S. Hrg. 117–849

RESTORING THE VOTING RIGHTS ACT: COMBATING DISCRIMINATORY ABUSES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

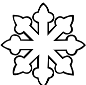
ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

SEPTEMBER 22, 2021

Serial No. J–117–36

Printed for the use of the Committee on the Judiciary



www.judiciary.senate.gov
www.govinfo.gov

U.S. GOVERNMENT PUBLISHING OFFICE
54–945 WASHINGTON : 2025

COMMITTEE ON THE JUDICIARY

RICHARD J. DURBIN, Illinois, *Chair*

PATRICK J. LEAHY, Vermont
DIANNE FEINSTEIN, California
SHELDON WHITEHOUSE, Rhode Island
AMY KLOBUCHAR, Minnesota
CHRISTOPHER A. COONS, Delaware
RICHARD BLUMENTHAL, Connecticut
MAZIE K. HIRONO, Hawaii
CORY A. BOOKER, New Jersey
ALEX PADILLA, California
JON OSSOFF, Georgia

CHARLES E. GRASSLEY, Iowa, *Ranking Member*
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
MICHAEL S. LEE, Utah
TED CRUZ, Texas
BEN SASSE, Nebraska
JOSH HAWLEY, Missouri
TOM COTTON, Arkansas
JOHN KENNEDY, Louisiana
THOM TILLIS, North Carolina
MARSHA BLACKBURN, Tennessee

JOSEPH ZOGBY, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION

RICHARD BLUMENTHAL, Connecticut, *Chair*

DIANNE FEINSTEIN, California
SHELDON WHITEHOUSE, Rhode Island
JON OSSOFF, Georgia

TED CRUZ, Texas, *Ranking Member*
JOHN CORNYN, Texas
MIKE LEE, Utah
BEN SASSE, Nebraska

DAVID STOOPLER, *Majority Chief Counsel*
ANDREW DAVIS, *Minority Chief Counsel*

C O N T E N T S

OPENING STATEMENTS

	Page
Blumenthal, Hon. Richard,	1
Cruz, Hon. Ted,	3

WITNESSES

Riordan, Maureen	12
Prepared statement	46
Saenz, Thomas	14
Prepared statement	58
Responses to written questions	166
Tolson, Franita	7
Prepared statement	119
Responses to written questions	168
von Spakovsky, Hans	9
Prepared statement	70
Yang, John	10
Prepared statement	143
Responses to written questions	171

APPENDIX

Items submitted for the record	45

RESTORING THE VOTING RIGHTS ACT: COMBATING DISCRIMINATORY ABUSES

WEDNESDAY, SEPTEMBER 22, 2021

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 226, Dirksen Senate Office Building, Hon. Richard Blumenthal, Chair of the Subcommittee, presiding.

Present: Senators Blumenthal [presiding], Whitehouse, Ossoff, Cruz, Cornyn, and Lee.

Also present: Senators Durbin, Leahy, Klobuchar, and Padilla.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Chair BLUMENTHAL. The Subcommittee on the Constitution of the Judiciary Committee will come to order. Welcome to my colleagues, and to our witnesses, and to the Chairman of the Committee, Senator Durbin, and the former Chairman, Senator Leahy. I will begin with an opening statement, turn to the Ranking Member, Senator Cruz. Thank you for being here. Then, if any of my colleagues have statements, we will hear from them.

Congress enacted the Voting Rights Act, as you all know, to confront one of the country's most enduring and deepest faults, the continued denial of equal participation and representation to citizens on account of their race.

A century after the Civil War ended, our Nation still failed to eradicate the blight of racial discrimination in voting and the promise of political equality remained unfulfilled for Black citizens.

In accomplishing what the ratification of the 14th and 15th Amendments had failed to do, the Voting Rights Act became, in the words of President Lyndon Johnson, "One of the most monumental laws in the entire history of American freedom." Congress reevaluated the continuing necessity of the Voting Rights Act five times between 1970 and 2006. Each time, it authorized the Act with overwhelming bipartisan support.

Congress didn't take this task lightly. Each authorization was accompanied by countless hearings, voluminous fact-finding, and it consistently led to the conclusion that the Voting Rights Act played and continues to play a continuing indispensable role in securing the Constitution's promises.

Because of the Voting Rights Act, the Department of Justice and ordinary voters were able to use the preclearance process to halt

the implementation of well over 1,000—1,000—discriminatory election rules proposed by State and local officials before those rules went into effect and had a repressive impact.

In recent years, the Supreme Court has all but disregarded Congress' judgment about the continued need for the Voting Rights Act, and has begun undermining the core protections, including preclearance. Most importantly, for the purposes of today's hearing, in 2013, in *Shelby County v. Holder* the Court rendered a 5-to-4 intensely partisan decision that overruled Congress' judgment. Although the Court ostensibly left preclearance intact, it invalidated a formula that determined which jurisdictions were subject to preclearance, and it thereby rendered the law essentially dead letter.

This year alone, we've experienced the most destructive legislative session for voting rights in generations, with States and localities enacting a torrent of new voting restrictions. Between January 1st and July 14th of this year, more than 400 bills that included provisions that restrict voting access have been introduced in 49 States. During that time, 18 States successfully enacted 30 laws that made it harder for people to vote.

These laws make mail voting and early voting more difficult. They manipulate the boundaries of districts to reduce minority representation. They've led to a purge already of up to 3.1 million voters from the rolls in areas that were once covered by the Voting Rights Act preclearance requirement.

Through decades of experience, Congress has learned that much of the success of the Voting Rights Act came from its capacity to meet ever new forms of discrimination. Justice Ginsburg, in her very powerful dissent in *Shelby County*, pointed to the vile infection of racial discrimination in voting, and said it, "resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place."

Today's reinvigorated efforts to deprive members of minority groups from equal access to the ballot box, through more subtle, second-generation barriers, proves that a new preclearance regime is needed now more than ever, and that's why we are here today.

Our response to the Supreme Court's decision in *Shelby* is the John Lewis Voting Rights Advancement Act. Passed by the House this year and introduced in the Senate last Congress, it includes new formulas to revive preclearance and protect the right to vote.

We're here today to focus on one of those best-known practices or practice-based coverage formula, which specifies types of restrictive practices that we've seen again and again and again. Repeated, known practices. They impose discriminatory effects, and our goal is to prevent those discriminatory effects in areas of increasing diversity before they can do damage.

The new practice-based preclearance regime responds directly to the Supreme Court's concerns with the prior preclearance formula, and it will allow the Voting Rights Act to keep pace with present conditions and America's rapidly changing demographics. It is narrowly tailored and targeted. Let me repeat. Narrowly tailored and targeted to those known practices that have been repeatedly used to suppress the vote based on discrimination.

Protecting that right to vote, equal opportunity to participate in the political process, is not a matter of partisanship, but of fulfilling the founding ideals of our Nation. Nothing is more fundamental, nothing, than the right to vote, and we must protect it from the torrent of restrictions that threaten it.

Thank you all, and I now turn to the Ranking Member.

STATEMENT OF HON. TED CRUZ, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CRUZ. Thank you, Mr. Chairman. By my count, this is the fourth hearing that Democrats have held this year to try to push their radical agenda to weaponize voting laws for partisan advantage.

The first hearing was in the Rules Committee on S. 1, what many are calling the Corrupt Politicians Act. That bill was the most brazen power grab we've seen in at least a generation, and it was designed so the Democrats would never lose an election for the next 100 years.

A month later, the Judiciary Committee held a hearing entitled, "Jim Crow 2021." That hearing was designed to impugn Georgia's common sense election bill. Much to Democrats' dismay, it did the exact opposite. By the end of the hearing, Chairman Durbin was forced to admit that the hearing title was simply meant to be "provocative." Why? Because the testimony showed that calling Georgia voting integrity efforts Jim Crow was offensive and had no connection to reality.

Ironically, there is a connection to Jim Crow that is playing out in this Congress. The original Jim Crow laws were laws that were written by Democrats, designed to prevent the voters from voting Democrats out of office, and they worked brutally effectively. In today's Democratic Congress, we again see Democrats wanting to change the rules so that the voters cannot vote Democrats out of office. There's a consistency to it, but it's not the consistency that fits the political narrative from the Democratic Party.

Just recently, in July, this Subcommittee held yet another hearing where Democrats argued for Congress to overturn two Supreme Court decisions: *Shelby County v. Holder*, and *Brnovich v. Democratic National Committee*. The facts and the testimony at the hearing demonstrated that both decisions were indisputably correct.

These hearings are having an effect on the national conversation, but not the one that the Democrats want. The more that Democrats talk about their voting bills, the less popular they become because people see them for what they are: naked, partisan power grabs. This hearing is ostensibly on practice-based preclearance, and I expect that it will be no different.

When it comes to election law, Democrats have failed to get their way in statehouses across the country. State legislatures elected by the people have not been nearly as willing as Washington Democrats to try to rig the system so the voters can only elect Democrats.

So now, the solution from our Democratic colleagues is to circumvent the Democratic process altogether. These pesky voters have a way of getting in the way of ensuring Democratic power,

and instead, to give unelected, far-left bureaucrats total veto power over democracy. The power to stop popular voting laws dead in their tracks that is mildly given the Orwellian name, practice-based preclearance.

Here's how it would work. Every State and local government across the country would have to submit, on bended knee, to Kristen Clarke and Vanita Gupta, two of the most radical, left-wing Democratic activists to ever walk the halls of the Department of Justice—also advocates for abolishing the police. You want to understand where they fall in the mainstream? Even our Democratic colleagues claim they don't support abolishing the police. The overlords that they would give veto power over every election law in America have both publicly, repeatedly in writing, advocated for abolishing the police. Those overlords, those partisan activists, would be given the power to set aside laws adopted by legislatures elected by the people.

Remember this. It's essential in Democratic rhetoric that they claim to support democracy. Just pause and understand the proposal they're putting forward undermines democracy. Democracy is the people electing, the people choosing. This bill says, nope. You pesky citizens who have a bad habit of voting for laws that make it harder for Democrats to stay in power forever, we're going to take away the power from the people. That's what this bill is about.

These partisan activists at the Department of Justice and their DOJ staffs, the vast majority of whom, for a long time, have been just as radical, just as partisan as they are, as one of the witnesses today, I expect, will testify. They would have the ability to object to these laws, to prevent them from going into effect. When they object, the State and local government couldn't implement the law unless and until they spend a tremendous amount of time and money fighting that objection in court.

This is an unbelievable amount of power going into the hands of a handful of unelected bureaucrats. You know, the Democrats might not be pushing that if not for the fact that they know those bureaucrats will be Democrats using that power to elect other Democrats.

That means if this bill doesn't pass, those unelected bureaucrats wouldn't be able to veto voter ID laws. Voter ID laws are immensely popular. Seventy to 80 percent of Americans support voter ID laws. A majority of Democrats in America support voter ID laws. A majority of African Americans in this country support voter ID laws. You know who doesn't support voter ID laws? Every Democrat on this side of the aisle, and they want to empower unelected bureaucrats at the Department of Justice to say, if you require a voter ID, that law is illegal and invalid.

Likewise, laws enhancing the security of absentee ballots. This bill would give an unelected bureaucrat the ability to say, nope, States, you have no power to ensure that an absentee ballot is secure. No power to ensure than an absentee ballot is safe. Why? Because Democrats do better in absentee ballots. When their efforts to protect the security of absentee ballots, it means that fraud is harder. I have to say, it is a strange place we find ourselves that one of the two major parties in America has decided that voter fraud is an outcome they are affirmatively in favor of. This is all

about giving unelected bureaucrats the ability to stop any and all reasonable voter integrity laws.

One final example. H.R. 4, the bill that this hearing is discussing, would require a State to preclear any law changing the way it maintains its voter rolls. The Carter-Baker Report—who are Carter and Baker? That would be Jimmy Carter, former Democratic President of the United States, and James Baker, former Republican Secretary of State. They led a comprehensive commission on voter fraud. Today's Democrats insist voter fraud doesn't exist. Carter-Baker Commission concluded voter fraud was a serious problem. It had a whole series of recommendations, and one of the amazing things, if you go through the Carter-Baker Commission, look at their recommendations for how to enhance the integrity of elections, what today's Democrats have done is just flipped everyone on its head. Okay, if our objective as Democrats is to detract from the integrity of elections, let's do the opposite of what Democratic President Jimmy Carter suggested.

The Carter-Baker Commission, for example, made clear that fraud, "arises from inactive or ineligible voters left on voter registration lists," and further, that, "the process of dating the list should be continuous."

For our friends in the Democratic aisles said, "Well, gosh, we certainly don't want lists with dead people. That would really undermine the integrity of elections," then you would expect them to say that seems like a good idea from former Democratic President Jimmy Carter. But, "No, no," they say, "if you want to update the list in any regard, if you want to remove dead people so people can't vote in the names of people who've gone to the life hereafter, well, you've got to get Kristen Clarke and Vanita Gupta to sign off on it."

This is all about political power, and it is about political power at the expense of the people, and at the expense of democracy. It is cynical, and it's wrong.

Chair BLUMENTHAL. I would turn to my colleague, Senator Leahy, if he has any opening remarks, in light of his extensive past involvement, or to the Chairman, Senator Durbin. I noticed Senator Cornyn is also here. If any of them have opening remarks.

Senator LEAHY. I yield to Senator Durbin. I'll say I do have questions, though, when the time comes to ask questions.

Chair BLUMENTHAL. I will introduce the witnesses if none of my colleagues have opening remarks.

We have an extraordinarily distinguished panel, I'm happy to say. I am very grateful to all of you for being here today. Professor Franita Tolson is vice dean for faculty and academic affairs and professor of law at the University of Southern California Gould School of Law, where she also holds an appointment in the political science and international relations department. Her scholarship and teaching focus on the areas of election law, constitutional law, and legal history. She has written on a wide range of topics, including partisan gerrymandering, political parties, the Election Clause, the Voting Rights Act of 1965, and the 14th and 15th Amendments. Vice Dean Tolson is one of the co-authors of the leading election law casebook, "The Law of Democracy," published by the Foundation Press. Sixth edition is forthcoming in 2022, I understand.

Her forthcoming book, "In Congress We Trust?: Enforcing Voting Rights from the Founding to the Jim Crow Era," will be published in 2022 by Cambridge University Press.

Mr. Hans von Spakovsky is senior legal fellow and manager of the election law reform initiative in the Center for Legal and Judicial Studies at the Heritage Foundation. Prior to joining the Heritage Foundation, he served as a Commissioner of the United States Federal Election Commission for two years and as a career lawyer in the Civil Rights Division of the Department of Justice, including serving as counsel to the Assistant Attorney General from 2002 to 2005. During that time, he helped coordinate the enforcement of Federal voting laws, and he received three meritorious service awards.

Mr. John Yang is president and executive director of Asian Americans Advancing Justice, AAJC. He leads the organization efforts to fight for civil rights and empower Asian Americans to create a more just America for all through public policy, advocacy, education, and litigation.

Mr. Yang uses his extensive legal background to enable Advancing Justice, AAJC, to address systematic policies, programs, and legislative attempts to discriminate against and marginalize Asian Americans and Pacific Islanders and other minority communities. Mr. Yang has held leadership positions in the American Bar Association, the D.C. Bar Association, and co-founded the Asian American Pacific Legal Resource Center, a nonprofit organization dedicated to addressing direct service legal needs of Asian Americans in the DC metropolitan area.

Ms. Maureen Riordan is litigation counsel at the Public Interest Legal Foundation. Ms. Riordan previously served in the Department of Justice for more than 20 years, including 18 years as Senior Counsel to the Assistant Attorney General for Civil Rights, and senior trial attorney in the Voting Section, as well as her service as Assistant Director of the Servicemembers and Veterans Initiative, and as a Special Assistant United States Attorney in the Western District of Virginia.

Prior to her tenure at DOJ, Ms. Riordan served as assistant district attorney in Nassau County, New York for 15 years.

Mr. Thomas Saenz is president and general counsel of MALDEF. He leads the organization in pursuing litigation, policy advocacy, and community education to promote the civil rights of all Latinos living in the United States, in the areas of education, employment, immigrants' rights, and voting rights.

He joined MALDEF in August 2009, after 4 years on the Los Angeles staff of Mayor Antonio Villaraigosa. He previously spent 12 years at MALDEF, practicing civil rights law, including 4 years as lead counsel for MALDEF in various cases, including challenges to California Proposition 187, California Proposition 227, and California redistricting.

In 2006, Mr. Saenz argued before the U.S. Supreme Court in the *United States v. Texas*, representing intervenors defending the Obama administration's deferred action initiative. He graduated from Yale College and Yale Law School. He clerked for two Federal judges before initially joining MALDEF in 1993.

I'm going to swear the witnesses, as you know is our custom, and then ask each of you to present your opening statement. We'll have rounds of questioning, 5 minutes each. If you would please stand.

[Witnesses are sworn in.]

Chair BLUMENTHAL. Dean Tolson, why don't we begin with your testimony, if we may.

STATEMENT OF FRANITA TOLSON, VICE DEAN FOR FACULTY AND ACADEMIC AFFAIRS AND PROFESSOR OF LAW, UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW, LOS ANGELES, CALIFORNIA

Dean TOLSON. Thank you. To Chairman Blumenthal, Ranking Member Cruz, and distinguished Members of the Subcommittee, thank you for the opportunity to appear and speak about what will hopefully be the Senate version of the John Lewis Voting Rights Advancement Act of 2021.

It is beyond dispute that voting rights are under assault, and this provision is a necessary step toward 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 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 voter discrimination as a relic of a 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 pre clearance updates the provisions that would trigger Federal oversight of State electoral systems, from the long-eradicated practices like the poll tax and literacy test heavily criticized by the *Shelby County* majority 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 practice-based preclearance. The 14th and 15th Amendments protect the fundamental right to vote and prohibit racial discrimination in voting, respectively.

While the 15th Amendment empowers Congress to address racially discriminatory action by the States, the 14th 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 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 14th and 15th Amendments. In *South Carolina v. Katzenbach*, in *City of Rome v. United States*, the Court rejected the argument that Con-

gress' enforcement power under the 15th Amendment was limited to remedy only intentional, racial discrimination, and read that provision to be as broad as the necessary and proper clause of Article 1.

Similar to the 15th Amendment, the Court had also described Congress' power under the 14th as broader than the judicial power to define the substantive reach of its provisions, but the Court substantially narrowed this authority in a case called *City of Boerne v. Flores*. According to the *City of Boerne* decision, Congress' enforcement powers are limited to remedial fixes, and do not include the ability to make substantive changes to the scope of the 14th Amendment.

There are two important take-aways from the *City of Boerne* decision 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 for 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 prohibition on racial discrimination in voting. Consequently, Congress is empowered to protect this right through appropriate legislation under Section 5 of the 14th Amendment, even in the absence of a pattern of racial discriminatory intent on the part of the States.

Congress also has broad authority to enact practice-based preclearance through 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), ignored how the Elections Clause, as a potential source of congressional 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 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.

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 geographic area or jurisdiction.

Congress' power under the 14th and 15th Amendments and the Elections Clause provide sufficient authorization for practice-based preclearance 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. Thank you.

[The prepared statement of Dean Tolson appears as a submission for the record.]

Chair BLUMENTHAL. Thanks very much, Dean Tolson. We're going to turn to Mr. von Spakovsky.

STATEMENT OF HANS VON SPAKOVSKY, MANAGER OF THE ELECTION LAW REFORM INITIATIVE AND SENIOR LEGAL FELLOW, HERITAGE FOUNDATION, LOS ANGELES, CALIFORNIA

Mr. VON SPAKOVSKY. Thank you, Mr. Chairman. There is no need for legislative reforms to the Voting Rights Act, which is one of the most successful laws ever passed by Congress. After the Supreme Court's correct decision in *Shelby*, the Voting Rights Act, including Section 2, remains a powerful statute that is more than sufficient to protect all Americans.

With the latest guidance from the Court on the proper application of Section 2 in the *Brnovich* decision, the Justice Department and private parties have the legal means to stop those increasingly rare instances of voting discrimination when they occur. The claim that there is a wave of voter suppression going on that requires expansion of the Voting Rights Act is simply false.

Enhancing the integrity of the election process through reforms such as voter ID requirements and improvement to the accuracy of voter registration lists protects voters and is not voter suppression.

A 2019 survey of 10 years of turnout data from all 50 States found that voter ID laws "have no negative effect on registration or turnout overall or for any group defined by race, gender, age, or party affiliation." Voter ID laws are in place in numerous States, like Indiana, Georgia, Alabama, Tennessee, South Carolina, Wisconsin, Kansas, Arkansas, Mississippi, and Texas, because courts agree they are not discriminatory.

There have been steady increases in registration and turnout in States that have implemented such reforms. The Justice Department has seen a steady decrease in enforcement actions due to a decreasing number of violations of Federal law. During the entire eight years of the Obama administration, DOJ filed only four cases to enforce Section 2. The Trump administration filed two Section 2 cases, so the frequency of the cases was exactly the same.

Thus, there was no upsurge in Section 2 cases after the *Shelby County* decision. In fact, the Obama administration filed far fewer Section 2 enforcement actions than the Bush administration. That record does not support the claim that there are widespread, unlawful voter suppression actions being taken against minority voters.

The Census Bureau's 2020 election survey also clearly demonstrates there's no wave of voter suppression, keeping Americans from registering and voting that requires amending and expanding the VRA. Indeed, the Census Bureau reports that the turnout in last year's election was 66.8 percent, just short of the record turnout of 67.7 percent of voting age citizens in the 1992 election. This was higher turnout than in President Barack Obama's first election.

The census survey shows that there was higher turnout among all races in 2020 when compared to the 2016 election. In fact, in an election year in which we were dealing with an unprecedented shutdown of the country due to a pandemic, we had, according to the Census Bureau, the highest voter turnout of the 21st Century.

The proposed amendments are almost certainly unconstitutional because they do not satisfy what is required by the Supreme Court's decision to justify continuing, much less expanding, the preclearance requirement.

Any requirement that States obtain preapproval of voting changes can only be imposed if Congress can show blatantly discriminatory evasions of Federal court decrees, lack of minority office-holding, voting tests and devices, voting discrimination on a pervasive scale, and flagrant or rampant voting discrimination. None of those conditions are anywhere to be found in any State in 2021.

The new coverage formula is also unfair and violates basic due process principles and will not satisfy constitutional concerns since it will impose coverage, even on jurisdictions that have never engaged in any discriminatory conduct because of problems caused by other jurisdictions within a State.

The unprecedented practice-based preclearance provision also violates basic due process. It is so broad and covers such a wide spectrum of election procedures that virtually all changes made by State and local governments could be vetoed.

The provisions also in the bill intended to overturn the *Brnovich* decision are ill-advised and interfere with the States' constitutional authority over the administration of elections. They attempt to get rid of factors that are very relevant to determining whether a Section 2 violation has occurred. With the availability of Section 3 of the Voting Rights Act, which allows a court to impose preclearance requirements on a specific jurisdiction, that is much better than a broad-based coverage.

It is not 1965, and there is no longer any justification for giving the Federal Government the ability to veto the election laws chosen by voters and their elected representatives. Thank you.

[The prepared statement of Mr. von Spakovsky appears as a submission for the record.]

Chair BLUMENTHAL. Thank you. Mr. Yang.

STATEMENT OF JOHN YANG, PRESIDENT AND EXECUTIVE DIRECTOR, ASIAN AMERICANS ADVANCING JUSTICE (AAJC), WASHINGTON, DC

Mr. YANG. Good morning. Thank you. Thank you to Chairman Blumenthal, Ranking Member Cruz, and the other Members of this Subcommittee and Committee. 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 Asian-American voters.

In targeting those practices that have been used throughout 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 election, practice-based preclearance will ensure that these practices are reviewed in areas where Asian Ameri-

cans 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 minority communities.

These issues have a special relevance to the Asian-American community. According to the 2020 census, Asian Americans are the Nation's fastest growing ethnic group, with a growth rate of 35 percent between 2010 and 2020, growing to over 24 million Asian Americans, and making up over 7 percent of the total population. Our community has more than doubled in the last 20 years.

For our community, this issue is not a partisan one. It is about having a voice in democracy. 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 for the Transcontinental Railroad, as Japanese-American soldiers in the most decorated World War II combat regiment, Senator Inouye's 442d.

Nevertheless, Asian Americans are still perceived as outsiders, aliens, perpetual foreigners. Indeed, we have seen an exponential rise in anti-Asian hate the last 21 months because of the scapegoating of Asian Americans as foreign, disease-carrying, and somehow a threat to America.

Because of these rapidly changing demographics, a fully restored Voting Rights Act must include both a substitute coverage formula for jurisdictions, based on a history of voting discrimination, and a mechanism that addresses the needs of emerging communities of color that face discrimination aimed to silence their political influence by those currently in power.

In this manner, a history-based coverage formula alone is not enough to protect the voting rights of emerging minority populations. The reality is that more and more of the most rapidly growing racial, ethnic, language minority communities are found in cities and States where there were not significant numbers previously. Stated differently, those jurisdictions where minorities have grown rapidly in size only recently often are unlikely to have a history of voter suppression because such tactics were previously unnecessary.

Yet history has borne out that the pockets of the most determined efforts to restrict minority voting rights were in areas of the country where racial, ethnic groups made up a larger than average share of the population because that is when they will be more likely to have a substantial influence on election outcomes. An assessment by Professor Luis Fraga in testimony before the House Judiciary Committee shows that the U.S. has a long history of restricting the vote to specific segments of the population across the Nation, which were often identified as a group based on race, ethnicity, national origin, or gender.

Racial tensions often occur when groups of minorities grow rapidly in an area and when there is an increase in political relevance of that minority community, such as Asian-American communities across the country. This can lead to fear or resentment toward Asian Americans by those in power, which can then result in hampering Asian Americans in exercising their freedom and right to vote without harassment and discrimination.

Discriminatory attitudes toward Asian Americans and the perpetual foreign image unfortunately have been squarely imbedded in the political process. Insidious manifestations of the stereotype can be found in the negative political ads and the manipulation of images of minority candidates in an attempt to trigger negative stereotypes. For example, State legislator in 2009 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 suggests, among other things, that Asian Americans are somehow apart from other Americans.

Similarly, in a 2004 primary election, supporters of a white incumbent facing Vietnamese-American opponent challenged the eligibility of only Asian Americans at the polls. The losing incumbent's rationale was if they couldn't speak good English, they possibly weren't American citizens. These two examples just provide just a snapshot of the types of discriminatory practices historically used to silence the voice of minority voters.

In conclusion, by including a preclearance mechanism based on practices, we are complementing the jurisdictional coverage formula to provide an efficient manner for addressing jurisdictions where minority populations are growing in previously nonmajority jurisdictions. By doing so, we will be safeguarding the political voice of all citizens. Thank you.

[The prepared statement of Mr. Yang appears as a submission for the record.]

Chair BLUMENTHAL. Thanks, Mr. Yang. Ms. Riordan.

STATEMENT OF MAUREEN RIORDAN, LITIGATION COUNSEL, PUBLIC INTEREST LEGAL FOUNDATION, INDIANAPOLIS, INDIANA

Ms. RIORDAN. Good morning, Mr. Chairman, Ranking Member Cruz, and Members of the Subcommittee. Thank you for your invitation to testify before you today. I am currently a litigation associate with the Public Interest Legal Foundation, which is a nonpartisan charity that devotes itself to promoting election integrity and preserving the constitutional mandate that allows States to administer their own elections.

I've been an attorney approximately 35 years. Twenty of those years, I served in the Civil Rights Division at the Department as both the Voting Section attorney and as Senior Counsel to the Associate to the AG for Civil Rights. From 2000, when I began at the Department until 2013, when the *Shelby County v. Holder* decision was made by the Supreme Court, my primary responsibility was to review changes in voting that were submitted for preclearance.

If passed H.R. 4 will give tremendous power over the election procedures of every State and local election to the partisan bureaucrats in the Voting Section. I watched this power abused firsthand, and I would like to share with you a few of the experiences I had while working there.

I began my employment in 2000, right prior to the 2000 election, and when the Florida recount occurred, I personally observed attorneys within the Section strategizing, faxing, and receiving faxes from DNC operatives in Florida. Such partisan beliefs permeate every aspect of the Section's work.

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

I would urge everybody here to read the DOJ Inspector General report on the Voting Section. It provides instance after instance of bad behavior, often racially motivated. It includes abuse of an African-American paralegal that was deemed by other attorneys in the Section not to be Black enough.

The Voting Section has a long record of abuse by its lawyers for improper collaboration with other advocacy groups. Between 1993 and 2000, the Voting Section has been sanctioned $2,358,000. For example, in *Johnson v. Miller*, the United States District Court sanctioned the Voting Section almost $600,000 for collusive misconduct by DOJ attorneys with attorneys from the ACLU. The Federal court pronounced the collusion between the DOJ and the ACLU as disturbing, and when an attorney, when questioned by the court, could not remember the exact circumstances of the relationship, the judge found that her professed amnesia was less than credible.

That continues today. On more than one occasion, after receiving a submission for a review, I was instructed to strategize with these very same advocacy groups. Furthermore, there is an open hostility to conservative States and elected officials. I've observed signs on doors that say, "Mess with Texas," and I've seen the targeting of specific elected officials when they review State redistricting maps for preclearance.

