALDEF, that work to challenge race-based voter suppression in the federal-court system; and 2) accumulating the requisite adjudications of voting rights violations as to trigger history-based pre-clearance coverage for these jurisdictions – most of which do not have long histories of significant minority voting populations – would involve so many resources as to delay such coverage for many years while voter suppression continues in the jurisdictions largely unabated. Stated more succinctly, practice-based coverage is necessitated by the scale and scope of the potential problem in the future and by the costs involved in court-based adjudication of voting rights issues.

Others have well documented the historical pattern of targeting growing populations of racial minorities in order to stem their political ascendancy and threat to extant power holders. MALDEF has had its own experiences with this phenomenon over our entire organizational existence. One experience of note in recent years followed the Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which struck down the longstanding coverage formula in section 4 of the VRA, which had included the entire state of Texas. Soon after that decision was released and jurisdictions across the country escaped the obligation to submit electoral changes to pre-review by the Department of Justice, the mayor of Pasadena, Texas announced that he would seek to restructure city government, a change he would never have pursued were it subject to pre-clearance review under the VRA.

The change involved the conversion of a city council comprised of eight members elected from districts, to a council with six district representatives and two seats elected at large. This change was plainly undertaken to prevent the growing Latino voting population from electing a majority of the city council; voter turnout differentials virtually ensured that the white population would elect its choices for the at-large seats in elections characterized by a racially-polarized vote. Absent pre-clearance review, MALDEF had to challenge the change in federal court under section 2 of the VRA. After a hard-fought trial, the district court judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to accomplish that aim. This resulted in the first contested "bail in" order, requiring Pasadena to pre-clear future electoral changes. However, again, that favorable outcome followed lengthy and costly trial preparation and trial, all of which would likely have been avoided had the challenged change itself been subject to pre-clearance review, as it would have been before the *Shelby County* decision.

The undeniable fact, well-supported by ubiquitous experience of those engaged in voting rights litigation, is that such court litigation is notoriously costly and time-consuming. The operative test for resolving these cases, as established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), involves a court's careful and searching evaluation of the "totality of the circumstances." As the name of the test implies, these cases involve tremendous work for



litigants and court; they generally involve multiple expert witnesses on both sides, multiple percipient witnesses – both elected government officials and community voters – from the jurisdiction involved, and pages and pages of documentary evidence. The range of different issues addressed by these witnesses and evidence generally yields findings of fact from the court that can readily exceed 100 pages. The scope of what is involved in section 2 litigation has resulted in the fact that only a handful of litigating organizations nationwide engage regularly in this kind of litigation. The voting rights bar is small, and it is experiencing only incremental growth even as the scope of possible litigation has increased significantly in the aftermath of the *Shelby County* decision.

While the scope of section 2 litigation in the vote-dilution context – in challenges to unfair redistricting or to at-large elections systems as in Pasadena, Texas – has been well-established for many years, the scope of section 2 litigation in the vote-denial context is still developing. That development trends toward even greater cost and time for such cases. The Supreme Court’s recent decision in *Brnovich v. Democratic National Committee* (decided July 1, 2021) will have many effects on such litigation in the future, but the clearest impact is to render such litigation even more time- and resource-intensive.

The “totality of the circumstances” test is essentially a review and evaluation of all relevant circumstantial evidence that may support a conclusion that discrimination is afoot. The very nature of our society means that such evidence is often highly contested. There is simply no way to avoid the extensive cost and time involved in court litigation under section 2 of the VRA.

With this backdrop, we should all recognize that, not only is the pre-clearance regime of section 5 of the VRA one of the most effective civil rights enforcement tools in federal law, it is also one of the earliest and most effective alternative dispute resolution (ADR) mechanisms incorporated into federal law. Like all good ADR, pre-clearance reduces court burdens while providing a quick and less-expensive resolution of disputes for all parties involved.

Over the nearly half a century that pre-clearance operated fully, prior to the *Shelby County* decision, pre-clearance effectively resolved well over a thousand disputes over elections-related changes and their implications for voting rights through pre-clearance review and objection and, by doing so, obviated the need for court litigation under section 2. A conservative estimate would likely calculate the monetary savings at several billion dollars. The vast majority of these savings accrued directly to the jurisdictions making the electoral changes because successful section 2 litigation also results in plaintiffs’ recovery of attorney fees and costs from the defendant jurisdiction. In effect, section 2 litigation results in double the costs for defendants who do not prevail; they absorb their own costs for attorney, experts, and other matters, and then must also pay those expenses for the successful plaintiffs.



Moreover, unlike ADR in other contexts, section 5 pre-clearance also had a clear deterrent effect on other covered jurisdictions and even on jurisdictions not covered by a pre-clearance obligation but interested in avoiding costly section 2 litigation. Because the Department of Justice acted publicly and transparently in rendering its objections, other jurisdictions could and did act (or choose not to act) in response to these public ADR outcomes. In this sense, pre-clearance was even more effective than private ADR that is too often characterized by a lack of transparency and even mandated non-disclosure.

It is one of the great ironies of policymaking and adjudication in voting rights -- a most critical area of policy to our nation's democracy -- that so many legislators and judges who embrace mandatory ADR, even in the face of vehement opposition by one set of parties, in the employment and consumer context, fail to accord such positive consideration to pre-clearance under the VRA. Nonetheless, all of the policy arguments in support of ADR apply to the voting rights arena, particularly because the cost of court litigation in this area is so particularly pronounced.

In addition to the virtues of good ADR, practice-based pre-clearance coverage also reflects careful attention to two major concerns expressed by the Supreme Court majority in *Shelby County* -- federalism and equal sovereignty. Thus, practice-based coverage serves as a constitutional complement to necessary geographic coverage, which reaches jurisdictions with an established recent history of adjudicated voting rights violations, by reaching jurisdictions without such a history but engaging in practices and circumstances that have proven fraught with potential for racial discrimination in voting.

By focusing solely on limited, identified elections-related changes, practice-based coverage narrowly tailors its intrusion on the ordinary policymaking process in states and other jurisdictions, reflecting respect for principles of federalism. Only where the historical experience relating to specific elections-related changes indicates both potential motivation for, and frequent implementation in a context of, racial discrimination in voting, would any jurisdiction have to submit its change for pre-clearance. Thus, the specified practices that trigger pre-clearance are only those most likely to yield potential violation of minority voting rights.

MALDEF, together with Asian Americans Advancing Justice | AAJC and the NALEO Educational Fund, recently published a report, submitted with this testimony, to document historical indications that the identified practices have been used to discriminate, particularly against growing minority voting communities that have reached a size perceived as a threat to those currently in power. Moreover, where the identified practice is a necessary or regular part of elections administration -- such as constitutionally-required redistricting, or the relocation and



reduction of polling places -- pre-clearance coverage has been further restricted to contexts of rapid growth in minority community or disparate effects on minority communities.

Practice-based pre-clearance coverage leaves the bulk of elections-related policy and practice changes to the ordinary processes of state and local law. This is appropriate for jurisdictions that do not have patterns of adjudicated voting rights violations, but that are engaging in elections-related changes that have proven rife with the potential for such violations. This strict limitation demonstrates attention to the concern for federalism expressed in the *Shelby County* decision.

In addition, practice-based pre-clearance coverage does not single out specific states or jurisdictions for differential treatment; thus, it presents no threat to equal sovereignty among the states, another concern articulated in the *Shelby County* decision. The only geographic limitation to practice-based coverage relates to population demography. Aside from this limitation, all states and jurisdictions are treated equally with regard to the pre-clearance obligation under practice-based coverage.

Moreover, the demography-based limitation is both efficacious and rational. It is efficacious because it appreciably reduces the burden on the Department of Justice in engaging in pre-clearance review. That reduction occurs through leaving out jurisdictions that are overwhelmingly of solely one race or ethnicity, with no significant population of any other specific racial/ethnic group.

The demographic threshold for practice-based pre-clearance is rational because racial discrimination in voting is less likely to occur where there is no minority group large enough to be perceived as a threat to apical powers. As noted above, it is this threat perception that often triggers elections-related changes that target growing population groups, such as Latinos.

Finally, because diversity of population and the growth of minority populations are occurring across the entire nation, more and more states will evolve into meeting the demographic threshold under practice-based coverage. This universal potential for future coverage through satisfaction of the demographic threshold also demonstrates equal treatment of the states.

As a legislative matter, practice-based coverage is not particularly extraordinary, as the *Shelby County* Court characterized the previous 2006 VRA pre-clearance coverage formula, because practice-based coverage narrowly limits its impact on federalism and leaves all states with equal sovereignty.



Our country is in the midst of significant and ongoing demographic change, which has and will result in a changed electorate. The Latino community, historically unprecedented in size and growth of a racial minority community, has already faced and will continue to face negative reaction to that demographic growth in the form of concerted attempts to suppress, deter, and dilute Latino voter participation.

As more and more jurisdictions confront Latinos and other minorities achieving critical mass in the local electorate, leadership will react in differing ways. Unfortunately, too many leaders will likely respond to a perceived threat to continued power by employing means and practices of voter discrimination employed by their predecessors in other jurisdictions.

These actions by leaders present a challenge to our democracy, heightened by the future frequency with which jurisdictions will face the phenomenon of minority voter ascendancy. If the nation fails to establish systems to respond effectively to this challenge in its increased frequency, the nation as a whole will confront a constitutional crisis and conundrum.

There is little hope of successfully overcoming this potential crisis for our democracy if we rely solely on court litigation under section 2 of the VRA. We need to employ effective ADR in the form of tailored pre-clearance. Pre-clearance is appropriate and efficacious both for jurisdictions with consistent histories of voting rights violation and for any jurisdiction engaging in a practice with a history of use in voting rights violation.

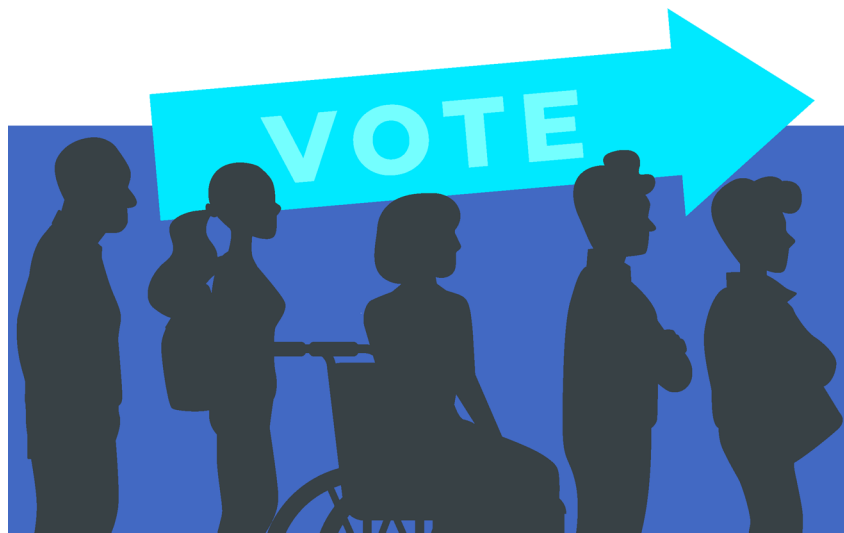
Stated differently, if you want to stop the vote killers, it is appropriate to target both serial vote killers and copycat vote killers. Practice-based pre-clearance coverage is a critical means to accomplish the latter. Practice-based coverage is a rational, tailored, and necessary complement to geographic coverage in the Voting Rights Act.



Practice-Based Preclearance:

Protecting Against Tactics Persistently Used
to Silence Minority Communities' Votes

NOVEMBER 2019



About the Organizations

Asian Americans Advancing Justice | AAJC

Rooted in the dreams of immigrants and inspired by the promise of opportunity, Asian Americans Advancing Justice | AAJC (Advancing Justice | AAJC) advocates for an America in which all Americans can benefit equally from, and contribute to, the American dream. Our mission is to advance the civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice | AAJC is a national 501 (c)(3) nonprofit founded in 1991 in Washington, D.C.

MALDEF (Mexican American Legal Defense and Educational Fund)

Founded in 1968, MALDEF is the nation's leading Latino legal civil rights organization. Our commitment is to protect and defend the rights of all Latinos living in the United States and the constitutional rights of all Americans. MALDEF has focused its efforts in protecting and promoting equal rights for Latinos, and constitutional rights for all, in four core program areas — education, employment and economic advancement, immigrants' rights, and voting rights and political access. Over the course of its 50-year history, MALDEF's litigation and advocacy efforts have spurred reforms and led to new laws and policies with wide-ranging impact for the Latino community and the nation as a whole.

NALEO Educational Fund

NALEO Educational Fund is the leading non-profit, non-partisan organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency encompasses the more than 6,700 Latino elected and appointed officials nationwide, and includes Republicans, Democrats and Independents serving at all levels of government. NALEO Educational Fund is dedicated to ensuring that Latinos have an active presence in our democratic process, and to that end, we engage in a broad range of census, civil rights and election policy development and voter engagement efforts.

Authors and Editors

Authors: Erin Hustings, NALEO Educational Fund; Terry Ao Minnis, Advancing Justice | AAJC; Andrea Senteno, MALDEF

Editors: Rosalind Gold, NALEO Education Fund; Jiny Kim, Advancing Justice | AAJC; Thomas Saenz, MALDEF; Arturo Vargas, NALEO Education Fund; John C. Yang, Advancing Justice | AAJC

Acknowledgements

Additional thanks go to: Eri Andriola, Advancing Justice | AAJC Staff Attorney, Litigation; Freddy Pech, NALEO Educational Fund Senior Creative Manager, Chali Prasertsri, NALEO Educational Fund Junior Visual Designer, and Samuel Cano, NALEO Educational Fund Policy Intern; Brianna Chapa, MALDEF Legal/Policy Assistant; Adam Fernandez, MALDEF Legislative Staff Attorney; and Melissa Giddings, MALDEF Legal Intern, for their contributions to this report.

Table of Contents

Executive Summary	1
Introduction.....	4
The Need for Restoring and Strengthening the Voting Rights Act.....	7
The Perceived Threat of Increasing Political Influence by Emerging and Existing Minority Populations.....	7
Restoring and Strengthening the Preclearance Structure	13
Known Practices as Proven Tactics to Discriminate in Voting.....	15
Changes in Method of Election That Entrench Majority Dominance.....	15
<i>The Discriminatory Intent and Effect of Changes in Method of Election.....</i>	16
<i>Discriminatory Changes in Method of Election in Practice.....</i>	19
<i>The Known Practice of Changing Methods of Election to Dilute Minority Voting Strength.....</i>	22
Redistricting After Significant Demographic Change.....	23
<i>The Discriminatory Intent and Effect of Redistricting After Significant Demographic Change.....</i>	24
<i>Discriminatory Redistricting in Action.....</i>	26
<i>The Known Practice of Redistricting in Diverse Jurisdictions to Dilute Minority Voting Strength.....</i>	28
Annexations and Deannexations That Reduce Minority Share of the Electorate	29
<i>The Discriminatory Intent and Effect of Annexations and Deannexations.....</i>	30
<i>Discriminatory Annexations and Deannexations in Action.....</i>	32
<i>The Known Practice of Annexation or Deannexation to Dilute Minority Voting Strength.....</i>	33
Restrictive Identification and Proof of Citizenship Requirements.....	34
<i>The Discriminatory Intent and Effect of Restrictive Identification Requirements.....</i>	34
<i>Discriminatory Voter ID and Proof of Citizenship Requirements in Action.....</i>	39
<i>The Known Practice of Imposing Unjustified, Unnecessary Identification Requirements on Intending Voters</i>	41
Polling Places Closures and Realignments.....	42
<i>The Discriminatory Intent and Effect of Polling Place Closures and Realignments</i>	43
<i>Discriminatory Polling Place Closures and Relocations in Practice.....</i>	46
<i>The Known Practice of Closing and Relocating Polling Places to Increase the Distance Between Ballot Boxes and Communities of Color.....</i>	48
Withdrawal of Multilingual Materials and Assistance.....	49
<i>The Discriminatory Intent and Effect of Denying Language Assistance</i>	50
<i>Discriminatory Denials of Language Assistance in Practice.....</i>	54
<i>The Known Practice of Withdrawing In-Language Materials and Assistance That Are Available in English.....</i>	57
Congressional Action Is Just As Necessary Today As It Was In 1965.....	57

EXECUTIVE SUMMARY

Section 5 of the Voting Rights Act (VRA) was instrumental in furthering the VRA's goals from its inception in 1965 until the Supreme Court's 2013 *Shelby County v. Holder* decision. When *Shelby County* was decided, Section 5 required states and local jurisdictions with a history of discrimination in voting against racial, ethnic, and language minorities to obtain federal approval for every proposed voting-related change before it could go into effect. This provision prevented the implementation of many voting changes that would have denied voters of color a voice in our democracy, from discriminatory polling place changes or closures to dilutive redistricting, and had a deterrent effect that prevented would-be bad actors from proposing discriminatory changes.

Without a fully-functioning Section 5 in place, states and local jurisdictions have employed a number of tactics to discriminate against voters of color, including shortening voting hours and days, erecting new barriers to voter registration, purging eligible voters from the rolls, implementing restrictive voter identification laws, closing polling places, and reconfiguring voting districts. But even when a coverage formula based on a jurisdiction's history of violating the Constitution and VRA was in effect, it could not always reach incidents of discrimination against newly emerging or mobilizing communities of voters of color living in places without an established record of VRA violations. Congress must enact a new geographic coverage formula for Section 5, and complement it with a provision—practice-based preclearance—that targets the known tactics policymakers have repeatedly used to silence minority voters whose presence is growing.

It is increasingly the case that our nation's most rapidly growing racial, ethnic, and language-minority communities are present in cities and states where they did not have a significant presence in the past. Throughout American history, conditions like these have triggered the use of particular tools to preserve the balance of political power between majority and emerging minority communities. From the widespread backlash against the successes of Reconstruction to today's simultaneous resurgence of anti-immigrant sentiment and adoption of measures like citizenship documentation requirements to register to vote, state and local lawmakers have established a pattern that the VRA is designed to combat.

Practice-based preclearance would focus administrative or judicial review narrowly on suspect practices that are most likely to be tainted by discriminatory intent or to have discriminatory effects, as demonstrated by broad historical experience. A practice-based preclearance coverage formula would extend to any jurisdiction across the country that is home to a racially, ethnically, and/or linguistically diverse population and is seeking to adopt a covered practice, in spite of advance notice of

its discriminatory potential. Diverse jurisdictions under the Voting Rights Advancement Act of 2019 are states and political subdivisions where two or more racial, ethnic, or language-minority groups each represent 20 percent or more of the voting-age population or where a single language-minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. Based on the most recent Census Bureau data, 15 whole states, the District of Columbia, and 801 counties or county equivalents (25.9 percent of all counties in the country) currently satisfy this threshold. This represents 6.9 percent of all counties in the Northeast portion of the country, 4.6 percent of all counties in the Midwest, 42 percent of all counties in the South, and 31.3 percent of all counties in the West. These jurisdictions would not be required to preclear all their voting-related changes, only those that are most frequently and fundamentally discriminatory based on their historical use to silence the political voices of communities of color.

The following practices would need to be precleared if adopted in a diverse state or political subdivision:

1. **Changes in Method of Election:** Where voters of color have overcome first-generation barriers to the ballot, manipulation of elections to ensure majority domination has become popular. For example, numerous lawmakers in places with growing and mobilizing minority communities have adopted at-large and multimember districts in which white majorities can outvote those cohesive minority communities. Two separate analyses of voting discrimination have found that discriminatory changes in method of election occur with great frequency in the modern era. For example, since 1957, there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.
2. **Redistricting:** Persistently high rates of residential segregation and racially polarized voting have made it possible for people with discriminatory motives to use the redistricting process to deny political power to emerging or sizeable minority populations. The complexity and obscurity of redistricting have enhanced its attractiveness as a tool for limiting minority voters' influence at times when racial motives generally are not socially acceptable. Two separate analyses of voting discrimination have found that discriminatory redistricting changes occur with great frequency in the modern era. For example, 982 redistricting plans have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

3. **Annexations or Deannexations:** Annexations or deannexations dilute minority political power by selectively altering the racial and ethnic makeup of a jurisdiction's electorate. In recent history these changes have often taken place quietly – often without the immediate notice required under pre-*Shelby County* Section 5 – and at times when minority voters' strength was growing within the political jurisdiction. Two separate analyses of voting discrimination have found that discriminatory annexations or deannexations occur with great frequency in the modern era. For example, at least 219 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.
4. **Identification and Proof of Citizenship Requirements:** Over the past twenty years, in places where African American voters have mobilized in historic numbers, and communities of color with immigrant origins are making a mark as patriotic naturalized citizens and first- and second-generation Americans, restrictive identification requirements have become an increasingly popular intervention. ID laws impose prerequisites to registering or voting that go above and beyond the legal minimum requirement of attestation to adulthood and U.S. citizenship, and that voters of color are disproportionately unable to satisfy. Two separate analyses of voting discrimination have found that discriminatory identification and citizenship requirements occur with great frequency in the modern era. For example, at least 52 attempts to implement discriminatory voter ID requirements have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.
5. **Polling Place Closures and Realignment:** Residential segregation has made racially-motivated manipulation of polling place locations an effective tool for deterring voters of color. With in-person voting enjoying sustained popularity and importance, in light of factors like the growing population of limited-English proficient voters, a trend of polling place closures threatens to dampen the electoral influence of underrepresented communities who have consistently lost access to voting resources when polling places are consolidated. Two separate analyses of voting discrimination have found that discriminatory polling place closures or realignments occur with great frequency in the modern era. For example, at least 295 attempts to move or close polling locations have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1957.

6. **Withdrawal of Multilingual Materials and Assistance:** Throughout history, policymakers with discriminatory motives have ascribed to limited-English proficient Americans allegations of ignorance, mental deficiency, and a dangerous other-ness, and have sought to deny them a political voice by imposing explicit or de facto English literacy prerequisites to voting. In the modern era, election administrators exclude language-minority voters by eliminating and obstructing multilingual assistance and the channels through which it is provided. Two separate analyses of voting discrimination have found that discriminatory barriers to language access occur with great frequency. For example, courts and lawmakers have taken remedial action to combat discriminatory effects or intent in at least 84 instances of obstruction, withdrawal, or severe neglect of language assistance services since 1957.

Congress and the President must work to ensure that the VRA provides effective protections to all voters of color, whether or not they live in jurisdictions with established histories of discriminatory election policymaking. A practice-based trigger would ensure that the VRA tracks known patterns of discrimination and redresses the most problematic restrictions adopted under the circumstances that make them likely to be unfair, before they take effect and without the crushing cost of litigation.

Introduction

The Voting Rights Act of 1965 (the VRA) has often been called “the crown jewel” of our nation’s civil rights law – including by President Ronald Reagan when endorsing the 1982 reauthorization of the VRA.¹ As one of our most fundamental rights, voting is the most basic form of participation in our democracy and is “preservative of all rights.”² The single most effective civil rights law enacted by Congress, the VRA addresses voting discrimination through both preventive protections and remedial measures. In particular, Section 5 of the VRA (Section 5) was instrumental from its inception in 1965 until the 2013 *Shelby County v. Holder* decision by the U.S. Supreme Court in furthering the VRA’s goals. Section 5 requires states and local jurisdictions with a history of racial discrimination in voting to submit every proposed voting-related change to either the U.S. Department of Justice (DOJ) or a federal court in the District of Columbia for approval, or “preclearance,” before the change goes into effect. Section 5’s success was due in large part to its function as a cost-effective dispute resolution mechanism and as

¹ E.g., Associated Press, “Reagan backs voting rights act,” THE TELEGRAPH (November 7, 1981), <https://news.google.com/newspapers?nid=2209&dat=19811107&id=naFrAAAAIBAJ&sjid=hfWFAAAAIBAJ&pg=6871.1296888>.

² *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

an alternative to protracted litigation.³ Section 5 prevented the implementation of many voting changes that would have harmed minority voting rights, from discriminatory precinct changes to dilutive redistricting. At the same time, Section 5 deterred even more discriminatorily-conceived voting changes from being proposed in the first place.

Section 5 should also be celebrated as one of the first and most effective alternative dispute resolution (ADR) provisions. Preclearance permits faster, less costly resolution of disputes over potentially discriminatory voting changes versus more cumbersome and resource-intensive court litigation. Like other ADR mechanisms, preclearance involves streamlined review by a non-judicial officer who considers both sides of the dispute. Unlike mandatory ADR in other contexts, Section 5 allows jurisdictions to bypass the non-judicial review and proceed directly to the D.C. federal court, as well as to receive expedited review that bypasses the appellate court of the district court's decisions. VRA litigation generally involves fee awards for prevailing plaintiffs. Preclearance saves taxpayers in covered jurisdictions a considerable amount of money because the jurisdiction can obtain quick decisions without having to pay attorneys, expert witnesses, or prevailing plaintiff's fees and costs that are incurred in complex and expensive litigation.⁴

Unfortunately, in June 2013, the Supreme Court dealt a blow to the VRA by striking down the Section 4(b) coverage formula which determined which jurisdictions were covered by Section 5, in a narrow five-to-four decision in *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013). This decision left millions of voters of color at the mercy of discriminatory voting changes, without the ability to stop voting discrimination before it occurs, and the country without an efficient mechanism to resolve voting rights disputes, just as such disputes are rising with respect to emerging minority populations and their growing political voice.

The years following the *Shelby County* decision have seen an increase in voting discrimination, particularly in the locations that were previously covered by Section 5. From shortening voting hours and days, erecting new barriers to voter registration, purging eligible voters from the rolls, implementing strict voter identification laws, and closing polling places to reconfiguring election systems and voting districts, states and local jurisdictions have employed a number of tactics to

³ While Section 2 of the VRA continues to afford an after-the-fact opportunity to challenge minority vote dilution, Section 2 litigation is among the costliest and most time-consuming, for both sides, in the civil rights arena. See, e.g., Christopher S. Elmendorf and Douglas M. Spencer, "Administering Section 2 of the Voting Rights Act After *Shelby County*," 115 *Columbia Law Review* 2143 (2015).

⁴ NAACP Legal Defense and Educational Fund, *The Cost (In Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation* (2018), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-081318_1.pdf.

discriminate against voters of color in recent years.⁵ Immediately after the *Shelby County* decision, previously-covered jurisdictions moved to implement voting changes that they knew would not have been precleared prior to the decision. In fact, on the day of the *Shelby County* decision, the Texas Attorney General tweeted, “Eric Holder can no longer deny #VoterID in #Texas after today’s #SCOTUS decision. #txlege #tcot #txgop;” “Texas #VoterID law should go into effect immediately b/c #SCOTUS struck down section 4 of VRA today. #txlege #tcot #txgop;” and “With [sic] today’s #SCOTUS decision #Texas should be freed from Voting Rights Act Preclearance. #txlege #tcot #txgop.”⁶ North Carolina moved to enact an extensive voter suppression bill, less than two months after the decision that included a strict photo ID requirement, reduced early voting, eliminated same-day registration, and ended annual voter registration drives, among other voting restrictions.⁷ The bill that was enacted was much broader and more restrictive in scope than initially proposed – a direct result of the Supreme Court’s decision.⁸

Similarly, Arizona immediately implemented a controversial change after the *Shelby County* decision that had previously been subject to a “More Information Request” (MIR) from the DOJ. MIRs usually signal to a jurisdiction that a change raises concerns and might not be approved. The change Arizona advanced—which made it a felony to possess anyone else’s early ballot, whether or not it was filled out—would have had a negative effect on Native American voters in particular. Because so few Native Americans have home mail delivery, “[t]hey rely on post office boxes that are often very far from their homes so families commonly ‘pool’ their mail, meaning one person who is going to town would collect it for everyone else to drop it off at the post office.”⁹ The law would have made such a person a potential felon. It was withdrawn when Section 5 preclearance applied prior to the *Shelby County* decision, and remains unresolved after the move to instate it post-

⁵ E.g., Wendy R. Weiser and Max Feldman, Brennan Center for Justice, *The State of Voting 2018* (June 5, 2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018>.

⁶ Matt Vasilogambros, “That Was Quick, Texas Moves Forward With Voting ID Law After Supreme Court Ruling,” NATIONAL JOURNAL (June 25, 2013), <https://web.archive.org/web/20130628065520/https://www.nationaljournal.com/politics/that-was-quick-texas-moves-forward-with-voter-id-law-after-supreme-court-ruling-20130625/>.

⁷ North Carolina H.B. 589 (2013).

⁸ 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-too-racist-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/>.

⁹ Natalie A. Landreth, Native American Rights Fund, Written Testimony Submitted in Connection with a Hearing of the House Judiciary Committee on Evidence of Current and Ongoing Voting Discrimination, September 10, 2019, <http://docs.house.gov/meetings/JU/JU10/20190910/109895/HHRG-116-JU10-Wstate-LandrethN-20190910.pdf>.

decision.¹⁰ These incidents, along with the many additional instances of voting discrimination that have occurred both before and after *Shelby County*, demonstrate the need for Congress to respond to the Supreme Court's charge and enact legislation to restore and strengthen the VRA based on recent evidence of voting discrimination – of which there is plenty.

The Need for Restoring and Strengthening the Voting Rights Act

The Perceived Threat of Increasing Political Influence by Emerging and Existing Minority Populations

It has been long understood that in heterogeneous societies the majority group has an incentive to become hostile toward minority groups when either political or economic resources are at stake. This observation is known as the power-threat hypothesis.¹¹ It applies to the United States, which has become more diverse over time and will continue to do so. The Census Bureau projects that by 2045 the country will become “majority-minority” – at which point the non-Hispanic white alone population will comprise less than 50 percent of the nation's total population.¹² Hispanics or Latinos are already the largest minority group in the country.¹³ The populations that will be fastest growing between 2018 and 2060 are projected to be the following, starting with the fastest: multiracial population (197.8 percent), Asian Americans (101 percent), Latinos (93.5 percent), Native Hawaiian and Pacific Islanders (45.9 percent), African Americans (41.1 percent), and American Indian and Alaska Natives (37.7 percent).¹⁴ The Census Bureau projects a decline in the growth rate of the non-Hispanic white population of -9.5 percent.¹⁵

Meanwhile, researchers have studied the reaction of the white majority to projected demographic changes in their home communities and the nation. Members of a majority racial or ethnic group experience feelings of resistance against minorities, and inclinations toward repression, that begin to increase when the majority learns that they are soon to become the minority, with the perception of the threat being

¹⁰ *Id.*

¹¹ Christopher Sebastian Parker and Christopher C. Towler, “Race and Authoritarianism in American Politics,” 22 *Annual Review of Political Science* 503 (May 2019) [hereinafter “Race and Authoritarianism”].

¹² Census Bureau, 2017 National Population Projections: Projected race and Hispanic origin (Table 4), <https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html>.

¹³ E.g., CNN, “Hispanics in the US Fast Facts” (March 6, 2019), <https://www.cnn.com/2013/09/20/us/hispanics-in-the-u-s-/index.html>.

¹⁴ Sandra L. Colby and Jennifer M. Ortman, Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, Doc. P25-1143 (March 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf>.

¹⁵ *Id.*

roughly proportionate to the presence of the minority relative to the majority.¹⁶ In response to the news that the country would become majority-minority in 2045, a Pew Research Center study found that whites were half as likely to say having a majority non-white population would be good for the country as minority participants in the study; about three-in-ten whites (28 percent) said this change would be bad for the country.¹⁷ Whites were also more likely than minority participants to say that a majority non-white population would lead to more racial and ethnic conflicts (53 percent versus 43 percent) and that it would weaken American customs and values (46 percent versus 24 percent).¹⁸ These feelings and reactions are not new – history shows that fear that a new demographic group, such as immigrants, might wield “too much electoral power” has often resulted in legislation aimed to curb that group’s ability to vote.¹⁹

It is important to understand the power-threat hypothesis and the Pew Research Center’s findings not just as they relate to the concept of a majority-minority country in 2045, but against the backdrop of the demographic changes we have already seen over the past decades. During the VRA’s more than 50-year history, each racial and ethnic group grew, but communities of color significantly outpaced non-Hispanic whites.²⁰ Over the last two decades, Asian Americans have been the fastest growing racial or ethnic minority, followed by Latinos.²¹ While there are states and localities where communities of color have traditionally resided in larger numbers, communities of historically underrepresented voters are now emerging in other areas of the country. For example, Asian American voters have long been concentrated in jurisdictions in the western United States, including Hawaii and California, but between 2000 and 2010, Georgia and North Carolina were two of the three states with the fastest-growing Asian American populations in the United

¹⁶ Race and Authoritarianism, *supra* n.11.

¹⁷ Kim Parker, Rich Morin, and Juliana Menasce Horowitz, Pew Research Center, “Views of demographic changes” (March 21, 2019), <https://www.pewsocialtrends.org/2019/03/21/views-of-demographic-changes-in-america/>.

¹⁸ *Id.*

¹⁹ Alexander Keyssar, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 67 (Basic Books: 2009) [hereinafter “The Right to Vote”].

²⁰ *E.g.*, Associated Press, “Census: Every Ethnic, Racial Group Grew, but Whites Slowest” (June 23, 2017), <https://www.nbcnews.com/news/nbcblk/census-every-ethnic-racial-group-grew-whites-slowest-n775591>; Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, Census Bureau, *Overview of Race and Hispanic Origin: 2010*, Doc. C2010BR-02 (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

²¹ Charles Lam and Associated Press, “Asians Remain Fastest-Growing US Group as Pacific Islanders, Mixed-Race Numbers Grow: Census,” NBC NEWS (July 29, 2016), <https://www.nbcnews.com/news/asian-america/asians-remain-fastest-growing-us-group-pacific-islanders-mixed-race-n597711>; Associated Press, “These Are the Fastest-Growing Racial Groups in America,” *FORTUNE* (June 23, 2016), <https://fortune.com/2016/06/23/census-bureau-race-age/>.

States. Today, almost one in four Asian Americans lives in the South.²² Georgia has also seen its Latino population more than double during this period.²³ Between 2007 and 2014, five of the ten U.S. counties whose Latino populations grew most rapidly were in North or South Dakota,²⁴ two states whose overall Latino populations still account for less than ten percent of their residents, and are dwarfed by Latino communities in states like New Mexico, Texas, and California.²⁵

It is precisely this rapid growth of different racial or ethnic populations that results in the perception that emerging communities of color are a threat to those in political power. In response to that threat, the political establishment implements voting-related changes to make it more difficult to vote and to dilute the voting power of that threatening population. The actions are often motivated by direct intentional discrimination or are cloaked in pretextual justifications – such as protection of incumbents' seniority, competitiveness, or continuity of representation. An assessment of elections under the VRA's protections reveals a pattern of jurisdictions' use of discriminatory tactics to silence the voices of emerging communities just as they begin to grow to a point where they can flex their political muscle and have their voices heard.

There are strong indications that rapid, visible growth of emerging racial or ethnic populations fosters perceptions that communities of color may pose a threat to existing political power structures. From America's founding, lawmakers denied enslaved African Americans the right to vote, and free African Americans were either formally excluded or barred in practice from voting by property ownership requirements and other stringent voter qualifications. Although the growth of America's abolitionist movement, the Union's victory in the Civil War, and Reconstruction in the South eliminated many voting impediments, concerns about

²² E.g., Asian Americans Advancing Justice, *A Community of Contrasts: Asian Americans, Native Hawaiians and Pacific Islanders in the South* (2014), https://www.advancingjustice-aaajc.org/sites/default/files/2016-09/2014_Community%20of%20Contrasts.pdf; Terry Ao Minnis, "Asian Americans Advancing Justice – AAJC, Section 5 of the Voting Rights Act and Asian American Voters" (June 20, 2016), <https://www.advancingjustice-aaajc.org/sites/default/files/2016-09/Section%205%20of%20the%20VRA%20and%20Asian%20Americans.pdf>; Gustavo Lopez, Neil G. Ruiz, and Eileen Patten, Pew Research Center, "Key facts about Asian Americans, a diverse and growing population" (September 8, 2017), <https://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>.

²³ Antonio Flores, Pew Research Center, "How the U.S. Hispanic population is changing" (September 18, 2017), <https://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing/>.

²⁴ Renee Stepler and Mark Hugo Lopez, Pew Research Center, "Fast-growing and slow-growing Hispanic counties" (September 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/08/2-fast-growing-and-slow-growing-hispanic-counties/> [hereinafter "Fast-growing Hispanic counties"].

²⁵ Renee Stepler and Mark Hugo Lopez, Pew Research Center, "Ranking the Latino population in the states" (September 8, 2016), <https://www.pewresearch.org/hispanic/2016/09/08/4-ranking-the-latino-population-in-the-states/>.

the political power of the African American vote dominated America's political discourse, and inspired backlash in the form of "black codes" and organized efforts to incarcerate, intimidate, and prevent African Americans from voting. The collapse of Reconstruction in 1877 further normalized these voter suppression tactics, and they became the ideological foundation of Jim Crow:

"Even before Reconstruction came to a quasi-formal end in 1877, black voting rights were under attack. Elections were hotly contested, and white Southerners ... engaged in both legal and extralegal efforts to limit the political influence of freedmen. In the early 1870s, both in the South and in the border states, districts were gerrymandered (i.e., reshaped for partisan reasons), precincts reorganized, and polling places closed to hinder black political participation."²⁶

Native Americans have also been excluded since our country's founding from the political process. The original text of the Constitution excluded "Indians not taxed" from the population basis for apportioning congressional seats among the states. In 1866, Congress adopted the Fourteenth Amendment, after the Civil War, granting citizenship to "[a]ll persons born or naturalized in the United States" except those not "subject to the jurisdiction thereof"—a provision specifically intended to exclude Native Americans from the franchise. These are examples of the concerted effort to deny the right to vote of Native Americans. During debate on the Fourteenth Amendment, "Senators expressed dual concerns that Indians were an inferior race and therefore not worthy of citizenship and that, if granted citizenship and the right to vote, their numbers could overwhelm the votes of white citizens in the western territories."²⁷

Immigrant communities have frequently attracted similar hostility when they grew large enough to potentially exercise political influence. In the late nineteenth century, a strong sentiment against universal suffrage began to increase as "opponents of universal suffrage consistently couched their opinions in language redolent with class, ethnic, and racial hostility."²⁸ Public antipathy extended to people with disfavored European national origins, such as the Irish, and intensified in the form of anti-immigrant attitudes about Latinos and Asian Americans. For example, "in Texas, Mexican immigrants were described as a 'political menace,' as

²⁶ The Right to Vote at 84, *supra* n.19.

²⁷ Bryan L. Sells, Written Testimony Submitted in Connection with a Hearing of the House Judiciary Committee on Legislative Proposals to Strengthen the Voting Rights Act, October 17, 2019, <http://docs.house.gov/meetings/JU/JU10/20191017/10084/HHRG-116-JU10-Wstate-SellsB-20191017.pdf> [hereinafter "Sells Testimony"].

²⁸ The Right to Vote at 98, *supra* n.19.

‘foreigners who claim American citizenship but who are as ignorant of things American as the mule.’”²⁹ At the end of the nineteenth century, most Americans supported both excluding people of Chinese origin from voting and from entering the country.³⁰ Provisions in state constitutions included language like the following, from California: “no native of China shall ever exercise the privileges of an elector in this State.”³¹ California’s constitution also prohibited from voting any “person who shall not be able to read the Constitution in the English language and write his name,” in response to the perception that foreign-born residents and Mexican Americans were immigrating in waves and forming a potential “ignorant foreign vote.”³²

Within the past two decades, these same patterns of restrictive lawmaking in response to political presence and mobilization have repeated in many parts of the country. In North Carolina, African American voter turnout surged during the presidential elections of 2008 and 2012: in 2000 the non-Hispanic white turnout rate was more than ten points higher than the African American participation rate, whereas in 2008, non-Hispanic white and African American voting rates were identical.³³ Legislators wrote a wide-ranging package of restrictions on voting, famously deemed by a panel of federal judges to have targeted black voters “with almost surgical precision,”³⁴ in the wake of the *Shelby County* decision and with the mobilization of the state’s black voting community fresh in their memory; the package was ultimately held to be intentionally discriminatory against African American voters.³⁵

Latino and Asian American voters have been historically stereotyped as foreigners,³⁶ regardless of their citizenship status. Where Latino and Asian American communities have grown most dramatically, anti-immigrant measures have

²⁹ *Id.* at 99.

³⁰ *Id.* at 113.

³¹ *Id.* at 114.

³² *Id.* at 117.

³³ Census Bureau, Current Population Survey, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race, and Hispanic Origin, for States: November 2000 (Table 4a), <https://www.census.gov/data/tables/2000/demo/voting-and-registration/p20-542.html>; Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008 (Table 4b), <https://www.census.gov/data/tables/2008/demo/voting-and-registration/p20-562-rv.html>.

³⁴ *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

³⁵ Sarah Childress, “Court: North Carolina Voter ID Law Targeted Black Voters,” FRONTLINE (July 29, 2016), <https://www.pbs.org/wgbh/frontline/article/court-north-carolina-voter-id-law-targeted-black-voters/>.

³⁶ For example, a Latino Decisions poll conducted for the National Hispanic Media Coalition found that non-Hispanic whites overestimated the percentages of U.S. Latinos who are immigrants, and who are undocumented. National Hispanic Media Coalition and Latino Decisions, *The Impact of Media Stereotypes on Opinions and Attitudes Towards Latinos 2* (September 2012), <http://www.nhmc.org/sites/default/files/LD%20NHMC%20Poll%20Results%20Sept.2012.pdf>.

followed to mitigate the perceived socio-political threat to historical white majorities.³⁷

For example, Prince William County, Virginia, made headlines when its Board of County Supervisors adopted a resolution in 2007 to mandate local officials' active participation in immigration enforcement activities and to exclude people with immigrant origins from accessing public services and benefits. Lawmakers hoped to discourage at least some immigrant settlement generally; then-Board chair Corey Stewart commented, "We are ground zero in this debate on immigration. We've got a responsibility to do it right."³⁸ At the time, Latino and Asian American populations in the county were increasing rapidly; according to Census data, the County's Latino population grew 229.7 percent and its Asian population grew 201.9 percent between 2000 and 2012. During that same period, the non-Hispanic white population increased by only 41.2 percent.³⁹ The County's new residents were either citizens or potential future voters, and in spite of officials' efforts to make the jurisdiction less welcoming and attractive to families from underrepresented communities, they have already changed the face of politics in Prince William County. In November 2017 the County's voters elected two of the first Latinas ever to serve in the Virginia House of Delegates, Elizabeth Guzman and Hala Ayala.

State and federal officials that represent rapidly growing Latino and Asian American constituencies have advocated similar legislation just as emerging communities in their jurisdictions have gained visibility and political attention. Between the 2000 and 2010 Censuses, Alabama's Latino population increased by more than 144 percent,⁴⁰ and in 2011, the state enacted H.B. 56, considered one of the harshest immigration enforcement laws in the country at the time. The law would have required immigration status checks during property rental and other commercial transactions, involved schools in investigating students and their families, and explicitly created a new barrier to voting by mandating that newly registering voters present documentation of their citizenship. That same year, Alabama also adopted a strict voter identification requirement.

³⁷ Audrey Singer, Jill H. Wilson, and Brooke DeRenzis, Metropolitan Policy Program at Brookings, *Immigrants, Politics, and Local Response in Suburban Washington* (February 2009),

https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf.

³⁸ Ian Urbina and Maria Newman, "Virginia County Votes to Deny Services to Illegal Immigrants," N.Y. TIMES (October 17, 2007), <https://www.nytimes.com/2007/10/17/us/17prison-cnd.html>.

³⁹ Prince William County, "The Prince William Report: Prince William County Demographic and Economic Newsletter" (January – March 2014), <https://www.pwcgov.org/government/dept/doit/gis/Documents/demographics/Prince%20William%20Report%202014%201st%20Q.pdf>.

⁴⁰ Sharon R. Ennis, Merarys Rios-Vargas, and Nora G. Albert, Census Bureau, *The Hispanic Population: 2010*, Doc. C2010BR-04 (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> [hereinafter "The Hispanic Population"].

In other states that experienced similar dramatic demographic change, including Georgia and South Carolina, legislative efforts to deny U.S. citizenship to American-born children of undocumented immigrants arose in lockstep with the increasing presence of Latino and Asian American communities:⁴¹ South Carolina's Latino population was the fastest-growing in the nation between 2000 and 2010, and by 2010, Georgia's Latino population was the tenth-largest in the country.⁴² Members of Congress from many of these same states have championed federal legislation to enact a birthright citizenship restriction; in the 116th Congress, the Birthright Citizenship Act of 2019, H.R. 140, has multiple co-sponsors from the Georgia, North Carolina, Texas, Florida, and South Carolina Congressional delegations.

These are some examples of discriminatory lawmaking that has played out in jurisdictions with growing and/or changing minority populations.

Restoring and Strengthening the Preclearance Structure

Recent evidence of continued voter discrimination makes clear that Section 5 is as needed today as it was in 1965. Voters of color continue to experience discrimination at every stage in the voting process, from registration to changes in election systems and districts. Chief Justice Roberts himself recognized that "voting discrimination still exists; no one doubts that" in the majority opinion in *Shelby County*.⁴³ Given the efficacy of Section 5 and the ongoing and escalating challenges to minority voting rights, Congress must enact a substitute coverage formula that takes account of recent historical experience to ensure that modern, repeat voting rights violators preclear their voting changes prior to implementation.

At the same time, our nation's most rapidly growing racial, ethnic, and language-minority communities are present today in cities and states in which they did not have a significant presence in the past. If preclearance reaches only places where discrimination has been observed and sanctioned in the past, this invaluable tool will neglect the needs of emerging populations that are only just beginning to experience discrimination inspired by their growing visibility. Thus, a legislative response to the *Shelby County* decision must include not only a new geographic coverage formula for Section 5, but a complementary provision that targets the

⁴¹ See Shankar Vedantam, "State Lawmakers Taking Aim at Amendment Granting Birthright Citizenship," WASHINGTON POST (Jan. 5, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/05/AR2011010503134.html>; *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding Fourteenth Amendment grants U.S. citizenship to native-born children of alien parents).

⁴² Pew Research Center Fact Sheet, "Latinos in the 2010 Elections: Georgia" (October 15, 2010), <https://www.pewresearch.org/hispanic/2010/10/15/latinos-in-the-2010-elections-georgia/>; The Hispanic Population, *supra* n. 40.

⁴³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

known practices policymakers have repeatedly used to silence growing minority electorates.

History shows that jurisdictions favor use of certain practices that have proven to be effective in voter suppression order to diminish the insurgent political threat posed by fast-growing or fast-mobilizing minority groups. Practice-based preclearance, or known practices coverage, narrowly focuses administrative or judicial review on these suspect practices that are most likely to be tainted by discriminatory intent or to have a discriminatory effect, as demonstrated by broad historical experience, including more than fifty years of VRA-based litigation. For example, known discriminatory practices involving methods of election, redistricting, annexations, polling place relocations, and interference with language assistance accounted for less than half of practices for which preclearance was sought between 1990 and 2012, but nearly two-thirds of preclearance denials between 1990 and 2013.⁴⁴

A known practices coverage formula would require review of certain voting-related changes—performed by either the DOJ or the federal District Court in Washington, DC—prior to implementation of that change and would extend to any jurisdiction across the country that is home to a racially, ethnically, and/or linguistically diverse population and is seeking to adopt a covered practice. Diverse jurisdictions covered by the Voting Rights Advancement Act of 2019’s practice-based preclearance provisions are states and political subdivisions in which two or more racial, ethnic, or language-minority groups each represent 20 percent or more of the voting-age population or in which a single language-minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. According to the 2013-2017 American Community Survey 5-year estimates, 15 states in whole, the District of Columbia, and 801 counties or county equivalents across the country (making up 25.9 percent of all counties in the country) currently satisfy this threshold qualification.⁴⁵ This represents 6.9 percent of all counties in the Northeast portion of the country, 4.6 percent of all counties in the Midwest, 42 percent of all counties in the South, and 31.3 percent of all counties in the West. These jurisdictions would not be required to preclear all their voting changes. They would preclear only the practices identified in law as having been the most frequently and fundamentally discriminatory on the basis of their shown historical use to silence the political voices of communities of color. This mechanism ensures that practice-based preclearance is narrowly-tailored.

⁴⁴ Based on authors’ original analysis of Lawyers Committee for Civil Rights Under Law’s database of objections to preclearance submissions, and records of the Department of Justice’s Voting Section in the Civil Rights Division.

⁴⁵ Based on authors’ original analysis of Census Bureau data, available in custom format at <https://data.census.gov/cedsci/> and <https://dataferrett.census.gov/>.

Known Practices as Proven Tactics to Discriminate in Voting

The Voting Rights Advancement Act of 2019, H.R. 4, would require preclearance of six different voting changes most likely to discriminatorily affect access to the vote in diverse jurisdictions whose minority populations are attaining visibility and influence.

Two separate analyses of voting discrimination have found that these known practices occur with great frequency in the modern era. One study conducted by Professor Morgan Kousser compiled instances of Section 2 cases where plaintiffs prevailed, objections under Section 5 and More Information Requests that resulted in changes in voting practices, challenges under the Fourteenth or Fifteenth Amendments where plaintiffs prevailed, Section 203 and 208 cases under the VRA where plaintiffs prevailed, cases based on a failure to make a Section 5 submission, and settlements and consent decrees under Section 2 or any other provisions that were favorable to minority voters, from 1957 to present where one of the known practices was implicated. The other study, conducted by the authors of this report, looked at all Section 5 objections and a developing set of Section 2 cases resulting in a decision or favorable settlement for plaintiffs since 1982, drawing in part on the work of Professor Ellen Katz and the University of Michigan Law School's Voting Rights Initiative, and the Lawyers Committee for Civil Rights Under Law. In both instances, the studies showed that known practices predominated among confirmed violations, and were repeatedly and consistently problematic. We describe the history and effects of those known practices below.

Changes in Method of Election That Entrench Majority Dominance

Lawmakers have a long, established history of manipulating methods of election to dilute the voting power of disfavored minority populations. "Method of election" refers to the system for electing members of a body and may include features affecting the size and composition of the electorate that votes for a given seat, the timing of election for certain seats, and the number or percentage of votes required to win an election. By manipulating these features, policymakers can ensure that even where voters of color are able to cast their ballots, the strength of their votes is diminished. Discriminatory methods of election artificially construct seats, districts, or staggered elections in which white voters are likely to outvote voters of color, in jurisdictions in which voters of color and white voters generally vote for opposing candidates. In so doing, manipulations of methods of election threaten the basic guarantee that each vote counts equally.⁴⁶

⁴⁶ NAACP Legal Defense and Educational Fund, Asian American Justice Center, and Mexican American Legal Defense and Educational Fund, *The Impact of Redistricting in YOUR Community* 14-19 (2010), <https://www.maldef.org/wp-content/uploads/2019/01/redistricting.pdf>.

The Discriminatory Intent and Effect of Changes in Method of Election

There are a wealth of confirmed Section 2 violations involving, and Section 5 objections to, changes in method of election that indicate that they are a tactic used to react in opposition to the perceived threat of a non-white voting bloc by minimizing the value of that community's voting power. Their potential to effectively prevent minority voters from electing representatives in fair proportion to their share of population is not only intuitive, but it is proven in practice where there are sizeable minority populations that have not yet reached the status of being a majority. Changing the method of election for particular seats is most often a neutral act on its face, and likely became popular because its discriminatory effects, or its discriminatory intent, may not always be immediately apparent.

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

At-large and multi-member elections for local office gained popularity just as the successes of Reconstruction motivated white majorities to seek more creative barriers for voters of color. Congress took a definitive step away from at-large elections as early as 1842 when, in view of the benefits of uniformity and of giving voice to more members of the electorate, it adopted the Apportionment Act of 1842 and mandated that Representatives be elected from discrete single-member districts.⁴⁷ Many states followed suit. Nonetheless, after the Civil War, municipalities in the South began to adopt at-large election systems to ensure that even if and where voters of color overcame hurdles to registering and voting, the weight of their votes could be cabined and limited.

One classic example of the perniciousness of at-large systems is what is known as the "Galveston plan." In the 1890s in Galveston, Texas, the city adopted a five-seat city council elected entirely at-large, resulting in the election of an all-white city council

⁴⁷ United States House of Representatives, "Whereas: Stories from the People's House" (April 16, 2019), <https://history.house.gov/Blog/2019/April/4-16-Apportionment-1/>.

to represent a town that was then 22 percent African American.⁴⁸ Even after the advent of the VRA, at-large elections remained disproportionately popular in jurisdictions whose discriminatory inclinations were well-established. In 1968, all but six of Texas's 185 home-rule cities elected city councilmembers at-large.⁴⁹ In 1976, 75 percent of southern cities with a population of at least 25,000 were still conducting at-large city council elections, compared to just 47 percent of cities elsewhere around the country.⁵⁰

The history of discriminatory use of changes in method of election is extensive and ongoing.⁵¹ For example, in *Dillard v. Crenshaw County*, 640 F. Supp. 1347 (M.D. Ala. 1986), the district court found that "in the 1960s the State of Alabama enacted numbered-place laws with the specific intent of making local at-large systems, including those used in county commissioner elections, more effective and efficient tools for keeping black voters from electing black candidates," consistent with the State's track record of limiting the influence of African American voters during that time period.⁵² The district court found that hundreds of Alabama's jurisdictions continued to intentionally employ at-large elections to discriminate against African American voters. As recently as September 2019, citizens challenged Mississippi's two-tiered system for winning statewide office, which requires candidates to win both the popular vote and a majority of the state's 122 House districts.⁵³ Under this scheme, no African American has held statewide office in Mississippi since Reconstruction.

The timing of changes in method of election is also often suspect.⁵⁴ For instance, in the immediate aftermath of the passage of the VRA, Mississippi amended state law to empower each county board of supervisors to adopt at-large elections, in place of

⁴⁸ Chandler Davidson and George Korbel, "At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence," 43 *The Journal of Politics* 982, 989-990 (November 1981).

⁴⁹ Philip W. Barnes, "Alternative Methods of Electing City Council in Texas Home Rule Cities," 16 *Public Affairs Comment* 1 (May 1970).

⁵⁰ Albert K. Karnig, "Black Representation on City Councils," 12 *Urban Affairs Quarterly* 235 (December 1976).

⁵¹ E.g., J. Morgan Kousser, "Protecting the Right to Vote," LOS ANGELES TIMES (September 28, 2012), <https://www.latimes.com/opinion/la-xpm-2012-sep-28-la-oe-kousser-voter-id-20120928-story.html> [hereinafter "Protecting the Right to Vote"]; cf. Ellen Katz with Margaret Aisenbrey, Anna Baldwin, Emma Cheuse, and Anna Weisbrodt, Voting Rights Initiative of the University of Michigan Law School, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (December 2005), https://www.law.berkeley.edu/files/katz_discrimination_in_voting.pdf; Philip P. Frickey, "Majority Rule, Minority Rights, and the Right to Vote: Reflections upon a Reading of Minority Vote Dilution," 3 *Law & Inequality: A Journal of Theory and Practice* 209, 228-230 (1985).

⁵² *Dillard*, 640 F. Supp. at 1356.

⁵³ *McLemore v. Hosemann*, No. 3:19-cv-00383-DPJ-FKB (filed 5/30/19), <https://www.documentcloud.org/documents/6102478-Mississippi-Elections-Lawsuit.html>.

⁵⁴ Protecting the Right to Vote, *supra* n.51.

the previous electoral scheme dictated by law of five single-member districts.⁵⁵ The Supreme Court struck down Mississippi's changes in *Allen v. Board of Elections*, 393 U.S. 544 (1969). In its decision, the Supreme Court stated, "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of race."

The long and widely-recognized history of manipulation of methods of election as a means of diluting votes has confirmed this tactic's effectiveness, and supports an inference that jurisdictions that employ these tools seek to intentionally limit the growing political voices of minority voting groups. For instance, in 1991, the DOJ issued an objection to a proposal by Refugio Independent School District in Refugio County, Texas, to elect its school board members using a structure of two at-large seats and five single-member districts. The School District had made a previously unsuccessful attempt to implement the plan that the DOJ had also blocked.⁵⁶ Similarly, in 2001, the Haskell Consolidated Independent School District in Texas unsuccessfully sought permission to convert from a single-member district to an at-large electoral system. Its request came less than a decade after the jurisdiction had settled VRA litigation that challenged the previous use of at-large elections and agreed to implement single-member districts that ensured electoral opportunities for Latino voters.⁵⁷ That jurisdictions adopt methods of elections with direct awareness of how they disadvantage minority communities demonstrates the persistence of intentional efforts to dilute minority voting power across the country.

Inversely, the disuse of at-large and multi-member elections and other methods of election that promote majority rule in favor of discrete districts has proven its worth as a means of ensuring that every vote carries equal weight. Scholarly work that studied the effect of the VRA in the South "demonstrate[d] that the substantial increases in minority representation since 1970 are due primarily to the elimination of at-large elections and other devices that can dilute minority voting strength."⁵⁸

⁵⁵ Morgan Kousser, "Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law," 27 *University of San Francisco Law Review* 551, 558 (November 1993).

⁵⁶ Department of Justice, Letter to Judy Underwood, Esq., April 22, 1991, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2340.pdf>.

⁵⁷ Department of Justice, Letter to Cheryl T. Mehl, September 24, 2001, <https://www.justice.gov/crt-0>.

⁵⁸ Peyton McCrary, "Bringing Equality to Power: How the Federal Courts Transformed the Electoral Power of the South, 1960-1990," 5 *University of Pennsylvania Journal of Constitutional Law* 665, 669 (2003).

*Discriminatory Changes in Method of Election in Practice*Florida

In 1992, Osceola County, Florida voters passed a charter amendment by referendum to adopt single-member districts to replace its at-large electoral system. As a result, Osceola County elected its first Hispanic county commissioner in 1996. But during the same time, Osceola County's demographics were dramatically changing. In 1980 Latinos made up only 2 percent of the total population, whereas by 2000, Hispanics made up almost 30 percent of the total population.⁵⁹ There was widespread understanding among Commissioners serving in the mid-90s that these changes in the County's population would give Hispanic voters the opportunity to elect candidates of their choice in one or more single-member districts.⁶⁰

It was in this context that the County began moving almost immediately to review the switch to single-member districts. Officials established a Charter Review Advisory Commission in 1995, composed of only non-Hispanic whites, and tasked it with considering a potential return to at-large elections. The Charter Review Advisory Commission recommend a switch back to at-large elections, with very little public input, and the Board decided to accept the recommendation and pose the issue to voters via referendum. The County held single-member district elections in 1996, and elected the first Hispanic to the County Board, but on the same ballot voters also approved the referendum to switch back to at-large elections. The successful Hispanic candidate, Robert Guevara, won in spite of a campaign marked by racial overtures. His opponent "sent a campaign mailer that depicted Guevara with darker skin and portrayed him as 'Night' and Owens as 'Day,'"⁶¹ and candidates warned that residents would not "want Osceola to turn into another Miami."⁶²

The DOJ sued the County in 2002, and alleged violations of Sections 2 and 208 of the VRA, because that County had also failed to ensure adequate language assistance for its Spanish-speaking voters. The district court held that the County's switch back to at-large elections had a discriminatory effect on Hispanic voters and was thus in violation of Section 2 of the VRA. Before ruling on the merits, the district court noted in its decision to grant the federal governments' motion for a preliminary injunction that there was "considerable evidence to suggest that defendant's institution and maintenance of an at-large voting system was motivated by a desire to dilute the vote of an emerging Hispanic population." The Court found that the County's

⁵⁹ *United States v. Osceola County, Florida*, 475 F. Supp. 2d 1220, 1222 (M.D. Fla. 2006).

⁶⁰ Complaint, *United States v. Osceola County, Florida*, No. 6:05-cv-1053-ORL-3IDAB (M.D. Fla. 2006), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/osceola2_comp_0.pdf.

⁶¹ *Osceola County*, 475 F. Supp. 2d at 1222.

⁶² *Id.*

articulated concerns about parochialism under a single-member system “ring[] hollow” and instead were a “rationalization or pretext under the circumstances for diluting the Hispanic vote in Osceola County.”⁶³ This incident illustrates how and why jurisdictions not covered by Section 5 have moved toward at-large elections just when demographics shifted enough to enable cohesive minority populations to elect candidates of choice.

South Dakota⁶⁴

In 1991, the South Dakota legislature created a new district, District 28, which would elect two state representatives from discrete single-member districts in order to protect minority voting rights; by contrast, in every other state legislative district, voters were to elect one state Senator and two state Representatives at-large.⁶⁵ House District 28A, which included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation, was comprised of 60 percent American Indians of voting-age. Five years later, however, the legislature changed the method of election for this area by abolishing House Districts 28A and 28B and required candidates to run at-large in District 28, after an American Indian candidate won the Democratic primary in District 28A in 1994. The reconstituted House District 28 had an American Indian voting-age population of only 29 percent.

Plaintiffs challenged the change under Section 2 of the VRA, but the courts did not rule on their claim because, in the interim, the South Dakota Supreme Court held that the Legislature exceeded its constitutional authority when it enacted the 1996 redistricting plan that abolished the single-member districts in question. The Court therefore declared the 1996 plan null and void. During trial on the VRA claim, expert analysis of the six legislative contests between 1992-1994 involving American Indian and non-American Indian candidates in District 28 held under the 1991 plan showed American Indian voters favored the American Indian candidates at an average rate of 81 percent, while whites voted for the white candidates at an average rate of 93 percent. In all six of the contests the candidate preferred by American Indians was defeated. After the preexisting 1991 plan was reinstated, the first Native American in history was elected to South Dakota’s state house from the Cheyenne River Sioux Indian Reservation during the ensuing special election for District 28A.

⁶³ Decision on Motion for Preliminary Injunction, *United States v. Osceola County, Florida*, No. 6:05-cv-1053-ORL-31DAB (M.D. Fla. June 26, 2006) (transcript of bench order on file with authors).

⁶⁴ Sells Testimony, *supra* n.27.

⁶⁵ *Id.*

Texas

In June 2013, just three weeks after the *Shelby County* decision, Mayor Johnny Isbell of Pasadena, Texas announced a plan to change the method of electing members to the city council, from eight members elected from districts, to a council with six district representatives and two seats elected at-large. He said at the time, the “Justice Department can no longer tell us what to do.”⁶⁶ Incumbents in Pasadena were facing increasing opposition from the growing Latino electorate, which accounted for about a third of the voters in the city, but more than half of the city’s total population.⁶⁷ The change proposed by the Mayor, which was approved by city voters, would have forestalled election of a majority of Latino-preferred city councilmembers, because elections in Pasadena were characterized by racially polarized voting and the city’s white population would effectively control the outcome of elections for the at-large seats.

Plaintiffs challenged the change under the VRA. In a ruling on the merits for plaintiffs, a federal judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to accomplish that aim. The district court stated, “The intent was to delay the day when Latinos would make up enough of Pasadena’s voters to have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats. Recent population shifts and growth in Latino citizen voting-age and Spanish-surnamed registered voter population made it clear that this power shift was about to occur.”⁶⁸ Among pertinent facts that surfaced at trial, it emerged that a city official associated with Mayor Isbell instructed a vendor developing a targeted mailing list for a mailer urging support for the switch to the at-large plan to “pull out the Hispanic names” from that list. The district court issued a “bail-in” order, requiring Pasadena to preclear future voting changes. This was the first time a court issued a contested order requiring a jurisdiction to be subject to federal preclearance after the *Shelby County* decision.

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

⁶⁶ SCOTUS Blog, “After Shelby County,” (November 6, 2013), <https://www.scotusblog.com/media/after-shelby-county/>.

⁶⁷ Ana Campoy and Nathan Koppel, “Voting Rights Fights Crop Up,” WALL STREET JOURNAL (November 1, 2013), <http://online.wsj.com/news/articles/SB10001424052702303843104579169900109920052>; Editorial, “Plans to Redistrict Pasadena City Council,” HOUSTON CHRONICLE (August 15, 2013), <http://www.chron.com/opinion/editorials/article/Plans-to-redistrict-Pasadena-City-Council-4736602.php>.

⁶⁸ *Patino v. Pasadena*, 230 F. Supp.3d 667, 725 (S.D. Tex. 2017).

aftermath of *Shelby County*, this intentionally discriminatory manipulation of elections went into immediate effect. Pasadena only settled the case, dropped its appeal of the district court's findings, and agreed to submit its voting changes for preclearance until 2023 after costly and protracted private litigation.⁶⁹

The Known Practice of Changing Methods of Election to Dilute Minority Voting Strength

The Voting Rights Advancement Act would require jurisdictions with diverse electorates to obtain preclearance of any proposal to add or replace one or more single-member districts with one or more at-large or multi-member seats on a governing body. The law would focus scrutiny on changes to methods of election that lawmakers and administrators propose for jurisdictions with sizable minority populations. In these locations, racial bloc voting often occurs, and electoral schemes that favor majorities are likely to negatively affect cohesive minority communities. We find that at least 329 laws or proposals that would have changed the method of a jurisdiction's election system have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982.⁷⁰ Since 1957, according to Professor Kousser's research, there have been at least 1,753 total actions successfully overturning a discriminatory change in method of election, and most of these occurred between 1982 and the present.⁷¹ For example, more than 80 percent of discriminatory at-large election schemes catalogued by Professor Kousser were adopted since 1982.

California adopted the California Voting Rights Act in 2001 to streamline challenges alleging vote dilution where there is an at-large election and racially polarized

⁶⁹ Ernest I. Herrera, Mexican American Legal Defense and Educational Fund, Written Testimony Submitted in Connection with Oversight Hearing of the House Judiciary Committee on Enforcement of the Voting Rights Act in Texas 5-6, May 3, 2019, <https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRG-116-JU10-Wstate-HerreraE-20190503.pdf>.

⁷⁰ This and subsequent citations to the authors' research are based on the authors' review of all Section 5 objections and a developing set of Section 2 cases resulting in a decision or favorable settlement for plaintiffs since 1982, drawing in part on the work of Professor Ellen Katz and the University of Michigan Law School's Voting Rights Initiative, and the Lawyers Committee for Civil Rights Under Law. For the purposes of this report, instances of discriminatory method of election practices include the use of at-large voting systems, majority vote requirements, numbered post requirements, and staggered terms.

⁷¹ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors. Note also that the prevalence of known practices among successful VRA and constitutional actions is an important, but not exclusive, indicator of the frequency of their use during any given period of time. Factors determinative of the historical numbers we report here include loss of preclearance coverage in 2013 and resulting dramatic decline in awareness of and capacity to challenge discriminatory use of known practices; and lawmakers' increasing appreciation of the VRA's effectiveness over the course of its lifespan, which caused many to involuntarily alter their behavior.

voting.⁷² The law has served as a beneficial deterrent to the maintenance of at-large systems as local demographics change, and a complement to the VRA. Dozens of jurisdictions throughout the state have switched their long-standing at-large systems to district elections, and have done so absent litigation. Recently, Asian American voters successfully challenged the use of at-large elections in Santa Clara, California's city elections.⁷³ The CVRA demonstrates the gains possible under a federal formula that promotes quick and cost-efficient resolution of problematic at-large systems in demographically changing jurisdictions. Research shows that under the CVRA, "[a]t least 389 local school boards, city councils, community college boards, hospital or water districts have at least begun the process of ending at-large elections."⁷⁴ Furthermore, these conversions under the CVRA to end local at-large systems are in jurisdictions that might later attempt to revert to an at-large system in whole or in part. A preclearance requirement for this type of action would serve as a deterrent against a switch designed to dilute the vote of minority citizens, and would prevent discriminatory reversions to at-large systems in those jurisdictions.

Redistricting After Significant Demographic Change

Redistricting is the process by which census data are used to periodically redraw the boundaries of electoral districts within a state. Redistricting takes place every ten years, soon after jurisdictions receive population data from the decennial census. This process affects districts at all levels of government — from local school boards and city councils to state legislatures and the United States House of Representatives. How districts are drawn often determines whether a community can elect representatives of choice. Redistricting also influences elected officials' responsiveness to constituents' needs.

In the 1960s, the Supreme Court established the "one person, one vote" rule, one of the most basic principles of redistricting. This principle requires that legislative and congressional districts be of equal population: the Supreme Court has held that state and local legislative districts' populations can differ by no more than ten percent, unless justified by some "rational state policy."⁷⁵ However, congressional districts must be virtually equal in population, unless justified by some "legitimate

⁷² *E.g.*, Lawyers Committee for Civil Rights of the San Francisco Bay Area, "The California Voting Rights Act: Fact Sheet (Spring 2014), https://www.lccr.com/wp-content/uploads/2014_CVRA_Fact_Sheet.pdf.

⁷³ CBS San Francisco Bay Area, "Santa Clara Splits Districts After Lawsuit Proves At-Large Voting Hurt Asian Candidates" (July 24, 2018), <https://sanfrancisco.cbslocal.com/2018/07/24/santa-clara-splits-districts-after-lawsuit-proves-at-large-voting-hurt-asian-candidates/>.

⁷⁴ Morgan Kousser, California Institute of Technology, Written Testimony Submitted in Connection with a Hearing of the House Judiciary Committee on Legislative Proposals to Strengthen the Voting Rights Act, October 17, 2019, <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>.

⁷⁵ See *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

state objective.”⁷⁶ The starting point for redrawing a district, therefore, is to determine its “ideal” population. For a single-member district plan, the “ideal” population is equal to the total population of the jurisdiction divided by the total number of districts. Any amount less or greater than this number is called a “deviation.” The law allows for some deviations in state and local redistricting plans, but when redrawing congressional plans, drawers must strive for the “ideal” population.

Like changes to methods of election, redistricting changes can alter the voting strength of voters of color, without directly preventing those voters from casting ballots. Legislators and their advisors have often created redistricting plans with relatively little public involvement or engagement. For most residents in jurisdictions, the details and effects of district plans are not easy to decode. The indirect and obscure nature of redistricting enhances the odds that the process will be used to limit the influence of emerging communities. In addition, the practical necessity of regular redistricting to ensure representation based on population change has contributed to the rise of a long and prolific history of intentional design of electoral districts to reduce underrepresented communities’ opportunities to elect candidates of choice.

The Discriminatory Intent and Effect of Redistricting After Significant Demographic Change

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

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

⁷⁶ See *Karcher v. Daggett*, 462 U.S. 725 (1983).

Policymakers have designed and adopted redistricting plans with explicit reference to and implicit understanding of their potential negative effects on historically underrepresented communities. As former member of the U.S. Commission on Civil Rights Abigail Thernstrom once wrote, “[Southern politicians] realized that while it had become nearly impossible to limit black voters’ access to the ballot box, it was still possible to limit the power of the votes they cast. And in the years immediately following the enactment of the Voting Rights Act, a growing number of southern jurisdictions...reconfigured state legislative districts...in an effort to reduce the effect of the newly surging black vote and to maintain white supremacy.”⁷⁷ Over the past decade, redistricting for racial ends continued. Recent reports revealed that deceased redistricting consultant Thomas Hofeller advised state legislatures in North Carolina, Texas, Missouri, Virginia, and elsewhere, and used race as a primary factor to design maps that would limit the influence of minority communities.⁷⁸ In another contemporary incident, former Member of Congress Mel Watt testified in a lawsuit concerning post-2011 redistricting in North Carolina that a mapmaker told him that he was drawing boundaries to create a district with a designated percentage of its electorate from a minority community; Congressman Watt’s testimony helped the Supreme Court conclude that the resulting plan was unconstitutional.⁷⁹

When lawmakers have adopted redistricting plans in order to limit minority voters’ influence just as they are poised to exercise it, they have frequently failed to justify their decision-making in race-neutral terms. Some reviewing courts have described these plans as bearing “uncomfortable resemblance to political apartheid”⁸⁰ and “extreme and bizarre.”⁸¹ Discriminatory redistricting plans that restrain emerging communities’ political influence create obvious mismatches between the preferences of the electorate and the officials who represent them, where minority community members’ preferences depart from those expressed by white majorities.

The historical record is full of examples of proposed redistricting plans that limit the political voice and voting strength of emerging communities. For example, South

⁷⁷ Abigail Thernstrom, “Redistricting, Race, and the Voting Rights Act,” NATIONAL AFFAIRS (Spring 2010), <https://www.nationalaffairs.com/publications/detail/redistricting-race-and-the-voting-rights-act>.

⁷⁸ E.g., David Daley, “GOP Racial Gerrymandering Mastermind Participated in Redistricting in More States Than Previously Known, Files Reveal,” THE INTERCEPT (September 23, 2019), <https://theintercept.com/2019/09/23/gerrymandering-gop-west-virginia-florida-alabama/>.

⁷⁹ Daniel Tokaji, “Restricting Race-Conscious Redistricting,” THE REGULATORY REVIEW (July 31, 2017), <https://www.theregview.org/2017/07/31/tokaji-restricting-race-conscious-redistricting/>; *Cooper v. Harris*, 581 U.S. ____ (2017).

⁸⁰ Nina Totenberg, “Questions of Race and Redistricting Return to the Supreme Court,” NPR MORNING EDITION (December 5, 2016), <https://www.npr.org/2016/12/05/504188630/questions-of-race-and-redistricting-return-to-the-supreme-court>.

⁸¹ *Bush v. Vera*, 517 U.S. 952, 971 (1996).

Dakota's statewide redistricting plan packed one district with 90 percent American Indians next to a district with 30 percent American Indians.⁸² In a 1991 example of "cracking," the community in Los Angeles's Koreatown, covering an area just over a square mile in size, was split into four city council districts and split into five different state assembly districts.⁸³ This fracturing was patently problematic after the 1992 riots in Los Angeles, during which an estimated \$1 billion in damages occurred, concentrated mainly on businesses operated by Koreans and other Asian immigrants in Koreatown. As a result of being divided among different districts, residents were unable to influence their representatives to respond adequately to the collective needs in Koreatown.

Discriminatory Redistricting in Action

California

The Kern County, California Board of Supervisors adopted a redistricting plan in 2011 for its five-district county plan based on 2010 U.S. Census data. The plan contained one district – District 5 – where Latinos constituted a majority of the eligible voters, but divided another politically cohesive Latino community in the northern part of Kern County into two supervisorial districts, neither one of which had sufficient Latino population to enable Latino voters to elect a candidate of their choice. In 2016, Latino residents sued, arguing that the plan violated Section 2 of the VRA.⁸⁴

During trial, the County contended that historical KKK activity in Kern County was nothing more than "morality policing" as opposed to the white-supremacist activity it was. Finding this and other arguments in defense unavailing, the District Court held in February 2018 that the redistricting plan violated Section 2 of the VRA because it unlawfully fractured a large cohesive Latino community, dividing their votes across two districts and thereby diluting Latino voters' ability to participate effectively in the political process.⁸⁵ After negotiations, a remedial plan was put in place that added a second Latino-majority district in Kern County, allowing Latino voters to finally have their votes counted equally.

⁸² *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

⁸³ Terry Ao Minnis, "Asian Americans & Redistricting: The Emerging Voice," 13 *Journal of Law in Society* 23, 25-26 (2011).

⁸⁴ Complaint, *Luna v. County of Kern*, No. 1:16-cv-00568-DAD-JLT (E.D. Cal. 2018), <http://www.maldef.org/assets/pdf/2016-04-22-Complaint.pdf>.

⁸⁵ *Id.*

Texas

In 2011, as Texas undertook redistricting for Congressional and state legislative seats, the state's rapid Latino population growth resulted in gain of four additional seats in Congress. Yet the new district map ultimately approved by the Texas Legislature failed to create even one new district in which Latino or other minority voters were likely to have the opportunity to elect a candidate of their choice. A three-judge federal district court reviewing the plan found clear evidence that the map was enacted with the intent to discriminate against Latinos and African Americans, pointing to email messages between legislative staff that revealed a plot to move important landmarks and active voting minority communities away from districts in which minority voters were previously able to exert notable influence.⁸⁶ About 60 percent of Dallas County districts for the Texas House would have contained white majorities even though white voters only constituted about one-third of the County's electorate; districts themselves appeared "jagged [and] bizarrely shaped."⁸⁷ "The only explanation Texas offers for this pattern is 'coincidence', but if this was coincidence, it was a striking one indeed," U.S. Circuit Judge Thomas B Griffith noted.⁸⁸

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

⁸⁶ Memorandum Opinion, *Texas v. United States*, No. 11-1303 (TBG-RMC-BAH) (D. D.C. 2012), <http://electionlawblog.org/wp-content/uploads/texas-redistricting-district-court.pdf>.

⁸⁷ Jose Garza, Mexican American Legislative Caucus, Texas House of Representatives, Written Testimony Submitted in Connection with Oversight Hearing of the House Judiciary Committee on Enforcement of the Voting Rights Act in Texas 10, May 3, 2019, <https://docs.house.gov/meetings/JU/JU10/20190503/109387/HHRC-116-JU10-Wstate-Garza-20190503.pdf>.

⁸⁸ Robert Barnes, "Texas redistricting discriminates against minorities, federal court says," WASHINGTON POST (August 28, 2012), https://www.washingtonpost.com/politics/texas-redistricting-discriminates-against-minorities-federal-court-says/2012/08/28/f6e6a2e0-f156-11e1-892d-bc92fee603a7_story.html.

Virginia

As local officials in Pittsylvania County, Virginia undertook redistricting for the school board and board of supervisors after the 2000 Census, they were emerging from a decade during which the County's African American population – 23.7 percent of residents – had finally achieved ability to elect a candidate of their choice from just one of seven single-member districts used to elect school board members and county supervisors. This shift in power seemingly raised concerns in a community perhaps most famous for the Reconstruction-era “Danville Riot,” in which white and African American residents battled against each other in public after a multiracial coalition took control of the city council. In 2001, county officials proposed to reduce the African American voting-age population of the one opportunity district in the jurisdiction to less than 50 percent.⁸⁹

The circumstances surrounding the proposed redesign of Pittsylvania County's electoral districts exacerbated the opportunity for and likelihood of discrimination occurring. Racial polarization in voting in the County was extreme, and experts found that small differences in the composition of the electorate assigned to a district could sway election results.⁹⁰ As the County Board deliberated over its redistricting plan, moreover, it refused to consider or review alternate plans proposed by advocates for the County's African American community, and chose a retrogressive plan even though it was very aware that there were other possibilities that were similar but extended more political opportunity to underrepresented voters.⁹¹ Because the County unnecessarily, but knowingly, adopted a plan that would imperil mobilizing minority voters' opportunity to influence local politics, the DOJ determined that its officials purposefully discriminated through its redistricting process.

The Known Practice of Redistricting in Diverse Jurisdictions to Dilute Minority Voting Strength

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of redistricting plans that would be implemented when there has been significant recent growth of a racial, ethnic, or language-minority group, to ensure that redistricting does not result in vote dilution. Historical evidence indicates that in these conditions of racial or ethnic diversity, the redistricting process inherently poses the greatest likelihood of discriminatory effect and is most likely to be tainted

⁸⁹ Department of Justice, Letter to William D. Sleeper, County Administrator, and Fred M. Ingram, Board of Supervisors Chair, Pittsylvania County, April 29, 2002.

<https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1290.pdf>.

⁹⁰ *Id.*

⁹¹ *Id.*

with discriminatory intent. Protection against discriminatory redistricting plans is made necessary by the long history of use of redistricting to limit newly mobilized minority voters' opportunity to elect their candidate of choice; preclearance coverage would ensure that a voting change whose discriminatory history is tied to its secretive nature is subjected to greater public scrutiny.

According to our research, at least 389 redistricting plans have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. A review encompassing a broader range of matters found that since 1957 there have been 982 successful actions that overturned discriminatory redistricting proposals; a large majority of these occurred between 1982 and the present.⁹² Historical experience tells us that resolving these violations without litigation would be preferable for all parties. In December 2018, redistricting litigation in North Carolina had already cost \$5.6 million in taxpayer dollars.⁹³ The litigation related to Texas's redistricting scheme was also a multi-million dollar affair, ultimately paid by taxpayers for the discrimination of government officials.⁹⁴

Annexations and Deannexations That Reduce Minority Share of the Electorate

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

⁹² Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

⁹³ Taft Wireback, "North Carolina's redistricting cases cost taxpayers \$5.6 million and counting," GREENSBORO NEWS & RECORD (January 6, 2018), https://www.greensboro.com/news/local_news/north-carolina-s-redistricting-cases-cost-taxpayers-million-and-counting/article_7acfc513-e4fa-5f03-bcfd-499594dba6bd.html.

⁹⁴ By 2014, three years after its commencement, litigation concerning the Texas legislature's redistricting plan had already cost the state nearly \$4 million; litigation would continue for several additional years and reach as far as the Supreme Court, entailing very significant additional cost. Peggy Fikac and David Saleh Rauf, "Taxpayers' tab for redistricting battle nears \$4 million," HOUSTON CHRONICLE (August 9, 2014), <https://www.houstonchronicle.com/news/politics/texas/article/Taxpayers-tab-for-redistricting-battle-nears-4M-5677830.php>.

underrepresented Americans and cemented disparities in access to employment, education, and other important opportunities for social and economic mobility.

The Discriminatory Intent and Effect of Annexations and Deannexations

Civil rights laws' early successes inspired the use of tactics to covertly suppress the political voice of emerging communities, while enduring residential racial segregation and racially polarized voting have made it possible for annexations and deannexations to become a recurring method of vote dilution. The dissimilarity index, a measure of how many people would need to move to achieve perfect integration, has improved for American cities between 1970 and 2010, but it is still true that in the typical urban area, well more than half of black residents would have to move residences to undo racial segregation.⁹⁵ Patterns of similar voting by groups of people who share minority racial and ethnic backgrounds also persist nationally⁹⁶ and in discrete jurisdictions.⁹⁷ As a result of these phenomena, officials who perceive a political threat from cohesive populations of color are able to isolate those disfavored groups using geographic criteria, and boundary interventions with precision to achieve desired political results. Annexations have frequently been proposed for the purpose of diminishing the relative strength of minority communities.⁹⁸

Lawmakers pursuing discriminatory ends through annexation and deannexation have circumvented places with significant minority populations and gone to extraordinary lengths to add white neighborhoods to their numbers. For example, in 1972, Lake Providence, Louisiana's population was evenly divided between white and African American communities. Two nearby areas requested annexation by Lake Providence; one had a largely African American population while the other was majority white. Lake Providence incorporated the white area and rejected the request from the African American area, and its decisions left the town with an

⁹⁵ THE ECONOMIST, "Segregation in America," (April 4, 2018), <https://www.economist.com/graphic-detail/2018/04/04/segregation-in-america>.

⁹⁶ E.g., Zack Beauchamp, "The midterm elections revealed that America is in a cold civil war," Vox (November 7, 2018), <https://www.vox.com/midterm-elections/2018/11/7/18068486/midterm-election-2018-results-race-surburb>

⁹⁷ Philip Bump, "Mississippi's special election is taking place in one of the most racially polarized states in the country," WASHINGTON POST (November 23, 2018), <https://www.washingtonpost.com/politics/2018/11/23/mississippi-special-election-is-taking-place-one-most-racially-polarized-states-country/>.

⁹⁸ Nina Perales, Mexican American Legal Defense and Educational Fund, Testimony before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights Regarding Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry 24, July 13, 2006, <https://www.judiciary.senate.gov/imo/media/doc/7-13-06ninaperales.pdf>.

electorate featuring a secure white majority.⁹⁹ Similarly, in 1986, officials in Augusta, Georgia adopted a policy of rejecting annexations that would alter its racial makeup, and in furtherance of it, conducted community surveys in an effort to identify majority white areas for potential annexation.¹⁰⁰

Discriminatory annexation plans often defy logic, or are adopted by proponents who obscure their true intent. For example, in the landmark case of an Alabama state law redrawing electoral boundaries in the city of Tuskegee, lack of a believable rationale led the court to conclude that a proposed plan violated the Fifteenth Amendment. A deannexation in that case would have transformed a square-shaped boundary into a 28-sided figure that excluded much of the city's African American community from its outer limits.¹⁰¹ In McClellanville, South Carolina, white officials discouraged minority community leaders from requesting annexation, foreshadowing rejection of any proposal that would have altered the town's demographic makeup. However, the same officials lied about those leaders' interest in annexation in submissions to the DOJ, in apparent hope of concealing the officials' racial motivations for resisting annexation.¹⁰²

Annexations and deannexations in diverse jurisdictions tend to disadvantage communities that have historically been targets of discrimination in voting. Sophisticated study of residential files and Census data revealed that over a broad geographic area and multiple individual transactions, communities with African American majority populations were the least likely to be annexed by a larger jurisdiction.¹⁰³ Moreover, majority white towns were "much less likely to annex black populations" even where a potential annexation would not have created a new black majority.¹⁰⁴

⁹⁹ Department of Justice, Letter to Town of Lake Providence, Louisiana, December 1, 1972, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1280.pdf>.

¹⁰⁰ Department of Justice, Letter to Hon. Charles A. DeVane, Mayor, Augusta, Georgia, July 27, 1987, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2170.pdf>.

¹⁰¹ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

¹⁰² Department of Justice, Letter to Philip A. Middleton, Attorney at Law, re: the Town of McClellanville, South Carolina, May 6, 1974, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1090.pdf>.

¹⁰³ E.g., Daniel T. Lichter, Domenico Parisi, Steven Michael Grice, and Michael Taquino, "Municipal Underbounding: Annexation and Racial Exclusion in Small Southern Towns," 72 *Rural Sociology* 47 (March 2007), <https://eric.ed.gov/?id=EJ806506>.

¹⁰⁴ *Id.*

*Discriminatory Annexations and Deannexations in Action*Alabama

In 1989, a federal court found in favor of private citizens challenging the use of at-large election districts in Foley, Alabama. In the following years, as the city adopted amended election procedures that expanded opportunities for its African American voters, it also sought to annex a number of areas outside its boundaries. The DOJ objected to several of these because they would have increased the town's white population disproportionately. It eventually became clear that a pattern amounting to a discriminatory city policy on annexation was in place; for example, a majority-black area had requested annexation and been rejected at the same time that city officials were proactively petitioning majority-white areas to join the jurisdiction.¹⁰⁵ Plaintiffs challenged this racially-selective standard under Section 2 of the VRA in 1994. To settle local residents' claims against it, the city agreed to a statement that acknowledged that if proven, these allegations would constitute violations of the Constitution. The city committed to accepting the annexation of any of several adjacent areas under consideration if the residents of a discrete area voted in favor of it, to ensure fair and consistent treatment of all potential constituents.¹⁰⁶

Texas

In 1997, city officials in Webster, Texas proposed to annex an area with a predominantly white population located just outside the city. Reviewers concluded that if approved, the annexation would decrease the city's Latino population from 19 percent down to 15 percent of residents, and its African American population from five percent to 4.2 percent, by adding about 1,160 white residents.¹⁰⁷ In addition, in its review of the annexation proposed by Webster officials, the DOJ uncovered a predominantly Hispanic outlying area that was not considered for annexation by city officials. If annexed at the same time as the outlying white area, this tract would have reduced the possibility of minority vote dilution, and Webster's single Latino city councilmember and other community leaders had in fact proposed that the area in question be annexed, to no avail.¹⁰⁸

After an extensive investigation into the operation of city government in Webster, the DOJ concluded its review of Webster's Section 5 submission by stating, "the

¹⁰⁵ Department of Justice, Letter to Fred G. Mott, City Administrator, Foley, Alabama, November 6, 1989, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AL-1780.pdf>.

¹⁰⁶ *Dillard v. City of Foley*, 926 F. Supp. 1053 (M.D. Ala. 1996).

¹⁰⁷ Department of Justice, Letter to Randall B. Strong, Attorney, re: City of Webster, Texas, March 17, 1997, http://www.usdoj.gov/crt/voting/sec_5/ltr/l_031797.pdf.

¹⁰⁸ *Id.*

city's application of its annexation policy and the city's annexation choices appear to have been tainted...by an invidious racial purpose," and found that proponents' claims of ignorance of the race of residents of the areas in question were "at best disingenuous."¹⁰⁹ Webster's refusal to consider the annexation of an area that would have minimized the dilutive effect of the all-white annexation made clear that discrimination was an animating motivator for adoption of the change.

California

The City of Hanford in Kings County, California sits in the San Joaquin Valley, a rich agricultural region whose population diversified significantly in recent decades with ebbs and flows of farmworker migration. Hanford's Asian and Latino populations were growing relative to populations of other races and ethnicities. Against this backdrop, Hanford submitted 73 proposed annexations for preclearance in 1992. Some of these were adopted and implemented without being precleared, despite their significant effect on the Hanford electorate: the DOJ noted disapprovingly that "nearly half of the city's...population reside[d] in these unprecleared annexed areas."¹¹⁰

In a letter objecting to their implementation, the DOJ raised acute concerns with the series of annexations that Hanford seemingly sought to hide. In aggregate, the addition of designated areas reduced the Latino proportion of city's population by 6.5 percentage points. At the time, the City held at-large elections with staggered terms, and Latino voters could not under that system elect candidates of their choice because voting was racially polarized and dominated by the white majority that the annexations had reinforced.¹¹¹ Annexations to the city went forward only after it adopted a system of single-member district elections that extended electoral opportunities to underrepresented components of the city's population; today, two Latino members sit on the Hanford City Council.

The Known Practice of Annexation or Deannexation to Dilute Minority Voting Strength

The Voting Rights Advancement Act would require preclearance of proposed annexations and deannexations only where a proposed change would significantly alter the racial or ethnic composition of the electorate in a diverse jurisdiction. The law would mandate pre-implementation review only in those jurisdictions in which multiple racial or ethnic groups constitute 20 percent of the voting-age population,

¹⁰⁹ *Id.*

¹¹⁰ Department of Justice, Letter to Michael J. Noland, Esq. re: the City of Hanford, California, April 5, 1993, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/CA-1040.pdf>.

¹¹¹ *Id.*

or a single language-minority group accounts for at least 20 percent of voting-age residents on Indian land. In those jurisdictions, only changes that would decrease by at least 3 percent a racial, ethnic, or language-minority group's share of a jurisdiction's voting-age population would require preclearance. This formula focuses tightly on boundary changes that have an established pattern of discriminatory purpose and effect based on their context.

According to our research, at least 62 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. Professor Kousser's research shows that since 1957, there have been 219 successful actions to block discriminatory annexations or deannexations, 179 of them occurring since 1982.¹¹²

Restrictive Identification and Proof of Citizenship Requirements

At the outset of the VRA era, lawmakers who desired to limit the influence of voters of color often imposed prerequisites to registering or voting that went above and beyond the legal minimum qualifications of adulthood and U.S. citizenship. By design, these laws demanded actions that underrepresented voters were disproportionately unable to take, such as payment of poll taxes, and demonstration of English literacy. After federal protections of the equal right to vote evolved to specifically prohibit prerequisites like these, some states and localities responded by accelerating adoption of a similar alternative: strict documentary identification requirements to register or vote. The nation's first statewide proof of citizenship mandate for registering voters became law in Arizona in 2004, and the first statewide strict voter ID requirements appeared in 2005 in Indiana and Georgia, on the heels of the Help America Vote Act of 2002's codification of individual identification requirements for certain newly-registered voters.

The Discriminatory Intent and Effect of Restrictive Identification Requirements

A strong, growing body of evidence demonstrates the discriminatory intent and effect of voter ID laws. No proponent of strict ID requirements has ever produced credible evidence of widespread impersonation fraud in the registration or voting processes that identification checks would allegedly prevent. This lack of evidence is not surprising. Common sense tells us that individuals pretending to be either qualified unregistered citizens or actual registered voters could alter the outcome of very few, if any, elections without extraordinary effort, and hence would have no

¹¹² Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

reason to try. At the same time, voter participation rates have declined from the 1950s to the 2010s.¹¹³ American democracy has not suffered because too many citizens have voted, but because too few have. Political operatives and government officials confirm that strict ID requirements are political gamesmanship. For example, North Carolina political consultant Carter Wrenn said of related developments in his state, “Of course [voter ID laws are] political. Why else would you do it?”¹¹⁴

Now that some strict voter identification requirements have been in effect for a decade or more, there is ample evidence that racial, ethnic, and linguistic minorities are statistically least likely to be able to meet ID mandates, and statistically most likely to expect and to experience exclusion on grounds of failure to provide an identification document. Identification prerequisites to vote are therefore widely understood to have likely discriminatory effects. For example, former Texas State Representative Todd Smith said of that state’s provision, “If the question is are the people that do not have photo IDs more likely to be minority than those that are not, I think it’s a matter of common sense that they would be.”¹¹⁵ In 2014, Texas State Senator Rodney Ellis “testified that all of the legislators knew that [Texas’s] SB 14, through its intentional choices of which IDs to allow, was going to affect minorities the most.”¹¹⁶

In 2006, the Brennan Center for Justice found that 25 percent of African Americans and 16 percent of Latinos did not have a current, valid government-issued photo ID, compared to 11 percent of all adult U.S. citizens surveyed.¹¹⁷ Since then, a long and constantly growing line of surveys and studies have shown that underrepresented voters disproportionately lack the identification documents they may need to register and to vote in person. For example, a February 2015 analysis by Dr. Vanessa Perez, based on the 2012 American National Elections Study, concluded that only 5 percent of white voters compared to 10 percent of Latino voters and 13 percent of

¹¹³ Census Bureau, Current Population Survey, Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2018 (Table A-1), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html>.

¹¹⁴ William Wan, “Inside the Republican creation of the North Carolina voting bill dubbed the ‘monster’ law,” WASHINGTON POST (September 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html.

¹¹⁵ *Veasey v. Perry*, 71 F. Supp.3d 627, 657 (S.D. Tex. 2014).

¹¹⁶ *Id.*

¹¹⁷ Brennan Center for Justice, New York University School of Law, *Citizens Without Proof: A Survey Of Americans’ Possession Of Documentary Proof Of Citizenship And Photo Identification* (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

African American voters lack “government-recognized photo ID.”¹¹⁸ Professors Matt Barreto and Gabriel Sanchez surveyed eligible Texas voters in 2014 and found that Latinos were 2.42 times more likely than whites to report lack of a usable ID, and African Americans 1.78 times more likely than whites.¹¹⁹ In 2017, Professors Eitan Hersh and Stephen Ansolabehere compared Texas’ voter registration list to lists of Texans who held each of the identification documents accepted at the state’s polling places, and found that 3.6 percent of registered non-Hispanic white voters appeared to lack qualifying voter ID, compared to 7.5 percent of African American, and 5.7 of Latino voters.¹²⁰

Studies of voter turnout confirm that racial and ethnic disparities in possession of ID documents have a disproportionate effect on voters of color. According to analysis of exit surveys of Texas, Pennsylvania, and Virginia voters, conducted after the adoption of stricter voter ID requirements, revealed that black voters were 4.5 times more likely than non-black voters to have been unable to vote because of an ID-related problem.¹²¹ A 2016 study of voting in Michigan by Professors Phoebe Henninger, Marc Meredith, and Michael Morse found that minority voters were 2.5 to six times more likely than non-Hispanic white voters to go to the polls without a photo ID.¹²²

Underrepresented racial, ethnic, and language-minority voters are also more likely than white voters to lack proof of their U.S. citizenship and other precursor documents they may need to obtain a voter ID or to register to vote. For example, a 2012 survey of 18- to 29-year old eligible voters by the Black Youth Project found that more than 84 percent of potential white voters had access to their birth certificates, and 47.5 percent had a U.S. passport. In comparison, just 73.3 percent of African Americans and 55.1 percent of Latinos had their birth certificates, and only 22

¹¹⁸ Vanessa M. Perez, Ph.D., Project Vote, *Americans Without Photo ID: A Breakdown of Demographic Characteristics 1* (February 2015), <http://www.projectvote.org/wp-content/uploads/2015/06/AMERICANS-WITH-PHOTO-ID-Research-Memo-February-2015.pdf>.

¹¹⁹ Matt A. Barreto and Gabriel R. Sanchez, Expert Report, *Accepted Photo Identification and Different Subgroups in the Eligible Voter Population, State of Texas, 2014* 18, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex. June 27, 2014).

¹²⁰ Stephen Ansolabehere and Eitan D. Hersh, “ADGN: An Algorithm for Record Linkage Using Address, Date of Birth, Gender, and Name,” 4 *Statistics and Public Policy* 1, 8 (October 12, 2017), <https://www.tandfonline.com/doi/pdf/10.1080/2330443X.2017.1389620?needAccess=true>.

¹²¹ Kelly S. McConville, Lynne Stokes, and Mary Gray, “Accumulating Evidence of the Impact of Voter ID Laws: Student Engagement in the Political Process,” 5 *Statistics and Public Policy* 1 (January 15, 2018).

¹²² Phoebe Henninger, Marc Meredith, and Michael Morse, “Who Votes Without Identification? Using Affidavits from Michigan to Learn About the Potential Impact of Strict Photo Voter Identification Laws” 3, prepared for the 2018 Election Sciences, Reform, and Administration Conference (July 13, 2018), <https://esra.wisc.edu/papers/HMM.pdf>.

percent of African Americans and 37.1 percent of Latinos had current passports.¹²³ Another study showed that Asian Americans were over 20 percent less likely to have two forms of identification compared to whites.¹²⁴ The approximately 1,800,000 Puerto Rican-born adults¹²⁵ living on the mainland United States face a unique high barrier to proving their citizenship. In 2009, the Puerto Rican government adopted new standards for official birth certificates, and simultaneously invalidated all Puerto Rican birth certificates issued before 2010.¹²⁶ Since the adoption of the new standards, all Puerto Rican-born voters that seek to register to vote in a state with a proof-of-citizenship requirement must either have a U.S. passport, or go through additional procedures and pay fees to obtain a new birth certificate after July 2010.

Naturalized citizens' ability to obtain the requisite documents to satisfy strict identification requirements may be even more constrained. As of 2017, Census data showed that 65.4 percent of eligible Asian American, Native Hawaiian and Pacific Islander voters; 24.9 percent of eligible Latino voters; and 7.7 percent of eligible black voters were naturalized citizens, compared to just three percent of non-Hispanic white voters. If naturalized and derivative citizens need a replacement certificate of citizenship or naturalization to register or vote, they face a major hurdle: certificates of citizenship presently cost \$1,170 and replacement certificates of naturalization cost \$555. In addition, to obtain a replacement, the average wait is between 75 days and eight and a half months for the Department of Homeland Security to process an application for a citizenship document, as of August 2019.¹²⁷

Although state-issued IDs are generally offered for free in states that require voters to display them to vote, the documents that voters must present to obtain these free IDs are not necessarily free. For example, in Texas, applicants for a free Election Identification Certificate must provide proof of U.S. citizenship; that proof, in turn, may cost anywhere from \$22, the minimum price of an official copy of Texas birth certificate, to \$1,170, the price of a certificate of citizenship that documents the status

¹²³ Jon C. Rogowski and Cathy J. Cohen, Black Youth Project, "Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election" 7-8, http://blackyouthproject.com/wp-content/uploads/2015/11/voter_id_effect_2012.pdf.

¹²⁴ Matt A. Barreto, Stephen A. Nuño, and Gabriel A. Sanchez, "Voter ID Requirements and the Disenfranchisement of Latino, Black and Asian Voters" 10, Prepared for presentation at 2007 American Political Science Association Annual Conference (September 1, 2007), [https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhksef1\).pdf](https://www.brennancenter.org/sites/default/files/legal-work/63836ceea55aa81e4f_hlm6bhksef1).pdf).

¹²⁵ Census Bureau, American Community Survey (1-year), Place of Birth by Nativity and Citizenship Status: 2017 (Table B05002), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_1YR_B05002&prodType=table.

¹²⁶ U.S. Department of State, "New Requirements for Passport Applicants with Puerto Rican Birth Certificates" (October 29, 2010), <https://2009-2017.state.gov/r/pa/prs/ps/2010/10/150173.htm>.

¹²⁷ U.S. Citizenship and Immigration Services, "Historical National Average Processing Time for All USCIS Offices," <https://egov.uscis.gov/processing-times/historic-pt>.

of a person who obtained U.S. citizenship as a minor through his or her parent(s). Sammie Bates, a Texan voter born in 1940, testified in 2014 trial proceedings concerning the state's strict voter ID rule that she needed to obtain an out-of-state birth certificate for \$43 in order to get a voter ID, but could not afford to do so. "We couldn't eat the birth certificate, and we couldn't pay rent with the birth certificate," she told the court.¹²⁸ Taking into account the time and expense necessary to gather precursor documents, travel to an ID-issuing location, and wait in line to complete a transaction, researchers recently estimated that North Carolina eligible voters without ID would have to expend the equivalent of between \$4.8 million and \$9 million in the aggregate to comply with the ID law adopted by the state legislature in 2013.¹²⁹ Furthermore, voter ID requirements also disproportionately affect voters of color given that "citizens without proof" are also more likely to lack regular access to transportation, and less likely to enjoy flexible work and family care schedules.¹³⁰

In sum, legislators have enacted heightened ID requirements for voters without logical, factually-supported reasons, knowing that a larger percentage of qualified minority voters cannot satisfy them. Minority voters are not only less likely than whites to possess voter ID, but also more likely to be asked for it at registration or when voting,¹³¹ and less likely to have election administrators answer their questions about voter ID laws satisfactorily.¹³² It is therefore regrettably unsurprising that polls and surveys conducted after the 2014 and 2016 elections consistently indicated that

¹²⁸ Jessica Huseman, "State's failures led to voter ID problems in 2016," TEXAS TRIBUNE (May 2, 2017), <https://www.texastribune.org/2017/05/02/texas-failures-led-voter-id-problems-2016-election/>.

¹²⁹ Stuart Shapiro and Deanna Moran, "The Costs of Voter ID Requirements," REGULATORY REVIEW (January 8, 2019), <https://www.theregreview.org/2019/01/08/shapiro-moran-burden-voter-identification/>.

¹³⁰ For example, both a 2011 analysis by the Brennan Center for Justice and a 2012 preclearance objection lodged by the Department of Justice found that eligible Texan Latino voters were more likely than others to live at a considerable distance from the closest state identification-issuing office, and to lack access to a convenient means of transportation to that location. See Sundee Iyer, Brennan Center for Justice, "Unfair Disparities in Voter ID" (September 13, 2011), <https://www.brennancenter.org/our-work/analysis-opinion/unfair-disparities-voter-id>.

¹³¹ E.g., R. Michael Alvarez, Stephen Ansolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III, Thad Hall, 2008 *Survey of the Performance of American Elections: Final Report 3*, https://elections.delaware.gov/pdfs/SPAE_2008.pdf; Lonna Rae Atkeson, Yann P. Kerevel, R. Michael Alvarez, and Thad E. Hall, "Who Asks For Voter Identification? Explaining Poll-Worker Discretion," 76 *Journal of Politics* 944 (October 2014).

¹³² When Professors Ariel R. White, Noah L. Nathan, and Julie K. Faller sent test inquiries about voter ID laws to more than 7,000 election administrators in 48 states in 2014, they found that when their messages came from Latino aliases or were written in Spanish, they were significantly less likely to receive any response, or to receive a correct and complete response, than when they sent messages from non-Latino white aliases. Ariel R. White, Noah L. Nathan, and Julie K. Faller, "What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials," 109 *American Political Science Review* 129 (February 2015).

strict voter ID requirements caused more voters of color to misunderstand voting rules and not participate than their white counterparts.¹³³

Discriminatory Voter ID and Proof of Citizenship Requirements in Action

Ohio

In 2006, Ohio enacted legislation that directed poll workers to require certain naturalized voters to present proof of U.S. citizenship before providing them with ballots or approving their provisional votes to be counted. The law would have applied to any voter challenged on the basis of his or her citizenship, and would have required election judges processing challenges to distinguish between native-born and naturalized citizens, and to single out naturalized Americans for extra scrutiny. Whereas native-born Americans would not have been subject to demands for documentation, any challenged voter who professed to be a naturalized citizen would have been asked to immediately produce proof of citizenship, or in the alternative, to vote a provisional ballot that would only be counted if the voter displayed proof of citizenship to an elections official within ten days of attempting to vote. Prior to adoption of this legislation, Ohio law allowed any challenged naturalized voter to swear an oath affirming his or her citizenship in lieu of producing original documentation.

Ohio's voter challenge provision had a long history of being used discriminatorily, and demographic realities ensured that 2006 amendments to it would have disproportionately affected voters of color. The state legislature previously amended the same statute in 1868 to create a specialized mechanism for challenging voters with a "distinct and visible admixture of African blood," on the explicit basis of their race. In 2004, several Ohio voters pre-emptively filed suit to block an impending campaign to challenge voters at selected precincts serving populations of largely African American voters. As of 2006, naturalized Ohioans were far more likely than all eligible voters to be historically underrepresented people of color. Even though African Americans, Latinos, and Asian Americans constituted just 14.3 percent of the

¹³³ For example, post-election surveys conducted in Texas by Professors Jim Granato and Renée Cross of the University of Houston and Mark P. Jones of Rice University showed that in the state's 23rd Congressional District and in Harris County, Latino non-voters were substantially more likely than white non-voters to cite lack of a qualifying ID as a principal reason for their non-participation, even though strong majorities of people queried actually had a qualifying ID. Majorities of non-voters in both areas also incorrectly believed that they had to present an unexpired Texas driver's license or state ID to vote in person in 2016, and Latino non-voters were the least likely segment of survey subjects to correctly describe ID requirements. Mark P. Jones, Jim Granato, and Renée Cross, *The Texas Voter ID Law and the 2016 Election: A Study of Harris County and Congressional District 23* (April 2017), <http://www.uh.edu/hobby/voterid2016/voterid2016.pdf>; Mark P. Jones, Jim Granato, and Renée Cross, *The Texas Voter ID Law and the 2014 Election: A Study of Texas's 23rd Congressional District* (Aug. 2015), <https://www.bakerinstitute.org/media/files/files/e0029eb8/Politics-VoterID-Jones-080615.pdf>.

state's eligible electorate that year, they accounted for 47.8 percent of naturalized Ohioans eligible to cast ballots, who were potentially subject to additional restrictions on the franchise. In light of its potential to incentivize racial and ethnic profiling of Ohio voters, and its likely discriminatory effects, a federal court permanently enjoined the law in October of 2006.¹³⁴

North Carolina

In 2013, less than two months after the Supreme Court's decision in *Shelby County v. Holder* freed North Carolina from its obligation to preclear voting law changes that would apply in its 40 covered counties, the state adopted a sweeping law that would have imposed a strict voter ID requirement upon in-person voters, among other provisions. Legislators' actions made it clear that the contours of this law – H.B. 589 – drew inspiration from a desire to reduce voting by underrepresented people of color, and from the free hand the state enjoyed post-*Shelby County* to adopt laws that a fully-functioning VRA would have blocked. The voter ID requirement that legislators enacted in 2013 would have conditioned receipt of a regular ballot at a polling place on presentation of a valid, unexpired photo ID. State IDs, military IDs, passports, and tribal identification cards were acceptable, while other common documents including student IDs and employer-issued identification would not have been accepted. These choices lawmakers made were deliberate: litigation revealed that the data legislators had requested and studied included statistics about the number of student IDs issued by the University of North Carolina, and the percentage of those issued to African American students.¹³⁵

Even though the Fourth Circuit Court of Appeals found that the legislature adopted H.B. 589 with unconstitutional discriminatory intent, and the Supreme Court specifically refused to reconsider this determination, this litigation was not the end for discriminatory voter ID requirements in North Carolina. In 2018, the same state legislature that acted with unconscionable discriminatory intent to adopt H.B. 589 placed a proposed constitutional amendment authorizing a voter ID requirement on the ballot, and voters approved the measure in November 2018. As of publication of this report, a second voter ID law adopted by the state legislature, following the voter enactment and over a gubernatorial veto, is in effect pending further litigation.

¹³⁴ *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006). Despite its confirmed unconstitutionality, the statute remains on the books and even underwent minor amendments in 2012. Ohio Rev. Code Ann. § 3505.20(A).

¹³⁵ *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 496 (M.D.N.C. April 25, 2016), *rev'd and remanded*, 831 F.3d 204 (4th Cir. 2016).

Illinois

In 2009, St. Clair County, Illinois officials identified the town of Alorton as the locus of cases of suspected voter fraud.¹³⁶ The population of Alorton in 2009 was approximately 97 percent African American, and less than one percent non-Hispanic white; by contrast, the 2009 population of St. Clair County was approximately 29 percent African American, and just over 65 percent non-Hispanic white.

In the immediate run-up to Election Day on April 7, 2009, and in an effort allegedly aimed at eliminating fraudulent votes, authorities sent letters to 558 Alorton residents threatening each with cancellation of registration and invalidation of any absentee ballots they had already cast in the April 7 contest. County officials sought to require each of the voters to appear in person before a clerk to confirm their eligibility to vote, thereby effectively imposing an extraordinary identification requirement upon a discrete group of African American voters who constituted a minority within the larger, election-administering jurisdiction. The outcome of the matter suggests there was no objective factual basis for challenging the registrations of these 558 residents; however, there was no public access to official records that would indicate what, if any, justification there was for investigating suspected fraud.

Fortunately, affected voters took quick action and filed suit under the VRA, and secured a conference with a federal judge and County representatives within days. The County agreed to an injunction entered by consent decree, which committed it to sending letters to inform the 558 targeted voters that they could cast ballots in the April 7 election without taking further action to confirm their eligibility.¹³⁷

The Known Practice of Imposing Unjustified, Unnecessary Identification Requirements on Intending Voters

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of any proposed restrictive identification prerequisites to registration that are more exacting than those in effect on the bill's effective date, and of any proposed identification prerequisites to obtaining a ballot that are more restrictive than the Help America Vote Act's (HAVA) requirements for first-time voters who have not yet conveyed to officials either their state identification card number or the last four digits of their Social Security number. Under HAVA, citizens who are new voters in a given state may affirm their identities in any one of numerous ways that do not necessarily mandate physical production of a government-issued document.

¹³⁶ Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and Supporting Memorandum of Law, *Chatman v. Delaney*, No. 3:09-cv-00259-CJP (S.D. Ill. April 3, 2009).

¹³⁷ Consent Order, *Chatman v. Delaney*, No. 3:09-cv-00259-CJP (S.D. Ill. April 3, 2009).

Moreover, voters that the law requires to produce documentation have a long list of flexible options that includes not just photo-bearing state-issued drivers' licenses and IDs, but also non-photo documents including bills, paystubs, and official government correspondence.

Enhanced protection against discriminatory voter identification requirements is made necessary by the recent and wide proliferation of such laws, and the strong likelihood of legislators adopting strict identification rules with discriminatory intent, or in spite of their discriminatory effects. During the VRA's modern era, between 1982 and 2019, more than half of all states, and a number of political subjurisdictions, adopted stronger identification prerequisites for voters that threatened to deprive qualified American voters of the franchise.¹³⁸

According to our research, at least 26 laws that would have toughened voter ID requirements have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. Professor Kousser's research shows that since 1957, there have been 52 actions that prevented the implementation of discriminatory voter ID changes.¹³⁹ Use of modern voter ID requirements is a more recent phenomena employed with increased frequency and effectiveness in suppressing the right to vote. Some of these requirements were also found to violate other federal and state laws complementary to the VRA. For example, implementation of proof-of-citizenship demands from newly-registered voters ran afoul of the National Voter Registration Act in states including Kansas and Arizona by requiring more documentation from those desiring to register than the federal law allows the states to request.

Polling Places Closures and Realignment

Although modern voters in many jurisdictions enjoy more options for casting ballots than voters generally had at the time the VRA was adopted, in-person voting at temporary polling places remains the foundation of American elections. In-person voters can take advantage of interpretation services offered on location, which can be crucial for Americans not fully fluent in English. In fact, all in-person voters can seek assistance from poll workers to address questions or concerns they may have when casting their ballot.

¹³⁸ National Conference of State Legislatures, Voter ID History (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

¹³⁹ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

For many voters, the ability to access polling places still determines whether or not they can participate in elections. According to the National Conference of State Legislatures, as of July 2019, 19 states still required voters to present one of a limited number of approved excuses in order to obtain an absentee or mail-in ballot that need not be cast in-person at a polling place. Even in states that offer no-excuse mail voting to all, voting without visiting a polling place requires advance planning and preparation. Most states require voters to send in absentee ballot requests days, or weeks, in advance of Election Day, and some make no emergency provision for people who do not meet the deadline but cannot get to a polling place. In sum, consistently large numbers of eligible voters have no practical option but to cast a ballot in-person, and depend entirely upon ability to find and physically access polling places in order to do so. The percent of all voters who have voted in person has remained consistent or risen in recent years even as technologies have changed: according to the Election Assistance Commission, 71.1 percent of 2014 voters and 73.1 percent of 2018 voters visited a polling place.¹⁴⁰ As a result, people intent on limiting the electoral influence of underrepresented communities may manipulate the number and location of polling places as a tool of discrimination.

The Discriminatory Intent and Effect of Polling Place Closures and Realignments

Any analysis of the purpose and effects of polling place changes must begin with a look at the clientele that polling places serve. In 2005, the first year for collection of annual American Community Survey data, there were just over 288 million individuals in the U.S. and just over 197 million adult U.S. citizens eligible to vote. By 2017, the most recent year for which data is presently available, there were nearly 326 million individuals in the U.S. and more than 231 million adults U.S. citizens eligible to vote.¹⁴¹ The number of individuals eligible to naturalize and vote increased by about 50 percent during this 12-year window. These trends are not expected to abate in the foreseeable future; election administrators must expect and prepare to accommodate a growing electorate.

The increasing size and diversity of the electorate, and the fact that so many voters still need to vote in-person at a polling place, is inconsistent with a trend to reduce polling places – in a sample of just 757 counties formerly covered under Section 5, there were 1,688 fewer polling places in 2018 than in 2012.¹⁴² Close investigation of

¹⁴⁰ U.S. Election Assistance Commission, *Election Administration and Voting Survey: 2018 Comprehensive Report 20* (June 2019), https://www.eac.gov/assets/1/6/2018_EAVS_Report.pdf

¹⁴¹ Census Bureau, American Community Survey (1-year), Sex by Age by Citizenship Status: 2005 and 2017 (Table B05003).

¹⁴² Leadership Conference Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* 10 (September 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [hereinafter “Democracy Diverted”].

factors like the sequence of events preceding proposed changes, and effects of changes on the distances between residential areas and assigned polling places reveal the discriminatory intent of many polling place closures. Dramatic changes to the number and location of polling places that happen close in time to major elections have proven to be particularly confusing and frustrating for voters; thus, when administrators adopt polling place reductions without inviting public feedback or conducting significant community outreach, as is often the case, the negative effects of those changes on vulnerable voters are all the more predictable, and all the more likely to have been the point. Although it is true that setting up fewer polling places can reduce the cost of an election, consolidations that save money can also serve impermissible motives. This can be particularly clear when, for example, it emerges that prospective cost savings are small, but the disruption a plan would cause is very significant and disproportionate to a certain minority group.

Schemes to reduce or relocate polling places have a disproportionate chilling effect on underrepresented voters of color, due in part to widespread residential segregation and socio-economic disparities.¹⁴³ When a jurisdiction closes some polling places and increases the number of voters assigned to each of the remaining polling locations, it is a virtual certainty that some of the jurisdiction's voters will need to travel farther to reach a polling place than they did before. Logistical hurdles like these disproportionately affect members of underrepresented communities. Nationally and consistently across time, Census and other data have shown that minority voters have relatively less access to means of transportation than white voters. As of 2015, just 6.5 percent of non-Hispanic white households, but 19.7 percent of African American households, 12 percent of Latino households, 11.3 percent of Asian/Pacific Islander households, and 13.6 percent of Native American households lacked access to a private vehicle.¹⁴⁴

Voters of color also have less flexibility in their work days, and more inflexible responsibilities to care for children and family members, which lessen their ability to access polling places when they move farther away. For example, when the Census Bureau last surveyed the population regarding work schedules in 2004, it found that while 30.9 percent of white workers said they could shift their working hours, just 20.7 percent of Latino workers and 21.2 percent of African American workers reported that same flexibility.¹⁴⁵ While Asian American men have similar flexibility compared to whites, Asian American women do not enjoy that same flexibility.¹⁴⁶

¹⁴³ See, e.g., *id.*

¹⁴⁴ As of 2015, just 6.5 percent of non-Hispanic white households, but 19.7 percent of African American households, 12 percent of Latino households, 11.3 percent of Asian/Pacific Islander households, and 13.6 percent of Native American households lacked access to a private vehicle. National Equity Atlas, Policylink, USC Program for Environmental and Regional Equity, "Indicators: Car Access" (2015), https://nationalequityatlas.org/indicators/Car_access.

¹⁴⁵ Terence M. McMenamin, "A time to work: recent trends in shift work and flexible schedules," *Monthly*

When jurisdictions consolidate or relocate polling places, the aggregate distance from residence to a polling place has often increased for historically underrepresented communities of color.

For example, county boards of election across the state of North Carolina changed the locations of about one-third of early voting polling places in 2014. Researchers found that the average white voter's distance from the nearest early voting site had increased by just 26 feet, while the average black voter's distance from the nearest early voting site had increased by a quarter of a mile.¹⁴⁷ In Alaska, numerous Native American voters live in rural, geographically isolated locations, and have found themselves at risk of being effectively barred from voting by proposed polling place closures and consolidations. A series of changes proposed in 2008 would have assigned some Alaskan voters to sites they could only reach by plane.¹⁴⁸ These proposals followed a string of 2004 proposals that left 24 Alaska Native villages without a polling place; the proposals were withdrawn only after the DOJ refused to preclear the closures and demanded more information about their effects on isolated voters.¹⁴⁹ In some of the most recent related litigation concerning voting locations for the 2016 election in northern Nevada, the Court noted that the closest planned early voting location to the Pyramid Lake Paiute Tribe's capital city was 32 miles away, while 21 other early voting locations were conveniently situated in and around Washoe County's non-Hispanic white population centers of Reno, Sparks, Incline Village and Sun Valley.¹⁵⁰ Instances like these magnify the disproportionately negative effects that access to transportation and workplace flexibility have on racial and ethnic minorities.

Persistent findings of longer wait times at polling places in communities of color support the proposition that individual polling place consolidation decisions form a pattern that hurts underrepresented voters in the aggregate. Numerous studies conclude that African American, Latino, and other voters of color wait longer at

Labor Review 8 (Dec. 2007), <https://goo.gl/gIaPsR> [hereinafter "A time to work"]; Census Bureau, Current Population Survey 2018 Annual Social and Economic Supplement, Average Number of People per Family Household With Own Children Under 18, by Race and Hispanic Origin, Marital Status, Age, and Education of Householder (Table AVG3); Family Caregiver Alliance, *Caregiver Statistics: Demographics* (2016), <https://www.caregiver.org/caregiver-statistics-demographics>.

¹⁴⁶ A time to work, *supra* n.145.

¹⁴⁷ William Busa, *insightus, North Carolina's Shell Game of Electoral Apartheid: How the Board of Elections Shoved Black Voters Away From the Ballot Box in 2014* (November 23, 2015), https://webcache.googleusercontent.com/search?q=cache:CDnCKSno8R0J:https://insight-us.org/fair_places.html+&cd=1&hl=en&ct=clnk&gl=us.

¹⁴⁸ Amici Curiae Brief of the Alaska Federation of Natives, Alaska Native Voters and Tribes in Support of Respondents 21-23 (filed February 1, 2013), *Shelby County v. Holder*, No. 12-96, https://www.narf.org/bloglinks/shelby_county_brief.pdf.

¹⁴⁹ *Id.* at 21-22.

¹⁵⁰ *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

polling places today than non-Hispanic white voters, and are disproportionately likely to face a wait of 30 minutes or more. In 2019, professors published their analysis of cell phone geolocation data from the 2016 general election. Controlling for factors like ballot length, the study found that voters in majority black precincts waited more than 15 percent longer on average to vote than voters in majority non-Hispanic white precincts.¹⁵¹ These researchers concluded that there was “substantial and significant evidence of racial disparities in voter wait times.”¹⁵² Responses to the 2006, 2008, 2012, and 2014 Cooperative Congressional Election Studies revealed that the average voter of color in those elections waited almost twice as long to vote as the average non-Hispanic white voter.¹⁵³ Professors Charles Stewart and Stephen Ansolabehere estimated that in 2012 alone, approximately 500,000-730,000 votes were likely lost to voters’ unwillingness or inability to appear in person and wait for as long as necessary to vote at a polling place.¹⁵⁴ In light of racial and ethnic disparities in access to a smoothly-functioning polling place, it is clear that lost votes are disproportionately those of voters of color.

Discriminatory Polling Place Closures and Relocations in Practice

North Dakota¹⁵⁵

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county’s polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court, arguing that closing the precincts on the Reservation would make it difficult or impossible for many Indians to vote in violation of the federal and state constitutions and Section 2 of the VRA. The district court granted a preliminary injunction that required the county to maintain the two polling places on the Reservation. The court concluded that closing the precincts would have a discriminatory effect on American Indian voters who lacked access to transportation or to voting by mail. In 2012, the parties settled the case; the county agreed to keep the reservation polling places open in future general elections. The settlement also called for a series of meetings between county and tribal officials to foster communication between the two entities.

¹⁵¹ M. Keith Chen, Kareem Haggag, Devin G. Pope, and Ryne Rohla, “Racial Disparities in Voting Wait Times: Evidence from Smartphone Data” 7 (September 4, 2019), <https://arxiv.org/pdf/1909.00024.pdf>.

¹⁵² *Id.* at 9.

¹⁵³ Stephen Pettigrew, “The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials,” 132 *Political Science Quarterly* 3, 528-30 (2017), <http://www.stephenpettigrew.com/articles/pettigrew-2017-psq.pdf>.

¹⁵⁴ Charles Stewart, III and Stephen Ansolabehere, “Waiting in Line to Vote” (July 28, 2013), <https://www.eac.gov/documents/2017/02/24/waiting-in-line-to-vote-white-paper-stewart-ansolabehere/>.

¹⁵⁵ Sells Testimony, *supra* n.27 at 19.

Virginia

Dinwiddie County, Virginia is home to a white majority and a substantial African American community that makes up about one-third of the population. Up until 1998, residents of the County's rural Darvills Precinct had voted for many years at the Darvills Community Center, which was damaged in a fire and rendered unusable. For the November 1998 general election, the Board of Supervisors selected a nearby Hunt Club to serve as a replacement polling place. The Club – which had a majority African American membership – installed a ramp to ensure access for disabled voters and made other improvements to enhance its suitability as a polling place.¹⁵⁶

After the election of 1998, petitioners asked County authorities to move this polling place from the Hunt Club to a church with a majority-white congregation, located about three miles from the Club. Although a majority of the petitioners were not voters in the Precinct in question or had not voted at the Hunt Club, and despite the proposed church's withdrawal from consideration, the Board of Supervisors adopted a resolution moving the polling place to a second majority-white church. Neither the Board nor petitioners appear to have advanced substantive concerns about the use of the Hunt Club in this process; instead, petitioners advocated a location “more centrally located.”¹⁵⁷

The DOJ examined Census data for the county and concluded that what petitioners represented as “more centrally located” would amount to a location closer to majority-white residential neighborhoods, and farther from majority African-American areas. Moreover, the church location ultimately chosen could not be characterized accurately as central to the County. The lack of objective, reasonable justification for moving the polling place in question led the DOJ to conclude that the proposal was intentionally discriminatory and therefore unconstitutional.¹⁵⁸

Texas

In 2006, officials moved to adopt a series of significant changes to the election of governors of the North Harris Montgomery Community College District near Houston. Among them were dramatic proposed changes to polling place locations: officials sought to move the election date for seats on the Board of Trustees to a new

¹⁵⁶ Letter from U.S. Department of Justice to Benjamin W. Emerson re: Dinwiddie County (October 27, 1999), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1270.pdf>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

date, and to open just 12 polling places for that election, instead of the total 84 polling places used for the previous Board election.¹⁵⁹

The proposal and details behind selection of the polling sites raised constitutional concerns. At the time that changes were proposed, there were more than 540,000 registered voters eligible to cast ballots for seats on the Board of Trustees. Twelve polling sites would have each served a staggering average of 45,000 potential voters, residing in a geographic area covering more than 1,000 square miles. Worse yet, the polling place locations chosen reflected severe racial and ethnic disparities. The polling location with the smallest proportion of voters of color assigned to it would have served about 6,500 voters, but the proposed location with the largest proportion of voters of color would have served more than 67,000 voters.¹⁶⁰

The DOJ concluded that the proposed consolidation of polling places for District elections was intentionally discriminatory. In the following years, advocates also successfully challenged the use of at-large elections for seats on the District's Board of Trustees.¹⁶¹ Because of the protections afforded by the VRA, the Board today includes two Latino members and two African American members.

The Known Practice of Closing and Relocating Polling Places to Increase the Distance Between Ballot Boxes and Communities of Color

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance of proposed reductions and relocations of polling places that would affect Census tracts with diverse populations, as well as reservations and land trust areas in which at least 20 percent of adult residents are members of a language minority group. The bill targets for scrutiny changes that would lessen the number of locations serving geographic concentrations of historically underrepresented voters.

The accelerating pace of polling place consolidation;¹⁶² the likelihood that closures will produce racially and ethnically disparate effects because of socioeconomic disparities and residential segregation; and the severity of the potential impact of polling place closures necessitate close scrutiny of specified proposals. At their worst, actual proposals to relocate polling places that arose during the VRA era would have made it virtually impossible for voters of color to exercise the franchise.

¹⁵⁹ Department of Justice, Letter to North Harris Montgomery Community College District, May 5, 2006, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2960.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ Consent Judgment and Decree, *Hubbard v. Lone Star College System*, No. 4:13-cv-01635 (S.D. Tex. October 11, 2013).