Abuse of power in the Section 5 process is not confined to *Johnson v. Miller*, and my written testimony provides additional instances. Section 5 was a temporary provision and for a reason that no longer exists. The Supreme Court make clear in *Shelby* that today, only certain conditions would justify any formula for a Section 5 coverage, including blatantly discriminatory evasions of Federal decrees, voting discrimination on a pervasive and rampant scale, and lack of minority officeholders.

I would ask Senators who support this bill to cite one single instance of an invasion of a Federal decree in a voting rights case. Just one.

As the Supreme Court stated, Federal intrusion into the powers reserved by the Constitution to the States must relate to empirical and present circumstances. According to information received from DOJ through a FOIA request by our organization, from 2000 to 2013, while I was at the Voting Section, we reviewed 222,132 submissions, but issued only 81 objections. An objection does not require any evidence of intentional discrimination. That is only .036 of 1 percent of all the submissions reviewed.

The proposed changes to Section 2 that are included in H.R. 4 turned Supreme Court precedent on its head. Once Americans begin to suspect that the Voting Rights Act is no longer being used to protect racial minorities, but political parties, they will stop supporting it. Once Americans think that Section 2, which has been

an incredibly successful civil rights statute, is a partisan tool, you will see support for civil rights evaporate. Thank you.

[The prepared statement of Ms. Riordan appears as a submission for the record.]

Chair BLUMENTHAL. Thank you very, very much, Ms. Riordan. Now, Mr. Saenz.

STATEMENT OF THOMAS SAENZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, LOS ANGELES, CALIFORNIA

Mr. SAENZ. Thank you. Good morning, Mr. Chair, honorable Senators. For the last 12 years, I've had the great honor of leading the Mexican American Legal Defense and Educational Fund, a now 53-year-old national legal civil rights organization whose mission is to promote the civil rights of all Latinos living in the United States. Throughout those 53 years, we have engaged in much litigation under Section 2, Section 5, Section 203 of the Voting Rights Act, as well as under the 14th and 15th Amendment with respect to voting in this country.

In addition to leading MALDEF, for the last 7 years, I have been the lead administrator of an informal consortium of 12 of the leading nonprofit voting rights litigating organizations in this country. Based on that experience, I can assure you, without any doubt, that the 2013 decision in *Shelby County v. Holder* dealt a severe blow to civil and voting rights in this country. It did so by effectively dismantling Section 5 of the Voting Rights Act of 1965, a provision accurately characterized by many as the most effective piece of civil rights legislation in our Nation's history. That provision, which blocked, as you've indicated, Mr. Chair, a number of voting rights violations from ever taking effect, over the years, prevented and deterred numerous violations of voting rights. It did so in an efficient and effective manner by employing an alternative dispute resolution, or ADR mechanism.

That's right. In addition to being an effective civil rights law, Section 5 was also perhaps the first enactment by this Congress of an ADR program for resolving disputes, these relating to voting rights.

Like all good ADR, preclearance is efficient and effective, preventing waste of time and cost in litigation that would otherwise occur under Section 2 and other provisions of the Voting Rights Act. The ADR that was effectively disabled in the *Shelby County* decision took the form of requiring covered jurisdictions to submit for pre-review voting-related changes to the Department of Justice, or, at the option of the jurisdiction—an option that at MALDEF we have seen the State of Texas invoke on numerous occasions—to the U.S. District Court in Washington, DC, for a pre-review and approval of those changes.

Dismantling preclearance, as accomplished by the *Shelby County* decision, must be reversed for us to have a hope of preserving voting rights in the future in this country. As I have mentioned, litigation under Section 2 that MALDEF and the other groups we work with in that consortium have consistently engaged in is expensive and time-consuming. It is so because, under the law, Section 2 ap-

plies a totality of the circumstances test in court to allege violations of voting rights.

As totality of the circumstances suggests, these cases involve multiple expert and lay-witnesses, thousands of pages of documents, before they reach resolution. That means that we need an alternative in order to ensure that voting rights violations are not widespread across this country. That alternative is the ADR in preclearance.

Litigating under Section 2 is simply not possible as a sole mechanism to prevent voting rights violations. The legislation considered and passed by the House included practice-based coverage as an element of a new preclearance formula. Practice-based coverage focuses specifically on practices that have a long history—demonstrated history—of being used to violate the rights of minority voters. Generally speaking, this has occurred where a jurisdiction sees a group of minority voters reaching a tipping point, critical mass to be perceived as a threat to those currently in power. That's when they invoke these voting rights violations, vote suppression mechanisms.

Preclearance, the practice-based coverage formula, would use the efficient mechanism of pre-review by the Department of Justice or a U.S. District Court in Washington, DC to ensure that these mechanisms could not be used again to violate the rights of growing minority voting groups.

Representing the Latino community, I recognize, as the census confirmed last month, that the Latino community has a fast-growing community, accounting for over 51 percent of the growth of the entire country over the last decade, will face challenges by those who perceive growing Latino voting communities as a threat, and will need to respond effectively. Practice-based coverage is an essential element of that effective response. Thank you.

[The prepared statement of Mr. Saenz appears as a submission for the record.]

Chair BLUMENTHAL. Thank you, Mr. Saenz. I'm going to turn first for questions to my colleague, Senator Leahy.

Senator LEAHY. Thank you very much, Mr. Chairman. I do appreciate that. You know, as I hear some of the questions being asked, I hear some of the discussions, I thought probably I'd just put a couple facts in here. I'm the lead Senate sponsor of the VRAA. I'm in talks trying to get broader bipartisan support, as there always has been in the past. In fact, restoring the Voting Rights Act has been an overwhelmingly bipartisan effort for virtually the entire history behind American law, whether President Nixon, President Reagan, President Bush and others.

One of the concerns I hear from my Republican friends is that certain preclearance enforcement programs unfairly target some States over others. I understand the practice-based preclearance applies to every State and every jurisdiction equally. I call it an equal opportunity enforcement power. Professor Tolson, could you comment on how practice-based preclearance treats all States and jurisdictions as equals, and shouldn't that help to allay concerns about certain States being treated differently?

Dean TOLSON. Thank you, Senator. Practice-based preclearance is a direct response to the concerns raised by the Court in *Shelby*

County v. Holder about having coverage based on outdated practices like the poll tax or literacy tests, and also using those practices to target specific jurisdiction. Practice-based preclearance doesn't target any geographic areas. Instead, it focuses on practices that courts have consistently found to be used against minorities at a point where they are started to influence the outcome of elections.

In that way, practice-based preclearance is directly responsive to *Shelby County* and applies to all jurisdictions equally.

Senator LEAHY. One of the reasons I asked that—some try to say that preclearances tended to protect just Democratic voters, not other voters. You know, I look at preclearance powers that could stop sudden changes to, well, absentee voting. Rural and elderly voters, who consistently tend to vote Republican, rely heavily on absentee voting, so, Mr. Yang, doesn't preclearance powers have to protect the voting rights of all Americans and not just one group or another?

Mr. YANG. Thank you for that question, Senator Leahy. Absolutely. The program should protect all Americans and not specific categories. That's, again, the benefit of practice-based preclearance is we are focusing on specific practices, number one. Number two, using demographics as a trigger. We are not using necessarily a long history with respect to the recognition that demographics are changing. They oftentimes change rapidly, and the needs could change rapidly.

As I testified earlier, with respect to the Asian-American community, our community is emerging in many places where people would not think of, whether it is in Arkansas, with respect to the Pacific Islander community, whether it is in Nevada, with respect to the Filipino and Chinese American community. Having a practice-based preclearance that is triggered by a practice that is historically known to discriminate and, with respect to demographics, where an emerging minority community exists, that really ensures that we have equal protection for all different categories.

Senator LEAHY. I like dealing in facts. I know the former President, Mr. Trump, spoke heavily about voter fraud, saying that's why he lost by several million votes. There was a significant example of voter fraud in Pennsylvania. They investigated that and found that there was a man who voted on behalf of his dead mother for Donald Trump, but it didn't affect the outcome.

Professor Tolson, what should we remember about the VRAA's history? You studied it as much as anybody I know, and I think about the fact that it brought Republicans and Democrats together across the political spectrum to support it in the past.

Dean TOLSON. So, the thing for me, is that the Voting Rights Act is not designed to protect voters of one party or another, right? It's something that has been consistently, at least prior to 2013, been in place through Republican and Democratic administrations. In recent years, particularly post-*Shelby County*, we've seen efforts to try to diminish the political power of minorities in a post-*Shelby* world.

It's not partisan legislation, and believe it or not, I'm a voting rights expert, and I don't care who people vote for. I just want peo-

ple to vote. Modernizing the Voting Rights Act really is important, and can I make one other point, Senator? Thirty seconds left?

This notion of widespread voter fraud is not something that is really a thing, and I think it's important to emphasize that because what we're seeing is they start to legislate to try to stop something that doesn't exist to match the rhetoric. As you pointed out, there are instances of fraud, but we cannot build a regulatory regime in order to stop a problem that is not extensive. We really do have to step in to protect minority voting rights. That has to be our focus. I'll stop there.

Senator LEAHY. Thank you very much, Senator Blumenthal.

Chair BLUMENTHAL. Thanks very much, Senator Leahy. I'm going to forego my questions and turn to the Ranking Member.

Senator CRUZ. Thank you, Mr. Chairman. I want to start with a question for each of the five witnesses. In your judgment, are voter ID laws racist? Professor Tolson.

Dean TOLSON. Thank you for that question. It depends. One thing we have to stop doing is treating all voter ID laws as the same.

Senator CRUZ. Okay, so, your answer—I want to move quickly, so, it depends is your answer?

Dean TOLSON. Yes, that's my answer.

Senator CRUZ. Okay, so, what voter ID laws are racist?

Dean TOLSON. Apologies, Mr. Cruz. Your State of Texas, perhaps?

Senator CRUZ. Okay, so, you think the entire State of Texas is racist. What about requiring an ID to vote is racist?

Dean TOLSON. I think, sir, that's pretty reductive. I'm not saying the entire State is racist, but——

Senator CRUZ. You just said my State of Texas, so, you tell me what about the Texas voter ID laws is racist?

Dean TOLSON. Absolutely. The fact that the voter ID law was put into place to diminish the political power of Latinos with racist intent, and have been found to have racist——

Senator CRUZ. If you're asserting that, what's your evidence for that?

Dean TOLSON. The Federal district court that first resolved the constitutionality of Texas' voter ID law.

Senator CRUZ. Okay, so, your view is voter ID laws are racist. How about you, Mr. Yang.

Mr. YANG. I agree with Professor Tolson. Voter ID laws can be racist.

Senator CRUZ. That's two. Mr. Saenz.

Mr. SAENZ. There are some voter ID laws that are racially discriminatory in intent.

Senator CRUZ. How about in practice. In intent—fine, you say there's some racists with a malevolent intent lurking in the back of their mind. Let's just talk as a practical matter. When I go to vote, they ask me for my ID. I pull out my ID, I show it to them, I vote. Is that racist?

Mr. SAENZ. If the law that requires you to do that was motivated by racially discriminatory intent, under our Constitution——

Senator CRUZ. What about the effect? Set aside intent. I'm asking about the effect.

Mr. SAENZ. Yes, in effect, I think that there are discriminatory effects from a number of voter ID laws.

Senator CRUZ. Thank you, that's very——

Chair BLUMENTHAL. I'm going to give the witness a chance to answer the question. Go ahead, Mr. Saenz.

Mr. SAENZ. Yes, in effects, I think many voter ID laws are discriminatory, and in design. They are designed to have that effect.

Senator CRUZ. Okay. Ms. Riordan.

Ms. RIORDAN. No, sir.

Senator CRUZ. Mr. von Spakovsky.

Mr. VON SPAKOVSKY. No, particularly because every single State that has passed an ID law has put in a provision to provide a free ID to anyone who doesn't have one. The turnout numbers show it has no effect, and I would remind everyone that the current version of the Texas voter ID law for in-person voting, the Obama administration agreed in court, in a court filing, that they were satisfied with it, and it was not discriminatory.

Senator CRUZ. You know, I have to say this range of question actually shows the wildly partisan nature of the Democrats' proposal. The record should reflect all three of the Democratic witnesses invited by the Chairman maintain to this Committee that voter ID laws can be, in many instances—in most instances, I think are the various ways they formulated—are racist.

Let me tell you who disagrees with that. Thirty-five States across the country disagree with that because 35 States have voter ID laws in effect. Not just 35 States. Eighty-one percent of voters in America disagree with the radical views proposed by the Democrats and the Democratic witnesses. Not just 81 percent of Americans. Seventy-seven percent of Black voters in America support voter ID laws. Seventy-eight percent of Hispanic voters in America support voter ID laws. MALDEF should think about that. Eighty-one percent of low-income Americans support voter ID laws. Yet, what this bill is about is putting radicals in charge of saying, "If you require an ID to vote, that is racist and must be struck down."

This is all about partisan power. DOJ has also said under the Biden administration, that it is not going to presume that a State acts lawfully if it simply returns to pre-COVID voting laws. Ms. Riordan and Mr. von Spakovsky, what does that tell you if they say after a pandemic, if you go back to the laws that existed before, DOJ is not going to assume that that's okay? What does that tell you about the partisan nature of DOJ?

Ms. RIORDAN. By issuing the guidance that they did, it says to me that what they would like to do is make permanent the emergency procedures that were instituted by many States through litigation by the DNC throughout the country prior to the 2020 election. They would like those to be permanent. Rather than understand that they are temporary, they are going to go after States that design to go back to their original election procedures.

Senator CRUZ. I think they also think Democrats did well under those emergency procedures, and so, keeping those emergency procedures in place will predictably benefit Democrats. You know, I would note in addition to disagreeing with the vast majority of the American people, the Democratic witnesses and the Democrats here also disagree with the U.S. Supreme Court.

When I was the solicitor general of Texas, I represented a coalition of States defending Indiana's voter ID law. Before the U.S. Supreme Court, a group of plaintiffs challenged that. It went to the Supreme Court, and the Supreme Court, by a vote of 6-to-3, upheld Indiana's voter ID law. Not only did they do so, Justice John Paul Stevens, one of the lions of the left, wrote the majority opinion, where he said voter ID laws protect the integrity of elections.

Yet, sadly, too many Democrats today don't want to protect the integrity of elections. I've got to say, there is a view, particularly from Northeastern Democrats that they look down on the rest of the country as a bunch of bigots in overalls. Their Southern cousins who are too oafish to be as enlightened as they are. I have to say there's an incredible hypocrisy in that, in that States like Georgia and Mississippi have a higher Black voter registration rate than States like Connecticut, the Chairman's home State. They have higher Black voter turnout rates than States like Connecticut. They have a lower gap between Black and white turnout than in States like Senator Blumenthal's Connecticut, and in fact, States like Georgia and Mississippi, African Americans voted a higher rate than white voters, and in Texas, they're basically equal.

One of the sad realities of today's Democratic Party is they define race as follows: if you're a Democrat, you qualify. Under the Democratic view, I'm not Hispanic. Senator Padilla is. If you're a Democrat, you're a Hispanic. My abuelo and abuela would be very surprised to discover I wasn't Hispanic. That's how Democrat views it.

That's how the radicals in the Civil Rights Division view it, and I will point out as an example, this Committee—one Federal district judge in the State of Texas, Jason Pulliam, is an African-American judge nominated by President Trump, sat at this table, presented superbly. The Democrats had no criticism, and every single Democrat on this Committee voted against him. Why? Because they perceived him as a Black Republican. He didn't qualify as a Black man. I actually asked as the Democrats were voting against Judge Pulliam, do you have one basis to vote against him? Anything you disagree with? None of them had any single answer at all.

This hearing's about one thing. It's about power and it's about ensuring Democrats stay in power. That's cynical and it's at the expense of Democracy and the right of voters to express their will through free and fair elections.

Chair BLUMENTHAL. I'm going to ask my questions now, and just begin by saying this hearing has nothing to do with any geographic discrimination, any idea that one State or another is oafish. I think that is laughable and sad. Almost pathetic. I said sad because, in his opinion for the Court, Chief Justice Roberts said our country has changed. He said history did not end in 1965. Our country has changed.

One way our country has changed in very dramatic and deeply harmful effect is in what you've just heard. What you've just heard is a partisan diatribe with very little connection to facts.

Put aside the tenuous connection to reality. What's most disturbing is the partisan nature of that attack because the Voting Rights Act used to be bipartisan. It was reauthorized again and again and again with overwhelming bipartisan support because it

protected the right to vote, which is a deeply American value. It's not Republican. It's not Democrat. It's not Southern. It's not Northeast.

I'm proud of the fact that the Connecticut legislature has approved an amendment to the State constitution to allow for early, in-person voting, which will be on the ballot in 2022. I'm proud that in June, Connecticut became the latest State to restore voting rights for people with felony convictions. I'm proud that the Connecticut House recently expanded the franchise by expanding access to absentee ballots with a bipartisan majority.

Connecticut is moving in the right direction. It has nothing to do with Democrat or Republican because there was support among Republicans and Democrats for those changes in the law. In my opening statement, I said nothing about Republicans. It was solely about the right to vote, and about expanding and protecting the franchise against efforts to contract it.

Far from disapproving or disparaging any State based on any characteristics—in fact, I laud and admire the efforts of, for example, members of the legislature in Southern States like Florida, Georgia, Texas, to resist laws suppressing the right to vote. The fact of the matter is, as my colleague from Georgia said, Raphael Warnock, some people just don't want some people to vote. That's what we have here, and it should never be partisan when we talk about the right to vote.

Let me ask Mr. Saenz, is stripping the vote from hundreds of thousands of people, as would be done by, for example, the law of Texas, what democracy is all about to you?

Mr. SAENZ. Not at all. Let me begin, though, by saying, Senator, that I'm from California, born and raised. You did indicate in my biography I had the privilege of going to college and law school in Connecticut. I do not consider myself a Northeasterner. My mother was born in Arizona, my father's family is from New Mexico. The organization that I head was founded in San Antonio, Texas. We still have a thriving office in that State.

No, what you've just described, as would occur under the recently enacted law, disenfranchising hundreds of thousands of voters, is not democracy. Ensuring that we have mechanisms in place to swiftly respond before any election moves forward under such a regime is critical to ensuring that voting rights are protected in the future in this country.

We have filed, at MALDEF, a lawsuit against that Texas law. It is just beginning. Because it's under the Voting Rights Act, it will take a long time to resolve. We cannot allow the length of time that these cases take to prevent our protection in the immediate forthcoming elections of those voters. That's why we need the ADR in preclearance.

Chair BLUMENTHAL. A number of you have been asked about voter ID laws. My interpretation of your testimony is that you would approve or disapprove voter ID laws and think they pass muster under the Constitution depending on the law. Depending on its provision. Depending on its intent and its effect because, as we know—most of us in this room are lawyers—that's how you judge laws. You read them and then you judge them on their effect, impact, and on their intent.

Is that a correct interpretation of your testimony, Assistant Dean Tolson?

Dean TOLSON. Yes, voter ID laws vary. Texas, in particular, has one of the most restrictive voter ID laws in the country, and they didn't spend a decade litigating it because of concerns about fraud. That statement made in the Texas legislature indicated that it was to suppress the turnout among Latinos.

It was also very different from the voter ID law litigated in Crawford, which was a facial challenge, and it hadn't went into effect yet, and on its face, was not as restrictive as Texas' law.

Chair BLUMENTHAL. Mr. Yang.

Mr. YANG. Absolutely. For example, in my testimony, I talked about the fact that one State legislator essentially suggested that Asian Americans should change their names so that they could comply with voter ID laws or make it simpler to comply with the voter ID laws.

We have numerous examples of where you have exact match provisions where, because of the way Asian names have been misspelled historically, have been found to be ineligible to vote or forced to cast a provisional ballot and search for the right documentation. Documentation that, frankly, oftentimes costs money. I understand that free IDs can be offered, but those free IDs, in order to get them, oftentimes requires birth certificates or other documentation that requires money to get.

Chair BLUMENTHAL. Mr. Saenz.

Mr. SAENZ. Yes, Senator, of course. What the Department of Justice would do in evaluating any voter ID provision is apply a well-established standard of intent or retrogression. If it satisfied that standard, it would be approved. I hasten to note that any jurisdiction that doesn't trust the Department of Justice, as the State of Texas did prior to *Shelby County*, with its own voter ID law, can choose to bypass the Department of Justice and go to a three-judge district court here in Washington, DC, where those judges will apply the exact same well-established standards to carefully evaluate the specifics of that law.

Chair BLUMENTHAL. Thank you. I should make the point, by the way, that I would support certain voter ID laws, depending on how they are framed, written, what their impact and effect are, and what their intent is, going through that kind of analysis. Senator Cornyn.

Senator CRUZ. Actually, if I can briefly, Mr. Chairman. You said in your remarks that my questions were a partisan diatribe. I do want to briefly point out—I just want to quote from the U.S. Supreme Court, Justice Stevens' opinion for the majority for six justices, where he described laws preventing voter fraud as, "protecting public confidence in the integrity of the electoral process, which has independent significance because it encourages citizen participation in the Democratic process. As the Carter-Baker Report observed," and here the Court quotes from Democratic President Jimmy Carter and Republican Secretary of State, James Baker, "the electoral system cannot inspire public confidence if no safeguard exists to deter or detect fraud, or to confirm the identity of voters."

Apparently, the views of President Jimmy Carter, the views of a six-justice majority of the Supreme Court are deemed by some Members of this Committee to be simply a partisan diatribe. If that's the case, I would ask the Chairman—you talked about the laws in Connecticut. Why is it that Connecticut has lower African-American registration and lower African-American turnout than Georgia and Mississippi?

Chair BLUMENTHAL. You know, I'm really not here to debate you, Mr. Cruz. I subscribe to Justice Stevens' opinion and to the views of former President Carter, a distinguished Southerner, and I'm going to turn to another distinguished Southerner, Senator Cornyn.

Senator CRUZ. That speaks volumes.

Senator CORNYN. I want to start by congratulating you, Mr. Chairman, and the State of Connecticut for joining 44 other States that allow early in-person voting, including Texas. I think that's important. Texas now, I think provides up to 17 days of early voting. Anybody who's qualified to vote can vote in Texas.

Let me agree with you, Mr. von Spakovsky. I believe the Voting Rights Act has been one of the most important civil rights laws ever passed in this country's history. The great thing is that it has actually worked. It changed behavior in the States that were covered by the original formula dating back to 1965. It was the failure of Congress, which was intentional, to not update that formula to reflect current conditions, which the Supreme Court held unconstitutional under Section 4 of the Voting Rights Act. Correct?

Mr. VON SPAKOVSKY. That's exactly correct.

Senator CORNYN. The preclearance requirement, Section 5, is still on the books. The Supreme Court didn't hold Section 5 unconstitutional, did it?

Mr. VON SPAKOVSKY. No. Only the coverage formula because it was so out-of-date.

Senator CORNYN. I don't know if you've looked at H.R. 4 or not—well, I take that back. I'm sure you have, but the coverage formula, which has been touted by some of the witnesses here, would reach back 25 years, and thus, not reflect current conditions, which is what the Supreme Court held would be the standard for the extraordinary measure of the Federal Government having the ability to preclear voting law changes. Would that suffer, in your opinion, from the same problem that *Shelby County* did? Or a similar problem, in that it does not just cover current conditions?

Mr. VON SPAKOVSKY. No, I think that is a problem, and furthermore, the other big problem with the formula is if you have one particular town or city government in an entire State, and it's a problem. It engages in discrimination. It does so repeatedly. If it does it enough times, the entire State will become covered, even though all of the other local governments had absolutely nothing to do whatsoever with what that one county was doing, had no control over what they were doing, which shows that this blanket coverage, I think, has severe problems under the constitution.

Senator CORNYN. Would you go so far as to say that H.R. 4, if passed by Congress and signed into law by President Biden, would be unconstitutional?

Mr. VON SPAKOVSKY. Yes, I don't think it fits any of the conditions the Supreme Court has lined out. It's important for people to

remember that when the Supreme Court in the early 1960's—a very important case—upheld Section 5, they pointed out that it was an extraordinary intrusion into State sovereignty that was justified at the time because of the widespread discrimination going on in places like Mississippi. That widespread discrimination today has totally disappeared. There's no difference between States like Mississippi, that was covered, and other States that weren't, except in many instances, Mississippi actually has better turnout and better registration than the noncovered States.

Senator CORNYN. Members of the U.S. Congress take an oath to uphold the Constitution and laws of the United States. I'm tempted to ask you, but I won't, what do you think a vote for H.R. 4, which you believe is unconstitutional, would be consistent with a Member of Congress' oath to uphold the Constitution and laws of the United States? I personally see tremendous conflict there, and I don't know how a Senator or Congressman could vote for a law which so clearly would be held unconstitutional under the *Shelby County* precedent.

That is their decision to make. I would just point out, as many have, Senator Cruz and others, that the turnout in places like Mississippi, Georgia, Texas, and the like, of minority populations far exceeds the Chairman's State of Connecticut, where 49.6 percent of African Americans were registered to vote and only 39 percent have voted. To me, I think the focus is perhaps in the wrong place.

Ms. Riordan, let me just ask you. You've documented how—in your testimony and in your sworn testimony that you gave us that's in writing that's part of this record—how unelected officials at the Department of Justice basically had previously been given veto power over the elected representatives of the people in the States to decide whether to preclear these voting law changes or not. Constitution aside, it gives me pause when somehow unelected lawyers at the Department of Justice get to determine what elected officials can do in the various States consistent with principles of federalism.

Is there any doubt in your mind that the preclearance requirement, if reinstated, could and probably would be used for partisan political purposes?

Ms. RIORDAN. Based upon my 20 years of experience within that section, I have no doubt that it will be used in a partisan fashion.

Senator CORNYN. Thank you.

Chair BLUMENTHAL. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman Blumenthal. I want to offer a little background to the battle that we're having over the national effort by the Republican Party to suppress and diminish Democratic and minority voting, and that is some of the peculiar behavior that is around it.

We have seen, for instance, the Heritage Action video, a donor video in which the Heritage Action fundraiser was telling the donors behind the effort how successful the effort had been to get voter suppression language adopted by Republican State legislatures. "They didn't even know it was us," she said. "We worked through 'sentinels' to get our bills passed in these States."

Clearly, there is dark money mischief afoot behind all of this, and I want to flag a group that I've looked at pretty steadily, which

is a group called the Judicial Crisis Network. It pairs with Judicial Education Project. When people get up to politics and 501(c) land, they usually pair a 501(c)(3) and a 501(c)(4) and work through that pair. Judicial Crisis Network was the group that spent the money against Garland when he was Obama's nominee, and then for Gorsuch, for Kavanaugh, for Barrett. The scheme to capture the Supreme Court for Republican donors funded that with checks as big as $17 million.

I think a rational person would look at somebody writing a check for $17 million and have a very reasonable question, what interest they had before the Court? We don't know that because all of this was dark money and all was secret. Some of the behavior around this has been pretty mysterious, and I'll just give a quick overview here.

[Poster is displayed.]

We started with this pairing of the Judicial Crisis Network and the Judicial Education Project, both funded by a dark money funding group called Wellspring, and as they went forward, we found out that they were paired physically as well, and their address was actually the same address as the Federalist Society, through which the Court capture turnstile was being run. In fact, they're down the hall from each other. A little bit more on that later.

Then, at the end of 2019, some peculiar corporate permutations were done, which is that the Judicial Crisis Network renamed itself as the Concord Fund, and the Judicial Education Project renamed itself as the 85 Fund, and then they both set up fictitious names for themselves with Concord Fund reviving Judicial Crisis Network as one fictitious name. Also going on to Honest Elections Project Action, which is their voter suppression effort. Similarly, the Judicial Education Project set up a fictitious name for itself as a former name, Judicial Election Project, while also adding Honest Elections Project. That was done in early 2020 after the name changed at the end of 2019.

Here's the rule under Virginia corporate law, setting up this fictitious name process that they went through, and this is the guy, Leonard Leo, who the Washington Post disclosed as being in the middle of what was then described as a $250 million web of court capture operations, in which a hearing in my Courts Committee showed to be a $400 million now operation, as more of the information has been revealed. At the end of the day, once it was clear that Trump wasn't going to win the election, that he was a loser in the making, and after the Washington Post exposé kind of blew up Leonard Leo's role in the Court capture scheme, he jumped from the Federal Society down the hall and became the person running the Honest Elections Project.

There's an element here of, kind of, hide the pea under the walnuts, but clearly, the hundreds of millions of dollars that went into the Leonard Leo Court capture operation, documented by the Washington Post exposé, is now behind the so-called Honest Elections Project, the latest iteration in this dark money voter suppression effort and obviously very aligned with the Heritage Action group that we caught in action talking about what they had done to press this through the State legislatures.

If you don't look at who's behind all this, it's hard to kind of get the joke about what's really going on, and I want to just make sure that the record of this hearing has taken us through the special interest dark money funding that has been behind this operation, and I appreciate the Chairman indulging me in allowing in that presentation.

Chair BLUMENTHAL. Thanks, Senator Whitehouse. Senator Lee.

Senator LEE. Mr. Chairman, I'm surprised, a little stunned to hear some of our witnesses suggest and some of our Members seem to agree, at least in part, that requiring of an identification form, a photo ID is somehow racially discriminatory. Raises all sorts of questions in my mind.