¹⁶² Democracy Diverted, *supra* n.142.

Our democratic system cannot tolerate elections that incorporate such impenetrable barriers to the ballot, particularly those that discriminatorily affect voters from language and racial minority communities.

According to our research, at least 33 attempts to move or consolidate polling locations have been invalidated by a court or the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects since 1982. Professor Kousser's research shows that since 1957 there have been 295 instances where discriminatory polling place closures or consolidations were successfully overturned, 269 of them occurring since 1982.¹⁶³

Withdrawal of Multilingual Materials and Assistance

For the duration of America's democracy, linguistic ability and literacy have served as overt and implicit proxies for characteristics, including race and national origin, in provisions that have restricted access to the franchise. Connecticut adopted the nation's first statewide voter literacy test in 1855. The restriction dually targeted voters who were relatively less-educated and who belonged to a minority race, ethnicity, or national origin group, including a group of farmworkers of Puerto Rican origin who were deemed ineligible to vote in Windsor, CT as recently as 1956.¹⁶⁴ South Carolina adopted an "eight box law" in 1882 that mandated use of different ballot boxes for different races, such that ballots were not counted unless voters matched the correct ballot to the correct receptacle by reading signage.¹⁶⁵ The state of New York adopted a targeted English literacy requirement for voters in 1921, in the midst of accelerated Puerto Rican migration into the state.¹⁶⁶

Although federal law now prohibits literacy tests and outright prohibitions on voting based on linguistic ability, voters who are not fully fluent in English remain vulnerable to disenfranchisement based on the inability to navigate English-only election procedures. As of 2018, Census data indicate that more than 37 million American adults speak a language other than English, and more than 11.4 million of them are not yet fully fluent in English. Experience confirms that voters who are perceived as members of language-minority communities, or who are not fluent in

¹⁶³ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

¹⁶⁴ Connecticut Humanities, "Literacy Tests and the Right To Vote" (November 5, 2018), <https://connecticuthistory.org/literacy-tests-and-the-right-to-vote/>.

¹⁶⁵ Merrill Fabry, "A Brief History of Voting Problems on Election Day," TIME (November 8, 2016), <https://time.com/4531415/history-voting-problems-election-day/>.

¹⁶⁶ E.g., Juan Cartagena, "Puerto Ricans and the 50th Anniversary of the Voting Rights Act," CENTRO VOICES e-Magazine, Center for Puerto Rican Studies, Hunter College, CUNY (August 2015), <https://centropr.hunter.cuny.edu/centrovoices/current-affairs/puerto-ricans-and-50th-anniversary-voting-rights-act>.

English, are less likely to vote and more likely to encounter hostility at the polls than voters comfortable in English.

The Discriminatory Intent and Effect of Denying Language Assistance

Denials of, and other barriers to, language assistance in elections arose at a time when elected officials and election administrators were less likely to obscure their discriminatory intent than they are today, and their history reveals their modern-day purpose. For example, a pair of 1905 editorials in support of Arizona's English literacy requirement stated, first, that, "There is a foreign element in our voting population which is both illiterate and ignorant of our institutions," and, eleven days later, that, "We are referring, of course, to the ignorant Mexican vote."¹⁶⁷

Over the course of more than 150 years of enforcement of linguistic restrictions on voting, the targets of such laws are and were clear, regardless of the extent to which lawmakers announced their intentions explicitly. For example, poll watchers in south Phoenix, AZ during the 1964 presidential election observed white activists – including future Supreme Court Chief Justice William Rehnquist – systematically and selectively challenge black voters and people not yet fully fluent in English to confirm their residences and to read and interpret Constitutional passages to demonstrate sufficient literacy to vote.¹⁶⁸ As of 1970 – before Congress extended the VRA to protect language-minority citizens – Texas law forbid election administrators from using any language other than English except in limited circumstances, and forbid assistance to any voter except those physically unable to mark ballots. The Court that invalidated the state's prohibition on assistance to illiterate voters noted that evidence showed that "the majority of illiterate voters in Texas are members of the Mexican-American and Negro ethnic groups," and that "the effect of the statute may be to exclude many Mexican-Americans and Negroes from assistance."¹⁶⁹

Lawmakers who restrict or have sought to prohibit language assistance in elections enjoy easy access to Census data that document substantial overlap between voters not fully fluent in English and voters of color. According to 2017 American Community Survey data, more than half of the adult U.S. citizens most likely to need linguistic assistance with voting are Latino; in total, more than 85 percent of eligible voters who may not be able to vote in English are people of color. Restrictions on

¹⁶⁷ Antonia Noori Farzan, "Racist History 101: When Arizona Blocked Spanish Speakers From Voting," PHOENIX NEW TIMES (March 19, 2018), <https://www.phoenixnewtimes.com/news/arizonas-racist-history-blocking-spanish-speakers-from-voting-10239647>; see also Kirk Branch, "A Mockery in the Name of a Barrier: Literacy Test Debates in the Reconstruction-Era Congress, 1864-1869," 3 *Literacy in Composition Studies* (2015), <http://licsjournal.org/OJS/index.php/LICS/article/view/82/114>.

¹⁶⁸ Dennis Roddy, "Just our Bill," PITTSBURGH POST-GAZETTE (December 2, 2000), <http://old.post-gazette.com/columnists/20001202roddy.asp>.

¹⁶⁹ *Garza v. Smith*, 320 F. Supp. 131, 135 (W.D. Tex. 1970).

and denials of linguistic assistance in voting not only produce obviously and inevitably discriminatory results, but also lack legitimate justifications, particularly in light of recent relative increase in the number of jurisdictions home to significant communities of language-minority voters.¹⁷⁰

Obstruction of language assistance and elimination of materials and assistance in languages other than English negatively affect voters of color at many points in the voting process. Eligible voters with limited English proficiency face threshold barriers to learning about elections and registering to vote. Although election alerts and voter registration forms convey or request basic information, even that basic information is unintelligible to millions of qualified American voters unless they have multilingual assistants; readers need only imagine the task of completing a voter registration form written in a language in which most Americans have no capacity – such as Navajo or Vietnamese – to understand how this is so.

Voters with limited English proficiency may also find it difficult or impossible to locate a polling place or understand and take advantage of absentee voting options. Voters with internet access must frequently choose one or more links to get to personalized logistical information on election administration websites; however, a majority of such sites around the country are in English-only. Google Translate and similar tools do not produce complete or accurate translations of webpages, particularly when pages are not optimized for translating or screen-reading applications. Additionally, the language on websites and forms that is associated with voter information and transactions can be difficult for even advanced English speakers to understand. For instance, a Virginian not fully fluent in English who finds the state's online application for an absentee ballot, must enter information on a page that is in English only, and that requires the user to read and agree to the affirmation that, "I certify and affirm that the information provided to access my voter registration is my own or I am expressly authorized by the voter to access this information. I understand that it is unlawful to access the record of any other voter, punishable as computer fraud under Va. Code § 18.2-152.3."¹⁷¹

¹⁷⁰ Between 2011 and 2016, the number of jurisdictions required to provide language assistance by reason of the size of their language minority voter communities increased from 248 to 263. Asian Americans Advancing Justice-AAJC, NALEO Educational Fund, and Native American Rights Fund, *Voting Rights Act Coverage Update 1-2* (December 2016), <https://advancingjustice-aaajc.org/sites/default/files/2016-12/Section%20203%20Coverage%20Update.pdf>. Contemporary factors contributing to growth of the need for language assistance include accelerated migration of Puerto Rican Americans to the mainland and recent increases in annual numbers of newly-naturalized Americans, some of whom are exempt from English language tests due to advanced age or disability.

¹⁷¹ Virginia Department of Elections, "Voter Information Lookup," <https://vote.elections.virginia.gov/VoterInformation>.

American voters seeking information in advance of an election might also consider calling local election officials, but many voters who are not yet fully fluent in English cannot hope or expect to speak to an official with whom they share a language in common. Even where administrators employ people who can provide live assistance, help can be hard to reach. Gila County, Arizona provides voter assistance in both Apache and Spanish. The County's website indicates – in English – that its Voter Outreach coordinator can provide information and personalized assistance in Apache,¹⁷² but a constituent must effectively be able to navigate the County's website in English, or communicate effectively with an operator likely not fluent in Apache, in order to identify and get in contact with the employee who can provide comprehensible information.

Assuming a voter can overcome the foregoing barriers in a jurisdiction that does not provide competent or comprehensive language assistance, she must then marshal her courage and stamina to actually cast a ballot. In multilingual polling places, administrators can prepare pollworkers to expect limited-English proficient voters and to treat them with equal respect; otherwise, voters who are not fluent in English have encountered unfortunate, persistent hostility. During the 2012 election, voters reported to the Election Protection Coalition that they had been unlawfully prevented from obtaining language assistance at polling places from Suffolk County, New York to New Orleans, Louisiana. One of the worst such incidents occurred when a pollworker in Kansas City, Missouri asked a voter's interpreter to leave the polling place and threatened her with arrest.¹⁷³ Litigation brought by the DOJ against the city of Boston alleged Section 2 violations based on disrespectful treatment toward limited-English proficient Chinese- and Vietnamese-American voters during the 2004 elections, including these voters being ignored or improperly influenced in making ballot choices.¹⁷⁴ In 2004, Bayou La Batre, Alabama had its first Asian American candidate running a competitive race for city council 2004. A white incumbent and his supporters challenged about 50 Asian American voters at the polls during the primary elections. The challengers' rationale was that if the voters "couldn't speak good English, they possibly weren't American citizens."¹⁷⁵

¹⁷² Gila County Elections Department, "Voter Outreach and Language Assistance,"

http://www.gilacountyaz.gov/government/elections/voter_outreach_and_language.php.

¹⁷³ Election Protection, Lawyers' Committee for Civil Rights Under Law, *The 2012 Election Protection Report: Our Broken Voting System and How to Repair It* 44-45(2013), <https://866ourvote.org/wp-content/uploads/2018/11/EP2012-FullReport.pdf>.

¹⁷⁴ Angelo N. Ancheta, "Language Accommodation and The Voting Rights Act," in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER, 293-395 (2007), https://www.law.berkeley.edu/files/ch_11_ancheta_3-9-07.pdf.

¹⁷⁵ Brennan Center for Justice, "The Voting Rights Act: Protecting Voters for Nearly Five Decades" (February 26, 2013), <https://www.brennancenter.org/our-work/research-reports/voting-rights-act-protecting-voters-nearly-five-decades>.

Even assuming a limited-English proficient voter obtains a ballot, those documents are often written in advanced English. Ballotpedia's analysis of statewide ballot measures upon which citizens voted in 2018 found that their average grade level was between 19 and 20, meaning that it would require a graduate degree-level education to understand them.¹⁷⁶ Review of measures put before voters between 1997 and 2007 produced similar results,¹⁷⁷ and demonstrated that administrators wrote ballots at consistently high grade levels. The difficulty of reading and responding to potentially complex English on ballots and elsewhere in voter information is compounded by the accelerated illiteracy rates, in any language, of voters who are not fully fluent in English.¹⁷⁸

In sum, language-minority voters – approximately 85 percent of whom are voters of color – encounter daunting hurdles to voting where administrators withdraw or otherwise prevent the provision of assistance in languages other than English. The effects of language assistance denials are predictable: as described in a recent news article, “LEP voters who aren’t accommodated...often have a difficult time exercising their right to vote. LEP voters have much lower participation rates than non-LEP voters, and studies have shown their participation rate is significantly higher where there are language accommodations.”¹⁷⁹

Furthermore, where the VRA’s provisions expand linguistic access to elections, they correspond with a positive effect on language minority voting communities’ rates of participation in elections and governance. For example, language-minority voters enjoy increased descriptive representation in local office the longer a jurisdiction has been subject to Section 203 of the VRA and has hosted federal observers.¹⁸⁰ Latinos who live in jurisdictions that provide Spanish election information and assistance are more likely to be registered to vote than Latinos who live in jurisdictions that operate monolingual elections,¹⁸¹ and more likely to vote as well.¹⁸² Over the course of the

¹⁷⁶ Ballotpedia, “Ballot measure readability scores” (2018),

https://ballotpedia.org/Ballot_measure_readability_scores_2018.

¹⁷⁷ Doug Chapin, Election Academy, “Everything I Need to Know About Ballots I Learned In . . . GRAD SCHOOL? Readability As Usability” (October 26, 2011),

<https://editions.lib.umn.edu/electionacademy/2011/10/26/everything-i-need-to-know-about/>.

¹⁷⁸ E.g., Jeanne Batalova and Michael Fix, “A Profile of Limited English Proficient Adult Immigrants,” 85 *Peabody Journal of Education* 511 (2010).

¹⁷⁹ Richard Salame, “Across the Country, Limited-English-Proficiency Voters Faced Obstacles,” *THE NATION* (November 12, 2018), <https://www.thenation.com/article/limited-english-proficiency-voters-midterms/>.

¹⁸⁰ E.g., Melissa J. Marschall and Amanda Rutherford, “Voting Rights for Whom? Examining the Effects of the Voting Rights Act on Latino Political Incorporation,” 60 *American Journal of Political Science* 3 (May 7, 2015).

¹⁸¹ E.g., Michael Parkin and Frances Zlotnick, “The Voting Rights Act and Latino Voter Registration: Symbolic Assistance for English-Speaking Latinos,” 36 *Hispanic Journal of Behavioral Sciences* 48 (2014).

VRA's language assistance provisions' existence, language minority community members' registration, voter turnout rates, and election to office, have all increased in the aggregate.¹⁸³ While ensuring that all of a jurisdiction's voters are able to successfully communicate their preferences, effective language assistance also signals a philosophy of welcoming to voters of varying backgrounds. Its absence discourages members of language-minority communities regardless of their English-speaking ability, while its presence is associated with higher turnout of voters of color who both can and cannot vote in English.

Discriminatory Denials of Language Assistance in Practice

Pennsylvania

Although its overall population growth has slowed in recent decades, Pennsylvania's Latino population has grown particularly rapidly. Between 2010 and 2018, its population of people born in Puerto Rico and other island territories ballooned by nearly 28 percent, to more than 164,000. Latino communities have a visible presence in Philadelphia and other urban centers in the state, but also in cities and counties with smaller populations that offer a high quality of life and attractive work opportunities. Luzerne County was one of the ten subjurisdictions in the nation with the fastest-growing Latino community between 2007 and 2014.¹⁸⁴ Over the course of the past three decades, the town of Hazleton in Luzerne County has acquired a majority-Latino population from a start of near-zero.¹⁸⁵

The rapid pace of demographic change in some places in Pennsylvania presaged some high-profile negative responses, such as the events of the 2001 and 2002 general elections in Berks County, Pennsylvania. Federal election monitors present during those elections documented a litany of egregious behaviors and obstructions of language assistance which became the basis of a successful VRA lawsuit against the County. A federal judge overseeing the case found that pollworkers had made audible hostile statements about Latino voters, including, "This is the U.S.A. – Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name," "No Hispanics wake up before 9:30 a.m.," and, "They can't speak, they can't read, and they come

¹⁸² E.g., Michael Jones-Correa, "Language Provisions Under the Voting Rights Act: Effectiveness and Implementation" (testimony presented to a public meeting of the Presidential Commission on Election Administration, Philadelphia, PA, September 4, 2013); Michael Jones-Correa, "Language Provisions Under the Voting Rights Act: How Effective Are They?," 86 *Social Science Quarterly* 549 (2005).

¹⁸³ E.g., James T. Tucker, "Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act," 10 *NYU Journal of Legislation and Public Policy* 206 (2006).

¹⁸⁴ Fastest-growing Hispanic counties, *supra* n.24.

¹⁸⁵ Charles F. McElwee, "Chain Migration Comes to Hazleton," *CITY JOURNAL MAGAZINE* (Spring 2018), <https://www.city-journal.org/html/chain-migration-comes-hazleton-15832.html>.

into vote.” Pollworkers also demanded photo identification not required by law from Latino voters, and selectively required only Latino voters to confirm their addresses because these individuals were presumed to “move a lot within the housing project.” Several people reported that pollworkers prevented them from assisting voters not fluent in English, including community activist Luis Pazmino, who was physically pushed by an election judge who told him, “You’re not supposed to be here.”¹⁸⁶ DOJ officials and community activists brought these issues to the attention of local authorities and yet they persisted, so the Court charged County officials with knowledge that there were problems, and refusal to remedy them.

Concluding that this pattern of hostile treatment had discriminatory effects, the Court granted plaintiffs a preliminary injunction and mandated further negotiation of a specific plan of action to ensure fair treatment of Berks County’s language minority voting population. Thanks to VRA protections, the County today provides extensive information about and assistance with elections in Spanish, and community organizers have declared voter mobilization efforts in 2016 and 2018 successful. “The numbers are unbelievable and show the community came out and voted” in 2018, according to Michael Toledo, CEO of the Daniel Torres Hispanic Center in Reading, PA.¹⁸⁷

Alaska

Particularly for Alaska’s more geographically-isolated Native communities, language assistance is a crucial determinant of voter participation rates, so the VRA has long obligated numerous Alaskan communities to provide voting materials and assistance accessible to Alaska Native voters.¹⁸⁸ Between 2011 and 2016, the number of subjurisdictions in the state covered under Section 203 of the VRA for Alaska Native languages more than doubled, from seven to 15, providing just one of many indicators of ongoing, robust demand for in-language elections materials.

Given the duration and breadth of the state’s experience carrying out federal language assistance provisions, it is particularly disappointing and telling that community advocates found it necessary to launch multiple, repetitive legal challenges of refusals to provide the same materials in-language as in English. In litigation filed in 2007, Yu’pik-speaking voters settled claims that local officials had

¹⁸⁶ *U.S. v. Berks Co.*, 250 F. Supp. 2d 525, 529-31 (E.D. Pa. 2003).

¹⁸⁷ Anthony Orozco, “Latinos encouraged by election turnout in Reading,” *READING EAGLE* (November 10, 2018), <https://www.readingeagle.com/news/article/latinos-encouraged-by-election-turnout-in-reading>.

¹⁸⁸ James Thomas Tucker, Natalie A. Landreth, and Erin Dougherty Lynch, “Why Should I Go Vote Without Understanding What I Am Going to Vote For?’ The Impact of First Generation Voting Barriers on Alaska Natives,” 22 *Michigan Journal of Race and Law* 328, 336-37 (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1074&context=mjrl> [hereinafter “Why Should I Go Vote”].

failed to confirm the bilingual abilities of appointed translators and to provide them with translations of complex ballot language, among other deficiencies. Plaintiffs won specific commitments to recruit and train personnel and to secure equal air time for election announcements in Yu'pik and English from recalcitrant officials:¹⁸⁹ according to the Court, their “efforts to overhaul the language assistance program did not begin in earnest until after this litigation.”¹⁹⁰ Just four years later, plaintiffs’ attorneys returned to court to enforce two more localities’ identical obligations. Apparently, Alaska officials made a “policy decision” not to comply with Section 203 requirements in several other covered boroughs and Census Areas. According to the Court, “The State’s own documents show[ed] that the statewide bilingual coordinator was directed to deny language assistance to those areas. Coincidentally (or not so), the bilingual coordinator’s last day of employment was on December 31, 2012, the very day that the *Nick* agreement ended.”¹⁹¹

In 2013, a group of tribal councils and Alaska Native voters charged state officials with continuing violation of the VRA and the Constitution by their refusal to provide information in Yu'pik that was available in English:

“In defending the latter claim, Alaska argued that the Fifteenth Amendment was inapplicable to Alaska Native voters. At the same time, state officials argued that Alaska Natives were entitled to less voting information than English-speaking voters. They rested their argument on a paternalistic belief that the State, not the voters, should determine what voting information provided to other voters was important enough for LEP Alaska Native voters to know before exercising their fundamental right to vote.”¹⁹²

In a ruling for these plaintiffs, the Court confirmed that officials’ negligence had produced egregious results--Yu'pik voters were deprived of any and all critical pre-election information including copies of ballots, candidates’ statements, and

¹⁸⁹ Consent Decree and Settlement Agreement Between Plaintiffs Billy McCann and Arthur Nelson and Defendants Bethel, Alaska and Lori Strickler, in her capacity as Municipal Clerk, *Nick v. Bethel, Alaska*, No. 3:07-CV-0098 (TMB) (D. Alaska July 9, 2009), https://www.acluak.org/sites/default/files/nick_v_bethel_settlement.pdf.

¹⁹⁰ Order Re: Plaintiffs’ Motion for a Preliminary Injunction Against the State Defendants 8, *Nick v. Bethel, Alaska*, No. 3:07-cv-00098 (TMB) (D. Alaska July 30, 2008).

¹⁹¹ James Thomas Tucker, Written Testimony Submitted in Connection With a Hearing of the House Judiciary Committee on Discriminatory Barriers to Voting 3, September 5, 2019, <http://docs.house.gov/meetings/JU/JUI0/20190905/109887/HHRG-116-JUI0-Wstate-TuckerJ-20190905.pdf>.

¹⁹² *Id.* at 3-4.

explanation of ballot measures. In order to ensure meaningful access for all voters, the court ordered sweeping, detailed remedial actions, from additional hires and production of specific items in specific languages, to preparation and use of standardized glossaries and training programs informed by native speakers of Alaska Native languages. The state remains subject to federal monitoring and court oversight today.¹⁹³

The Known Practice of Withdrawing In-Language Materials and Assistance That Are Available in English

The Voting Rights Advancement Act would require jurisdictions to obtain preclearance before discontinuing provision of in-language materials or assistance, and before selectively altering the provision or distribution of materials and assistance in languages other than English. The bill would focus scrutiny on instances in which laws and policy decisions single language-minority voters out for less favorable treatment than English-speaking majorities, such as those occasions on which pollworkers purport to apply consistent limitations to people who offer to interpret for voters with limited proficiency, but do not treat people assisting voters with disabilities similarly.

According to our research, courts and lawmakers have taken remedial action to combat discriminatory effects or intent in at least 23 instances of obstruction, withdrawal, or severe neglect of language assistance services since 1982. This count of matters litigated excludes charges brought against recalcitrant jurisdictions solely on the basis of Section 4(e), 203, or 208 of the VRA, or any combination thereof, because such matters are commonly resolved absent allegations or findings of retrogression, discriminatory effects, or discriminatory intent. Professor Kousser's research, incorporating claims based on Sections 203 and 208 of the VRA, shows that since 1957, there have been 84 instances where restrictions to language access, including access to materials and translators, have been successfully overturned; 78 of these occurred since 1982.¹⁹⁴

Congressional Action Is Just As Necessary Today As It Was In 1965

Voters of color undoubtedly face significant and persistent barriers to the franchise based on their race, ethnicity, and language. After *Shelby County*, voters have suffered from the lack of voting protections and the necessity of litigation to secure the equal right to vote. However, Congress has the authority and the responsibility to modernize the VRA by enacting legislation to restore the vibrancy of Section 5

¹⁹³ Terms of order and ongoing supervision listed in *Why Should I Go Vote*, *supra* n.188.

¹⁹⁴ Based on Professor Morgan Kousser's compilation of instances voting discrimination. Database is on file with authors.

through an updated coverage formula. A modern VRA would make possible the timely and efficient resolution of voting rights disputes everywhere in the nation, especially where those disputes arise from negative legislative reactions to growing minority political influence.

America's demographics are changing rapidly. The tactics that sustain disparities in voter participation that inspired the VRA are in use in a wider cross-section of our communities than ever before, as voters of color are increasingly present and mobilizing in places that were previously homogeneous. The VRA's tools must be employed as responsively and creatively as are the changes to election policies that some lawmakers employ to silence emerging communities. We urge Congress to enact the Voting Rights Advancement Act and its practice-based preclearance formula to ensure ongoing progress toward a democracy that reflects the full diversity of our nation and provides effective protection to emerging and newly mobilized voters of color.

Mr. COHEN. Thank you, sir.

Our next Witness is Mr. John. C. Yang. Mr. Yang is President and Executive Director of Asian Americans Advancing Justice, otherwise known as AAJC, which seeks to advance to the civil and human rights of Asian Americans and to build and promote a fair and equitable society for all through policy advocacy, education, and litigation.

He is a long-time leader in the Asian American Pacific Islander community, having founded the Asian Pacific American Legal Resource Center in 1997 and served as President of the National Asian Pacific American Bar Association. Also, served in the Obama Administration as a senior advisor for trade and strategic initiatives at the Commerce Department. Earlier this year he testified before this Subcommittee at our hearing on anti-Asian Discrimination and Violence and that ended up helping produce good legislation.

We thank you.

Mr. Yang received his J.D. with honors from GW Law School here. He served as editor of the George Washington Law Review and is a Member of the Moot Court Board. He received his B.A. from Washington University in St. Louis, Missouri.

Mr. Yang, you are recognized for five minutes.

STATEMENT OF JOHN YANG

Mr. YANG. Thank you, Mr. Chair Cohen.

Thank you, Ranking Member Johnson, as well as the other Members of this Subcommittee.

My name is John Yang. I'm the President and executive director of Asian Americans Advancing Justice, AAJC. The mission of our organization is to advance the civil and human rights of Asian Americans and to promote a fair and equitable society for all.

I appreciate this opportunity to testify before you on this issue of importance to Asian Americans. Practice-based preclearance in conjunction with the restored coverage formula is critical to modernizing the Voting Rights Act to reflect the emerging political voice of the Asian American voters.

In targeting those practices that have been used throughout history to silence the political voice of minority communities just when they are beginning to reach critical mass and when they could begin to impact the outcome of elections practice-based preclearance will ensure that the practice being proposed is not discriminatory and harmful to the minority community.

These issues have special relevance for the Asian American community. According to the 2010 census Asian Americans are the nation's fastest growing community with a growth rate of 46 percent between 2000 and 2010. At that time, we number about 17.3 million Asian Americans in the United States. Now, after the 2020 sentence—census we are approximately 23 million of the American population.

While the Asian American population has increased exponentially in the last 50 years, our community also has been part of the American fabric for centuries, whether as railroad workers and building the transcontinental railroad, whether as Japanese American soldiers in the most decorated World War II U.S. combat regi-

ment, whether it is working on farms or on the front line as health care workers during COVID-19.

Nevertheless, Asian Americans are still perceived as outsiders, foreigners, and aliens. Indeed, we have seen this exponential rise in anti-Asian hate over the last 18 months because of the scapegoating of Asian Americans as foreign, disease-carrying, and somehow a threat to America.

Because of this view of Asian Americans as the foreigner we have been denied rights held by U.S. citizens including the ability to vote for most of the country's existence until significant changes were made in 1940s and then with the culmination of the Immigration and Nationality Act of 1965. Prior to such reforms Asian Americans were excluded from civic participation often driven by that fear of the other and the potential threat to the political livelihood of those in power.

This is not only a problem with the past, but it is one that rears its ugly head in the present day and one that is poised to become even bigger because of the demographic shifts that I have mentioned above.

Asian Americans are becoming more politically visible, more politically viable in new jurisdictions throughout the country including in unlikely places such as North Carolina, Georgia, Nevada, and Arizona.

With this growth is an increase in racial abuse against Asian American candidates and efforts to erect barriers to the ballot for Asian American voters. For example, during a 2009 Texas State House of Representative hearing a legislator suggested that Asian American voters adopt names that are easier for Americans to deal with to avoid difficulties imposed on them by voter identification laws. This statement among other things cast Asian Americans apart from other Americans simply because of names that may sound foreign to those individuals.

Similarly, in a 2004 primary election in Alabama supports of a White incumbent facing a Vietnamese American opponent challenged the eligibility of only Asian Americans at the polls by falsely accusing them of not being U.S. citizens or city residents or having felony convictions. The losing incumbent's rationale was if they couldn't speak good English, they possibly weren't American citizens. DOJ's investigation found the challenged racially-motivated and prohibited interference from the challengers during the general election.

As the testimony from others demonstrate today practice-based preclearance focuses on those practices that have been shown to be used to silence the political voice of a growing and emerging community of color. These practices include voter identification laws, withdrawal of multilingual support, and the reduction of polling places.

The U.S. Census Bureau forecasts that while the number of Asian American immigrants will grow between now and 2040 the proportion of Asian Americans who are immigrants will decrease and there will be a very high naturalization rate of—and an increase in U.S-born Asian Americans in the coming years.

Voter participation rates in the Asian American community is growing steadily and very quickly, and indeed its political visibility

will only increase. It is precisely for these reasons that restoring and strengthening the Voting Rights Act is a top priority for our organization. Thank you very much.

[The statement of Mr. Yang follows:]



**Testimony of
John C. Yang
President and Executive Director
Asian Americans Advancing Justice – AAJC**

For

Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage”

**US House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
July 27, 2021**

Introduction

The Voting Rights Act of 1965 (VRA) has been vital to the prevention of actual and threatened discrimination aimed at Asian Americans in national and local elections, and for increasing the community’s access to the ballot. And while the VRA continues to protect the voting rights of Asian Americans, its efficacy has been curtailed by the harmful and short-sighted decision by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 2 (2013) (*Shelby County*). This testimony will detail the history of discrimination against Asian Americans, demographics of the Asian American community, the ongoing discrimination Asian Americans face in the Post-*Shelby County* world, and the need to restore and strengthen the VRA through modernizing how to determine coverage for Section 5 preclearance, including the importance of practice-based preclearance to protect Asian American voters. While Asian Americans are the nation’s fastest growing racial group and are quickly becoming a significant electoral force in jurisdictions across the country, the community will not be able to maximize its political power without the full protection of their voting rights.

Citizenship and the ability to vote are inextricably intertwined – without one, the other is impossible to achieve. And for the better part of America’s history, the franchise was denied to the Asian American community due to its inability to gain citizenship. Racist laws barring Asian Americans from entering the country, staying in the country or voting in the country, among other exclusionary laws, were often driven by fear of the “other” and the potential threat to the political livelihood of those in power. This is not only a problem of the past but one that rears its ugly head in present day, based on the ongoing stereotype of Asian Americans as “outsiders,” “aliens,” and “perpetual foreigners. As the fastest growing racial or ethnic group for almost the last two decades, Asian Americans are becoming more politically visible and

viable in new jurisdictions across the country, especially in nontraditional gateway cities. With this growth is an increase in racial appeals against Asian American candidates and efforts to erect barriers to the ballot for Asian American voters.

Practice-based preclearance, in conjunction with a restored coverage formula, is critical to protecting the emerging political voice of Asian American voters. In targeting those practices that have been used through history to silence the political voice of minority communities just when they begin to reach critical mass and when they could begin to impact the outcome of elections, practice-based preclearance will ensure that these practices are reviewed in areas where Asian Americans and other communities of color are reaching the point where they are perceived as threats to ensure that the practice being proposed is not discriminatory or harmful to the minority community.

Organizational Information

Asian Americans Advancing Justice – AAJC (Advancing Justice – AAJC) is a national 501 (c)(3) nonprofit founded in 1991 in Washington, D.C. Rooted in the dreams of immigrants and inspired by the promise of opportunity, Advancing Justice – AAJC advocates for an America in which all Americans can benefit equally from, and contribute to, the American dream. Our mission is to advance the civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice – AAJC fights for our civil rights through education, litigation, and public policy advocacy and serves to empower our communities by bringing local and national constituencies together and ensuring Asian Americans are able to participate fully in our democracy. In particular, Advancing Justice – AAJC works to eliminate barriers to the participation of Asian Americans in our nation's political process. This includes working to defend and enforce the Voting Rights Act (VRA), improving election systems and providing analysis of Asian American electoral participation. AAJC also provides training and technical assistance to local groups on a wide range of issues that remove barriers to voting, such as implementation of federal voting statutes and enforcing the language assistance provisions of the VRA.

Advancing Justice – AAJC is a member of Asian Americans Advancing Justice (Advancing Justice), a national affiliation of five civil rights nonprofit organizations that joined together in 2013 to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. The Advancing Justice affiliation is comprised Advancing Justice – ALC located in San Francisco, Advancing Justice – Los Angeles, Advancing Justice – AAJC located in Washington, D.C., Advancing Justice – Chicago, and Advancing Justice – Atlanta.

Advancing Justice – AAJC also has our Community Partners Network, a collaboration of nearly 250 community-based organizations in 37 states and the District of Columbia, which helps to further our reach and strengthen our understanding of the communities we represent. Established in 1995, the Community Partners Network has accumulated more than 20 years of experience in coalition-building as well as providing training and technical assistance to local

groups on advocacy and community education efforts. Through this network, we work to increase regional and local capacity to elevate community voices nationwide. In turn, the network provides us insight into the issues facing our diverse community. The states in which we have Community Partners are: AL, AZ, AR, CA, CO, CT, DC, FL, GA, HI, IL, IA, KY, LA, ME, MD, MA, MI, MN, MS, NE, NV, NJ, NM, NY, NC, OH, OK, OR, PA, RI, TN, TX, UT, VA, WA, and WI.

History of Asian American discrimination

Discrimination against Asian Americans is rooted in the false stereotype of Asian Americans as “outsiders,” “aliens,” and “perpetual foreigners.”¹ Based on this perception, Asian Americans were denied rights held by U.S. citizens, including the ability to vote for most of the country’s existence.

The history of the discrimination against Asian Americans begins in the mid-19th century, with the initial migration to the U.S. of Chinese workers to work in the gold mines, the agricultural and garment industries, and as laborers building railroads on the west coast.² The end of the 19th century marked the rise in anti-Chinese sentiment as Chinese immigrants were scapegoated for the lack of economic opportunity.³ This scapegoating resulted in the 1875 Page Act, which barred immigrants deemed as “undesirable” and primarily targeted Asian immigrants.⁴ Rooted in anti-Asian sentiment, the bill intended “to stop the flow of the ‘yellow peril’ to American shores.”⁵

The Senate then passed the Chinese Exclusion Act and its progeny to deter immigration not only from “undesirables,” but from *all* new Chinese immigrants. The Chinese Exclusion Act—the first U.S. immigration law to bar an entire ethnic group—effectively prohibited Chinese immigrants to the U.S. for nearly 60 years.⁶ The Act also barred all persons of Chinese descent

¹ See, e.g., Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc’y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them). Racial stereotyping of Asian Americans reinforces an image of Asian Americans as “different,” “foreign,” and the “enemy,” leading to stigmatization of Asian Americans, heightened racial tension, and increased discrimination. Spencer K. Turnbull, Comment, *Wen Ho Lee and the Consequences of Enduring Asian American Stereotypes*, 7 UCLA Asian Pac. Am. L.J. 72, 75 (2001); Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 Asian L.J. 69, 72, 74-75 (2000); Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 Hastings Women’s L.J. 165, 181 (1995); Note, *Racial Violence Against Asian Americans*, 106 Harv. L. Rev. 1926, 1930-32 (1993); see also Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. Personality & Soc. Psychol. 447 (2005) (documenting empirical evidence of implicit beliefs that Asian Americans are not “American”).

² See Office of the Historian, *Chinese Immigration and the Chinese Exclusion Acts*, <https://history.state.gov/milestones/1866-1898/chinese-immigration> (“Office of the Historian”).

³ See George Anthony Pepper, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, Am. Ethnic Hist. J. 28, 28–46. (1986), https://www.jstor.org/stable/27500484?read-now=1&seq=1#page_scan_tab_contents (“Forbidden Families”).

⁴ 18 Stat. 477, 43 Cong. Ch. 141.

⁵ See *Forbidden Families* at 29, 28–46.

⁶ 22 Stat. 58, 47 Cong. Ch. 126.

from gaining citizenship.⁷ The Geary Act of 1892 extended the Chinese Exclusion Act of 1882 for another ten years.⁸ This bill singled out Chinese individuals, requiring them to obtain “certificates of residence,” and denied them the right to be released on bail upon application for a writ of habeas corpus. Chinese immigrants also could not bear witness in court.⁹ Instead, only a “credible white witness” could testify for them.¹⁰ Although economic security was touted as a reason for the Chinese Exclusion Act, the Act fit within a larger anti-Chinese movement intended to advance a racist agenda for white purity threatened by Chinese immigration.¹¹ In 2011, the Senate introduced and passed a resolution recognizing the discriminatory nature of the Chinese Exclusion Act and other laws against those of Chinese descent in America.¹²

Chinese exclusionary laws paved the way for future immigration laws rooted in anti-Asian sentiment, and the Supreme Court issued harmful precedents by repeatedly upholding challenges to discriminatory laws against Asian immigrants and its progeny, establishing Congress’ plenary power on immigration matters.¹³ Later legislation such as the Naturalization Act of 1906,¹⁴ which allowed only “free white persons” and “persons of African nativity or persons of African descent” to naturalize, also survived constitutional challenges from immigrants seeking to overturn discriminatory policies against Asian immigrants, with two key U.S. Supreme Court cases – *Ozawa v. U.S.* (1922) and *U.S. v. Thind* (1923) – holding that Asian immigrants were not free white people and therefore, ineligible for naturalized citizenship.¹⁵ The Immigration Act of 1924¹⁶ expanded the reach of the Chinese Exclusion Act to prevent citizens from all Asian nations from immigrating to the United States, and these exclusionary laws remained in effect until they were repealed by the Magnuson Act in 1943.¹⁷ Exclusionary laws changed the face of America. As a result, by 1960, only 877,934 Asian Americans lived in the United States.¹⁸ That figure represented a mere half of one percent of the American population.¹⁹

⁷ *Id.*

⁸ Pub. L. No. 52-60, 27 Stat. 25.

⁹ Maureen Fan, *An Immigrant’s Story: Against a Wall of Exclusion*, S.F. Chron. (Oct. 4, 2019), <https://www.sfchronicle.com/opinion/article/An-immigrant-s-story-Against-a-wall-of-14494875.php>.

¹⁰ *Id.*

¹¹ Office of the Historian.

¹² S. Res. 201, 112th Cong. (2011) (enacted), <https://www.congress.gov/bills/112th-congress/senate-resolution/201/text>.

¹³ *See, e.g., Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

¹⁴ Pub. L. 59-338, 34 Stat. 596.

¹⁵ *See, e.g., Ozawa v. United States*, 260 U.S. 178, 198 (1922) (Ozawa, a Japanese immigrant who had lived in the U.S. for over 20 years was “clearly ineligible for citizenship” because he “is clearly of a race which is not Caucasian”); *U.S. v. Thind*, 261 U.S. 204 (1923) (establishing the cancellation of an Indian national’s US citizenship due to the fact that he was not a “free white person” as commonly understood).

¹⁶ Pub. L. 68-139, 43 Stat. 153.

¹⁷ Pub. L. 78-199, 57 Stat. 600.

¹⁸ Asian Americans Advancing Justice, *Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities* 20 (2019), https://www.advancingjustice-aaajc.org/sites/default/files/2019-06/1153_AAJC_Immigration_Final_Pages_LR-compressed.pdf.

¹⁹ *Id.*

Just over a year before the Magnuson Act was signed into law, President Franklin D. Roosevelt issued Executive Order 9066, which authorized the removal of people of Japanese ancestry from their homes and communities in the interest of “national security.” U.S. military leaders, without cause and with fabricated intelligence, feared that American citizens of Japanese descent would execute acts of sabotage against the government. Despite never having been accused of any crime and without trial or representation, approximately 120,000 U.S. residents of Japanese ancestry, half of whom were children, were incarcerated in federal detention. As a result, about 2,000 people died in incarceration from a series of causes, including infectious diseases, bad sanitation, or even shooting by guards.²⁰ And more than 5,000 American babies were born in detention.²¹ The Supreme Court upheld the laws and curfews implementing Executive Order 9066 against U.S. citizens of Japanese descent in a shameful series of opinions. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). Although the Supreme Court ultimately overruled *Korematsu*, the Court simultaneously upheld the Muslim ban, despite the efforts of the Fred Korematsu Institute, Gordon Hirabayashi, Minoru Yasui, and their descendants against injustice.²² The legacy of exclusionary laws against Asian Americans and Japanese incarceration still impacts today’s policies, such as the Muslim ban; modern detention imprisoning of families, including children; and the targeting and profiling of Chinese and Asian Americans and immigrants.

Asian Americans were also subject to other discriminatory laws during this time period. They were removed from their homes and confined to areas set aside for slaughterhouses and other businesses thought prejudicial to public health or comfort.²³ They were denied the right to own land and related real property rights.²⁴ They faced a number of other discriminatory laws ranging from foreign miner taxes, directed at Chinese gold miners, to anti-Asian business

²⁰ Gisela Perez Kusakawa, *The Korematsu Legacy: “Stand up for what is right!”*, AAJC (Jan. 30, 2020), <https://medium.com/advancing-justice-aaic/the-korematsu-legacy-stand-up-for-what-is-right-4a19c5af491d>.

²¹ *Id.*

²² Karen Korematsu, *How the Supreme Court Replaced One Injustice with Another*, N.Y. Times (June 27, 2018), <https://www.nytimes.com/2018/06/27/opinion/supreme-court-travel-ban-korematsu-japanese-internment.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

²³ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (describing San Francisco ordinance).

²⁴ *See, e.g., Webb v. O'Brien*, 263 U.S. 313 (1923) (upholding California Alien Land Law prohibiting land rights for “aliens ineligible for citizenship”); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding similar Alien Land Law in Washington); *see also* Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998) (describing the history of Alien Land Laws, which, while facially race-neutral, were passed in response to Japanese immigrants competing for agricultural land); *see also Oyama v. California*, 332 U.S. 633, 662 (1948) (Murphy, J., concurring) (noting that California’s Alien Land Law “was designed to effectuate a purely racial discrimination, to prohibit a Japanese alien from owning or using agricultural land solely because he is a Japanese alien”).

regulations.²⁵ Both immigrant and native-born Asian Americans also experienced pervasive discrimination in everyday life.²⁶

Asian American Demographics

Laws denying Asian Americans the opportunity to vote because of their inability to enter the country or naturalize continued until the mid-20th century, with the bar on Asian Americans from becoming United States citizens by federal policy lasting until 1943 and the racial criteria for naturalization remaining until 1952.²⁷ Additionally, it was not until the passage of the 1965 Immigration Act and the end of race-based immigration quotas were Asian Americans able to immigrate to the U.S. in large numbers. Since 1965, Asian American communities in the U.S. have grown dramatically. According to Census 2010, Asian Americans are the nation's fastest growing racial group, with a growth rate of 46% between 2000 and 2010; growing to over 17.3 million Asian Americans and making up six percent of the total population.²⁸ Asian Americans continue to be the fastest growing group this decade, with over 22.8 million Asian Americans living in the United States today.²⁹

Often viewed as a monolithic group, Asian Americans are exceedingly diverse with different needs. The country's fastest growing Asian American ethnic groups were South Asian, with the Bangladeshi and Pakistani American populations doubling in size between 2000 and 2010.³⁰ Chinese Americans continue to be the largest Asian American ethnic group, numbering nearly 5.4 million nationwide, followed in size by Indian, Filipino, Vietnamese, and Korean Americans in 2019.³¹

Asian Americans are also geographically diverse and are growing fastest in non-traditional gateway communities. Asian American populations in Nevada, Arizona, North Carolina, and

²⁵ See Sucheng Chan, *Asian Americans: An Interpretative History* 46-47 (1991).

²⁶ *People v. Brady*, 40 Cal. 198, 207 (1870) (upholding law providing that "No Indian. . . or Mongolian or Chinese, shall be permitted to give evidence in favor of, or against, any white man" against Fourteenth Amendment challenge); see also *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregation of Asian schoolchildren).

²⁷ See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of Chinese laborers; repealed 1943); Immigration Act of 1917, ch. 29, 39 Stat. 874, 874-98, and Immigration Act of 1924, ch. 190, 43 Stat. 153 (banning immigration from almost all countries in the Asia-Pacific region; repealed 1952); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 415 (2005).

²⁸ Asian Pacific American Legal Center & Asian American Justice Center, *A Community of Contrasts: Asian Americans in the United States: 2011*, 6, 16, http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf ("Community of Contrasts") (Note: Figures are for the inclusive population, single race and multi-race combined, and are not exclusive of Hispanic origin, except for white, which is single race, non-Hispanic).

²⁹ U.S. Census Bureau, 2019 Population Estimates, Annual Estimates of the Resident Population by Sex, Age, Race Alone or in Combination, and Hispanic Origin: April 1, 2010 to July 1, 2019 (July 1, 2019), <https://www2.census.gov/programs-surveys/popest/tables/2010-2019/national/asrh/nc-est2019-sr11h.xlsx>.

³⁰ Community of Contrasts at 9.

³¹ Abby Budiman & Neil G. Ruiz, *Key facts about Asian Americans, a diverse and growing population*, Pew Research Center (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/2021/04/29/key-facts-about-asian-americans/> ("Pew Key Facts").

Georgia were the fastest growing nationwide between 2000 and 2010.³² California had an Asian population of roughly 6.7 million in 2019, by far the nation's largest. It was followed by New York (1.9 million), Texas (1.6 million), New Jersey (958,000) and Washington (852,000).³³ Since 2010, the top 10 fastest growing Asian American populations were in Indiana, Nebraska, South Carolina, Montana, Kentucky, Texas, Iowa, South Dakota, North Carolina, and Utah, with growth rates ranging between 46 percent to 67 percent.³⁴ California, New York, Texas, and New Jersey remained the four largest Asian American populations in the nation, but Illinois became the fifth largest, with an estimate of 710, 119 Asian Americans in 2019.³⁵

A similar increase among Asian American voters can be seen. The number of eligible Asian Americans grew by almost 150% from almost five million in 2000 to over 11.5 million in 2020 (as compared to a growth rate of 24% for the total population over that same time period).³⁶ The growth rate of eligible Asian Americans registering (200%; from almost 2.5 million to over 7.3 million registered) and voting (236%; from just over 2 million to almost 7 million who voted) was even greater during that same time period.³⁷ The 2020 election showed over 1.2 million additional eligible voters from the previous presidential election, and an even higher increase in Asian Americans who actually registered and voted.³⁸ This represented a 27.1% increase in registered Asian Americans and 36.4% increase in Asian Americans who voted between the 2016 and 2020 presidential elections.³⁹ This growth will continue, with Asian American and Pacific Islander voters slated to make up five percent of the national electorate by 2025 and ten percent of the national electorate by 2044.⁴⁰

Current Effects of Ongoing Discriminatory Attitudes Against Asian Americans

Racist sentiment towards Asian Americans is not a passing fad but a continuing reality, fueled in recent years by a growing xenophobic and racist backlash against immigrants.⁴¹ Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.⁴² These attacks have grown

³² Community of Contrasts at 8.

³³ Pew Key Facts.

³⁴ Author's calculations based on U.S. Census Bureau 2019 5-year estimates ACS data.

³⁵ Author's calculations based on U.S. Census Bureau 2019 5-year estimates ACS data.

³⁶ Author's calculations based on U.S. Census Bureau data https://www2.census.gov/programs-surveys/cps/tables/p20/585/table02_5.xlsx (2020 data points) and <https://www2.census.gov/programs-surveys/cps/tables/p20/542/tab04b.xls> (2000 data points).

³⁷ *Id.*

³⁸ Author's calculations of U.S. Census Bureau data available on voter participation in federal elections through its Current Population Survey.

³⁹ *Id.*

⁴⁰ Karthick Ramakrishnan & Farah Z. Ahmad, State of Asian Americans and Pacific Islanders, Center for American Progress and AAPI Data (2014), <http://ampr.gs/AAPIREports2014>.

⁴¹ See U.S. Dep't of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later*, at 4 (Oct. 19, 2011) (noting that the FBI reported a 1,600 percent increase in anti-Muslim hate crime incidents in 2001), http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf.

⁴² See, e.g., *Id.*, at 7-9 (discussing numerous incidents of post-9/11 hate crimes prosecuted by the DOJ).

exponentially with the COVID-19 pandemic, with racist harassment and violence directed toward Asian Americans who are wrongly blamed for the COVID-19 pandemic. While hate incidents targeting Asian Americans sharply rose with the onset of the pandemic and has been ongoing over the past year, the recent spate of violent attacks against elderly Asian Americans captured on video⁴³ has drawn previously unseen media attention.

Since February 2020, over 8,000 hate incidents targeting Asian Americans have been reported to Stop AAPI Hate (<https://stopaapihate.org/>) and the Asian American Advancing Justice affiliation's Stand Against Hatred reporting site (<https://www.standagainsthared.org/>) since the beginning of the pandemic. But it is important to note that the anti-Asian racism and hate is not a new phenomenon,⁴⁴ and comes on the heels of years of attacks on immigrant communities by the Trump administration. In fact, the Advancing Justice affiliation launched the Stand Against Hatred website⁴⁵ in January 2017 in response to the increase in hate incidents against Asian Americans connected to the xenophobic, anti-immigrant, and racist rhetoric of Trump's presidential campaign in the 2016 election cycle. It comes as no surprise that Trump and other elected officials' racist rhetoric blaming China for COVID, and calling it the "Chinese Virus" and "Kung Flu" poured fuel on the fire of anti-immigrant and anti-Asian sentiment that was slowly burning for years.

In fact, anti-Asian hate and discrimination has impacted almost every aspect of life for Asian Americans during the pandemic, including housing, employment, and places of public accommodation like restaurants, stores, and so much more.⁴⁶ In Indiana, two Hmong men were denied lodging by a motel employee who asked if they were Chinese and refused to give them a room.⁴⁷ Other reports include Asian American renters being refused housing based on their race. In New York City alone, between February and April 2020, there were 105 reports of anti-Asian incidents reported to the New York Commission on Human Rights, including 5 reports of

⁴³ Kyung Lah and Jason Kravarik, *Family of Thai immigrant, 84, says fatal attack 'was driven by hate'*, CNN, (February 16, 2021), <https://www.cnn.com/2021/02/16/us/san-francisco-vicha-ratanapakdee-asian-american-attacks/index.html>.

⁴⁴ The current wave of anti-Asian racism and xenophobia is part of the deep structural racism that has long impacted communities of color. Anti-Asian racism has manifested itself at many points throughout U.S. history, including with the "Yellow Peril" and the Chinese Exclusion Act of 1882; the incarceration of over 120,000 Japanese Americans during World War II; the murder of Vincent Chin in 1982 at the height of trade tensions with Japan, and the scapegoating and violence directed against Arab, Middle Eastern, Muslim, and South Asian communities after 9/11.

⁴⁵ Asian Americans Advancing Justice, www.standagainsthared.org.

⁴⁶ Catherine Thorbecke and Deena Zaru, *Asian Americans face coronavirus 'double whammy': Skyrocketing unemployment and discrimination*, ABC News, (May 20, 2020), <https://abcnews.go.com/Business/asian-americans-face-coronavirus-double-whammy-skyrocketing-unemployment/story?id=70654426>.

⁴⁷ Shawn Nottingham and Dave Alsop, *Hmong men record alleged coronavirus discrimination at Indiana hotels*, CNN, (February 15, 2020), <https://www.cnn.com/2020/02/14/us/hmong-men-hotel-refusals/index.html>.

housing discrimination, 9 reports discrimination in public accommodation, and 91 reports of harassment.⁴⁸

Discriminatory attitudes toward Asian Americans and the aforementioned “perpetual foreigner” stereotype have also become squarely embedded in the political process. Insidious manifestations of the stereotype can be found in the verbal attacks levied against Asian American candidates and voters, negative political ads that use the misconception of “Asia” as an enemy to the U.S., and manipulation of images of candidates to trigger negative stereotypes of minority candidates. The following are examples of these types of manifestations:

- In April 2005, in Trenton, New Jersey, radio hosts used racial slurs and spoke in mock Asian gibberish during an on-air radio show. The hosts demeaned a Korean American mayoral candidate and made various other derogatory remarks. One of the hosts, Craig Carton, said:

Would you really vote for someone named Jun Choi [said in fast-paced, high-pitched, squeaky voice]? ... And here’s the bottom line. no specific minority group or foreign group should ever dictate the outcome of an American election. I don’t care if the Chinese population in Edison has quadrupled in the last year, Chinese, should never dictate the outcome of an election, Americans should... And it’s offensive to me... not that I have anything against uh Asians... I really don’t... I don’t like the fact that they crowd the goddamn blackjack tables in Atlantic City with their little chain smoking and little pocket protectors.⁴⁹

- In April 2005 in Washington State, a citizen named Martin Ringhofer challenged the right to vote of more than one thousand people with “foreign-sounding” names. Mr. Ringhofer targeted voters with names that “have no basis in the English language” and “appear to be from outside the United States” while eliminating from his challenge voters with names “that clearly sounded American-born, like John Smith, or Powell,” and ultimately primarily targeted Asian and Hispanic voters.⁵⁰ In one of the counties where Mr. Ringhofer initiated his challenge, the county auditor declined to process the challenge and contacted the Department of Justice (DOJ) because of the challenge’s apparent violation of state and federal law.⁵¹
- In November 2005, a candidate of South Asian descent, Tom Abraham, running for City Council Seat 4 in Orange City, Florida was mocked by his opponent for his accent at a

⁴⁸ Stephanie Yang, *New York City Has Logged 248 Complaints of Coronavirus Discrimination*, Wall Street Journal, (April 19, 2020), <https://www.wsj.com/articles/new-york-city-has-logged-248-complaints-of-coronavirus-discrimination-11587308400>.

⁴⁹ Hearing on H.R. 9 Before the H. Subcomm. on the Const. of the H. Judiciary Comm., 109th Cong. 40 at 4 (2006) (prepared statement of K. Narasaki).

⁵⁰ *Id.*

⁵¹ Letter dated April 5, 2005 from Franklin County Auditor to Martin Ringhofer.

community forum. His opponent, Dan Sherrill, claimed that he could not understand him and was quoted by the *Orlando Sentinel* as saying, “I’m usually not prejudiced, but I don’t want an Indian in my government. As far as I know, he could be a nice guy, but these kind of people get embedded over here. You remember 9/11.” The *St. Petersburg Times* further reported that Sherrill said that voters wouldn’t support Abraham if they saw and heard him.⁵²

- In August 2006, former Senator George Allen, while on the campaign trail, made the following announcement – before a predominantly Caucasian audience – about a 20-year-old South Asian staffer working for his opponent: “Let’s give a warm welcome to Macaca, here. Welcome to America and the real world of Virginia.” The term “macaca” is a racial slur in some parts of the world. Allen’s comments implied that the South Asian staffer, who was born and raised in Virginia, did not belong in America because of his appearance and ethnic background.⁵³
- During a 2009 Texas House of Representatives hearing, legislator Betty Brown suggested that Asian American voters adopt names that are “easier for Americans to deal with” in order to avoid difficulties imposed on them by voter identification laws.⁵⁴ The statement made clear that Brown perceived the Asian American community’s voice as unwelcome in American politics and notably cast Asian Americans apart from other “Americans.”
- In June 2010, State Senator Jake Knotts described South Carolina State Representative Nikki Haley, an Indian American who was running in the state’s gubernatorial race, as “[a] f---ing raghead... [w]e got a raghead in Washington; we don’t need one in South Carolina... [s]he’s a raghead that’s ashamed of her religion trying to hide it behind being Methodist for political reasons.” Knotts further stated he believed Haley had been set up by a network of Sikhs and was programmed to run for governor of South Carolina by outside influences in foreign countries.⁵⁵
- On April 3, 2012, Washington, D.C. Councilmember and former mayor Marion Barry made disparaging remarks about Asian Americans at his Ward 8 primary election victory party. He stated, “We got to do something about these Asians coming in and opening up businesses and dirty shops ... They ought to go. I’m going to say that right now.”⁵⁶ A few

⁵² S. Asian Americans Leading Together, *From Macacas to Turban Toppers: The Rise in Xenophobic and Racist Rhetoric in American Political Discourse* at 21 (2010), http://saalt.org/wp-content/uploads/2012/09/From-Macacas-to-Turban-Toppers-Report.small_.pdf (“SAALT Report”).

⁵³ *Id.* at 17.

⁵⁴ R.G. Ratcliffe, *Texas Lawmaker Suggests Asians Adopt Easier Names*, Houston Chron., Apr. 8, 2009, <http://www.chron.com/news/houston-texas/article/Texas-lawmaker-suggests-Asians-adopt-easier-names-1550512.php>.

⁵⁵ SAALT Report at 19.

⁵⁶ Tim Mak, *Report: Marion Barry: ‘Dirty’ Asian Stores*, Politico, Apr. 5, 2012, <http://www.politico.com/news/stories/0412/74866.html>.

weeks later, Barry declared, "In fact, it is so bad, that if you go to the hospital now, you find a number of immigrants who are nurses, particularly from the Philippines."⁵⁷

We have continued to see these racist attitudes and stereotypes permeate our political process over the last several election cycles:

- During the 2017 local and statewide elections in New Jersey, Asian American candidates were targets of racist propaganda. *First*, in Edison, New Jersey, two school board candidates, Jerry Shi and Falguni Patel were targeted with anti-immigrant mailers that said "Make Edison Great Again" and calling for their deportation.⁵⁸ The mailers said that "[t]he Chinese and Indians are taking over our town," and "Chinese school! Indian school! Cricket fields! Enough is enough."⁵⁹ *Next*, in Hoboken, New Jersey, Sikh mayoral candidate, Ravi Bhalla was targeted with racist flyers placed on car windshields in Hoboken with the message "Don't let TERRORISM take over our town!" above his picture.⁶⁰ Ultimately, despite these xenophobic attacks, all three Asian Americans won their elections.
- In 2018, the New Jersey Republican Party distributed campaign mailers about current Congressman Andy Kim (NJ-03), who was running as a challenger to then-Rep. Tom MacArthur, with the words "Something Is Real Fishy about Andy Kim," in a typeface called Chop Suey with a picture of a dead fish on ice. In July 2021, Congressman Kim was again targeted in a video made by Republican challenger Tricia Flanigan, in which she says about Congressman Kim, "He doesn't represent our interests. He is not one of us." Congressman Kim responded that such words were deliberately used against him as an Asian American, and that "'Not one of us' are words that make many Asian Americans constantly feel like we are seen as foreigners in our own country."⁶¹
- At a Congressional hearing on March 15, 2018, Japanese American Congresswoman Hanabusa questioned Interior Secretary Ryan Zinke about why the Trump Administration "cancelled funding for a program to preserve the history of internment camps that held people of Japanese ancestry -- most of them Japanese-Americans --

⁵⁷ Tim Craig, *D.C.'s Marion Barry Called 'racist' for Remark About Filipino Nurses*, The Wash. Post, Apr. 24, 2012, http://www.washingtonpost.com/local/dc-politics/dcs-marion-barry-called-racist-for-remark-about-filipino-nurses/2012/04/24/gIQA9WXXft_story.html.

⁵⁸ Amy B Wang, *'DEPORT': Racist campaign mailers target Asian school board candidates*, Washington Post, Nov. 2, 2017, https://www.washingtonpost.com/news/education/wp/2017/11/02/deport-racist-campaign-mailers-target-asian-school-board-candidates/?utm_term=.c84f7d1ab7a2.

⁵⁹ *Id.*

⁶⁰ Alyana Alfaro, *Racist Campaign Literature Surfaces in New Jersey*, Observer, Nov. 6, 2017, <http://observer.com/2017/11/racist-campaign-literature-surfaces-in-new-jersey/>.

⁶¹ Mary Chao, *'Not one of us': Congressman Andy Kim responds to video by potential GOP challenger*, NorthJersey.com (July 20, 2021; updated July 21, 2021), <https://www.northjersey.com/story/news/politics/2021/07/20/gop-candidate-tricia-flanigan-video-andy-kim-not-one-us/8034983002/>.

during World War II.”⁶² As part of her questioning, Representative Hanabusa began by detailing her own family’s experiences during this atrocious time in American history. In response, Secretary Zinke, began his response with an insensitive “Oh, Konnichiwa.”⁶³ “Konnichiwa is a Japanese expression that roughly translates to ‘good afternoon.’ This prompted Hanabusa to shoot back that it was still morning, which meant ‘ohayo gozaimasu’ would actually be the more appropriate greeting.”⁶⁴ Secretary Zinke’s remarks demonstrate the ongoing “perpetual foreigner” problem faced by Asian Americans; although she is a fourth-generation American-born member of Congress, Secretary Zinke somehow thought it appropriate to greet the Congresswoman in Japanese.

- In March 2021, GOP Representative Chip Roy (TX-21) made what could only be described as a pro-lynching remarks during a House Judiciary Committee on the rise in anti-Asian American violence. Representative Roy railed against the “Chinese Communist Party” and referred to them as the “bad guys” that he wanted to lynch.⁶⁵
- In July 2021, State Rep. Gerald Brady apologized for using a racist sexist slur for Asian woman in an unrelated email about sex work. The email was sent to an advocate working on decriminalizing prostitution. The words were “Is the dude basically saying, if we provide free (sex acts) for Uncle Pervie there will be few rapes and few (slur for Asian women) will be shipped in CONEX containers to the Port of Wilmington?”⁶⁶

We have also seen efforts to undermine the community’s political voice, such as what happened during the 2004 primary elections in Bayou La Batre, Alabama. Supporters of a White incumbent, facing a Vietnamese American opponent during the primaries, challenged the eligibility of only Asian Americans at the polls by falsely accusing them of not being U.S. citizens or city residents, or of having felony convictions.⁶⁷ The losing incumbent’s rationale was “if they

⁶² Interior Secretary Ryan Zinke criticized for internment camp,, CBS News, March 16, 2018, <https://www.cbsnews.com/news/interior-secretary-ryan-zinke-criticized-for-internment-camp-remarks-colleen-hanabusa/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Timothy Bella and Marianna Sotomayor, *GOP lawmaker references lynching during anti-Asian violence hearing: ‘Find all the rope in Texas and get a tall oak tree’*, The Wash. Post, Mar. 18, 2021, <https://www.washingtonpost.com/politics/2021/03/18/chip-roy-lynching-violence-atlanta/> (“There’s old sayings in Texas about, you know, ‘find all the rope in Texas and get a tall oak tree.’ You know, we take justice very seriously, and we ought to do that — round up all the bad guys.”).

⁶⁶ Sakshi Venkatraman, *Delaware state lawmaker apologizes for using racist slur against Asian women*, NBCNews Asian American, July 21, 2021, <https://www.nbcnews.com/news/asian-america/delaware-state-lawmaker-apologizes-using-racist-slur-against-asian-women-n1274628>.

⁶⁷ See H.R. Rep. No. 109-478, at 45 (2006); *Challenged Asian Ballots in Council Race Stir Discrimination Concerns*, Associated Press, Aug. 30, 2004, at 2B.

couldn't speak good English, they possibly weren't American citizens."⁶⁸ DOJ's investigation found the challenges racially motivated and prohibited interference from the challengers during the general election.⁶⁹ That year, Bayou La Batre elected its first Asian American to the City Council.⁷⁰ Similarly, in Harris County (Houston), Texas, during the 2004 Texas House of Representatives race, accusations of non-citizen voting were implied in the request for an investigation by the losing incumbent into the election resulting in the victory of Hubert Vo, a Vietnamese American.⁷¹ While both recounts affirmed Vo's victory, making him the first Vietnamese American state representative in Texas history, his campaign voiced concern that such an investigation could intimidate Asian Americans from political participation altogether in future elections.⁷²

Need for Restoring and Modernizing Section 5 to Protect Asian American Voters

Section 5 of the Voting Rights Act prohibits the implementation by covered jurisdictions of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first receiving approval, or "preclearance," from DOJ or the U.S. District Court for the District of Columbia.⁷³ Section 5 applies to all voting changes in covered jurisdictions, including redistricting, annexation of other territories or political subdivisions, and polling place changes. Voting changes with a discriminatory purpose or with a retrogressive effect (i.e., where the change puts minorities in a worse position than if the change did not occur) will not be pre-cleared and the submitting jurisdiction would be prohibited from adopting the voting change.