Is our entire healthcare system racist? Are pharmacies racist? The airline industry? Is that racist? The TSA? What about bars? You go into a bar. I mean, some people consider a form of flattery, I guess, if they get carded, but, you know, it happens, and they're required to ask for IDs. Many of them do as a matter of policy.

What about universities? One thing I've learned about all colleges and universities these days: they all issue a student ID, and they have photos on them to make sure that the privileges associated with that university aren't being used improperly by someone else. What about Major League Baseball? The NFL? Or all other event organizers who require you to show an ID when you go to pick up your tickets. Are they all racist? That would be news to me.

It's certainly not racist to require someone to prove who they are in order to gain access to government benefits of one sort or another. They've never been deemed such. Why, all of a sudden, are we calling it that when people just wanting to vote? Some people will say on the other side of this, oh, well, this is different. It's the right to vote. We've got to have as many people voting as possible. Hang on just a minute. You don't have some process of verifying that the person is who the person says he or she is, then what happens? What happens is that you have a very significant risk that someone will vote when they're not supposed to, and they're not allowed. Somebody will vote multiple times, perhaps many multiple times.

When that happens, you have disenfranchisement. You have disenfranchisement of those who were entitled to vote. If these things are racist, that's news to me, and we've got a much bigger problem with all these industries that I've just mentioned.

Of course, none of this is true because this is absolute nonsense. We have the ability, in fact, we have a duty—not we, because we're not the ones who control voting rolls. That is up to the States. Constitution goes out of its way to make sure that that's up to the States. The States have the obligation, they have the opportunity, they have the duty to make sure that there is confidence in our voting system. That's why they do it.

Mr. von Spakovsky, H.R. 4, the John Lewis Voting Rights Advancement Act, not only creates updated formulas for jurisdictional preclearance, but it also creates a new form of preclearance triggered by practices that many progressives fear. Loathe, in fact. Ironically, these practices are widely popular with voters across the political spectrum, which raises all sorts of questions as to progressives might fear them, but let's set that aside for a minute. Be-

cause they are popular and they're popular specifically because they ensure the integrity and the potency and the legitimacy of each ballot.

They include, among other things, voter ID requirements and efforts to maintain the integrity of voter registration files, to make sure that someone who has died or moved out of State or otherwise is ineligible to vote in the jurisdiction in question doesn't vote and thereby disenfranchise those who are entitled to vote in that jurisdiction.

How would these practice-based preclearance provisions in H.R. 4 ensure that most, if not all, voting jurisdictions in the United States are forced into the even more burdensome jurisdiction-based preclearance process?

Mr. VON SPAKOVSKY. The problem with this practice-based preclearance, particularly the one applied to the clean-up of voter rolls, is the—I know the attitude of the career people inside the voting section. Maureen Riordan has talked about it. They opposed almost any clean-up of voter rolls, any attempt to make sure they're accurate. You can see this in all the lawsuits that have been filed. You'll recall that a lawsuit in Ohio went all the way to the Supreme Court, the *Husted* decision.

Senator LEE. They're neutral, aren't they? You can trust them, can't you?

Mr. VON SPAKOVSKY. I think so. Right. Here's the thing that people forget about this whole claim that somehow maintaining voter registration systems leads to discrimination. First of all, States are strictly regulated in what they can do by the National Voter Registration Act. It sets out very strict rules on what you can do to clean up voter rolls. Second, this constant claim I hear that, oh, you know, cleaning up voter rolls, taking off people who have died or moved away. It disenfranchises voters.

It also ignores the fact that this Congress passed, in 2002, the Help America Vote Act. In fact, 92 Senators voted in favor of it. That put in a balloting provision, so, even if a State makes a mistake—you know, they remove somebody from the voter roll because they think they moved out of State and they don't, all that person—when they show up at their polling place and they're told, listen, you're not on the list. We thought you had moved—they are federally entitled to a provisional ballot. They simply have to declare, no, I'm eligible, I was registered. They are given a provisional ballot. Elected officials then investigate, and if a mistake was made, their ballot counts.

People are not going to be disenfranchised, even if a mistake is made.

Senator LEE. Mr. Chairman, I see my time's expired. I've got one follow-up question I'd like to ask Ms. Riordan, if that's okay.

Chair BLUMENTHAL. If it's quick. Yes, I should tell the Members we have a vote underway right now.

Senator LEE. Understood. Ms. Riordan, under Section 2 of the Voting Rights Act, still fully intact, still fully intact regardless of whether this ever becomes law, any reason why that's inadequate to address these? Is there any argument to be made that the Section 2 violations going on are so rampant, so out of control, as Con-

gress concluded they were at the time of the original passage of Sections 4 and 5, that they can't keep up with this?

Ms. RIORDAN. I don't believe so. Section 2, especially the way that it has been enlarged to include, in effect, portions of Section 2, really targets intentional discrimination, as well. That is consistent with *Shelby*. Although there has been some testimony here that Section 2 is expensive and it's long, it is certainly within, you know, the powers of the 15th Amendment, and it also provides DOJ what it needs, and that is to target areas within the United States that are discriminating, as opposed to making everybody in the United States subject to Section 5, when there's no basis for it.

I will say that DOJ, since the *Shelby* decision, has only brought approximately six Section 2 cases, their last one being the one that they filed in Georgia. I would say that's pretty indicative that there's not rampant discrimination within the United States because DOJ is certainly not there filing lawsuits.

Senator LEE. Thank you.

Chair BLUMENTHAL. I will yield to Senator Klobuchar for her questions, and she will Chair in my absence. I'm going to go vote and I'll be running right back. Then, if she has to leave and I'm not back, if she could yield to Senator Padilla.

Senator KLOBUCHAR [presiding]. Sounds like a good plan. Thank you, Mr. Chair, and thank you, Ranking Member Cruz for this important hearing. We know the right to vote is fundamental, and we have several important bills coming before us, the first, of course, the John Lewis Voting Rights Act. Mr. Yang, could you talk about why it's important that the reauthorization include preclearance formulas that are geographic and practice-based?

Mr. YANG. Thank you very much for that question, Senator Klobuchar. It's important because we recognize that for minority communities, especially the Latino community and the Asian-American community, were rapidly growing in jurisdictions that are oftentimes not covered by the jurisdictions that would have been historically covered under the coverage formula.

Thus, having a practice-based preclearance system sets in place to allow for—again, we should remember it's dual triggers. One is the percentage of individuals in that community must, at a demographic matter, reach a certain level, but second is to look at the practice involved. If the practice was historically one that could be used to discriminate against communities, then that would trigger preclearance.

I think the other important thing to remember about this, going back to what Mr. Saenz testified about it, is that this provides a form of ADR. Really, it allows for efficient and effective means for looking at different types of manners of voting before they become into law, rather than the costly and very expensive, time-consuming aspect of trying to do litigation afterward.

Senator KLOBUCHAR. Got it. Very good. Thank you. That's very well said. Mr. Saenz, you know, Rules Committee had the first field hearing in 20 years in Georgia, and we learned about their law. I'm going to get to the Freedom of Vote Act in a minute, but, and I think a lot of the publicity, understandably, about it has been oh, no water, food in line for—but when you really look at it, it's really

quite extraordinarily bad, and this is why so many major companies have come out against it.

It is things like you can't vote on weekends during the run-off period, and you can before it, leading to maximum confusion, and, of course, inability for many people to vote who thought they could on a weekend. Writing your birthday on the inside envelope on the outside, and of course, many voters think they should write the date that they cast their ballot. Instead, it's your birthday.

The limitation on drop-in ballot boxes and the like, and the fact that you can register 29 days before, and the run-off is 28 days before. I don't know what else you need to know. In the words of the North Carolina Court in another case, that it is discrimination with, in their words about another law, "surgical precision." What is the impact? In just 30 seconds here because I want to go on to something else. The impact on the laws in Georgia on voter participation, particularly among voters of color and voters in rural areas.

Mr. SAENZ. It is potentially very significant. Every time you make it more complicated, more difficult, you are not facilitating a vote, and that's particularly going to have impacts on less frequent voters, those who are newer voters, whether because they're naturalized or only recently turned 18, and those who are elderly.

Those are the effects of all of these laws, and I will just add very quickly, Senator, going back to what Mr. Yang said, it's these kinds of crafty laws why we need both coverage formulas. Because we won't get the new approaches, new ways of suppressing the vote under practice-based coverage because it's limited to what's specified, but on a geographic trigger, we will——

Senator KLOBUCHAR. Both things.

Mr. SAENZ [continuing]. Get the new, crafty ways of suppressing the vote.

Senator KLOBUCHAR. Right. Exactly. Let's talk about that. I'll give you my last series of questions, Ms. Tolson. Thank you for being here. The crafty ways and what's happening.

I am dismayed that—voting rights has always been bipartisan in the past. I remember growing up in Minnesota and the League of Women Voters, and we were proud of our voter turnout, and I'll note that many of the provisions in the For the People Bill and now the more negotiated with Senator Manchin and others, the Freedom to Vote Act, which I'm really proud of that he worked with me on this through the summer.

These provisions get at things that, to me, are common sense. Mail-in voting, that we know so many voters, Democrats and Republicans used through the pandemic. Just the information we got out of that pandemic where, you know, so many people voted most ever in the middle of a public health crisis. Why not use those?

In my State, these laws, where we usually have the highest voter turnout in the country, I have seen what's happened. We've elected Democratic Governors in our current Governor, Tim Walz. We've elected Republican Governors with these voting laws, in Tim Pawlenty. We have even elected Jesse Ventura, and what's the thing about it to me? You've seen this in other States that have strong voting laws. What is it? It means more people feel like they're part of a democracy, and they may come up to me and say,

well, I didn't vote for you, but I do agree with you on something like this.

They're part of the democracy. We make it easier for them to be part of the democracy. Professor Tolson, over 83 percent of likely voters support public disclosure of contributions, like we have the Disclose Act and the Freedom to Vote Act. Even 57 percent of likely Republican voters support nonpartisan redistricting commissions. Sixty-five percent support the option to vote early. I mean, just go through the line. The people are with us on this.

Could you talk about why it is appropriate to characterize the provisions in the Freedom to Vote Act as actually for America, and not, as some of our colleagues are doing, as partisan?

Dean TOLSON. I like to think of the act—actually both H.R. 1 and H.R. 4 together——

Senator KLOBUCHAR. Exactly.

Dean TOLSON [continuing]. But H.R. 1, in particular is—its really a list of best practices. Right? You look at what States are doing, and you incorporate those practices into a bill that can make sure we have a healthy democracy. For example, independent commissions to draw district lines is something that has worked well in States that have adopted them. That's something that we can apply at a national level in order to decrease the instances of partisan gerrymandering.

Coupled with that, H.R. 4 is a way of protecting minority communities that have historically experienced discrimination, which is also an aspect of a healthy democracy. I think it's important to view these two bills together to the extent that we're trying to respond to the ways in which voter suppression has evolved.

Congress has to evolve, too, because voter suppression has certainly evolved, and history has shown that if we don't stay on top of it, then it could definitely take us back 100 years.

Senator KLOBUCHAR. Thank you very much. Next up. Okay. Senator Ossoff, I understand, has logged into Webex.

Senator OSSOFF. Thank you for the recognition and thanks to our panel for joining us today. Professor Tolson, until 2013, until the *Shelby County v. Holder* decision, Georgia and jurisdictions within Georgia had to preapprove changes to voting laws with the Civil Rights Division at the Department of Justice, in accordance with Section 5 of the VRA. After the *Shelby County* decision gutted Section 5, preclearance was no longer a barrier, and the State and jurisdictions within it were free to enact changes without Federal oversight. That's exactly what we've seen.

I want to highlight in particular the closure of polling places in Georgia. At least 214 polling places in Georgia have been closed since the *Shelby County v. Holder* decision was made, and we've seen that the impact of these closures has been most profoundly felt by minority voters and in minority communities.

Professor Tolson, my question for you—what threat do polling place closures and relocations pose to voting access and why, therefore, is known practices coverage, which we're discussing today in this hearing, a necessary tool to mitigate that threat and protect valid access?

Dean TOLSON. Thank you, Senator. It's incredibly important, in part because, in Georgia in particular, you saw the strategic clo-

sure of polling places in minority areas, and this led to 9, 10, 11-hour waits in some parts of Fulton County, in particular, but statewide, you definitely have problems with voters having to wait in line for a long time.

I think there is this perception that the pandemic caused a lot of this. Right? You had increased rates of absentee voting. You still had voters waiting in line to vote in person for a really long time. This is, in part, a response to *Shelby County*.

Since 2013, jurisdictions formerly covered by Section 5 have closed, on average, 20 percent more polling places than jurisdictions in the rest of the country. The problem that we saw in Georgia is something that is very widespread, and practice-based preclearance will help mitigate some of that.

Senator OSSOFF. Thank you, Professor Tolson. Some opponents of preclearance requirements have said it's too hard for jurisdictions to prove to the Justice Department that changes would not harm ballot access for minority voters. Is that true? Is it reasonable to expect that a jurisdiction understands the impact of changes to voting access on minority voters before making that change, and is it reasonable to presume good intent on the part of those same actors?

Dean TOLSON. Yes, Senator, I would think that jurisdictions would perform this sort of cost-benefit analysis prior to determining whether or not to close a polling place. If they have done so, then it shouldn't be administratively difficult for them to prove that they need to close a polling place.

I would also point out that under the prior coverage formula, hundreds of jurisdictions complied with the Voting Rights Act administratively with no problem. We tend to focus on the bad actors and the fact that they litigate changes for years and years and years, but in reality, this is not a huge administrative lift for most jurisdictions who are acting in good faith.

Senator OSSOFF. Thank you, Professor Tolson. Redistricting is one of the practices that Congress is considering including in a covered practices provision of the John Lewis legislation. What is the best evidence that redistricting poses a particular threat to racial and language minority voters?

Dean TOLSON. Is that also for me?

Senator OSSOFF. Yes, ma'am.

Dean TOLSON. Okay. Great. Redistricting, especially now, as we are at the beginning of redistricting that occurs at the beginning of the decade. Minority communities are, in this moment, in very weak positions because many States have passed restrictive voting laws, and in those States, you'll see efforts to try to gerrymander racial minorities into the districts, which is something that was extensively litigated over the last decade.

Cases came out of North Carolina, out of Alabama, out of Texas, where State legislatures tried to pack minority voters into districts, claiming that the Voting Rights Act required them to do so, an argument that the Supreme Court ultimately rejected. As we enter into this next round of redistricting, we will see more efforts to try to suppress the political power of minority communities by packing them into districts, and also cracking them across districts, which is why practice-based preclearance is so important.

Senator OSSOFF. Thank you, Professor Tolson. Madam Chair, my final question for Mr. Yang. Mr. Yang, over the past 20 years, the number of Georgians who identify as Asian American has more than doubled, and nationwide, Asian Americans are the fastest growing demographic segment of eligible voters.

Why, in your view, is passage of the John Lewis Voting Rights Advancement Act critical to protecting voting rights and ballot access for immigrant communities and minority communities like the Asian-American community, and why, in your view, is it vital to require preapproval before States can enact changes like redistricting or closing polling places, please?

Mr. YANG. Thank you for that question. Certainly, because Asian Americans are so rapidly growing in the United States in many places that people don't expect, such as Georgia, it's important to have the modernized Voting Rights Act be passed to protect the rights of Asian Americans, really to make sure that they are able to exercise their voice in democracy, specifically with respect to the practice-based preclearance.

The key thing to remember here is that Asian Americans are appearing in places that traditionally have not had minorities, whether it's in Nevada, whether it's in Arkansas, whether it is in other more remote or rural places, and if we only look at historical geographies, then we may miss the growth of Asian Americans and other communities of color in those geographies.

That's why it's also necessary to include practice-based preclearance as a complement to the coverage formula under Section 5.

Senator OSSOFF. Thank you, Mr. Yang. Thank you, Madam Chair. I yield.

Senator PADILLA [presiding]. Thank you, Senator Ossoff. At this point, I believe it's my turn to hold the virtual gavel here for a minute, and I'll proceed with my questions. I want to thank all the witnesses again for your participation today.

A couple of issues I want to touch on, beginning with the myth of voter fraud. You know, voter fraud, if you look at the data, is exceedingly rare in the United States. And yes, the data that I looked at repeatedly in my prior capacity as California secretary of state. I'll say it again. Voter fraud is exceedingly rare in the United States.

In election after election, including the November 2020 election, we see little evidence of the massive or widespread voter fraud that some political figures would want you to believe and be afraid of. Nonetheless, this myth of voter fraud is used as a pretext to suggest and pass unnecessary voting measures or changes to election laws whose only real effect is to make it harder for eligible voters, particularly minority voters, to cast a ballot. Some of us have recognized that already in this hearing.

My first question is to Mr. Saenz, if you can continue to expand on how this myth of voter fraud is weaponized against increasingly ascendant minority communities in particular. The country is only becoming more diverse by the day, and I'd like for us to focus on creating as inclusive a democracy as possible, not less so. Mr. Saenz.

Mr. SAENZ. Absolutely. The mythology around voter fraud is used by its constant repetition despite no evidence of anything other than isolated and often inadvertent voter fraud in the form of those who are not eligible actually casting a ballot. Isolated instances often inadvertent. The other form of voter fraud that is a myth and put out there is the notion of voter intimidation. Precious little evidence of any voter intimidation, where someone is coerced into voting against their actual views. Doesn't happen, but that's often weaponized against remote voting.

What happens is the myth of voter fraud becomes and imperative to act to protect election integrity, even if elections have a great, great deal of integrity already. So, you see the enactment as in Georgia, as in Texas, of new measures that make it more complicated to vote. As you know, that has a particular effect on newer voters, whether they're newer because they just decided to register or they just became eligible through naturalization or age—eligible to vote. For newer voters and often for longtime voters who are elderly, these complicating factors do not facilitate participation. They actually deter, and in some cases, prevent participation.

That's where we see the discriminatory effects. It, in turn, goes back to why we often see racially discriminatory intent. Because there is an understanding that some of these measures will in fact have their greatest impact on minority voting communities.

Senator PADILLA. Back to the myth of voter fraud. Fact versus fiction or myth versus data. In this hearing, we've heard a lot of back and forth about voter ID, the role of voter ID, the fact that many States have a voter ID law. Is there any data that you can point us to that suggests voter ID is actually a solution to a problem, or is a solution in search of a problem? Does voter ID do more good in preventing voter fraud or more bad in terms of making it harder for eligible people to vote, or actually disenfranchising eligible voters from participating?

Mr. SAENZ. The fact is it's hard to demonstrate any impact because there is no evidence of significant voter fraud. It is a problem that doesn't exist. How do you demonstrate that you're actually addressing it?

I will point out that anyone who's really interested in engaging in fraudulent voting, an ineligible voter, can very easily obtain a fraudulent ID. It's not hard. That's why these examples given by Senator Lee really are not relevant because we see fraud in those circumstances, whether it's at a bar, as he suggested, or in accessing benefits. We see fraud. Using fraudulent ID in those circumstances, so, it's absolutely unclear that voter ID has any effect other than to make it more difficult, often involving cost and time for those to obtain a voter ID that they've never had before because usually, where it's had its most pernicious impact, the limits on what IDs are acceptable is critical.

You can point out, Senator Lee used school IDs as an example, and yet, school IDs in the State of Texas are not allowed as a voter ID. That's the kind of problems that we see. There's really no match between nonexistent voter fraud and what voter ID is intended to do.

Senator PADILLA. Your concealed weapon permit is allowed in Texas, so, there you go. Next question is for both Mr. Yang and

Professor Tolson. We've talked during the course of the hearing about the geographic-based approach versus a practice-based approach under the formula for the Voting Rights Act. We know that it covers certain jurisdictions who, since 2013, have experienced significant demographic change. There's also not covered jurisdictions, where Asian-American community, Latino community, African-American community, others are continuing to diversify those populations.

Can you just shed a little bit more light on the nuance between previously covered versus noncovered and the significance of geographic-based versus practice-based protections here?

Mr. YANG. One of the beauties of practice-based coverage is that it avoids some of the stigma that the Supreme Court talked about in *Shelby County*, with respect to suggesting that certain States fall under stigma by falling under the geographic provisions. Here, on the practice-based coverage, we are looking at historic practices that have been used to disenfranchise, essentially, communities of color. We should say all vulnerable voters, but it really has been more on communities of color.

By focusing there with some precision as to what practices we are talking about, we add a layer of coverage that would give protection to those communities that are emerging in places that have historically not seen minority voters.

Dean TOLSON. I don't have much to add, but I will point out that one of the benefits of having practice-based coverage is that it's significantly more tailored than Section 4(b) was in its original form because it focuses on specific practices, and also picks a demographic threshold that is really important because it's really at a point where minority communities are starting to reach numbers where they can influence the outcome of an election.

Then, that coupled with some geographic coverage, which would allow the statute to get at voting right violators. Having geographic coverage and practice-based preclearance together in a way that effectively addresses the concerns raised by the Court in *Shelby County*, is a narrowly tailored and a better way to approach the issue of voting rights violations now.

Senator PADILLA. Thank you. Mr. Chair, before I turn it back over, more of a comment, not really a question, but to lay a marker for an issue that I'd love to work with you on going forward, and that is to discuss voter ID, how it's problematic. We've in practice become familiar with, sometimes it's not an exact name match, how it appears in the voter registration rolls versus an ID, particularly in the Latino community when sometimes you have multiple last names, sometimes government administrators will erroneously shift one of your last names to your middle name, you know, etc. Those sorts of things. We've talked about language issues and the roll of better training for poll workers, for example, to better serve language minorities who are citizens of age, registered to vote, eligible, but sometimes face barriers to voter participation.

I know in California, we've been working with advocacy organizations to provide better training for poll workers to better serve the LGBTQ community, particularly trans voters. Eligible voters. Citizens who may not present themselves in person when coming to vote in the same way they may appear on a voter registration roll

or even on their ID when showing up to vote in a voter ID State, so, some research to be done there. Some best practices to research, and I would love to bring forward some opportunities to buttress that nationally, not just in California.

Chair BLUMENTHAL [presiding]. Thanks, Senator Padilla. I'm going to ask a few questions, then my colleague, Senator Cruz, is on the way back from a vote, but let me just say a lot has been said here today about turnout. My colleagues have cited the record high turnout, as they pointed at minority voters as evidence that the Federal protections under the Voting Rights Act are no longer needed or don't need to be restored. This argument seems to be premised, in part, on the fact that prior coverage formulas relied on voter registration and voter turnout rates to identify jurisdictions for coverage, and those rates have increased substantially since 1965.

I think we ought to celebrate that minority registration and turnout has, in fact, reached historic heights. In fact, we have the Voting Rights Act to thank for that development. Now that the Voting Rights Act has been hobbled, impeded, undercut, even eviscerated, we see that minority voting rights are under attack again, and that's the reason that we're here. To make sure that turnout is protected.

The Census 2020 voter registration and turnout data show that even with these historic levels of turnout, voter registration and turnout rates among Black, Hispanic, Asian voters is below that of whites across the country, in almost every State. Isn't it true—I'm going to ask Mr. Yang and Mr. Saenz—that, though there are significant racial turnout gaps between minority and white voters, isn't it true that there are these gaps? Mr. Saenz and Mr. Yang.

Mr. SAENZ. Absolutely. There are still significant gaps particularly faced in the Latino community, and it is taken advantage of by some decision-makers. I gave an example in my written testimony of Pasadena, Texas. One of the very first changes made after the *Shelby County* decision was in Pasadena, Texas, where the city council was on the very cusp of having a Latino-elected majority. The mayor came forward and said he was going to do something he wanted to do before but couldn't under preclearance because he knew he couldn't get away with it, which was to shift two of the eight seats on that city council to at-large elections. He knew that, because of the turnout gap that you've just described, those two at-large seats would, for the foreseeable future, be elected by white voters, even though under an eight-district system, he knew that Latino voters would in fact choose a majority to the city council.

There is still a significant turnout gap despite many efforts to address it, and it is exploited by some of those who engage in these practices.

Chair BLUMENTHAL. Mr. Yang.

Mr. YANG. Certainly, within the Asian-American community, there is both a registration gap and a turnout gap. Although we have tried to make up ground in that respect through hard activism by many groups, that gap still remains when compared to white voters. The other thing I would mention is that there's been references made to the 2020 elections and the record voter turnout for the 2020 elections. I think, although that happened during a

pandemic, that also happened during a time when we opened up the franchise of voting in a way that bipartisan people have agreed that was a secure election. There were not any major instances of voter fraud that would have changed the elections.

From that perspective, that experiment seemed to have worked. To suggest that we should go back to the old ways when we knew that voter turnout lagged under the old systems, seems to be really a defeat for democracy because if we are trying to have a democracy where we wanted to have as many eligible citizens vote, then we should open up the franchise in a way that, while maintaining security, allows more people to vote.

Chair BLUMENTHAL. Has that turnout gap changed since the *Shelby County* decision? In other words, in jurisdictions that were previously covered by preclearance, has there been a change in particular?

Mr. YANG. Unfortunately for the Asian-American community, we don't have very good data on that. What we do know is that the Asian-American community still has a registration and turnout gap. One of the most frequent reasons that is cited is confusion over where polling places are, confusion over what voter registration requirements are necessary, and the language gap that accompanies that.

Chair BLUMENTHAL. I'm going to put in the record two documents from the Brennan Center, which answer, in part, the question I just raised. Overall, these documents show in the 2020 election, 70.9 percent of white voters cast ballots, while only 58.4 percent of non-white voters did. There's a lot more information in these documents which I think supports the points that you have just made.

[The information appears as a submission for the record.]

Chair BLUMENTHAL. Let me ask Mr. Saenz and Professor Tolson, in your written testimony, you both discuss extensively the concept of minority community reaching a tipping point, at which they become perceived as a political threat, and the result is potentially a community backlash. How does the known practices coverage formula, which is central to this legislation, address this concept of a tipping point at which voter discrimination becomes more likely?

Mr. SAENZ. It addresses it, Senator, by recognizing that these are jurisdictions that often have not had a long history of voter suppression and voter discrimination, simply because their minority communities weren't large enough to be perceived as a threat and therefore to trigger action against them. Absent some threat to those in power, you don't usually see any reason to engage in voter discrimination. This recognizes that the geographic trigger, as important as it is, will not cover jurisdictions that don't have that history and are, for the first time, seeing a minority group of voters as a threat.

Pasadena, Texas that I just cited in response to your last question, is an example of that. That's what happened there, and that's what known practices coverage or practice-based coverage is designed to address.

Chair BLUMENTHAL. Ms. Tolson.

Dean TOLSON. The demographic trigger of 20 percent is actually very important because that is a number where minorities are

starting to reach a threshold where they can influence the political process. It's not uncommon for jurisdictions to take discriminatory actions against minority populations, even if their numbers are small.

For example, in my written testimony, I talk about District 24 in Texas, where African Americans were only about 25 percent of the district, but they were the swing voting bloc, and that district was dismantled after Texas redistricted its legislative districts in 2003. It's not uncommon for minority groups to experience their political power being challenged even when they are in small numbers. The demographic trigger of 20 percent is very important for that reason.

Chair BLUMENTHAL. I presume you would agree that the demographic trigger and other provisions of this bill respond to the points made in *Shelby County* for striking down the preclearance formula under that previous legislation.

Dean TOLSON. Absolutely. The *Shelby County* Court was predominantly concerned about the tailoring of the statute. Right? The demographic trigger is an effort to tailor the reach of the statute, as opposed to applying it to all jurisdiction. For a certain specific covered practices, it targets those jurisdictions that have minority populations in significant numbers where that population could face some backlash.

Chair BLUMENTHAL. I said in my opening statement that the legislation is narrowly tailored and targeted because of these provisions. For example, the 20 percent trigger provision. Perhaps you can explain to folks, apparently, some of my colleagues that don't understand that narrowly tailored approach.

Dean TOLSON. In *Shelby County*, the Supreme Court invalidated Section 4(b)'s coverage formula because the Court found that it was both overinclusive and underinclusive. Overinclusive in a sense that jurisdictions that had committed no wrongdoing were required to preclear all the changes to their election laws, and underinclusive in a sense that jurisdictions that were engaging in bad behavior didn't have to comply with preclearance.

Practice-based preclearance is important because it targets specific practices that have a history of being used to disenfranchise minority populations, and it also focuses on jurisdictions with substantial numbers of members of minority groups. It is a direct effort to respond to the tailoring problem, and the demographic trigger does that.

Chair BLUMENTHAL. A lot has also been said about the constitutional authority here. As you know, Congress has traditionally and historically drawn on the 14th and 15th Amendments as its source of authority in supporting the VRA's—Voting Right Act's preclearance authority. Would you agree that they apply here, and I would also argue that the Elections Clause provides an additional source of authority for this measure?

Dean TOLSON. Absolutely. One of the disadvantages of the litigation posture in *Shelby County* is that the Court focused exclusively on the 14th and 15th Amendments and didn't consider the Elections Clause, even though the Elections Clause is a broad source of authority for Congress to make or alter State regulations.

The 14th and 15th Amendments are important, too, and to some extent, the *Shelby County* Court ignores the fact that the 14th Amendment protects a fundamental right to vote that Congress can protect through appropriate legislation. Instead, the Court focuses on the fact that the 15th Amendment requires proof of intentional racial discrimination in voting. Congress' authority is much broader than that.