In enacting the VRA in 1965, Congress recognized that previous efforts to litigate discriminatory voting practices were limited in their effectiveness as particularly recalcitrant jurisdictions would simply replace the struck-down discriminatory practice with another, newer discriminatory practice. Responding to the persistent nature of discriminatory schemes in voting, Congress developed a mechanism in the VRA to provide a "check" on whether proposed

⁶⁸ See DeWayne Wickham, *Why Renew Voting Rights Act? Ala. Town Provides Answer*, USA Today, Feb. 22, 2006, http://usatoday30.usatoday.com/news/opinion/editorials/2006-02-22-forum-voting-ac_t_x.htm (quoting defeated City Council incumbent Jackie Ladnier).

⁶⁹ See *id.*

⁷⁰ See Press Release, U.S. Dep't of Justice, Justice Department to Monitor Elections in New York, Washington, and Alabama (Sept. 13, 2004), http://www.justice.gov/opa/pr/2004/September/04_crt_615.htm ("In Bayou La Batre, Alabama, the Department will monitor the treatment of Vietnamese-American voters.").

⁷¹ See *Decided Victory: Heflin's Camp Swelled Store of Disinformation*, Houston Chronicle, Feb. 9, 2005, <http://www.chron.com/opinion/editorials/article/Decided-victory-Heflin-s-camp-swelled-store-of-1640120.php>.

⁷² See *id.*; Thao L. Ha, *The Vietnamese Texans*, in *Asian Texans: Our Histories and Our Lives*, 263, 284-85 (Irwin A. Tang ed., 2007).

⁷³ 52 U.S.C. § 10304. The following States are covered by Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Only certain counties or towns in the following states are covered under Section 5: California, Florida, Michigan, New York, North Carolina, and South Dakota. It must be noted, however, that even if only a part of a jurisdiction is covered by Section 5, congressional and state legislative redistricting plans for the entire state must be submitted for review. For a detailed listing of counties and towns covered, please visit http://www.justice.gov/crt/about/vot/sec_5/covered.php.

voting changes by particularly bad actors would be problematic for minority voters – Section 5 preclearance. This infrastructure (preclearance) has been critical to a) prevent discriminatory voting practices from going into effect, b) provide notice to the community about potential discriminatory changes and c) provide a cost-effective and swift mechanism to determine whether a proposed voting change should be approved. As a result, voting became more accessible to all communities.

Unfortunately, the U.S. Supreme Court weakened the VRA in *Shelby County*. The Court ruled 5-4 that the formula used to determine Section 5 jurisdictions was based on “decades-old data and eradicated practices,” despite the extensive record confirming that these areas continued to commit acts of voting discrimination.⁷⁴ Thus, while the Court did not invalidate Section 5, it rendered it useless by invalidating the formula that determined what jurisdictions were required to submit voting changes for preclearance. But at the same time, the Court recognized that “no one doubts” that voting discrimination still exists and invited Congress to pass legislation with a modernized formula.⁷⁵

Since the Court invalidated the key enforcement provision of the Act in 2013, voting discrimination has become harder to stop. In states, counties, and cities across the country, legislators pushed through laws designed to make it harder for minorities to vote. For example, in 2013, mere months after the *Shelby County* decision, North Carolina – where the Asian American population increased by 85 percent between 2000 and 2010 – passed H.B. 589. The legislation restricted voting through a ban on paid voter registration drives; eliminated same-day voter registration; allowed voters to be challenged by any registered voter of the county in which they vote, rather than just their precinct; reduced early voting by a week; authorized vigilante poll observers with expanded range of interference; expanded the scope of who may examine registration records and challenge voters; repealed out-of-precinct voting; eliminated the flexibility in opening early voting sites at different hours within a county; and curtailed satellite polling sites for the elderly or voters with disabilities. In striking down the law, the Fourth Circuit found that the legislature purposefully and selectively decided to attack specific election laws that benefit African American voters in order to impede their political participation. In fact, the court noted that “the new provisions target African Americans with almost surgical precision” and “impose cures for problems that did not exist.”⁷⁶ This litigation would not be necessary if Section 5 were still in full force. Indeed, one state senator noted that it was because of the Court’s decision in *Shelby County* that the legislature was free to “go with the full bill,” indicating his full awareness that they would never have received approval for the

⁷⁴ *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2627 (2013).

⁷⁵ *Id.* at 2619.

⁷⁶ Robert Barnes and Ann E. Marimow, *Appeals Court Strikes Down North Carolina’s Voter-ID Law*, Washington Post, July 29, 2016, https://www.washingtonpost.com/local/public-safety/appeals-court-strikes-down-north-carolinas-voter-id-law/2016/07/29/810b5844-4f72-11e6-aa14-e0c1087f7583_story.html?utm_term=.8e86e5a8273c. See also Complaint, *North Carolina State Conference of the NAACP et al. v. McCrory et al.*, No. 1:13-cv-658 (M.D.N.C. Aug. 12, 2013)., Complaint, *League of Women Voters et al v. North Carolina et al.*, No. 1:13-cv-00660 (M.D.N.C. Aug. 12, 2013)., and, Complaint, *U.S. v. The State of North Carolina*, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

bill under the full protections of the VRA. In 2016, 14 states, including Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia, which were previously covered in full or in part by Section 5, had new voting restrictions that include strict photo ID requirements and registration restrictions in place for the first time in a presidential election.⁷⁷

More recently, in March 2021, Georgia Governor Brian Kemp signed into law Georgia Senate Bill 202 (“SB 202”), a bill that was introduced in the Georgia General Assembly just 35 days earlier. Several proponents of SB 202 explained that the intent of the bill was to reduce Georgian voter turnout, especially in light of the fact that a record number of votes were casted by Georgians in the 2020 General Election and 2021 Runoff Elections. Georgia achieved this unprecedented turnout, in part, by affording its voters several options for exercising their constitutional right to vote, not only in person on Election Day, but also through absentee-by-mail ballots that could be returned through the postal system or deposited in secure drop boxes. SB 202, which was rushed through and erratic and non-transparent legislative process, would eliminate many of these options and make accessing the ballot more difficult.

Advancing Justice – AAJC, Advancing Justice–Atlanta, and Advancing Justice – ALC brought a lawsuit challenged certain provisions of SB 202 under Section 2 of the VRA, as well as the First, Fourteenth, and Fifteenth Amendments to the United States Constitution.⁷⁸ The challenged provisions include decreasing the time frames to request and receive absentee-by-mail ballots, limiting access to secure drop boxes, prohibiting election officials’ proactive mailing of ballot applications, impose additional identification requirements as part of the absentee-by-mail ballot application process, and criminalizing certain return of completed ballot applications. The lawsuit contends that such voting restrictions intentionally discriminate against communities of color, specifically voting-eligible Asian American and Pacific Islander Georgians, disproportionately and negatively impact the voting ability of voting-eligible Asian American and Pacific Islander Georgians, and impose severe and unjustified burdens on the fundamental right to vote—all in violation of federal law.

Asian Americans and Pacific Islanders in Georgia vote absentee-by-mail at a substantially higher rate than the average voter in the state. During the 2020 General Election, approximately 40% of Asian American and Pacific Islander voters used absentee-by-mail voting, compared to about 26% of all Georgian voters on average. And during the 2021 Runoff Elections, approximately 34% of Asian American and Pacific Islander voters voted absentee-by-mail, compared to about 24% of all Georgian voters on average. As these statistics reflect, absentee-by-mail ballots facilitate greater Asian American and Pacific Islander participation in Georgia’s elections. The Asian American community has a higher proportion of foreign-born residents compared to

⁷⁷ Brennan Center for Justice, Webpage on New Voting Restrictions in America, https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf.

⁷⁸ See, Press Release, Asian American Advocacy Groups File Lawsuit to Ensure Freedom to Vote, Mar. 25, 2021, <https://www.advancingjustice-atlanta.org/news/freedomtovote>; First Amended Complaint, *Asian Americans Advancing Justice – Atlanta v. Raffensperger*, No. 1:21-cv-1333 (N.D. Ga. Apr. 27, 2021), <https://storage.courtlistener.com/recap/gov.uscourts.gand.288705/gov.uscourts.gand.288705.27.0.pdf> (First Amended Complaint Advancing Justice SB 202).

other racial groups in Georgia, and limited English proficiency (“LEP”) remains common in the Georgia Asian American community. For context, more than one in five Asian American and Pacific Islander households in Georgia are LEP households. And while Asian Americans make up less than five percent of Georgia’s total population, they form approximately one quarter (24.39%) of the state’s LEP population. Newly naturalized citizens, first time voters, and LEP voters often need more time to review their ballot materials and/or seek assistance from persons authorized under Georgia law. Absentee-by-mail voting allows these voters crucial time and resources that may be less available or accessible through in-person voting.

Further burdening the right of Georgian Asian Americans and Pacific Islanders is the reduced access to secure drop boxes. Before SB 202 was enacted, Georgia voters enjoyed the ability to safely and securely cast their ballots in one of 330 drop boxes in Georgia, most of which were freestanding outside of a building and often accessible 24 hours a day. Moreover, drop box locations were permitted to open as early as 49 days before Election Day, and did not close until 7:00 p.m. on Election Day. As a result of SB 202, the number of drop boxes will be reduced sharply. For example, in Gwinnett County, whose population is approximately 50% non-white and 12.5% Asian American and Pacific Islander, there were 23 ballot drop boxes during the 2020 election cycle. Under SB 202, that number will dwindle; likely, only six drop boxes will be permitted for a county of over 936,000 residents. Similarly, Fulton County, a county with over one million residents and the second largest Asian American and Pacific Islander population in the state, offered 36 drop boxes during the 2020 election cycle. But SB 202 would force Fulton County to cut the number of drop boxes to as few as nine. Combined with a drastic reduction in the times these drop boxes will be made available, the reduction of drop boxes will harm Asian American and Pacific Islander voters in Georgia who will already face time constraints to navigate a further-complicated absentee-by-mail ballot system.

The effect of these restrictions on Asian American and Pacific Islander voters, in addition to other restrictions in SB 202 that disproportionately affect communities of color, would not have passed muster under a Section 5 review, as voters of color would have been made worse off as a result of this voting change. Instead of a resource-efficient process to assess the proposed voting change (under preclearance), there are currently eight lawsuits challenging these provisions and many voters who will likely be harmed while these lawsuits work their way through the legal process.⁷⁹

Importance of Practice-Based Preclearance for Asian Americans

Because of the changing demographics of this country, a fully restored and modernized VRA is needed more than ever.⁸⁰ Racial tensions often occur when groups of minorities grow rapidly in

⁷⁹ See, Brennan Center, Voting Rights Litigation Tracker 2021: Georgia, <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021#georgia>.

⁸⁰ A fully restored and modernized VRA is one that would also address the disappointing Supreme Court decision in *Brnovich v. DNC*. See, Asian Americans Advancing Justice – AAJC, Press Release, Asian Americans Advancing Justice – AAJC Calls On Congress to Protect Freedom to Vote Following Supreme Court Decision in *Brnovich v. DNC*, July 1, 2021, <https://advancingjustice-aaic.org/press-release/advancing-justice-aaic-brnovich>.

an area and where there is an increase in political relevance of that minority community, such as Asian American communities across the country.⁸¹ This can lead to fear of and resentment toward Asian Americans by those in power, which can then result in hampering the Asian American community's exercising of their right to vote free of harassment and discrimination, as documented above. The community's population growth will also likely lead to increased efforts to undermine the political voice of Asian Americans similar to the recent and ongoing efforts to restrict access to the polls.⁸² Asian Americans are potential swing voters⁸³ and are becoming numerous enough to make the difference in certain races, and they will be facing tried and true tactics often used to minimize the political impact of an emerging community.

To that end, a legislative fix to the *Shelby County* decision must include both a substitute coverage formula and a mechanism that also addresses the needs of emerging communities of color that face discrimination aimed to silence their political influence by those currently in power. A history-based coverage formula alone is not enough to protect the voting rights of emerging minority populations. Practice-based preclearance focuses on suspect practices that have historically been utilized to silence the political voice of communities of color and would require preclearance review (performed by either the Department of Justice or the federal District Court in Washington, DC) prior to implementation of the covered practice.⁸³ The coverage for practice-based preclearance would apply to diverse jurisdictions throughout the country (not already covered through a history-based coverage formula), generally defined as those states and political subdivisions in which two or more racial, ethnic, or language minority groups each represent 20 percent or more of the voting-age population or in which a single

⁸¹ See generally Toni Monkovic, *Why Donald Trump Has Done Worse in Mostly White States*, New York Times, Mar. 8, 2016, http://www.nytimes.com/2016/03/09/upshot/why-donald-trump-has-done-worse-in-mostly-white-states.html?_r=0 ("Political scientists have written about the importance of tipping points in ethnic strife or resentment around the globe. It occurs when one group grows big enough to potentially alter the power hierarchy."); see also Audrey Singer, Jill H. Wilson & Brooke DeRenzis, *Metropolitan Policy Program at Brookings, Immigrants, Politics, and Local Response in Suburban Washington* (2009), https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf (noting that longtime residents of Prince William County, Virginia, perceived that their quality of life was diminishing as Latinos and other minorities settled in their neighborhoods); James Angelos, *The Great Divide*, New York Times, Feb. 20, 2009, http://www.nytimes.com/2009/02/22/nyregion/thecity/22froz.html?_r=3&pagewanted=1 (describing ethnic tensions in Bellerose, Queens, New York, where the South Asian population is growing); Ramona E. Romero & Cristóbal Joshua Alex, *Immigrants Becoming Targets of Attacks*, National Campaign to Restore Civil Rights, Jan. 26, 2009, <http://rollback.typepad.com/campaign/2009/01/it-has-happened-again---in-early-december-less-than-a-month-after-seven-teenagers-brutally-attacked-and-killed-marcelo-luc.html> (describing the rise in anti-Latino violence where the immigration debate is heated in New York, Pennsylvania, Texas, and Virginia); Sara Lin, *An Ethnic Shift Is in Store*, Los Angeles Times, Apr. 12, 2007, <http://articles.latimes.com/2007/apr/12/local/me-chinohills12> (describing protest of Chino Hills residents to Asian market opening in their community where 39% of residents were Asian).

⁸² See Caitlin Yoshiko Kandil, *Asian Americans' numbers and political influence are growing*, Los Angeles Times, Sept. 22, 2016, <http://www.latimes.com/socal/daily-pilot/entertainment/tn-wknd-et-0925-asian-american-voting-20160903-story.html>; Seung Min Kim, *The one big Senate race that Asian-Americans could decide*, Politico, Aug. 25, 2016, <https://www.politico.com/story/2016/08/senate-nevada-asian-american-voters-227366>.

⁸³ See Asian Americans Advancing Justice, MALDEF, and NALEO, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes* (Nov. 2019), <https://www.advancingjustice-aajc.org/report/practice-based-preclearance>.

language minority group represents 20 percent or more of the voting-age population on Indian lands located in whole or in part in the political subdivision. These jurisdictions would only be required to seek preclearance if they are making one of the covered changes, not all voting changes. This is important for Asian American communities that are growing exponentially in new cities and counties, where they are beginning to emerge as a potential political power. Preclearance has been proven to protect the voting rights of Asian Americans and is needed today.

The covered practices currently contemplated by practice-based preclearance have been shown to be used against Asian Americans. For example, Section 5 has helped address discriminatory redistricting plans drafted in states with large Asian American communities. As shown in *Perry v. Perez*, 132 S. Ct. 934 (2012), the Texas Legislature drafted a redistricting plan, Plan H283, that would have had significant negative effects on the ability of minorities, and Asian Americans in particular, to exercise their right to vote. Since 2004, the Asian American community in Texas State House District 149 has voted as a bloc. With Hispanic and African American voters to elect Hubert Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62 percent.⁸⁴ Texas is home to the third-largest Asian American community in the United States, growing 72 percent between 2000 and 2010.⁸⁵ In 2011, the Texas Legislature sought to eliminate Vo's State House seat and redistribute the coalition of minority voters to the surrounding three districts. Plan H283, if implemented, would have redistributed the Asian American population in certain State House voting districts, including District 149 (Vo's district), to districts with larger non-minority populations.⁸⁶ Plan H283 would have thus abridged the Asian American community's right to vote in Texas by diluting the large Asian American populations across the state.⁸⁷

At-large elections have impaired Asian American voters' ability to elect candidates of choice. For example, in Fullerton, California, a lawsuit was brought challenging the at-large election system on behalf of Asian Americans in 2015. At that time, Asian Americans made up 23% of the city's population and 20.9% of the citizen voting age population; but no Asian American served on Fullerton's City Council at that time.⁸⁸ In fact, in the entire existence of the city's history (beginning when it was founded in 1887), only two Asian Americans served on the city

⁸⁴ See United States and Defendant-Intervenors Identification of Issues 6, *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 29, 2011, Dkt. No. 53.

⁸⁵ See Community of Contrasts, Appendix B.

⁸⁶ See Martin Test. at 350:25-352:25. District 149 would have been relocated to a county on the other side of the State, where there are few minority voters. See <http://gis1.tlc.state.tx.us/download/House/PLANH283.pdf>.

⁸⁷ In fact, it was only due to Section 5 that the Texas Legislature was not able to dilute the Asian American community's right to vote. Despite the Asian American community's best efforts, the Texas Legislature pushed through this problematic redistricting plan. However, because of Section 5's preclearance procedures, Asian Americans and other minorities had an avenue to object to the Texas Legislature's retrogressive plan, and Plan H283 was ultimately rejected as not complying with Section 5. See *Texas v. United States*, C.A. No. 11-1303 (D.D.C.), Sept. 19, 2011, Dkt. No. 45, ¶ 3. The U.S. Supreme Court vacated the District Court of the District of Columbia's ruling suspending Texas' redistricting map as moot in light of their decision in *Shelby*.

⁸⁸ Complaint, *Paik v. Fullerton*, No. 30-2015-00777673-CU-MC-CJC (Mar. 18, 2015), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/03/Complaint-1.pdf>.

council. The at-large method of election coupled with the long history of discrimination against Asian Americans throughout Orange County (in which Fullerton sits) resulted in Asian American voters consistently being thwarted in electing their candidates of choice for city council.⁸⁹ This discrimination was also borne out in Fullerton's elections and political processes. Even in the rare instance when Asian Americans were able to get elected to the city council, discrimination abounded. In 1996, Councilmember Julie Sa's citizenship status was repeatedly questioned by Fullerton residents during Council meetings, harkening back to the racial undertones of the "perpetual foreign" as a white immigrant fellow councilmember was not subject to the same scrutiny. In fact, in one incident, "one of the residents mocked Sa's accent during his comments, stating, 'To put it in English that you will all understand, especially you Ms. Sa: You no sleep here, you no be on council.'" In the 2014 election race for the 65th Assembly District, an opponent of a Korean American candidate disseminated campaign literature with the phrase "Not One of Us" next to the Korean American candidate's photo. Plaintiffs settled the lawsuit, with the development of a district-based system for electing its city council that was to be presented for voter approval as part of the settlement.⁹⁰

Furthermore, the ability of Asian Americans to vote is also frustrated by sudden changes to poll sites without informing voters. For example, in 2001, primary elections in New York City were rescheduled due to the attacks on the World Trade Center. The week before the rescheduled primaries, advocates discovered a certain poll site, I.S. 131, a school located in the heart of Chinatown and within the restricted zone in lower Manhattan, was being used by the Federal Emergency Management Agency for services related to the World Trade Center attacks. The Board chose to close down the poll site and no notice was given to voters. The Board provided no media announcement to the Asian language newspapers, made no attempts to send out a mailing to voters, and failed to arrange for the placement of signs or poll workers at the site to redirect voters to other sites. In fact, no consideration at all was made for the fact that the majority of voters at this site were limited English proficient, and that the site had been targeted for Asian language assistance under Section 203.⁹¹

⁸⁹ The history of discrimination in Orange County began with strong anti-Asian American sentiments starting from the late 19th century that resulted in events such as the city-sanctioned burning down of Santa Ana's Chinatown to the campaigns for school segregation laws in order to keep members of the Asian American community separated from white children and has continued into the current era, with incidents such as the DOJ investigation that found consistent racial discrimination against minorities in the police and fire department's hiring practices between 1986 and 1993 and the racial profiling of young Asian Americans as alleged gang members. *Id.*

⁹⁰ Settlement Agreement, *Paik v. Fullerton* (July 7, 2015), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/07/Settlement-Agreement-1.pdf>.

⁹¹ The voters were only protected from this sudden change that would have caused significant confusion and lost votes because DOJ issued an objection under Section 5 and informed the Board that the change could not take effect. The elections subsequently took place as originally planned at I.S. 131, and hundreds of votes were cast on September 25. See Asian American Legal Defense and Education Fund, *Asian Americans and the Voting Rights Act: The Case for Reauthorization*, 41 (2006), <http://www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf>.

With over two out of three Asian Americans being born outside of the U.S. today,⁹² almost three out of every four Asian American speaks a language other than English at home and almost one in three Asian American is LEP.⁹³ As a result, a major obstacle facing Asian American voters is the language barrier. Navigating the voting process can be complicated and overwhelming, even for those who are fluent in English. Trying to understand how to access the ballot for citizens whose first language is not English is even more difficult. Furthermore, the complexity of voting materials makes voting even more challenging for voters with language barriers.

The withdrawal or denial of multilingual support create formidable hurdles for language-minority voters – approximately 85% of whom are voters of color – the effects of which are predictable: LEP voters “often have a difficult time exercising their right to vote[and have] much lower participation rates than non-LEP voters.”⁹⁴ In addition to the harmful effect the withdrawal or denial of multilingual support, the history of discriminatory intent in denying language assistance further indicates the problematic nature and purpose in denying multilingual support today.⁹⁵ The lack or denial of multilingual support has long been understood to interfere with a LEP voter’s free and fair access to the ballot and has been used for just that purpose.

Similar to the nefarious purpose behind the denial of multilingual support, the practice of creating additional and/or onerous documentary requirements for voting, such as proof of citizenship and voter ID, are often targeted at immigrants (i.e., naturalized citizens). These <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> practices also serve to simply make it more difficult for them to access the ballot. Voter ID and proof of citizenship requirements disproportionately impact Asian Americans due to high rates of immigration and naturalization in the community. Studies show that Asian Americans and other communities of color are less likely to have photo IDs compared to whites.⁹⁶ Moreover, naturalized citizens’ ability to obtain the requisite documents needed to obtain the requisite photo IDs may be even more constrained as they often lack access to the required underlying documents such as naturalization documents, and there can be a significant cost to replacing such documents if they are even available.⁹⁷

⁹² Author’s calculation based on U.S. Census Bureau, 2019 ACS 1 Year Estimates, Table B16005D: Nativity by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (Asian Alone), <https://data.census.gov/cedsci/table?q=ACSDT1Y2019.B16005D&tid=ACSDT1Y2019.B16005D&hidePreview=true>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Hearing on “Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multilingual Support To Interfere with Free and Fair Access to the Ballot” Before the H. Subcomm. on Elections of the H. Administration Comm., 117th Cong. (May 24, 2021) (prepared statement of Terry Ao Minnis) (“Minnis Testimony”).

⁹⁶ See e.g. Barreto MA, Nuño S, Sanchez GR, Walker HL, The Racial Implications of Voter Identification Laws in America, American Politics Research, March 2019, 47(2): 238-249.

⁹⁷ Minnis Testimony.

Additionally, while not as prevalent, there have been states who have treated their naturalized citizens as second-class citizens by placing additional requirements upon them in order to vote. For example, in 2006, Ohio enacted legislation that directed poll workers to require certain naturalized voters to present proof of U.S. citizenship before providing them with ballots or approving their provisional votes to be counted. In 2006, naturalized Ohioans were far more likely than all eligible voters to be historically underrepresented people of color. Even though African Americans, Latinos, and Asian Americans constituted just 14.3% of the state's eligible electorate that year, they accounted for 47.8% of naturalized Ohioans eligible to cast ballots, who were potentially subject to additional restrictions on the franchise.⁹⁸ In Louisiana, a law on the books for almost 150 years required only naturalized citizens to submit proof of citizenship in person at their local registrar's office after submitting their voter registration form.⁹⁹ After a lawsuit was filed challenging this law after an increase in enforcement of the century-old law, Louisiana's governor signed a bill that repealed the discriminatory requirement in 2016.¹⁰⁰ More recently, in Mississippi, a lawsuit was filed in November 2019 challenging state law that imposes a documentary proof-of-citizenship requirement for voter registration on only naturalized citizens.¹⁰¹ Documentary requirements have a negative effect on Asian American voters and interfere with their free and fair access to the ballot.

Efforts to purge voters from the voter rolls have fallen more heavily on voters of color, including Asian Americans. For example, Georgia has enacted various iterations of an "exact match" protocol since 2008: a voter registration protocol that places would-be voters in "pending" status if their voter registration data does not exactly match the same information as it appears in other state databases. In 2009, DOJ criticized Georgia's protocol as "flawed" and "frequently subject[ed] a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and . . . erroneous burdens on the right to register to vote." The DOJ found that Asian American and Pacific Islander applicants were more than twice as likely as their white counterparts to be flagged under "exact match." In advance of the November 2018 general election, the "exact match" protocol froze approximately 53,000 voter registrations, 80% of which belonged to people of color. The "exact match" protocol has been the subject of extensive litigation; although in 2019 the Georgia General Assembly largely ended the protocol with regard to identity data, eligible Georgia voters continue to be burdened by the "citizenship match" portion of the protocol, which flags voters as potential noncitizens based on data from the Department of Driver Services known to be outdated. Many of the affected voters are Asian American and Pacific Islander, as they are often voters who recently naturalized as citizens and/or obtained a Georgia driver's license prior to naturalization. Additionally, Georgia

⁹⁸ In light of its potential to incentivize racial and ethnic profiling of Ohio voters, and its likely discriminatory effects, a federal court permanently enjoined the law in October of 2006. *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825-27 (N.D. Ohio 2006).

⁹⁹ Maura Ewing, *Foreign-born citizens in Louisiana have had to take extra steps to register to vote — until now*, The World (June 5, 2016), <https://www.pri.org/stories/2016-06-06/foreign-born-citizens-louisiana-have-had-take-extra-steps-register-vote-until-now>.

¹⁰⁰ *Id.*

¹⁰¹ Emily Wagster Pettus, *Voting suit challenges Mississippi law on citizenship proof*, AP (Nov. 18, 2019), <https://apnews.com/article/4ffb6d691734447baf51f72c65824142>.

aggressively purges voter registration rolls in a way that disproportionately harms Asian American and Pacific Islander voters. In 2019 alone, the state removed 313,000 voters from the rolls on the grounds that they moved from their voter registration address. A subsequent analysis revealed that 63.3% of the voters had not moved at all and that the flawed purge process predominantly impacted non-white voters in the Atlanta metro region, where the majority of Asian American and Pacific Islander voters in Georgia reside.¹⁰²

Conclusion

Despite the gains that have been made since the enactment of the VRA, more is left to be done, particularly in light of the damage done (and that continues to be done) by misguided Supreme Court decisions, including *Shelby County*. Voting discrimination, as Chief Justice Roberts acknowledged in his opinion in *Shelby County*, is still very real and very current. The U.S. Census Bureau forecasts that while the number of Asian immigrants will grow between now and 2040, the proportion of Asian Americans who are immigrants will decrease, with high naturalization rate and in increase of U.S.-born Asian Americans in the coming years. It is likely that voter participation rates among the Asian American community, and indeed its political visibility, will only increase. It is precisely for these reasons that restoring and modernizing the Voting Rights Act, including the addition of practice-based preclearance, is a top priority for our organization.

¹⁰² First Amended Complaint Advancing Justice SB 202. *See also*, Brief for Asian Americans Advancing Justice – AAJC, National Association of Latino Elected and Appointed Officials Education Fund, LatinoJustice PRLDEF, and Seventeen Other Organizations as Amici Curiae, *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), <https://www.advancingjustice-aaajc.org/sites/default/files/2017-09/16-980%20bsac%20Asian%20Americans%20Advancing%20Justice%20et%20al.pdf>.

Mr. COHEN. Thank you, Mr. Yang. What State was that said that—the question about if you can't speak English you shouldn't be able to—good English you shouldn't be able to vote?

Mr. YANG. That was in Alabama that they used those terms.

Mr. COHEN. Oh, wow.

Mr. YANG. Good English.

Mr. COHEN. That's kind of ironic.

Our next Witness is Mrs. Luis—well, we are on—I guess we are going to the remote, is that right?

Our next Witness is Luis Fraga. He is the Reverend Donald P. McNeill Professor of Transformative Latino Leadership, Joseph and Elizabeth Robbie Professor of Political Science, Director of the Institute for Latino Studies and fellow with the Institute for Educational Initiatives at the University of Notre Dame.

His primary interests are in American politics where he specializes in Latino politics, voting rights, immigration, and education. He has published 6 books, 40 articles in scholarly journals and edited volumes. His most recently co-edited book is *Latinos and the 2016 Election: Latino Resistance in the Election of Donald Trump*, published in 2020. Prior to teaching at Notre Dame, he taught at Stanford for 16 years.

Professor Fraga received his Ph.D. and M.A. from Rice and his A.B. cum laude from Harvard.

Professor Fraga, you are recognized for five minutes.

You need to turn on your—we cannot hear you.

STATEMENT OF LUIS RICARDO FRAGA

Mr. LUIS FRAGA. Maybe if I turn on microphone, that will work.

Mr. COHEN. That always works.

Mr. LUIS FRAGA. Thank you, Mr. Chair, Ranking Member of the Committee, and other Members of the Committee.

There is a long history of voter suppression, including vote dilution and voter disenfranchisement, in the history of the United States. At times, there were specific groups that were the targets of these efforts, including immigrants, African Americans, Latinos, Asian Americans, Native Americans, other language minorities, and women. Other times, such targeting occurred behind the required payment of property taxes, poll taxes, literacy tests, or convictions for a felony.

What is significant about these efforts is that they were in almost every instance enacted by efforts designed to maintain groups in power by excluding others. Those groups were most often White males.

It is also important to understand that, when successful efforts were pursued to fully enfranchise a previously excluded group, those who perceived themselves to have lost or who now had to share power often worked actively to reverse that enfranchisement. Success, in other words, has rarely been maintained. Retrenchment and reaction have often led to backsliding that required even greater efforts to overcome policies and practices of dilution and disenfranchisement.

In the report that I submitted to the Committee I discuss a history of the presence of efforts at voter suppression, with a special emphasis on both dilution and disenfranchisement in the history of

the United States. This is done to provide analytical background to more comprehensively understand the continuing need for governments—national, State, and local—to actively work to overcome laws, policies, and practices that suppress voters' capacities to cast a meaningful vote and to cast a vote at all.

This history can also be used to understand that current efforts that lead to voter suppression build, and often replicate, what has been done in the nation's past. One can say that historical legacy may, in fact, not be a legacy of the past, but, rather, a current manifestation of that past legacy.

It is also the case that judicial endorsement of the expansion of voting rights has been uneven and oftentimes not long-lasting. For example, the Supreme Court in *Shaw v. Reno* in 1993 and *Shelby County v. Holder* in 2013 changed Court precedent most recently.

What is learned from the history of the United States is that, without a clear, strong commitment on the part of the Federal government, one cannot depend on State and local jurisdictions to protect the voting rights of racial, ethnic, language minority, and other historically marginalized voters.

This history must be remembered, as Congress considers amending section 4 of the Voting Rights Act, to focus on practices that lead to disenfranchisement and vote dilution throughout the country. Such practices, as we know, can be overt as well as subtle. Whatever clarity can be provided by the rewriting of section 4 will work to enhance the likelihood that all voters will have an equal chance to vote and to cast a meaningful vote. Only then will one of the most fundamental ideals of American democracy have the chance to be realized.

Thank you, Mr. Chair.

[The statement of Mr. Luis Fraga follows:]

Vote Dilution and Voter Disenfranchisement in the History of the United States

Luis Ricardo Fraga, PhD
Rev. Donald P. McNeill, C.S.C., Professor of Transformative Latino Leadership
Joseph and Elizabeth Robbie Professor of Political Science
Director, Institute for Latino Studies
University of Notre Dame

There is a long history of voter suppression, including vote dilution and voter disenfranchisement, in the history of the U.S.¹ At times there were specific groups that were the targets of these efforts including immigrants, African Americans, Latinos, Asian Americans, Native Americans, other language minorities, and women. Other times such targeting occurred behind the required payment of property taxes, poll taxes, literacy tests, or convictions for a felony. What is significant about these efforts is they were in almost every instance enacted by efforts designed to maintain groups in power by excluding others. Those groups were, most often, white males.

It is also important to understand that when successful efforts were pursued to fully enfranchise a previously excluded group, those who perceived themselves to have lost or who now had to share power, often worked actively to reverse that enfranchisement. Success, in other words, has rarely been maintained. Retrenchment and reaction have often led to backsliding that required even greater efforts to overcome policies and practices of dilution and disenfranchisement.

In this report, I discuss a history of the presence of efforts at voter suppression, with a special emphasis on vote dilution and disenfranchisement, in the history of the U.S. This is done to provide analytical background to more comprehensively understand the continuing need for

¹ See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (NY, NY: Basic Books, 2000).

governments—national, state, and local—to actively work to overcome laws, policies, and practices that suppress voters’ capacities to cast a meaningful vote and to cast a vote at all. This history can also be used to understand that current efforts that lead to voter suppression build, and often replicate, what has been done in the nation’s past. One can say that historical legacy may, in fact, not be a legacy of the past, but rather a current manifestation of that past legacy.

It is also the case that judicial endorsement of the expansion of voting rights has been uneven, and often times not long lasting. For example, the Supreme Court in *Shaw v. Reno* (1993),² and *Shelby County v. Holder* (2013),³ changed court precedent most recently. What is learned from the history of the U.S. is that without a clear, strong, commitment on the part of the federal government, one cannot depend on state and local jurisdictions to protect the voting rights of racial, ethnic, language minority, and other historically marginalized voters. This history must be remembered as Congress considers amending Section 4 of the Voting Rights Act to focus on practices that lead to disenfranchisement and vote dilution throughout the country. Such practices can be overt as well as subtle. Whatever clarity can be provided by the rewriting of Section 4 will work to enhance the likelihood that all voters will have an equal chance to vote and to cast a meaningful vote. Only then will one of the most fundamental ideals of American democracy have the chance to be realized.

² 92 U.S. 357.

³ 570 U.S. 529.

Vote Dilution and Voter Disenfranchisement in United States History

Luis Ricardo Fraga, PhD
Rev. Donald P. McNeill Professor of Transformative Latino Leadership
Joseph and Elizabeth Robbie Professor of Political Science
University of Notre Dame

There is a long history of voter suppression, including vote dilution and voter disenfranchisement, in the history of the U.S.¹ At times, there were specific groups that were the targets of these efforts, including immigrants, African Americans, Latinos, Asian Americans, Native Americans, other language minorities, and women. Other times such targeting occurred through the required payment of property taxes or poll taxes in order to vote, mandated literacy tests for potential voters, or prohibitions on voting for those convicted of a felony. What is significant about these restrictions is they have, in almost every instance, been enacted to maintain power by a dominant group—most often white males—by excluding others.

It is important to understand that when successful attempts to fully enfranchise a previously excluded group have been attempted, those in power—whether perceived or in reality—have often worked to reverse that enfranchisement. Success, in other words, has rarely been maintained. Retrenchment and reaction have often led to backsliding that required even greater efforts to overcome the policies and practices of dilution and disenfranchisement.

In this report, I discuss the history of efforts at voter suppression in the United States, with a special emphasis on vote dilution and disenfranchisement. This is to provide analytical background to more comprehensively understand the continuing need for governments—national, state, and local—to actively work to overcome laws, policies, and practices that

¹ See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (NY, NY: Basic Books, 2000).

suppress voters' ability to cast a meaningful vote, or to cast a vote at all. This history can also be used to understand that current efforts that lead to voter suppression build upon, and often replicate, what has been done in the nation's past. One can say that historical legacy may, in fact, not be a legacy of the past but rather a current manifestation of that past legacy.

Voter Disenfranchisement from the Founding through the Antebellum Period

The origins of disenfranchisement date back to the founding of the U.S.² Although those who could participate in the selection of government officials expanded significantly in the new national government of the U.S., especially after the adoption of the Constitution of 1787, voting regulations were established on a state-by-state basis, and voting was uniformly restricted to white males who owned property. Property was understood as land and buildings. The justification for this restriction was that only such individuals purportedly had a stake in society, which generally meant that they had reason to closely follow governmental decisions, especially those associated with taxation.

It is well known that this requirement excluded almost half of the population through the omission of women. What is less well known is that it also excluded "[f]reedman of African and Amerindian descent."³ It is estimated that such restrictions likely limited voting to about 60-70 percent of the adult white males at the time of the American Revolution,⁴ a pattern that was maintained after the war.

What is important to note about this early history of the U.S. is how restricting the franchise was reconciled with the spoken ideal of democracy under the Constitution of 1787,

² This section is largely taken from Alexander Keyssar, 2000, Chapter 1, "In the Beginning," pp. 1-25.

³ Keyssar, 2000, p. 6.

⁴ Keyssar, 2000, p. 24.

especially given that the spirit of that constitution gave such credence to the ideal of governments being established as a result of the consent of the governed. At issue, of course, was who was included and who was excluded from that consent. Stated differently, the reconciliation of democracy with the exclusion of segments of the population from voting was among the founding principles of the new national government, a principle that would be maintained, and at times reinforced, as the nation proceeded to develop.

To be sure, there were instances in the relative early history of the republic where the right to vote was expanded. By the 1850s, the property requirement had been eliminated in most states, at a time when many states were writing new state constitutions.⁵ Additionally, most states eliminated the requirement that voters pay taxes, especially property-related taxes, during this period as well.⁶ Moreover, most states established that rules regarding voting applied to municipalities and their elections as well as statewide elections.⁷

It is also the case that during this period, the franchise was often extended to declarant noncitizens, that is, immigrants who intended to become American citizens.⁸ It was during this period when immigrants from Europe, especially Germany and Ireland, added significantly to the populations of many cities and helped populate many rural areas of the Midwest.

Historian Alex Keyssar notes that lawmakers had three motivations when expanding the franchise during this time: 1) giving immigrants an incentive to defend the republic if another war was necessary to defend the U.S. against foreign aggressors, 2) enfranchising all white males in the South to help secure militias to guard against rebellions of enslaved people, and 3) the

⁵ Keyssar, 2000, pp. 26-29.

⁶ Keyssar, 2000, p. 29.

⁷ Keyssar, 2000, p. 31.

⁸ Keyssar, 2000, p. 33.

expansion of political party competition and attempts to bring new voters into the electorate.⁹

The third reason was a particular goal of the Democratic Party under the leadership of individuals such as Andrew Jackson.¹⁰ This has been referred to as one of the tenets of Jacksonian Democracy, and through the related growth in the electorate Jackson was able to win the White House. The power of political parties was, for the first time in the history of the country, directly related to the mass participation of partisan supporters.

While the franchise for white male voters was expanded, the restrictions on women's voting remained, and there was a simultaneous restriction on the franchise for free Blacks. One historical report indicates that by 1855 only the states of Massachusetts, Vermont, New Hampshire, Maine, and Rhode Island did *not* prohibit free Blacks from voting; all other states did.¹¹ Moreover, the debate concerning free Blacks voting included an explicitly racist dimension wherein opponents argued that allowing free Blacks to vote would encourage the migration of more free Blacks and would result in "amalgamation."¹² In Texas, opponents of the franchise for free Blacks argued to Texans that if free Blacks were allowed to vote, large numbers of Mexican Indians "will be moving in...and vanquish you at the ballot box though you

⁹ Keyssar, 2000, pp. 37-39.

¹⁰ Clearly the parties have shifted in the South where the more conservative party is now the Republican Party. See Earl Black and Merle Black, *The Rise of Southern Republicans* (Cambridge, MA: Harvard University Press, 2002).

¹¹ Keyssar, 2000, p. 55.

¹² Keyssar, p. 59.

are invincible in arms.”¹³ Similar concerns were expressed regarding native peoples in California.¹⁴ In fact, from 1790 to 1850, voting rights for Native Americans were narrowed.¹⁵

It was also during this time that voter registration systems began. New York was among the first states to adopt voter registration, and specifically sought to limit the political influence of immigrants, many of whom were Irish Catholics who had become an important source of the growth of the Democratic Party in the North.¹⁶ Some of the first examples in the U.S. of debates considering English language literacy tests to limit voting among immigrants occurred during constitutional conventions in Northeastern states during the 1840s. Further, there were debates in some states, such as New York, as to whether immigrants who had been naturalized should be restricted from voting for a period, ranging from one to twenty-five years.¹⁷

This allows us to conclude that even when the franchise was expanding for some, particularly white males who did not own property, there coexisted efforts to restrict voting for women, free Blacks, Mexican Americans, and Native Americans. Expansion of the franchise was never intended to include everyone. The overall principle of exclusion remained in place despite some gains of inclusion for some limited segments of the population.

The principle of exclusion became especially apparent with the rise of the Know Nothing Party, which was prevalent in regions of the country that had received significant numbers of immigrants from Europe. The party operated from 1850 to 1858, and its primary goal was limiting the political influence of immigrant voters, especially Roman Catholics. Among the

¹³ Montejano, David, *Anglos and Mexicans in the Making of Texas* (Austin: University of Texas Press, 1987), as quoted in Keyssar, 2000, p. 59.

¹⁴ Keyssar, 2000, p. 59.

¹⁵ Keyssar, 2000, p. 60.

¹⁶ Keyssar, 2000, p. 65.

¹⁷ Keyssar, p. 66.

party's positions was that that in order to protect the nation from the subversion of "American values and institutions,"¹⁸ Congress should adopt national laws to 1) require that immigrants wait twenty-one years to be eligible for naturalization rather than the then existing five-year period, 2) permanently disallow citizenship for those not born in the U.S., while at the state level they advocated that states adopt, 3) voter registration systems, and 4) voter literacy tests.¹⁹ Although their popularity was uneven across the country, they succeeded in getting laws enacted in New York that established a registration system that would serve to "purify" the ballot box.²⁰ Notably this law only applied to New York City and, at that time, where very large numbers of immigrants lived. In Oregon, laws limited the franchise to whites in order to prevent Chinese immigrants from voting.²¹ Leaders of the Know Nothing Party were also successful in getting state-level laws enacted that severely limited the franchise for Irish immigrants, largely working class men, in Massachusetts and Connecticut. These were states that had also experienced high levels of immigration, particularly from Ireland.²² In 1857, Massachusetts law required that voters be able to read a section of the United States Constitution and that they be able to write their names. Connecticut passed a similar law.²³ These laws established the use of, in effect, a *literacy test*.

There are four primary conclusions that I draw from this brief historical accounting. First, until the Civil War, the U.S. has a long history of restricting the vote to specific segments of the population. Working class immigrants, especially Irish, women, free Blacks, Mexican

¹⁸ Keyssar, p. 84.

¹⁹ Ibid.

²⁰ Keyssar, 2000, p. 85.

²¹ Keyssar, 2000, p. 86.

²² Ibid.

²³ Ibid.

Americans, and Chinese Americans, to the extent that they were allowed to naturalize, all were specific targets of exclusion. Second, this occurred even at times when there was a significant expansion of who could vote through the elimination of the property requirement for white males. That is, expansion of the franchise to broader segments of the population occurred simultaneously with both the maintenance of past restrictions for other segments of the population and new restrictions for growing segments of the population. Third, these efforts to restrict the franchise were argued, enacted, and implemented both in Northern and Southern states. In fact, the restrictions on immigrants, a pattern that I will also discuss further in a later section of this report, came predominantly from Northern states. The perceived and most often real political advantages gained by some voters was always coexistent with a drive to exclude other segments of the electorate. This was not just political conflict; the rules of citizenship acquisition and voting were crafted with a desire by those in power to gain political advantage through the effective elimination of potential opponents. Four, the targets of exclusion were often identified as a group based on race, ethnicity, national origin, and gender. These dimensions of exclusion would become the precedent for subsequent acts of voter disenfranchisement during the most contentious period in the history of the U.S.: the Civil War, Reconstruction, and Post-Reconstruction/Jim Crow.

Voting during Reconstruction and Post-Reconstruction Jim Crow

The nation's greatest challenge to democracy occurred during the Civil War. It was a time when traditional institutions of governance, including the presidency, Senate, House, and Supreme Court, were unable to resolve the perennial challenge to the ideal of American democracy: slavery. With the country's origins grounded in the enslavement of African human beings on American soil, the nation tried to balance the interests of states that promoted abolition

and states whose political, economic, and cultural interests demanded the maintenance of slavery. At the conclusion of the Civil War, both Northern and Southern states struggled with the realities of integrating the formerly enslaved into an often hostile American society. In fact, racial prejudices and related cultural predispositions both in the North and in the South would soon center voting as an essential question to be addressed during the period of Reconstruction after the Civil War.

The 13th, 14th, and 15th Amendments to the Constitution lead both to a tremendous expansion in voting rights and a directly related reactive effort to restrict those rights, all within a few decades. The 13th Amendment to the Constitution eliminated race-based slavery in the nation.²⁴ Because, however, the nation was unsure as to how former slaves would be treated in American society—especially in former slave states—the 14th Amendment attempted to clarify the meaning of American citizenship and limited the capacity of states to restrict the rights of former slaves.²⁵ Given the history of voter disenfranchisement, as explained in the previous

²⁴ The 13th Amendment states:

“Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have the power to enforce this article by appropriate legislation.”

²⁵ The 14th Amendment states:

“Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein

section, it was very unclear whether states could still restrict the franchise from former slaves. It was the explicit purpose, therefore, of the 15th Amendment to specify that voting could not be “denied or abridged” to anyone on the basis of “race, color, or previous condition of servitude.”²⁶ Although the enactment of this amendment was contentious in Congress, it expressed as much clear support for guaranteeing the right to vote for African Americans as was politically possible at that time.²⁷

In a relatively short time, hundreds of thousands of former slaves voted. One estimate put the number of newly freed former slaves who voted at around 500,000 across the South, where most African Americans lived.²⁸ Not surprisingly, they worked with some white coalition partners to elect African American and sympathetic white Republicans to local, state,

shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one year years of age in such state. Section 3. No person shall be a Senator or Representative in ?Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability. Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States or any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void. Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”

²⁶ The 15th Amendment states:

“Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.

²⁷ Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (NY, NY: W. W. Norton and Company, Inc., 2019), especially Ch. 3, “The Right to Vote: The Fifteenth Amendment,” pp. 93-123.

²⁸ <https://www.crf-usa.org/black-history-month/race-and-voting-in-the-segregated-south>. Accessed July 7, 2021.

and national offices, especially in the South, where most African Americans lived. At least 300 African Americans were elected to state and national offices soon after Reconstruction began.²⁹ Another historical estimate indicates that sixteen African Americans served in Congress, and perhaps as many as 600 in state and local governments.³⁰ In Mississippi, where over half of the population was African American, two African American U.S. senators were elected, as was an African American lieutenant governor.³¹ How then was it possible for Southern states to ultimately undermine the 15th Amendment, leading to the almost complete disenfranchisement of these newly enfranchised African American voters?

J. Morgan Kousser, the preeminent historian of voting rights during this period, provides an extremely effective explanation to understand how this developed.³² When freed Blacks became eligible to vote and run for office, they were initially deterred by “violence, intimidation, and fraud”³³ on the part of whites. These activities were pursued by organized white vigilante groups, especially the Ku Klux Klan, that was originally organized in Tennessee.³⁴ The targets of “assault, arson, and murder” included newly enfranchised Blacks as well as sympathetic whites, especially Republicans, school teachers, and interracial couples.³⁵ The violence was very

²⁹ J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (The University of North Carolina Press, 1999), p. 19.

³⁰ <https://www.yourvoteyourvoicemn.org/past/communities/african-americans-past/reconstruction-era-1865-1877>. Accessed July 7, 2021.

³¹ <https://www.crf-usa.org/black-history-month/race-and-voting-in-the-segregated-south>. Accessed July 7, 2021.

³² J. Morgan Kousser, “The Undermining of the First Reconstruction: Lessons for the Second,” in Chandler Davidson, ed., *Minority Vote Dilution* (Washington, DC: Howard University Press, 1984), pp. 27-46. Also see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, CT: Yale University Press, 1974).

³³ Kousser, 1984, p. 30.

³⁴ Eric Foner, 2019, p. 116.

³⁵ Ibid.

apparent in Southern counties where Blacks and whites were more or less equal in population and the “balance of power [was] uncertain.”³⁶ Historian Eric Foner characterized these actions as being motivated by a desire on the part of whites to maintain “white supremacy.”³⁷

The violence of the Ku Klux Klan led Congress to pass three Enforcement Acts.³⁸ These Acts demonstrated the willingness of Congress to use federal power and authority to protect African American voters and would be voters. As Foner states, “[Congress] prescribed penalties for state officials who discriminated against voters on the basis of race; for ‘any reason’ who used force or intimidation to prevent an individual from voting; and for two or more persons going about in disguise (as Klansmen often did) to prevent the ‘free exercise’ of any right ‘granted and secured’ by the Constitution.”³⁹ The second Enforcement Act was intended to prevent voting irregularities by the Democratic Party in the North, especially in large cities.⁴⁰ The third Act was entitled an Act to Enforce the Fourteenth Amendment and was focused on preventing conspiracies such as those pursued by the Ku Klux Klan to “deprive citizens of the right to vote, serve on juries, or enjoy equal protection of the laws, and classified such efforts as federal crimes, which could be prosecuted in federal courts, and authorized the president temporarily to suspend the writ of habeas corpus and use the armed forces to suppress such conspiracies.”⁴¹ Foner estimates that about 2,500 cases related to the Enforcement Acts were argued in federal

³⁶ Ibid.

³⁷ Ibid.

³⁸ Foner, 2019, pp. 117-118.

³⁹ Foner, 2019, p. 118.

⁴⁰ Ibid.

⁴¹ Ibid.

courts by the newly established Justice Department in the early 1870s.⁴² Overall, Kousser refers to this as the “Klan Stage,” the first stage in the attack on African American voting rights in the immediate post-Civil War period.⁴³

The second stage in the effort by whites in the South to regain power in the Reconstruction period is termed the “dilution stage” by Kousser.⁴⁴ There were at least sixteen different methods used by Southern Democrats to dilute the influence of enfranchised African American voters. Dilution, in the context of voting, refers to acts that significantly limit the influence of a group’s vote on the outcome of the election, and especially that limit the chances that a group’s voters can elect candidates of choice. These dilutionary practices did not mention race specifically and in that way were not on their face racially discriminatory, although that was clearly their intent. Faced with the sizeable numbers of Black voters and the election of significant numbers of black elected officials, these practices were a way to further limit the political influence of this newly enfranchised segment of the electorate.

The first technique that was used were discriminatory redistricting practices, also known as *race-based gerrymandering*.⁴⁵ Race-based gerrymandering in this context refers to the drawing of district lines in order to limit the influence of Black voters or to limit the number of elected officials whom they could choose if they voted as a block. This practice was most often used when Black or white office-holders who received overwhelming support from Black voters were elected to office, or when Black voters were geographically concentrated and represented a

⁴² Foner, 2019, p. 121.

⁴³ Kousser, 1984, 30.

⁴⁴ Ibid.

⁴⁵ Kousser, 1984, p. 31.

substantial, and at times a majority, share of the voters in a specific jurisdiction.⁴⁶ There are two primary methods of discriminatory redistricting practices that were race-based: packing and cracking. Cracking refers to subdividing racial or language minority voters across a number of different districts so that they would not constitute a majority in any one district. Packing refers to placing as many racial or language minority voters as possible within as few districts as possible to limit the number of officials who would achieve their victory because of the minority vote.

The second mechanism that was used to dilute the votes of African Americans was the implementation of *at-large elections*.⁴⁷ At-large elections were highly effective in limiting the likelihood that African Americans could elect candidates of choice when they were a minority of the electorate. In at-large elections, if whites vote as a block against the preferences of African American voters, that white block would, in effect, prevent Blacks from electing any of its first choice candidates to office. The use of at-large elections was most often used in the election of county and city officials. This was an extremely effective method of diluting the vote of African Americans. They could still vote, but that vote did not result in any success when opposed by a consistent majority of white voters.

A third mechanism that was used was the *white primary*.⁴⁸ In this type of election, voting was restricted to whites only in the Democratic Party primary, but African Americans could vote in the general election. However, if Blacks were again a minority of the voters in the general election, the candidate chosen in the white primary was guaranteed to be the winner in the

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Kousser, 1984, pp. 31-32.

general election and, again, if the preferences of white and Black voters were distinct, the candidate preferred by whites would be the winner.

Where African Americans had clear, but not overwhelming majorities, mechanisms such as *registration acts*, *poll taxes*, *secret ballots*, *multiple box laws*, and *petty crimes laws*⁴⁹ were used to lower the likelihood that African Americans could register to vote, and thus limit the extent to which they could vote. Registration acts were designed to require that potential voters register with a local official, usually a county registrar of voters, to be able to vote. Deadlines for such registration were often well before the actual election was to occur. Poll taxes required that a potential voter pay a tax to vote and that tax payment was often due well before an election. If the poll taxes were not paid, then a person could not register to vote. Secret ballots were often used to change the votes of African American voters or to not count their ballots at all. Multiple box laws were designed to make it difficult for Black voters to know where to vote. The specific location of the voting place was often not stated and even moved at the last minute. Petty crime laws were used to prevent individuals from voting. If a person had been arrested for a petty crime—and certainly if they had been convicted of such a crime—that person was not allowed to register and therefore could not vote. All of these procedures and practices were, on their face, not targeting voters on the basis of race. However, their application and impact was designed to limit the voting of enough African Americans such that they could not be, even with white coalition partners, numerous enough to determine the outcome of elections.

Yet another way to limit the influence of African American voters and their white coalition partners was through *annexation* and *deannexation*.⁵⁰ In these circumstances a city, for

⁴⁹ Kousser, 1984, p. 32.

⁵⁰ Ibid.

example would expand its current jurisdictional boundaries in a way that included predominantly white voters. This practice was especially effective in cities where African Americans were a majority or near majority of voters. An annexation would make African American voters a numerical minority and, in combination with the above described gerrymandered or at-large elections, could make African American voters a permanent minority who would not be able to elect their first-choice candidates to public office if their choices were opposed by a block of white voters.

The consolidation of *polling places* or last minute *failure to open polls*⁵¹ were yet two other mechanisms that were used to limit the capacity of African American voters to cast a vote. African Americans could technically still vote, they just either had to wait in line longer than whites. If it was only the polling places for African American voters that were consolidated, or if the polls were not opened at all, the African American voters were less likely to be able to cast a vote. Again, they could vote, but they had more difficulty getting that vote counted.

Some Southern jurisdictions during this time also increased the *bonds* that candidates had to pay to run for office or, when they were able to pay such bonds, *refused to accept the bonds as valid*.⁵² This type of candidate diminution made it less likely that African American voters would have a candidate whom they might prefer in an election. African Americans could still vote; however, the candidates on the ballot were unlikely to be their candidates of first choice.

Lastly, two final techniques that were used to dilute African American votes were *impeaching elected officials preferred by African American voters and their allies* or *changing positions from being elected to being appointed*.⁵³ In these circumstances, as previously

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

discussed, African Americans could formally vote, however the candidates and even successfully elected officials that reflected Black voters' preferences were either removed from office or could no longer attain that office through election.

The Application of Dilutionary and Disenfranchising Policies and Practices

Historians have noted how a number of these techniques were used in the Reconstruction and post-Reconstruction South. Kousser describes how in South Carolina in the 1880s, where sixty percent of the population was Black, only one of seven Congressional districts elected an African American to office. This was due to gerrymandering through packing. The Black congressman's district was unusually shaped to include as many Black voters as possible and it contained almost a third more residents than any other congressional district in the state.⁵⁴ The drawing of unusually shaped congressional districts during this time to pack as many Black voters as possible also occurred in North Carolina, Alabama, Mississippi, and Texas.⁵⁵ This also occurred at the city level during this time in Richmond, Virginia; Nashville, Tennessee; Montgomery, Alabama; Raleigh, North Carolina; Chattanooga, Tennessee; and Jackson, Mississippi.⁵⁶

Historian Howard N. Rabinowitz states that "[d]espite white opposition, however, blacks won the right to vote and hold office in 1867; and throughout the remainder of the period, white Southerners struggled with the reality of the Negro voter. Once again their aim was to develop a system that would minimize the effects of the Negroes 'new freedom.'"⁵⁷

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Kousser, 1984, p. 32, and Howard N. Rabinowitz (NY, NY: Oxford University Press, 1978), esp. pp. 266-281.

⁵⁷ Rabinowitz, 1978, p. 257.

Changing from single-member district to at-large elections was used in a number of cities right after Blacks gained the vote and were registered in substantial numbers. Atlanta successfully lobbied the state legislature to allow it to use at-large elections in 1868. Although districts were again used to elect city council members when Republicans regained a majority of the legislature, when Democrats were back in control in 1871, at-large elections were reimposed and they remained this way until 1953.⁵⁸ At-large elections for city government and school board were mandated by a “rabidly racist” legislature in 1874 and 1876 in Alabama.⁵⁹

The white primary was used in Texas in 1874, in two South Carolina counties, Edgefield and Charleston, in 1878, in Birmingham, Alabama, in 1888, and in Atlanta in 1895. This practice did not end until 1944 when the Supreme Court decided *Smith v. Allright*.⁶⁰

Alabama and Mississippi imposed strict registration laws in 1875. In 1874 the Texas legislature gave cities the power to delete “ineligibles” from registration rolls and this was primarily targeted at newly enfranchised Black voters. South Carolina enacted a strict registration law that required individual to sign their names, effectively serving as a literacy test. In 1857, Massachusetts required this of all new voters but did not require this of those who were already registered. These are examples of disingenuous methods to limit African American registration and allow for some whites to continue to vote whether they were literate or not.⁶¹

All eleven states of the former Confederacy had adopted a poll tax by 1908. It is acknowledged that this was targeted at trying to limit African Americans’ ability to register and

⁵⁸ Kousser, 1984, p. 32.

⁵⁹ Kousser, 1984, p. 33.

⁶⁰ 321 U.S. 649.

⁶¹ Kousser, 1984, p. 34.

vote.⁶² Similarly, petty crimes provisions were designed to reduce Black registration and voting. Among the crimes that were included in these provisions were theft of cattle or swine. In Mississippi, the 1875 petty crimes law was referred to as the “pig law.”⁶³ Sections of Montgomery, Alabama were deannexed in 1877. These areas were predominantly African American. For similar reasons, the size of Selma, Alabama was reduced as well.⁶⁴ Bonds to run for office in Huntsville, Texas were raised to \$20,000 in the 1880s. In Vance County, North Carolina, the bond to run for sheriff was set at \$53,000 in 1887. In Warren County, North Carolina, county commissioners did not allow a successful candidate to be seated because he was a “colored man.”⁶⁵ His white opponent was given the office despite being rejected by the voters.⁶⁶

The movement and closing of polling places was common as well. In 1876, in Alabama's Black Belt region, polls closed and opened, and others moved, at “the whim” of local elected officials. Polls were also never opened in some places in Hale, Perry, Marengo, Bullock, Barbour, Greene, Pickens, Wilcox, and Sumter counties that were strongholds of Republican voters.⁶⁷ In 1870, North Carolina Governor William W. Holden was impeached for trying to “put down the Ku Klux Klan.”⁶⁸ He was a Republican. In 1869, the Democratic dominated state legislature in Tennessee removed Republican elected city officials and replaced them with Democrats. In a similar fashion the state legislature of Virginia in 1870 removed Republican

⁶² Ibid.

⁶³ Kousser, 1984, p. 35.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Kousser, 1984, p. 36.

city officials in Richmond, the state capital, and replaced them with Democrats.⁶⁹ In Alabama, the state legislature abolished the Dallas County criminal court when the one African American judge refused to resign. The legislature also dissolved all the county governments in five Black Belt counties in the 1870s. As quoted by Kousser, the motivation for this action was later stated by a state legislator who said:

'Montgomery county came before us and asked us to give them protection of life, liberty and property by abolishing the offices that the electors in that county had elected. Dallas asked us to strike down the officials they had elected in that county, one of them a Negro that had the right to try a white man for his life, liberty and property. Mr. Chairman, that was a grave question to the Democrats who had always believed in the right of people to select their own officers, but when we saw the life, liberty and property of the Caucasians were at stake, we struck down in Dallas county the Negro and his cohorts. We put men of the Caucasian race there to try them.'⁷⁰

In a similar fashion the state legislature of North Carolina altered the method of selection of county commissioners and justices of the peace, from election to being appointed. Justices of the peace were appointed by the state legislature and these justices then appointed the county commissioners.⁷¹

I reach three conclusions from this review of the history of the implementation of dilutionary policies and practices. First, Southern whites pursued these dilutionary mechanisms because of the substantial increase in the voting and election of African Americans that resulted from the 13th, 14th, and 15th Amendments. The only way that white Democrats could regain or further consolidate their power in many areas of state and county government was to reduce the power of Black voters and in this way reduce the number of African American elected officials. Once these dilutionary practices were effective, white Democrats were in positions to enact even

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

more draconian disenfranchisement laws that would limit African American voting for a long period of time. Second, many of these dilutionary practices did not include race-specific language, although they included race-specific motivations. In not including race-specific language, these laws and practices were, to a degree protected—depending on judicial interpretation—as not being in violation of the 14th and especially 15th Amendments. Three, the historical evidence demonstrates that these dilutionary and at times disenfranchising mechanisms had as their primary target newly enfranchised African American voters. The racial context of the time, the desire on the part of Southern whites to reimpose white supremacy in light of losing the Civil War, and what would turn out to be the very uneven enforcement of the 14th and 15th Amendments to protect the newly gained voting rights of African Americans by the national government and especially the courts, led to the rebirth of white control of almost all the levers of governmental authority and power.⁷² This racial targeting and resultant marginalization of the African American community would soon be codified in the writing of new state constitutions that occurred in many Southern states in the early 1900s. Permanent disenfranchisement and permanent disempowerment, by law, resulted from the successful implementation of these dilutionary mechanisms. Rabinowitz states:

As the Southern press stressed on numerous occasions, blacks should never be able to exercise a pivotal role in politics. Hence at the core was not the issue of how the Negroes voted but the fact they could vote; it was Negro suffrage per se that was the problem. As a disquieting force in Southern politics, whites believed blacks had to be disciplined. Through the use of legal and illegal techniques, this job had largely been accomplished in the Southern cities by 1890.⁷³

It is important to note how a number of these policies and practices have continued for decades. The use of discriminatory redistricting practices that are race-based, changing single-

⁷² See Foner, 2019, Ch. 4, pp. 125-167.