Chair BLUMENTHAL. Mr. Yang or Mr. Saenz, do you have any comments on that question?

Mr. SAENZ. I absolutely agree with Professor Tolson. It's quite clear that Congress' authority is broad, and it's been recognized by the Supreme Court in the past with respect, specifically, to preclearance, though limited by *Shelby County*, and as she has indicated, practice-based coverage is a direct response to those concerns on both the side of federalism—too much intrusion, in the Court's view, majority's view, and on the issue of equal sovereignty.

It responds to changes in the Supreme Court's analysis, but otherwise consistently, the Supreme Court has recognized broad authority in the area of protecting the fundamental right to vote, and under the Elections Clause.

Chair BLUMENTHAL. Thank you. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. It's an unfortunate reality of today's politics that Democrats do not believe in democracy. They believe in power. It speaks volumes that S. 1, the very first bill introduced by Chuck Schumer and the Democrats in this Senate, is a bill for the Federal Government to take over elections and to strike down virtually every reasonable voter integrity law adopted across the country.

It is likewise the case that H.R. 1, the first bill introduced by Nancy Pelosi is the same bill, a Federal takeover of elections designed to strike down virtually every reasonable voter integrity law in the country.

The priority of Democrats is not COVID, as the rhetoric might suggest. The priority of Democrats is not jobs. The priority of Democrats is not our national security. The priority of Democrats is to ensure that Democrats stay in power no matter what. No matter what the voters think.

This bill before us is designed to prevent those pesky voters from ever making a decision other than electing Democrats. It's a long tradition. Jim Crow was exactly the same thing. Democratic politicians writing laws, changing the election laws to ensure the voters could only elect Democrats. Sadly, there are decades of ugly history behind this.

You know, before I was in the Senate, I was a constitutional litigator and Supreme Court litigator. I didn't do a lot of redistricting law, but I did, in 2003 and 2004 and 2005, represent the State of Texas in the redistricting litigation that occurred then.

I have to say I agree with Chief Justice Roberts, who described in one voting rights case, "It is a sordid business, this divvying us up by race." Because that is much of what redistricting law is right now. It is focused on—in that case, we heard testimony. We heard testimony actually from African-American elected Democrats in Texas about the racist history of Democrats in Texas. In particular, when the State legislature, in 2003, passed a new congressional re-

districting map, it was replacing a map that had been passed by Democrats in Texas that had been widely described as the most egregious gerrymander in the country.

It was a map that, even though a substantial majority of Texans were voting consistently Republican, elected Democrats and a large majority of congressional Democrats, despite the views of the voters. Democrats fought tooth and nail, including fleeing to Ardmore, Oklahoma, including fleeing to Albuquerque, New Mexico to try to keep their partisan gerrymander in place to elect Democrats, even though the voters didn't want to elect Democrats.

The testimony we heard at trial from African-American elected Democrats was that the strategy of white Democrats to elect white Democrats was very simple. A moment ago, we heard about thresholds of minority representations in districts.

The testimony we heard at trial is the white Democrats knew that if you put a sufficient number of African-American voters in a district—but not too many—and a sufficient number of Hispanic voters in a district—but not too many—that in the primary that the African-American Democratic voters were join with white Democratic voters in voting against an Hispanic Democrat, and that the Hispanic Democratic voters would join with white Democratic voters in voting against a Black Democrat. The result would be exactly what happened in Texas. White Democrats would win the primaries, and then those minority voters would vote for Democrats in the general, and it would ensure that white Democrats stay in power in perpetuity.

Texas legislature, the Republican legislature eliminated that gerrymander and resulted in a map that actually elected a congressional delegation that reflected the views of the voters of Texas, and Democratic activists viewed that as an abomination. Why? Because they're objective is to elect Democrats.

In the State of Texas, I'm the first Hispanic ever elected as a U.S. Senator. The activists who are engaged on these issues did not celebrate that issue because you are not Hispanic if you are not Democrat in their view. Never mind that every time I've been on the ballot in Texas, over 40 percent of Hispanics have voted for me. Never mind that Texas is the only majority-minority State in the union that consistently elects Republicans.

That arouses the ire of Democratic activists because we minorities aren't supposed to think for ourselves. In fact, we're told by enlightened Democrats that we Hispanics are too dumb to figure out how to get a driver's license. I'll be damned, we can't drive a car, we can't get on a plane, we can't get married. We're just not smart enough.

It's offensive and it's ridiculous. It's why the overwhelming majority of Americans support voter ID. Because they know the Democrats, they don't even believe what they're saying. They know that. This is about political power. That's what it's all about.

What does this bill say? If you believe in democracy, what do you want? If you believe in democracy, you want the voters to be able to vote for policies they support. That would mean if the voters support for policies like photo ID, you should have a photo ID law. This bill says no, no, no, no, no. You voters are not smart enough to know that. We're going to take the power away from you by giv-

ing it to unelected bureaucrats who can strike down what an entire State legislature—in Texas, our legislature is elected by 29 million people. One bureaucrat at the Department of Justice has more power under this bill than 29 million people in the State of Texas.

You want to talk about something offensive to democracy. Saying one bureaucrat at DOJ has more power to enact laws than 29 million voters going and exercising the Democratic franchise.

You know, earlier in this hearing, we heard testimony about discrimination against Asian Americans. I agree, there's a lot of discrimination against Asian Americans. Some of the most egregious discrimination against Asian Americans occurs in elite academic institutions, like Harvard, and Yale, and Princeton that discriminate against Asian Americans that have quotas against Asian Americans. I'm a graduate of Princeton and Harvard. The Chairman is a graduate of Yale.

All of those institutions have quotas that are every bit as noxious as the quotas in the 1950's and 1960's against Jews. They were enforced against Jews. We don't want too many Jews is what those academic institutions said. Now, they say we don't want too many Asian Americans. We're going to have reverse quotas. What's one of the very first things the Biden Department of Justice did? The Civil Rights Division. They dismissed the lawsuit from the U.S. Department of Justice against Yale University for discriminating against Asian Americans because politically, they support that discrimination, and I would note, by the way, earlier this year, when voting on a bill on Asian-American discrimination, I introduced an amendment. It was a one-paragraph amendment that said Federal funds shall not flow to any educational institution that discriminated against Asian Americans in admissions or in granting scholarships. It was straightforward, it was simple, and every single Democrat in the U.S. Senate voted against it. Every single Democrat said, in effect, we support discriminating against Asian Americans when it suits our politics.

This ain't about protecting the rights of voters. This is about keeping Democrats in power. Ms. Riordan, you've served in the Civil Rights Division of the Department of Justice. Can you tell this Committee the extent to which that Division has exercised partisan decision-making, in your experience?

Ms. RIORDAN. One of the most egregious situations that I have observed is when the city of Kinston, North Carolina submitted a change for preclearance wherein they were no longer going to run on a party. They wanted to run nonpartisan. This is an African American majority city, so, the African Americans controlled, you know, the city council, who wanted to make that change. The Department objected to the change because it felt, and in its letter, it said basically that if there was no D next to the name of the candidates, then the African Americans would no longer get elected, and they would not know who to vote for.

They were clearly protecting the Democrat party, and they were also insulting the African Americans that lived within the city of Kinston, as well as the elected officials.

Senator CRUZ. Unfortunately, there's a lot of protecting the Democratic Party and insulting African-American voters and Hispanic voters in the process.

Mr. Chairman, I have in front of me a statement from Steve Marshall, who's the attorney general of Alabama, who has submitted a statement that responds to charges that voter integrity laws are unnecessary and cites, among other things, two Alabama mayoral elections in 2016 that were overturned because of voter fraud. I ask unanimous consent that this statement be included in the record.

Chair BLUMENTHAL. Without objection.

[The information appears as a submission for the record.]

Senator CRUZ. We ought to be protecting democracy. We shouldn't be—neither party should be engaged in partisan efforts to stay in power, but I would note it is the Democrats in Congress who have set their very first priority keeping Democrats in power, democracy be damned.

Chair BLUMENTHAL. We are here because we want more people to vote, we want to remove obstacles to vote, we want to increase access regardless of how they vote, what party they're in. That is the narrowly tailored and targeted purpose of the measure before us.

I'd like to give you an opportunity, Mr. Saenz, to respond to some of what you've heard here.

Mr. SAENZ. I would first point out that I, too, was there for a portion of the trial in 2003 on Texas redistricting, and apparently, Senator Cruz disagrees with the U.S. Supreme Court, which subsequently heard the case after remedial orders were put in place because of what the legislature, in part, did, which included packing Latino voters into a limited number of districts in order to prevent them from having the opportunity to elect additional Congress members to the Texas delegation.

I also just want to point out that I know from personal experience that this is a nonpartisan issue. MALDEF is a nonpartisan organization. The very same decade that we were in Texas litigating against a Republican-led Texas legislature's maps, I was in California in 2001—that's the same decade—litigating against a California legislature led by Democrats that had similarly chosen to, in this case, split Latino voters in order to protect incumbents, and by doing that, they prevented Latino community in California from electing another member of their choice to the California congressional delegation.

I know from that experience back then to today this is not a partisan issue. As you said, this is about enabling every voter to have their opportunity to express their preference, and the outcome of the election is then determined by the collective preferences of those in a community.

It's about ensuring that we don't have structures, including the way we redistrict, that prevents voters, all eligible voters, from having their views reflected.

Chair BLUMENTHAL. Much as I would love to talk about Harvard and Yale, I'm going to bring us back to the reason that we're here. The Court in *Shelby County* made clear that Congress has to show it's done due diligence. That's why we're here: to do the due diligence that the Court in *Shelby County* said we must do for a preclearance provision in the voting protection provisions here.

The known practices preclearance provision in the House version of the John Lewis Voting Rights Advancement Act identifies seven specific practices that have historically been shown, they're known practices, to diminish the voting rights and power of minority voters. Mr. Saenz, I'd like to ask you to talk about those practices identified in this bill, practices that continue to be used to disenfranchise minority voters.

Mr. SAENZ. Thank you, Senator. We've talked about some of them already today, but they include, for example, a reversion to at-large seats because of historically recognized by the Supreme Court, and going back to the *Thornburg v. Gingles* decision, that at-large seats often play a role in disenfranchising minority voters. They include annexations, de-annexations at the local level because historically, those have been used to expand the electorate to include more white voters, to contract the electorate to eliminate more minority areas.

They include redistricting in a context where there has been significant growth of a minority community of any race in a particular jurisdiction, so, not a redistricting, but a recognition that where you've had significant growth of the prior decade of a minority community, that's often where you see a failure to create new seats to answer the changes in the electorate.

It does include voter ID provisions where they are adjudicated either by the Department of Justice or, importantly, at the jurisdiction's choice, district court here in Washington, where they conclude that it cannot meet the standard established. It includes a reduction in multilingual voter materials. While Section 203 is a powerful protection for those voters who need non-English language materials, this is to prevent a retrogression, a reversion, in jurisdictions that may look at that as an easy way to lower the minority vote.

It includes those changes in voting locations, precinct changes, polling place relocations that we know often are a barrier to those who've consistently voted over time at a particular place, but it includes those changes where they have a demonstrated disparity impact, discriminatory effect on minority voters.

Finally, it includes certain voter purges. We have seen at MALDEF problems with voter purges. Just recently, the State of Texas engaged in a targeted attempt to purge voters based on citizenship information provided years earlier to the motor vehicles department, recognizing that those folks, almost all of them had already naturalized, but had no reason to go back and tell motor vehicles that they had naturalized because it was of no moment or significance to that bureau.

Those are the practices identified. All of them have a continuing and historical demonstrated effect in being used particularly to reduce the threat perceived by those in power from a growing minority electorate.

Chair BLUMENTHAL. Historically demonstrated effect based on facts. Not Republican facts or Democratic facts.

Mr. SAENZ. Based on adjudications by and large. Adjudications by judges appointed by a President of both parties and confirmed by the Senate.

Chair BLUMENTHAL. As Ronald Reagan is said to have remarked, I'm not sure it was originally him, but facts are stubborn things, especially in a courtroom.

Let me ask you finally, Mr. Yang, could you explain to us why preclearance, and practice-based preclearance specifically, is so crucial at a time of rapidly increasing diversity in the United States. The 2020 Census results are beginning to show that the United States is diversifying even faster than has been predicted. In particular, Hispanic and Asian Americans are some of the fastest growing demographics. At the same time, this non-white voter gap has been drastically increasing in the years immediately following *Shelby County*. Why is preclearance important?

Mr. YANG. Perhaps jumping off of Mr. Saenz's testimony and talking about the specific provisions that we're talking about, specific practices that we're talking about, when we're talking about, for example, methods of elections, specifically when you're talking about early voting, in all the polls that we have done, Asian Americans prefer early voting, prefer mail-in ballots. If you look at Georgia, for example, 40 percent of Asian Americans, which is above the average in Georgia, voted by mail, voted early by mail. Thirty-two percent voted early by mail in the runoff election, whereas only 24 percent of the general population voted by mail. That would be a practice that would be of concern.

If you're looking at a reduction in multilingual voting materials, Asian Americans, approximately one-third—I think it's actually about 30 percent of Asian Americans are what we would consider limited English proficient. English is not our first language. We are no less of a citizen simply because English is not our first language. The notion of disenfranchising voters simply based on language is something that we should not be countenancing.

With respect to voter purges, I think Mr. Saenz testified about it very well. Again, one of the problems here is notification in language in a culturally appropriate way for the Asian-American population, recognizing that Asian Americans are lower propensity voters.

The other thing about all of these practices that we're talking about is, essentially, we're asking many of these voters, communities of color, in particular, to essentially re-prove their voter registration, or re-prove their eligibility to vote, whereas we are not asking that of other people. Here I'm talking about how it is specifically applied. I gave two examples in my initial opening statement about how it's been applied disparately to the Asian-American community by asking only Asian Americans about their citizenship. Or suggesting that Asian Americans should adopt a more American-sounding name to avoid any problems with respect to voter ID laws.

Those are some of the ways in which practice-based preclearance specifically affect our community and why it is so important for our community.

Chair BLUMENTHAL. Thank you. I'm going to close this hearing. Documents for the record may be submitted. The record will remain open for 1 week for submission of questions or statements—and happy to hear you in a moment, Senator Cruz.

I ask unanimous consent to enter into the record a report entitled, “Practice-based Preclearance” prepared by MALDEF, AAJC, National Association of Latino Elected Officials Education Fund, testimony from Dr. Luis Fraga and Dr. Bernard Fraga, and three reports on voting discrimination prepared by the Southern Poverty Law Center. Hearing no objections, Senator Cruz.

[The information appears as a submission for the record.]

Senator CRUZ. Thank you, Mr. Chairman. I just want to briefly make an observation in response to the exchange between you and Mr. Saenz. Mr. Saenz made reference to the Texas redistricting case and the fact that it went to the U.S. Supreme Court. He is, of course, right, and as he knows, I'm the lawyer that argued that case before the U.S. Supreme Court, and Mr. Saenz observed the Supreme Court raised concerns about one district. That is true. The Supreme Court also upheld the redistricting map, upheld revoking the Democratic gerrymander that had kept Democrats in power despite the large majority of Texans voting for Republicans consistently.

Of the 36 congressional districts, the U.S. Supreme Court upheld 35 of them. There was one district in which the Supreme Court required some modifications. That was CD 23. I would note even that district, the only district with which the Supreme Court found any concerns, that district today, CD 23, is represented by an Hispanic Republican, and so, the efforts of the Democratic plaintiffs to insist that the Supreme Court somehow ensure that Texans keep sending a large majority of Democrats to Congress, even though the voters disagreed, the Supreme Court thankfully rejected that claim and followed the law instead, as it should have.

Chair BLUMENTHAL. This hearing is going to close. I'll invite any of the witnesses who want to respond in writing to any of the comments that have been made, you have an open invitation, a general question.

I apologize that we can't let you do it now because Senator Cruz and I are about to miss a vote, and I am very, very grateful to every one of you for your very helpful and informative testimony.

We are here to do our due diligence. You've aided us very, very significantly. We thank all of you. Thank you. This hearing is adjourned.

[Whereupon, at 12:41 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

Miscellaneous submissions:

Brennan Center For Justice	221
Harriet Tubman Freedom Fighters, Corp., Et Al, v. Laurel Lee, Et Al	179
Marshall, Steve, Written Statement	176
Sixth District of the African Methodist Episcopal Church v. Kemp	234
Texas House of Representatives	236
Vote Dilution and Voter Disenfranchisement in United States History	181
Zwiener, Erin, State Representative, Texas House District 45	230

Asian Americans Advancing Justice (AAJC), MALDEF, NALEO Educational Fund
https://www.govinfo.gov/content/pkg/CHRG-117shrg54945/pdf/CHRG-117shrg54945-add5.pdf

Attorney General's Office, State of Alabama
https://www.govinfo.gov/content/pkg/CHRG-117shrg54945/pdf/CHRG-117shrg54945-add1.pdf

Southern Poverty Law Center (SPLC), "Fight for Representation"
https://www.govinfo.gov/content/pkg/CHRG-117shrg54945/pdf/CHRG-117shrg54945-add2.pdf

Southern Poverty Law Center (SPLC), "Freedom Summer, Shelby County, & Beyond"
https://www.govinfo.gov/content/pkg/CHRG-117shrg54945/pdf/CHRG-117shrg54945-add3.pdf

Southern Poverty Law Center (SPLC), "Selma, Shelby County, & Beyond"
https://www.govinfo.gov/content/pkg/CHRG-117shrg54945/pdf/CHRG-117shrg54945-add4.pdf

Testimony Before the Senate Judiciary Committee's Subcommittee on the Constitution

Hearing on "Restoring the Voting Rights Act: Combatting Discriminatory Abuses"

September 22, 2021

Maureen S. Riordan
Litigation Counsel
Public Interest Legal Foundation
32 E. Washington Street, Suite 1675
Indianapolis, Indiana 46204
317-203-5599
www.PublicInterestLegal.org

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

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

I have been an attorney for approximately 35 years. For more than twenty of those, I served in the Civil Rights Division of the Department of Justice. Eighteen of those years were spent both as a Voting Section trial attorney and well as Senior Counsel to the Attorney General for Civil Rights. During my tenure at the Department, I have been the recipient of numerous awards.

From August 2000 until the Supreme Court's decision in *Shelby v Holder,* my primary responsibility was to review changes in voting submitted for preclearance under Section 5.

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

The Voting Section has a long history of partisan and ideological polarization. It should not be granted this virtually limitless power. I began my employment in the

Voting Section just prior to the 2000 election. When the Florida recount occurred, I personally observed Voting Section staff discussing strategies to aid the DNC in Florida and receiving and sending faxes to Democratic National Committee and campaign operatives.

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

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

But don’t just take the word of the DOJ Inspector General on this point, listen to what the Justice Department itself has said about the abuse of power. The Office of Legislative Affairs detailed in a letter to Representative Sensenbrenner the millions of

---

[1] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwib5dKmlbrxAhVBG80KHRquAv4QFjABegQIBRAD&url=https%3A%2F%2Foig.justice.gov%2Freports%2F2013%2Fs1303.pdf&usg=AOvVaw09dTbH3E3cEhHWZFmI48bw

dollars in sanctions the Voting Section has incurred for bad behavior in Section 5 reviews and other court cases. I have attached the letter to my testimony.

When the Voting Section brought an action against an African American named Ike Brown, in Noxubee County Mississippi, for violating the Voting Rights Act, these partisan bureaucrats disagreed with the filing of the case and were hostile to it throughout the prosecution of the case. They have disdain for the equal application of civil rights laws to all Americans. It is not wise to give such a place limitless power over states.

Past Abuse of Section 5 Powers

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

Between 1993 and 2000, the Voting Section has been sanctioned $2,358,687.31 For example, in *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section $594,000 for collusive misconduct by DOJ Voting Section lawyers. A federal court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working

together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible." Abuse of power in the Section 5 process is not confined to *Johnson v. Miller*.

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

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

A 2009 objection in Kinston, North Carolina, shows the outrageous, abusive and legally indefensible positions the Voting Section will adopt using Section 5. Kinston, a majority black jurisdiction, in a referendum decided to dump partisan elections for town office and move to nonpartisan elections. The Voting Section, required that Kinston prove that this change, supported by African American elected officials was not adopted with a discriminatory purpose or that it had a discriminatory effect. The logic of the Section 5 objection was that if black voters did not have the word

Democrat next to candidate names, they would not be able to elect the candidates of choice they really supported. (Objection letter attached as EXH. B)

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

Every change no matter how small

H.R 4's practice-based preclearance triggers will require almost every small election change to be submitted to the federal government for approval, no matter how inconsequential the change may be. For example, a polling place change does not just include a change in physical address. It includes ANY change to the polling place. If a

polling place moved from the *school gym to the school cafeteria*, under this proposal, the lawyers in the Voting Section would have to review and approve or reject the change. Voter registration changes include office hour openings from 8:30 to 8:25 would have to be approved. Any change in a polling place *signage font* would have to be approved. Changes in the location of the registrar from the old city hall to new city hall literally across the street, changes in the numbering of precinct numbers that do not affect location, all of these would have to be approved.

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

Preclearance is not necessary in 2021

Section 5 was a temporary provision for reasons that no longer exist. The Supreme Court made clear in *Shelby* that only certain conditions would justify any formula for Section 5 coverage today. Among the touchstones listed by the Court are "blatantly discriminatory evasions of federal decrees," lack of minority office holding, tests and

devices, "voting discrimination 'on a pervasive scale," "flagrant" voting discrimination, or "rampant" voting discrimination. Such discrimination does not exist today.

I would ask Senators who support this bill to cite one single instance of an evasion of a federal decree in a voting rights case. Just one.

How about a lack of minority office holding? Quite the opposite. According to the National Directory of Latin Elected Officials, there were 6,682 Latin elected officials in the United States in 2019. According to the National Database of Non-White Elected Officials, at gmcl.org, there are over 10,000 Black elected officials in the United States and in some states significantly more than the percentage of minorities in the general population. As the Supreme Court stated "Federal intrusion into the powers reserved by the Constitution to the States must relate to these empirical circumstances. Triggers that are built around political or partisan goals will not withstand Constitutional scrutiny.

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

Tools Exist to Stop Discrimination

Permanent provisions of the Voting Rights Act such as Section 2 still prohibit discrimination and provide the Justice Department with the ability to challenge election procedures. When the Voting Section filed a lawsuit against Georgia a few months ago, the Department has only brought 5 Section 2 cases since the Shelby decision in 2013. If there is rampant discrimination in voting actually exists why has DOJ not brought cases challenging these ills?

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

Section 3(c) the "bail in provision", allows a judge to order a state or subdivision to submit to the preclearance provisions, if it finds that the jurisdiction intentionally discriminated against minority voters. It is also consistent with the *Shelby* mandate that federal oversight of state or local elections be closely matched by need. However, H.R. 4 would also allow a jurisdiction to be subjected to the rigors of Section 3 for violations of H.R. 4, violations of Section 5, or when a jurisdiction has agreed to settle a case through a consent decree. None of the new allowable triggers require a showing of intentional discrimination and are inconsistent with permissible federal oversight as outlined in the *Shelby* decision.

Lastly, but of great importance is Section 11(b), which prohibits intimidation, threats, or coercion directed towards voters or those aiding voters. This section is also

available post Shelby, yet there has not been a case brought by the Department through 11(b) since the case against the New Black Panther Party in 2009.

Proposed Changes to Section 2 of the VRA

The proposed changes to Section 2 that are included in HR 4 turn Supreme Court precedents on their head. In *Bartlett v Strickland*, the Supreme Court held that "coalition districts" (those where a protected racial minority does not represent a majority, but voters of other races vote cohesively with the racial minority to allow the racial minority to elect a candidate of choice) were not protected by the VRA. The party asserting Section 2 liability must show that the racial minority population is greater than 50% and is geographically compact, Yet, the proposed bill mandates protection of "protected classes" that are politically cohesive as opposed to the protection of a racial minority group. Recognizing that a Section 2 claim where minority voters cannot elect their candidate of choice based upon their own votes without assistance from others would grant special protection to their right to form political coalitions which are not authorized by the VRA.

The Voting Rights Act protects racial minorities, not political parties. Once Americans begin to suspect otherwise, that the Voting Rights Act is a one way ratchet to protect political parties, they will stop supporting it. Once Americans think that this

incredibly successful civil rights statute is a partisan tool, you will see support for civil rights evaporate.

Furthermore, the proposed bill destroys – by design - the Supreme Court's decision in the *Brnovich* case, by utilizing the Senate factors that are considered for vote dilution claims and applying them to other Section 2 claims.

The proposed bill now provides for a successful Section 2 claim based upon the expanded Section 5 "retrogression standard". This would likely be unconstitutional.

Finally, the proposed "evidentiary standard" for obtaining a preliminary injunction proposed in H.R. 4 sets federal law on its head. The Supreme Court has held that a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, (2008). The Court further noted that because a preliminary injunction is such an extraordinary remedy, it is NEVER awarded as a right, and that courts should pay particular regard for the public interest. *Winter* at 24. The new standard contained in H.R. 4 not only disregards the public interest held by the State, H.R. 4 actually prohibits the court from considering the interest of the State in any application for the preliminary injunction. In doing so, the proposal wrecks the notion of due process.

Thank you for your time and attention.

Testimony of Thomas A. Saenz
President and General Counsel, MALDEF

Before the Subcommittee on the Constitution
of the Senate Committee on the Judiciary

Hearing on Restoring the Voting Rights Act: Combating Discriminatory Abuses.

September 22, 2021

Good morning. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which has, for 53 years now, worked to promote the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where we were founded; and Washington, D.C. We will soon open a new regional office in Seattle. I thank you for this opportunity to appear before you to address practice-based coverage and it impact on voting rights concerns of the Latino community.

MALDEF focuses its work in five subject-matter areas: education, employment, immigrant rights, voting rights, and freedom from open bias. Since its founding, MALDEF has worked diligently to secure equal voting rights for Latinos, and to promote increased civic engagement and participation within the Latino community, as among its top priorities. MALDEF played a leading role in securing the full protection of the federal Voting Rights Act (VRA) for the Latino community through the 1975 congressional reauthorization of the 1965 VRA. In court, MALDEF has, over the years, litigated numerous cases under the Fourteenth and Fifteenth Amendments, and under Section 2, Section 5, and Section 203 of the VRA, challenging at-large systems, discriminatory redistricting, ballot access barriers, undue voter registration requirements, voter assistance restrictions, and failure to provide bilingual ballot materials. We have litigated numerous significant cases challenging statewide redistricting in Arizona, California, Illinois, and Texas, and we have engaged in pre-litigation advocacy efforts, as well as litigation related to ballot access and local violations, in those states, as well as in Arkansas, Colorado, Georgia, Nevada, and New Mexico.

Comparative rates of voter registration and voter participation among racial groups, including Latinos, continue to demonstrate that voter suppression – through vote denial, as well as vote deterrence – remains a salient flaw of our democracy. It is one of the unexplained ironies of our national discourse that an election -- the 2020 presidential general election -- that showed unprecedented numbers of voters participating and rates of eligible participation unseen in a

century, has not been universally celebrated as a milestone in reducing voter suppression, but has instead been used to justify increased efforts to reduce minority voter participation in future elections.

The fact that one presidential candidate has refused to date to accept the legitimacy of his own substantial defeat at the polls is currently being used to justify voter suppression measures in too many states across our country. The unprecedented egotism of Donald Trump, despite positive past examples from presidents of both parties in graciously accepting electoral defeat, has led to an attempted insurrection and is currently catalyzing too many legislative attempts at suppression of minority voters.

Unfortunately, this continues a recent pattern of increasing voter suppression efforts. This longer-term increase stems from ongoing demographic changes, including in particular the unprecedented growth of the Latino voting community. Data released last month from the 2020 Census confirms this ongoing phenomenon. Latinos, while making up almost 19 percent of the total United States population, nonetheless accounted for over 51 percent of the nation's population growth between 2010 and 2020. Moreover, contradicting assumptions that Latino population is overwhelmingly comprised of recent immigrants, over 44 percent of the growth in the United States citizen, voting-age population (CVAP) came from the Latino community in the ten years prior to 2019. CVAP growth is a useful proxy for growth in the eligible voter population. 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, or to work to convince those voters to change their views, but instead to engage in expanded efforts at voter suppression. These suppression efforts have taken the form both of new mechanisms to obstruct, such as restricting access to food and water while waiting in line to vote, as well as through the proliferation of longstanding mechanisms to suppress meaningful participation, such as targeted voter purges, creation of at-large elected positions, and precinct changes that do not respond to recent elections' in-person voting experiences. 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 VRA 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 inextricably to voter suppression. Litigation under Section 2 is costly – in direct resources and opportunity costs – and time-consuming. Pre-clearance review benefits jurisdictions by dramatically reducing their costs to defend elections-related changes, and benefits minority and other voters by yielding more timely resolution of voting rights disputes. In addition, litigation under Section 2 is too often unable to secure resolution before an election moves forward with the taint of voting rights violations attached; once an election, it is virtually

impossible for the court system to enforce a remedy that would undo the damage in that completed election.

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 in those elections. Such rational gaming of the system, catalyzed by inadequate resources to challenge all instances of voter suppression nationwide, undermines confidence in our democracy and presents a clear constitutional crisis.

In the aftermath of the 2013 Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), MALDEF originated the idea of practice-based pre-clearance coverage as a complement to a geographic, history-based formula for broader pre-clearance coverage. Practice-based coverage was proposed as a means to address the increasing introduction and enactment of voter suppression measures precisely in response to the growth of the local Latino community to a level viewed as a threat to the political powers that be. Often, where the Latino community reaches that "tipping point" where they are perceived as a political threat, it is the first minority community to reach such a point, meaning that the jurisdiction involved had no reason to engage in race-targeted voter suppression – or to be challenged for such acts – previously in the jurisdiction's history. This means that building a record of adjudications against race-targeted voter suppression sufficient to invoke geographic coverage would take many years and involve substantial cost to plaintiffs and, even more so, to the jurisdiction. The result could well be a severely budget-challenged city (or other jurisdiction) just as the numerically ascendant minority group is provided sufficient voter protection to enable it to exercise controlling political power in the city. Such a result is in no one's interests, not residents', not current or future elected officials', not the judicial system's.

Moreover, the simple fact of ongoing United States demographic change, highlighted again in the many headlines surrounding the first release of detailed data from the 2020 Census, predicts that more and more local and state jurisdictions will face that "tipping point" of perceived political threat from an ascendant minority group -- likely Latino in the next many years, but joined by Asian Americans in a similar position down the line. With so many jurisdictions coming to that tipping point, we cannot reasonably expect that expensive and time-consuming litigation under Section 2 of the Voting Rights Act – and the distant prospect of sufficient successful litigation to trigger geographic pre-clearance coverage – will remotely suffice to meet the scope of the nationwide challenge. Failure to meet the challenge would permit entrenched powers across the nation to sacrifice democracy to their own retention of authority. It is no exaggeration to characterize such widespread abuses of authority as an existential threat to our democracy and a constitutional crisis of significant proportion.

An adequate response demands recourse to the powerful and effective alternative dispute resolution (ADR) mechanism in pre-clearance review under the VRA. Like the best ADR, pre-clearance saves time and money, efficiently addressing potential violations of voting rights without overburdening the courts and opposing parties with burdensome volumes of litigation under Section 2 of the VRA, applying Section 2's time-consuming and resource-intensive "totality of the circumstances" test. The greatest benefit from the ADR of pre-clearance inures to the elections-administering jurisdictions themselves, which face massive costs in losing Section 2 litigation because of fee-shifting for prevailing plaintiffs under the VRA. Under pre-clearance, by contrast, the jurisdictions receive timely and protective approvals of their covered elections changes without facing the daunting prospect of lengthy and costly defense of a Section 2 lawsuit.

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. Where these and other voting-related changes are motivated by a desire to limit the political power of a growing racial minority group, the changes stem from intentional racial discrimination; because intent constitutes a violation of the Constitution's Fourteenth and Fifteenth Amendments, such changes are therefore unconstitutional, even if they are ultimately challenged and struck down on statutory grounds through the VRA.

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.

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 the course of virtually our entire organizational existence. One experience of note in recent years followed the Supreme Court decision in *Shelby County*, striking 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. This would have ensured that Latino residents of Pasadena would continue to face policies made by a city council majority that Latinos did not support and that, in turn, showed little responsiveness to the concerns of the Latino community, which comprised a majority of the city's total population.

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. The finding of intent signaled that the change catalyzed by the mayor was also unconstitutional. The court's findings and conclusions resulted in the first contested "bail in" order after the *Shelby County* decision, requiring Pasadena to pre-clear future electoral changes. That favorable outcome followed lengthy and costly trial preparation and

trial, all of which would likely have been avoided had the challenged change been subject to pre-clearance review, as it would have been before the *Shelby County* decision.

More recently, MALDEF pursued litigation under both the Fourteenth Amendment prohibition of intentional discrimination and Section 2 of the VRA to challenge a targeted attempt to remove naturalized Latino voters from the rolls. In early 2019, the Texas state secretary of state directed counties to send letters questioning the right to vote of thousands of registered voters who were not yet citizens when they sought driver's licenses many years earlier at the Texas Department of Public Safety (DPS). Disregarding the fact that the vast majority of those targeted had naturalized since the Texas DPS collected their information, the secretary of state plowed forward, targeting voters who, as naturalized citizens, were overwhelmingly from Latino and other racial minority communities. After MALDEF and others moved swiftly to challenge the proposed purge of voters, the federal judge assigned to the case opined that the state's "threatening correspondence" epitomized "the power of government to strike fear and anxiety and to intimidate the least powerful among us." Order, Feb. 27, 2019 in *Texas LULAC v. Whitley*, Case No. SA-19-CA-074-FB (W.D. Tex.), at 1. Indeed, many of the thousands of legitimate Latino voters who were on the state list were greatly intimidated. Ultimately, the litigation caused Texas to abandon its efforts to purge the targeted voters, but, to a great extent, the damage to many voters was already done. And, because naturalized voters were targeted, most of the damage was borne by racial minorities, including Latinos.

Beyond these specific, litigated examples of how the specified practices in practice-based pre-clearance have been used recently to engage in unconstitutional racial discrimination in voting, others have extensively documented longer histories of misuse of these practices. For example, Professor Luis Fraga has explained the consistent misuse of some of these practices to suppress the vote of racial minority groups. Luis Fraga, "Vote Dilution and Voter Disenfranchisement in United States History" (2021) (copy submitted with this testimony). That is not to say that these practices are inevitably misused, but pre-clearance provides a mechanism to quickly and efficiently assess where misuse has occurred. The demographic threshold to limit the pre-clearance obligation to jurisdictions where the size of at least one minority group has reached a point of perceived threat, ensures greater efficiency by focusing on jurisdictions where unconstitutional vote suppression is more likely to occur. Professor Bernard Fraga has explained why the demographic threshold is rational and appropriate. Bernard Fraga, "A Population-Limited Trigger for Practice-Based Preclearance Under the Voting Rights Act" (2021) (copy submitted with this testimony).

The Pasadena reversion to at-large seats and the Texas attempted purge of naturalized voters were each ultimately ended through litigation by private parties under Section 2 of the VRA. 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, such as challenging voter purges, 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. By providing a more efficient and less costly mechanism to resolve potential contention about the legality of voting-related changes, such as reversion to at-large seats or improperly targeted voter purges, practice-based provides an effective form of alternative dispute resolution (ADR) to prevent unconstitutional and unlawful voting changes that target racial minority communities.

Of course, the benefits from pre-clearance, as highly effective ADR, extend beyond the specific circumstances of practice-based coverage and the demography-driven "tipping point" phenomenon that is becoming increasingly widespread in the United States. These benefits also accrue to geographies that may be covered under a geographic formula for pre-clearance grounded in recent historical patterns of voting rights violations. Here, the pre-clearance formula steps in, as almost a tripped fuse or breaker box, to stop jurisdictions with a pattern of race-targeted vote suppression from continuing to engage in such behavior and from perpetuating the expensive prospect of successful challenges to that vote-suppressive behavior. Instead, the geographic formula substitutes the ADR of pre-clearance in place of costly litigation.

In other ways, the two pre-clearance coverage formulas are symbiotic to one another. That is to say, practice-based coverage is a complement to, not a substitute for, a geographic pre-clearance formula. As I have said colloquially, the two formulas together allow us to use the powerful pre-clearance mechanism to target both serial vote killers and copycat vote killers. By focusing on jurisdictions with a longstanding, yet recent, pattern of race-targeted, vote-suppressive conduct, the geographic formula does the former. By targeting jurisdictions using

practices employed in the past by many other jurisdictions to suppress votes, practice-based coverage accomplishes the latter.

Changing metaphors, no one in their right mind would have suggested in the face of a dangerous pandemic that science focus solely on finding successful treatment for infected persons, without also seeking a vaccine to prevent serious infection from occurring among others. Conversely, no one with any humanity would have suggested that science only seek to develop a vaccine, while allowing those already infected to simply suffer and possibly die with no research efforts to find effective treatment. Here, the geographic coverage formula addresses jurisdictions already showing signs of severe infection with the disease of voter suppression, while practice-based coverage uses the science of pre-clearance to prevent serious infection with the disease among those jurisdictions showing susceptibility to it.

Neither coverage formula can address all legitimate voting rights concerns; both are needed. For example, because practice-based coverage only reaches specified changes in elections-related practices, it cannot work to prevent proliferation of any new and crafty mechanisms devised to limit the right to vote of racial minorities. By contrast, geographic coverage, in reaching all elections-related changes, does have the ability to stem any new or obscure means of accomplishing voter suppression. Moreover, this distinction is rational because serial vote suppressers, having unsuccessfully tried other means of vote suppression (indeed, it is past challenges to discriminatory vote suppression that triggers pre-clearance coverage under the geographic formula), are those most likely to seek out and attempt to implement craftier means of suppressing and deterring voter participation. The jurisdictions covered by practice-based coverage are less likely to seek to devise new means of vote suppression because they can simply copy mechanisms used elsewhere to stem the perceived threat from an ascendant minority voter group.

Of course, over time, any jurisdiction -- including those initially engaged in changes triggering practice-based coverage -- that engages in successive and different means of attempting to suppress minority votes will ultimately find itself subject to the broader geographic pre-clearance coverage. In this way, the two formulas are complementary as well. Neither is a substitute for the other. The worst rights-violating jurisdictions may start with facing pre-clearance of certain known practices, but ultimately face pre-clearance for all elections-related changes under geographic coverage. While practice-based coverage may delay triggering coverage under the geographic formula for some of the jurisdictions most tenaciously-committed to vote suppression, that is all to the good because the delay occurs because specified practices with a discriminatory intent or effect will have been blocked through practice-based coverage. Finally, the use of practice-based coverage to efficiently prevent certain rights-violating changes from being implemented, will also enable scarce enforcement resources – in both the Department of Justice and in the private sector – to be marshalled toward Section 2 litigation challenging the more innovative means of vote suppression that may be attempted in the future. It is in these novel and knotty cases that court adjudication, applying the “totality of the circumstances” test, is most appropriate.

Ultimately, of course, practice-based coverage may have the effect of deterring jurisdictions from engaging in the targeted practices at all. If we reach that point, many years from now, we can celebrate the highly effective deterrent of pre-clearance. In the meantime, practice-based coverage is needed to sufficiently address the challenge of voter suppression through historically established, discriminatory practices, especially as we face today's suppression proposals and as we look to a future of substantial demographic change that will challenge the ability of many officeholders and political leaders nationwide to cede power voluntarily without attempting to manipulate democracy through suppression of electoral participation by ascendant minority voter groups.

Practice-based coverage is constitutionally sound, within the plain authority of Congress. There is no more important goal, no goal more central to our national existence, than to prevent race-targeted voter suppression. Our history demonstrates the ongoing harm from such suppression. Practice-based coverage, grounded in demonstrated history of the use of these practices to suppress the votes of minority groups growing in population, is an appropriate and measured response to the challenge facing a nation of rapid demographic change.

There are numerous constitutional bases of authority to enact practice-based coverage. The most important of these are the congressional implementation provisions of the Fourteenth and Fifteenth Amendments of the Constitution, and the Elections Clause of the Constitution. The Elections Clause plainly would support practice-based pre-clearance in application to federal elections.

Under its Fourteenth and Fifteenth Amendment authority, Congress may enact practice-based coverage because the formula responds directly to the federalism and equal sovereignty concerns expressed in the Supreme Court decision in *Shelby County v. Holder*. By restricting the pre-clearance obligation to specified changes – changes that have historically correlated with efforts at suppression of growing groups of minority voters -- rather than to all elections-related changes, practice-based coverage limits the intrusion on state policymaking and elections administration, answering the *Shelby County* majority's federalism concerns.

In addition, by applying to all jurisdictions, rather than to specifically identifiable states or other jurisdictions, practice-based pre-clearance coverage responds to the equal sovereignty concerns expressed by Chief Justice Roberts in *Shelby County*. No stigma would even theoretically attach to any state based on its history or previous policymaking. The only threshold for coverage rests on demography, which is largely beyond the scope of historical or ongoing policymaking of the jurisdictions that meet the threshold for coverage of specified changes in elections practice. This threshold is a necessary step to greater efficiency and lower cost in administering practice-based pre-clearance. It rationally relates to where voter suppression is more likely by excluding jurisdictions that are overwhelmingly comprised of a

single racial group. From a constitutional perspective, the threshold supports the congruence and proportionality of the response, in practice-based coverage, to the danger of race-targeted vote suppression. Because vote suppression that is not targeted at race, or with disproportionate effect by race, lies beyond the scope of the Fourteenth and Fifteenth Amendments, requiring jurisdictions that are nearly all white (or increasingly likely, nearly all comprised of some other single race) would be incongruent with the Amendments and disproportional to the actual danger of race-targeted vote suppression.

Some have recently raised concerns about this threshold because it relies on measures of population by race. These concerns are unwarranted; our Constitution does not require ignorance of matters like racial differences and their correlation with differences in voting preferences. Indeed, the Supreme Court has acknowledged this correlation in its Voting Rights Act Section 2 jurisprudence. Moreover, under practice-based pre-clearance coverage, 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, which would result in permission to move forward if the standards of pre-clearance review are met.

Of course, the threshold does not distinguish among the races; all that is required is the presence of any two racial groups, each comprising a significant proportion of those potentially eligible to vote in the near future in the jurisdiction. Although today, one of those two groups, in virtually every jurisdiction, is most likely to be whites, that will almost certainly change over time. Eventually, the threshold will be satisfied by other combinations of two racial groups in a jurisdiction, like Latino-Native American (in New Mexico, perhaps), or Asian American-Latino (in Hawaii, perhaps), or Black-Latino (in Georgia perhaps), or Black-Asian American (in Virginia, perhaps) in specific states or sub-state jurisdictions.

Indeed, it is unlikely that the Supreme Court would see the demographic threshold as a race-based classification at all. Jurisdictions, not people, face a legislative consequence from the demographic threshold, such that racially mixed jurisdictions are treated differently from racially isolated jurisdictions. As pointed out above, that distinction is rationally grounded in the constitutionally-authorized legislative purpose of targeting race-targeted vote suppression. Not without reason, some would assert that the *Shelby County* decision itself, through the "equal sovereignty" notion, anthropomorphized states to an extent never seen before, focusing on human emotions like stigma with respect to states. Nonetheless, it would be hard to conclude that the Court is prepared to anthropomorphize jurisdictions to the point of asserting that they have a "race" or could have a "race classification."

Indeed, the Congress and President have for many years, through the Higher Education Act and its reauthorizations, provided funding and support targeted to HBCUs (historically Black colleges and universities) and HSIs (Hispanic-serving institutions). This is an award of support to colleges and universities based primarily on how racially-mixed their enrollments have been historically and are today. This has occurred without credible challenge through an assertion that

these colleges and universities each have their own "race" and are being benefitted unconstitutionally because of their specific "race" through an improper racial classification.

The recent Supreme Court decision in *Schuette v. BAMN*, 572 U.S. 291 (2014), may also be instructive. There, in a plurality opinion announcing the Court judgment, Justice Anthony Kennedy essentially rejected the notion that issues or policy areas could be judicially determined to have a "racial focus" because they inure to the primary benefit of a specific race or races. He cautioned against assumptions about how different racial groups feel about a particular issue or policy, and about classifying the issues themselves on that basis. This suggests that, whatever the Supreme Court's tendency toward anthropomorphizing entities – closely-held businesses, states – it is not yet prepared to extend that trend to the peculiarly human attribute of "race."

Because the demographic threshold does not distinguish among the races, does not impose consequences on people (as opposed to jurisdictions) of any specific race or on the basis of race, and does not assign a "race" to jurisdictions but distinguishes based solely on racial isolation, MALDEF does not believe the Supreme Court would characterize the threshold as a constitutionally suspect racial classification. Moreover, without belaboring the point, MALDEF also believes that, even were it so characterized, the threshold would survive strict scrutiny as necessary and tailored sufficiently to serve the compelling government purpose of preventing and deterring race-targeted voter suppression.

I should also note that some have recently questioned – whether from concerns of constitutionality or practical utility -- why the demographic threshold established in the proposed practice-based coverage utilizes voting-age population (VAP), rather than citizen, voting-age population (CVAP). Because practice-based coverage is premised on perceptions of threat from a growing group of minority voters, something other than total population is appropriate because large numbers of children, particularly younger children, are not an electoral threat to the political powers that be. Indeed, this may be why so many young people of all races believe elected officials to be inattentive to their concerns.

Using CVAP instead of VAP would also exclude another set of current non-voters – immigrants not yet naturalized. Use of VAP is superior to use of CVAP in this specific context. Initially, I note that VAP data from the Census is more accurate than CVAP data, which comes only from American Community Survey (ACS) estimates, normalized over several years. But, more important is the fact that the powers that be in jurisdictions hitting the "tipping point" of perceived political threat are forecasting future electoral threats to their perpetuation in office. This generally means that they are looking four years out – to their next potential re-election contest – assuming a four-year term of office. The vast majority of immigrants not yet naturalized are lawful permanent residents. All lawful permanent residents, except the small number disqualified from naturalizing, are three to five years or less from eligibility to naturalize and to vote. Thus, political-threat perception projected four years to the next election should include immigrants not yet naturalized; therefore, VAP is the better measure of the potential for perceived political threat by those in power. Indeed, because of the likely four-year time

horizon, it would be best to include also those from age 14 to 17, but doing so would be unduly cumbersome to implement. VAP is the best, most readily available measure for these purposes.

Our changing nation faces significant challenges in the future with the growing presence of minority voters, and in particular the unprecedented growth of the Latino voting population. These significant changes present an opportunity to ensure that our democracy thrives based on real, core values of fairness and non-discrimination. Unfortunately, we have already seen a tendency among some political leaders, including the disgraced former president, Donald Trump, to resist those demographic changes through lies around election integrity that catalyze attempts at further race-targeted voter suppression. We can only hope to effectively counter these threats and to seize the opportunity to build a thriving democracy by including practice-based coverage, together with geographic coverage, to reinvigorate the powerful pre-clearance mechanism, in the John Lewis Voting Rights Advancement Act. Thank you.

CONGRESSIONAL TESTIMONY

"Restoring the Voting Rights Act: Combating Discriminatory Abuses"

Testimony before the
Committee on the Judiciary

Subcommittee on the Constitution

United States Senate

September 22, 2021

Hans A. von Spakovsky
Senior Legal Fellow
Center for Legal and Judicial Studies
The Heritage Foundation

Introduction

My name is Hans A. von Spakovsky.[1] I appreciate the invitation to be here today. I am a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years. Before that I spent four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights (2002-2005), where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act, the National Voter Registration Act, the Help America Vote Act, and the Uniformed and Overseas Citizens Absentee Voting Act.[2]

There Is No Need for Legislative Reforms

The answer to the question of whether there is a need for legislative reforms to the Voting Rights Act of 1965 ("VRA") is a straightforward "no." The VRA is one of the most important – and most successful – statutes ever passed by Congress to guarantee the right to vote free of discrimination. After the U.S. Supreme Court's correct decision in *Shelby County v. Holder*,[3] the VRA through its various provisions, including Section 2, remains a powerful statute whose remedies are more than sufficient to protect all Americans.

With the latest guidance by the U.S. Supreme Court on the proper application of Section 2 to discriminatory practices in *Brnovich v. DNC*,[4] both the U.S. Justice Department and private parties have the legal means at their disposal to stop those increasingly rare instances of voting

---

[1] The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During 2020, it had hundreds of thousands of individual, foundation, and corporate supporters representing every state in the U.S. Its 2020 operating income came from the following sources: Individuals 66%, Foundations 18%, Corporations 2%, Program revenue and other income 14%. The top five corporate givers provided The Heritage Foundation with 1% of its 2020 income. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

[2] I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981. I am the coauthor of *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (2012) and *Obama's Enforcer: Eric Holder's Justice Department* (2014).

[3] Shelby County v. Holder, 570 U.S. 529 (2013).

[4] Brnovich v. Democratic National Committee, 594 U.S. ___ (2021).

discrimination when they occur.

There Is No Wave of "Voter Suppression" Occurring

The claim that there is a wave of voter suppression going on across the country that requires expansion of the VRA is simply false. Efforts to enhance the integrity of the election process through reforms such as voter identification requirements and improvements in the accuracy of statewide voter registration lists are not voter suppression.

On voter ID, for example, the data is clear that such a requirement does not prevent any eligible individuals from voting and yet the proposed legislative reforms treat it as a suspect, discriminatory practice. A 2019 survey of ten years of turnout data from all fifty states found that state voter ID laws "have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation."[5] Voter ID laws are in place in numerous states like Indiana, Georgia, Alabama, Tennessee, South Carolina, Wisconsin, Kansas, Arkansas, Mississippi, and Texas because courts agreed they are not discriminatory and do not represent a tangible burden on voters.

We have also seen evidence of this in the steady increases in registration and turnout in states that have implemented much-needed election reforms intended to improve access, integrity, and security, as well as in the steady *decrease* in the number of enforcement cases being brought by the Justice Department due to a decreasing number of violations of federal law, even after the 2013 *Shelby County* decision.

I explained this in greater detail in a recent law review article, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," which is attached to, and incorporated into, this testimony.[6] For example, during the entire eight years of the Obama administration, the Civil Rights Division of the Justice Department filed only four cases to enforce Section 2 of the VRA. The Trump Administration filed two Section 2 enforcement actions.

In short, there was no upsurge in Section 2 cases after the *Shelby County* decision; in fact, the Obama Administration filed far *fewer* Section 2 enforcement actions than the Bush Administration, which filed 16 such cases. The record over the past two decades, and particularly in the last ten years, provides no evidence to support the claim, which has been asserted many times, that there are widespread, systematic unlawful, voter suppression actions being taken against minority voters by state and local jurisdictions.

As the Supreme Court outlined in 2013 in *Shelby County*, the original conditions that justified the preclearance requirement no longer existed; in fact, the turnout of minority voters in

[5] Enrico Cantoni and Vincent Pons, "Strict Voter ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008-2018, National Bureau of Economic Research, Working Paper No. 25522 (Feb. 2019, Revised May 2021).
[6] Hans A. von Spakovsky, "The Myth of Voter Suppression and the Enforcement Record of the Obama Administration," 49 U. Mem. L. Rev. 1447 (2018-2019).

the covered jurisdictions was higher in "five of the six States originally covered by Section 5, with a gap in the sixth State of less than one half of one percent."[7] No one disputes that Section 5 was needed in 1965. But in the same way that the Supreme Court did, we must all recognize that time has not stood still, and "[n]early 50 years later, things have changed dramatically."[8]

This can also be seen in Census Bureau reports on registration and turnout in the subsequent federal elections after the 2013 decision in *Shelby County*. The Bureau's report on the 2012 election showed that black Americans voted at a higher rate than whites nationally (66.2% vs. 64.1%).[9] Other examples abound. According to the Census Bureau's reports (found in Tables 4a) for the 2016, 2018, and 2020 elections, Mississippi, a formerly covered state, had a higher overall turnout of citizen voters than Connecticut, New York, and Delaware. The turnout, respectively, for Mississippi was 67.7%, 54.2%, and 70.3% in each election. The citizen turnout in the other three states according to the Census Bureau was less for each election year:

Connecticut – 63.9% (2016); 54% (2018); and 66.6% (2020)

New York – 57.2% (2016); 49.5% (2018); and 64.7% (2020)

Delaware – 62.3% (2016); 51.8% (2018); and 67.7% (2020)

Moreover, the turnout of black citizens ("alone" per the Census category as outlined in Table 4b) exceeded that of whites "alone" in Mississippi in each of those elections. The same cannot be said for Connecticut, New York, and Delaware, in which the vote of whites exceeded that of blacks in some elections, while the reverse was true in others. Georgia, a formerly covered state, also had a higher overall percentage of turnout of its citizens according to the Census reports than New York in the 2016, 2018, and 2020 elections, and the turnout percentage of black citizens was also higher in Georgia in the 2018 (59.6%) and 2020 (64%) elections than in New York in both elections (51.3% and 62.7%).

The Census Bureau's recent release of its 2020 election survey of voter turnout also clearly demonstrates that there has been no wave of "voter suppression" keeping American voters from registering and voting or that requires amending the VRA and expanding the power of the Justice Department.[10]

Instead, the Census Bureau reports that the turnout in last year's election was 66.8 percent – just short of the record turnout of 67.7 percent of voting-age citizens for the 1992 election. This

---

[7] *Shelby County*, 570 U.S. at 535.
[8] *Shelby County*, 570 U.S. at 547.
[9] Thom File, U.S. Census Bureau, "The Diversifying Electorate – Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections) 3 (2013).
[10] "2020 Presidential Election Voting and Registration Tables Now Available," U.S. Census Bureau, Press Release (April 29, 2021).

was higher than the turnout in President Barack Obama's first election, which was reported as 63.6 percent by the Census Bureau.

The Census survey shows that there was higher turnout among all races in 2020 when compared to the 2016 election. Black Americans turned out at 63 percent, compared to only 60 percent in 2016. Fifty-nine percent of Asian Americans voted in 2020, a 10-percentage point increase from 2016 when 49 percent turned out to vote.

The Census Bureau reports that voter registration in 2020 reached 72.7 percent, which is higher than the 70.3 percent who registered in 2016 after eight years of the Obama-Biden administration. Not only that, but voter registration in 2020 was higher than in the 2000, 2004, 2008 and 2012 elections.

Hispanics made up 11 percent of the total turnout in the 2020 election, up from only nine percent in 2016. The Hispanic share of the vote was just behind that of Black Americans, who had 12 percent of the total vote in 2020 – the same percentage of the total vote by Black Americans in the 2016 election at the end of the Obama-Biden administration.

The bottom line of the Census Bureau's survey is that Americans are easily registering – when they want to – and they are turning out to vote when they are interested in the candidates who are running for office. In fact, in an election year in which we were dealing with an unprecedented shutdown of the country due to a pandemic, we had, according to the Census Bureau, "the highest voter turnout of the 21st century."

Proposed Amendments in H.R. 4

Not only are minority voters registering and turning out to vote in record numbers, but the other factors that showed the need for preclearance have also long disappeared. As the Supreme Court pointed out in the *Northwest Austin* case: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[11] Yet the amendment being proposed in H.R. 4, "The John Lewis Voting Rights Act Advancement Act," would not only bring back the preclearance requirement of Section 5, but actually *expand* preclearance to reach every state in the country with a new and unprecedented "practice based" preclearance requirement at a time when there is less voting discrimination than at any point in our history as a democratic republic.

The new coverage formula in H.R. 4 is unfair and will not satisfy constitutional concerns. First of all, a state government and all of its subdivisions will be placed under preclearance coverage for ten years if there are 15 "voting rights violations" by local jurisdictions during the "previous 25 calendar years." Thus, a state government can have preclearance imposed on it, even

[11] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (citation omitted).

though it has no voice in who is elected to positions in local government and no supervisory authority over, and no ability to direct, what those local elected officials do in passing local ordinances and engaging in redistricting.

Similarly, local governments that have never engaged in any discriminatory actions of any kind, and that obviously have no control over what the state legislature or other local governments do, will still have preclearance imposed on them for ten years if there are ten voting rights violations committed by other actors, one of which was the state. Both of these coverage formulas violate basic and fundamental principles of due process and fairness, among other problems.

Second, "voting rights violations" include not just final court judgments that a jurisdiction has violated the VRA or the Fourteenth and Fifteenth Amendments, but also settlement agreements, consent decrees, and any preclearance objections made by the Attorney General. Such objections by the Attorney General do not require any finding of intentional discrimination and can be based on statistical disparities that are not discriminatory.

Including settlement agreements and consent decrees will not only deter defendants from settling cases, it will also lead to collusive litigation. Even settlements of meritless litigation that a state or local jurisdiction enters into to avoid the cost of litigation would count as a "voting rights violation" for purposes of triggering preclearance coverage. Moreover, there will be a strong incentive for plaintiffs who are allied politically with the elected leadership of local jurisdictions to file collusive litigation in which the defendants quickly agree to settle what may be a frivolous lawsuit in order for it to count as a voting rights violation so preclearance will be imposed on the entire state. This could enable partisan advocacy groups and others to bring states within preclearance coverage through a series of such lawsuits against their political partners.

However, H.R. 4 contains a new, unprecedented preclearance provision that would expand the reach of Section 5 far beyond what existed in 1965. The additional "practice based" preclearance being proposed would apply to every single political jurisdiction in the United States, whether they meet the new coverage formula or not, even if there has been absolutely no evidence of discriminatory conduct whatsoever by those jurisdictions. It would apply to changes covering election rules – "practices" – such as the "documentation or proof of identity" needed to register or vote or the methods used by states to maintain the accuracy of their voter lists.

The "practices" that would have to be approved by the Justice Department or the U.S. District Court for the District of Columbia before they can take effect are so broad and cover such a wide spectrum of election administration procedures and rules that election changes made by state legislatures and local governments in virtually every state would be within federal control.

There is no justification for requiring cities, counties, and states to get the approval of the Attorney General of the United State for changes, including referenda approved by voters, that have been implemented through the democratic process.