⁷³ Rabinowitz, 1978, p. 328.

member district election to at-large, race-targeted registration practices, annexations and deannexations, and polling place openings and location changes have remained as fundamental strategies to limit the voting influence of racial and ethnic minorities.

The Dilutionary Motivations and Consequences of the Municipal Reform Movement of the Progressive Era

Among the most significant historical examples of the use of dilutionary practices outside of the South was the use of at-large elections to ostensibly overcome neighborhood-based public policy decision-making and government by “ethnic” politicians. As stated above, the use of at-large elections to dilute the votes of African Americans was well developed both as a motivation and as a practice. It is also the case, however, that at-large elections were proposed as a solution to diminish the power of the white ethnic, immigrant origin voters, and at times African American voters, when the support of these groups was critical to the success of urban political machines in large American cities such as New York, Chicago, and Boston, among others. At-large elections were part of a series of structural reforms proposed by leaders of the Municipal Reform Movement of the Progressive Era who wanted to regain control of city government from white ethnic politicians.

Urban political machines were quasi-formal organizations that developed in a number of major cities in the U.S. where the growth in the white immigrant ethnic population was so substantial that machine leaders could consistently win elections by receiving the support of these ethnic voters. In cities such as New York, Chicago, Boston, Detroit, Milwaukee, Minneapolis, Newark, New Haven, and San Francisco, the percentage of the population that was

either foreign-born or who had one foreign-born parent was well over 50% in 1910.⁷⁴ In these cities, the sheer size of the ethnic population was enough, if properly organized and especially mobilized on election day, to dominate the election of many city officials. The ways that leaders of machines were able to secure and rely upon this support was by catering to these voters based on social service provision, patronage (including the offer of jobs in local government), and even the opportunity for certain members of the community to become important leaders within the machine.

The primary key to the development of these relationships was the effective establishment of single-member districts by ethnic neighborhood. With such a strong focus on largely white ethnic identity in elections, the policy consequences were predictable. The propensity of cities to develop along ethnically and racially segregated residential lines—for example, predominantly Irish neighborhoods, Italian neighborhoods, Polish neighborhoods, and even some African American neighborhoods, largely comprised of people who had migrated to the North in search of better economic opportunities and less overt racial discrimination—was well established. What the machines did was built upon this existing white ethnic and racial identity when drawing single-member districts, ensuring that groups were represented in the city council. Stated differently, it allowed for properly mobilized voters to elect one of their own and allow city services to be brought to these neighborhoods.

This coalition of interests that focused on ethnic and racial identity led to several major problems according to critics of the machine, especially municipal structural reformers. Primarily, structural reformers argued that city government decision-making was corrupt, driven

⁷⁴ Kenneth D. Wald, "The Electoral Base of Political Machines: A Deviant Case Analysis," *Urban Affairs Quarterly*, 16 (1), 1980, p. 5.

by the short-term interests of elected officials, and often led to local taxes that were higher than they needed to be. Among the early critics was Andrew D. White, a scholar at Cornell University, who wrote:

Without the slightest exaggeration we may assert that with very few exceptions, the city governments of the United States are the worst in Christendom—the most expensive, the most inefficient, and the most corrupt. No one who has any considerable knowledge of our own country and of other countries can deny this.⁷⁵

These critics believed that among the primary reasons that cities were allegedly badly governed was that, within the machine, cities elected individuals with strong ethnic identities who brought these identities into the public policy-making process. As another structural reformer, Harry A. Toulmin stated:

The spirit of sectionalism had dominated the political life of every city. Ward pitted against ward, alderman against alderman, and legislation only effected by 'log-rolling' put extravagant measures into operation, mulcting the city, but gratifying the greed of constituents, has too long stung the conscience of decent citizenship. This constant treaty-making of factionalism has been no less than a curse.⁷⁶

The concern of reformers with the electoral influence of immigrant voters and their ethnic representatives is captured in the comments of many delegates to the first three annual Conferences of Good City Government of the National Municipal League. A representative from New Orleans spoke of the "thousands of immigrants from the slums and prisons of Italy and Southern Europe who added to the corruptible vote of the city."⁷⁷ A representative from Chicago

⁷⁵ Andrew D. White, "Municipal Affairs Are Not Political," in Banfield (ed.), *Urban Government: A Reader in Administration and Politics* (NY: The Free Press, 1969), p. 271. White first published this article in 1890.

⁷⁶ As quoted in Samuel P. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," *Pacific Northwest Quarterly*, 55(4), October 1964, p. 164, p. 164.

⁷⁷ As quoted in Melvin G. Holli, "Urban Reform in the Progressive Era," in *The Progressive Era*, Lewis L. Gould (ed.), (Syracuse, NY: Syracuse University Press, 1974), p. 137.

stated that “newcomers from the bogs of Ireland, the mines of Poland, and brigand-caves of Italy, and from the slave camps of the South but one removed from the jungles of Africa, made poor grist for milling civic patriots.”⁷⁸ A representative from Baltimore characterized machine politics there as where “the saloons and gambling houses and brothers are...nurseries for [urban] statesmen.”⁷⁹ Another conferee stated that “vice regions should have no representation. Such sections are to be governed and not to govern.”⁸⁰

Reformers argued that among the major structural reforms that should be implemented in cities were commission government and later city-manager government. The key to both of these forms of government operating effectively was the elimination of single-member districts to elect commissioners, aldermen, and council members, and instead employ the use of an exclusive system of at-large elections. They argued that the city, after all, was a corporation, and as such, should be run like a business. The commission plan attempted to approximate decision-making in many larger corporations by a board of directors. Legislative and executive powers were combined in the office of a commissioner. Generally, five commissioners were elected at-large and each was responsible for a major administrative subdivision of the city government. A typical commission system had commissioners who served as Mayor, Public Safety, Streets and Sewers, Finance, and Buildings. Sitting together they constituted the city legislative body. Richard S. Childs succinctly summarized the primary advantages of the Commission Plan as perceived by its proponents. He stated,

A single vote [of the commission] stopped talk and let action begin. The spirit of a board of directors replaced the heavy procedures of a legislative machinery [as

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

under a typical mayoral plan] which was right, for modern city governments are 90-odd percent administrative rather than ordinance making.⁸¹

This plan was adopted by many communities after 1901. But by 1916 the Commission Plan was recognized by reformers as no longer being the panacea to the ills of municipal government which it had previously been considered.⁸² In many cities individual commissioners established machine-type organization centered around the favors and patronage which their administrative position offered. Decision-making within the commission was characterized by substantial log-rolling and conflicts between individual commissioners often stifled much city government action.⁸³

The reformers' proposed solution to these problems was a city manager plan. The city manager was to be a competent, professional administrator, appointed by the at-large elected council to serve as the primary administrator in city government, with the authority to appoint department heads, propose the budget, and direct all aspects of city government administration. Through such administrative centralization, it was argued, the problems caused by a fragmented administration would be eliminated. The city manager was appointed by, and could be removed by, the city council.

Again, the key to either of these two plans being successful was to move from ward or single-member district election of council members to their election at-large. Under a single-member district system, it was argued, councilmembers attempted to maximize the expenditure of public revenues for their individual districts. As a result, many decisions made by the city

⁸¹ Richard S. Childs, *Civic Victories: The Story of an Unfinished Revolution*, (NY,NY: Harper Brothers, 1952), p. 138.

⁸² Bradley Robert Rice, *Progressive Cities: The Commission Government Movement in America, 1901-1920* (Austin: University of Texas Press, 1977), p. 106.

⁸³ Rice, 1977, pp. 91-91 and 97-99.

council were not based on the interests of the city as a whole, but rather upon the effect a particular policy would have on their neighborhoods or districts. Historian Bradley Robert Rice notes that in the early 1900s, reform Mayor Mathis of Des Moines, Iowa, “argued that it was possible for the five best candidates to reside in the same precinct.”⁸⁴ John Judson Hamilton in *The Dethronement of the City Boss* wrote in 1910 that election at-large would guarantee “the elimination of the merely neighborhood candidate from public consideration.”⁸⁵ Andrew D. White, writing in 1890, argued that at-large election of councilmembers was necessary if narrow decision-making was to be overcome in local governments. He wrote:

I would elect the common council by a majority of all the votes of all the citizens; but instead of electing its members from wards (single-member districts) as at present—so that wards largely controlled by thieves and robbers can send thieves and robbers, and so that men who can carry their ward can control the city—I would elect the board of aldermen (city council) on a general ticket (at-large) just as the mayor is elected now, thus requiring candidates for the board to have a city reputation.⁸⁶

Historian James Weinstein argues that the adoption of at-large elections, together with other reforms such as commission and council-manager government and nonpartisan elections in cities, increased campaign costs for individual candidates and political, racial, and national minorities whose voting strength tended to be concentrated in specific wards that subsequently lost formal representation.⁸⁷ Historian Samuel P. Hays argues that geographical considerations in Pittsburgh underlay business interests in promoting at-large elections. On the one hand, the business class in the city wanted to protect its economic base, consisting of plants and factories, which were often outside its residential neighborhoods and in working class parts of town. At-

⁸⁴ As quoted in Rice 1977, p. 77.

⁸⁵ Ibid.

⁸⁶ White, 1969, pp. 272-273.

⁸⁷ James Weinstein, “Organized Business and the City Commission and Manager Movements,” *The Journal of Southern History*, 28 (2), May 1962, pp. 176-178.

large elections overcame this problem by ensuring that industrial properties remained within the electoral districts of property owners. Moreover, when Pittsburgh had ward representation, the backgrounds of aldermen generally reflected the social characteristics of the wards they represented. Councilmembers representing working class areas generally were “workingmen, labor leaders, saloonkeepers, or grocers.”⁸⁸ Middle class areas tended to be represented by small business men such as “druggists, undertakers, community real estate dealers, banker, and contractors.”⁸⁹ Upper class areas tended to have “central city bankers, lawyers, doctors, and manufacturers”⁹⁰ as councilmembers.

A number of scholars of city politics have noted that at-large elections provided mechanisms of selective exclusion which served the purposes of those who were particularly concerned with minimizing the political strength of Blacks and Mexican Americans in the South and Southwest. Chandler Davidson and George Korbel note that the commission and city manager plans originated in the South and that “Southern progressivism coincided with the peak of racial reaction.”⁹¹ Their essay reviewed fourteen studies published between 1961 and 1981 that addressed the effects of at-large elections on the representation of African Americans and Latinos. The authors of eleven of these studies concluded that the use of at-large elections led to the lower descriptive representation of African Americans and Latinos as compared to the use of single-member districts.

⁸⁸ Samuel P. Hays, “Political Parties and the Community-Society Continuum,” in *The American Party System: Stages of Political Development*, Second Edition, William Nesbitt Chambers and Walter Dean Burnham, eds. (London: Oxford University Press, 1975), p. 164

⁸⁹ Ibid.

⁹⁰ Hays, 1975, p. 165.

⁹¹ Chandler Davidson and George Korbel, “At-large Elections and Minority Representation: A Re-Examination of Historical and Contemporary Evidence,” *The Journal of Politics*, 43(1), November 1981, pp. 986-988.

Political scientists Wolfinger and Field offer racial explanations for the adoption of reform structures, where at-large elections were a key component, in the South. They state,

[In the South]...most municipal institutions seem to be corollaries of the region's traditional preoccupation with excluding Negroes from political power...At-large elections minimize Negro voting strength...This southern concern with unity may also explain why Mexican-Americans in Texas have been so apolitical, in contrast to the political environment of immigrants in the North...if immigrants come into a political system where the elites shun conflict with each other...they are likely to find that the interest of those elites is to exclude them from politics rather than appeal for their support.⁹²

What the above discussion makes clear is that the purpose of at-large elections outside of South was to minimize, if not eliminate, the ability of white immigrant ethnic, working-class voters, and sometimes African Americans, to elect candidates of choice. It is also the case that in the South, such efforts were linked to new structures of urban governance that developed in the early 20th century when most African Americans were already disenfranchised. These new structures included at-large elections and were adopted by many Southern and Southwestern municipalities across the early 20th century. The exclusionary consequences are clear. African Americans and Mexican Americans in the Southwest had great challenges in electing their candidates of choice in at-large systems.

Voting Rights, the Judiciary, and the 1965 Voting Rights Act

Much federal judicial decision-making did not find the dilutionary and even disenfranchising mechanisms used in the South and other regions of the country to violate either the 14th or the 15th Amendments. There were, however, some notable exceptions that occurred

⁹² Raymond E. Wolfinger and John Osgood Field, "Political Ethos and the Structure of City Government," *American Political Science Review*, 60 (2), p. 325.

prior the passage of the Voting Rights Act in 1965 (the VRA) and two specific decisions of the Supreme Court, soon after the enactment of the VRA.

In *Smith v. Allright*⁹³ the Supreme Court revisited the use of the white primary in Texas. In 1927 in the case of *Nixon v. Herndon*,⁹⁴ the Supreme Court ruled that a Texas state law that restricted voting in the Democratic primary violated the 14th Amendment. Texas's attempt to circumvent this decision by giving the state Executive Committee of the Democratic Party the authority to determine participation in that party's primary the action was again found to violate the 14th Amendment in the case of *Nixon v. Condon*⁹⁵ in 1932. However, when the state made no law regarding participation in the Democratic primary the Court upheld the use of the white primary because the Democratic Party was a private organization, and not formally a governmental entity, that could determine its own membership. This was decided in the case of *Grovey v. Townsend*⁹⁶ in 1932.

The all-white primary was again the issue in *Smith v. Allright*, which was first argued before the Supreme Court in 1943 and reargued in 1944. The Supreme Court ruled that because “[p]rimary elections are conducted by the party under state authority... We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election.”⁹⁷ The Court concluded that “...we are applying, contrary to the recent decision in *Grovey v. Townsend*, the well-established

⁹³ 321 U.S. 649.

⁹⁴ 273 U.S. 536.

⁹⁵ 286 U.S. 73.

⁹⁶ 295 U.S. 45.

⁹⁷ 321 U.S. 649.

principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grove v. Townsend* is overruled."⁹⁸ Although Blacks might still be able to participate in the general election, because white primaries that excluded Black voters effectively decided the election in a one-party state, the white primary was unconstitutional.

The issue of deannexation was directly addressed by the Supreme Court in the case of *Gomillion v. Lightfoot*⁹⁹ in 1960. This case emanated from a decision by the Alabama legislature in 1957 to alter the boundaries of the city of Tuskegee such that city boundaries that had been a square now resulted in a 28-sided figure that removed all but four or five of its four hundred African American voters.¹⁰⁰ In this case the Court ruled that although the Alabama legislature claimed that its motivation for the deannexation was the "realignment of political subdivisions,"¹⁰¹ "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."¹⁰² The Court continued "[w]hen a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."¹⁰³ The significance of this case was that it found an action that was explicitly designed to harm a racial minority to be a violation of the 15th Amendment.

⁹⁸ Ibid.

⁹⁹ 364 U.S. 339.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

In 1966, after the 1965 Voting Rights Act was enacted, the state of South Carolina sued the Attorney General challenging the constitutionality of Section 5 of the VRA in *South Carolina v. Katzenbach*.¹⁰⁴ Section 5 is that provision that requires covered jurisdictions to submit any changes in voting practices or procedures to the Attorney General or to a specially empaneled group of three judges in the United States District Court for the District of Columbia, for approval. In an 8-1 decision, the Court was unconvinced by South Carolina that Section 5 of the VRA “violates the principle of the equality of the states,”¹⁰⁵ citing the long history of voting rights discrimination against African Americans in the state. The Court concluded that

“[w]e here hold that the portions of the Voting Rights Act Properly before us are a valid means for carrying out the commands of Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly ‘the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.’¹⁰⁶

In *Katzenbach*, the Supreme Court made very clear that Section 5 of the VRA was an extension of Section 2 of the 15th Amendment.

Three years later, in 1969, the Supreme Court considered whether actions taken by certain states in the South were in violation of the Voting Rights Act in *Allen v. State Board of Elections*.¹⁰⁷ The relevant policies and practices in Mississippi and Virginia did not lead to the strict disenfranchisement of African American voters. In Mississippi the state legislature required that county supervisors be elected at-large rather than from single-member districts. In another act, the legislature eliminated the option of electing or appointing superintendents of

¹⁰⁴ 383 U.S. 301.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ 393 U.S. 544.

education and that all had to be appointed. Additionally, independent candidates had to meet certain requirements to run in general elections. In Virginia, the disputed policy pertained to whether the state would accept labels on write-in ballots. Virginia's argument was that its policy did not violate the Voting Rights Act because it did not deny African Americans the right to vote. What was at issue was whether state actions that led to the vote dilution of African Americans were covered under the Voting Rights Act.

The Court was very clear in addressing each of these concerns. It stated,

The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation of the right to vote, recognizing that voting includes 'allocation necessary to make a vote effective.' We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the Sec. 5 approval requirements.¹⁰⁸

What the Supreme Court did in this decision was to determine that dilutionary policies and practices were also included under the Voting Rights Act.

Three conclusions can be reached from these Court decisions. First, the Supreme Court was providing guidance that instances of voter disenfranchisement were unconstitutional because they violated the 15th Amendment to the Constitution. Second, after the enactment of the Voting Rights Act in 1965, Southern states were trying to bypass the provisions of Section 5 which they believed inhibited their ability to promulgate policies that limited the political participation of African Americans. Third, dilutionary policies and practices, such as those discussed throughout this report, were prevented by the Voting Rights Act. The Supreme Court determined that voting

¹⁰⁸ Ibid.

and casting an effective vote were basic rights under both the 15th Amendment and the 1965 Voting Rights Act.

Language Minorities and the 1975 Expansion and Renewal of the Voting Rights Act

Section 5 of the VRA required congressional renewal in 1975. There was agreement between major civil rights organizations and Justice Department of the Ford Administration that it should be renewed for another five years. However, a new effort, led by the Mexican American Legal Defense and Educational Fund (MALDEF), sought to expand the VRA to protect a wider group of people. A notable exception to the Southern states covered under Section 5 of the Act was Texas. As discussed previously, Texas had a long history of using a variety of vote dilution mechanisms against both its African American and Latino, largely Mexican American, populations. Nonetheless, it did not qualify for coverage under the trigger formula of Section 4 because its voter participation rates were not as low as the formula required. However, the expansion of the Act to include groups that would be termed “language minorities,” led to many Latinos, Asian Americans, American Indians, Alaska Natives, and Pacific Islanders to also be protected in 1975. As a result, the entire State of Texas was now covered under Section 5 and protected the voting rights of both Mexican Americans and African Americans.¹⁰⁹

Although the goal of the expansion of Section 5 was to include language minorities across the Southwest and other regions of the country, most of the evidence presented to Congress justifying this action came from Texas¹¹⁰ and built upon the decision of the Supreme

¹⁰⁹ See Luis Ricardo Fraga, “The Origins of the 1975 Expansion of the Voting Rights Act: Linking Language, Race, and Political Influence,” *US Latina & Latino Oral History Journal* (1), 2017, pp. 7-28.

¹¹⁰ Fraga, 2017, p. 13.

Court in *White v. Regester*¹¹¹ where the Supreme Court found that the use of multi-member districts to elect state legislators in Dallas and Bexar counties violated the voting rights of African Americans and Mexican Americans due to effective at-large vote dilution. Although individuals in the Washington, D.C., office of MALDEF began efforts to find evidence of vote dilution and disenfranchisement of Mexican Americans, it was the regional office of MALDEF in San Antonio, Texas, that provided the key evidence that was brought to Congress justifying the expansion.¹¹² Organizations such as the League of United Latin American Citizens (LULAC), the American GI Forum, and the Southwest Council of La Raza (which evolved into the National Council of La Raza and is now known as UnidosUS) were solicited, as well as individual testimony from persons who were involved in trying to mobilize Mexican Americans to register and vote.¹¹³

What is clear from the evidence presented to Congress was that there was always a blurring of the line between specific language-based discrimination and voting rights violations generally. Stated differently, Mexican Americans experienced the same type of voting rights challenges—such as at-large elections and exclusionary slating—experienced by African Americans, in addition to challenges such as the fact that all registration and voting materials were only available in English and the lack of availability of any assistance for citizens for whom English was not their first language.¹¹⁴ Testimony was presented that Mexican American communities experienced,

economic reprisals against Mexican Americans who participated in politics, the use of multimember elections for state legislative offices in Bexar and Dallas

¹¹¹ 412 U.S. 755.

¹¹² Fraga, 2017, p. 15.

¹¹³ Ibid.

¹¹⁴ Ibid.

counties to dilute the votes of Mexican Americans, the use of the majority runoff system in counties with large minority populations, the presence of polarized voting, the very low representation of Mexican Americans in elective office across many cities in Texas, and the limited access of Mexican Americans to elective office across many cities in Texas, and the limited access of Mexican Americans to the slating process.¹¹⁵

Among the most powerful testimony was provided by Modesto Rodriguez, who stated that he had experienced instances of economic intimidation, hostility from law enforcement officers, the placement of polling places that made it very difficult for Mexican Americans to gain access, annexation of majority Anglo areas to dilute the votes of Mexican Americans, and clear evidence of gerrymandering.¹¹⁶ Additionally he stated that all voter registration and election materials were in English, there were no translators, and individuals had to sign their ballot stubs in order to have their votes counted.¹¹⁷ Other witnesses testified that in addition to voting materials being available only in English, Mexican Americans had to confront paying a poll tax and that Mexican American poll watchers were often intimidated.¹¹⁸

Testimony from witnesses in California noted that the Mexican American communities often had few registration personnel who spoke Spanish, and there were no bilingual registration materials. This was especially detrimental to Mexican American voter participation in rural areas where large numbers of Mexican Americans were predominantly Spanish speaking. It was also stated that in areas of high Mexican American population concentration, gerrymandering was common and polling booths were moved frequently in certain jurisdictions.¹¹⁹ Congressman Edward Roybal from California testified that in his state there was very little bilingual

¹¹⁵ Fraga, 2017, p. 16.

¹¹⁶ Fraga, 2017, pp. 16-17.

¹¹⁷ Fraga, 2017, p. 16.

¹¹⁸ Fraga, 2017, p. 17.

¹¹⁹ Ibid.

registration assistance, there was a widespread use of at-large elections to choose school board members, and a widespread use of discriminatory redistricting practices that were race-based.¹²⁰

Although several witnesses had given testimony of the way that English-only elections served as a type of literacy test that was used against Mexican Americans in the Southwest, it perhaps was the testimony of two leading African American members of Congress that convinced members of the Congressional Black Caucus that it was appropriate to pursue expanding the VRA even though it risked the non-renewal of areas, largely in the South, that protected large numbers of African American voters. Congressman Andrew Young (D-GA), a leader with impeccable credentials working to expand the civil rights of African Americans, stated on the House floor that,

I could not go on without saying that the same kind of things that happened to us in 1965 and still happening in some places, are happening to people of Spanish origin, and I would strongly support the inclusion of some of the new sections in that bill, such as the bills offered by my colleagues Mr. Badillo, Mr. Roybal, and Congresswoman Jordan.¹²¹

Perhaps the most convincing testimony provided by a member of Congress was that given by Congresswoman Barbara Jordan who represented a district in Houston that included substantial numbers of both African Americans and Mexican Americans. She stated,

To provide a remedy for these discriminatory voting practices perpetrated upon blacks and Mexican Americans I have introduced H.R. 3247, which is before this subcommittee. My bill would extend the provisions of the Voting Rights Act to Texas, New Mexico, Arizona, and parts of California. H.R. 3247 would guarantee to Mexican-Americans and blacks residing in these jurisdictions the same special protection to their voting rights now afforded to blacks in the South...I believe the Fifteenth Amendment contemplates voting protection of all races including Mexican-Americans. The constitutional question is one which is resolved in my mind, but the members of the subcommittee should confront the issue directly...[I]s language the primary voting problem among Mexican-

¹²⁰ Fraga, 2017, p. 19.

¹²¹ As quoted in Fraga, 2017, p. 21.

Americans? Probably not, but it is characteristic of the myriad of problems Mexican Americans face. Just as the Congress seized upon literacy tests as characteristic of the voting problems facing blacks in the South, so too are English-only ballots among a substantial Spanish-speaking population.¹²²

The focus on language was also covered by another provision of the 1975 expansion, Section 203, that required the translation of registration, ballots, and all other voting related materials in areas that met certain population and related language use requirements. The citizen groups covered were “Asian Americans, American Indians, Alaska natives, or persons of Spanish heritage. Asian American is further defined, in the legislative history, to mean Chinese, Japanese, Korean, and Filipino American.”¹²³ Additionally, three criteria had to be met: “(1) more than five percent of the citizens of voting age of the jurisdiction are members of a single language minority group, (2) fewer than 50 percent of the voting age citizens of the jurisdiction voted in the 1972 presidential elections, and (3) that election was conducted only in English.”¹²⁴ These provisions covered the entire state of Texas, but other areas as well, and resulted in a broader coverage of areas of California under the VRA.¹²⁵

Senator Orrin Hatch (R-UT) succinctly characterized the need for the Section 203. He stated

The right to vote is one of the most fundamental of human rights. Unless government assures access to the ballot box, citizenship is just an empty promise. Section 203 of the Voting Rights Act, containing bilingual requirements is an integral part of our government’s assurance that American do have such access.¹²⁶

¹²² As quoted in Fraga, 2017, p. 22.

¹²³ David H. Hunter, “The 1975 Voting rights Act and Language Minorities,” *Catholic University Law Review* 25 (2), 1976, p. 262.

¹²⁴ Hunter, p. 256.

¹²⁵ Fraga, 2017, pp. 22-23. For a comprehensive discussion of Section 203 see James Thomas Tucker, “Enfranchising Language Minority Citizens: The Bilingual Elections Provisions of the Voting Rights Act,” *Legislation and Public Policy* 10 (195), 2006-2007, pp. 195-260.

¹²⁶ As quoted in Tucker, 2006-2007, p. 196.

The final legislation extended Section 5 for seven years, expanded the trigger formula to include language minorities, and added Section 203. The bill attracted substantial bipartisan support. The House approved the renewal and expansion by a vote of 341-70 and the Senate approved it by a vote of 77-12. President Ford signed the bill on July 25, 1975.¹²⁷

Two lessons are learned from the above discussion of the 1975 expansion and renewal of the Voting Rights Act. First, it is clear that the types of dilutionary tactics used against African Americans in the South were also used against Mexican Americans and likely used against other language minorities. Dilution and effective disenfranchisement were imposed upon other groups who represented substantial segments of the population and of the potential electorate. Second, it was necessary to mobilize the authority of the federal government to limit the extent to which these dilutionary and disenfranchising policies and practices prevented language minorities from having a chance to elect their first choice candidates to public office. Without federal intervention, state and local practices in many parts of the country would lead to discrimination in ways similar to the discrimination experienced by African Americans in the South.

Limiting Who Can Vote and Who Can Cast a Meaningful Vote in the History of the U.S.

Limiting who can vote and who can cast a meaningful vote has a long history in the U.S. For most of the nation's history, not all segments of the citizen population have been able to vote. Initially, only white male property owners could vote. When property ownership and the paying of property-related taxes was largely removed as a bar to voting in the mid-1800s, women and free Blacks were still largely excluded. When formerly enslaved people were granted the right vote with the adoption of the 15th Amendment, a tremendous expansion in the electorate

¹²⁷ Ibid.

occurred in the South, especially in areas where African Americans were a sizeable segment of the population. As a result, intimidation and violence were initially used by whites to inhibit Black citizens from exercising the franchise. Later, a variety of dilutionary mechanisms—especially at-large elections, annexations and de-annexations, gerrymandering, manipulation of polling places, voter registration requirements, and poll taxes—were used to limit African American voting and virtually eliminate the chances of Black voters electing candidates of their choosing. The disempowerment of African Americans culminated in the almost complete disenfranchisement of the Black community in the South through mechanisms such as literacy tests that in most cases were codified in new state constitutions adopted in the early 1900s.

Outside of the South, a variety of reform structures of local government, including commission and council-manager structures, were grounded in the use of at-large elections, and had the goal of minimizing, if not eliminating, the political influence of voters from working class (largely ethnic and sometimes racial) areas of cities. The goals and effects of these efforts were the same—to make sure that the influence of certain segments of the electorate was minimized and that the influence of other segments of the electorate were enhanced. As implemented in the South and Southwest, these reform structures had the effect of further limiting the political influence of African Americans, especially in the South, and of Mexican Americans in the Southwest. With a few exceptions, the political influence of these groups was minimized until the enactment of the 1965 Voting Rights Act and its renewals and expansions, including its subsequent judicial endorsement. Although that judicial endorsement has not been long lasting, see *Shaw v. Reno* (1993),¹²⁸ and *Shelby County v. Holder* (2013),¹²⁹ what is clear

¹²⁸ 92 U.S. 357.

¹²⁹ 570 U.S. 529.

from the history of the U.S. is that without a strong commitment on the part of the federal government, voters cannot depend on state and local jurisdictions to protect the voting rights of racial, ethnic, language minority, and other historically marginalized groups. This history must be remembered as Congress considers amending Section 4 of the Voting Rights Act to account for practices that lead to disenfranchisement and vote dilution throughout the country. Such practices can be overt and they can be subtle. Whatever clarity can be provided by the rewriting of Section 4 will work to enhance the likelihood that all voters will have an equal chance to cast a meaningful vote. Only then will one of the most fundamental ideals of American democracy have the chance to be realized.

Mr. COHEN. Thank you, Professor. Is it Fraga?

Mr. LUIS FRAGA. Fraga, yes.

Mr. COHEN. Yes, I got it right this time. Thank you.

Mr. LUIS FRAGA. You are very welcome.

Mr. COHEN. Sorry about the first time.

Is our next Witness related to you, Professor Fraga?

Mr. LUIS FRAGA. He is my son.

Mr. COHEN. Good work.

Our next Witness is Bernard Fraga, Associate Professor of political science at Emory University. His research interests are in the areas of American electoral politics, racial/ethnic politics, and political behavior. Broadly, he studies how group identities in the electoral context impact individual political behavior. His methodology tends towards the statistical analysis of observational data, associated voter registration records, and election results. He also conducts research on election law and electoral institutions in the United States. He teaches graduate and undergraduate courses on American elections, racial/ethnic politics in the United States, and political science research methods. Professor Fraga received his PhD and MA—it says here, “AM”; I guess they called it an “AM” instead of an “MA”—from Harvard University and his BA from Stanford University.

Professor, you win “the good son” award. You are recognized for 5 minutes.

STATEMENT OF BERNARD L. FRAGA

Mr. BERNARD FRAGA. Thank you so much, Chair Cohen and Ranking Member Johnson, and other distinguished Members of the Vomittee. It is an honor to testify before you today.

My name is Bernard Fraga, and I am an associate professor of political science at Emory University in Atlanta, Georgia.

I was asked to provide testimony regarding the need to enhance the Voting Rights Act via election-practice-based coverage. My peer-reviewed research focuses on the quantitative analysis of elections in the United States, including the assessment of racial, ethnic, and other demographic differences in voter turnout, office-seeking, and election outcomes in both contemporary and historical contexts.

Now, when I teach my graduate and undergraduate students about American elections, one of the first things that I note is that State and local election laws, and, in particular, the presence or absence of Federal oversight of such laws, can have a dramatic impact on whose voices are heard in American democracy.

Nothing indicates the important role the Federal government, especially Congress, can play in enhancing our electoral process better than the Voting Rights Act of 1965. However, a powerful tool of the Act for combating efforts to restrict the right to vote was rendered inactive after the *Shelby County v. Holder* decision in 2013. In that decision, the preclearance provisions of the Voting Rights Act were ruled inoperable because the coverage formula was deemed unconstitutional. Chief Justice Roberts noted that, while, quote, “voting discrimination still exists, no one doubts that,” unquote, Congress needed to, quote, “draft another formula based on current conditions.”

Now, in preparation for today's testimony, and with an eye towards drafting such a formula, I analyzed historical, theoretical, and empirical evidence regarding where and when voting rights violations were most likely to occur. This included using a database of thousands of voting rights laws nationwide and detailed demographic data on States and counties over the past four decades.

In my analysis, I found the following:

First, historical evidence clearly indicates that in States and counties with a larger minority population percentage, efforts to limit the electoral participation of racial/ethnic minority citizens are substantial and persist, absent Federal intervention. This is true even when looking within the Deep South during the height of Jim Crow. Counties with a larger Black population were the last holdouts to allowing Black citizens to register, as we saw in dramatic fashion on Bloody Sunday. I found a similar pattern in heavily Latino and Native American areas of the Southwest. This is exactly why the Voting Rights Act was so important and remains so important today.

Second, since passage of the Voting Rights Act, suits alleging violations of minority voting rights are more common in States and counties with sizable racial/ethnic minority populations, as compared to States or counties with smaller minority population shares. Just to give you a sense of the numbers here, roughly two-thirds of counties where a minority group makes up more than 20 percent of the voting-age population have had at least one voting rights-related lawsuit filed against them since 1982. This is about four times the rate we see in counties with a smaller minority population share.

Finally, when combined with a practice-based approach to preclearance, limiting this preclearance to areas where at least two racial/ethnic groups make up 20 percent or more of the States' or counties' population balances the tradeoff between protecting rights, on the one hand, and creating additional requirements for election officials, on the other hand. Jurisdictions meeting this population criteria are more likely than not to have had at least one violation of voting rights in recent decades.

In my professional opinion, therefore, this population-limited approach to practice-based preclearance would ensure the most just and most efficient allocation of Federal legal resources possible to protect voting rights. This formula would also meet Chief Justice Roberts's call for a formula imposing current burdens based on current needs and current conditions.

In closing, I urge the Committee to reinvigorate the Voting Rights Act and renew the promise of voting rights for all Americans. Thank you very much, and I look forward to your questions.

[The statement of Mr. Bernard Fraga follows:]

Testimony of

Professor Bernard L. Fraga

Emory University, Atlanta, GA

Before the

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Of the U.S. House Committee on the Judiciary

The Need to Enhance the Voting Rights Act: Practice-Based Coverage

July 27, 2021

Chair Cohen, Ranking Member Johnson, and distinguished members of the committee, it is an honor to testify before you today. My name is Bernard L. Fraga, and I am an associate professor of political science, with tenure, at Emory University in Atlanta, Georgia. My research focuses on the quantitative analysis of elections in the United States, with particular attention to the causes and consequences of disparities in voter turnout. I received my B.A. in Political Science and Linguistics from Stanford University and my Ph.D. in Government and Social Policy from Harvard University.

The right to vote is the cornerstone of representative democracy. In the majority opinion for *Reynolds v. Sims*,¹ Chief Justice Earl Warren noted that as “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”² The same year *Reynolds v. Sims* was argued, however, John Lewis was arrested for carrying a “One Man, One Vote” sign in Selma, Alabama and Fannie Lou Hamer was beaten nearly to death by state troopers in Montgomery County, Mississippi for her voting rights activism. Less than a week after Chief Justice Warren read the *Reynolds v. Sims* decision, Freedom Summer activists James Chaney, Andrew Goodman, and Michael Schwerner were murdered while trying to organize a voter registration drive. Thus, at the same time voting can be recognized as central to our system of government, the vote can be denied in places where resistance to changing the existing power structure is entrenched and unyielding.

It took federal action through the Voting Rights Act of 1965 to change this pattern. However, a powerful tool of the act for combatting efforts to restrict the right to vote was rendered inactive after *Shelby County v. Holder*.³ In that decision, the preclearance provisions of the Voting Rights Act, which mandated federal oversight for election law changes in a set of

¹ 377 U.S. 533 (1964)

² *Ibid.*, at 562.

³ 570 U.S. 529 (2013)

states and counties, were ruled inoperable as the coverage formula was deemed unconstitutional. Noting that while “voting discrimination still exists; no one doubts that,”⁴ Chief Justice Roberts called on Congress to “draft another formula based on current conditions.”⁵

In the attached report, I outline a flexible, forward-looking formula for practice-based preclearance that can secure our rights far into the future. Drawing on a database of over 3,500 legal cases or proceedings related to minority voting rights, along with historical, theoretical, and empirical evidence regarding where voting rights violations are likely to occur, I show a strong relationship between the racial/ethnic composition of a state or county and the likelihood that that the jurisdiction will see a violation. This pattern appears across racial/ethnic minority groups and over time. Specifically, I find the following:

1. Historical evidence indicates a clear relationship between attempts to restrict the franchise and the size of the racial/ethnic minority population in the jurisdiction. In states and counties with a larger minority population, efforts to limit the participation of racial/ethnic minority citizens are substantial and persist absent federal intervention to protect the right to vote. (Pgs. 2-7 of the report)
2. In recent years, voting rights-related litigation is vastly more common in states and counties with sizeable racial/ethnic minority populations. This pattern persists even when isolating the analysis to litigation resulting in successful prosecution of a voting rights case. (Pgs. 8-19 of the report)
3. Combined with a practice-based approach to preclearance, a population-limited trigger for preclearance coverage can ensure an appropriate balance between protecting voting rights and creating additional requirements for election officials. The threshold that best balances this tradeoff is 20%, such that practice-based preclearance would be required for states or counties where at least two racial/ethnic groups each make up at least 20% of the jurisdiction’s population. (Pgs. 19-23 of the report)

I invite members of the committee to read the attached report and the conclusions therein, and ask that the report be officially entered into the record. In closing, I urge the committee to reinvigorate the Voting Rights Act and renew the promise of voting rights for all Americans. Indeed, no single action taken by the members of this Congress may be more consequential. It is up to you, and the other members of the House and Senate, to heed the call.

⁴ Ibid, at 2.

⁵ Ibid, at 24.

A POPULATION-LIMITED TRIGGER FOR PRACTICE-BASED PRECLEARANCE
UNDER THE VOTING RIGHTS ACT

Bernard L. Fraga, Ph.D.
Associate Professor of Political Science
Emory University, Atlanta, GA

I. INTRODUCTION

In 2013, the *Shelby v. Holder*¹ decision invalidated the key formula used to determine which jurisdictions would be subject to the Section 5 “preclearance” provisions of the Voting Rights Act. Writing for the 5-4 majority, Chief Justice Roberts stated “a statute’s current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets. The coverage formula met that test in 1965, but no longer does so.”² Instead, the Court indicates “Congress may draft another formula based on current conditions...Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”³

In this report, I outline the rationale for a current population-limited trigger for additional scrutiny of election practices that could be used to violate the voting rights of Black, Hispanic, Asian American, Pacific Islander, and American Indian/Alaska Native (AIAN) populations. I first demonstrate that there is strong historical, theoretical, and empirical evidence for a relationship between the share of the electorate that is minority and potential violations of minority voting rights. Using a detailed database of recent voting rights act-related litigation, I then show that in counties and states where two racial/ethnic groups separately compose at least

¹ 570 U.S. 529 (2013)

² *Ibid.*, at 18. Internal quotes and references to *Northwest Austin* (557 U.S. 193, 2009) omitted.

³ *Ibid.*, at 24.

A Population-Limited Practice-Based Preclearance Trigger

20% of the voting-age population, “current conditions” justify additional scrutiny of covered election practices via the Voting Rights Act.

By constructing a formula for coverage of specific election practices based on contemporary demographics, I provide a flexible trigger that both meets current needs and can adapt to the changing conditions of the future. Combined with a cogent analysis of which election practices should be subject to additional scrutiny, and any further triggers based on established, recent discriminatory practices, this formula could be one part of a strengthened Voting Rights Act that protects the voting rights of all Americans.

II. HISTORICAL AND THEORETICAL BASIS FOR A POPULATION-LIMITED TRIGGER

In this section, I discuss why a population-limited trigger is justifiable based on the extant record of where minority voting rights violations have occurred. I first begin by outlining the history of federal oversight to protect racial/ethnic minority voting rights. Then, drawing on theoretical understandings of elections and extant empirical evidence, I discuss the circumstances where federal oversight may be most necessary to safeguard voting rights.

a. Reconstruction, Jim Crow, and the Role of Federal Oversight in Ensuring Minority Voting Rights

For most of U.S. history, the voting rights of racial/ethnic minority groups were curtailed by statutes and laws restricting access to the franchise. At the start of the Civil War, *de jure* exclusion of the African-American population was nearly complete, as a handful of northern states permitted African Americans to vote by law, but whether enslaved or free, the much larger

A Population-Limited Practice-Based Preclearance Trigger

Black population of the South was excluded from the franchise.⁴ Native Americans on Indian lands and Asian Americans were *de jure* barred from voting as they were ineligible for citizenship or naturalization.⁵ Latinos held tenuous, but at times electorally relevant voting rights, especially in the former Mexican territories where nearly all Latinos resided prior to 1900.⁶

After the Civil War, the historical record of minority voting rights indicates periods of expansion, contraction, and then expansion that directly coincides with federal action to prevent states from *de jure* or *de facto* racial/ethnic discrimination in voting. The first notable expansion of voting rights to African-Americans occurred with the Reconstruction Acts of 1867 and 1868, which granted the vote to formerly enslaved Black men and placed voter registration under the control of Union (Northern) military commanders. Over 700,000 African Americans registered to vote, outnumbering White registrants in multiple Southern states and ensuring election of a Congress and state legislatures conducive to the 14th and 15th Amendments.⁷ However, the 14th Amendment's *de facto* application to African-Americans alone meant that most Native Americans, Latinos, and Asian Americans remained barred from voting.⁸

White resistance to enfranchisement of Black men was immediate, severe, and concentrated in the South where the relatively high proportion of Black voters relative to white voters meant that Black men could exert significant influence on election outcomes. The “Redeemer” movement, as it was called, viewed ending Black suffrage as the proximate goal to regain political power for former Confederates and sympathizers, resorting first to violence and

⁴ Fraga (2018), at 21-22.

⁵ *Ibid.*, at 22-24; McCool, et al. (2007) at 1-2.

⁶ Fraga (2018), at 23; Montejano (1987) at 39.

⁷ Fraga (2018), at 24; Walton, et al. (2012) at 233, 247, 263; Davidson (1992) at 10.

⁸ Haney López (2006), at 37

A Population-Limited Practice-Based Preclearance Trigger

then *de facto* disenfranchising policies implemented by local election officials.⁹ These policies, including poll taxes, literacy tests, and residency requirements, were administered in a racially discriminatory manner but were ruled as beyond federal oversight by the Supreme Court in *U.S. v. Reese*.¹⁰¹¹ The removal of remaining federal troops from the South in 1877, and Congress's failure to pass legislation designed to counter *U.S. v. Reese*, directly resulted in heavily-Black Southern states passing new constitutions between 1890 and 1910 with the specific, intentional goal of disenfranchising African Americans.¹²

The second period of expansion again indicates the important role of federal oversight in places where racial/ethnic minorities are a significant share of the population. Through Supreme Court rulings outlawing Grandfather Clauses (1915)¹³ and the final iteration of the White Primary (1944),¹⁴ heavily-Black and heavily-Latino (in particular, Texas) states of the South were no longer able to *de jure* prevent African-Americans and Latinos from voting statewide. However, the poll tax and literacy test were still administered in a discriminatory fashion by local officials in heavily-Black and Latino counties,¹⁵ just as resistance to ending the White Primary was strongest in heavily-Black parts of Southern states.¹⁶ Indeed, by the 1950s, Black voter registration rates were relatively high in Northern cities and rapidly increasing Southern counties with smaller Black concentrations.¹⁷ In ending the ban on naturalization for remaining Asian and Latin American origin groups, the 1952 McCarran-Walter Act opened the door to

⁹ Fraga (2018), at 25; Foner (1988) at 424; Keyssar (2009), at 85.

¹⁰ 92 U.S. 214 (1876)

¹¹ Goldman (2001), Kousser (1974), at Ch. 2-3.

¹² Davidson (1992), at 10-11; Walton, et al. (2012), at 368; Perman (2001).

¹³ *Guinn v. United States* (238 U.S. 347, 1915)

¹⁴ *Smith v. Allwright* (321 U.S. 649, 1944)

¹⁵ Keyssar (2009), at 89; Brischetto, et al. (1994)

¹⁶ Key (1949), at 519-523.

¹⁷ *Ibid.*; Valelly (2004), at 154.

A Population-Limited Practice-Based Preclearance Trigger

naturalization (and voting rights) for any legal resident of the United States.¹⁸ Thus, by the mid-1950s federal action had eliminated the explicit racially discriminatory barriers to voting outside of heavily-minority counties.

Stronger federal action was necessary to ensure voting rights in places with a large share of racial/ethnic minority citizens. The Civil Rights Acts of 1957, 1960, and 1964 sought to eliminate discriminatory voter registration practices in the South by targeting the methods used by local election officials to curb Black voter registration.¹⁹ Yet resistance continued, culminating in the violent, “Bloody Sunday” attacks by local officials in heavily-Black Selma, Alabama.²⁰ This spurred passage of the Voting Rights Act of 1965, mandating two key forms of federal oversight for jurisdictions with a recent history of discriminatory election practices: federal voting registrars and a requirement that election law changes are “precleared” by federal officials prior to implementation.²¹ While not explicitly defining states and counties subject to federal supervision on the basis of population size, each of the 7 states covered in whole or in part²² by the coverage formula outlined in Section 4 were at least 20% African-American and were the top 7 states in Black population percentage as of the 1970 Census.

The Voting Rights Act of 1965 was amended and expanded to include American Indian/Alaska Native, Hispanic, and Asian American/Pacific Islander populations through amendments in 1970 and 1975. Mirroring the situation for African-Americans in the Deep South, discrimination was most severe in states and localities with relatively large numbers of Latino and Native American voters. For instance, testimony in favor of the 1975 VRA Amendments by

¹⁸ Takaki (1998), at 412-414.

¹⁹ Matthews and Prothro (1966), at 19.

²⁰ May (2013)

²¹ Davidson (1992), at 19; Davidson and Grofman (1994), at 379.

²² 40 out of 100 counties in North Carolina were covered via Section 4 of the Voting Rights Act of 1965 at the time of enactment. These counties had a higher Black population share on average than non-covered counties in North Carolina.

A Population-Limited Practice-Based Preclearance Trigger

Latino witnesses focused on voting rights violations in counties in Texas and California with large shares of Latino citizens.²³ Disenfranchisement of Native American voters appeared in states and counties with tribal lands and reservations concentrating potential Native American voting strength.²⁴

b. Minority Population Size is Associated with Attempts to Restrict Voting Rights

The history of minority voting rights briefly outlined above indicates a generalizable relationship between minority population size and attempts to restrict voting rights. While at various times limitations on the franchise were quite widespread (and impeded participation for non racial/ethnic minority groups as well²⁵), the pockets of most determined efforts to restrict minority voting rights were areas of the country where racial/ethnic groups made up a larger than average share of the population. Attempts to counter continued disenfranchisement through federal intervention thus also focused on these areas, during both the Reconstruction Era and Civil Rights Era. The creation, preservation, and reinstatement of minority voting rights across the United States thus hinges on the actions of the federal government.

This historical evidence aligns with theoretical expectations about where incentives to disenfranchise should be most acute. In an often-quoted section of the canonical text *Southern Politics in State and Nation* (1949), political scientist V.O. Key noted that “in grand outline the politics of the South revolves around the position of the Negro,” and due to the substantial size of the Black population in the historic “black belt” region, “the whites of the black belt have the most pressing and most intimate concern with the maintenance of the established pattern of racial and economic relations.”²⁶ By the 1960s, disenfranchisement came with significant costs to

²³ de la Garza, Rodolfo O. and Louis DeSipio. (1993), at 1482-1484.

²⁴ Jackson (2004), at 272-274

²⁵ Keyssar (2009)

²⁶ Key (1949), at 5, 513.

A Population-Limited Practice-Based Preclearance Trigger

Southern states and counties, including threat of sustained protests and federal action; in theory, this cost should be borne only when white dominance on election day would be threatened with Black enfranchisement.²⁷ Indeed, empirical evidence indicates that the immediate impact of the Voting Rights Act of 1965 on Black enfranchisement was greatest in the heavily-Black counties of the Deep South, precisely where electoral incentives to disenfranchise were strongest.²⁸ Thus, while the legacy of slavery and Jim Crow may be associated with efforts to disenfranchise,²⁹ the key differentiator *within* the South was minority population size. Where minority groups could influence politics, even if only as significant members of coalitions with White voters, efforts to restrict voting rights followed.

These incentives remain most powerful in states and counties with significant racial/ethnic minority populations today. Just as in the past, where a racial/ethnic group is a larger share of the population, they will be more likely to have substantial influence on election outcomes. Different from past trends, and speaking to the success of the Voting Rights Act in eliminating the most egregious forms of disenfranchisement, campaigns, candidates, and voters themselves now seek to leverage the power that large and/or growing racial/ethnic minority populations have when given the opportunity to vote. Indeed, voter turnout for racial/ethnic minority groups is now significantly higher in states and counties where minority citizens make up a larger than average share of the population.³⁰ Officeseeking by candidates from minority groups is also far more common in heavily-minority states and legislative districts, as are opposing efforts to dilute minority voting strength via manipulation of electoral systems and

²⁷ Alt (1994), at 359.

²⁸ Alt (1994); Fraga (2018), at 33.

²⁹ See, e.g., Acharya, et al. (2018)

³⁰ Fraga (2018), Ch. 4-5

A Population-Limited Practice-Based Preclearance Trigger

district boundaries.³¹

Further discussion of recent trends in potential voting rights violations is provided in Section III of this report, but in short, the relationship between a state or county's minority population size and efforts to disenfranchise minority voters has a solid historical, theoretical, and empirical basis. Thus, there is a clear need for federal oversight to protect minority voting rights in jurisdictions with large shares of minority voters today, and to provide a flexible coverage formula that can account for growing racial/ethnic minority populations in the future. This need is most acute in the protection of Latino and Asian American/Pacific Islander voting rights, whose population growth often occurs in areas that did not have a history of repressing African-American voting rights.

III. DETERMINING AN APPROPRIATE POPULATION-LIMITED TRIGGER

If a population size-based trigger is to be used to determine which jurisdictions warrant additional scrutiny in the application of certain election practices, what population threshold or thresholds should trigger coverage? Again we must turn to the patterns of past voting rights violations, but be cognizant of the need to “draft another formula based on current conditions.”³² In this section, I demonstrate that the pattern of potential and actual VRA violations from 1982 to the present indicates that a racial/ethnic group population size threshold of 20% is justifiable, that such a formula would provide flexibility to address both current and future needs as racial/ethnic group populations change over time, and that specifying *two* racial/ethnic groups must *each* meet the threshold appropriately considers where policies could reasonably impede the voting rights of racial/ethnic minority groups.

³¹ Lublin, et al. (2009), at 534; Stephanopoulos (2014), at 103-108.

³² *Shelby County v. Holder*, 570 U.S. 529 (2013), at 24.

a. Tracking Potential Violations of Minority Voting Rights

To track previous potential violations of minority voting rights, I rely on a database constructed by Dr. J. Morgan Kousser. Dr. Kousser is professor emeritus of history and social science at the California Institute of Technology, and a leading expert on voting rights. Dr. Kousser's research, and specifically a previous version of the database I use, were discussed by Dr. Kousser in testimony to the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary in October 2019.³³ In that testimony, Dr. Kousser remarked that his effort to "create a database of all voting rights actions under any federal or state statutes or constitutional provisions" was designed to allow "evaluations of the adequacy of past and potential coverage schemes if Congress wishes to replace Section 4 of the VRA."³⁴ It is in this capacity that I use his database.³⁵

Dr. Kousser's database has approximately 3,540 legal cases or proceedings³⁶ related to minority voting rights from 1965 to 2018.³⁷ Of these cases, 2,510 focus on potential violations of Black voting rights, 801 with potential violations of Hispanic/Latino voting rights, 32 with potential violations of Asian American voting rights, and 135 with American Indian or Alaska

³³ Testimony of Professor J. Morgan Kousser, U.S. House Committee on the Judiciary, October 17, 2019.

³⁴ *Ibid.*, p. 1.

³⁵ I am grateful to Dr. Kousser for his willingness to share the database with me. All errors in use or interpretation of the database are my own.

³⁶ A majority of the "actions" in Dr. Kousser's database are lawsuits brought by Black, Latino, or Native American plaintiffs against state or county officials in charge of election processes. Most of the remainder are Section 5 preclearance "Voting Determination Letters" posted by the Department of Justice for states and counties covered under Section 5 of the Voting Rights Act. A small fraction are cases where minority voting rights are violated by non-governmental bodies using the election process, e.g. political action committees (PACs) gathering signatures for voting rights-related referenda. Cases are organized by state or political subdivision (e.g. counties), and thus cases spanning multiple counties within the same state, but not the state as a whole, may be counted more than once.

³⁷ This figure excludes "More Information Requests," (MIRs) where the Department of Justice asked for additional information from Section 5-covered jurisdictions regarding preclearance submissions (*see* Testimony of Professor J. Morgan Kousser, U.S. House Committee on the Judiciary, October 17, 2019, at 8). MIRs are not incorporated into my analysis as they were used inconsistently from 1982-2013 and Dr. Kousser's database only includes MIRs that resulted in a "withdrawal of the submission or a substantial change to make it more favorable for minorities." Inclusion of MIRs would make differences between formerly Section 5 covered and non-covered jurisdictions more acute, and given the strong correlation between former Section 5 coverage and racial/ethnic minority population size, make the patterns justifying a population-limited trigger even more pronounced.

A Population-Limited Practice-Based Preclearance Trigger

Native voting rights.³⁸ Table 1 shows the number of cases by group and by decade from 1965 to 2018, the most recent year with comprehensive data in Dr. Kousser's database. In Table 1 we see that the total number of cases per decade peaked in the 1980s and 1990s. Cases where Black and Native American voters were the primary groups of interest peaked in the 1980s, while cases where Hispanic or Asian American citizens were principal groups peaked in the 1990s.

Table 1: Voting Rights Cases by Racial/Ethnic Group and Decade, 1965-2018

Decade	All Jurisdictions					Section 5 Covered Only				
	<i>Total</i>	<i>Black</i>	<i>Hispanic</i>	<i>Asian</i>	<i>AIAN</i>	<i>Total</i>	<i>Black</i>	<i>Hispanic</i>	<i>Asian</i>	<i>AIAN</i>
1960s	102	94	3	0	4	100	94	1	0	4
1970s	620	469	79	1	20	597	463	76	1	9
1980s	1136	963	121	4	35	1009	881	92	1	17
1990s	1119	669	398	10	25	950	549	341	7	12
2000s	356	199	124	8	26	223	137	64	3	11
2010s	207	116	76	9	25	63	36	21	0	5

Note: Racial/Ethnic group counts may exceed values in "Total" column as some suits cited the experiences of multiple racial/ethnic groups. "AIAN" stands for American Indian/Alaska Native.

Table 1 also provides separate statistics for cases involving counties or towns subject to the Voting Rights Act Section 5 preclearance provisions from 1965 to 2013. A similar pattern of cases by decade and by race appears for these jurisdictions in isolation, as prior to the invalidation of Section 5 coverage in *Shelby v. Holder* the vast majority of cases were in preclearance-covered jurisdictions. Of course, the nature of Section 5 coverage pre-*Shelby* meant that the strongest predictor of a lawsuit or other action being taken on behalf of minority

³⁸ Dr. Kousser did not indicate which racial/ethnic minority groups were the principal focus of a case for a small number of entries in his dataset. These cases are excluded from the group-specific tabulations in Table 1, but efforts were made to ascertain which racial/ethnic group would be most impacted by associated rulings if this would make a material difference in my conclusions.

A Population-Limited Practice-Based Preclearance Trigger

plaintiffs was whether or not the county was subject to preclearance.³⁹ However, in every decade after the 1970s at least 100 cases were filed *outside* of Section 5 preclearance jurisdictions.

In the more detailed analyses below, I focus on the period from 1982 forward, as the 1982 amendments to the Voting Rights Act and *Gingles* decision clarified the intent of the VRA of 1965 with an eye to policies with discriminatory effect, not just discriminatory intent. The post-1982 period is also when the vast majority of “successful” voting rights actions occurred,⁴⁰ and the bulk of potential violations of minority voting rights overall, constituting 74% of cases in all jurisdictions and 70% of cases in jurisdictions covered by Section 5 from 1965-2013. Finally, I examine *all* cases of potential minority voting rights violations, not just cases that resulted in an outcome favorable to minority plaintiffs. Given the different legal standards used to make judgements about vote dilution versus vote denial, Section 5 versus Section 2 claims, and voting rights violations more broadly over time, the more complete picture of where plaintiffs indicated a voting rights violation *may* have occurred is one appropriate metric for determining where, e.g., U.S Department of Justice resources would need to be deployed.

Finally, this report focuses on counties and states as units of analysis, as Dr. Kousser’s database is organized at the state and county level. American Indian lands are also important political units from the perspective of American Indian voting rights, and a key part of both the Voting Rights Act Section 203 language assistance formula and the proposed coverage formula. However, violations of voting rights occurring in or for those with residence in Indian reservations are generally directed to the state or county whose territory overlaps with those reservations.⁴¹

³⁹ Kousser (2015), at 16.

⁴⁰ Testimony of Professor J. Morgan Kousser, U.S. House Committee on the Judiciary, October 17, 2019, at 7.

⁴¹ See, e.g., *Brief of Amicus Curiae Navajo Nation In Support of Respondents, Brnovich v. DNC* 594 U.S. ____.

b. Geographic Pattern of Potential Voting Rights Violations

Compiling Dr. Kousser's data, we see wide dispersion in potential voting rights violations when examining state-level suits and legal actions. Figure 1 shows states with a statewide potential voting rights violation during the period from 1982-2018. Color indicates which racial/ethnic group's voting rights were most clearly impacted in the first alleged statewide violation. Broadly speaking, the distribution of first cases by race/ethnicity often coincides with which groups make up the largest share of the racial/ethnic minority population in each state. In the Deep South, African-American plaintiffs were the first to allege a statewide violation. In most of the Southwest, Latino plaintiffs were first. In Alaska and Arizona, both of which came under Section 5 preclearance as a result of historical discrimination against Alaska Native and American Indian populations, respectively, these groups were first to allege a statewide violation of their voting rights.

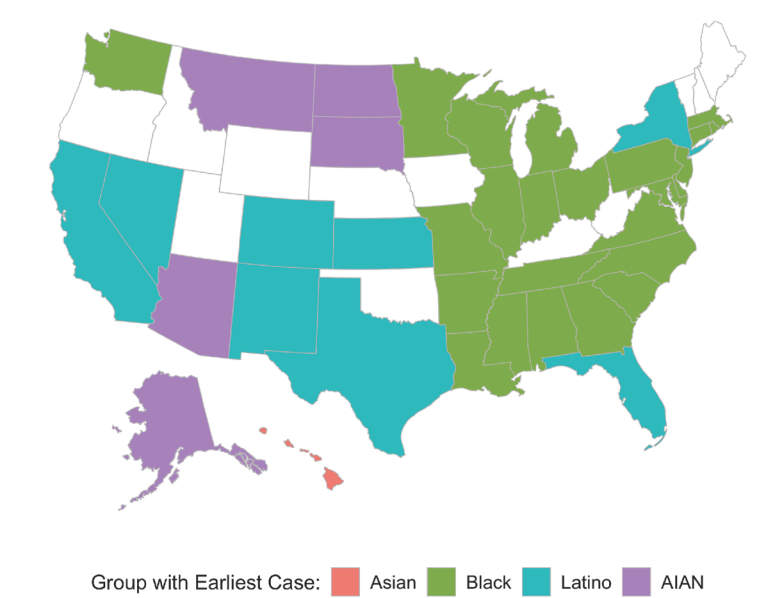
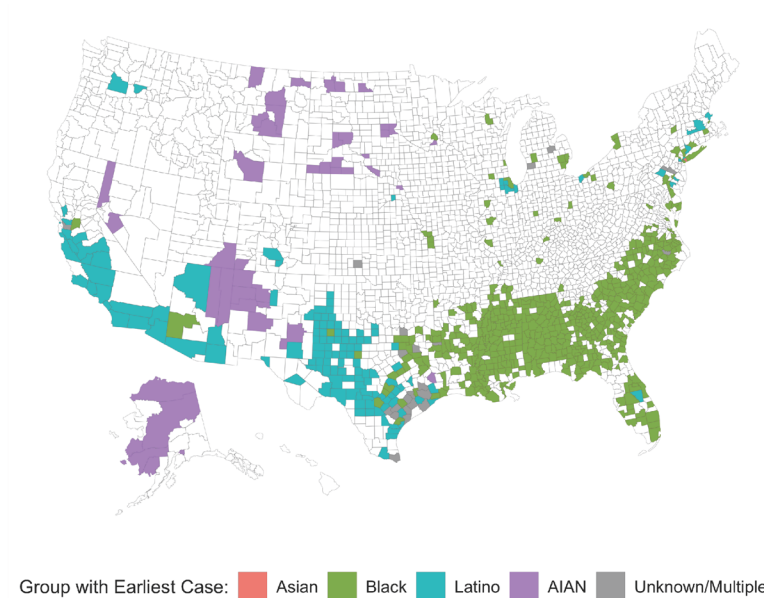
Figure 1: States with Statewide Potential Voting Rights Violations, 1982-2018

Figure 2 documents which counties that have ever had a violation or potential violation via litigation. Again, this does not include the DOJ's More Information Request process, which may mask additional potential violations that were averted in Section 5 covered counties.⁴² As with the statewide map in Figure 1, Figure 2 shows only counties with potential voting rights violations occurring between 1982 and 2018. Shading indicates the first group to bring a suit at the county level, and counties in white did not have a county-level suit. Again, we see a pattern broadly consistent with the known distribution of racial/ethnic groups in the United States, though the map makes it more clear that potential voting rights violations are concentrated in the Deep South, heavily-minority urban counties of the North and Midwest, and some heavily-

⁴² Fraga and Ocampo (2007)

Latino and Native American areas of the Southwest and West.