There is also no need for new legislation reimposing and actually expanding the onerous preclearance requirements of Section 5 of the VRA, and no evidence that the permanent provisions of the VRA such as Section 2 are not adequate to protect voters' rights. The proposed amendments are also almost certainly unconstitutional because they do not satisfy what is required by the Supreme Court's *Shelby County* decision to justify continuing, much less expanding, the preclearance requirement.

As the Court made clear in that decision, the 1965 standards were obsolete, and any requirement that states obtain federal pre-approval of any proposed election changes before they can be implemented could be imposed only if Congress found "blatantly discriminatory evasions of federal decrees;" lack of minority office holding; voting tests and devices; "voting discrimination 'on a pervasive scale;'" or "flagrant" or "rampant" voting discrimination. These conditions are nowhere to be found in any state in 2021.

Additionally, Section 3 of the VRA already allows a federal court to impose a preclearance requirement in a particular jurisdiction for as long as necessary where the court determines that there is intentional misconduct and preclearance is required to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments.[11] With the availability of the customized preclearance requirement of Section 3 that can be imposed on a recalcitrant jurisdiction based on the specific evidence of wrongdoing uncovered in a specific enforcement action, there is no need for a broad, general, and expanded preclearance requirement as proposed in H.R. 4.

If H.R. 4 is enacted, the lawyers inside the Voting Section of the Civil Rights Division would be given veto authority over state election laws and regulations. When it comes to exercising that powerful discretion and initiating unbiased enforcement actions, the attorneys in that section have a very checkered record. This was perhaps best captured in 1994 in *Johnson v. Miller*, where a federal court issued a scathing opinion in a preclearance case charging that "the considerable influence of ACLU advocacy on the voting rights decisions of the United States attorney general is an embarrassment" and that the "dynamics" between the DOJ and American Civil Liberties Union lawyers "were that of peers working together, not of an advocate submitting proposals to higher authorities." The judge was "surprised" that DOJ "was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."[12] The judge also found the "professed amnesia" of the DOJ lawyers about their relationship with ACLU attorneys "less than credible."

In another case involving preclearance, a federal court ruled against DOJ, holding that it "had arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies."[13] In fact, using its power under the VRA, DOJ "impermissibly encouraged –

---

[12] Johnson v. Miller, 864 F.Supp. 1354 (S.D. Ga. 1994).
[13] Hays v. State of Louisiana, 839 F. Supp. 1188 (W.D. La. 1993).

nay, mandated – racial gerrymandering."[15] The public was forced to pay the state of Louisiana over $1.1 million in attorneys' fees and costs due to DOJ's wrongdoing in that case.

As the Senate Judiciary Committee should be aware from a letter sent to the House Judiciary Committee in 2006 by the Justice Department, these were just two of 11 cases involving the Civil Rights Division from 1993 to 2000 in which courts admonished the Division for its misbehavior and awarded over $4.1 million in attorneys' fees and costs to defendants abusively targeted by the Division.[16]

In 2013, the Inspector General of the Justice Department issued a critical report on the operations of the Voting Section of the Civil Rights Division that cited numerous examples of inappropriate and biased behavior by its staff.[17] No one who reads that report could possibly think that giving the partisans who work in the Voting Section the regal power to decide what the election rules are for each state could possibly be a good idea.

The VRA is race-neutral – it protects *all* voters from discrimination. But that is decidedly not the view of the Voting Section staff. The Inspector General found "relevant evidence" demonstrating the staff "disfavored" cases where victims of discrimination were white.[18] This resulted in their ignoring discrimination against white voters even in the most egregious of circumstances.

For example, the Voting Section failed to take action against a Guam law that used a blood ancestry test – the same kind used in the South during the Jim Crow era to exclude blacks – to prevent white and Asian residents of Guam from being able to register and take part in a plebiscite. It took an expensive private lawsuit to end Guam's bigoted treatment of its residents, which the Ninth Circuit U.S. Court of Appeals found violated the Fifteenth Amendment in *Davis v. Guam* in 2019.[19]

In 2006, according to the Inspector General, staff members assigned to file a lawsuit under the VRA against black officials in Noxubee County, Mississippi, for discriminating against white voters were subjected to written and verbal abuse from peers. The team leader was called a "Klansman" in official email correspondence. A black intern who requested to join the team was repeatedly taunted as a "token" and when the intern's mother paid a visit to the office, career employees complained that her son was acting as a racial "turncoat."[20]

A federal court in 2007 found that the defendants in Noxubee County had engaged in "blatant" racial discrimination in a case that the majority of career staff not only did not want to

---

[15] 936 F.Supp. 360 (W.D. La. 1996).
[16] Letter of April 12, 2006, from William E. Moschella, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Hon. F. James Sensenbrenner, Chairman, Committee on the Judiciary, U.S. House of Representatives.
[17] "A Review of the Operations of the Voting Section of the Civil Right Division," Office of the Inspector General, U.S. Department of Justice (March 2013) (hereinafter "OIG Report").
[18] OIG Report, p. 179.
[19] Davis v. Guam, 932 F.3d 822 (9th Cir. 2019).
[20] OIG Report, p. 121-123.

bring, but in which they attempted to intimidate and harass those involved in working on the case.[21]

The Inspector General also found that career employees, identifying themselves as DOJ employees, published "highly offensive and potentially threatening statements" about colleagues on prominent liberal-leaning news websites, including posting comments about one person's "Yellow Fever" – a demeaning reference to that person's presumed sexual attraction to a person who "look[s] Asian."[22]

Another staff employee confessed to being the organizer of a three-person "cyber-gang" that published comments falsely asserting that a supervisor was a racist after hanging a noose in the supervisor's office (p. 128-129). This employee, who adopted an online avatar of a black literary character who becomes a killer, made further online comments, including stating his desire to "choke" colleagues with whom he disagreed (p. 130).

The Inspector General found other conduct by staff in the Voting Section to be "disturbing," including posting messages on liberal news sites disparaging administration officials and Section managers, and using extremely bigoted, racial language towards anyone they believed did not share their liberal views. When confronted with the Internet postings about conservative co-workers, one member of the "cyber bullying" group initially lied under oath to the Inspector General's staff about her participation.[23]

Lying to an Inspector General employee conducting an investigation is federal crime, just as it is to lie to an FBI agent. Yet no adverse actions of any kind were taken against this Section staffer. In fact, a source inside the Voting Section told me she was treated as a "hero" by other employees.

Relevant to the finding by a federal court in the *Miller* case, the Inspector General also criticized Voting Section management for specifically reaching out only to progressive organizations, such as the ACLU, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense and Education Fund, and the Lawyers' Committee for Civil Rights under Law, to fill job openings, while ignoring the resumes of other qualified professionals.[24] As a result, only applicants whose views were slanted dramatically to the left on the ideological spectrum, many of whom endorsed questionable views of the law, were given serious consideration.[25]

One can already see this bias and abuse of authority in some of the latest actions taken by the Civil Rights Division. DOJ threatened Arizona over the forensic post-election audit it is

---

U.S. v. Brown, 494 F.Supp.2d 440 (S.D. Miss. 2007), affirmed 561 F.3d 420 (5th Cir. 2009).

OIR Report, p. 127.

OIG Report, p. 127-129.

OIG Report, p. 198.

OIG Report, p. 219-222.

conducting in a May 5 letter and issued "guidance" on July 28 purporting to outline "Federal Law Constraints on Post-Election Audits."[2]

This "guidance" wrongly exaggerates the reach of 52 U.S.C. §§ 20701-20706. The purpose of these federal statutes, which require the preservation of federal election records, is investigatory in nature. They exist to help the Attorney General in determining the advisability of commencing possible investigations of federal election offenses. But if there is no underlying potential voting rights violation, any exercise of this power is not authorized and is a brazen abuse of power.

Contrary to the assertions made by DOJ, conducting an audit of a past election does not violate the VRA or any other federal election law. In fact, the Justice Department has never – in the entire history of the existence of the Civil Rights Division – interfered with or investigated an election audit, because its past leadership has understood it has no legal authority to do so. There is also no basis for DOJ to assert, as it does in the guidance, a possible violation of Section 11b of the VRA, which prohibits the direct intimidation, threat or coercion of individuals "for the purpose of interfering" with the ability to vote given that Arizona *voters have already voted!* The Justice Department' assertion that an audit could violate Section 11b is a highly implausible, if not outright absurd, interpretation of the law.

The same is true of the Justice Department's July 28 "Guidance Concerning Federal Statutes Affecting Methods of Voting."[7] In this "guidance," DOJ says that it does not "consider a jurisdiction's re-adoption of prior voting laws or procedures to be presumptively lawful," and instead will review the changes "for compliance with" federal law. In other word, DOJ will use the emergency procedures as the new baseline for reviewing a state's election laws under the VRA.

Not only is such a standard not contemplated by the text and legislative history of Section 2 of the VRA, which defines the Department's authority to assert violations of the law, it certainly is not in accord with the clear guidance provided by the U.S. Supreme Court on the application of Section 2 in the *Brnovich v. Democratic National Committee* decision. It is another example of the Division's abuse of its authority. Instead, the Department is trying to intimidate states to prevent them from returning to their election rules that were in place prior to the health emergency caused by the COVID-19 pandemic.

The provisions of H.R. 4 that attempt to overturn the Supreme Court's clear, common-sense guidance in the *Brnovich* decision on the application of Section 2 of the VRA are also ill-advised and interfere with states' constitutional authority over the administration of elections. H.R. 4 attempts to eliminate rational and fundamental factors that are essential to evaluating the "totality of the circumstances" in any Section 2 lawsuit and whether a particular election practice is racially discriminatory.

"Federal Law Constraints on Post-Election 'Audits'," U.S. Department of Justice (July 28, 2021).

"Guidance Concerning Federal Statutes Affecting Methods of Voting," U.S. Department of Justice (July 28, 2021).

It seems obvious that whether a similar practice – such as requiring voters to vote in their assigned precincts – has a "long pedigree or was in widespread use" or is "identical or similar" to the practices of other states is highly relevant to whether the practice is discriminatory. So is looking at the "availability of other forms of voting unimpacted by the challenged qualification." And yet H.R. 4 would eliminate these important considerations as a defense to any claimed Section 2 violation.

H.R. 4 eliminates other highly relevant factors for evaluating the "totality of the circumstances" such as the "total number or share of members of a protected class on whom" the challenged practice will "not impose a material burden." This is patently absurd. Under this formulation of Section 2, if a state is able to show that 99.99% of Hispanic or black voters are unaffected by an election change, the state could still be found in violation of Section 2.

The proposed amendments would interfere with the ability of state legislators to protect their voters and the integrity of the election process by eliminating their ability to act to prevent election fraud or maintain public confidence in our elections. Those are two of the most fundamental duties of state and local officials when it comes to elections and the protection of democracy. Yet H.R. 4 would throw out all of these relevant factors as a viable defense to a Section 2 claim.

If enacted, this would be a dangerous and reckless policy that would risk the integrity of our elections and the confidence of voters in the fairness and security of elections. Maintaining public confidence is essential to turnout and keeping voters motivated to cast their ballots and participate in choosing their representatives at all levels of government. As former President Jimmy Carter (D) and former Secretary of State James Baker (R) said in their bipartisan 2005 report on our elections, "[b]uilding confidence in U.S. elections is central to our nation's democracy."[23]

Conclusion

Existing federal voting laws, including the VRA and other statutes such as the National Voter Registration Act and the Help America Vote Act, are more than sufficient to protect voters and ensure that they can easily and securely practice their franchise without discrimination, fear, or intimidation. Americans today have an easier time registering and voting securely than at any time in our nation's history. Voter registration and turnout data, as well as the enforcement record of the U.S. Justice Department, show that there is no widespread, systematic discrimination by state or local election officials to prevent citizens from registering and voting.

The permanent, nationwide provisions of the VRA such as Section 2 and Section 3 that apply across the country – not just to formerly covered jurisdiction under Section 5 – are powerful tools that still exist and are more than adequate to protect voting rights in those increasingly rare instances

[23] "Building Confidence in U.S. Elections," Report of the Commission on Federal Election Reform (Sept. 2005), p. iv.

where discrimination does occur.

There is simply no need to resuscitate the outdated and obsolete preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5, which in addition to bringing back preclearance for covered jurisdictions, would add a "practice-based" preclearance requirement that would apply to every city, county, and state in the country.

It is not 1965 and there is no longer any justification for giving the federal government the ability to veto the election laws and regulations that citizens and their elected representatives choose to implement in their respective states. There is also no justification for eliminating the ability of states to defend themselves from meritless lawsuits filed under the Voting Rights Act for nondiscriminatory, widespread, traditional election practices that have been developed to ensure both access for voters and the safe, fair, effective, and secure administration of our elections.

The Myth of Voter Suppression and the Enforcement Record of the Obama Administration

HANS A. VON SPAKOVSKY*

I. INTRODUCTION 1147
II. THE NEED FOR REFORM TO PREVENT ELECTION FRAUD 1150
III. THE FALSE CLAIMS ABOUT SECTION 5, *SHELBY COUNTY*, AND VOTER SUPPRESSION 1153
IV. THE RECENT ENFORCEMENT RECORD OF THE DOJ 1157
A. The Recent Enforcement Record of the DOJ Under Section 2 1158
B. The Recent Enforcement Record of the DOJ Under Section 11(b) 1171
C. The Recent Enforcement Record of the DOJ Under Section 208 1172
D. The Recent Enforcement Record of the DOJ Under the National Voter Registration Act 1173
V. A NEW SECTION 5? 1179
VI. CONCLUSION 1182

I. INTRODUCTION

The progressive Left's leadership, including former President Barack Obama, former Secretary of State Hillary Clinton, and former

* Hans A. von Spakovsky is a Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies and Manager of the Election Law Reform Initiative at The Heritage Foundation. He is a former member of the Federal Election Commission and was a career Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice from 2002–05. The opinions expressed in this Essay are those of the author and do not necessarily represent those of the Heritage Foundation.

Attorney General Eric Holder,[1] created a false hue and cry about a supposed loss of voting rights in recent years. They claim that state legislatures', and particularly Republicans', including President Donald Trump, support for reforms intended to improve the election process's integrity, such as voter identification requirements and the maintenance procedures of statewide voter registration lists, amounts to widespread, systemic "voter suppression" of minority voters.[2]

In fact, there is no "voter suppression" epidemic, as demonstrated by, among other things, the enforcement record of the Voting Section of the Civil Rights Division of the U.S. Department of Justice (the "Civil Rights Division"). The Civil Rights Division is responsible for enforcing all federal voting rights laws that prohibit discrimination,

---

1. *See, e.g.*, Attorney General Eric Holder, Attorney General Eric Holder Addresses the NAACP Annual Convention (July 16, 2013), https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-naacp-annual-convention; President Barack Obama, Remarks by the President at the National Action Network's 16th Annual Convention (Apr. 11, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/04/11/remarks-president-national-action-networks-16th-annual-convention; Jamelle Bouie, *Hillary Clinton Hits the GOP on Voter Suppression*, SLATE (June 4, 2015, 9:29 PM), https://slate.com/news-and-politics/2015/06/hillary-clinton-speaks-out-on-voting-rights-the-democratic-frontrunner-condemns-republicans-for-attempting-to-suppress-the-vote.html.

2. The progressive Left seems to label almost any election rule or regulation they dislike as "voter suppression." *See generally* Danielle Root & Liz Kennedy, *Increasing Voter Participation in America*, CTR. FOR AM. PROGRESS (July 11, 2018, 12:01 AM), https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/ ("Furthermore, states must have in place affirmative voter registration and voting policies in order to ensure that eligible voters who want to vote are able to and are not blocked by *unnecessary and overly burdensome obstacles* such as *arbitrary voter registration deadlines* and *inflexible voting hours*.") (emphasis added). That includes voter ID laws; not counting ballots cast outside of an assigned precinct; any steps taken by states to maintain the accuracy of voter registration rolls by removing ineligible voters; and even the requirement that has been in place for decades in the overwhelming majority of states that requires an individual to register prior to election day. *See id.* According to the founder of iVote, a partisan "advocacy group that campaigns to elect Democratic secretaries of state," "[v]oter registration itself is a voter-suppression tool." Ellen Kurz, *Registration Is a Voter-Suppression Tool. Let's Finally End It*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/opinions/registration-is-a-voter-suppression-tool-lets-finally-end-it/2018/10/11/c1356198-cca1-11e8-a360-85875bac0b1f_story.html?utm_term=.92b2beaaf1af.

intimidation, and other efforts intended to prevent individuals from voting, as well as federal requirements imposed on the states for offering voter registration opportunities and maintaining those records' accuracy.[3]

These new state regulations and laws addressing the security of our elections, such as requiring voter identification or participation in programs that compare state voter registration lists, cannot be validly termed as "voter suppression" because they comply with existing federal voting laws, particularly given the evidence that such reforms have not hurt turnout or prevented eligible individuals from being able to vote.[4] Moreover, the U.S. Department of Justice ("DOJ") has seen a steady decrease in the number of enforcement cases due to decreasing violations of federal law.[5]

"Voter suppression" isn't even a legitimate, defined legal term under the statutes that protect voters, including the Voting Rights Act of 1965 ("VRA") and the National Voter Registration Act of 1993 ("NVRA").[6] "Voter suppression" is a faux term artificially created to unfairly condemn any election reform with which critics disagree, including perfectly legal reforms. The term is a linguistic trick designed to lump reasonable, legal, and common-sense actions by states meant to safeguard the integrity of the election process with illegal activities like poll taxes and literacy tests, thereby tainting legal actions taken by states to protect voters and elections.

The critics of these reform efforts allege that maintaining accurate voter registrations rolls to ensure that only eligible individuals cast ballots, prosecuting actual cases of election fraud, and implementing basic security reforms such as voter identification requirements that the American people overwhelmingly support is somehow "voter suppression."[7] Nothing could be further from the truth.

---

3. *Voting Section*, U.S. DEP'T JUST., https://www.justice.gov/crt/voting-section (last visited May 13, 2019).

4. *See* discussion *infra* Parts III & IV.

5. *See* discussion *infra* Part IV.

6. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified as amended in scattered sections of 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

7. *See supra* note 1.

This Essay will explain, in Part II, the need for election reform that addresses the vulnerabilities in our voter registration and election system and increases the security and integrity of the election process. Part III will demonstrate that these reforms do not constitute "voter suppression" and that there have been no widespread, systemic efforts to implement discriminatory legislation, including since the Supreme Court's 2013 decision that lifted the Section 5 preclearance requirements from certain jurisdictions. Part IV will show that the DOJ's recent enforcement record of applicable federal voting rights laws demonstrates that there is no ongoing voter suppression campaign. Part V will explain why a new Section 5 is not needed to protect voting rights across the country. Part VI concludes.

II. THE NEED FOR REFORM TO PREVENT ELECTION FRAUD

The United States has a long history of election fraud, and preventing it remains a legitimate state interest, contrary to those who claim that it doesn't exist. As the U.S. Supreme Court observed when it upheld Indiana's voter ID law, states have "a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient."[8] Unfortunately, with regard to election fraud, it remains true, as the Supreme Court stated:

> [T]hat flagrant examples of such fraud . . . have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting . . . demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.[9]

Most states utilize an "honor" system for the voter registration and voting process that does a poor job of guarding against election fraud. The Heritage Foundation maintains the only database in the country of recent cases of election fraud, and as of May 2019, the database contained 1,199 proven instances of voter fraud, including over

8. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008).
9. *Id.* at 195–96 (footnotes omitted).

a thousand criminal convictions and other cases in which a court ordered new elections because of fraud.[10] This database is not a comprehensive list of all the fraud that has occurred in American elections, but it is a sampling of the many different types of fraud that have occurred and serves as a sobering reminder of the need for election safeguards.[11]

This catalog of cases does not include other evidence of election fraud. For example, the Government Accountability Institute ("GAI") discovered that thousands of individuals had illegally cast votes in multiple states in the 2016 election.[12] GAI obtained voter rolls and voter histories from twenty-one states, representing 17% of all possible state-to-state combinations.[13] GAI performed a data comparison of registered voters using a rigorous matching methodology that relied on names, birthdates, and full social security numbers.[14] As GAI said in its report, "[t]he probability of correctly matching two records with the same name, birthdate, and social security number is close to 100 percent. Using these match points will result in virtually zero false positives from the actual matching process."[15]

GAI found almost 8,500 individuals who had voted illegally in more than one state.[16] That included 2,200 duplicate voters in Florida, where George W. Bush's 2000 election margin of victory was only 537 votes, and the 2018 election had several extremely tight races including for governor and U.S. senator.[17] Despite this clear evidence of fraud

---

10. *Election Fraud Cases from Across the Country*, HERITAGE FOUND., https://www.heritage.org/voterfraud (last visited May 13, 2019).

11. *Id.*; *see, e.g.*, JOHN FUND & HANS VON SPAKOVSKY, WHO'S COUNTING?: HOW FRAUDSTERS AND BUREAUCRATS PUT YOUR VOTE AT RISK 33–44 (2012); LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS 274–301 (1996).

12. GOV'T ACCOUNTABILITY INST., AMERICA THE VULNERABLE: THE PROBLEM OF DUPLICATE VOTING 2–3 (2017) [hereinafter AMERICA THE VULNERABLE], http://g-a-i.org/wp-content/uploads/2017/07/Voter-Fraud-Final-with-Appendix-1.pdf.

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.*

16. *Id.* at 2–3.

17. PowerPoint, Ken Block, Presidential Advisory Commission on Election Integrity, Data Mining for Potential Voter Fraud: Findings and Recommendations, Slide 8 (Sept. 12, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/docs/pacei-ken-block-

by thousands of voters, there is no indication that a single election official in any of the states examined by GAI made any effort to obtain the names of any of these duplicate voters to initiate investigations and possible prosecutions. GAI estimated that extending its conservative matching formula to all 50 states "would indicate an expected minimum of 45,000 high-confidence duplicate voting matches."[18]

The Public Interest Legal Foundation ("PILF"), a non-profit public interest law firm dedicated to improving election integrity,[19] has also obtained official registration records from several states including Virginia, Michigan, and New Jersey. These records showed that thousands of noncitizens were removed from voter rolls after the noncitizens contacted officials and asked to be removed, but not before many of them had cast ballots in multiple elections.[20] What is most concerning about this is the fact that these noncitizens registered and cast illegal votes without detection by any election officials, which demonstrates the vulnerability of the current "honor" system most states have in the election process. The fact that these noncitizens were removed only after they voluntarily notified election officials of the problem begs the question: how many other undetected noncitizens are illegally registered and voting across the nation?

Just as with GAI's findings, there is no indication that election officials forwarded the names of any of the noncitizens reported by

---

presentation.pdf; *Florida State Results*, FOX NEWS, https://www.foxnews.com/midterms-2018/state/florida (last visited May 13, 2019).

18. AMERICA THE VULNERABLE, *supra* note 12, at 3.

19. The author serves on the board of the Public Interest Legal Foundation. *About Us: Board of Directors*, PUB. INT. LEGAL FOUND., https://publicinterestlegal.org/about-us/board-of-directors/ (last visited May 13, 2019).

20. *See* PUB. INTEREST LEGAL FOUND., ALIEN INVASION II: THE SEQUEL TO THE DISCOVERY AND COVER-UP OF NON-CITIZEN REGISTRATION AND VOTING IN VIRGINIA 2 (May 2017), https://publicinterestlegal.org/files/Alien-Invasion-II-FINAL.pdf; PUB. INTEREST LEGAL FOUND., GARDEN STATE GOTCHA: HOW OPPONENTS OF CITIZENSHIP VERIFICATION FOR VOTING ARE PUTTING NEW JERSEY'S NONCITIZENS AT RISK OF DEPORTATION 1 (Sept. 2017), https://publicinterestlegal.org/files/Garden-State-Gotcha_PILF.pdf; PUB. INTEREST LEGAL FOUND., MOTOR VOTER MAYHEM: MICHIGAN'S VOTER ROLLS IN DISREPAIR 1 (Oct. 2018), https://publicinterestlegal.org/files/Motor-Voters_Michigan-Report_FINAL_MediumQuality.pdf; PUB. INTEREST LEGAL FOUND., SAFE SPACES: HOW SANCTUARY CITIES ARE GIVING COVER TO NONCITIZENS ON THE VOTER ROLLS 1 (Aug. 2018), https://publicinterestlegal.org/files/Safe-Spaces_Final.pdf;

PILF to law enforcement officials for investigation and possible prosecution.

Our voter registration and election system desperately needs reforms intended to address these types of vulnerabilities, and these reforms are not, as some claim, "voter suppression."

III. THE FALSE CLAIMS ABOUT SECTION 5, *SHELBY COUNTY*, AND VOTER SUPPRESSION

The supposed voter suppression epidemic is often blamed[21] on the U.S. Supreme Court's decision in *Shelby County v. Holder*, in which the Court struck down the coverage formula of Section 5 of the VRA.[22] The claim is that once certain states were no longer covered under Section 5, their state legislatures rushed to pass laws intended to suppress minority voters and keep them from registering and casting their ballots.[23] Critics say these discriminatory laws would have been stopped by the DOJ under preclearance requirements of Section 5.[24] That is also a false claim.

Passed in 1965, Section 5 was originally an emergency five-year provision that required covered jurisdictions to get approval of any changes in their voting laws from the U.S. Department of Justice ("DOJ") or a three-judge panel in federal court in Washington, D.C., a process known as preclearance.[25] It was renewed for an additional five years in 1970; for an additional seven years in 1975; for an additional twenty-five years in 1982; and finally an additional twenty-five years in 2006.[26] At the time of the *Shelby County* decision in 2013, Section 5 covered nine states and parts of six others.[27]

---

21. *See, e.g.*, Vanita Gupta, President & CEO, The Leadership Conference on Civil & Human Rights, Statement of Vanita Gupta at the DPCC Forum on Voting Rights 1 (Sept. 19, 2017), http://civilrightsdocs.info/pdf/testimony/vg_dpcc_statement_9_19_17.pdf.

22. Shelby County v. Holder, 570 U.S. 529, 556–57 (2013).

23. *See, e.g.*, Gupta, *supra* note 21, at 1–2.

24. *Id.*

25. 52 U.S.C. § 10304 (2012); *Shelby County*, 570 U.S. at 538.

26. *Shelby County*, 570 U.S. at 538–39.

27. *See Jurisdictions Previously Covered by Section 5*, U.S. DEP'T. JUST., https://www.justice.gov/crt/jurisdictions-previously-covered-section-5 (last updated Aug. 6, 2015) [hereinafter *Jurisdictions Previously Covered by Section 5*].

Critics point to the *Shelby County* decision as the genesis of the voter suppression movement despite the fact that voter ID requirements were implemented in places like Georgia, Indiana, and Arizona years before the Court decided *Shelby County*.[28] In fact, both Georgia and Arizona were covered under Section 5, and their ID laws were not only precleared and approved by the U.S. Department of Justice under Section 5 but also survived court challenges under Section 2 of the VRA.[29]

The Court ruled that the coverage formula contained in Section 4, which determined which states and jurisdictions were subject to Section 5, was unconstitutional because it had not been updated to reflect modern conditions when it was renewed by Congress in 2006: "[H]istory did not end in 1965 . . . . [Y]et the coverage formula that Congress reauthorized in 2006 . . . ke[pt] the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."[30]

Congress specifically designed the coverage formula of Section 4 to capture those states that were engaging in blatant discrimination by taking into account black voters' low registration and turnout caused by discriminatory practices.[31] Thus, coverage under Section 4 was based on a jurisdiction maintaining a test or device as a prerequisite[32] to voting as of November 1, 1964, and registration or turnout of *all* voters of less than 50% in the 1964 election.[33] Registration or turnout of less than 50% in the 1968 and 1972 elections was added in successive renewals of the law, the latest in 1975.[34] That was the last time the coverage formula was revised, and the Section 4 formula did not utilize more current information when Section 5 was renewed in 2006.

28. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185–86 (2008); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1346 (11th Cir. 2009), *cert. denied*, 556 U.S. 1282 (2009); Gonzalez v. Arizona, 485 F.3d 1041, 1046 (9th Cir. 2007).

29. *See, e.g.*, Common Cause/Ga. v. Billups, 554 F.3d at 1357; Gonzalez v. Arizona, 485 F.3d at 1052; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

30. *Shelby County*, 570 U.S. at 552–53.

31. 52 U.S.C. § 10303(b) (2012).

32. A test or device referred to a practice such as a literary test that was used by local election officials to deny or abridge the right to an individual. *See id.* § 10303(c).

33. *Id.* § 10303(b).

34. *Id.*

As the Court pointed out, the original conditions that justified the preclearance requirements no longer existed; in fact, the turnout of minority voters in the covered jurisdictions was higher than in the rest of the nation, and black turnout exceeded white turnout in "five of the six States originally covered by Section5, with a gap in the sixth State of less than one half of one percent."[35]

Section 5 was needed in 1965. But as the Court recognized, time has not stood still, and "[n]early 50 years later, things have changed dramatically."[36] Systematic, widespread discrimination against black voters has long since disappeared. As the Court recognized in the *Northwest Austin* case in 2009: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[37]

The Census Bureau's May 2013 report on the 2012 election showed that blacks voted at a higher rate than whites nationally (66.2% vs. 64.1%).[38] That same report shows that black voting rates exceeded that of whites in Virginia, South Carolina, Georgia, Alabama, and Mississippi, all of which were covered in whole by Section 5, and in North Carolina and Florida, portions of which were covered by Section 5.[39] Louisiana and Texas, which were also covered by Section 5, showed no statistically significant disparity between black and white turnout.[40] Overall, the black voting rate is consistently higher than the white voting rate in the formerly covered jurisdictions than in most of the nation.[41]

Looking at long-term trends, in the 2014 congressional elections, black turnout was slightly above the black turnout rate in 1978 (40.6% vs. 39.5%) while white turnout in the same period had declined

---

35. *Shelby County*, 570 U.S. at 535.