Figure 2: Counties with Potential Voting Rights Violations, 1982-2018



c. Data on Racial/Ethnic Group Population Size

Figures 1 and 2 are suggestive of a pattern of recent potential voting rights violations similar to the historical record I discuss in Section II of this report. To provide more firm evidence on this dimension, I rely on data from the U.S. Census Bureau that is contemporaneous to *each* potential violation in Dr. Kousser's database. Specifically, I rely on yearly intercensal estimates of the voting-age population by race/ethnicity from 1982 to the present at both the state and county level.⁴³ Yearly intercensal estimates for racial groups other than Whites and African-Americans are not available at the county level until 1990. Thus, for years from 1982-1990, I

⁴³ e.g., <https://www.census.gov/programs-surveys/popest/data/tables.1982.html>

A Population-Limited Practice-Based Preclearance Trigger

interpolated the 1980 to 1990 state or county-level change in the voting-age population by race and ethnicity, providing trends in the non-Hispanic White, Black, Hispanic, and Asian American/Pacific islander voting-age populations.⁴⁴ For years from 2010-2018, I rely on data from the U.S. Census Bureau's Population Estimates Program (PEP), which is broadly similar to the Intercensal estimates.⁴⁵

As the above indicates, one advantage of a coverage trigger based on racial/ethnic population size is the fact that all data necessary to enact the formula is already collected, compiled, and analyzed by the U.S. Census Bureau. A determinations file, similar to that provided every five years for establishing coverage under the population-based formula for language assistance in Section 203 of the Voting Rights Act, could be constructed by the Census Bureau and provided to the Department of Justice for publication in the Federal Register.

d. Correlating Potential Violations with Population Size

A descriptive analysis of the relationship between racial/ethnic minority group population share and potential voting rights violations confirms the patterns suggested by Figures 1 and 2, and validates the historical and theoretical foundations for a population-limited trigger for coverage as outlined in Section II of this report.

Dr. Kousser's database indicates that a majority of states have had at least one potential minority voting rights violation since 1982. In the 12 states that have not, no single racial/ethnic group was 10% or more of the state's voting-age population at any point in time between 1982 and 2018. However, in *every* state where a single racial/ethnic group has been at least 10% of the state's voting-age population, at least one suit or action has been brought at the statewide level. On average, the first statewide potential violation in a state occurred when the group in question

⁴⁴ <https://www.census.gov/data/datasets/time-series/demo/popest/1980s-state.html>

⁴⁵ <https://www.census.gov/data/datasets/time-series/demo/popest/2010s-counties-detail.html>

A Population-Limited Practice-Based Preclearance Trigger

was 12% of the voting-age population. For states that have never had a statewide violation, the average size of the single largest racial/ethnic minority group is only 5.2%.

A county-level analysis provides additional insights. As with states, counties that have had a violation or potential violation of minority voting rights since 1982 had larger minority populations at the time of their first potential violation, on average. Since 1982, at least 804 counties have had at least one potential violation of minority voting rights occur in their jurisdiction. 61% of counties with violations had their first violations happen when a single racial/ethnic minority group was 20% or more of the jurisdiction voting-age population. Furthermore, only 321 counties where a single racial/ethnic minority group makes up more than 20% of the population have not had a voting rights-related lawsuit, approximately one-third of the counties with a minority population reaching this threshold.

Table 2: Minority Group Percentage at Time of First Potential Violation, 1982-2018

Single Group Voting-Age Population	Counties with Violation	Counties with No Violation	Percent with Violation
Less than 10%	126	1648	7.1%
10-20%	187	418	30.9%
20-30%	183	156	54.0%
30-40%	145	60	70.7%
40-50%	81	44	64.8%
50% or more	81	61	57.0%

Table 2 also indicates that the likelihood of a violation increases sharply as the county population shifts from having a single racial/ethnic group making up less than 10% of the county's voting-age population, to 10-20%, to 20-30%. Beyond the 20-30% category, increases

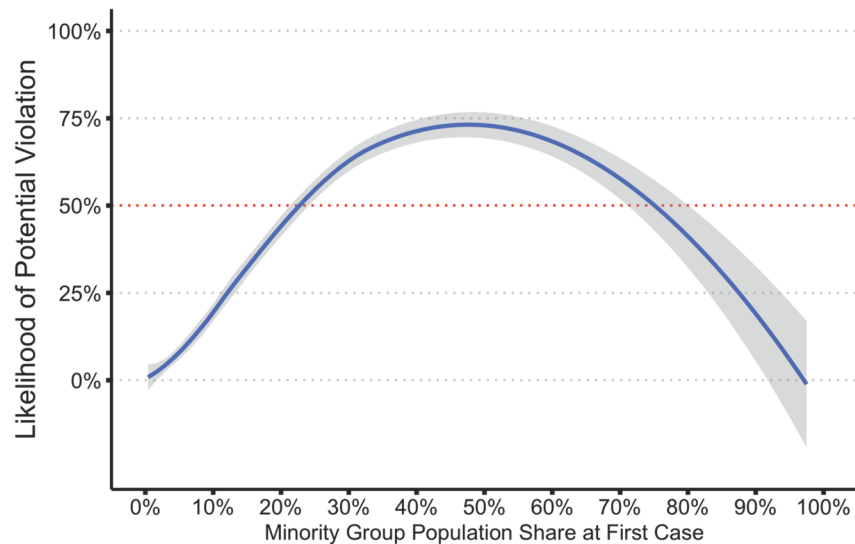
A Population-Limited Practice-Based Preclearance Trigger

in the percentage of counties with a violation are significantly smaller. Indeed, once a single non-white racial/ethnic group makes up a majority of the county (the final row in Table 2), the likelihood of a voting rights violation *decreases* relative to jurisdictions where a single racial/ethnic group is nearly a majority of the voting-age population, dropping to roughly the rate we see in the 20-30% category.

Another way of visualizing this pattern is presented in Figure 3. Figure 3 plots the share of counties with a potential violation as a function of the size of the racial/ethnic group at the time the violation occurred (or the size of the largest racial/ethnic group in the county today, if no potential violation occurred between 1982 and 2018). The blue line is the moving average⁴⁶ of the share of counties with a potential violation (left side of chart) given the racial/ethnic group size specified (bottom of the chart). The red line in the middle of the chart denotes the point where a county has even (50% yes, 50% no) odds of a potential violation.

Figure 3 again shows a very strong relationship between the size of the racial/ethnic minority population and the likelihood of a potential voting rights violation. We see a roughly linear increase in the likelihood of a violation as the population approaches roughly 20%, with diminishing returns to further increases in single minority group population size before the probability begins to decrease after 50% minority. Furthermore, the point of equal likelihood of having a potential violation versus not occurs when the racial/ethnic group whose rights may have been violated is approximately 20% of the overall voting-age population in the jurisdiction. Beyond 20%, counties have better-than-even chances of having had a potential violation, until roughly 75% when the likelihood of a violation drops below 50-50 once again.

⁴⁶ In statistical terms, the moving average I use is a tricubic weighted smoothing function. It does not assume that trends are linear. The 95% confidence interval of the smoother surrounds the blue line in light gray.

Figure 3: Likelihood of Potential Violation as a Function of Minority Group Percentage

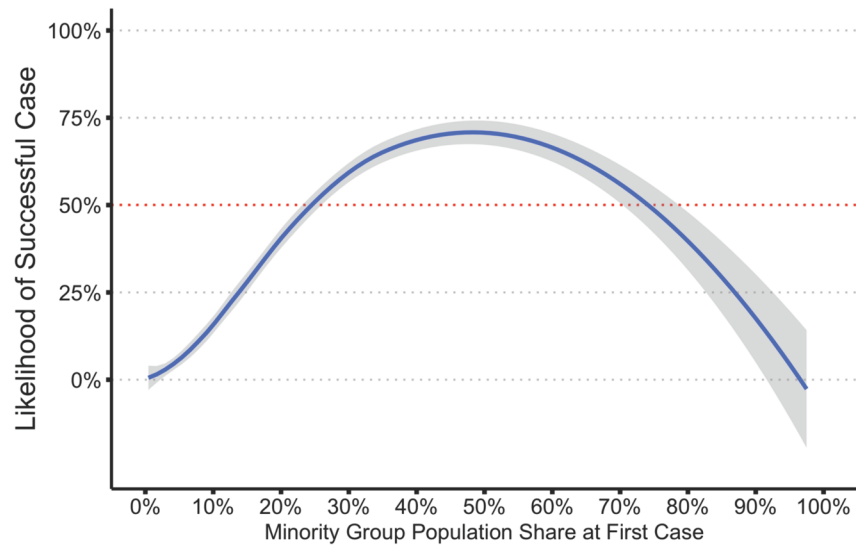
A similar pattern is present for counties with successful cases, where courts determined (or appeared set to determine according to defendants, as they were settled out of court) that a violation of a group's voting rights had occurred. Figure 4 shows these patterns at the county level.⁴⁷ In Figure 4, we see almost exactly the same rate of successful cases as a function of minority group population share as we do for the number of cases overall (successful or not). The chance of a successful voting rights case is better than 50-50 when a minority group is about 25% of the voting-age population in a county. Of course, not all voting rights-related actions result in an outcome in favor of plaintiffs. However, Figure 4's close match with Figure 3 indicates that the relationship between voting rights suits and minority group size is not

⁴⁷ For consistency with the rest of the analyses, More Information Requests (MIRs) are not included here despite the fact that they often resulted in a policy change favoring minority (potential) plaintiffs. See Section III(a) for a more extended discussion of how these requests impact potential voting rights litigation.

A Population-Limited Practice-Based Preclearance Trigger

attributable to an increased number of unsuccessful cases brought by minority plaintiffs in heavily-minority counties.

Figure 4: Likelihood of Successful Voting Rights-related Legal Action as Function of Minority Group Percentage



e. Ensuring equal treatment of counties based on probability of a violation

The analyses above demonstrate that once a racial/ethnic minority group grows large enough to make up 20% of a county's voting-age population, the probability of at least one potential voting rights-related legal action reaches 50%. Given the nature of the election practices that would be subject to preclearance, in that these are commonly used practices that are often tarnished by those seeking to discriminate against minority voters, this threshold may be an appropriate benchmark for determining where additional scrutiny is warranted. However, it is important to consider how various population thresholds balance the need to protect voting

A Population-Limited Practice-Based Preclearance Trigger

rights with the potential to add an additional layer of review of state and county election practices.

Table 3: County-level False Negative and False Positive Rates with Different Thresholds

Single Group Threshold	False Negative Rate	False Positive Rate	Overall Error Rate
10% or More	15.8%	52.2%	27.1%
20% or More	39.1%	39.6%	19.9%
30% or More	61.8%	35.0%	20.7%
40% or More	79.9%	39.3%	23.4%
50% or More	89.9%	43.0%	24.6%

In any process where some jurisdictions are going to be subject to additional scrutiny, while others are subject to conventional review, there will be instances where *after the fact* we see that the additional scrutiny did not result in finding a violation or the conventional review revealed a violation on its own. Therefore while the goal is to minimize such instances, it is not realistic to eliminate them entirely. With this in mind, Table 3 examines the suitability of various single-group relative population size thresholds in terms of the recent history of potential voting rights violations in counties nationwide. Under the population thresholds listed in the first column of Table 3, a county would gain practice-based preclearance if it had a single non-white racial/ethnic group's population making up the indicated percentage of the voting-age population in the county. The "False Negative Rate", also called Type I error, indicates the percent of counties that would *not* be covered via the indicated population threshold formula, but did have a potential violation. The false negative rates in Table 3 indicate that with all population thresholds higher than 20%, more than half of counties having potential violations would *not* have triggered practice-based preclearance based on the population at the time of their first potential violation.

A Population-Limited Practice-Based Preclearance Trigger

The “False Positive Rate,” also called Type II error, indicates the percent of counties that *are* covered via the listed population threshold-based trigger, but *have never* had a potential violation in Dr. Kousser’s database. While generally lower than the false negative rate, we do see that at both the high end of the potential thresholds and low end of potential thresholds, a larger share of jurisdictions would be subject to preclearance despite never having a voting rights suit filed against the jurisdiction.⁴⁸

The final column of Table 3, titled “Overall Error Rate” aggregates Type I and Type II error and shows the percent of counties nationwide that are either incorrectly excluded (not covered despite having had a violation) or incorrectly included (covered despite never having a violation). While differences between coverage thresholds are relatively small, we do see that the 20% threshold for coverage minimizes the *overall* number of counties with violations that are missed and covered counties that have not had suits filed against them in the past.

At the highest racial/ethnic minority population percentages, Figure 3 shows that the rate of potential violations decreases drastically. Table 3 also indicates that the number of false positives begins to increase with thresholds beyond 30%, as in recent decades heavily-minority counties have *not* had potential voting rights violations despite many of these counties being subject to preclearance under Section 5 of the Voting Rights Act. From a theoretical perspective, this is logical: in such places contemporary methods used to violate minority voting rights are unlikely to change the underlying dynamic of which racial/ethnic group holds power, so attempts to disenfranchise are rare. Therefore, in places where a single *minority* group is more than 80%

⁴⁸ Here it is important to note that the term “false” is used for consistency with scientific studies of classification metrics. Given the vagaries of the litigation process, it would be incorrect to assume that jurisdictions that have not had a suit filed against them are free of voting rights violations that would be scrutinized via the preclearance process. In other words, the false positive rate is likely a significant overestimate of the share of jurisdictions where, *after the fact*, we would say preclearance was unnecessary.

A Population-Limited Practice-Based Preclearance Trigger

of the population, and therefore (numerical) minority racial/ethnic group is less than 20%, disenfranchisement is similarly unlikely. Crafting a two-group formula as such also accords with the reality that 15th Amendment protections apply to *all* Americans, not just members of specific racial/ethnic minority groups.

Table 4 documents the effect of using a two-group threshold on false negative, false positive, and overall error rates. Error rates are little changed from Table 3, as today, few counties have a single racial/ethnic minority group at or exceeding 80% of the county's population. However, the small number of counties that do have such a high minority population have no recent history of voting rights violations, and with future demographic shifts more counties will likely fall into this category in the future. Requiring that *two* racial/ethnic groups are at least 20% of the voting-age population in a jurisdiction thus both recognizes the "current conditions" cited by C.J. Roberts in the *Shelby* decision, and acknowledges how our country will "change" in the future.

Table 4: County-level False Negative and False Positive Rates with Two-Group Thresholds

Two-Group Threshold	False Negative Rate	False Positive Rate	Overall Error Rate
10% or More	15.9%	52.0%	27.0%
20% or More	39.8%	38.6%	19.6%
30% or More	63.7%	32.1%	20.4%
40% or More	84.2%	33.2%	23.2%

The 20% threshold proposed above also serves to allocate legal resources as efficiently as possible. Due to the nature of the election procedures that would be subject to preclearance, where policies may be facially race-neutral but used to discriminate under certain circumstances, it may be useful to concentrate additional effort on places where discriminatory effect is more

A Population-Limited Practice-Based Preclearance Trigger

likely to occur. Counties unlikely to have a violation may not need extra scrutiny for these commonplace practices. Of course, jurisdictions under the threshold could still be subject to litigation under Section 2 of the Voting Rights Act, as they are today. These jurisdictions may also fall into coverage as their racial/ethnic minority population grows.

IV. CONCLUSION

For over 150 years, the federal government has played a key role in preserving the voting rights of racial/ethnic minorities. After the Civil War, the erosion of minority voting rights was most severe in states of the former Confederacy with large African-American populations; the Voting Rights Act of 1965 targeted these states and counties and secured the right to vote for all Americans. In the words of C.J. Roberts, “there is no denying that, due to the Voting Rights Act, our Nation has made great strides,”⁴⁹ but the changing demographic and political profile of the country persuaded the Court to call for a formula based on “current conditions” of racial discrimination in voting that “no one doubts” still exist.⁵⁰

In this report, I provided the rationale for one such formula. Tracking thousands of voting rights-related judicial actions in recent decades, and buttressed by historical, theoretical, and empirical evidence regarding where voting rights violations are likely to occur, I show a strong relationship between the racial/ethnic composition of a state or jurisdiction and the likelihood that the jurisdiction will see a violation of racial/ethnic minority voting rights. Evaluating tradeoffs between various population size-based thresholds, I also demonstrate that one threshold in particular, 20%, ensures fairness in which jurisdictions are subject to the added scrutiny of a tailored preclearance provision.

⁴⁹ *Shelby County v. Holder*, 570 U.S. 529 (2013), at 16.

⁵⁰ *Ibid.*, at 2.

A Population-Limited Practice-Based Preclearance Trigger

The Voting Rights Act of 1965's special provisions were a key tool in the federal government's arsenal to ensure all Americans could participate in the electoral process. A flexible, forward-looking formula will ensure that the Act can continue to secure our rights far into the future. No other action of the current Congress may be more consequential than the reinvigoration of this commitment to the American people.

REFERENCES

- Acharya, Avidit, Matthew Blackwell, and Maya Sen. (2018). *Deep Roots: The Political Legacy of Southern Slavery*. Princeton, NJ: Princeton University Press.
- Alt, James E.. (1994). "The Impact of the Voting Rights Act on Black and White Voter Registration in the South." In Grofman, Bernard and Chandler Davidson (eds.) *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*. Princeton, NJ: Princeton University Press.
- Brischetto, Robert, David R. Richards, Chandler Davidson, and Bernard Grofman. (1994). "Texas." In Grofman, Bernard and Chandler Davidson (eds.) *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*. Princeton, NJ: Princeton University Press.
- Davidson, Chandler. (1992). "The Voting Rights Act: A Brief History." In Grofman, Bernard and Chandler Davidson (eds.) *Controversies in Minority Voting*. Washington, DC: The Brookings Institution.
- Davidson, Chandler and Bernard Grofman. (1994). "The Voting Rights Act and the Second Reconstruction." In Grofman, Bernard and Chandler Davidson (eds.) *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990*. Princeton, NJ: Princeton University Press.
- de la Garza, Rodolfo O. and DeSipio, Louis. (1993) "Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage." *Texas Law Review* 71(1): 1479-1540.
- Foner, Eric. (1988). *Reconstruction: America's Unfinished Revolution, 1863-1877*. New York: Harper and Row.
- Fraga, Bernard L. (2018). *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America*. New York: Cambridge University Press.
- Fraga, Luis Ricardo and Maria Lizet Ocampo. (2007). "More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act." In *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*. Berkeley, CA: Berkeley Public Policy Press.
- Goldman, Robert M. *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank*. Lawrence, KS: University of Kansas Press.
- Haney López, Ian. (2006). *White By Law: The Legal Construction of Race*. New York: New York University Press.
- Hasen, Richard L. (2014). "Race or Party? How Courts Should Think About Republican Efforts To Make It Harder To Vote in North Carolina and Elsewhere." *Harvard Law Review Forum* 127: 58-75.
- Jackson, Danna R. (2004). "Eighty Years of Indian Voting: A Call To Protect Indian Voting Rights." *Montana Law Review* 85(2): 269-288.
- Key, V.O. (1949) *Southern Politics in State and Nation*. New York: A.A. Knopf.
- Keyssar, Alexander. (2009). *The Right to Vote: The Contested History of Democracy in the United States*. Rev. Ed. New York: Basic Books.
- Kousser, J. Morgan. (1974). *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*. New Haven, CT: Yale University Press.

A Population-Limited Practice-Based Preclearance Trigger

- Kousser, J. Morgan. (2015). "Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?" *Transatlantica* 1: 1-38.
- Lublin, David, Thomas L. Brunell, Bernard Grofman, and Lisa Handley. (2009). "Has the Voting Rights Act Outlived Its Usefulness? In a Word, 'No'." *Legislative Studies Quarterly*. 34(4): 525-553.
- Matthews, Donald R. and James W. Prothro. (1966). *Negroes and the New Southern Politics*. New York: Harcourt, Brace, and World.
- May, Gary. (2013). *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy*. New York: Basic Books.
- McCool, Daniel, Susan M. Olson, and Jennifer Lynn Robinson. (2007). *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*. New York: Cambridge University Press.
- Montejano, David. (1987). *Anglos and Mexicans in the Making of Texas: 1836-1986*. Austin, TX: University of Texas Press.
- Perman, Michael. (2001). *Struggle for Mastery: Disenfranchisement in the South, 1888-1908*. Chapel Hill, NC: University of North Carolina Press.
- Stephanopoulos, Nicholas O. (2014). "The South After Shelby County." *The Supreme Court Review*. 2013(1): 55-134.
- Takaki, Ronald. (1998). *Strangers from a Different Shore: A History of Asian Americans*. New York: Little, Brown, and Company.
- Valelly, Richard M. (2004). *The Two Reconstructions: The Struggle for Black Enfranchisement*. Chicago: University of Chicago Press.
- Walton Jr., Hanes, Sherman C. Puckett, and Donald R. Deskins, Jr. (2012). *The African-American Electorate: A Statistical History*. Vol 1. Washington, DC: CQ Press.

Mr. COHEN. You are welcome, Professor.

Our next Witness is Mr. T. Russell Nobile—is that correct? Nobile. Mr. Nobile is a senior attorney with Judicial Watch, Inc. From 2005–2012, he served as a trial attorney in the Civil Rights Division of the U.S. Department of Justice, including five years in the Division's Voting Section. He also previously was the legislative assistant for a Member of the House Financial Services Committee. Mr. Nobile received his JD from Mississippi College School of Law and his BA from the University of Mississippi. He served as a law clerk in the Supreme Court of Mississippi.

You are recognized for 5 minutes, sir.

STATEMENT OF T. RUSSELL NOBILE

Mr. NOBILE. Thank you. Good afternoon, Chair Cohen and Ranking Member Johnson, and other Members of the Subcommittee. Thank you for having me here today to testify.

H.R. 4 includes two separate preclearance coverage provisions, each requiring separate and independent justifications. That is, H.R. 4's practice-based coverage cannot rest on the same generalized showings that will be assembled in support of H.R. 4's new section 5 geographic coverage formula. One needed showing in that will be that the current racial disparities in voting are materially worse than those from 1965 and that such disparities justify a new practice-based coverage. This will be a difficult task.

A future review by the Supreme Court will focus on minority ballot access and whether the DOJ can effectively combat discrimination in 2021 via litigation. Current data shows that racial disparities in voting have been dramatically reduced or eliminated in many States across the country. Considering that Black registration and turnout exceeds White in some section 5 jurisdictions, proponents will have a difficult time showing that 2021 disparities necessitate a 1965 remedy.

The argument that H.R. 4 conserves DOJ resources fails no better. DOJ's own data shows that most of the practices covered by H.R. 4 have only led to 14 lawsuits in the last 10 years, hardly a rate that strains Department resources.

Many reports circulating in support of H.R. 4 includes inflated enforcement statistics that often lump together counts of private enforcement actions as proof of rampant discrimination, but the Supreme Court does not view private suits the same as it does DOJ suits. In general, private discrimination lawsuits are a poor measure for determining the amount of discrimination occurring and can be misleading.

The problem for H.R. 4 proponents is clear. Despite relentless claims of suppression by the media and academia, the data shows that minority registration and turnout continue to improve, in many instances eliminating meaningful disparities in many States. This undeniable trend has led to shifting voter suppression narratives over the last year, showing that H.R. 4 proponents are still searching for a theory to explain their opposition to State laws they simply just don't like. H.R. 4 is a remedy in search of a problem.

Just in the last three months, there has been dramatic shifts, and they have been significant. For example, shortly after a public poll showed that 80 percent of Americans support voter ID, the Ma-

majority Whip publicly stated that he has always supported voter ID. This is obviously a paradigm shift to anyone that follows election law policy.

Another recent shift involves the Postal Service. For the last 10-plus years, there has been a public campaign to promote in States vote-by-mail electoral systems, despite obvious security risk. The primary argument in support of these systems is that the use of the Postal Service will increase franchise. Yet, just three weeks ago, in her Brnovich dissent, Justice Kagan found that requiring Native American voters to use the Postal Service could lead to disenfranchisement.

A third shift also comes out of Arizona. During last November's election, many ignored or mocked concerns about ballot chain of custody and the handling of uncounted ballots during the Georgia certification process. Yet, just last month, the DOJ wrote to Arizona alleging that improper handling and inadequate chain-of-custody controls of already counted ballots in the audit potentially would intimidate voters.

There are a lot of reports being circulated to explain voter suppression in 2021, but the world did not need 10,000-word reports to explain Jim Crow suppression in 1965. Everyone in this hearing, I believe, knows what Jim Crow involved. It was state-sponsored oppression of its citizens, and in several instances much worse. For that reason, it is mystifying that some smear reasonable, common-sense election regulations as Jim Crow 2.0. Such glib comments suggest that speakers neither understand Jim Crow 1.0, nor election regulations. Jim Crow is not a brand; it is not a software update. It is a dark period in our history that is invoked often to inflame passions.

Efforts to label common-sense election integrity regulations as Jim Crow suggests that some see they are losing the rhetorical battles on election regulation. Ballot access data provides clear hope. Despite relentless voter suppression claims over the last 15 years, minority registration and turnout has continued to increase while racial disparities have dramatically decreased.

Thank you very much for inviting me to testify, and I will look forward to answering your questions.

[The statement of Mr. Nobile follows:]

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

**Hearing on "The Need to Enhance the Voting Rights Act: Practice-Based Coverage"
July 27, 2021**

T. Russell Nobile
Senior Counsel
Judicial Watch, Inc.

Good afternoon Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee. Thank you for the invitation to speak with you today.

My name is Russell Nobile. I am a Senior Attorney at Judicial Watch Inc. and part of its election integrity group. Judicial Watch is the largest conservative public interest group in the United States. It is dedicated to promoting transparency and restoring trust and accountability in government, politics, and the law. For almost a decade, Judicial Watch has been involved in ensuring the honesty and integrity of our electoral processes.

I have been practicing as a litigator for 16 years. I have specialized knowledge and expertise in voting law. I served as a Trial Attorney for the Civil Rights Division of the U.S. Department of Justice for seven years. During this time, I led numerous voting rights investigations, litigation, and settlements in dozens of jurisdictions. I received several awards during my time at the Department, including a Commendation in 2006 and a Service Award in 2010.

From 2006 to 2012, I worked in the Civil Rights Division's Voting Section, which is responsible for enforcing all provisions of the Voting Rights Act of 1965 ("VRA"), the National Voter Registration Act of 1993 ("NVRA"), and the Uniformed and Overseas

Citizens Absentee Voting Act (“UOCAVA”). At different times during my tenure, I was the primary career attorney assigned to monitor and receive reports out of certain Section 5 covered jurisdictions, such as South Carolina, Georgia, Mississippi, and Texas. I am particularly familiar with the VRA, which is the subject of my testimony today.

Some of my voting work at the Department of Justice included the 2008 case against Waller County, Texas over how its registrar handled voter registration applications from students at Prairie View A & M University, an historically black university. That case ultimately led to a consent decree resolving violations of Section 5 of the VRA and Title I of the Civil Rights Act of 1964.¹ The Department’s website shows that the Waller County case was one of the last Section 5 cases it brought before the U.S. Supreme Court invalidated further use of the triggering mechanism for Section 5 in *Shelby County*, 570 U.S. 529, 546 (2013).² In 2011, I was part of the trial team that represented the United States against Texas in the massive Section 5 case Texas filed over its 2010 redistricting.³

In 2012, I went into private practice, where I continued handling civil rights and voting cases. I joined Judicial Watch in 2019. Since joining Judicial Watch, I have litigated voting cases in several states and have filed numerous friend-of-the-court briefs before the U.S. Supreme Court and courts of appeal.

¹ *U.S. v. Waller County, et al.*, 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008).

² See Dept. of Justice, Civil Rights Division, “List of Cases Raising Claims Under Section 5 of the Voting Rights Act” available at <https://www.justice.gov/crt/voting-section-litigation> (last visited July 25, 2021).

³ *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013).

I. Section 5 of the VRA and Shelby County

Section 5 of the VRA was a temporary, extraordinary remedy to address an extraordinary problem. Before its passage, the democratic process in much of the South was failing because of intentional state-sponsored and/or state-supported efforts to disenfranchise black voters. Because of this discrimination, elections did not accurately reflect popular support in those jurisdictions. The registration data from that time showed just how much the system was failing. Before the enactment of the VRA, only 19.4 percent of black citizens of voting age were registered to vote in Alabama, 31.8 percent in Louisiana, and a remarkably low 6.4 percent in Mississippi. *See Shelby County*, 570 U.S. at 546. These figures reflected a roughly 50 percent or greater disparity between the registration rates of black and white voters. *Id.*

This data led Congress to enact the Voting Rights Act of 1965, which was comprised of permanent statutes banning discrimination as well as Section 5. Congress developed Section 5 after it “found 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.” *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Through Section 5, Congress created an unusual remedy to limit discrimination without the need for prior adjudication, and to do so by subjecting only a specific set of jurisdictions to these extraordinary provisions. *Id.* Section 5 basically *presumed* that any voting change by a covered jurisdiction was unlawful (i.e., implemented out of discriminatory intent or effect) until the jurisdiction proved otherwise. The Supreme Court ruled this presumption of guilt

without a trial was justified in the context of the shockingly low level of black voter registration and turnout in 1965.

While it was originally enacted as a temporary provision set to expire after five years, Congress extended Section 5 for the next 66 years using virtually the same coverage formula Congress adopted in 1965. The Supreme Court’s rejection of this formula in *Shelby County* does not mean that intentional or effect-based discrimination in voting is legal. Permanent provisions of the VRA, such as Section 2, still prohibit such discrimination, and provide the tools needed for the Justice Department or private litigants to challenge discriminatory election standards, practices, or procedures.

After *Shelby County*, it was reasonable to expect that the Justice Department would have shifted strategies focusing its resources on Section 2 enforcement. It would not have been surprising to see a large increase in the number of Section 2 cases brought by the Department since 2013, especially given the media’s drive-by reporting of “rampant voter suppression” occurring nationwide. Yet, there has been no noticeable uptick in the number of Section 2 cases brought during this time. In fact, the Justice Department has only brought *five* Section 2 cases since the *Shelby County* decision, two of which were a replacement for the Section 5 redistricting cases against Texas, which were vacated following the *Shelby County* decision.⁴ Since the start of the Obama administration in

⁴ *United States v. State of Texas* (W.D. Tex. 2013) and *United States v. State of Texas* (S.D. Tex. 2013). See Dept. of Justice, Civil Rights Division, “List of Cases Raising Claims Under Section 2 of the Voting Rights Act” available at <https://www.justice.gov/crt/voting-section-litigation> (last visited July 25, 2021). See also *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

2008, the Justice Department has filed only *ten* Section 2 enforcement cases.⁵ This is not to suggest that racism no longer exists. Nor is it meant to impugn my former Department colleagues' sincere desire to bring Section 2 cases. Rather, it is simply reliable data that shows the Attorney General is currently capable of enforcing voter protections on a case-by-case basis and that he does not need new authority to combat "rampant voter suppression."

The central question is whether current circumstances still necessitate Section 5's extraordinary remedies to combat "widespread and persistent discrimination in voting." *See Katzenbach*, 383 U.S. at 328. Actual data, not social media likes or talking points, directly answers this question. It is hard to maintain "that case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting" in 2021, given the small number of Section 2 cases initiated by the Justice Department over the 8 years since the *Shelby County* decision.

Registration and Turnout Data⁶

Data tells the true story of ballot access in America. To objectively evaluate whether racial minorities have an equal opportunity to participate in the electoral process, you must look at racial registration and turnout data. Looking at the most recent data, the minority

⁵ *Id.*

⁶ All registration and turnout data regarding the 2020 election is from an April 2021 report from the Census Bureau. *See* Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020) (Table 4b) available at <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html> (last visited May 25, 2021).

participation is exponentially better now than it was in 1965. Based on this data, it is hard to contend that Section 5 needs to be expanded as proposed in H.R. 4.

Registration. Current data shows that black registration has completely rebounded and, in some instances, exceeds white registration rates. In fact, the data shows that eight years after *Shelby County*, registration disparities in Texas, Florida, North Carolina, Louisiana, and Mississippi – all previously covered (in whole or part) by Section 5 – are all below the national average. Black registration in Mississippi is 4.3% *higher* than white registration. Registration disparities in these former Section 5 states are lower than the disparities in California, New York, Connecticut, D.C., Delaware, and Virginia. In fact, the four biggest registration disparities, *i.e.*, where white registration most exceeds black registration, are found in Massachusetts, Wisconsin, Oregon, and Colorado, all of which President Biden won in 2020. Any discussion of a revised preclearance formula should at a minimum start with those four states.

Turnout. The 2020 election had a higher turnout across all racial groups.⁷ Voter turnout disparities in Mississippi, North Carolina, Georgia, Florida, and Texas were all smaller than the national average. In fact, the disparities in turnout in Massachusetts, Wisconsin, Oregon, Colorado, New Jersey, and New York were higher than turnout disparities in these former Section 5 states. Again, turnout for black voters in Mississippi exceeded that of whites.

⁷ “Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record,” Dept. of Commerce, Census Bureau, Apr. 29, 2021, available at <https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html> (last visited on May 25, 2021).

There is a significant disconnect between this ballot access data and the media narrative. Notwithstanding pervasive talking points about “rampant voter suppression,” the public data cannot be ignored: registration and turnout for minority voters in 2020 far exceeds that of 1965. When black citizens now register and turnout at higher rates than white citizens in places like Mississippi, it is simply not credible to claim that Jim Crow style voter suppression currently exists.⁸

II. Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019)

Though it purports to remedy the problems highlighted by the Supreme Court in *Shelby County*, the truth is that H.R. 4 goes far beyond any civil rights law enacted during the height of the civil rights era. Rather, it appears part of a grander plan to shift control of American elections away from state legislatures accountable to voters and into the hands of a single federal bureaucratic agency. It accomplishes this by giving the Attorney General a previously unseen level of nationwide authority over elections. Even more troubling than this change to our constitutional tradition of leaving elections to the states, new changes in H.R. 4 will lead to lasting damage to the Department of Justice’s credibility.

A. There Is No Data Supporting The New Practice-Based Nationwide Section 5 Coverage

H.R. 4 proposes a nationwide coverage provision that did not exist in the VRA before the *Shelby County* decision that will vastly expand the federal government’s control

⁸ Editorial, ‘Jim Eagle’ and Georgia’s Voting Law: Biden Compares State Voting Bills to Jim Crow, *Never Mind the Facts*, WALL STREET JOURNAL, March 26, 2021, available online at <https://www.wsj.com/articles/jim-eagle-and-georgias-voting-law-11616799451> (last visited May 26, 2021).

over federal, state, and local elections. It creates a “practice-based preclearance” requirement that would apply to every jurisdiction in the country, regardless of its history of discrimination or racial disparities. Whatever the claims in support of this new practice-based coverage, there is no data that supports using Congress’ Fourteenth and Fifteenth Amendment powers to take over, for example, all municipal annexations and poll site changes nationwide. If 1965 voting disparities did not prompt Congress to enact nationwide coverage during the height of Jim Crow, current registration and turnout data certainly does not support imposing a new nationwide coverage today. To the extent that H.R. 4 purports to enforce the guarantees of the Fourteenth Amendment, it is constitutionally required that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). The record and data do not support the claim that voting rights are somehow in peril, nor can they justify a nationwide, federal takeover of states’ electoral processes.

H.R. 4’s new nationwide coverage applies to seven practices: 1) method of elections, 2) annexations, 3) redistricting, 4) voter documentation and qualifications, 5) bilingual materials, 6) poll site changes, and 7) state list maintenance practices. Each one of these new coverages raises more questions than answers, such as what existing conditions support using Congress’ Fourteenth and Fifteenth Amendment powers to require federal approval of traditional state activities.

Beyond looking at the data, Congress needs to look at the practical reality related to the Department of Justice’s ability to enforce the VRA on a case-by-case basis. In

Katzenbach, the Supreme Court emphasized that Congress reviewed the Department’s ability to enforce black voting rights before making a factual determination that “case-by-case litigation [by the Department of Justice is] inadequate to combat widespread and persistent discrimination in voting[.]” While that was true in 1965, it is no longer the case. Looking at the Department’s own enforcement data since 2010, it is hard to contend that it cannot enforce the VRA’s protections on a case-by-case basis.

For over five decades, the Department has used Section 2 to challenge discriminatory annexations and methods of elections. Because jurisdictions change their method of elections and boundaries infrequently, the universe of colorable VRA claims that may arise from such changes is small. Even accounting for this, the number of recent enforcement actions involving such changes is strikingly small. Since 2010, the Department has brought only *three* Section 2 cases challenging methods of elections and *zero* annexation cases.⁹ Of the three cases mentioned, one settled the day the complaint was filed and the other settled within three weeks, which shows these cases required only limited Department resources.¹⁰

Redistricting certainly occurs more frequently than changes to methods of election and annexations. Yet the Department has brought even fewer redistricting cases since 2010. In fact, during the last redistricting cycle, the Department brought only *two* Section

⁹ Voting Section Litigation available at <https://www.justice.gov/crt/voting-section-litigation> (last visited July 25, 2021).

¹⁰ *United States v. Chamberlain School District*, Civ. No. 3:21-cv-00988 (W.D. La. 2021) and *United States v. Chamberlain School District*, Civ. No. 4:20-cv-04084 (D.S.D. 2020).

2 cases, both against Texas in 2013.¹¹ Thus, over the last 11 years the Department has brought a combined total of *five* cases challenging methods of election, annexations, and redistricting plans. This current caseload volume is dramatically lower than the caseload facing the Department when it began enforcing the VRA in 1965. It shows the Department is fully capable of handling redistricting claims on a case-by-case basis.

H.R. 4's new practice-based coverage also requires federal review of all poll site changes nationwide as well as the text and translation for all bilingual materials distributed by each individual jurisdiction. In practice, bilingual materials often need to be revised every election cycle. Accordingly, this coverage may result in requiring the Department or the U.S. District Court to review hundreds of thousands of pages of translated documents. Again, the Department's website tells the true story regarding the need for nationwide coverage and its ability to protect voting rights related poll sites and language minorities on a case-by-case basis. Since 2010 the Department has brought *zero* lawsuits over poll site changes. Similarly, since 2010 it has brought only *eight* cases under the language minority provisions of the Voting Rights Act, all of which were settled, conserving Departmental resources. Such a caseload hardly supports a federal nationwide takeover as proposed for these covered practices. The language minority enforcement staff in the Department are certainly capable of handling the current rate of cases. If H.R. 4's practice-based coverage is enacted, however, the Department will most assuredly need

¹¹ See note 4, *supra*.

more resources to timely review all poll site changes or bilingual materials from across the nation.

As originally filed, H.R. 4's nationwide coverage targets wildly popular state requirements that voters show some form of identification when voting. Since then new polling shows that 80% of Americans support requiring voters to show photo identification in order to cast a ballot.¹² Only 18% oppose this requirement. Voter ID laws are promulgated at the state level, making it hard to claim that the Department cannot handle such claims on a case-by-case basis. Since 2010, the Department has only brought *one* Section 2 case challenging state voter ID provisions. Again, the record shows the Department is capable of prosecuting voter ID enforcement actions on a case-by-case basis without the nationwide federal takeover proposed in H.R. 4.

B. H.R. 4 Gives the Attorney General Powers That Go Far Beyond Voting

H.R. 4 grants the Attorney General authority to enjoin “any act prohibited by the 14th or 15th Amendment” of the Constitution.¹³ This little-noticed provision will abolish a 153-year-old legal principle that limits the Attorney General’s jurisdiction over Fourteenth Amendment disputes between states and private individuals.¹⁴ It opens the door to highly contentious litigation between states and the Attorney General. It is difficult to overstate the risk that this new law poses to the Department. The Congress should end this

¹² See “Public Supports Both Early Voting And Requiring Photo ID to Vote” published on June 21, 2021 https://www.monmouth.edu/pollinginstitute/reports/monmouthpoll_us_06212_1/ (last visited on July 26, 2021).

¹³ Sec. 7(a) of H.R. 4.

¹⁴ Robert Popper, *Little-Noticed Provision Would Dramatically Expand DOJ's Authority at the Polls*, THE DAILY CALLER, March 28, 2014.

unprecedented effort to inject the Department into partisan election disputes before it goes any further.

Under current law, the Attorney General is only authorized to bring civil rights claims under specific statutes, typically those statutes prohibiting discrimination, and has no authority to sue directly for certain violations of the Constitution. Private plaintiffs can, and do, allege violations of the Constitution, but the Department does not. This proposed change is a major shift, allowing the Justice Department to become involved in a whole range of Fourteenth Amendment cases that previously it would have been unable to pursue. What is more alarming is that the new powers included in H.R. 4 are not limited to voting rights. Whether intentionally or unintentionally, as written, the Attorney General will be allowed to bring *any* action under the Fourteenth Amendment, which could include actions to promote (or restrict) gun rights, religious liberties, and abortion rights. The opportunity for any administration, Republican or Democratic, to exploit this new law is significant. How the Attorney General exercises these new powers will, of course, depend on whichever direction the political winds are blowing at that time. Members of Congress who support H.R. 4 may feel radically different when another administration takes control.

C. H.R. 4's Trigger Formula For Traditional Section 5 Coverage

H.R. 4's new coverage formula for traditional Section 5 creates incentives that pervert civil rights enforcement. Under H.R. 4, jurisdictions that have had a number of "voting rights violations" over a period of time will be subject to Section 5 coverage. The most obvious problem with this new coverage formula is the incentive it creates. H.R. 4 defines "voting rights violations" broadly, capturing minor settlements that never resolved

the merits of any claims. This definition actually penalizes jurisdictions that previously entered into good faith settlements motivated by their desire to amicably resolve disputes and limit public costs without regard to the legitimacy of the claims. Having handled both defensive and affirmative civil rights litigation, I can say firsthand that discouraging settlement is counterproductive to civil rights enforcement.

It is not just the Justice Department who brings voting lawsuits. H.R. 4 creates something akin to the “heckler’s veto” for the loudest (*i.e.*, richest) private interest groups, encouraging them to drive up “voting rights violations” (*i.e.*, minor settlements) against targeted jurisdictions. Under this coverage formula, advocacy groups and other litigants will be incentivized to “sue and settle” even trivial claims, before running to the Justice Department to claim their settlement triggered Section 5 coverage. Such incentives encourage collusive settlements – where local officials enter into meritless settlements with groups to which they are aligned – artificially driving up “voting rights violations.”

Ultimately, H.R. 4’s coverage formula does not correct the problems raised in *Shelby County*. In fact, it aggravates such problems by replacing the data-based approach for Section 5 coverage with a new, easily corruptible process that rewards litigious and collusive parties. This will further encourage the type of close coordination between the Justice Department and advocacy groups criticized in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *affirmed*, 515 U.S. 900 (1995). This is not how Section 5 coverage should be determined.

Regardless of coverage, it goes without saying that the bureaucratic nature of the Section 5 process discouraged jurisdictions from making good faith improvements to their

voting laws. We may disagree on the degree, but anytime costs and regulations increase, it discourages the targeted behavior – in this case, even non-discriminatory changes to elections practices. Much has been made of new voting changes implemented by covered jurisdictions since 2013, but such changes are to be expected. For 48 years, there were substantial costs and risks (both legal and political) associated with making even minor changes to how elections were conducted in Section 5 jurisdictions. The fact that a change was made post-*Shelby County* does not mean that it was racially motivated.

III. Civil Rights Division

I would like to touch briefly on my experiences while a trial attorney at the Civil Rights Division. Under H.R. 4, the Department of Justice's Voting Section will have significantly enhanced responsibilities. The Voting Section of the Justice Department has in the past proved to be a hotbed of partisanship. Even within arguably the most political town in the country, the culture of the Voting Section stands out for its partisanship. An Inspector General's report from March 2013 described the harassment of conservative and Republican employees, and race-based enforcement of the Voting Rights Act.

There has been recent debate over the use of Critical Race Theory ("CRT"). From my observations, there are few places in the federal government that are more partisan or dominated by the assumptions that underlie CRT than the Civil Rights Division. The partisanship and hostility towards conservative staff that do not hold the same CRT assumptions is startling. Section staff know how to identify other staffers who do not hold CRT-like views. While some maintained professional decorum, others showed a troubling level of intolerance to those they disagreed with and, in some cases, actively harassed them,

as recounted in the OIG report.¹⁵ I personally witnessed many of the episodes chronicled in the OIG report and several that were not.

IV. **Brnovich v. DNC**

A. Vote Denial Under Section 2 Prior to Brnovich

Prior to *Brnovich*, courts adopted basically two approaches in resolving vote denial claims under Section 2. The difference between these approaches ultimately led to a significant split between circuits, and even between different panels of the same circuit. A clear majority of courts and circuits required “proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate.”¹⁶ A second approach, however, did not require plaintiffs to establish that a challenged procedure itself particularly caused the loss of opportunity proscribed by Section 2, but only that a challenged procedure “affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both.”¹⁷ In other

¹⁵ A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, March 2013, available at <https://oig.justice.gov/reports/2013/s1303.pdf>

¹⁶ *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-38 (6th Cir. 2016); see *Frank v. Walker*, 768 F.3d 744, 752-53 (7th Cir. 2014); *Luft v. Evers*, 963 F.3d 665, 668-69, 672-73 (7th Cir. 2020); *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998); *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1233, 1238 (11th Cir. 2020); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 598, 600 (4th Cir. 2016); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989).

¹⁷ *Veasey v. Abbott*, 830 F.3d 216, 245 (5th Cir. 2016) (en banc); see *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); see also *Ohio State*

words, under this second approach, (1) disparate impact, plus (2) general, Senate Factor evidence establishes a violation of Section 2's "results" standard.

B. The Decision in Brnovich

In *Brnovich*, the Supreme Court resolved this split and outlined for the first time a framework for how challenges to state time, place, and manner regulations ("TMP regulations") are handled under Section 2.¹⁸ The ruling did not depart from the text of Section 2, as some have claimed. In fact, I see the *Brnovich* decision as providing long-needed guidance regarding how Section 2's "totality of circumstances" analysis applies to vote denial challenges to TPM regulations. Indeed, if the Court had issued the ruling in a less contentious political atmosphere, as far back as ten years ago, *Brnovich* would have been unremarkable.

To put the impact of *Brnovich* in context, a brief overview of Section 2 is useful. The text of Section 2 allows two types of claims: intent-based and results-based claims. Section 2 cases can be further categorized as either vote dilution cases, challenging the system of election itself, or vote denial cases, challenging particular administrative requirements. The distinction between dilution and denial cases is often overlooked. One of the most significant aspects of the *Brnovich* ruling is that it firmly established that these categories require different analyses. Since its enactment in 1965, Section 2 enforcement

Conference of NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014), *vacated*, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014). Evidence of "social and historical conditions" is what is known as "Senate Factor" evidence, a reference to the Senate report discussing Section 2. *Id.*; see S. Rep. No. 97-417, at 28-29 (1982).

¹⁸ *Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257 and 19-1258, ___ S. Ct. ___, 2021 U.S. LEXIS 3568 (July 1, 2021).

has largely involved dilution claims.¹⁹ *Brnovich* does not alter Section 2’s vote dilution analysis. Aside from redistricting, jurisdictions rarely alter their methods of elections. Thus, vote dilution claims are not a growth area for Section 2 litigation. In fact, many jurisdictions nationwide have already either been investigated for, or subject to, a Section 2 claim while many others proactively modified their method of elections to avoid such suits. As a result, vote dilution claims have been in secular decline. This should be a source of national pride. Many advocacy groups, however, have shifted their focus and resources to vote denial claims targeting race-neutral TPM regulations. A great many Section 2 lawsuits were commenced in recent years challenging ordinary seeming regulations – and changes to such regulations – governing, for example, the use of absentee ballots, in-precinct voting, early voting, voter ID laws, election observers, same-day registration, durational residency requirements, and straight-ticket voting.²⁰ Attacks on these longstanding regulations are facilitated by utilizing the assumptions inherent in Critical Race Theory, which postulates that existing institutions and regulations are designed to reinforce current racial, ethnic, and gender hierarchies, in order to establish the necessary “social and historical conditions that have produced discrimination.” These new types of denial claims often depend on statistics that artificially amplify alleged burdens caused by targeted regulations.

¹⁹ This fact is cemented by Congress’ decision in 1982 to add a proviso at the end of Section 2 that expressly refutes any belief that its protections entitled protected classes to proportional representation.

²⁰ See Brief of Senator Ted Cruz and Ten Other Members of the United States Senate as Amici Curiae in Support of Petitioners, Dec. 7, 2020, at 22-24, cited in *Brnovich*, 2021 U.S. LEXIS 3568 at *21 & n.6.

Brnovich addresses how result-based vote denial cases are handled under Section 2. The Court provided a list of five “relevant circumstances” (*i.e.*, extent of any burden, departure from a historical benchmark, the significance of any disparity, other opportunities to register and vote, and the strength of the state’s interest) than can be used by courts to evaluate denial cases. Most of these “relevant circumstances” are common considerations any voting lawyer would review in preparing a Section 2 case. The Court made clear that it was providing a non-exhaustive list of considerations, leaving the door open for future litigants to raise *any* other circumstances they contend are important to their Section 2 claims. The Court then addressed which dilution considerations were useful for analyzing denial claims. In particular, the Court addressed the preconditions and Senate factors set forth in the seminal vote dilution case of *Thornburg v. Gingles* and discussed how, if at all, these applied to denial cases. The tools used to consider whether an at-large election system dilutes minority votes are often of little probative value in determining whether a TPM regulation denies or abridges someone’s right to vote. The Court, however, did note that considerations such as past discrimination and lingering effects of past discrimination were relevant to a denial claim. None of *Brnovich* should surprise a practitioner familiar with the traditional Senate Factors. In fact, very little in *Brnovich* is new. Vote denial raises different issues than vote dilution. Dilution-based analysis is often completely irrelevant to denial claims.

Thank you very much for inviting me to testify today. I look forward to answering your questions.

Mr. COHEN. Thank you, sir.

Our next Witness is Mr. Bryan Tyson. Mr. Tyson is a partner in the law firm of Taylor English Duma in Atlanta, Georgia. He primarily represents governments, candidates, and companies in election and campaign finance matters. He previously advised the Georgia General Assembly during its 2011 redistricting process and was appointed as Special Assistant Attorney General to assist in securing Federal approval of all three redistricting plans adopted by the legislature during that special session. He also previously served as Policy Aide to former Congressman Lynn Westmoreland of Georgia. He received his JD magna cum laude from Oak Brook College of Law.

Mr. Tyson, you are recognized for 5 minutes.

STATEMENT OF BRYAN P. TYSON

Mr. TYSON. Thank you, Mr. Chair, Ranking Member Johnson, Members of the Committee. It is a privilege to be with you today to discuss the provisions of practice-based coverage.

I don't come to this as an academic; I come to this as a practitioner. I have worked both as an expert and a litigator in redistricting, election Administration, and Voting Rights Act cases for right at 20 years. So, what I wanted to do today is share with you a practitioner's perspective on these practice-based components of preclearance and identify several issues for you.

I have to give the disclaimer as well that, although I and my law firm represent a number of governmental clients in Voting Rights Act and election litigation, I am speaking today in my personal capacity, based on my perspective and experience and not on behalf of a client.

So, first, I think we all recognize that the Voting Rights Act of 1965 is one of the most significant pieces of legislation enacted by Congress to secure the voting rights of minority voters across the country, and without the Voting Rights Act and the kind of special provisions that were included for a special time in our nation's history, a very dark time in our nation's history, we might not have ever effectively protected the right to vote for minority voters.

So, the question today for the Committee, and what you are looking at, is whether and what additional protections are needed beyond what still remains in force of the Voting Rights Act. After Shelby County, the Voting Rights Act retained significant force. Jurisdictions that engage in intentional racial discrimination can be brought, under the preclearance regime under section 3, by a court. Jurisdictions that reduce or dilute minority voting strength in violation of section 2 face litigation with a strong incentive for plaintiffs that was referenced earlier—full recovery of attorney and expert fees. Those of us in Georgia have seen there is no shortage of individuals and groups who are willing to litigate about election Administrations, especially in our State.

In contrast, what we have in H.R. 4's practice-based coverage is the idea that elections should be federalized by injecting the Federal government into these intensely local questions of election Administration because it covers practices that are extremely broad.

So, in my prepared remarks, I reference the difficulties and burdens around the preclearance process. I think, again, as the Com-

mittee considers placing the types of obligations on jurisdictions, the burden and difficulty of submitting for preclearance is a major factor in that.

For the specific practices the Committee is considering, both the redistricting and the jurisdictional boundary practices take particular racial numbers at which preclearance is required, but, again, these are areas where section 2 more than addresses that need. That is especially true when the redistricting section is written in such a way that it is not nearly tailored at all; it is extremely broad in terms of which jurisdictions it will capture—almost every redistricting undertaken by most jurisdictions in the country.

Then, there are several practices in the proposed legislation that are singled out with an apparent partisan lens. For example, the documentation or qualifications to vote has no racial category limitation. So, any provision adding photo ID, for example, is covered, despite the fact—this was referenced earlier—that large majorities of voters of all races and political parties support photo identification laws.

Changes to list maintenance are similar. List maintenance is required by Federal law. So, this legislation is, apparently, seeking to freeze in place whatever a State is currently doing in its list maintenance process. We litigated list maintenance in Georgia—challenges under both the NVRA and challenges under the constitutional burden on the right to vote. Our process in Georgia was upheld in those challenges. There is no reason to think that similar challenges to list maintenance would need an extraordinary burden of preclearance and couldn't be handled through the normal course of litigation.

Finally, the provisions for changing voting locations and opportunities to vote is incredibly broad. Decisions about voting locations and voting hours in Georgia are charged primarily to local election officials. State officials play no role in those decisions.

These types of limitations would also capture a lot of innocent conduct. Counties sometimes close polling places because of budget considerations or disability access issues. This would subject those types of decisions to preclearance. The continued increases in early voting that we see across the country, likewise, reduce the strain on election day polling sites and mitigate the need to have kind of a case-by-case review of these.

So, protecting voting rights is critically important, but H.R. 4, as it currently has the practice-based provisions, will ultimately undermine the purposes of the Voting Rights Act. It includes a number of provisions that will adversely affect the ability of States and local jurisdictions to effectively operate elections, codifies this Federal takeover of elections, and opens the door to the partisan use of the preclearance process, instead of protecting voting rights.

So, as we will discuss, existing law covers the areas that are covered by the practice-based coverage components of the bill, and there are not extraordinary circumstances which require this massive Federal intervention.

I look forward to answering your questions and appreciate the time today. Thank you.

[The statement of Mr. Tyson follows:]

198

TESTIMONY OF BRYAN P. TYSON, ESQ.
Partner, Taylor English Duma LLP
Atlanta, Georgia

BEFORE THE U.S. HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage”

July 27, 2021

**TESTIMONY OF BRYAN P. TYSON, ESQ.
BEFORE THE U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**

Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage”

July 27, 2021

INTRODUCTION

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

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

I. THE VOTING RIGHTS ACT OF 1965.

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

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

Even after *Shelby County*, the VRA retains significant force. Jurisdictions that engage in intentional racial discrimination can be bailed in under Section 3.⁵ Jurisdictions that dilute minority voting strength in violation of Section 2 face litigation with a strong incentive for plaintiffs: full recovery of attorney and expert fees.⁶

Shelby County recognized that “Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.”⁷ I have previously testified to the subcommittee on the problems presented by the VRAA’s

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

² 52 U.S.C. § 10304.

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

⁴ U.S. CONST., art. I, § 4, cl. 1.

⁵ 52 U.S.C. § 10302(c).

⁶ 52 U.S.C. § 10301; 10310(e).

⁷ 570 U.S. at 553.

proposed formula to cover states. Today's hearing is focused on the practice-based provisions of the VRAA that apply to every jurisdiction in the country, apparently with the design to avoid singling out certain jurisdictions. But, as we will discuss, the extremely broad definition of "voting rights violation" in proposed Section 4(b) and the limitations to certain jurisdictions with defined populations in proposed Section 4A lead to an overbroad coverage that far exceeds what is congruent and proportional to the needs of enforcing voting rights.

A. Burden of preclearance.

Proposed Section 4A requires all States and political subdivisions to submit certain defined categories of electoral changes for preclearance to the Attorney General or the D.C. District Court. As a practitioner who has submitted multiple preclearance submissions on behalf of jurisdictions, I want to be sure the committee understands the complicated and difficult nature of these submissions.

The Department of Justice requires the following information for *each* submission:

1. A copy of the document embodying the proposed change affecting voting.
2. A copy of the document showing the state of the law, regulation, or practice prior to the proposed change.
3. A statement of the difference between existing law and the proposed change.
4. The contact information for the individual making the submission.
5. The name of the jurisdiction responsible for the change.
6. The identification of the body or person responsible for the change.
7. The statutory or other authority that allows the jurisdiction to decide to undertake the change, along with a description of the procedures required.
8. The date of the adoption of the change.

9. The date the change is to take effect.
10. An affirmation that the change has not yet been enforced or administered.
11. An explanation of the scope of the change.
12. A statement of the reasons for the change.
13. A statement of the anticipated effect of the change on minority groups.
14. A statement of any past or pending litigation involving the change.
15. A statement that the prior practice has been precleared or explaining why it is not subject to preclearance.
16. Any other information required by the Attorney General.⁸

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

1. Demographic information, including:
 - a. Total and voting-age population of the affected area.
 - b. Registered voters for the affected area by race and language group.
 - c. Estimates of population by race and language group made in connection with the change.
2. Maps showing:
 - a. The prior and new boundaries of the voting unit or units.
 - b. The prior and new boundaries of voting precincts.
 - c. The location of racial and language minority groups.
 - d. Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.

⁸ 28 C.F.R. § 51.27.

- e. The location of prior and new polling places.
 - f. The location of prior and new voter registration sites.
3. Election returns showing:
- a. The name of each candidate.
 - b. The race or language group of each candidate, if known.
 - c. The position sought by each candidate.
 - d. The number of votes received by each candidate, by voting precinct.
 - e. The outcome of each contest.
 - f. The number of registered voters for the last 10 years, by race and language group, for each voting precinct for which election returns are furnished.
4. Public notices that show the public had an opportunity to participate including:
- a. Copies of newspaper articles discussing the proposed change.
 - b. Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).
 - c. Minutes or accounts of public hearings concerning the proposed change.
 - d. Statements, speeches, and other public communications concerning the proposed change.
 - e. Copies of comments from the general public.
 - f. Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.
5. For annexations:

- a. The present and expected future use of the annexed land (e.g., garden apartments, industrial park).
- b. An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.
- c. A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations subject to the preclearance requirement that have not been submitted for review.⁹

And all of the required and suggested information is just for a *single* preclearance submission of a single change in an election practice or procedure.

As an example of these challenges, one county in Georgia had used a school building as a polling place for years. The school was undergoing renovations over the summer, but school officials had assured election officials that the renovations would be complete in time for the next election. But shortly before the election, school officials notified the election staff that the school would not be ready in time. Our firm prepared an emergency preclearance submission to move the polling place from the school undergoing renovations to another school that was right next door and had to include all of the above information. Failing to obtain preclearance ahead of the election would have meant the jurisdiction would be subject to an enforcement action (including payment of the plaintiffs' attorney fees)¹⁰ and would become ineligible for bailout because it enforced a voting change that had not been precleared.¹¹

⁹ 28 C.F.R. § 51.28.

¹⁰ 52 U.S.C. § 10303.

¹¹ 52 U.S.C. § 10303(a)(1)(D).

The burden on jurisdictions is significant because not only must the jurisdiction provide all of this information, it must do so to prove a negative—and the proposed Section 4A(c) on particular practices does not change that reality. Each submission must show that the change would *not* cause a retrogression in the position of minority voters to receive preclearance. Failure to submit sufficient information would lead to a “More Information Request” or a rejection of the request for preclearance. And this burden would be necessary for a State or a political subdivision to obtain advance *federal* approval of a proposed voting change adopted by local policymakers.

B. Past concerns regarding partisan administration.

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

The men and women of the Voting Section are professionals who are deeply committed to their work. But concerns about partisan administration influenced how jurisdictions approached preclearance in 2011 cycle and likely will again in the 2021 cycle. For example, Georgia sought preclearance of its 2011 redistricting maps on both statutory tracks simultaneously: filing a declaratory judgment action seeking preclearance in the D.C. District Court and filing for administrative preclearance with the Attorney General.¹² The lawsuit included an alternative claim: if preclearance was not granted, then the formula

¹² *Georgia v. Holder*, Case No. 1:11-CV-01788 (D. D.C.).

imposing preclearance on Georgia was unconstitutional.¹³ Texas used a similar two-pronged strategy when seeking preclearance of its photo identification requirement for voting.¹⁴

Concerns about partisan use of the Department of Justice have not abated, especially when Attorney General Merrick Garland announced the filing of a lawsuit against Georgia's new voting law, Senate Bill 202, just last month.¹⁵ There is no similar litigation against any other state, despite Georgia's new legislation providing more opportunities to vote than a number of other states in the country, including three weeks of early voting, weekend voting, and no-excuse absentee voting.

II. H.R. 4 PRACTICE-BASED PRECLEARANCE.

The VRAA creates a new Section 4A, which is titled "Practice-Based Preclearance." This section does not utilize the new formula for preclearance coverage, but applies to *all* jurisdictions in the entire country. It requires that all jurisdictions obtain preclearance before implementing the following types of changes to elections:

1. Adding seats that are elected at large, if racial groups represent certain percentage thresholds.
2. Converting seats elected from single-member districts to at-large or multi-member districts, if racial groups represent certain percentage thresholds.
3. Any change to jurisdiction boundaries that reduce the minority percentage of a jurisdiction by three points or more.

¹³ *Id.*, Complaint at pp. 19-25 (October 6, 2011) available at <http://redistricting.ils.edu/files/GA%20preclear%2020111006%20complaint.pdf>

¹⁴ *Texas v. Holder*, 888 F. Supp. 2d 113, 117 (D.D.C. 2012) vacated 570 U.S. 928 (2013).

¹⁵ U.S. Department of Justice, *Attorney General Merrick B. Garland Delivers Remarks Announcing Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law*, <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-announcing-lawsuit-against-state> (June 25, 2021).

4. Any change in boundaries of election districts where there has been an increase of a minority group of 10,000 or 20% of the voting-age population.
5. Any change in documentation or proof of identity to vote that is more stringent than the non-photo identification provisions of the Help America Vote Act.
6. Any change in documentation require to register to vote that is more stringent than the date of the VRAA's passage.
7. Any change that reduces multilingual voting materials or changes the way they will be distributed if there is no reduction or alteration in English-language materials.
8. Any change that "reduces, consolidates, or relocates voting locations, including early, absentee, and election-day voting locations, or reduces days or hours of in person voting on any Sunday during the period occurring prior to the date of an election," if racial groups represent certain percentage thresholds.
9. Any change to voter-list maintenance that "adds a new basis for removal from the list of active registered voters or that puts in place a new process for removing a name from the list of active registered voters" if racial groups represent certain percentage thresholds.

These election practices are so broad that they encompass almost all of the election changes made by state and local officials, subjecting them to federal control. And the interlocking nature of the VRAA is also extremely problematic—local jurisdictions that fail to obtain preclearance for these changes will subject their states to potential coverage under the new Section 4(b) formula because the VRAA specifically provides that a denial of

preclearance by the Attorney General or a court is a “voting rights violation” that counts against a State for coverage.¹⁶

My testimony will focus primarily on the incredible burden imposed by the practice-based coverage proposals and how this deep intrusion into the area of state and local elections is not congruent and proportional to any need to root out discriminatory practices that remain available under the VRA generally.

III. CONCERNS ABOUT PRACTICE-BASED PRECLEARANCE.

The list of election practices that could lead to objections and subject a state to inclusion under the proposed coverage formula in the VRAA leads to a number of concerns to me as a litigator, especially because the language of the VRAA is an open invitation to further partisanship in the administration of the VRA. This Subcommittee should be extremely concerned when a law as significant as the VRA is turned into a partisan weapon.

A. Addition of states that have never been subject to preclearance.

Proposed Section 4A subjects *all* states and *all* political subdivisions to the requirements of preclearance for its enumerated practices. States with more than 20% minority population for purposes of several of the practices that have never been completely covered by preclearance include Maryland, Delaware, and Hawaii. Preclearance is a burden on local jurisdictions, as explained above, and something as simple as counties or States not recognizing the new burdens placed on them could result in entire States ensnared in a new coverage formula based on local jurisdictions failing to obtain preclearance. That a mere lack of knowledge could lead to coverage is not a valid basis on which to “single out states” as the Supreme Court warned in *Shelby County*.

¹⁶ VRAA, Sec. 3 at 4(b)(3)(C) and (D).

B. *Concerns about specific election practices.*

1. Changes to non-district elections.

The first practice purports to capture situations when a State or local jurisdiction adds at-large seats when minorities are present or changes seats away from single-member districts. Current litigation in Georgia seeks to define statewide elected officials as candidates who are elected “at large,”¹⁷ meaning that adding statewide elected officials potentially could be included. Further, the Supreme Court has made clear that at-large methods of election are not *per se* violations of the Voting Rights Act.¹⁸ Requiring preclearance of all such changes is not narrowly tailored and any potential harm from changing to at-large elections can be easily handled by the existing framework of Section 2 cases, with the incentive for plaintiffs to receive their attorneys’ fees for a successful outcome.

2. Changes to jurisdiction boundaries.

The second practice focuses on jurisdictional boundaries but chooses an arbitrary three-point reduction in voting-age population as the benchmark. Again, these are changes that could be easily handled under Section 2 with its existing vote-dilution framework. This provision also flies in the face of the Supreme Court’s recent direction which rejected disparate-impact theories under Section 2 of the Voting Rights Act.¹⁹ Using a disparate-impact standard to impose the burdensome preclearance process on a jurisdiction is not narrowly tailored, especially when existing caselaw provides clear direction about reduction in minority population for purposes of Section 2.

¹⁷ *Rose v. Raffensperger*, Case No. 1:20-cv-02921-SDG (N.D. Ga.).

¹⁸ *Thornburg v. Gingles*, 478 U.S. 30, 46, 48 (1986).

¹⁹ *See Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021)

3. *Redistricting.*

The third practice captures virtually all changes to election districts across the country, requiring federal approval for even the slightest change in district boundaries. The limitations on increases in minority population over the past decade do not provide a sufficient boundary, especially when most states will see minority population increases of more than 10,000 individuals of “any racial or language minority group” over the prior decade.

This provision is not a rifle shot, tailored to areas where there may actually be problems—it is a shotgun blast, hitting almost *every* redistricting undertaken by *every* jurisdiction in the country. Given the well-established vote-dilution standards surrounding claims under Section 2 for redistricting plans, there is no need to subject *every* change in district boundaries for *every* jurisdiction to a potential federal-government veto. Nor is there a need to impose the dramatic burden of preclearance filings on jurisdictions for an entire decade when a State’s minority population has increased by 10,001 individuals.

4. *Changes in documentation or qualifications to vote.*

The VRAA next hands the federal government control over the entirety of the registration and voting process by requiring changes to documentation or identity for voting or registration purposes to be precleared. Unlike other changes, there is no racial-category limitation here. If a state like Maine, with a total minority population of seven percent, adds a photo identification requirement, then it must obtain preclearance as to whether that requirement will impact minority voters or not. This is not the narrow tailoring the U.S. Supreme Court requires for dramatic imposition of preclearance on states.

Further, there is no factual basis to demonstrate that photo identification requirements have an impact on minority-voter turnout in jurisdictions.²⁰ And voters of all races and political parties broadly support photo identification laws.²¹ Singling out one portion of the overall administration of elections for special scrutiny—without anything but a partisan basis for doing so—opens up opportunities for partisan administration of the Voting Rights Act and opportunities for the Department of Justice to undermine confidence in elections by targeting certain states.

5. *Changes to multilingual voting materials.*

Section 203 of the Voting Rights Act already requires covered jurisdictions to make voting materials available in languages other than English. The provisions of the VRAA purport to expand that even further—not only must a covered jurisdiction provide voting materials in other languages; it must also never decrease the amount or manner in which those materials are produced. But the broad language of this provision of the VRAA also extends to jurisdictions that are *voluntarily* providing materials in other languages. If those jurisdictions make even a slight reduction in the amount printed or distributed (for example, due to low demand), that decision would be subject to preclearance by the federal government. Not only is this provision not narrowly tailored to any actual harm, it also provides plaintiffs with an ability to bring a variety of enforcement actions where they could receive attorney’s fees against jurisdictions based only on distribution of materials and not on any other voting

²⁰ See Justin Grimmer, *Comment on “Voter Identification Laws and the Suppression of Minority Votes”* (August 7, 2017), available at http://stanford.edu/~jgrimmer/comment_final.pdf; Hood, M. V., and Charles S. Bullock, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, *State Politics & Policy Quarterly* 12, no. 4 (2012): 394-414, <http://www.jstor.org/stable/24711094> (last accessed July 26, 2021).

²¹ Monmouth University Poll (June 21, 2021), available at https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_062121/

practice. Section 203 enforcement actions provide enough teeth to address a jurisdiction failing to provide multilingual materials that assist voters.

6. *Changes in voting locations and opportunities.*

The sixth provision is so broad that it encompasses *every* decision made by election officials about the administration of in-person voting. Not only does it require preclearance of changes in voting locations—it also requires preclearance of changes to voting *hours*.

In Georgia, the Secretary of State plays no role in the provision of voting hours or polling locations.²² All decisions about voting locations and early voting hours, including whether and when to have Sunday voting, are entrusted to local officials.²³ Election experts recognize that polling places may close and consolidate for any number of reasons, often driven by local budgetary considerations.²⁴ Georgia also has an increasing number of voters who vote early, reducing the strain on election-day voting locations and leading some counties to reduce or consolidate polling sites.

Given the multitude of non-discriminatory reasons why voting hours or locations would change, subjecting *every* change in location and *every* reduction in hours to preclearance is not narrowly tailored to address any wider harm. Even the limitations on minority

²² *Fair Fight Action v. Raffensperger*, Case No. Case 1:18-cv-05391-SCJ, Doc. 612, slip op. at 38 (N.D. Ga. Feb. 16, 2021) (“State law explicitly assigns responsibility for determining and changing precincts and polling places to the county superintendents.”).

²³ O.C.G.A. §§ 21-2-31, 21-2-50, 21-2-385(d).

²⁴ Matt Vasilogambros, Carrie Levine & Pratheek Rebala, *National Data Release Sheds Light On Past Polling Place Changes*, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/29/national-data-release-sheds-light-on-past-polling-place-changes> (Pew Stateline Sept. 29, 2020) (“Is this suppression,” he asked, “or is this the reality of providing voting as a government service, given the challenges of providing government services in underserved, minority communities?”)

population do not provide a sufficient reason to interfere with decisions that are entirely local, they are often not even made by the States themselves.

7. *List maintenance changes.*

The final category focuses on voter-list maintenance, which is required by the National Voter Registration Act (NVRA).²⁵ Like other provisions of the VRAA, there is no reason to add to the clear requirements of the NVRA regarding how states may conduct list maintenance. States are already subject to lawsuits under the NVRA for violations.

In addition, the messaging around list maintenance is often presented in draconian terms of “voter purges.”²⁶ But all sides agree that list maintenance is necessary.²⁷ Debates often center around how and why voters are removed.

This policy-based decision on administering voter rolls illustrates why this category is particularly inapt for coverage by preclearance. For example, Georgia has conducted list maintenance for decades for voters that have no contact with election officials. Despite constitutional claims that it was improperly purging voters, Georgia’s process was found to be consistent with the NVRA and constitutional when challenged in court.²⁸ But the VRAA would require even the slightest change to existing list-maintenance processes to be subject to federal approval and essentially give the Attorney General a veto over processes that are reserved to the states and for which options for judicial review are already available. Also, given the number of preliminary injunctions that were filed over Georgia’s process in 2019

²⁵ 52 U.S.C. § 20507(a)(4); *Bellitto v. Snipes*, 935 F.3d 1192, 1194 (11th Cir. 2019).

²⁶ See, e.g., Brennan Center for Justice, *Voter Purge Rates Remain High, Analysis Finds*, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> (August 1, 2019).

²⁷ *Id.* (“To be sure, there are many good reasons for a voter to be purged.”).

²⁸ *Fair Fight Action*, supra n. 22, Doc. 617 at 55-56 (“the burden imposed by Georgia’s list maintenance process is not severe.”)

and 2020,²⁹ there is no indication that the pre-enforcement review of preclearance is needed or required for this topic.

C. The practice-based coverage in the VRAA raises the distinct possibility of politicized enforcement of preclearance.

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

That focus on intentional discrimination is completely upended by the VRAA. Because the VRAA defines a “voting rights violation” as an unsuccessful application for preclearance to the Attorney General or a federal court,³⁰ States which have local governments that do not submit certain practices for preclearance can find themselves on the hook for statewide coverage under the new formula. Because jurisdictions must prove the lack of discrimination in their preclearance submission, allowing a rejection *for any reason* to constitute a voting rights violation grants significant latitude to the Attorney General to force jurisdictions under preclearance by rejecting applications for preclearance for the particular election practices it lists.

The practice-based components are so broad that they empower the Attorney General to object (or file enforcement actions against targeted sub-jurisdictions) in a way that requires an entire state to be covered by the formula outlined in other part of the VRAA. If the

²⁹ *Black Voters Matter Fund v. Raffensperger*, No. 1:20-CV-04869-SCJ, 2020 WL 7394457 (N.D. Ga. Dec. 16, 2020); *Fair Fight Action v. Raffensperger*, No. 1:18-cv-05391-SCJ, Doc. 188 (N.D. Ga. Dec. 27, 2019).

³⁰ VRAA, Sec. 4(b)(3)(C)-(D).

Subcommittee is going to proceed with the VRAA, it should at the very least require a finding of intentional discrimination or other changes that would avoid the high likelihood that politics could become a key driver in litigation under the VRAA.

D. The continued politicization of voting litigation adds to concerns about the political use of the VRAA.

The broad definition of “voting rights violations” also raises significant concerns about future political abuse of the VRA because of the current partisan use of litigation and arguments about voting practices. Ignoring the oft-quoted saying, “the plural of anecdote is not data,” today’s voting litigation is often highly organized along partisan lines, frequently combining a variety of scattered events in an attempt to utilize the federal courts to control elections in states.³¹ These types of political efforts to obtain federal-court (and federal government) oversight of state election processes will be heightened by the VRAA’s practice-based preclearance process.

Unlike the crisis situation across the covered states in 1965, complaints about election administration today tend to involve the collection of scattered stories woven into a partisan narrative that is contrary to the data on the election as a whole. For example, Georgia was accused of massive voter suppression during the 2018 elections. Claims alleged that Georgia election officials held up over 50,000 voter registration applications, closed polling places, and targeted minority voters with overly restrictive database-matching processes and have been almost entirely rejected by federal courts reviewing challenges.³² Georgia offers automated

³¹ See Brennan Center, *Voting Rights Litigation Tracker 2020 (Georgia)*, <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020#Georgia> (chronicling cases brought by Democratic Party entities and affiliated groups against Georgia prior to the 2020 election).

³² *Fair Fight Action*, supra n.22, n.28 (summary judgment orders rejecting almost all of the claims).

voter registration, no-excuse absentee voting, and at least three weeks of in-person advance voting—and all of those practices were in place for the 2016 and 2018 elections.³³ The Brennan Center for Justice identified Georgia’s automated voter registration program as the most successful in the country, almost doubling the rate of voter registration.³⁴ Georgia’s recent election legislation expanded weekend voting.³⁵

Decisions regarding enforcement of the VRA—and especially which practices should be subject to preclearance—should be driven by data, not by partisan considerations.

IV. CONCLUSION.

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

The Subcommittee should strongly consider amending the legislation to address intentional discrimination, but at the very least eliminate the practice-based coverage components from the bill. Existing law covers those areas well and there are not extraordinary circumstances which must be required to justify the massive federal intervention of preclearance for the practices identified.

³³ See History of AVR & Implementation Dates. *Brennan Center for Justice*. <https://www.brennancenter.org/analysis/history-avr-implementation-dates> (last visited July 26, 2021). See also State Laws Governing Early Voting, *National Conference of State Legislatures*, <http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> (last visited July 26, 2021) and Absentee and Early Voting, *National Conference of State Legislatures*, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited July 26, 2021).

³⁴ Morris, Kevin and Peter Dunphy, AVR Impact on State Voter Registration, *Brennan Center for Justice* (April 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_AVR_Impact_State_Voter_Registration.pdf (last visited July 26, 2021).

³⁵ SB 202 at 59:1496-1503.

Mr. COHEN. Thank you, Mr. Tyson.

Our final Witness is Franita Tolson. She is Vice Dean for Faculty and Academic Affairs and Professor of Law at the University of Southern California Gould School of Law, where she teaches a course on con law and election law. She has written on a wide range of topics, including partisan gerrymandering, campaign finance reform, the Elections Clause of the Voting Rights Act of 1965, and the 14th and 15th Amendments. Her research also has appeared in leading law reviews, including Boston University Law Review, the Vanderbilt Law Review, the Alabama Law Review, the Notre Dame Law Review, and not in the top 15 of football schools, the University of Pennsylvania Law Review Online. Professor Tolson received her JD from the University of Chicago Law School, where she served as a member of the University of Chicago Law Review. She has a BA cum laude from Truman State University. She served as law clerk for the Honorable Ann Claire Williams of the United States Court of Appeals for the 7th Circuit and the Honorable Ruben Castillo of the Northern District of Illinois.

Professor Tolson, you are recognized for 5 minutes.

STATEMENT OF FRANITA TOLSON

Ms. TOLSON. Thank you, Chair Cohen. To the Chair and Ranking Member Johnson, as well as the distinguished Members of the Subcommittee, thank you for the opportunity to appear and speak about the practice-based coverage provision of H.R. 4.

It is beyond dispute that voting rights are under assault, and this provision is a necessary step towards restoring the protections of the Voting Rights Act. The Supreme Court's decision in *Shelby County v. Holder* hobbled the preclearance regime that would have prevented a number of States from passing these new voting restrictions by requiring them to submit these changes to the Federal government for approval before they could take effect. Importantly, the Shelby County decision tried to paint pervasive voting discrimination as a relic of time long past, ignoring that legislators often fall back on certain practices to diminish the political power of minority communities.

By singling out certain electoral schemes that disenfranchise and/or minimize minority political power, practice-based preclearance updates the provisions that would trigger Federal oversight of State electoral systems—from the long-eradicated practices like the polls tax and literacy tests, heavily criticized by the Shelby County Court, to techniques that have been consistently used, and importantly, are still being used by States to disenfranchise minority voters. Shelby County notwithstanding, Congress retains substantial authority under the 14th and 15th Amendments, as well as the Elections Clause, to pass the practice-based preclearance provision of H.R. 4.

Notably, the Shelby County Court enabled the 14th and 16th Amendments to require Congress to establish a pattern of intentionally discriminatory action on the part of the States as a prerequisite for reauthorizing the original coverage formula of section 4(b). This view misrepresents prior case law.

Initially, the Supreme Court broadly interpreted Congress' power to enforce the 15th amendment in both *South Carolina v. Katzen-*

bach and *City of Rome v. United States*, which rejected the argument that Congress' enforcement power under the 15th amendment was limited to remedying only intentional racial discrimination, and read that authority to be as broad as the necessary and proper clause of article I.

Similar to the 15th Amendment, the Court had also described Congress' enforcement power under section 5 of the 14th amendment as broader than the judicial power to define the substantive scope of section 1 of the Amendment, but the Court narrowed this authority in a case called *City of Boerne v. Flores*. According to *City of Boerne*, Congress' enforcement power is limited to remedial fixes and does not include the ability to make substantive changes to the scope of the 14th Amendment.

There are two important takeaways from *City of Boerne* as it pertains to Congress' authority to protect the right to vote under the 14th and 15th Amendments.

First, Shelby County never determined whether *City of Boerne's* rationale also applies to the 15th Amendment, leaving in place Congress' broad authority to enforce that provision as articulated in *City of Rome* and *Katzenbach*.

Second, while the Court's decision in *City of Boerne* sharply circumscribed Congress' ability to enforce the 14th Amendment, it remains true after the decision that intentional discrimination is not a necessary prerequisite to a 14th amendment violation. In *Harper v. Virginia State Board of Elections*, the Court held that the equal protection clause of the 14th amendment protects a fundamental right to vote that is distinct from the 15th Amendment's provision on racial discrimination in voting. The 14th amendment separately authorizes Congress to target practices, either discriminatory or non-discriminatory, that undermine the fundamental right to vote in local, State, and Federal elections.

Congress also has broad authority to enact practice-based preclearance pursuant to the Elections Clause, which empowers States to choose the time, places, and manner of Federal elections, but, importantly, reserves to Congress the power to make or alter State electoral schemes. The Court, in assessing the constitutionality of the coverage formula of section 4(b) in Shelby County, ignored how the Elections Clause, as a potential source of authority for the Voting Rights Act, mitigated the federalism concerns raised by the statute. Under the clause, Congress has the authority to alter State law, where appropriate; make law completely independent of the State's legal regime and commandeer State officials to implement Federal law. This structure permits Congress to enact the complete code for Federal elections, which is an invaluable source of authority, particularly if States have jeopardized the health and vitality of Federal elections in some way.

Indeed, the practice-based preclearance provision isolates those practices that States have historically used to abridge or deny the right to vote, and it does so without singling out any particular jurisdiction or geographic area. Congress' power under the 14th and 15th Amendments, as well as the Elections Clause, provides sufficient authorization for H.R. 4 because those provisions empower Congress to enact legislation seeking to prevent local, State, and

Federal election regulations that abridge or deny the right to vote or that have a racially discriminatory impact.

Thank you. I welcome your questions.

[The statement of Ms. Tolson follows:]

**U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on
“The Need to Enhance the Voting Rights Act: Practice-Based Coverage”
July 27, 2021**

Statement of Franita Tolson

Professor of Law and Vice Dean for Faculty and Academic Affairs*
University of Southern California Gould School of Law
699 Exposition Blvd.
Los Angeles, CA 90089
213-740-5502
ftolson@law.usc.edu
<https://gould.usc.edu/faculty/?id=73521>

***affiliation for identification purposes only**

To Chairman Cohen, Ranking Member Johnson, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to appear and speak about the practice-based coverage provision of H.R. 4. It is beyond dispute that voting rights are under assault, and this provision is a necessary step towards restoring the protections of the Voting Rights Act of 1965 (“VRA”). Indeed, the COVID-19 pandemic revealed, in stark fashion, the urgent need for new federal voting rights legislation by exacerbating already existing inequities in our political system. For example, Georgia closed 214 polling places, located mostly in poor or minority communities, between 2012 and 2018.¹ These earlier polling place closures, coupled with a shortage of poll workers and additional pandemic related closings, led to waiting times of nine, ten, and sometimes, eleven hours to cast a ballot during the 2020 election cycle.² The challenges faced by those seeking to exercise their right to vote in Georgia and other states derive, in part, from the U.S. Supreme Court’s decision in *Shelby County v. Holder*. The *Shelby County* decision effectively hobbled the preclearance regime of the VRA that would have prevented many of these polling place closures by requiring the state to submit these changes to the federal government for approval before they could take effect.

Since *Shelby County*, hundreds of polling places have closed in jurisdictions formerly covered by the VRA, making voting less accessible for minority communities. To name some of the worst

* Affiliation Listed for Identification Purposes Only

¹ Mark Niesse, Maya T. Prabhu, and Jacquelyn Elias, *Voting precincts closed across Georgia since election oversight lifted*, THE ATLANTA JOURNAL CONSTITUTION, Aug. 31, 2018, available at <https://www.ajc.com/news/state--regional-govt-politics/voting-precincts-closed-across-georgia-since-election-oversight-lifted/bBkHxptlim0Gp9pKu7dfrN/>.

² Sam Levine, *More than 10-hour wait and long lines as early voting starts in Georgia*, THE GUARDIAN, Oct. 12, 2020, available at <https://www.theguardian.com/us-news/2020/oct/13/more-than-10-hour-wait-and-long-lines-as-early-voting-starts-in-georgia>.

offenders, Louisiana has 126 fewer polling places than it did in 2012,³ and Mississippi closed five percent of its polling places (around 100 precincts) in six years,⁴ but this problem is fairly widespread. According to the NAACP, “since 2013, jurisdictions formerly covered by [s]ection 5 closed, on average, almost 20% more polling stations per capita than jurisdictions in the rest of the country.”⁵

Georgia, which was a tipping point state in the 2020 presidential election, also overhauled its voting laws in the wake of that election, enacting changes that will have a deleterious effect on the ability of communities of color to cast a ballot in the state. Georgia’s new restrictions, for example, would curb access to the absentee voting process that was used at higher rates by minority communities during the 2020 election cycle.⁶ Other states like Florida and Arkansas have followed Georgia’s lead, enacting recent changes to their voting laws also designed to curb this historic turnout among minority groups.

Due to the pandemic, state legislators—particularly in Pennsylvania which, like Georgia, was a tipping point state in the 2020 presidential election—have shown an interest in restricting absentee voting, seeking to make voting through this method more burdensome to limit its use by voters. Among these proposed restrictions include imposing witness signature requirements; limiting absentee ballot return options; and reducing access to drop boxes.⁷ While the pandemic has led to increased attention to voting by mail, state legislatures are also seeking to restrict voting in the ways in which we have become very familiar: through strict voter identification and proof of citizenship requirements and by purging the voting rolls.

Numerous states have introduced bills that either strengthen or impose new voter identification requirements, and others have introduced measures to expand their voter purge practices.⁸ These measures have been a foil, ostensibly enacted under the auspices of addressing voter fraud, but for all practical purposes, burdening the rights of minority voters. Similarly, a number of bills have been proposed across multiple states that would require documentary proof of citizenship to register to vote, a requirement that has been litigated for over a decade and that is potentially a violation of federal law.⁹ In all, over 400 bills with restrictive voting provisions have been introduced in 49

³ Elizabeth Crisp, *Louisiana voters have fewer polling places after dozens shuttered in recent years*, THE ADVOCATE, Sept. 10, 2019, available at https://www.theadvocate.com/baton_rouge/news/politics/article_fd89ca52-d374-11e9-aaa2-c3e60a57db25.html.

⁴ Anna Wolfe and Alex Rozier, *Free from federal oversight, 5 percent of Mississippi polling locations have closed since 2013*, MISSISSIPPI TODAY, Oct. 24, 2018, available at <https://mississippitoday.org/2018/10/24/free-from-federal-oversight-5-percent-of-mississippi-polling-locations-have-closed-since-2013/>.

⁵ NAACP LDF, *Democracy Diminished: State and Local Threats to Voting Post Shelby County v. Holder*, June 22, 2021, available at https://www.naacpldf.org/wp-content/uploads/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf.

⁶ Nick Corasaniti and Reid J. Epstein, *What Georgia’s Voting Law Really Does*, N.Y. TIMES, April 2, 2021, available at <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html>.

⁷ Alison Durkee, *Pennsylvania Governor Vetoes Voting Restrictions – But GOP Could Still Pass Voter ID Rule Anyway*, FORBES, June 30, 2021, available at <https://www.forbes.com/sites/alisondurkee/2021/06/30/pennsylvania-governor-vetoes-voting-restrictions—but-gop-could-still-pass-voter-id-rule-anyway/?sh=63854b4b216b>.

⁸ Brennan Center for Justice, *Voting Laws Roundup: July 2021*, available at <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>.

⁹ *Id.* See also *Arizona v. Inter Tribal Council of Ariz., Inc.* (“*Arizona Inter Tribal*”), 570 U.S. 1 (2013) (finding that Arizona’s documentary proof of citizenship requirement was preempted by the National Voter Registration Act).

states.¹⁰ Effectively, this means that there is only one state in which legislators have not introduced restrictive voting measures, highlighting the need for federal intervention on this front.¹¹

The absence of a VRA coverage formula, particularly in light of the spate of newly proposed and enacted voting restrictions, will only exacerbate the discrimination that minorities traditionally face when trying to vote. And the Supreme Court has signaled that it likely will not intervene. In the recent case of *Brnovich v. DNC*, the Court held that two Arizona voting laws—one that prohibits ballot collection by anyone other than election officials and close family members, and another that requires ballots cast anywhere other than an assigned precinct be discarded—do not violate Section 2 of the Voting Rights Act.¹² The Court made this determination despite conclusive evidence that both restrictions disproportionately disenfranchised voters of color relative to whites, contrary to Section 2's mandate that minority voters have equal opportunity to participate in the political process.¹³ *Brnovich's* interpretation of Section 2, unsanctioned by the text and history of the statute, privileges a status quo that is less inclusive and more restrictive than what Congress envisioned in amending Section 2 almost forty years ago.¹⁴

This rollback in voting protections is occurring at a time in which states are posed to redraw their state legislative and congressional seats following the 2020 census. Communities of color will be particularly vulnerable during the upcoming round of redistricting given the invalidation of Section 4(b) of the Voting Rights Act and the Court's narrow reading of Section 2 of the Act in the *Brnovich* decision. Even when there was a coverage formula and a more robust version of Section 2 in place, legislators in a number of states sought to undermine the political power of these groups in defending their 2010 redistricting plans. Their justifications for doing so ranged from arguing that the Voting Rights Act *required* packing minority groups into fewer districts,¹⁵ to hiding behind partisan justifications to excuse racial gerrymandering,¹⁶ and to engaging in outright intentional racial discrimination in voting.¹⁷

As this discussion illustrates, the right to vote is increasingly under threat, but these threats are not unprecedented. For its part, the *Shelby County* decision tried to paint pervasive voter discrimination as a relic of a time long past, ignoring that legislators often fall back on certain reliable practices to

¹⁰ *Voting Laws Roundup*, *supra* note 8.

¹¹ Vermont is the exception. See Maria Cramer, Vermont's Governor Expands Voting Rights, Bucking Republican Push, N.Y. TIMES, June 7, 2021, available at <https://www.nytimes.com/2021/06/07/us/vermont-voting-rights.html>.

¹² *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

¹³ Among the considerations, according to the Court, that support its finding that there is no Section 2 liability is that the Arizona restrictions do not impose inconveniences that are inconsistent with the "usual burdens" of voting; the voting rules do not depart from what was standard practice in 1982; and states can legislate to prevent fraud, even if the fraud occurs in another state. *Id.*

¹⁴ See, e.g., *id.* (Kagan, J., dissenting). As Justice Kagan notes:

The majority...finds its decision on a list of mostly made-up factors, at odds with Section 2 itself. To excuse this unusual free-form exercise, the majority notes that Section 2 authorizes courts to conduct a "totality of circumstances" analysis. ... That inquiry hardly gives a court the license to devise whatever limitations on Section 2's reach it would have liked Congress to enact. But that is the license the majority takes. The "important circumstances" it invents all cut in one direction—toward limiting liability for race-based voting inequalities. ...

Id.

¹⁵ *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015).

¹⁶ *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

¹⁷ *Abbott v. Perez*, 138 S. Ct. 1 (2018).

diminish the political power of minority communities. Part of the reason that the Court's view of voting discrimination is so narrow is because that body focuses on actions that affirmatively keep someone from casting a ballot or, alternatively, looks for explicit statements of discriminatory intent.¹⁸ The Court ignores that state legislators use a mix of old and new tactics in their voter suppression efforts, seeking to achieve the same ends without articulating their discriminatory motives for doing so.

H.R. 4 accepts the invitation extended by *Shelby County v. Holder* to provide a new coverage formula that is better tailored to remedy potential constitutional violations. The prior coverage formula violated the equal sovereignty principle, according to the Court, because it applied to mostly southern jurisdictions, but not equally guilty northern states.¹⁹ Even more perniciously, in the Court's view, coverage was determined based on whether states used devices such as poll taxes and literacy tests, which have been illegal for at least four decades.²⁰ By singling out certain electoral schemes that disenfranchise and/or minimize the voting power of communities of color, H.R. 4's practice-based preclearance updates the provisions that would trigger federal oversight of state electoral systems – from the long eradicated practices heavily criticized by the *Shelby County* Court to techniques that have been consistently used and, importantly, are still being used by states to disenfranchise minority voters. Its structure also complements H.R. 4's geographic coverage formula, which triggers preclearance if jurisdictions have committed a certain number of voting rights violations under federal law. Historically, many of these violations have involved practices that would be subject to practice-based preclearance under the current bill, making this provision a vital pre-enforcement mechanism to screen these laws before they can do damage.²¹

This written testimony focuses on Congress' broad authority to enact the practice-based preclearance provision of H.R. 4. To explain the scope of this authority, the remainder of this testimony is organized as follows. Part I clarifies the scope of congressional power under the Fourteenth and Fifteenth Amendments and the Elections Clause of Article I, Section 4,²² illustrating that these provisions provide sufficient constitutional authorization for practice-based preclearance under existing judicial precedents. Part II briefly canvasses some of the practices that would be subject to coverage under H.R. 4 to show that states have long used these practices as vehicles for discrimination, illustrating the need for federal intervention. Because Congress is relying on multiple sources of constitutional authority as justification for practice-based preclearance and there is ample evidence that the targeted practices have been used to abridge or deny the right to vote, this testimony concludes that this provision is a constitutional use of congressional power.

¹⁸ *Abbott v. Perez*, 138 S. Ct. 1 (2018); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

¹⁹ *Shelby County v. Holder*, 570 U.S. 529, 544-45 (2013) (noting that “despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.”).

²⁰ The Twenty-Fourth amendment to the constitution outlawed poll taxes for federal elections in 1964, and the Supreme Court declared poll taxes in state elections unconstitutional in 1966. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

²¹ *See* Part II, *infra*.

²² The Elections Clause, in its entirety, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. CONST. art. I, § 4, cl. 1.

I. The Constitutional Framework

In assessing the legislative record underlying the Voting Rights Act, the *Shelby County* majority heavily criticized Congress' failure to show "anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."²³ By requiring a record of intentional discrimination, in 2013, similar to the extensive record of discrimination in voting that Congress established in 1965, the Court placed a substantial hurdle before Congress should it seek to authorize a new coverage formula relying on the Fourteenth and Fifteenth Amendments alone.

Indeed, one of the biggest landmines facing the Voting Rights Act in the years prior to *Shelby County* was that it had basically functioned since 1982 as an effects-based regime. States can violate Section 2 of the Voting Rights Act if they adopt a law, practice or procedure that has the effect of discriminating on the basis of race. Similarly, Section 5 preclearance is premised on a showing of nonretrogression, which asks whether the proposed change has the purpose or effect of making minorities worse off than under the prior law. Neither provision requires that the state act with discriminatory purpose to face liability, but Section 2 violations as well as Section 5 preclearance denials were a substantial portion of the record that Congress compiled in 2006. Despite the Court's incessant focus on discriminatory intent and its efforts to hamstring federal voting rights legislation, however, Congress is not helpless in the face of the current challenges to the right to vote and minority political representation. *Shelby County* notwithstanding, Congress retains substantial authority under the Fourteenth and Fifteenth Amendments as well as the Elections Clause to pass the practice-based preclearance provision of H.R. 4.

1) The Fourteenth and Fifteenth Amendments

The Fourteenth and Fifteenth Amendments protect a fundamental right to vote and prohibit racial discrimination in voting, respectively. While the Fifteenth Amendment empowers Congress to address racially discriminatory action by the states, the Fourteenth Amendment separately authorizes Congress to target practices, either discriminatory or nondiscriminatory, that undermine the fundamental right to vote in local, state or federal elections. However, the *Shelby County* Court read both Amendments to require Congress to amass evidence of a pattern of discriminatory intent on the part of the states as a prerequisite for reauthorizing the original coverage formula of Section 4(b).

This view misrepresents prior caselaw. Initially, the Supreme Court broadly interpreted Congress' power to enforce the Fourteenth and Fifteenth Amendments. In *City of Rome v. United States*, for example, the Court rejected the argument that Congress' enforcement power under the Fifteenth Amendment was limited to remedying only intentional racial discrimination, noting that "even if [Section] 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to [Section] 2, outlaw voting practices that are discriminatory in effect."²⁴ The Court further observed that Congress may pass legislation under Section 2 of the Fifteenth Amendment to prohibit acts that do

²³ *Shelby County*, 570 U.S. at 554.

²⁴ 446 U.S. 156, 173 (1980).

not violate Section 1 of the Act, “so long as the prohibitions attacking racial discrimination in voting are ‘appropriate,’ as that term is defined in *McCulloch v. Maryland*.”²⁵

Congress is also constitutionally empowered to identify and target the practices that state legislatures use to abridge or deny the right to vote in violation of the Fourteenth Amendment.²⁶ In *Harper v. Virginia State Board of Elections*, the Court held that the Equal Protection Clause of the Fourteenth Amendment protects a fundamental right to vote. Importantly, the *Harper* decision established that voting is a fundamental right under the Fourteenth Amendment that is distinct from the Fifteenth Amendment’s prohibition on racial discrimination in voting. Consequently, Congress is empowered to protect this right through “appropriate legislation” under Section 5 of the Fourteenth Amendment in the absence of a pattern of racially discriminatory intent on the part of the states.

Similar to the Fifteenth Amendment, the Court had described Congress’ power to enforce the Fourteenth Amendment as broader than the judicial power to define the substantive reach of its provisions.²⁷ In *Katzenbach v. Morgan*, for example, the Court held that legislation enacted pursuant to Section 5 of the Amendment would be upheld

so long as the Court could find that the enactment ‘is plainly adapted to [the] end’ of enforcing the Equal Protection Clause and ‘is not prohibited by but is consistent with ‘the letter and spirit of the constitution’ regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.”²⁸

In effect, the Court interpreted Congress’ enforcement powers as “no less broad than its authority under the Necessary and Proper Clause,” capable of addressing state action that has a discriminatory purpose, that has a discriminatory effect, or that might not even violate the substantive provisions of the Amendments.²⁹ And given the reach of the Necessary and Proper Clause,³⁰ Congress’ power to renew the Voting Rights Act had been beyond question until the Court’s decision in *City of Boerne v. Flores*.

In *City of Boerne*, the Court substantially narrowed Congress’ enforcement power under the Fourteenth Amendment. At issue was the refusal of city authorities to grant a building permit to the regional Catholic archbishop to enlarge a church building that had been designated a historic landmark.³¹ The archbishop claimed that this refusal violated the Religious Freedom Restoration Act of 1993 (“RFRA”), the relevant provision of which prohibited state governments from “‘substantially burdening’ a person’s exercise of religion even if the burden results from a rule of general applicability.”³² In passing RFRA, Congress relied on its enforcement power based on the rationale that it was protecting one of the First Amendment freedoms from state infringement under the Fourteenth Amendment.³³

²⁵ 17 U.S. 316 (1819).

²⁶ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

²⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (recognizing Congress’ power under the Fifteenth Amendment to pass the VRA but seeing no need to overrule its own contrary precedents).

²⁸ *City of Rome*, 446 U.S. 156, 176 (1980) (citing *Katzenbach v. Morgan*, 384 U.S. at 641 (1966)).

²⁹ *Id.* at 175.

³⁰ See generally *United States v. Comstock*, 130 S. Ct. 1949 (2010) (discussing the extraordinary breadth of the Necessary and Proper Clause).

³¹ *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (evaluating a city ordinance that required preapproval for all construction affecting historic landmarks and buildings).

³² *Id.* at 515–16.

³³ *Id.* at 519–20.

Congress passed RFRA in response to a Supreme Court decision, *Employment Division v. Smith*, which held that rational basis review applied to laws of general applicability that infringe on a person's exercise of religion.³⁴ Contrary to this caselaw, RFRA subjected these laws to strict scrutiny. The fact that RFRA increased the level of scrutiny for laws of general applicability beyond that required by *Smith* led the Court to conclude that RFRA was not a proper exercise of Congress' enforcement powers because the statute did not deter or remedy a constitutional violation.³⁵ Instead, Congress made it more difficult for states to defend laws that would be constitutional under the Court's jurisprudence.

According to the Court, Congress could not use its Section 5 power to "decree the substance of the Fourteenth Amendment's restrictions on the states" because "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."³⁶ In other words, Congress' enforcement powers are limited to remedial fixes and do not include the ability to make substantive changes to the scope of the Fourteenth Amendment.³⁷ In order to distinguish Congress' remedial power from acts that make a substantive change in the governing law, *Boerne* established that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁸

There are two important takeaways from the *City of Boerne* decision as it pertains to Congress' authority to protect the right to vote. First, *Shelby County* never determined whether *City of Boerne*'s "congruence and proportionality" standard also applies to the Fifteenth Amendment, leaving the standard by which the Court reviews congressional authority in flux.³⁹ The Court contended that the coverage formula of Section 4(b) failed rational basis review⁴⁰ and the standard derived from *Northwest Austin Municipal Utility District Number One v. Holder*,⁴¹ which, according to the Court, "guides [its] review under both [the Fourteenth and Fifteenth] Amendments."⁴² However, the *Northwest Austin* case did not articulate a standard of review under these provisions.⁴³

³⁴ *Id.* at 512–16.

³⁵ *Id.* at 519.

³⁶ *Id.* (arguing that Congress "does not enforce a constitutional right by changing what the right is").

³⁷ *Id.* at 520.

³⁸ *Id.* at 519–20. The Court later expounded on the congruence and proportionality test. *See* *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (Congress could not subject states to suits under Title I of the American with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (Congress could not subject states to suits under the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Congress could not subject states to suits for patent infringement). *But see* *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Pitts*, *supra* note 30, at 247 (arguing that "the most important contribution *Hibbs* made to the congruence and proportionality body of jurisprudence is that the [Supreme] Court somewhat lessened Congress's burden to prove a widespread pattern of recent constitutional violations to justify a prophylactic remedy").

³⁹ In its grant of certiorari, the Court acknowledged that the preclearance regime is based on dual sources of constitutional authority, but otherwise ignored the implications of this fact in assessing the regime's constitutionality. *See* *Shelby Cty. v. Holder* (2013) (discussing only Fifteenth Amendment), *cert. granted*, 568 U.S. 1006 (2012) (acknowledging Fourteenth and Fifteenth Amendments in grant of certiorari).

⁴⁰ *Shelby County v. Holder*, 570 U.S. 529 (2013) (explaining that Section 4(b) was rational "in both practice and theory" when adopted but is now irrational).

⁴¹ 557 U.S. 193 (2009).

⁴² *Shelby Cty.*, 570 U.S. 529 n.1.

⁴³ *See* *Northwest Austin Municipal District Number One v. Holder*, 557 U.S. 193, 2004 (2009) ("The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements. . . . That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test [congruent and proportional or rational basis]." (citations omitted)).

In reality, Congress' power under Section 2 of the Fifteenth Amendment remains significantly broad and ostensibly undisturbed by the Court's opinion in either *City of Boerne* or *Shelby County*.⁴⁴ The appropriate standard for Fifteenth Amendment legislation remains the standard articulated by the Court in *South Carolina v. Katzenbach*.⁴⁵ In *Katzenbach*, the Court held that the preclearance provisions of the VRA were constitutional under the Fifteenth Amendment, citing the famous language from *McCulloch v. Maryland* regarding the scope of federal power:

Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁴⁶

By its terms, this language gives Congress significantly more leeway regarding the scope of federal legislation than *City of Boerne*'s congruence and proportionality test.

Second, while the Court's decision in *City of Boerne* sharply circumscribed Congress' ability to enforce the Fourteenth Amendment, it remains true, after the decision, that intentional discrimination is not a necessary prerequisite for a Fourteenth Amendment violation. That decision specifically pertained to the scope of congressional power, not the contours of what the Court has determined to be a substantive violation of the Fourteenth Amendment. As the Court held in *Harper* and has consistently reaffirmed for decades, the Fourteenth Amendment can be violated by practices that abridge or deny the right to vote in the absence of racially discriminatory intent.⁴⁷ Congress has the authority, under Section 5, to address these violations and *City of Boerne* does not prohibit Congress from doing so.

2) The Elections Clause

The *Shelby County* Court expressed reservations about Section 4(b) of the VRA because of the federalism costs that the formula imposed on covered jurisdictions, but the federalism issue is significantly more complicated than the Court appreciated. Notably, the Elections Clause empowers states to choose the "Times, Places, and Manner" of federal elections but, importantly, reserves to Congress the power to make or alter state electoral schemes. In essence, Congress has a veto power over certain state electoral practices, a veto that was present in the VRA's suspension of regulations that govern federal elections in targeted states.⁴⁸ Yet the Court, in assessing the constitutionality of the coverage formula of Section 4(b), ignored how the Elections Clause, as a potential source of congressional authority for the VRA, affected the federalism issues present in the case.

⁴⁴ *Shelby County v. Holder*, 570 U.S. 529, 555 (2013) (declining to resolve whether the congruence and proportionality standard applied to the Fifteenth Amendment and noting that Section 4(b) is not "consistent with the letter and spirit of the constitution" as required by the *McCulloch* standard); *Id.* at 569 (Ginsburg, J., dissenting) ("Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed 'rational means.'").

⁴⁵ 383 U.S. 301 (1966).

⁴⁶ *Id.* at 308.

⁴⁷ *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (noting that "[e]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications and that courts must balance the benefits of the law against its burdens in assessing constitutionality").

⁴⁸ *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

Because of its structure, the Elections Clause has less to do with federalism, as that term is typically understood,⁴⁹ and more to do with providing an organizational structure that gives the states broad power to construct their electoral systems while retaining final policymaking authority for Congress. According to the Court, Congress' authority under the Elections Clause "is paramount,"⁵⁰ and that body has, on occasion, imposed substantive requirements that states must follow in structuring federal elections.⁵¹ The Clause's overarching purpose is to ensure the continued existence and legitimacy of federal elections,⁵² the health of which have been continually challenged by many of the practices that would be subject to practice-based preclearance.

The Supreme Court has ignored how congressional power under the Elections Clause challenges the narrative of state sovereignty that dominates this area and, ultimately, led to the invalidation of Section 4(b) of the Voting Rights Act. The Court, at least initially, believed that Congress had the authority to circumscribe the states' authority over elections, but not because of broad federal power under the Elections Clause. Instead, the Court assumed that the extraordinary circumstances of extensive discrimination in the south warranted federal intervention in matters traditionally regulated by the states. In *South Carolina v. Katzenbach*, for example, the Court rejected the argument that the VRA distorted our constitutional structure of government and offended our system of federalism.⁵³ The *Katzenbach* Court noted that although the states "have broad powers to determine the conditions under which the right of suffrage may be exercised," the Fifteenth Amendment supersedes contrary exertions of state power.⁵⁴ The idea that Congress can intervene in elections only when states are behaving badly has persisted in the case law, but this view ignores other constitutional provisions, like the Elections Clause, that do not require a finding of official wrongdoing.

Instead, the Elections Clause embodies principles that ensure the legitimacy of federal elections, contrary to the state centered values that are the focus of the Court's federalism jurisprudence. As the Court has recognized, the Elections Clause prioritizes federal law, despite the substantial authority that states exercise over federal elections, because "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules" to "insur[e] against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."⁵⁵ Moreover, the Clause "act[s] as a safeguard against

⁴⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991) (reviewing the "system of dual sovereignty between the States and the Federal Government").

⁵⁰ *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

⁵¹ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004) (plurality opinion) (describing the Apportionment Acts of 1842, 1862, and 1901, which required, at various points, that members of the House be elected from single member districts that are compact, contiguous, or have equal populations).

⁵² See Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018).

⁵³ *South Carolina v. Katzenbach*, 383 U.S. 301, 313-14 (1966) ("Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders."); see also *City of Rome v. United States*, 446 U.S. 156, 176 (1980) ("[L]egislation enacted under authority of § 5 of the Fourteenth Amendment would be upheld so long as the Court could find that the enactment 'is plainly adapted to [the] end' of enforcing the Equal Protection Clause and 'is not prohibited by but is consistent with the letter and spirit of the constitution,' regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause.").

⁵⁴ *Katzenbach*, 383 U.S. at 324.

⁵⁵ *Arizona State Legis. v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate.”⁵⁶

The Court must interpret the allocation of power between the two levels of government in a manner that best promotes these goals by recognizing that Congress has wide ranging authority to achieve these ends. Under the Clause, Congress has authority to “alter” state law where appropriate, “make” law completely independent of the state’s legal regime, and “commandeer” state officials to implement federal law. This structure permits Congress to enact a complete code for federal elections, which is an invaluable source of authority, particularly if states have jeopardized the health and vitality of federal elections in some way. These values, as well as the text and structure of the Clause itself, empower Congress to pass broad federal voting rights legislation.

First, as sovereign, Congress’ power over the times, places, and manner of federal elections is broader than the power retained by the states.⁵⁷ For example, in *Foster v. Love*, the Court held that 2 U.S.C. § 7, which sets the November date for the biennial election for federal offices, preempted a Louisiana law allowing candidates for federal office to be “elected” on primary day in October if they obtained a majority of the votes.⁵⁸ Notably, the Court did not hold that the states must have the opportunity to set the date for federal elections *first* before Congress could act, which would indicate that federal action is limited to displacing state authority rather than setting its own rule. Congressional power under the Clause not only allows Congress to set a date even if Louisiana had failed to do so for its general election, but Congress could arguably set voter qualifications if there was also a gap in that area, indicating that federal power under the Clause is different in kind and scope than state authority.⁵⁹ The Court has recognized that the Elections Clause “gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.’”⁶⁰

Second, the text of the Clause, which gives Congress a general supervisory power, allows Congress to commandeer state offices, state law, and state officials to execute federal law—authority that stands in stark contrast to traditional views about the nature of sovereignty under federalism

⁵⁶ *Id.*

⁵⁷ The Court has rejected a construction of congressional power in other contexts in which the scope of Congress’ authority would be unduly tied to the actions of the states or the courts. *See Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966) (rejecting New York’s challenge to the literacy test provisions of the VRA because Congress does not need a judicial determination that state literacy requirements actually violate the Constitution before Congress can act).

⁵⁸ *See* 522 U.S. 67, 68-69 (1997); *see also* *Millsaps v. Thompson*, 259 F.3d 535, 547, 549 (6th Cir. 2001) (upholding the Tennessee early voting statute because the law was not “intended to make a final selection of a federal officeholder” on the day before Election Day).

⁵⁹ *See* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B. U. LAW REV. 317 (2019). *See also* Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. §§ 20301-20311 (2018). UOCAVA created a uniform federal ballot specifically for use by a category of voters overlooked by state law—military personnel—and incorporated state voter qualification standards to determine which personnel were entitled to vote. The practical effect of UOCAVA, through its incorporation of state voter qualification standards for a category of voters overlooked or insufficiently protected by state law, was to create a new category of voters for purposes of federal elections even though UOCAVA was enacted pursuant to Congress’ authority under the Elections Clause.

⁶⁰ *Foster v. Love*, 522 U.S. 67, 71 n.2 (1997) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see also id.* (stating that this authority encompasses both congressional elections and “any” primary election which involves a necessary step in the choice of candidates for election as representatives in Congress” (quoting *United States v. Classic*, 313 U.S. 299, 320 (1941)).

doctrine.⁶¹ The Clause's text, providing that "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed* in each State by the Legislature thereof" is very different from Congress' authority, in which Congress "*may at any time* by Law make or alter such Regulations."⁶² The use of the mandatory language "shall be prescribed" to describe state authority and "may ... make or alter" to describe congressional authority illustrates that Congress can act if it chooses, but states must act, even if at the behest of Congress.

Thus, to the extent that federalism traditionally is, and has been, about granting a subunit of government final policymaking authority in an area of governance, the Elections Clause denies states the true hallmark of sovereignty by giving Congress veto authority over state regulations governing the times, places, and manner of federal elections. The failure to recognize congressional sovereignty in this context has led the Supreme Court to either interpret Congress' power under the Elections Clause more narrowly than is appropriate to avoid intruding on the states' authority over elections or, as in the case of *Shelby County*, ignore the Clause altogether. But its presence as a source of federal power, when combined with congressional enforcement authority under the Fourteenth and Fifteenth Amendments, affects judicial review of the legislative record in important ways.

3) Judicial Assessment of the Legislative Record

Congress has power pursuant to multiple sources of constitutional authority to enact practice-based preclearance, which implicates the Fifteenth Amendment's prohibition against racial discrimination in voting; the Fourteenth Amendment's protections for the fundamental right to vote; and congressional power over the times, places and manner of federal elections under the Elections Clause. The fact that multiple constitutional provisions are at play—which, in the aggregate, allows Congress to reach practices that govern local, state, and federal elections—necessitates more deference to the legislative record than if Congress were acting pursuant to one or two provisions that serve as a more narrow grant of authority than these three sources of authority, collectively. The Supreme Court's caselaw has suggested that the scope of congressional authority to enforce and protect constitutional rights is broader—or alternatively, increased deference to the legislative record is warranted—when Congress enacts legislation pursuant to multiple sources of constitutional authority.⁶³ Authorization based on multiple constitutional provisions has, in some cases, proven to

⁶¹ Cf. *New York v. United States*, 505 U.S. 144, 151-54 (1992) (holding that Congress could not commandeer states into enacting a federal regulatory program by forcing them to take title to their waste). See also *Shelby County v. Holder*, 570 U.S. 529 (2013) (criticizing the preclearance regime for "requir[ing] States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."). But see Tolson, *Election Law Federalism*, *supra* note 52 (arguing that the Elections Clause permits Congress to impose the requirements of the preclearance regime on the states). Other scholars have also argued that Congress can commandeer state officials when acting pursuant to the Elections Clause. See, e.g., Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237-38 (1997). See also Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 109 (2013):

[Congress'] power to enforce its "general supervisory power[]" ... has remained intact [under the Elections Clause], even with the Court's developing Eleventh Amendment jurisprudence, which carves out a protected zone for core state functions.... Similarly, direct federal regulation [of elections] is unaffected by the concern for impermissible federal commandeering of state functions presented by congressional attempts to compel state undertakings for federal programs directly.

⁶² U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

⁶³ See Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067, 1086-88 (2016) (discussing *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *The Legal Tender Cases*, 79 U.S. 457 (1870), as decisions that rest "on the combined effect of multiple enumerated powers" but noting that "[n]ot much has happened since then in the world of

be the difference between invalidation and constitutionality for some federal statutes.⁶⁴ The paradigmatic example is the Affordable Care Act, which survived a constitutional challenge in 2012 because the Court found that the Act, though an unlawful exercise of the commerce power, was a valid use of the taxing power.⁶⁵

The Court also has not been shy about sustaining legislation where Congress has failed to specify the source of authority pursuant to which it is acting. In *Fullilove v. Klutznick*,⁶⁶ for example, the Court upheld an affirmative action program requiring that ten percent of federal funds granted for local public works be allocated to minority owned firms.⁶⁷ The Court found that the program was a constitutional exercise of federal power under the Spending Clause and the Commerce Clause, even though Congress did not rely on either provision in enacting the law.⁶⁸ Similarly, in *Woods v. Lloyd W. Miller Co.*,⁶⁹ the Court upheld the Housing and Rent Act as a lawful exercise of the war power, inferring from “the legislative history that Congress was invoking its war power to cope with a current condition of which the war was a direct and immediate cause.”⁷⁰ Even though hostilities had ceased, the Court observed that, “[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”⁷¹

Uncertainty about the actual source of federal authority was on full display in *Jones v. Alfred H. Mayer*,⁷² where the Court upheld 42 U.S.C. § 1982, which guaranteed to all citizens the right to convey real and personal property, as a valid exercise of the Thirteenth Amendment.⁷³ Section 1982 was originally part of Section 1 of the Civil Rights Act of 1866, and many then in Congress believed that the Act exceeded the scope of congressional authority under the Thirteenth Amendment.⁷⁴ While the Act was reauthorized after the passage of the Fourteenth Amendment, which provided sufficient justification for its provisions, there has never been any suggestion that *Jones* was wrongly decided because the Court focused on the Thirteenth Amendment instead of the Fourteenth.

Jones and the unusual historical circumstances surrounding § 1982 might also suggest that far-reaching and potentially controversial legislation can gain substantial legitimacy from the fact that Congress can draw on multiple sources of power. A prominent example of this is Section 4(e) of the VRA, which prohibits literacy tests as a precondition for voting as applied to individuals from

power/power combination analysis” because most decisions focus on one source of authority “as independently sufficient to sustain the federal enactment under review”).

⁶⁴ For example, Congress enacted Title VII of the Civil Rights Act of 1964 pursuant to its authority under the Commerce Clause, but in 1972, extended the reach of the statute to authorize money damages against state governments under the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976) (explaining that Congress relied on Fourteenth Amendment to amend Title VII of Civil Rights Act of 1964). After the Court’s decision in *Seminole Tribe*, if Congress had relied on the Commerce Clause alone, the 1972 amendments would have been invalidated. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (holding that Congress cannot abrogate state sovereign immunity under Commerce Clause).

⁶⁵ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563-66 (2012).

⁶⁶ 448 U.S. 448 (1980).

⁶⁷ *Id.* at 490.

⁶⁸ See *id.* at 473-76.

⁶⁹ 333 U.S. 138 (1948).

⁷⁰ *Id.* at 144.

⁷¹ *Id.*; see also *Wilson-Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir. 1996) (“A source of power has been held to justify an act of Congress even if Congress did not state that it rested the act on the particular source of power.”).

⁷² 392 U.S. 409 (1968).

⁷³ *Id.* at 413.

⁷⁴ *Id.* at 455 (Harlan, J., dissenting) (presenting a comprehensive review of the legislative history suggesting that many in the Thirty-Ninth Congress believed that 1866 Civil Rights Act was unconstitutional).

Puerto Rico who have completed at least the sixth grade. In *Katzenbach v. Morgan*,⁷⁵ the Court upheld Section 4(e) as an appropriate exercise of Congress' authority to enforce the Fourteenth Amendment.⁷⁶ The Court sustained Congress' ban on literacy tests, even though Congress made no evidentiary findings that literacy tests were being used in a racially discriminatory manner and an earlier court decision found these tests to be constitutional as a general matter.⁷⁷ As a practical matter, the Court might have been willing to defer to Congress because of the myriad provisions that the Court identified as potential sources of authority for Section 4(e)—ranging from the treaty power to the Territorial Clause of Article III—even though Congress did not explicitly rely on any of these provisions in enacting the legislation.⁷⁸ At the very least, *Morgan* illustrates that the presence of multiple sources of constitutional support has some relevance to the inquiry into the scope of congressional power,⁷⁹ a position that received the Court's full-throated endorsement in the *Legal Tender Cases*⁸⁰ and *McCulloch v. Maryland*.⁸¹

As this caselaw illustrates, the Court's review of the legislative record of H.R. 4 must account for the unique circumstances of each provision upon which Congress has relied to justify its legislation which, in the case of practice-based preclearance, warrants greater judicial deference to the underlying legislative record than if Congress is proceeding based on the Fourteenth or Fifteenth Amendments alone.⁸²

II. Practice-based Preclearance as a Constitutional Use of Federal Power

Practice-based preclearance directly addresses the Supreme Court's concerns, in *Shelby County v. Holder*, about having a trigger that 1) singles out specific jurisdictions 2) based on an inadequate record of intentional racial discrimination in voting. Instead of relying on outdated practices to determine coverage, Congress has instead relied on over six decades of experience to isolate the election changes that have historically and are currently being used to minimize the political power of minority groups. A quick canvas of some of the changes that would be subject to preclearance under H.R. 4 illustrates why the abuse of these particular practices raise unique concerns pursuant to the Fourteenth and Fifteenth Amendments and the Elections Clause.

⁷⁵ 384 U.S. 641 (1966).

⁷⁶ *Id.* at 655-58 (concluding that New York's english literacy requirement for voters could discriminate against New York's large Puerto Rican community, but not requiring congressional findings that prove this proposition).

⁷⁷ *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-54 (1959) (holding that literacy tests are constitutional absent discriminatory intent).

⁷⁸ *Katzenbach v. Morgan*, 384 U.S. 641, 646 n.5 (1966) (stating that Court need not consider whether Section 4(e) could be sustained under Territorial Clause).

⁷⁹ Even Justice Scalia, an enduring critic of expansive federal authority, suggested that federal power is broader when Congress can point to an additional source of authority to support its legislation. *See Gonzales v. Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) (“[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.”). At the very least, the presence of an additional source of power arguably expands the universe of means that Congress can employ in furthering the ends of the statute. *Cf. Gonzales*, 545 U.S. at 38 (Scalia, J., concurring) (“As the Court said in the *Shreveport Rate Cases*, the Necessary and Proper Clause does not give ‘Congress . . . the authority to regulate the internal commerce of a State, as such,’ but it does allow Congress ‘to take all measures necessary or appropriate to’ the effective regulation of the interstate market, ‘although intrastate transactions . . . may thereby be controlled.’” (citations omitted)).

⁸⁰ 79 U.S. 457, 534 (1870) (holding it is “allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred”).

⁸¹ 17 U.S. 316, 407-12 (1819) (finding that Congress' power to charter a bank stems from its “great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies” as supplemented by the Necessary and Proper Clause).

⁸² Tolson, *The Spectrum of Congressional Power*, *supra* note 59.

1) Changes in Method of Election/Redistricting

Many of the Court's early cases in this area recognized the risk that certain election changes can pose to minority voting power. In 1965, for example, the Court declined to find that multimember districts were per se unconstitutional, but acknowledged that, "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."⁸³ In enacting the Voting Rights Act to enforce the mandates of the Fifteenth Amendment, Congress likewise recognized these potential dangers such that it suspended *all* changes to a covered jurisdiction's election laws so that the Department of Justice can assess whether the scheme in fact "operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population."

The Court has, on a number of occasions, validated Congress' position that both minor and major changes can undermine the right to vote, necessitating a preclearance regime of sufficient breadth to prevent states from circumventing the Act's protections. In *Allen v. State Board of Elections*, the Court held that Section 5 of the Voting Rights Act required Mississippi to preclear a number of changes to their election laws including a shift from district elections to at-large elections for county supervisors and changing the office of county superintendent of education from an elective office to an appointive one.⁸⁴ Preclearance was required, according to the Court, because of the recognition that the change from a district to an at-large or multimember election scheme was the "type of change [that] could therefore nullify [the] ability [of minority groups] to elect the candidate of their choice just as would prohibiting some of them from voting."⁸⁵ And even the shift from an appointive office to an elective one is a change that should be subject to preclearance because "[t]he power of a citizen's vote is affected by this [change]."⁸⁶

While there are currently no jurisdictions subject to the preclearance requirement because of Section 4(b)'s invalidation in *Shelby County v. Holder*, the holding in *Allen* that both major and minor changes are subject to preclearance for covered jurisdictions remains good law post-*Shelby County*. Moreover, jurisdictions have continued to adopt changes that could potentially subject them to being bailed into the preclearance regime under the remaining provisions of the Voting Rights Act. For example, in the recent case of *Patino v. City of Pasadena*, a federal district court invalidated a 2014 city council plan that changed the city of Pasadena, Texas from eight single member districts to six single member districts and two at-large districts. Notably, the court held that the City acted with discriminatory intent towards Latinos in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Because of these findings, the court concluded that the City should again be subject to the preclearance requirement and have to submit any future changes to its redistricting plan to the Department of Justice for preclearance before those changes can go into effect. In the *Patino* case, the court's decision to place the city back into preclearance was relatively straightforward because of its intentionally discriminatory actions. However, the city's blatantly discriminatory behavior should not obscure that changes to the method of election have

⁸³ *Fortson v. Dorsey*, 379 U.S. 433 (1965). See also Practice-based Preclearance, *supra* note 87, 14 ("At-large and multi-member elections for local offices gained popularity just as the successes of Reconstruction motivated white majorities to seek more creative barriers for voters of color.").

⁸⁴ *Allen v. State Bd. Of Elections*, 393 U.S. 544 (1969).

⁸⁵ *Id.* at 569.

⁸⁶ *Id.*

also abridged or denied the right to vote in violation of the Fourteenth Amendment in the absence of discriminatory intent.⁸⁷

Given that the rules governing how officials are elected can be manipulated to harm minority groups, it is unsurprising that redistricting also has been a point of vulnerability for voters of color. The Supreme Court case of *Gomillion v. Lightfoot* established, over sixty years ago, that the state does not have unrestricted power to organize and reorganize its electoral districts, a principle that has been extended to the context of congressional elections as well. Notably, the Court decided *Gomillion* before *Reynolds v. Sims* and *Wesberry v. Sanders*, which are famous for imposing the one person, one vote rule on states in drawing legislative districts.⁸⁸ In *Gomillion*, the Court held that the twenty-eight sided “uncouth” figure, not unlike many of the districts drawn by states today, violated the Fifteenth Amendment because it fenced out almost all of the African American voters from the City of Tuskegee. Practice based preclearance would prevent states from using deannexations, like the plan at issue in *Gomillion*, from undermining minority voting power. Importantly, *Gomillion* was not a one-off nor is it truly a relic of the past. According to a recent report, “Since 1957, 982 redistricting plans have been either withdrawn, or alternatively, challenged or invalidated by a court or the DOJ.”⁸⁹ Many of these challenges have come in recent decades.

In *Alabama Legislative Black Caucus v. Alabama*, for example, the Court held that a redistricting plan that packed black voters into majority-minority districts well beyond the numbers required for those voters to elect their candidate of choice violated the Equal Protection Clause of the Fourteenth Amendment. The state argued that the nonretrogression principle of Section 5 of the Voting Rights Act required that majority-minority districts maintain the same percentage of minority voters as they had on the eve of redistricting. Had the state been successful, this would have diminished the political power of minority populations, limiting their ability to influence election outcomes across a greater number of districts. Indeed, the state’s interpretation raised significant constitutional concerns, according to the Court, because “it would be difficult to explain just why a plan that uses racial criteria predominantly to maintain the black population” based on some artificial threshold, without assessing the ability of black voters to elect their preferred candidate, is narrowly tailored to achieve the compelling governmental interest in preventing Section 5 retrogression.⁹⁰

Similarly, the Supreme Court, in *Cooper v. Harris*, found that North Carolina violated the Fourteenth Amendment by raising the percentage of minority voters in two districts that had, prior to the redistricting, been districts in which minorities, who were less than fifty percent of the districts’ populations, could elect their candidate of choice with the help of white crossover voters. Like Alabama, the North Carolina legislature tried to pack minority voters into these districts to diminish their political strength statewide. The Court rejected the argument that the legislature would face liability under Section 2 of the Voting Rights Act for failing to increase the number of voters within one of the districts. The fact that black voters could elect their candidate of choice with sufficient

⁸⁷ See Asian Americans Advancing Justice (AAJ), *Practice Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, Nov. 2019, available at https://www.advancingjustice-aaajc.org/sites/default/files/2019-11/Practice%20Based%20Preclearance%20Report%20Nov%202019%20FINAL%20-%20reduced_0.pdf (“Since 1957, there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.”)