36. *Id.* at 547.

37. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (citation omitted).

38. THOM FILE, U.S. CENSUS BUREAU, THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 3 (2013).

39. *Id.* at 9 fig.5.

40. *Id.*

41. *Id.* at 8.

by about five percentage points (50.6% vs. 45.8%).[42] By comparison, there has been a steep downward trend in the overall turnout rate in congressional elections from 48.9% in 1978 to only 41.9% in 2014.[43] This turnout data does not support the claim that the turnout of black voters is somehow being "suppressed." In fact, minority turnout has bucked the overall long-term downward trend in general turnout.[44]

No one can reasonably claim that there is still widespread, official discrimination in any of the previously covered states, or that there are any marked differences between states such as Georgia, which was covered, and states such as Massachusetts, which was not covered.[45] As the Supreme Court approvingly noted and as Judge Stephen F. Williams pointed out in his dissent in the *Shelby County* decision in the District of Columbia Court of Appeals, jurisdictions covered under Section 4 before *Shelby County* had "*higher* black registration and turnout" than uncovered jurisdictions.[46] Covered jurisdictions also "ha[d] *far more* black officeholders as a proportion of the black population than do uncovered ones."[47] In a study that looked at lawsuits filed under Section 2 of the VRA, Judge Williams found that the "five worst uncovered jurisdictions . . . have worse records than eight of the covered jurisdictions."[48]

Arizona and Alaska, which were covered under Section 5, had no successful Section 2 lawsuit ever filed against them in the 24 years

---

42. THOM FILE, U.S. CENSUS BUREAU, WHO VOTES? CONGRESSIONAL ELECTIONS AND THE AMERICAN ELECTORATE: 1978–2014, at 4 fig.3 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf.

43. *Id.* at 4 fig.2.

44. The 2018 congressional election saw an increase in turnout. The turnout of the voting eligible population was 50.3%. *2018 November General Election Turnout Rates*, U.S. ELECTION PROJECT, http://www.electproject.org/2018g (last updated Dec. 14, 2018).

45. Georgia and Massachusetts had almost identical turnout of their voting eligible populations in the 2018 congressional election: 55% in Georgia and 54.6% in Massachusetts. *Id.*

46. Shelby County v. Holder, 570 U.S. 529, 541 (2013); Shelby County v. Holder, 679 F.3d 848, 891 (D.C. Cir. 2012) (Williams, J., dissenting) (emphasis added).

47. 679 F.3d at 892.

48. *Id.* at 897.

reviewed by that same study cited by Judge Williams.[49] The increased number of current black officeholders throughout the covered jurisdictions provides additional assurance that official, systemic discriminatory actions are highly unlikely to recur.

Without evidence of widespread voting disparities among the states, continuing the coverage formula unchanged in 2006 was irrational. As the Supreme Court said in *Shelby County*, Congress "did not use the record it compiled to shape a coverage formula grounded in current conditions."[50] Instead, it reenacted Section 4 "based on 40-year-old facts having no logical relation to the present day."[51] It would be no different than if Congress in 1965 had based the coverage formula not on what had happened in the prior year's election in 1964, but had instead opted to base coverage on registration and turnout from the Hoover era in 1928 or the Roosevelt election in 1932.

The *Shelby County* decision did not affect the viability of other portions of the VRA, including its most powerful tool. Section 2 of the VRA is a nationwide, permanent prohibition on the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees" that protect language minorities.[52]

IV. The Recent Enforcement Record of the DOJ

If there really had been a flood of laws passed by state legislatures to suppress the votes of minority voters, particularly after *Shelby County*, there is no question that there would have been an increase in the enforcement activities of the DOJ under the various federal voting rights laws it is tasked with enforcing. Yet not only did that not occur, enforcement actually decreased during the Obama administration when compared to the prior Bush administration.

---

49. *Id.*

50. *Shelby County*, 570 U.S. at 554.

51. *Id.*

52. 52 U.S.C. § 10301(a) (2012). Under Section 203 of the VRA, language minorities are individuals who are not literate in English and "have suffered a history of exclusion from the political process: Spanish, Asian, Native American, and Alaskan Native." *Section 203 of the Voting Rights Act*, U.S. DEP'T. JUST., https://www.justice.gov/crt/language-minority-citizens (last updated Feb. 26, 2018).

A. The Recent Enforcement Record of the DOJ Under Section 2

Tom Perez (2009–13) and Vanita Gupta (2014–17), two political appointees who headed the Civil Rights Division during the Obama administration, have made similar claims that so-called voter suppression is an ongoing issue.[53] Gupta claims that voting rights "in America are under assault" and that the "*Shelby County* decision emboldened states to pass voter suppression laws, such as those requiring photo identification."[54] Perez claims he investigated "voter suppression" and spent "much of [his] time" as head of the Civil Rights Division "suing states that tried to block eligible voters from the ballot box."[55]

Given the very clear statements of members of the Obama administration, including the two heads of the Civil Rights Division who were responsible for enforcing the VRA, there is little doubt that if a state were to have engaged in voter suppression—abridging the right to vote in a discriminatory manner—the Obama administration would have filed suit to stop it. In fact, Attorney General Eric Holder announced on July 16, 2013, only one month after the *Shelby County* decision, that he was directing the Civil Rights Division "to shift resources to the enforcement of Voting Rights Act provisions that were not affected by the Supreme Court's ruling—including Section 2."[56]

Yet a review of the litigation record of the Voting Section of the Civil Rights Division after *Shelby County* shows no sharp increase in enforcement actions that would correlate with a widespread (or even isolated) "voter suppression" effort.[57] In fact, the Obama administration's enforcement record, contrary to the claims of Perez and Gupta, shows an overall substantial *downward* trend in the number of enforcement actions filed in comparison to the Bush administration under the

---

53. *See* Gupta, *supra* note 21; Tom Perez, *Trump Administration's Voter Suppression Attempts Ahead of Midterms Are Not Only 'Morally Wrong,' They're Illegal*, CNBC (Sept. 11, 2018, 10:44 AM), https://www.cnbc.com/2018/09/11/trump-voter-suppression-attempts-are-morally-wrong-and-illegal.html.

54. Gupta, *supra* note 21.

55. Perez, *supra* note 53.

56. Holder, *supra* note 1.

57. *Voting Section Litigation*, U.S. DEP'T JUST., https://www.justice.gov/crt/voting-section-litigation (last updated Apr. 26, 2019) [hereinafter *Voting Section Litigation*].

various provisions of the VRA from 2001 to 2016, including after 2013, the year *Shelby County* was decided.[58]

The Voting Section's litigation list shows that the Bush administration filed sixteen cases to enforce Section 2 of the VRA in the administration's eight years.[59] Four of those cases were in three jurisdictions covered by Section 5: South Carolina, Georgia, and Mississippi.[60]

The Obama administration filed only four cases to enforce Section 2 in that administration's eight years, three of which were filed after the *Shelby County* decision.[61] Those three cases were in jurisdictions covered by Section 5: two in Texas (covered in whole) and one in North Carolina (where only part of the state was covered).[62]

There was no upsurge in Section 2 cases after the 2013 *Shelby County* decision; in fact, the Obama administration filed far fewer Section 2 enforcement actions than the prior administration. The number of Section 2 cases filed in Section 5 jurisdictions by the Bush administration prior to *Shelby County* and the number of Section 2 cases filed in former Section 5 jurisdictions by the Obama administration after *Shelby County* was exactly the same—three.

So again, there was no sudden rise in enforcement actions filed to stop voting discrimination (or so-called voter suppression) in jurisdictions formerly covered by Section 5. Thus, despite its rhetoric, the Obama administration was not able to discern any widespread voter suppression efforts or else it would have filed many more Section 2 enforcement actions. Instead, it filed only one-third the number of cases of the prior Republican administration.

An examination of those Section 2 cases filed against Texas and North Carolina by the Obama administration also raises serious doubts about the "voter suppression" claim.

One of those Texas cases was a typical redistricting case, similar to many other redistricting cases that the Civil Rights Division filed

---

58. *Id.* The official DOJ list of cases and settlement agreements under the VRA and the NVRA is available on the webpage of the Voting Section of the Civil Rights Division. *Id.* The settlement agreements listed are in enforcement matters that were settled without suit being filed. *Id.* That webpage provides the numbers of enforcement cases cited in this article.

59. *Id.*

60. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

61. *Voting Section Litigation*, *supra* note 57.

62. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

over the long history of the VRA against both Democratic and Republican state legislatures.[63] Such cases often come down to a dispute over relatively small differences in the percentages of minority voters in particular districts and the effects those differences may or may not have on the ability of voters to elect their candidates of choice.[64] Those "effects" are often based on speculation by competing experts on whether candidates preferred by minority voters have the ability to get elected.[65] The "voter suppression" claim can't be made against the Texas case given the Supreme Court's conclusion that there was no evidence of intentional discrimination.[66]

The other Texas enforcement action was against the state's voter ID law,[67] while the case filed against North Carolina by the DOJ attacked not only the state's voter ID law but also its changes in early voting, termination of same-day registration, and its reinstatement of a requirement for voting in a voter's assigned precinct.[68]

In *North Carolina State Conference of the NAACP v. McCrory*, a three-judge panel of the Fourth Circuit overruled a district court finding that none of these reforms were discriminatory in either purpose or

---

63. For the long, complicated history of the most recent redistricting dispute in Texas, see Abbott v. Perez, 138 S. Ct. 2305 (2018). The Supreme Court held that there was no evidence of bad faith or intentional discrimination when Texas adopted an interim redistricting plan; rejected claims that one congressional and two state house districts violated the VRA; and held that one state house district that had been turned into a Latino opportunity district by moving in Latino voters at the request of counsel for a plaintiff was an impermissible racial gerrymander. *Id.* at 2327, 2313–14, 2335. Texas was trying to make it easier to elect a Hispanic candidate, not harder.

64. In redistricting cases, Section 2 requires that protected groups have the same ability as other voters "to elect representatives of their choice." 52 U.S.C. § 10301(b) (2012 & Supp. 2018) (originally codified at 42 U.S.C. § 1973(b)).

65. This is because Section 2 provides that the "extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" when determining if a legislative district violates Section 2. *Id.*

66. *See Perez*, 138 S. Ct. at 2327.

67. Veasey v. Abbott, 888 F.3d 792, 795 (5th Cir. 2018). As discussed in detail later in this Section, the amended Texas voter ID law is in place today after being upheld by the Fifth Circuit.

68. *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

effect.[69] Instead, it held that all these reforms, including the state's voter ID law, were discriminatory and violated the VRA.[70]

The Fourth Circuit panel's decision regarding the North Carolina law, however, is an outlier that is not in accord with the findings and holdings of other courts. The Fourth Circuit panel accused the district court judge of having "missed the forest in carefully surveying the many trees" in finding that the North Carolina election reform law was not discriminatory.[71] However, it is the Fourth Circuit panel that seems to have missed both the trees and the forest because the district court judge presented a detailed analysis of the factual evidence and the expert's opinion that demonstrated that the various reforms were not enacted with any discriminatory intent and would not have a discriminatory effect on voters.[72]

As just one example, the panel assigned great weight (and assigned nefarious motives) to the fact that the state legislature requested racial data relevant to its proposed changes in election laws.[73] But the panel was seemingly ignorant of the DOJ's practices under the VRA. A portion of North Carolina had long been covered under the preclearance procedures of Section 5 until the *Shelby County* decision.[74] The state legislature was well aware that, because of that coverage, the DOJ

---

69. *Id.* at 214. On the denial of certiorari, Chief Justice Roberts noted that there was a dispute over the petition filed with the Court. North Carolina v. N.C. State Conf. of the NAACP, 137 S. Ct. 1399, 1399–1400 (Roberts, C.J., concurring). It had been filed by the state, its governor (a Republican), and the state board of elections prior to the 2016 election. *Id.* The newly elected Democratic attorney general moved to dismiss the petition on behalf of the state and the new Democratic governor. *Id.* The North Carolina legislature objected, claiming the attorney general had no authority under state law to dismiss the petition on behalf of the state. *Id.* According to Roberts:

> Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case."

Id. at 1400.

70. *McCrory*, 831 F.3d at 215.

71. *Id.* at 214.

72. *See* N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 351–412 (M.D.N.C. 2016).

73. *McCrory*, 831 F.3d at 216–17.

74. *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

always demanded such racial data from jurisdictions filing preclearance submissions.[75] While Section 5 was no longer in effect when this law was being considered by the state legislature, North Carolina was simply following the same procedures it had been following for 40 years as required under Section 5 practices.

Except for the voter ID requirement, all the other changes made by the North Carolina legislature at issue in the 2016 decision were actually in effect in the 2014 primary and general elections.[76] As the district court pointed out, "the greatest increase in turnout in the 2014 midterm primary was observed among African American voters, despite the implementation of [the election reform bill];" similarly, "[n]ot only did African American turnout increase more than other groups in 2014 . . . but that general election saw the smallest white-African American turnout disparity in any midterm" since 2002.[77] Thus, contrary to the panel's speculation, there was actual evidence that these reforms did not have a discriminatory effect in depressing minority turnout.

The Fourth Circuit panel also threw out the voter ID portion of the election reform law.[78] But a different panel of the same Fourth Circuit upheld Virginia's voter ID requirement in 2016, finding that it was not discriminatory under the VRA.[79] Virginia's law requires a photo ID to vote but has an exemption that allows individuals to vote who don't have an ID just as the North Carolina law did, which the Fourth Circuit said was discriminatory despite that exemption.[80]

The Fourth Circuit's decision in *NAACP v. McCrory* that not allowing voters to cast a ballot outside of their assigned precinct is discriminatory and amounts to voter suppression is not consistent with the law and decisions from other jurisdictions. As the Sixth Circuit said in *Sandusky County Democratic Party v. Blackwell*, requiring individuals

---

75. The author is the former Counsel to the Assistant Attorney General for Civil Rights and Coordinated Enforcement of Section 5 of the VRA when he was at the DOJ from 2001 to 2005.

76. *N.C. State Conf. of the NAACP*, 182 F. Supp. 3d at 332–37, 348–49.

77. *Id.* at 349–50.

78. *McCrory*, 831 F.3d at 219.

79. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 608 (4th Cir. 2016).

80. *Lee*, 843 F.3d at 594; *McCrory*, 831 F.3d at 219. Under the Virginia law, "if a voter does not possess an acceptable form of photo identification, Virginia's Board of Elections must provide one to the voter free of charge and without any requirement that the voter present documentation." *Lee*, 843 F.3d at 594.

to vote in an assigned precinct is an "aspect common to elections in almost every state" and did not violate federal law.[81] There are rational and reasonable grounds for such a requirement:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.[82]

A panel of the Ninth Circuit recently held that "Arizona's longstanding requirement that in-person voters cast their ballots in their assigned precinct" is not a violation of Section 2 of the VRA or the First, Fourteenth, and Fifteenth Amendments.[83] Such a requirement imposes "only a minimal burden on voters" and serves "Arizona's important regulatory interests."[84]

There cannot be a violation of the law when there is no discrimination present that prevents individuals from voting in their assigned precincts even though it may be more "convenient" to vote outside of an assigned precinct.

The Sixth Circuit also disagreed with the Fourth Circuit panel's distorted view of early voting and same day registration and issued a warning to courts about getting "entangled, as overseers and micromanagers, in the minutiae of state election processes."[85] The Fourth Circuit held that North Carolina's elimination of same day registration (which the majority of states do not allow)[86] and its reduction in the

---

81. 387 F.3d 565, 568 (6th Cir. 2004) (per curiam).

82. *Id.* at 569.

83. Democratic Nat'l Comm. v. Reagan, 904 F.3d 686, 696–97 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (2019).

84. *Id.* at 697.

85. Ohio Democratic Party v. Husted, 834 F.3d 620, 622–23 (6th Cir. 2016), *application for stay denied*, 137 S. Ct. 28 (2016).

86. As of January 2019, only 17 states and the District of Columbia allow same day (or election day) registration. *Same Day Voter Registration*, NAT'L CONF. ST.

number of early voting days from seventeen to ten (although the number of hours the polls stayed open remained the same) was also discriminatory.[87] But the claim that making changes in early voting or not offering same day registration is somehow discriminatory is not only not true, it amounts to a court micromanaging the state's election process.

As the Sixth Circuit pointed out in *Ohio Democratic Party v. Husted*, the "Constitution does not require *any* opportunities for early voting."[88] The plaintiffs in that case claimed that the Ohio legislature's decision to reduce the number of early voting days from thirty-five to twenty-nine days before Election Day was discriminatory under Section 2 of the VRA and unconstitutional.[89] According to the Sixth Circuit, which ruled against the plaintiffs, this was "an astonishing proposition":

> Nearly a third of the states offer no early voting. Adopting plaintiffs' theory of disenfranchisement would create a "one-way ratchet" that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances. Further, while the challenged regulation may slightly diminish the convenience of registration and voting, it applies even-handedly to all voters, and, despite the change, Ohio continues to provide generous, reasonable, and accessible voting options to all Ohioans.[90]

Those who argue that not allowing same day registration or early voting amounts to voter suppression and a violation of federal law because such opportunities might benefit some voters are making the wrong inquiry. As the Sixth Circuit laid out:

LEGISLATURES (Apr. 17, 2019), http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

87. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

88. *Ohio Democratic Party*, 834 F.3d at 623.

89. *Id.*

90. *Id.*

> The issue is not whether some voter somewhere would benefit from . . . early voting or from the opportunity to register and vote at the same time. Rather, the issue is whether the challenged law results in a cognizable injury under the Constitution or the Voting Rights Act. We conclude that it does not.[91]

If all voters in a state, regardless of their racial or ethnic background, have the same opportunity to register and exercise their right to vote, it is not voter suppression of minority voters if they are not given a certain number of days of early voting or are not allowed to register and vote on Election Day. As the Sixth Circuit in *Ohio Democratic Party* stated, it is as if the critics want to "disregard the Constitution's clear mandate that the states (and not the courts) establish election protocols, instead reading the document to require all states to maximize voting convenience."[92] Under that legal theory:

> [L]ittle stretch of imagination is needed to fast-forward and envision a regime of judicially-mandated voting by text message or Tweet (assuming of course, that cell phones and Twitter handles are not disparately possessed by identifiable segments of the voting population).[93]

Similarly, in 2012, a federal judge rejected a challenge to the State of Florida's reduction of early voting from twelve to eight days, concluding it was not a violation of the VRA or the Constitution.[94] The fact that more minority voters might prefer early voting did "not demonstrate that the changes will deny minorities equal access to the polls."[95] The court pointed out that many states do not have early voting at all, yet under the theory being pushed by the plaintiffs, the "next logical step" would be a claim:

> [T]hat if a state with a higher percentage of registered African-American voters than Florida did not implement

---

91. *Id.*
92. *Id.* at 629.
93. *Id.*
94. *See* Brown v. Detzner, 895 F. Supp. 2d 1236, 1255–56 (M.D. Fla. 2012).
95. *Id.* at 1246.

> an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida. It would also follow that a Section 2 violation could occur in Florida if a state with a lower percentage of African-American voters employed an early voting system . . . that lasts three weeks instead of the two week system currently used in Florida. This simply cannot be the standard for establishing a Section 2 violation.[96]

Contrary to the Fourth Circuit panel's view about early voting, although some voters may find it more convenient, turnout data show that early voting seems to actually *decrease* turnout. For example, a 2013 study released by professors from the University of Wisconsin that compared turnout in early voting states to those without early voting showed that "early voting lowers the likelihood of turnout by three to four percentage points."[97]

Even the experts retained by the challengers in *NAACP v. McCrory* admitted that early voting does not increase turnout. The district court pointed out that one of the experts opined, in a peer reviewed publication, that the "research thus far has already disproved one commonly made assertion, that early voting increases turnout. It does not."[98] In fact, the longer the window of early voting, the greater the effect on lowering turnout.[99] The reasons that early voting hurts turnout have not been conclusively determined. But a reasonable inference is that allowing voters to vote over an extended period of time diffuses the effectiveness of mobilization activities by candidates and political parties.

In addition to the North Carolina voter ID law that was challenged by the DOJ, a Section 2 lawsuit was also filed by the Obama

---

96. *Id.* at 1254 (quoting Jacksonville Coal. for Voter Prot. v. Hood, 351 F. Supp. 2d 1326, 1335–36 (M.D. Fla. 2004)).

97. Barry C. Burden, et al., *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 102 (2014); *see also* Memorandum, Hans A. von Spakovsky, The Heritage Found., Legal Memorandum No. 218: The Costs of Early Voting (Oct. 3, 2017), https://www.heritage.org/sites/default/files/2017-10/LM-218.pdf.

98. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 383 (M.D.N.C. 2016) (emphasis omitted).

99. Hans A. von Spakovsky, The Costs of Early Voting, *supra* note 97, at 3.

administration against Texas in *Veasey v. Abbott*.[100] Despite the frequently asserted claim that all ID laws are intended to suppress votes, they have been upheld as nondiscriminatory, an intangible burden on voters, and constitutional in court decisions in numerous states including Georgia, Indiana, Tennessee, South Carolina, Virginia, Wisconsin, and Alabama, among others.[101]

The end result of *Veasey* is that, with minor modifications, the voter ID law is in place in Texas.[102] This litigation resulted in a series of decisions by the Southern District of Texas and the Fifth Circuit. In an *en banc* decision, the Fifth Circuit found the ID requirement had a disparate impact on minority voters but reversed the district court's finding that the ID requirement was enacted with a discriminatory purpose and remanded the case for further consideration.[103] The Fifth Circuit said that the district court's finding was "infirm" and that the court had "relied too heavily on the evidence of State-sponsored discrimination dating back hundreds of years" instead of more contemporary examples.[104] Furthermore, said the Fifth Circuit, "[n]o one questions the legitimacy" of the concerns of the state legislature in passing this law that "centered on protection of the sanctity of voting, avoiding voter fraud, and promoting public confidence in the voting process."[105]

It should be noted that actual voter turnout contradicted the claims that the Texas voter ID law would have a disparate impact on minority voters in Texas, reflecting that the *en banc* court's conclusion

---

100. *See* Veasey v. Abbott, 888 F.3d 792 (5th Cir. 2018).

101. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016); Frank v. Walker, 768 F.3d 744 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); Common Cause/Ga. v. Billups, 554 F.3d 1340 (11th Cir. 2009), *cert. denied*, 129 U.S. 2770 (2009); Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253 (N.D. Ala. 2018); Green Party of Tenn. v. Hargett, 194 F. Supp. 3d 691 (M.D. Tenn. 2016); Nashville Student Org. Comm. v. Hargett, 155 F. Supp. 3d 749 (M.D. Tenn. 2015); South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012).

102. *See Veasey*, 888 F.3d 792. The original Texas statute required a Texas driver's license, non-driver's license ID, or "Election Identification Certificate" issued by the Texas Department of Public Safety, a Texas concealed carry permit, a U.S. passport, or military ID. Veasey v. Abbott, 830 F.3d 216, 225 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

103. *See Veasey*, 830 F.3d at 272.

104. *Id.* at 230–31.

105. *Id.* at 231.

on the effect of the law was wrong.[106] Before the ID law was preliminarily enjoined, it was in effect for the 2013 state elections in Texas in which there were state constitutional amendments on the ballot, as well as candidates and other ballots issues in individual counties.[107] Turnout went up with the ID law in place when compared to the 2011 state election, including in counties that are heavily minority counties.[108]

On remand from the Fifth Circuit, the district court issued a permanent injunction against the ID law.[109] This was later reversed as an abuse of discretion by a panel of the Fifth Circuit, which held that an amendment to the original law that had been approved by the state legislature ameliorated the problems claimed by the plaintiffs.[110] That amendment allowed any voter without one of the free photo IDs issued by the state to vote after completing a "Declaration of Reasonable Impediment" form and presenting a specified form of non-photo ID.[111]

Election officials could not question the reasonableness of the voter's explanation in the declaration of why the voter was not able to obtain the free photo ID.[112] The form of non-photo ID that had to be presented with the declaration included a valid voter-registration or birth certificate, a current utility bill, bank statement, government check, paycheck, or other government documents with the voter's name and address.[113]

Contrast the Obama administration's position in the *Veasey* case with its position in *NAACP v. McCrory*. When *Veasey* was on remand, the DOJ filed a joint pleading with Texas prior to the 2016 election in which the DOJ agreed that an appropriate interim remedy would be a "reasonable impediment" exemption—the very same exemption that

106. Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 4146: Lessons from the Voter ID Experience in Texas (Feb. 11, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4146.pdf. In fact, turnout in the 2013 election doubled from turnout in 2011. *Id.* at 2.

107. *Id.* at 1.

108. *Id.* at 2.

109. Veasey v. Abbott, 265 F. Supp. 3d 684, 700 (S.D. Tex. 2017).

110. Veasey v. Abbott, 888 F.3d 792, 795–96 (5th Cir. 2018).

111. *Id.* at 796.

112. *Id.*

113. *Id.*

the Texas legislature then adopted in 2017, which the Fifth Circuit subsequently held ameliorated the plaintiffs' claims.[114] This submission was made by Vanita Gupta, who was the principal deputy (and thus acting) attorney general for the Civil Rights Division.[115]

Significantly, the DOJ's position in *Veasey* was inconsistent with the position it took in *McCrory*. The North Carolina voter ID law challenged by the DOJ (that was eventually thrown out by the Fourth Circuit Court of Appeals panel)[116] in *McCrory* had been similarly amended by the state legislature to add a reasonable impediment exemption.[117] The North Carolina law allowed an individual to vote after completing a declaration of reasonable impediment form, *without* the second requirement of showing an identification document such as a valid voter-registration or birth certificate, a current utility bill, bank statement, government check, paycheck, or other government documents with the voter's name and address.[118] Thus, the North Carolina law was less "burdensome" than the Texas law that the Civil Rights Division had previously approved.

Yet, contrary to the position it took in *Veasey*, the DOJ claimed, and a panel of the Fourth Circuit agreed, that even with the reasonable impediment exemption, the North Carolina ID law was discriminatory.[119] The Fourth Circuit's view was not only out of step with the Fifth Circuit in *Veasey*, it was also not in accord with a three-judge panel decision in the District of Columbia.

In 2012, when Section 5 of the VRA was still in effect, South Carolina filed a lawsuit in the District of Columbia seeking preclearance of its new voter ID law, which had a reasonable impediment exemption.[120] Individuals would still be able to vote without a photo ID

---

114. *Id.*; Joint Submission of Agreed Terms at 2, Tex. State Conf. of NAACP Branches v. Cascos, No. 2:13-cv-291 (S.D. Tex. Aug. 3, 2016) & Taylor v. Texas, No. 2:13-cv-348 (S.D. Tex. Aug. 3, 2016) [hereinafter Joint Submission of Agreed Terms].

115. Joint Submission of Agreed Terms at 4, *supra* note 114.

116. *See* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

117. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 344–345 (M.D.N.C. 2016).

118. *McCrory*, 831 F.3d at 243.

119. *See id.* at 240.

120. South Carolina v. United States, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

by signing "an affidavit at the polling place" that listed "the reason that they have not obtained a photo ID" provided by the state for voting without a fee.[121]

In an opinion written by then-District of Columbia Circuit Court Judge (now Associate Justice) Brett Kavanagh, the panel held that South Carolina's voter ID law did not violate the VRA.[122] The court stated that the South Carolina law "does not have a discriminatory retrogressive effect" and "was not enacted for a discriminatory purpose."[123] That law has been in place since 2013 without any reported problems.

The idea that it is a violation of the VRA if there is some slight disparity between racial groups in the percentage of black and whites who already have a photo ID is simply not credible nor reasonable. When the Seventh Circuit upheld Wisconsin's voter ID law against claims that the law was discriminatory because, it was alleged, there was a slight disparity between the percentage of whites and blacks who already possess photo IDs, the court articulated a common sense argument that disrupts the voter-ID-is-voter-suppression mantra:

> Plaintiffs describe registered voters who lack photo ID as "disenfranchised." If the reason they lack photo ID is that the state has made it impossible, or even hard, for them to *get* photo ID, then "disfranchised" might be an apt description. But if photo ID is available to people willing to . . . stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time.[124]

The numbers often put forward by those who claim that large numbers of Americans don't have photo ID are, as the Seventh Circuit correctly noted, "fanciful" in a:

---

121. *Id.*

122. *Id.*

123. *Id.* Under Section 5, no voting change could be approved if it would have a retrogressive effect, i.e., putting voters in a worse position than before the change. *See id.*

124. Frank v. Walker, 768 F.3d 744, 748 (7th Cir. 2014).

> [W]orld in which photo ID is essential to board an airplane, enter Canada or any other foreign nation, drive a car (even people who do not own cars need licenses to drive friends' or relatives' cars), buy a beer, purchase pseudoephedrine for a stuffy nose or pick up a prescription at a pharmacy, open a bank account or cash a check at a currency exchange, buy a gun, or enter a courthouse to serve as a juror or watch the argument of this appeal.[125]

Thus, the DOJ's recent record of enforcement of Section 2 of the VRA provides little evidence to support the claim that there are widespread, unlawful, voter suppression actions being taken against minority voters by states and local jurisdictions. The Texas voter ID litigation in *Veasey* resulted in only minor changes to its election procedures, and the court's decision in the North Carolina case, *NAACP v. McCrory*, is inconsistent with both the law and what actually happened in North Carolina when the law was in effect.