⁸⁸ *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁸⁹ Practice Based Preclearance, *supra* note 87.

⁹⁰ *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 277-78 (2015).

crossover voting from white voters indicated that racial bloc voting—one of the elements of a successful Section 2 claim—was absent.

Just as the Court has read the Fourteenth and Fifteenth Amendments to prevent states from adopting redistricting plans that dilute or otherwise minimize minority political power, Congress also has broad authority to prohibit such actions in enforcing these amendments. Practice based preclearance would complement the enforcement mechanism in Section 2 of the VRA by preempting those redistricting plans that would otherwise violate the statute's terms, saving resources and years of litigation.

Additionally, Congress' power to regulate the "manner" of federal elections under the Elections Clause also applies to congressional redistricting plans, authority that the Supreme Court has read incredibly broadly.⁹¹ The historical record bears out this view of the Clause. In a comprehensive review of founding era sources discussing the "manner" of elections, Professor Robert Natelson observed that "English, Scottish, and Irish sources used the phrase 'manner of election' to encompass the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; strictures against election-day misconduct; and the rules of decision (majority, plurality, or lot)."⁹² Professor Natelson further concluded that "Americans ascribed the same general content to the phrase 'manner of election' as the English, Irish, and Scots did."⁹³ As the next section shows,⁹⁴ the breadth of the term "manner" results in significant overlap between manner regulations and voter qualification standards. But the abuse of these methods by the states, a trend that has become increasingly more common in the wake of the *Shelby County* decision, justifies judicial deference to exercises of congressional power that target these types of hybrid regulations.⁹⁵

2) Restrictive Voter Identification/Proof of Citizenship Requirements/Language Assistance

It has been difficult for courts to police the boundary between voter qualification standards and manner regulations because of the uncertainty surrounding the definition of these terms,⁹⁶ but

⁹¹ 285 U.S. 355, 366 (1932) (resolving a challenge to a congressional redistricting plan and finding that Congress, pursuant to the Elections Clause, can implement "a complete code for congressional elections").

⁹² Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (2010). In his summary of the evidence, Professor Natelson noted that American, English, Irish, and Scottish lawmakers defined "manner of election" in largely the same way, encompassing factors such as elector and candidate qualifications, time of elections, terms of office, place of elections, rules for elections, mechanics of voting, election dispute procedures and regulation of election day misconduct. *Id.* at 17-18.

⁹³ *Id.* at 13-14 (discussing the 1721 South Carolina election code that "described 'the Manner and Form of electing Members' to the lower house of the colonial assembly as including the qualifications of office-holders and the freedom of voters from civil process on election days," and the 1780 Massachusetts Constitution which "described the 'manner' by mandating the time of the election . . . property and age qualifications of electors, a notice of election, and who would serve as election judges"); see also *id.* at 16 ("State election laws adopted after Independence employed 'manner of election' and its variants in the same general way. The 'mode of holding elections' in a 1777 New York statute provided for public notice at least ten days before election in each county for elections for governor, lieutenant-governor, and senate. It specified the places for election, the supervising officers and election judges, times of notice, returns of poll lists, declaration of winner, and some voter qualifications.").

⁹⁴ See *id.* at 20 (explaining that "[t]he constitutional language governing congressional elections differed from usual eighteenth-century 'manner of election' provisions" because the Constitutions lists "qualifications, times, and places separately from 'Manner'" and describes "the residuum as 'the Manner of holding Elections'").

⁹⁵ Cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁹⁶ See *Ariz. Inter Tribal*, 570 U.S. 1 (2013) (noting that a federal statute precluding a state from enacting voting qualifications would be constitutionally questionable). But see *Or. v. Mitchell*, 400 U.S. 112, 122 (1970) (referring to the

Congress is not so constrained. As I have argued in my scholarship,⁹⁷ voter identification laws and proof of citizenship requirements should be considered manner regulations rather than voter qualification standards because requiring that a voter show identification or proof of citizenship to prevent fraud or to ensure the integrity of the electoral process aligns more with regulating the mechanics of the actual election, as opposed to functioning as a voter qualification standard that determines whether a person is qualified to vote (such as an age or residency requirement). As such, Congress can prevent the state from prioritizing its interest in ensuring the integrity of the electoral process where such concerns are not empirically supported and instead are a pretext for disenfranchisement.⁹⁸

Given their somewhat ambiguous nature—touching on both the manner of federal elections and voter qualification standards—these laws illustrate that the Fourteenth and Fifteenth Amendments, coupled with Congress’ power under the Elections Clause, can and should reach stringent voter identification and/or proof-of-citizenship requirements that undermine minority turnout and participation in state and federal elections. These laws condition voting on the ability of one to pay because, in many cases, those lacking the required identification have to purchase underlying documents to get the ID or to show proof of citizenship. Legally, states must provide the ID, but not the underlying documents, free of charge if a person cannot afford it. However, birth certificates can cost between \$10 and \$25, and in some places, now can exceed \$40; a passport costs \$110. While some states have held steady in the price of birth certificates, others have either increased their prices or add processing fees to the cost of birth certificates. Compared to 2012, in Texas a birth certificate is now \$23 instead of \$22; Mississippi is \$17 instead of \$15; Tennessee is now \$15 (instead of \$8). In Georgia, a birth certificate remains \$25 but now there is an \$8 processing fee to obtain the document. For naturalized Americans, replacement citizenship documents cost \$220.⁹⁹

According to the Brennan Center, approximately 11% of eligible voters lack identification. To put these numbers in broader perspective, nearly five hundred thousand eligible voters do not have access to a vehicle and live more than 10 miles from the nearest state ID issuing office that is open more than two days a week. Over 10 million voters in 10 states live more than 10 miles from their nearest ID issuing office that is open more than two days a week.¹⁰⁰ The requirement of voter ID also has a disparate racial impact. Although 11% of all voters lack the requisite ID, among voters of color this number is much higher, approaching 25% of African Americans, 20% of Asians, and 19% of Latinxs.¹⁰¹ Additionally, there are 1.2 million eligible African American voters and 500k eligible Latinx voters live more than 10 miles from their nearest ID issuing office that is open more than two days a week.¹⁰²

Voter identification laws and proof of citizenship requirements, although facially neutral, mimic the disenfranchising efforts of the pre-Voting Rights Act era. For example, in 1965, less than one

single-member district requirement for congressional elections as a voter qualification standard).

⁹⁷ See Tolson, Spectrum of Congressional Authority, *supra* note 59.

⁹⁸ See Tolson, Elections Clause “Federalism,” *supra* note 52, at 2269 (arguing that the Court must “conced[e] the sovereignty that Congress has under the [Elections] Clause, which may, in some limited instances, permissibly interfere with state control over voter qualifications”).

⁹⁹ Keesha Gaskin and Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, July 29, 2012, available at https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

percent of African Americans were registered to vote in Dallas County, Alabama, even though African-Americans constituted half of the county population. The registration office was open only two days a month, and the registrars would arrive late, leave early, and take long lunches, making the process of registering to vote difficult, if not impossible. In addition to literacy tests and other discriminatory voter qualification standards, the difficulty of registering to vote—which the Court has found to be a “manner” regulation subject to congressional authority under the Elections Clause—arguably contributed to the low percentage of African Americans in the county capable of exercising their right to vote.

There has been a similar trend in many jurisdictions formerly covered by the Voting Rights Act. Some jurisdictions—Alabama, Mississippi, Texas, to name a few—have part-time ID issuing offices in the rural regions with the highest concentrations of people of color and people in poverty. More than one million eligible voters in these states fall below the federal poverty line and live more than 10 miles from their nearest ID issuing office open more than two days a week. In addition, Florida significantly cut back early voting including Sunday voting used for the “souls to the polls” that black churches used to get its membership to the polls. This trend is not limited to the south. For example, the ID issuing office in Sauk City, Wisconsin is only open the fifth Wednesday of any month. Obviously not every month has a fifth Wednesday.¹⁰³

There are other historical parallels that one can draw on to make the point that voter identification and proof of citizenship laws should be covered practices under H.R. 4. In 1889, North Carolina law allowed registrars to require that a voter prove “as near as may be” his “age, occupation, place of birth and place of residency . . . by such testimony, under oath, as may be satisfactory to the registrar.” In many cases, black men born into slavery did not know their age and often lived on streets with no names and in houses with no numbers; therefore, they could not vote under the North Carolina regime. While voter registration is very common today, in 1889, it was used to disenfranchise African Americans.¹⁰⁴

Similar to North Carolina’s registration law, North Dakota’s voter identification law requires that prospective voters show a valid form of identification that must provide the person’s legal name, current residential street address in North Dakota, and date of birth. The problem is that a large percentage of Native Americans in North Dakota live on reservations with no addresses, resulting in widespread disenfranchisement among this population. Tribal leaders printed IDs for individuals to comply with the North Dakota law ahead of the 2018 elections, but many individuals were still disenfranchised because of the sheer number of people who needed identification.¹⁰⁵ Voter identification laws have become common, but in the broader political and societal structure of North Dakota, these laws—like the 1889 North Carolina voter registration law—became tools for disenfranchisement.

Like voter identification laws, proof of citizenship requirements also have disparate racial impacts and burden the fundamental right to vote. Moreover, these requirements have an ugly history. According to the Brennan Center,

¹⁰³ *Id.*

¹⁰⁴ J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

¹⁰⁵ Brakkton Booker, *North Dakota and Native American Tribes Settle Voter ID Lawsuits*, NPR, Feb. 14, 2020, available at <https://www.npr.org/2020/02/14/806083852/north-dakota-and-native-american-tribes-settle-voter-id-lawsuits>.

Some proof of citizenship requirements apply to voters who are ‘challenged’ at the polls. Ohio has one such law, which is the same law amended just after the Civil War to allow challenges to voters with a ‘distinct and visible admixture of African blood.’ Although racial appearance is no longer an express ground for challenge, experience shows that voters who ‘look foreign’ are still likely to be challenged more often.¹⁰⁶

Arizona implemented a documentary proof of citizenship law in 2004 that led to 75% of new registrants in Arizona’s largest county being rejected for failure to provide documentation. Although that rate of rejection fell after two years of intense public education (and years of litigation challenging the constitutionality of the law), approximately 17% of new registrants – many of whom are Latinx and almost all of whom are recognized by state officials to be eligible citizens – were consistently being rejected under the requirement.

The Supreme Court has held that states have broad authority to enact these restrictions to ensure the integrity of their elections by preventing fraud or the appearance of fraud, but voter fraud is rare. The Washington Post, for example, found 31 credible instances (not prosecutions or convictions, but credible allegations) of in person fraud from 2000 to 2014 out of one billion votes cast.¹⁰⁷ Another study similarly found 10 cases nationwide from 2000-2012 and zero successful prosecutions of voter fraud in five states where politicians have claimed that there is fraud during the years 2012-2016.¹⁰⁸ Even though in-person voter fraud and illegal voting by noncitizens is negligible, since 2010, 15 states enacted more restrictive voter ID laws and 12 states passed laws making it harder for citizens to register or stay on the voter rolls.¹⁰⁹

Practice-based preclearance would allow Congress to ensure that voter identification and documentary proof of citizenship requirements are necessary and not pretextual attempts to undermine minority voting rights. These protections are key, not only for racial, but also language minorities. H.R. 4 would also require preclearance of efforts to withdraw or reduce multilingual materials and assistance as well as proposed reductions and relocations of polling places that would affect jurisdictions in which at least 20 percent of adult residents are members of a language minority group. Currently, Sections 4(e), 4(f)(4), and 203 require these jurisdictions to provide voting materials in their native language to voters who have limited English proficiency. However, enforcement of these provisions has been spotty and noncompliance with these provisions have been widespread.¹¹⁰ For example, the state of Texas is required, under Section 203, to provide bilingual election materials because of their large Latinx population; however, in 2016, MALDEF

¹⁰⁶ Brennan Center for Justice, *Proof of Citizenship*, Sept. 2006, available at <https://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Citizenship.pdf>.

¹⁰⁷ Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, WASH. POST, Aug. 6, 2014, available at <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

¹⁰⁸ Sami Edge and Sean Holstege, *Voter Fraud is not a persistent problem*, NEWS21, Aug. 20, 2016, available at <https://votingwars.news21.com/voter-fraud-is-not-a-persistent-problem/>. See also Election Fraud in America, <https://votingrights.news21.com/interactive/election-fraud-database/> (database of all election fraud cases reported to News21 since 2000).

¹⁰⁹ See Brennan Center for Justice, *New Voting Restrictions in America*, Nov. 2019, available at <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf>.

¹¹⁰ United States Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*.

found that many counties in the state failed to provide the required materials.¹¹¹ These failures, and others, illustrate the necessity of additional safeguards to help protect the voting rights of these vulnerable communities.

As mentioned prior, formerly covered jurisdictions have escalated the pace in which they have closed or consolidated polling places in the wake of the *Shelby County* decision. This trend is common in jurisdictions with large numbers of language minorities including Texas, North Carolina, and Arizona. Arizona, in particular, was added to the preclearance regime in 1975 because Congress expanded Section 5 to better encompass language minority communities. Nonetheless, the state has been particularly aggressive in making voting harder for communities of color by, for example, closing more polling places than any other state since 2013; imposing additional hurdles to registration such as its documentary proof of citizenship requirement; and making voting harder with laws like the out of precinct rule and ban on ballot collection challenged in the *Brnovich* decision.¹¹²

Congress has broad authority, pursuant to the Elections Clause and the Fourteenth and Fifteenth Amendments, to address the pernicious effects of voter identification and proof of citizenship requirements as well as the failure of jurisdictions to protect language minority populations. Recognizing that state and federal power in this area does not fall in neat silos, the Court has, in prior cases, sustained Congress' broad authority under the Clause despite the implications for the state's authority over voter qualifications. In *Ex parte Yarbrough*, for example, the Court sustained an indictment under the 1870 Enforcement Act against individual defendants who conspired against a black man "in the exercise of his right to vote for a member of the Congress of the United States . . . on account of his race, color, and previous condition of servitude . . ."¹¹³ The Court held that the Fifteenth Amendment "gives no affirmative right to the colored man to vote," suggesting that this provision standing alone was insufficient support for the Act, but ultimately concluding that "it is easy to see that under some circumstances it may operate as the immediate source of a right to vote."¹¹⁴ Those circumstances are present where Congress regulates federal elections under the Elections Clause, as it was in *Yarbrough* and as it seeks to do through H.R. 4.¹¹⁵

In addition to recognizing that Congress could, in some instances, protect the right to vote from private discriminatory behavior through the Elections Clause, *Yarbrough* and another case, *In re Coy*,¹¹⁶ also held that Congress' authority under the Elections Clause is not diminished simply

¹¹¹ *Id.* at 191. See also *id.* (noting a similar pattern for Asian Americans in New York state).

¹¹² *Id.* at 171. See also *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (Kagan, J., dissenting) (noting that "Arizona's out-of-precinct policy has such a racially disparate impact on voting opportunity. Much of the story has to do with the siting and shifting of polling places. Arizona moves polling places at a startling rate. Maricopa County (recall, Arizona's largest by far) changed 40% or more of polling places before both the 2008 and the 2012 elections.").

¹¹³ *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884); see also Richard M. Valelly, *Partisan Entrepreneurship and Policy Windows, in* *Formative Acts* 126, 133 (Steven Skowronek ed., 2007) (noting that the *Yarbrough* Court, in holding that Congress has ample authority to protect federal elections under Elections Clause, "strengthened Fifteenth Amendment enforcement by fusing it to the congressional regulatory power contained in Article I").

¹¹⁴ *Yarbrough*, 110 U.S. at 665.

¹¹⁵ *Id.* at 662 (upholding Sections 5508 and 5520 of the 1870 Enforcement Act as a lawful exercise of Congress' power under the Elections Clause, the Fifteenth Amendment, and the Necessary and Proper Clause because Congress "must have the power to protect the elections on which its existence depends from violence and corruption"); see also Valelly, *supra* note 113, at 135 ("[A] unanimous Court ruled that in order to protect the electoral processes that made it a national representative assembly, Congress could protect the right to vote of any citizen, Black or white.").

¹¹⁶ 127 U.S. 731 (1888).

because a federal regulation may affect state and local elections.¹¹⁷ Federal law made it a crime for any election official to “violate or refuse to comply with his duty” at “any election for representative or delegate in Congress,” but the defendant election inspectors argued they could not be indicted under federal law because they were tampering with the returns to taint state and local elections, not the U.S. House election.¹¹⁸ The Court found this argument “manifestly contrary to common sense” because “[t]he manifest purpose of both systems of legislation is to remove the ballot-box as well as the certifications of the votes cast from all possible opportunity of falsification, forgery, or destruction.”¹¹⁹ Just as the Court has allowed Congress to regulate both constitutional and unconstitutional state action when legislating pursuant to the Fourteenth and Fifteenth Amendments, Congress’ power under the Elections Clause has, by necessity, touched on voter qualification standards and state elections in the course of vindicating Congress’ interest in protecting the health and legitimacy of federal elections. These provisions, in the aggregate, give Congress broad authority to enact the practice-based preclearance provision of H.R. 4.

Conclusion

The practice-based preclearance provision isolates those practices that states have historically used to abridge or deny the right to vote, and it does so without singling out any particular jurisdiction or geographic area. Its structure not only complies with the equal sovereignty principle that was the pressing threats to the right to vote, especially in the wake of the 2020 election, demand federal action as the number of states seeking to make voting harder grows.¹²⁰ The list of covered practices are those that have been and will continue to be used by states as vehicles for disenfranchisement.

Congress’ power under the Fourteenth and Fifteenth Amendments and the Elections Clause provide sufficient authorization for H.R. 4 because those provisions empower Congress to enact legislation seeking to prevent local, state, and federal elections regulations that abridge or deny the right to vote, or that have a racially discriminatory impact. Importantly, because Congress seeks to act pursuant to more than one constitutional provision in enacting H.R. 4, this not only shores up constitutional support for H.R. 4, but also necessitates more judicial deference to the legislative record than if Congress was acting pursuant to the Fourteenth and Fifteenth Amendments alone.

¹¹⁷ See *id.* at 752 (stating that federal government may regulate Congressional elections, regardless of state and local elections taking place); *Yarborough*, 110 U.S. at 662 (stating that no federal powers are “annulled because an election for state officers is held at the same time and place”).

¹¹⁸ *In re Coy*, 127 U.S. 731, 749-50, 753 (1888).

¹¹⁹ *Id.* at 755; see also Valelly, *supra* note 113, at 135-36 (arguing that the Court rejected the claim because “during the elections the state and local elections officials had, for all intents and purposes, become officers of the United States and were subject to the jurisdiction of the United States”).

¹²⁰ Cf. *Shelby County v. Holder*, 570 U.S. 529 (2013).

Mr. COHEN. Thank you, Ms. Tolson.

We now go to the question period of 5 minutes each to ask questions, and I will recognize myself for 5 minutes.

Let me start with Mr. Yank. You have read *Shelby v. Holder* and you have read the more recent case with Brnovich. What would you advise this Committee to do to come up with a law, a voting rights amendment, that will withstand a Supreme Court challenge?

Mr. YANG. Well, certainly, by holding these hearings is very important to establish the record of discrimination, of the need for the known practices coverage that we are talking about here today.

One thing that I would also offer is that the question here is not whether there is less discrimination than when the Voting Rights Act was passed in 1965, but whether there is discrimination that still needs to be addressed. Again, that is why the need for an extensive record, the hearings that you are holding, is relevant to what we are doing today.

Mr. COHEN. The hearings, obviously, and we need to have a record. Do you think there is any geographic designations that we could come up with that would satisfy the Justices?

Mr. YANG. I think I would actually defer to Mr. Saenz to talk a little bit more in-depth about that, but certainly—

Mr. COHEN. He is nodding. So, we obviously want to respond.

Mr. YANG. Right. That is right.

But, certainly, we can. I think this is also where it is important to have what we have been talking about in terms of complementary coverage with both the preclearance, the no practices coverage, as long as the geographic coverage.

Mr. COHEN. Professor?

Mr. SAENZ. Yes, I think you can come up with a geographic coverage formula that would pass muster. The Shelby County majority, as you know, expressed concerns about equal sovereignty and about federalism, and they expressed concerns that the coverage formula that had existed for so long when the case came to them did not reflect current conditions. I think it is clear, if you have a formula, a geographic formula, that is based on adjudications of voting rights violations in that specific jurisdiction, that is a reflection of current conditions. It is also the kind of violation, as we see with section 3, where a court can order bail in. It is also the kind of violation that warrants the intrusion on federalism that the majority was concerned about in Shelby County, and it is also respectful of equal sovereignty because every State that engages in the number of violations provided in the legislation that you enact would be subject to preclearance, whether they are in any region of the country.

Mr. COHEN. Thank you.

Professor Tolson, Congress, as a matter of longstanding constitutional interpretation, should have broad authorities to assure all Americans are guaranteed equal opportunity to vote free from discrimination in all ways. We have seen a number of decisions from the Supreme Court—*Shelby v. Holder* the first—that seemed to go out of their way to try to limit that broad authority, even while leaving those broad precedents undisturbed. In light of this, how confident can we be that this current Supreme Court would uphold a practice-based coverage formula, based on existing precedents in-

interpreting the Reconstruction Amendments in the Elections Clause?

Ms. TOLSON. Thank you, Chair.

I don't think anything is certain, but you can definitely make it harder for them. Because one thing that we have to stop doing is lumping the 14th and 15th Amendments together. I think when we do that, it sort of blurs the lines between what Congress can and cannot do.

Another thing Congress can do is be explicit about the sources of authority that it is relying on. That way, when the record goes before the Justices, they have to be clear in articulating why the new coverage formula is unconstitutional.

So, for example, let me give you a sense of what this means. The Shelby County decision seems to indicate that the record has to show intentional discrimination on the part of the States for it to be sufficient to justify the coverage formula. That is only part of the story, if you are relying on the 15th Amendment. The 14th amendment also protects a fundamental right to vote, which means that the record can show abridgment or denials of the right to vote, even in the absence of intentional discrimination.

Even more importantly, the Elections Clause doesn't require either, right? Congress can make or alter State law, and they can do so without any justification, especially where States have jeopardized the health and wellness of Federal elections. So, that is a much different record than a record that was before the Court in 2013.

Mr. COHEN. Thank you.

Professor Fraga, the senior, the father, what can history and demographics teach us about the likelihood that certain jurisdictions will turn to voter suppression efforts, particularly in places where jurisdiction may not otherwise have a long history of having engaged in voting rights violations?

Mr. LUIS FRAGA. Part of what I was trying to get across, Mr. Chair, was that this history of voter suppression and efforts like the implementation of at-large elections have occurred in many different parts of the country, targeted at different groups and at different times.

So, what I am trying to get across in that consideration, in response to your question, is that it is very important that there be continued vigilance because every time that that vigilance has been removed, every time that enforcement efforts to protect voting rights have been removed, every single time in the history of our country there has been an equivalent movement to try to limit the voting rights of particular segments of our population. That vigilance I see as being possible and absolutely necessary when we reconsider the nature of section 4.

Mr. COHEN. Thank you, sir.

I now recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON of Louisiana. I thank the Chair and thank all the Witnesses again.

Let me begin with Mr. Nobile. I just want to ask you a very simple question because there seems to be a lot of confusion about this and debate in the country. Depending on which news program you

watch, you may have a different opinion. You are an expert on it. Is there widespread voter suppression in this country today?

Mr. NOBILE. No.

Mr. JOHNSON of Louisiana. Explain that a little bit more. I know you did in your testimony, but we have to repeat it over and over.

Mr. NOBILE. Yes, yes. I mean, look, in Shelby and the cases, you have to look at the actual ballot access data, and turnout and registration are told most of the story, right? I mean, Justice Kagan, in her dissent last week, or three weeks ago, said something to the effect of, if people don't turn out, so be it. Justice Kagan is 100 percent right in her dissent. Unfortunately, that is not how a lot of the advocates feel. They feel like, if there is not a turnout, then there must be some problem. Problems with turnout are sometimes, or usually, completely unrelated to regulations and time, place, and manner regulations.

Mr. JOHNSON of Louisiana. The intent of the legislature or the officials in charge, right?

Mr. NOBILE. Correct.

Mr. JOHNSON of Louisiana. Why is the Administration, do you think, highlighting Georgia and Texas as examples of States pushing so-called voter suppression and not other States? I don't know, say those run by Democrats that have had virtually identical laws on the books for many years.

Mr. NOBILE. I mean, I haven't done a full survey, but I suspect, if you go back for the last 30 years and look at every purple State, you will see all the claims arising there. So, States where they feel like they can flip is going to be where resources are poured into. That is why private suits are not really that helpful in determining local discrimination. It is really just who has got the most money and who has the most lawyers willing to bring a section 2 case? Honestly, that is not a very high bar. There is lots of money out there. There is lots of lawyers willing to take a section 2 case, and that is going to really determine where the most cases are brought.

Mr. JOHNSON of Louisiana. So, it looks like a brazen political agenda, does it not?

Mr. NOBILE. Yes, I mean, it is you want to get your vote out. You want to drive up your base. I mean, you want to show people that you are fighting in there for their votes. So, it is trying to get people to turn out and trying to get support generated in whatever State or region or municipality that you are trying to flip.

Mr. JOHNSON of Louisiana. Very good.

My colleague, Representative Owens, said in a previous hearing here that it is offensive to those who actually lived through the Jim Crow era to equate today's voting measures to that. As you summarized, I thought, really well, Jim Crow is not a mere brand or a slogan. I think it is just thrown around today, and people don't understand the import of that.

Mr. NOBILE. It is really, I mean honestly—I mean I am not here to give a moral lesson on anything—but it is really shocking that Jim Crow gets thrown around the way it does. I mean, everyone knows what Jim Crow is. It is a dark part of our history. I mean, I have brought civil rights cases. I brought the case involving Prairie View A&M students in Waller County, Texas. I have brought cases on behalf of minority plaintiffs. It quite troubling the way

that just gets thrown because, I mean, it is a dark time in our history, and you wouldn't do that with other things. I am not going to draw parallels from international history, but we are all aware of them, and you wouldn't throw those around to try to inflame people's passions or to try to win your rhetorical argument.

Mr. JOHNSON of Louisiana. I just want to disagree with you on one point. I don't think everybody does understand what Jim Crow really was and the dark era that it was in our nation, because they use it so casually.

Let me go—I am running out of time. Mr. Tyson, thank you for your testimony today.

What other provisions currently existing within the Voting Rights Act and other Federal statutes that adequately address States that violate the Constitution by engaging in voter discrimination? You touched on this a little bit. It was said just a few moments ago we have to be continually vigilant. Can't we do that without this new legislation?

Mr. TYSON. Absolutely. I think that is one thing that we have seen very clearly, especially in 2018, 2019, and 2020 in Georgia. There has been no hesitancy and no lack of effort in bringing litigation about a variety of elections practices. That is true under the fundamental right to vote claims. That is true under section 2. That is true under the Civil Rights Act and other claims that were there. There are a variety of methods to use, and we have seen that plaintiffs have not been hesitant to use those at all ensuing when they believe that something is going wrong with election Administration.

Mr. JOHNSON of Louisiana. So, if this were to pass, how do you expect the proposed coverage formula would play out, considering that it would require all jurisdictions to be subject to preclearance in certain circumstances? I think more problematic, it would allow outside groups to file enforcement actions against States. Is that a recipe for disaster?

Mr. TYSON. I think it is, and especially the broad definition of a voting rights violation in the current version of the draft the Committee has. It includes things that are so broad there will be incentives for private groups to go sue States that they want to pull under preclearance. Then, ultimately, again, that leads to the danger of partisan enforcement. Voting rights are too important to be given over to a partisan political agenda.

Mr. JOHNSON of Louisiana. Very good.

I am, unfortunately, out of time. I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Ms. Ross from North Carolina is recognized now for 5 minutes.

Ms. ROSS. Thank you so much, Mr. Chair, and thank you so much to our Witnesses. This has been a really great hearing.

I am from North Carolina and was a State legislator when we expanded voting rights and a State legislator when we watched them get shut down or attempts to get shut down. I have also brought voting rights cases myself as a civil rights lawyer.

I want to talk briefly about racial gerrymandering in North Carolina. In 2016, our State legislature created new congressional maps—this was after having them struck down—that gerrymandered the State on an implicitly racial basis. The bill divided

the campus of North Carolina Agricultural and Technical State University, the largest HBCU in the country, into two separate districts. The scheme diluted the votes of thousands of young African American voters.

However, in 2020, new maps were redrawn after a long period of litigation, and NC A&T's campus is now consolidated into one district. Amazingly, voter turnout on campus increased substantially in 2020, once that community of interest was brought together.

Practices like this one that divide and diminish the power of minority voters are known to be discriminatory in nature. We need to remedy those violations in a way that doesn't require years of litigation.

I would also like to remind this Committee that the preclearance formula in the Voting Rights Act of 1965 covered several counties in North Carolina, but not the State as a whole. North Carolina's monster voter suppression law that targeted African Americans with surgical precision potentially could have been enacted even before the Shelby County decision, because the entire State was not subject to preclearance.

That law would have restricted early voting, imposed discriminatory voter ID requirements, repeal the same-day voter registration at early voting sites, and even more. These are all known practices that are being considered again in many States today and in North Carolina and should be prevented at the outset. I am grateful to all of you for your testimony on the need and legal basis for known practice coverage.

My first question is for Professor Bernard Fraga. In your written testimony, you observed that the historical record of minority voting rights indicates periods of expansion, contraction, and then, expansion that directly coincides with Federal action to prevent States from *de jure* and *de facto* racial and ethnic discrimination in voting.

Would you agree that, since the Civil War, minority voting rights have only been protected due to active efforts by the Federal government, and that the Voting Rights Act has been critical to preventing a backsliding on voting rights?

Mr. BERNARD FRAGA. Thank you, Representative Ross.

I think that is a very, very important point to make. Federal action is what has sustained voting rights, even despite the 14th and 15th Amendments, right? The lack of Federal action that we saw after the Reconstruction Period during the Redeemer Movement, right, the lack of Congress specifically taking action to counter some Supreme Court decisions, and the actions of southern States, is what led to Jim Crow.

So, when we talk about Jim Crow, and we talk about not recognizing the history of Jim Crow, I think we are not recognizing the origin of Jim Crow, which is a lack of Federal action, congressional action specifically, to ensure that African Americans—African American men at the time—maintained the right to vote.

Ms. ROSS. Thank you very much.

To your dad, Professor Fraga, in your view, are there common historical conditions that explain why politically dominant whites have resorted to the same voting practices to limit the voting

strength of ethnic and racial minorities at different times and places throughout American history?

Mr. LUIS FRAGA. Yes, and I think the primary one is the competitiveness of statewide elections and the way in which this happened throughout the period before the formalization of Jim Crow. This was the period of dilution right after over half a million African Americans voted and elected Members to local office and to Congress and to State office, and even two Senators from Mississippi. The concern was, how do we make sure that they don't get a majority and keep a majority, given the closeness of the election?

So, a series of procedures were used—I try to outline a number of them in my report—to make sure that the numbers never constituted a majority. The same thing was done at State legislative levels. The same thing was done at the city level. It is this sense of partisan competition, if you will, the sense of partisan competition that made the efforts race-targeted, because of the way in which these two factors intersect.

The parallel that I see is that there is grave concern that the small margins that characterize election outcomes can be affected by current voter suppression methods.

Mr. COHEN. Thank you, Professor. Thank you—

Ms. ROSS. Thank you very much, and I yield back.

Mr. COHEN. Thank you, Representative Ross.

I now recognize the gentleman from California, the thoughtful conservative, Mr. McClintock.

Mr. MCCLINTOCK. Well, thank you, Mr. Chair.

Mr. Nobile, doesn't every fraudulent vote disenfranchise a legitimate voter?

Mr. NOBILE. Yes.

Mr. MCCLINTOCK. Wouldn't you say that is the ultimate voter suppression?

Mr. NOBILE. It certainly dilutes. I mean, it dilutes everyone's vote. So, yes.

Mr. MCCLINTOCK. So, obviously, it is incumbent upon us to have a process that makes fraud very difficult to commit. I mean, obviously, we don't allow people to mail in drug tests, for example, for obvious reasons.

Mr. NOBILE. I mean, ballot stuffing is not just a euphemism. It has actually happened. That is why people use it as a euphemism.

Mr. MCCLINTOCK. By definition, in a democracy, somebody is always going to win, and somebody is always going to lose. The success of democracy depends on the loser accepting the legitimacy of an election, does it not?

Mr. NOBILE. Correct.

Mr. MCCLINTOCK. So, to do so—

Mr. NOBILE. I would add, and the public accepting, everyone accepting the legitimacy of the election.

Mr. MCCLINTOCK. Yes, but especially the loser.

Mr. NOBILE. Well, they are usually the ones that don't.

Mr. MCCLINTOCK. That is the hardest pill to swallow.

So, they have got to have confidence in the integrity of the vote. What have recent changes in election procedures done to the public's confidence in the integrity of the vote.

Mr. NOBILE. Well, I mean, I think the sustained opposition to seemingly benign, race-neutral time and place and manner of regulations have really sort of been troubling. I think Georgia's trying to at least have someone monitoring, allowing access to a drop-box for ballots during business hours makes sense. You shouldn't have drop-boxes open 24/7.

Mr. MCCLINTOCK. Well, I wonder about that because, up until just a few years ago, our elections process was very simple. It was accepted over many, many generations. You registered to vote with an election's official. They were available at any fire station or library or municipal office, but you have to go face-to-face with somebody and swear you were who you said you were. There was a 30-day close of registration, so that all parties could canvass the voters. Candidates knew exactly who they were talking to. Those who had moved or died could be removed from the rolls.

Then, we all waited until Election Day—that is why we called it Election Day; it was a single day after the entire campaign had concluded, after we had heard the entire debate. We all together, in what George Will once called “the communion of democracy,” went to our local polling place. It was usually in a neighbor's garage or a neighborhood grade school.

We looked our neighbors in the eye as we identified ourselves and they handed us our ballot. We brought our children along, so that they could observe the process because we taught them how important that was to their country.

Then, we took that ballot immediately into a curtained booth, where nobody could cajole or pressure or plead with us, and we cast our individual votes according to our own conscience. We, then, gave that ballot back to our neighbor, who immediately put it in a locked ballot box. It was all done in a public place where all citizens from all parties could observe it.

Then, at 8:00 p.m., when the polls closed, we knew exactly how many votes had been cast and, by 10:00 p.m., we usually knew who won. In a close election, it might be midnight.

Now, that has all been torn down by the left. Now, you register to vote simultaneously with voting. It makes it impossible for parties to canvass. Superannuated registrations are rarely removed from the rolls.

We, then, send ballots to everybody, every name on those rolls, followed up by ballot harvesters to collect those ballots. There is no chain of custody from the time the ballot is mailed until the ballot is returned. Ballots are not secret. Family members, spouses, caregivers, friends can all—and for that matter, party ballot harvesters—can all cajole and pressure us. Those votes can be cast many weeks before the debate is over.

What has that done to invite fraud, and what has that done to undermine confidence in the integrity of the vote?

Mr. NOBILE. Well, I mean, anytime you make a system more complex, there are more problems, right? That is, essentially, what you have done. You have had Election Day go from Election Day to election month.

You have delivered and brought the joy of showing up at the poll site to your house, where people can come and try to pressure you into voting one way or the other in the form of a harvester.

The Voting Rights Act, when it was originally passed, and it still exists, actually had a carveout saying your union boss or your union rep and your employer couldn't help you cast a ballot. That is because, even in 1965, people knew that certain groups would be subject to undue pressure or coerced, not because of anything other than maybe they are poor or they need a job or they are a minority, or they have got some reason. So, that has all created a problem.

Mr. MCCLINTOCK. Thank you.

Mr. COHEN. Thank you, Mr. McClintock.

Next, would be—Mr. Raskin is still not with us. Mr. Hank Johnson, are you out on bail? Mr. Johnson, you are recognized for 5 minutes.

Mr. JOHNSON of Georgia. I actually orchestrated an escape. So, I am here.

[Laughter.]

I want to thank the Constitution Subcommittee of the Judiciary Committee for having this very important hearing.

The 15th, 19th, and 26th Amendments guarantee the right to vote, and if the right to vote is denied, those so deprived lose the ability to preserve all other constitutionally guaranteed rights and our country becomes a democracy in name only.

To paraphrase Justice Kagan, never before has a statute been as extraordinary, required more sacrifice, and done more to advance our democracy than the Voting Rights Act. Yet, the Supreme Court has treated this special statute worse than other law passed by Congress, first, by eviscerating section 4, and thus, castrating section 5. Then, in *Brnovich*, the Court has sought to dismember the Voting Rights Act by applying a tourniquet to section 2. The majority of the Court appears to fear that the Voting Rights Act is too, quote, "radical," end quote, that it will invalidate too many State voting laws. So, the majority, instead, wrote its own set of rules in *Brnovich*, acting as both arbiter and legislator, and pretty much putting Justice Roberts' calling balls and strikes for his own team.

Professor Tolson, do you think it is fair to characterize the Roberts Court as hostile to the Voting Rights Act?

Ms. TOLSON. I think that characterization is a fair characterization. Shelby County often gets a lot of heat, but when you have, really, is a series of decisions that have undermined the scope of the Voting Rights Act, both section 2, and prior to Shelby County, section 5. So, I think that is a fair characterization, and this is why I urge not only this Committee, but Congress as a whole, to be thorough with the legislative record and be clear about the source of congressional authority. Because I do think that the Court itself has not viewed the Voting Rights Act favorably. So, it is really important to be careful, but the authorization is there. So, Congress can pass practice-based coverage as well as the geographic formula in H.R. 4.

Mr. JOHNSON of Georgia. Well, given that the Court seemed to rewrite section 2, and thus, legislate from the bench and become a, quote, "activist Court" right before our eyes, what approach would you suggest Congress take to avoid any future flawed readings by this activist Court? Specifically, what should we be careful about when drafting this language of known practices coverage?

Ms. TOLSON. So, with respect to the practice-based preclearance, the current bill identifies those practices that really six decades of experience has taught Congress are practices that State legislators often fall back on to abridge or deny minority voting rights, and indeed, voting rights more generally, right? It depends on the political calculus, but minority groups are especially vulnerable when, for example, States redistrict, which they do every 10 years, or if a State or a locality engages in an annexation or a de-annexation, and so on. Like there is case law. There are examples of these measures being used repeatedly to disenfranchise minority communities.

In addition, the language assistance provisions of the Voting Rights Act are still—oh, the States routinely violate those provisions, further showing that there needs to be some Federal intervention here to protect language minorities. So, the evidence is there. It is squarely in front of Congress and sort of urges and shows the need for further congressional action here.

In terms of the Court misinterpreting the scope of the Voting Rights Act, there clearly needs to be some section 2 fix, because the *Brnovich* decision, in particular, emphasizes the State's authority over elections, but ignores the disparities that were caused by the Arizona law, the out-of-precinct rule as well as the ban on ballot collection.

So, by emphasizing the State over the right to vote, the *Brnovich* Court really misconstrued congressional intent with respect to the update to section 2 of the Voting Rights Act.

Mr. JOHNSON of Georgia. Thank you.

What should we be careful about, Mr. Bernard Fraga, in drafting the language on the practice coverages?

Mr. BERNARD FRAGA. Well, I think that we clearly need the record to be established, and that is what we are doing here today. But we also need to make sure that we are basing it on current conditions. So, in my report I outline the population-limited, practice-based preclearance that says, in places where we have history, even recent history, it is much more likely that things like redistricting will be used to discriminate against minority voters. Those are the places where resources should be devoted, and attention, scrutiny, needs to be paid going forward.

Mr. JOHNSON of Georgia. Thank you. My time is up, and I appreciate it, Mr. Chair. I yield back.

Mr. COHEN. Thank you, Mr. Johnson. Good to see you.

Ms. Garcia of Texas, judge, and Congressperson, 5 minutes.

Ms. GARCIA. Thank you, Mr. Chair, and thank you for putting this group together. I feel like I should call them "The Magnificent Seven" because they really did do a good job of presenting all perspectives.

Certainly, I have known my friend, Mr. Saenz, for many years and worked with MALDEF. So, welcome back.

Mr. Chair, this Subcommittee convenes once again to address the need to enhance the Voting Rights Act. I, for one, think that we could have a hearing like this every month until we get this done, and I would have no problem with it, because we know that the Constitution protects our right to vote. That something that all of us should take very, very seriously.

The Constitution also provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. That is really at play here also.

Yet, we continue to see an all-out assault on American democracy based on lies and baseless claims. The GOP's current efforts are not about voter security; they are, in fact, about voter suppression.

As Congress considers advancing H.R. 4, we must ensure that growing communities whose primary language is not English are included and protected in the voting process. Barriers to voting which systematically exclude minority voters will language barriers only hinder our ability to provide equal protection and opportunity for all.

These voter suppression tactics are visible in Texas, much to my dismay. It is almost embarrassing to acknowledge that Texas leads the country in voter discrimination complaints that have been sent to the Justice Department pre-Shelby, and even after Shelby, most of the cases that have come out with discrimination come from Texas. In Harris County, we are a population greater than 26 States. We speak about 145 languages, but it is getting harder and harder to get access to the ballot. So, this is especially true every election season.

So, Mr. Saenz, you heard the Republican Witness say that H.R. 4, the Voting Rights Act, the John Lewis Voting Rights Act, was "a remedy in search of a problem." Yet, your organization, MALDEF, AAJC, and NALFO joined forces to conduct a study to look at the types of changes that are made that would be covered by the John Lewis Voting Rights Act in a practice-based preclearance formula. Could you just discuss a couple of examples of how to demonstrate the need?

Mr. SAENZ. Sure. Unfortunately, for the reasons you have said, these examples, more often than not, come out of Texas, in MALDEF's experience. The first example that I would give is one of the very first changes after the Shelby County decision was handed down. Both came out of Texas. As you know, Texas State leadership indicated an intent to revise the voter ID provision to make it more difficult, and that was rendered possible by the Shelby County decision.

What I focus on in my written testimony and today is what the Mayor of Pasadena, Texas did. He immediately announced that Shelby County enabled him to do what he had wanted to do for so long, but couldn't, when he knew that it would be subject to preclearance review. That was to shift a city council of eight districted Members to six districted Members and two at-large Members.

Ms. GARCIA. He publicly stated his intent.

Mr. SAENZ. He publicly stated his intent to Act in reaction to Shelby County.

Ms. GARCIA. Right.

Mr. SAENZ. The whole purpose for doing that was because the Latino community in that city had reached critical mass and was on the verge of taking over a majority of the seats on the city council. So, to prevent that, he put in place this reversion to at-large seats. That is one of the identified practices in known practices coverage, as you know.

Ms. GARCIA. Well, thank you.

Now, to Mr. Fraga from Emory, you said in your testimony that, absent any congressional role, us getting involved in doing something, that the voices of a minority electorate would not be heard. Could you tell us specifically what you were referring to? Also, can you tell us exactly what you think or recommend that we should do and what our role should be?

Mr. BERNARD FRAGA. So, it is very clear after the *Shelby v. Holder* decision that Congress needs to play a role in updating the formula and bringing preclearance back in, making it valid once again, right? I mean, this is the charge that Congress received from Chief Justice Roberts.

I think that what we see over time, historically, but also in recent times, is that, when a group is growing, it threatens the existing power structure. I don't mean threatened by protests and other things. I mean threatening at the ballot box. That is democracy at work. Attempts to suppress the vote or dilute the vote are an effort to undermine democracy. I think that is what I am referring to there as it regards minority voters. It is that, without congressional action, it will be easier and easier, and more common, of course, for minority voices to be silenced, especially growing minority groups like Latinos and Asian Americans.

Ms. GARCIA. Thank you, Mr. Chair. I believe my time has run out.

Mr. COHEN. Yes, it has. Thank you.

That concludes our questioning for the day. I want to thank our Witnesses for appearing and for your testimony. It really was good.

Ms. GARCIA. Mr. Chair, I forgot I needed to ask for unanimous consent to introduce a document for the record.

Mr. COHEN. So, granted.

Ms. GARCIA. Thank you.

Mr. COHEN. Without objection.

[The information follows:]

MS. GARCIA FOR THE RECORD

The Texas Election Bill Contains a New Obstacle to Voting That Almost No One Is Talking About

July 26, 2021 27

There's a problem buried inside Texas's latest election bill, and it's not one of the headline-grabbing restrictions that have torn the Legislature apart during the special session. Nonetheless, it could disenfranchise a significant number of the state's voters.

Amid all the fighting, most lawmakers have apparently overlooked a provision that would force counties to automatically reject some mail-in ballot applications. Here's why: The Republican-authored legislation would require voters to submit either their driver's license number or a partial Social Security number when applying to vote by mail. That number would then be cross-checked with the state's voter-registration database. Most applicants would be fine, because almost 90 percent of all registered Texas voters have both their Social Security number and driver's license number in the database. However, 1.9 million voters—about 11 percent of the total—have only one of the two numbers on file with the state.

During late-night testimony to a committee of the Texas House on July 10, Chris Davis, the elections administrator for Williamson County, explained that most of the voters with only one number on file wouldn't remember which number they filed, often many years earlier, and would

have to guess. “You have a 50 percent chance of the voter guessing wrong,” said Davis. Guess wrong and your application would be rejected, even if it’s been twenty years since you used your Social Security or driver’s license number to register to vote. “I challenge any person on the committee: do you remember what you filled out when you got your voter registration? I certainly don’t. And I’m in the business of this. And if [the numbers] don’t match, we’re rejecting.”

Some 11 percent of Texas voters **cast their ballots by mail in 2020**, so if that percentage held up in future elections, 209,000 of the 1.9 million voters with only one ID number on file with the state would be requesting mail-in ballots. If most of those voters are guessing which ID number to cite on their application, and they have a 50 percent chance of guessing correctly, then 104,500 of them would have their applications rejected. Some of these voters might find other ways to vote, including in person. But some with serious disabilities, or those who have to be out of state during the period when polls are open, would be out of luck.

Ever since the special legislative session began this month, a handful of local and state officials have tried in vain to call attention to the problem. But their pleas appear to have fallen on deaf ears. The night of the hearing, none of the fifteen House committee members—including six Democrats—asked Davis a question about the risks of ID-matching. Instead, they voted the bill out of committee with no changes. Two days later, the full Senate adopted a nearly identical companion bill, also with no discussion and no changes to the provision.

During the regular session, which stretched from January through May, Texas was the focus of international attention as Republicans tried to push through what voting rights groups and Democrats labeled voter suppression and Jim Crow 2.0, a reference to state laws, especially in the South, that discriminated against Blacks from the 1870s until the 1960s. In its final iteration, the proposal contained eleventh-hour provisions that would have limited Sunday voting and made it easier for judges to overturn elections. After Democrats left the Capitol during the final days

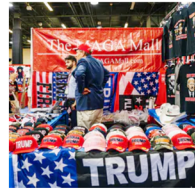
7/27/2021

The Texas Election Bill Contains a New Obstacle to Voting That Almost No One Is Talking About – Texas Monthly

of the session to deprive Republicans of the quorum required to pass legislation, the bill died and Governor Greg Abbott quickly called the Legislature back for the thirty-day special session currently underway.

Ultimately no Republicans involved in the crafting of the bill took responsibility for the last-minute additions, but leaders in the House and Senate pledged to keep the objectionable Sunday-voting and overturning-elections measures out of any future legislation. Less noticed were other flaws. First during the regular session and then again in the ongoing special session, the authors of the “election integrity” legislation increasingly weakened crucial guardrails protecting the security of mail ballots. In addition to the new ID-matching requirements, it now contains a flawed way for voters to “cure,” or fix, a rejected mail-in ballot.

LATEST FROM POLITICS & POLICY

[SEE MORE](#)

JULY 13, 2021

Enrique Marquez, spokesperson for House Speaker Dade Phelan, declined to answer questions about why the House moved the bill forward without addressing the ID-matching and curing issues, nor would he say whether there was any specific plan for addressing these issues if the House Democrats return to Austin. “There are no bills that can be considered on the floor until Democrats return home,” Marquez wrote in an email. “However, House Bill 3 author Andrew Murr has repeatedly stated he will work with all his colleagues to make the best bill possible.” (Murr’s chief of staff said Murr was aware of the problem and “looked forward to working with colleagues about remedying concerns about how differing numbers could result in a ballot not being counted.”)

Davis said many Republicans have failed to listen to the complaints of election officials, ignoring suggestions for improvements to nonpartisan, process-related issues. “It’s just like ‘Who is steering this bus?’” Davis told me. “They are following the pattern of only listening to their ‘the steal is real’ base and not consulting with any county elections officers.”

Davis said that while he decided to testify before the House, he chose not to give testimony before the Senate because Bryan Hughes, a Mineola Republican who chairs the State Affairs Committee, had brushed him off so many times before. Davis said he reached out to Hughes’s office about the ID-matching problem multiple times, but never received confirmation that a fix was in the works. Two legislative staffers, one working for a Republican and one for a Democrat, confirmed that the Texas secretary of state’s office had also advised legislators that the ID-matching provision needed to contain a failsafe for voters who do not have both numbers in the registration system, but the changes were never made. The staffers requested anonymity because they were not authorized to speak about negotiations. “Why are [election administrators] going to waste our time testifying?” asked Davis, who was appointed to his nonpartisan job by the Williamson County Commissioners’ Court. “They don’t care what we have to say. They haven’t from the beginning.”

County election administrators say the ID-matching provision imposes significant burdens on their offices, and they are unclear how to enforce it. Under the new language, the ID number—either a partial Social Security number or a driver’s license number—would have to be written on the envelope, forcing counties to spend thousands of dollars redesigning envelopes in order to accommodate a privacy flap that poll workers would peek under to check the number. “We’ve joked about whether it should be a scratch-off,” Davis said. If poll workers make an error or if voters, for example, transpose two numbers by accident, the application would be rejected with little opportunity for the voter to address the problem. “We don’t have time for that,” Davis said. “We’re getting down to registration deadlines by the time we receive a lot of these. There’s no time for the voter to mail another one.”

Texas Monthly and the nonprofit election-integrity news project Votebeat, who are jointly publishing this story, asked for interviews with Abbott, Hughes, House Elections Committee chairman Briscoe Cain, and Lieutenant Governor Dan Patrick, but none responded by press time. Republican representative Travis Clardy, who sits on the committee hearing the election bill in the House, said he preferred to deal with the problems once the proposal reaches the full House. “My expectation was and is—if we are able to establish a quorum again—that [the fixes] would be something we would consider,” he said. “I don’t see anybody getting locked up on that.”

There are other potential deficiencies in the ballot security measures buried in the legislation, despite GOP pledges to make elections more secure and safe from fraud. One of the most common security measures for protecting the integrity of the mail-in ballot involves signatures. Under current Texas law, voters must sign the envelope they use to send in their ballot. Then a committee of untrained volunteers recruited by the local election administrator reviews the signature to see if it matches the signature on file with the county. If the committee decides the signatures don’t match, the ballot is immediately rejected. There is widespread recognition that the lack of an appeals or correction process—or “ballot curing”—is an oversight in Texas law and the courts **have pressured the state** to join the eighteen other states that allow ballot curing.

In May, during the regular session, both Republicans and Democrats agreed to add a provision to the election bill, now in the special session version, which creates a ballot-curing process but contains ambiguous rules and few options for voters. It’s also unclear whether this process would be extended to absentee ballot applications rejected for ID mismatches—even as legislators put far more emphasis on matching those numbers than on matching signatures. The current special session version of the elections bill allows ballots and applications whose numbers do match to skip the signature-verification process entirely. But what happens if the numbers don’t match? The ballot is immediately rejected, and the bill is unclear on whether voters can appeal *those* rejections.

“They created this new language on curing ballots, but we may never get to that step,” said Davis. In other words, Republicans built contradictory provisions into their bill—whether intentionally or unintentionally—creating a solution to a problem that may no longer exist while also creating a new problem.

“Curing is critical to security,” said Tammy Patrick, a mail-ballot expert and senior adviser to the elections project at the Washington, D.C.-based Democracy Fund, a foundation aimed at improving the democratic process. Allowing voters to correct rejected ballots is obviously beneficial to voters. But it also allows election workers to determine if a mismatched signature is evidence of fraud or an innocent mistake. If there is widespread voter fraud, as many Republican officials believe, then the ballot-curing process could help root it out, though election administrators say they are far more concerned about a rash of needlessly rejected ballots.

“I used to make those calls [in Arizona] and every time the answer was that they had just suffered a stroke or their arm was in a cast or they signed the envelope on the dashboard of the car while driving to drop it off,” Patrick said. “It was important to know why those signatures mismatched rather than leave that question unanswered.”

The bill’s current ballot-curing language differs slightly between the House and the Senate. While the House version indicates that counties must institute a process for curing rejected ballots, the Senate’s version makes the process optional, eliminating the ability to achieve consistency among counties—one of the major motivations for House Republicans. “Consistency and clarity was the goal,” said Clardy. “It should be the same in every county.”

Both bills provide few options for voters to appeal the decision to reject their ballots. One option allows local officials to mail the suspect ballot back to the voter, who would then send in a corrected version—a shaky prospect, especially for voters who are out of state at election time, given the U.S. Postal Service’s slow delivery performance in recent years.

7/27/2021

The Texas Election Bill Contains a New Obstacle to Voting That Almost No One Is Talking About – Texas Monthly

Another option allows voters to return ballots in person, which would not be possible for homebound or far-flung voters. Other states such as North Carolina and Arizona allow far more options, including resolving the matter over the phone or by email.

Several Republican House members including Clardy, Charlie Geren, Jacey Jetton, and Matt Shaheen, said in interviews that they'd prefer the ballot-curing provision be mandatory. Clardy called the opportunity to appeal a rejected ballot a "fundamental issue of fairness." He added: "This is one of those areas—and I'm glad you pointed it out—that we would want correcting language for."

But it's unclear why the authors have designed a ballot-curing process that focuses so much on signatures. After all, if the current proposal becomes law, "signature matching goes the way of the dinosaur" anyway, said Davis. Election administrators, including Davis, said they do not understand how the ID-matching section will impact the ballot-curing process, or how many ballots might even make it to the newly crafted curing process at all. No legislator was able to explain it either.

This article is a collaboration with Votebeat, a nonprofit news outlet focused on voting access and election integrity.

Mr. COHEN. "The Magnificent Seven," that was good. That was good.

Without objection, all Members will have five legislative days to submit additional written questions for the Witnesses or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 4:57 p.m., the Subcommittee was adjourned.]

QUESTIONS AND ANSWERS FOR THE RECORD

Questions for the Record Chairman Jerrold Nadler (D-NY)
Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage”

July 27, 2021

Thomas A. Saenz, President and General Counsel MALDEF

1. What constitutional basis does Congress have to pass practice-based coverage that would survive scrutiny from the current Supreme Court?

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, but only in application to federal elections.

As explained in my written testimony, 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 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.

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. 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.

2. How widespread is voter suppression in our country today and, in your opinion, are such efforts increasing? Are the remaining enforceable provisions of the Voting Rights Act adequate to counteract voter suppression measures?

Comparative rates of voter registration and voter participation among racial groups 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 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 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 or revamped 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 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 explained in my written testimony, litigation under Section 2 is costly – in direct resources and opportunity costs – and time-consuming. The alternative dispute resolution (ADR) mechanism of 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.

3. How widespread is voter fraud in our country today? Does the amount of voter fraud in the United States justify current state-based efforts to restrict the vote?

There is no credible evidence of widespread voter fraud, in any form, in the United States going back many decades. Isolated instances of voting by ineligible persons

have never emanated from any proven conspiracy and have never amounted to quantities sufficient to remotely affect the outcome of elections. The absolute absence of any evidence of significant voter fraud is undoubtedly what led to the early termination of the much-vaunted Trump administration Presidential Advisory Commission on Election Integrity, led by Mike Pence and Kris Kobach, which pursued its work in a very non-public manner and then was swiftly disbanded without producing any public finding. Furthermore, with respect to the 2020 presidential election, absolutely no evidence supports the Big Lie. Despite review in multiple federal courts, no credible evidence of fraud has emerged with regard to the unprecedented turnout in the November 2020 election.

Available evidence of voter fraud, or more accurately the complete absence of evidence, does not remotely justify substantial changes in the process of voting in any state of the nation. Instead, these state-based efforts seem to be grounded in the worst sort of bootstrapping: proponents perpetuate false narratives of voter fraud that undermine public confidence in election integrity; then, the reduction of public confidence in election integrity is used to justify measures that suppress voter participation, particularly among new and infrequent voters. To be clear, evidence of voter fraud does not support any of these measures; false narratives intended to undermine public confidence create a very thin and flimsy facade of legitimacy for these measures as needed to bolster public confidence in election integrity.

4. How do voter suppression measures today compare to the Jim Crow era?

I am aware of no one who would suggest that voter suppression anywhere in the country today has reached the level of the Jim Crow era, when huge proportions of the legitimate electorate were completely barred, on the basis of their race, from casting an effective vote, through multiple suppressive mechanisms, formal and informal. But, this issue is a canard put forward by those interested in perpetuating voter suppression that, while not as complete in effect as during the Jim Crow era, would still have outcome-determinative impacts on local, state, and even national elections.

The Fourteenth and Fifteenth Amendments of the United States Constitution do not solely protect against a resumption of the Jim Crow era. They exist to protect against any deprivation of the right to vote on the basis of race or ethnicity, including deprivations that could affect the outcome of democratic elections. Because both amendments predate the Jim Crow era, it is certainly true that congressional inaction to enforce the amendments following the notorious

Compromise of 1877 contributed to the initiation and continuation of the Jim Crow era; however, that failure to act does not mean that congressional action to enforce is only appropriate when depredations of right approaching the level of Jim Crow are threatened.

Congress can and should step in whenever the right to vote is threatened on the basis of race. Today, we face both new and crafty means to discourage, deter, and prevent voters of color from casting an effective vote, as well as the further proliferation of long-used mechanisms to stem the growing power of ascendant minority group voters. Congress can and should act in response to these developments whether or not they come close to the voter suppression practiced during the Jim Crow era.

5. Why does the Voting Rights Act allow private parties to enforce preclearance obligations?

To be clear, the pre-clearance system is largely driven by the jurisdictions submitting elections-related changes, including identified practices, for pre-clearance, and by the Department of Justice (DOJ) and its Voting Section, which conducts pre-clearance review. While there is opportunity for interested private parties to provide input during the DOJ review process (and this is why pre-clearance constitutes a powerful and efficient mechanism of alternative dispute resolution (ADR)), the Department weighs that input and makes an independent determination of whether the submitted change satisfies the Voting Rights Act (VRA) criteria for pre-clearance. Thus, private parties have a limited role in pre-clearance as determined by DOJ. Private parties cannot enforce pre-clearance obligations, for example, by themselves submitting a change contemplated by a jurisdiction and asking DOJ to disapprove it.

Certainly, where a jurisdiction exercises its VRA-granted right to seek pre-clearance, *see* 52 U.S.C. § 10304(a), from the U.S. District Court for the District of Columbia rather than from DOJ, private parties may, and frequently do, intervene to participate in those court actions to present evidence and legal argument about the presented change. Still, the decision to forego the ADR process of DOJ review and instead to seek court adjudication belongs entirely to the jurisdiction. A private party may not, for example, decide that it does not trust the DOJ and its pre-clearance review and seek to transfer the process to the D.C. court; private parties have no rights in this regard. The decision to go to court belongs solely to the jurisdiction seeking to implement the change that is subject to pre-clearance review.

In fact, the only way that private parties “enforce” pre-clearance obligations is through the right to file a federal-court action when a jurisdiction implements an elections-related change without obtaining pre-clearance where the law requires it to do so. In these actions, the sole questions are whether the change required pre-clearance review and approval, and if so, whether the approval had been obtained before implementation of the contemplated change. This very limited private involvement in enforcement is a recognition that DOJ could not possibly monitor all elections-related changes being implemented in thousands of jurisdictions nationwide. We must rely on private parties to surface changes not presented for pre-clearance review, or too many jurisdictions would simply ignore the pre-clearance obligation and take the gamble that DOJ would not catch them in a timely fashion.

6. How can the Congress best address any diminution in public confidence in the integrity of elections?

The main driver of any diminution in public confidence in the integrity of elections is the perpetuation and propagation of false narratives about the existence and dangers of voter fraud in our current elections systems. Under the First Amendment, of course, Congress can do nothing to restrict the trafficking in false information that we see from political leaders as well as from irresponsible media, including social media, outlets and platforms. Efforts in this regard must be hortatory and emanate from groups of leaders rather than from Congress as a body.

Of course, some of what drives the success of these false narratives is confirmation bias; people are too ready to accept election fraud as an explanation for why the candidate that they favored lost, no matter how badly he or she may have lost. Congress can do nothing formally in this regard, but its leaders can model better behavior, by accepting electoral loss with grace and with an intent to move forward as critical opposition in bipartisan lawmaking, rather than as mindless obstructors of any and all policy initiatives of those who won. As a body, Congress can do what it can to bolster the public availability of evidence that demonstrates strong reason to have confidence in election integrity. These efforts must be bipartisan and consistent, perhaps in the form of a blue-ribbon task force to (again) review election integrity issues.

Lack of familiarity with various specific election processes also permits false narrative to take stronger hold. Donald Trump, who had himself used remote voting in the past, was only able to undermine confidence in remote voting through his onslaught of lies because too many in the electorate are unaware of the specific

mechanics of remote voting. This is because, in too many states, vote-by-mail is unduly restricted to the elderly and some of the disabled. Thus, Congress can increase the overall level of experience with specific electoral processes by working to broaden the availability and use of such specific processes.

In a related vein, widening divergence in voter experience between states contributes to the public lack of familiarity with electoral processes. As the chasm in voter experience between states increases, voters will find it more and more difficult to accept election integrity with regard to other states' processes that are increasingly unfamiliar and dissimilar to their own voter experience. Congress can address this problem by working, through its Elections Clause authority, for example, to introduce greater uniformity in voter experience from state to state. The National Voter Registration Act (NVRA) made strides in this regard, at least with respect to the registration process. Congress needs to attempt more of this greater uniformity, and therefore common familiarity, with respect to other aspects of the voting experience.

Finally, anything that increases eligible voter participation will increase public confidence in election integrity by increasing those who have experience with complete, unobstructed participation and by increasing the perspective that our elections do in fact reflect the preferences of all the people. In this regard, steps like enacting the John Lewis Voting Rights Advancement Act would itself increase, over time, public confidence in the integrity of elections.