B. The Recent Enforcement Record of the DOJ Under Section 11(b)

Another provision of the VRA that could be used to go after actual voter suppression is Section 11(b), which provides that "[n]o

---

125. *Id.* Voter ID laws have not been shown to depress turnout, and turnout has increased in many states that implemented voter ID law. *See* Justin Grimmer et. al., *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, J. POL. 80, No. 3 (July 2018): 1045–51; Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 3451: Lessons from the Voter ID Experience in Georgia (March 19, 2012); Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 3679: Lessons from the Voter ID Experience in Kansas (July 25, 2012), http://thf_media.s3.amazonaws.com/2012/pdf/ib3679.pdf (detailing that only 0.002% of registered voters requested an ID); Memorandum, Hans A. von Spakovsky, The Heritage Found., Issue Brief No. 4180: Lessons from the Voter ID Experience in Tennessee (Mar. 25, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/IB4180.pdf; Memorandum, Hans A. von Spakovsky, The Heritage Found., Legal Memorandum No. 70: Voter Photo Identification: Protecting the Security of Elections (July 13, 2011), https://thf_media.s3.amazonaws.com/2011/pdf/lm0070.pdf; *see also* Enrico Cantoni & Vincent Pons, *Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008–2016*, at 1 (Nat'l Bureau Econ. Research, Working Paper 25522, 2019) ("[Voter ID] laws have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation."), https://www.nber.org/papers/w25522?utm_campaign=ntwh&utm_medium=email&utm_source=ntwg22.

person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote . . . ."[126] Part (a) of the same statutory provision prohibits failing or refusing to permit someone to vote who is entitled to vote or to otherwise refuse to "tabulate, count, and report such person's vote."[127]

Yet during its entire eight years in office, the Obama administration *did not file a single case* to enforce this provision of the VRA. In contrast, the Bush administration filed two cases to enforce Section 11(b), including *United States v. New Black Panther Party* in Pennsylvania and *United States v. Brown* in Mississippi.[128] Regardless, this record provides no evidence of any widespread, recent voter suppression efforts that would violate this provision of the VRA.

C. The Recent Enforcement Record of the DOJ Under Section 208

Section 208 of the VRA requires local governments to allow "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write [to] be given assistance by a person of the voter's choice . . . ."[129] Although this may sound like an

---

126. 52 U.S.C. § 10307(b) (2012).

127. *Id.* § 10307(a).

128. *See Cases Raising Claims Under Section 11(B) of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/cases-raising-claims-under-section-11b-voting-rights-act#philadelphia (last updated Aug. 6, 2015) [hereinafter *Cases Raising Claims Under Section 11(B) of the Voting Rights Act*]. The mishandling by the Obama administration of the New Black Panther Party lawsuit filed by the Bush Administration just before it left office was very controversial. The complaint alleged that members of the New Black Panther Party, dressed in black, paramilitary-style uniforms and carrying nightsticks, threatened and intimidated individuals at a polling place in Philadelphia. The case in large part was dismissed with a watered-down injunction even though the DOJ could have obtained a default judgment when the defendants failed to answer the lawsuit. FUND & VON SPAKOVSKY, *supra* note 11, at 139–47. *U.S. v. Brown* was the first case ever filed by the DOJ against local black officials for discriminating against white voters. The district court judge concluded that the VRA protects all voters and that the defendants engaged in racially-motivated manipulation of the electoral process to dilute the votes of white voters. *See* United States v. Brown, 494 F. Supp. 2d 440, 486–87 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

129. 52 U.S.C. § 10508 (2012).

innocuous provision, the DOJ has used it in the past to go after jurisdictions that were refusing to allow voters to be assisted or who were allowing improper assistance—assistance that was intimidating or involved threats to voters to make them vote for particular candidates.[130]

Yet the Obama administration filed only one enforcement action utilizing this provision in its entire eight years in office, and that case was filed in 2009,[131] four years before *Shelby County*. In comparison, the Bush administration filed ten cases to enforce Section 208.[132] Only two of those cases were filed in a jurisdiction covered by Section 5, both in Texas.[133]

Again, the record of the last ten years of enforcement of Section 208 shows no widespread voter suppression effort that prevents voters from getting the assistance they need to vote.

D. The Recent Enforcement Record of the DOJ Under the National Voter Registration Act

Often claims of "voter suppression" relate to registration list maintenance procedures that remove voters who have died, moved away, or otherwise become ineligible to vote. The NVRA[134] sets out strict standards that specify the rules governing such maintenance procedures (which the law requires to be utilized on a regular basis)[135] and the conditions under which registrants can be removed from the voter rolls. Compliance with the NVRA cannot reasonably be termed "voter suppression."

---

130. *See, e.g.*, Consent Decree, Judgment, and Order, United States v. Fort Bend Cty., No. 4:09-cv-1058 (S.D. Tex. April 13th, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/ftbend_cd.pdf.

131. *Voting Section Litigation*, *supra* note 57.

132. *Id.*

133. *Id.*; *Jurisdictions Previously Covered by Section 5*, *supra* note 27.

134. 52 U.S.C. § 20501 (2012). There are also requirements governing statewide voter registration lists as well as voter registration in general in the Help America Vote Act of 2002. *See id.* § 20901; *see also id.* § 21083 (entitled "Computerized statewide voter registration list requirements and requirements for voters who register by mail").

135. States must "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters . . . ." *Id.* § 20507(a)(4).

Violations of the NVRA by, for example, removing eligible voters from statewide voter registration lists, could, on the other hand, be considered voter suppression. Yet the enforcement records of the Voting Section of the Civil Rights Division show a sharp *downturn* in the number of enforcement actions filed under the NVRA over the past decade, including since *Shelby County*.[136] While the Bush administration filed ten lawsuits to enforce the NVRA and entered into two settlement agreements, for a total of 12 enforcement actions, the Obama administration filed only four cases to enforce the NVRA and entered into two settlement agreements, for a total of six enforcement matters in the eight years it was in office, less than one per year.[137]

That hardly constitutes evidence of widespread "voter suppression" given the number of election jurisdictions across the United States, which includes thousands of counties and individual townships in addition to the fifty states and the District of Columbia. In total, there are over 10,000 election administration jurisdictions in the United States.[138] And that record certainly does not support the claim of the former head of the Civil Rights Division, Tom Perez, that he spent most of his time "suing states that tried to block eligible voters from the ballot box."[139]

Two of the NVRA lawsuits filed by the Obama administration, against Rhode Island and Louisiana, claimed that the states were not offering "voter registration opportunities in [state] public assistance offices and offices that provide state-funded programs primarily serving persons with disabilities."[140] One enforcement action against Florida

136. *See Cases Raising Claims Under the National Voter Registration Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#rhodeisland (last updated Mar. 27, 2019) [hereinafter *Cases Raising Claims Under the National Voter Registration Act*].

137. *See id.*; *see also Voting Section Litigation*, *supra* note 57. The Obama administration initiated an action against New York by letter dated January 6, 2017, but the case was ultimately settled by the Trump administration. *See Memorandum of Understanding*, U.S. DEP'T JUST. (June 20, 2017), https://www.justice.gov/crt/case-document/memorandum-understanding.

138. *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (June 15, 2016), http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx.

139. Perez, *supra* note 53.

140. *Cases Raising Claims Under the National Voter Registration Act*, *supra* note 136.

asserted it was conducting a list-maintenance program within 90 days of a federal election, which is prohibited under the NVRA.[141] A fourth lawsuit against the City of New York, which is not exactly known as a Republican stronghold, was over the city's list maintenance procedures.[142] The DOJ claimed New York's flawed procedures included not removing voters from the registration list who had died or moved away, as well as removing some voters for a failure to vote without using the notice procedures mandated in the NVRA.[143] Although these cases all involved technical violations of the NVRA, none of them showed intentional, partisan conduct aimed at suppressing minority voters.

Both of the settlement agreements entered into between the Obama administration and the states of Connecticut and Alabama concerned the development of an electronic voter registration system for driver's license applicants to replace the states' paper-based systems.[144] While that may certainly be a more efficient method of ensuring voter registration at DMV offices, the NVRA has no requirement for an electronic-based system.[145] While the Obama administration persuaded these states to agree to implement new procedures not required under federal law, these settlement agreements cannot even remotely be classified as correcting any type of voter suppression, systemic or otherwise.

A relatively recent Supreme Court decision, *Husted v. A. Philip Randolph Institute*,[146] lays to rest the claim that complying with the NVRA's requirement of removing voters who have moved, died, or otherwise become ineligible to vote to improve the accuracy of statewide voter registration rolls constitutes "voter suppression." As that decision pointed out, registration lists in this country are very unreliable and inaccurate: "24 million voter registrations in the United

---

141. *See id.*

142. *Id.*

143. Complaint in Intervention at 14–15, Common Cause N.Y. v. Bd. of Elections in N.Y., No. 1:16-cv-06122-NGG-RML (E.D.N.Y. Jan. 18, 2017).

144. *See Voting Section Litigation*, *supra* note 57.

145. See 52 U.S.C. § 20504 (2012), which requires states to provide applicants for a driver's license with a voter registration form. There is no mention of an electronic form being required versus a paper form.

146. Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).

States—about one in eight—are either invalid or significantly inaccurate. And about 2.75 million people are said to be registered to vote in more than one State."[147]

Husted dealt with Ohio's list maintenance procedures.[148] Ohio uses the precise method outlined in the NVRA to maintain the accuracy of its voter rolls, procedures that the plaintiffs claimed violated both the NVRA and the Help America Vote Act ("HAVA") of 2002.[149] As the Supreme Court summarized:

> Ohio uses the failure to vote for two years as a rough way of identifying voters who may have moved, and it then sends a preaddressed, postage prepaid card to these individuals asking them to verify that they still reside at the same address. Voters who do not return this card *and* fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.[150]

According to the Court, Congress anticipated that some voters would not return the prepaid card to confirm they have not moved, and the NVRA treats that failure as non-dispositive evidence that they no longer reside at their registered address.[151] The NVRA then allows states to remove that voter from the registration list if the voter fails to vote in two federal elections *after* the date the notice was sent out.[152]

The plaintiffs' challenge, claiming that states cannot remove registrants for a failure to vote under any circumstances, "not only second-guesses the congressional judgment embodied in [the NVRA's] removal process, but it also second-guesses the judgment of the Ohio Legislature as expressed in the State's [removal process]."[153] States that comply with the NVRA therefore cannot be engaged in "voter suppression."

Finally, it should be noted that the Obama administration filed one enforcement action under HAVA, which supplements the NVRA,

---

147. *Id.* at 1838 (citation omitted).
148. *See id.*
149. *Id.* at 1838–41.
150. *Id.* at 1838.
151. *Id.* at 1839.
152. *Id.* at 1839–40.
153. *Id.* at 1846.

and entered into one settlement agreement.[154] The DOJ settlement agreement was in regard to Palm Beach County, Florida's failure to use voting machines that were fully compliant with Section 301 of HAVA, which requires at least one voting machine in each precinct that can used by blind or disabled voters.[155]

The HAVA enforcement action was filed against Fort Bend County, Texas, for not providing provisional ballots as required under Section 302 of HAVA, and the case settled through a consent decree.[156] HAVA's provisional ballot provision allows any individual to vote after asserting that she is eligible and registered, even if her name does not appear on the list of registered voters in her precinct or if an election official challenges her eligibility.[157] The voter casts a provisional ballot that is forwarded to election officials at the end of Election Day.[158] Those officials determine if the individual was entitled to vote.[159] If so, the vote must be counted, and the voter must be notified of the election officials' decision, and if it is not counted the reasons for the decision.[160]

Thus, if an eligible voter is removed from the registration list due to an administrative error or some kind of intentional misconduct by election officials, that voter will still be able to vote through the provisional balloting process. That is why claims of so-called voter

---

154. *See Voting Section Litigation*, *supra* note 57.

155. 52 U.S.C. § 21081(a)(3) (2012 & Supp. 2014) (originally codified as 42 U.S.C. 15482(a) (2012)); *see MOA- Palm Beach County FL HAVA*, U.S. DEP'T JUST., https://www.justice.gov/crt/case-document/palm-beach-county-fl-hava. Gov. Ron DeSantis removed the supervisor of the Palm Beach Elections Department, Susan Bucher, a Democrat, in January 2019 for incompetence, neglect of duty, and malfeasance for violating state election laws. Steve Bousquet & Skyler Swisher, *Gov. DeSantis Replaces Palm Beach Elections Chief After 2018 Election Woes*, SUNSENTINEL (Jan. 18, 2019, 2:30 PM), https://www.sun-sentinel.com/news/politics/fl-ne-ron-desantis-suspends-susan-bucher-20190118-story.html.

156. 52 U.S.C. § 21082(a); *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. DEPT. JUSTICE, https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act#ftbend (last updated Oct. 16, 2015).

157. *See* 52 U.S.C. § 21082(a).

158. *Id.* § 21082(a)(3).

159. *Id.* § 21082(a)(4).

160. *Id.* § 21082(a)(4)–(5).

suppression over the supposedly unfair efforts to remove ineligible individuals from voter registration rolls should ultimately fail—because HAVA's provisional balloting requirement acts as a failsafe to ensure that every individual who complies with his or her state's registration requirement will be able to vote. And in its entire eight years in office, the Obama administration found only one instance from anywhere across the nation in which a political jurisdiction was violating the provisional balloting requirement.[161]

The overall enforcement record of the DOJ under the VRA, the NVRA, and HAVA does not support the claim that there is widespread, unlawful "voter suppression" of minority voters going on across the country, either before or after the *Shelby County* decision. In fact, there has been a sharp downturn in the number of enforcement actions filed by the DOJ to enforce federal voting rights laws, particularly during the Obama administration.

Those who still claim there is a "voter suppression" epidemic cannot blame a lack of resources or personnel at the Civil Rights Division to pursue such claims either because the DOJ retained the lawyers and staff who worked full-time on Section 5 matters after the 2013 *Shelby County* decision.[162] As directed by Eric Holder, that staff was reassigned to enforce the other provisions of the VRA and the NVRA (and HAVA).[163] And appropriations from Congress for the Civil Rights Division have steadily increased from $136 million in FY 2013, the year *Shelby County* was decided, to $147.2 million in FY 2018.[164]

Given that no one questions the Obama administration's willingness to enforce provisions of the VRA, the NVRA, and HAVA, the

---

161. Consent Decree, Judgment, and Order, United States v. Fort Bend Cty., Tex., No. 4:09-cv-1058 (S.D. Tex. April 13, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/ftbend_cd.pdf; *Voting Section Litigation*, *supra* note 57.

162. Holder, *supra* note 1.

163. *See id.*

164. CIVIL RIGHTS DIVISION, U.S. DEP'T JUSTICE, FY 2019 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/jmd/page/file/1033091/download; CIVIL RIGHTS DIVISION, U.S. DEP'T JUSTICE, FY 2016 BUDGET REQUEST AT A GLANCE, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/16_bs_section_ii_chapter_-_crt.pdf.

downturn in enforcement actions most likely reflects a reduction in discriminatory actions by states and localities that would otherwise be sufficient to justify the DOJ filing a lawsuit.

V. A NEW SECTION 5?

Proponents of the "voter suppression" myth have called upon Congress to reinstate Section 5 of the VRA.[165] The enforcement record, however, demonstrates that there is no need for Congress to reinstate Section 5. While Section 5 might have been a necessary measure at the time it was enacted, it constituted an unprecedented and extraordinary intrusion into state sovereignty, requiring covered states to get the federal government's approval for voting changes made by state and local officials. No other federal law presumes that states cannot govern themselves and that they must obtain the federal government's approval before they implement any changes to their own laws. As the Supreme Court said, Section 5 "employed extraordinary measures to address an extraordinary problem."[166]

Today, six years after *Shelby County*, as the DOJ's enforcement record shows, there is still no evidence of widespread, systemic, official discrimination by any of the formerly covered jurisdictions (or any other state) that would justify re-imposing the onerous Section 5 preclearance requirement. In the relatively few jurisdictions where a Section 2 violation has been found, there is no evidence that those political bodies have evaded the court-imposed remedies to implement further discriminatory practices.

That is a key point because the fundamental reason that Section 5 was implemented in 1965 as an adjunct to Section 2 was to stop efforts by local jurisdictions to evade court-ordered remedies. As the Supreme Court said in 1966 in *Katzenbach v. South Carolina*, in which it upheld the constitutionality of Section 5, the preclearance requirement was tailored to stop such "obstructionist tactics."[167] But in 2013, the Supreme Court in *Shelby County* reiterated its earlier observation

---

165. Mike Lillis, *Dems Vow Quick Action to Bolster Voting Rights upon Taking Power*, THE HILL (Nov. 30, 2018, 4:08 PM), https://thehill.com/homenews/house/419187-dems-vow-quick-action-to-bolster-voting-rights-upon-taking-power.

166. Shelby County v. Holder, 570 U.S. 529, 534 (2013).

167. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

in *Northwest Austin* that nearly half a century later, "[b]latantly discriminatory evasions of federal decrees are rare."[168]

Moreover, it would be fundamentally unfair to impose preclearance requirements on states or other political jurisdictions because of discriminatory actions—if they occur—that are committed by political subdivisions over which they have no control.

To meet the requirements of the Constitution and justify federal supervision of state and local government, a new coverage formula for Section 5 would have to identify those jurisdictions for which Section 2 would not be effective because of systemic racial discrimination and evasion of federal court decrees. That will not be possible because there is no evidence of such behavior in voting either in the states formerly covered under Section 5 or anywhere else.[169]

The absence of Section 5 does not mean jurisdictions can never be subject to federal oversight and a preclearance requirement. Critics of *Shelby County* seem to ignore another provision of the VRA, Section 3, which can be used to supervise any jurisdiction that has a proven pattern of discriminatory conduct.[170] While the Supreme Court struck down the coverage formula of Section 4 that triggered Section 5 preclearance requirements, Section 3 was not at issue in *Shelby County*. Although Section 3 has rarely been used, if a jurisdiction has engaged in repeated discrimination and a court finds it is necessary to prevent future problems, Section 3 provides that the court can essentially place the jurisdiction into the equivalent of Section 5 coverage.[171]

If that happens, then "no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless" the court or the Attorney General has precleared the change and found that it "does not have the purpose and will not have the effect of denying or abridging the right to vote."[172]

The point here is that while the Supreme Court in *Shelby County* found that the general conditions in covered states today do not justify their continued exception from general constitutional principles and

168. *Shelby County*, 570 U.S. at 531 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009)).

169. *See supra* Part IV.

170. 52 U.S.C. § 10302(c) (2012).

171. *Id.*

172. *Id.*

structures, a court can still appoint federal examiners and place a particular jurisdiction into the equivalent of federal receivership—Section 5 preclearance—if it finds sufficient evidence of current, repeated discrimination and a recalcitrant defendant.

Section 5 was also unprecedented in the way it violated fundamental American principles of due process: it shifted the burden of proof of wrongdoing from the government to the covered jurisdiction.[173] Unlike all other federal statutes that require the government to prove a violation of federal law, covered jurisdictions were put in the position of having to prove a negative—that a voting change was not intentionally discriminatory and did not have a discriminatory effect.[174] While such a reversal of basic due process principles may have been constitutional at the time it was enacted, given the extraordinary circumstances present in 1965, it cannot be justified today.

Section 3 does not present this constitutional due process problem because it does not shift the burden of proof for preclearance to covered jurisdictions *until* the government or a private plaintiff has *proven* that the jurisdiction has engaged in discrimination.[175] Thus, it remains a valuable, case-specific tool for those jurisdictions that a court finds should have a preclearance requirement.

And this powerful tool to combat attempts to suppress the votes of eligible, legitimate voters by recalcitrant jurisdictions has been successfully employed in two relatively recent cases in Alabama and Texas.[176] The fact that there have only been two cases since *Shelby County* in which a political jurisdiction was ordered to be covered un-

---

173. *Id.* § 10304(a). Section 5 required a jurisdiction to prove that its voting change would not have "the purpose nor will have the effect of denying or abridging the right to vote." *Id.*

174. *Id.*

175. *Id.* § 10302(c).

176. *See* Patino v. Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017); Allen v. City of Evergreen, No. 13-0107-CG-M, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014). These are the only two cases in which a federal court has found evidence sufficient to warrant imposition of the preclearance regime of Section 3 since *Shelby County*. This is another indication of how rare the circumstances are that would warrant preclearance. In the Texas voter ID case, Section 3 was not imposed on the state because the Fifth Circuit held that the district court not only had "no legal or factual basis to invalidate" the Texas ID law, but that "its contemplation of Section 3(c) relief accordingly fails as well." Veasey v. Abbott, 888 F.3d 792, 801 (5th Cir. 2018).

der Section 3, though, also shows that there is no evidence of widespread, voting discrimination or voter suppression anywhere in the country. It seems obvious that this claim is a myth created for partisan political purposes to scare voters.

VI. CONCLUSION

Americans today have an easier time registering and voting than at any time in our nation's history. The DOJ's enforcement record under the VRA, the NVRA, and the HAVA demonstrates that there is no widespread, systemic voter suppression effort by state legislatures to discriminate against minority voters and deny them (or any other citizens) the ability to vote.

In fact, the substantial reduction in enforcement actions during the eight years of the Obama administration demonstrates that the opposite is true—we have less discriminatory conduct today than ever before. The data on turnout in recent elections also provides no evidence that state laws and regulations governing registering to vote, casting ballots, or maintaining voter rolls are suppressing the ability of any American to cast ballots and participate in the electoral process.

This record also shows that there is no reason to reinstate the preclearance requirements of Section 5 of the VRA to, in essence, place certain states in the equivalent of federal receivership when it comes to their laws and regulations governing voting. In fact, Congress would have a difficult time coming up with any kind of coverage formula that would withstand constitutional scrutiny and justify imposing such an extraordinary requirement on state and local governments.

To ensure fair elections that accurately reflect the will of the voters, states must have the ability to maintain the accuracy of voter registration rolls. In fact, federal law requires that they do so.[177] Furthermore, states have an obligation to address the vulnerabilities in the honor system in place by implementing reforms that help improve the integrity of the democratic process, from the casting of votes to the counting of ballots.

Manufacturing false claims of voter suppression when states try to improve the security and integrity of the election process or when

177. 52 U.S.C. § 20507(a)(4) (2012).

they make routine changes such as moving a polling place is a disservice to our democratic system. Not only does it damage public confidence, but also it clogs the judicial system with meritless claims in an attempt to persuade judges to, as the Sixth Circuit said, "become entangled, as overseers and micromanagers, in the minutiae of state election processes."[178] That is a serious error that federal judges should avoid.

It is also not a violation of the Constitution and it is not a discriminatory violation of the VRA to require voters to: vote on Election Day, as opposed to weeks before that day; register prior to the election;[179] vote in the precinct where they reside; show some proof of identity; or verify that they still reside in a jurisdiction when election officials receive evidence that they may have moved out of state and thus have become ineligible to vote. This is not voter suppression.

A common refrain when it comes to voting rights and election administration is that we want to ensure that every eligible American citizen can vote and that fraud or administrative errors do not dilute his vote. That requires states to take reasonable, common sense actions that impose minimal burdens on voters and do not constitute "voter suppression." Any claims to the contrary are wrong.

---

178. Ohio Democratic Party v. Husted, 834 F.3d 620, 622–23 (6th Cir. 2016), *application for stay denied*, 137 S. Ct. 28 (2016).

179. Although, states cannot require registration more than 30 days before Election Day. Dunn v. Blumstein, 405 U.S. 330, 360 (1972). James F. Blumstein, the plaintiff, is the University Professor of Constitutional Law at the Vanderbilt University School of Law. *Id.* at 331.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
Hearing on
"Restoring the Voting Rights Act: Combating Discriminatory Abuses"
September 22, 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 Blumenthal, Ranking Member Cruz, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to appear and speak about the Senate version of the John Lewis Voting Rights Advancement Act of 2021 ("VRAA"). 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, which 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.

---

* 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.

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 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 not uncommon. 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 swing 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 high rates by minority communities during the 2020 election cycle.[6] Other states like Florida, Texas, 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 crucial swing 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 considering 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 several 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 *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…founds 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.

The VRAA 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, the VRAA's practice-based coverage 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. This structure complements the VRAA'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 coverage 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 the VRAA. 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 coverage under existing judicial precedents. Part II discusses the VRAA's demographic trigger, which subjects to practice based preclearance only those jurisdictions that have racial or minority groups that account for 20% or more of the political subdivision's voting age population. The 20% threshold tailors coverage to those jurisdictions most likely to use the covered changes to undermine the political power of their minority populations. This section also briefly canvasses some of the practices that would be subject to coverage under the VRAA to show that states have long used these practices as vehicles for discrimination, illustrating the need for federal intervention. Because Congress can rely on multiple sources of constitutional authority as justification for practice-based

---

[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.

coverage and there is ample evidence that the targeted practices have been used to abridge or deny the right to vote, this testimony concludes that practice based preclearance is a constitutional use of congressional power.

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 based on 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 coverage provision of the VRAA.

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 state, local, or federal elections. However, the *Shelby County* Court read both 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).[24]

This view misrepresents prior caselaw. Initially, the Supreme Court broadly interpreted Congress' power to enforce the Fourteenth and Fifteenth Amendments. For example, in *South Carolina v. Katzenbach*, the Court held that the preclearance provisions of the VRA were constitutional under the

[23] *Shelby County*, 570 U.S. at 554.

[24] Congress initially passed the Voting Rights Act in 1965 under the Fifteenth Amendment, but cited both the Fourteenth and Fifteenth Amendments when it reauthorized the Act in 1970. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 52 U.S.C. §§10101 (2006)).

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.[25]

Similarly, in *City of Rome v. United States*, 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."[26] The Court further observed that Congress may pass legislation under Section 2 of the Fifteenth Amendment to prohibit acts that do 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*."[27]

The Court has also described Congress' enforcement power under the Fourteenth Amendment as broader than the judicial power to define the substantive scope of Section 1 of the Amendment.[28] 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.[29]

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.[30] And given the reach of the Necessary and Proper Clause,[31] 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.[32] The archbishop claimed that this refusal violated the Religious Freedom Restoration Act of 1993 ("RFRA"), the relevant provision of which prohibited state governments from

---

[25] *Id.* at 308.
[26] 446 U.S. 156, 173 (1980).
[27] 17 U.S. 316 (1819).
[28] *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).
[29] *City of Rome*, 446 U.S. 156, 176 (1980) (citing Katzenbach v. Morgan, 384 U.S. at 641 (1996)).
[30] *Id.* at 175.
[31] *See generally* United States v. Comstock, 130 S. Ct. 1949 (2010) (discussing the extraordinary breadth of the Necessary and Proper Clause).
[32] 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).

"'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability." [33] 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.[34]

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.[35] 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.[36] 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."[37] 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.[38] 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."[39]

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.[40] The Court contended that the coverage formula of Section 4(b) failed rational basis review[41] and the standard derived from *Northwest Austin Municipal Utility District Number One v. Holder*,[42] which, according to the Court,

[33] *Id.* at 515–16.
[34] *Id.* at 519–20.
[35] *Id.* at 512–16.
[36] *Id.* at 519.
[37] *Id.* (arguing that Congress "does not enforce a constitutional right by changing what the right is").
[38] *Id.* at 520.
[39] *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").
[40] 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).
[41] 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).
[42] 557 U.S. 193 (2009).

"guides [its] review under both [the Fourteenth and Fifteenth] Amendments."[43] However, the *Northwest Austin* case did not articulate a standard of review under these provisions.[44]

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*.[45] The appropriate standard for Fifteenth Amendment legislation remains the standard articulated by the Court in *South Carolina v. Katzenbach* and *City of Rome v. United States*.[46] These cases give 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 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. Thus, post-*City of Boerne*, Congress is 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, even if such actions are not racially discriminatory.

This view accords with existing caselaw. 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.[47] 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. 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.[48] 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

---

[43] *Shelby Cty.*, 570 U.S. 529 n.1.
[44] *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).
[45] 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.'").
[46] 383 U.S. 301 (1966).
[47] Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).
[48] *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 balances the benefits of the law against its burdens in assessing constitutionality).

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.[49] 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, mitigated the federalism concerns present in the case.

Because of its structure, the Elections Clause has less to do with federalism, as that term is typically understood,[50] 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,"[51] and that body has, on occasion, imposed substantive requirements that states must follow in structuring federal elections.[52] The Clause's overarching purpose is to ensure the continued existence and legitimacy of federal elections,[53] the health of which have been continually challenged by many of the practices that would be subject to practice-based coverage.

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.[54] 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.[55] 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

---

[49] *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

[50] *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").

[51] *Arizona Inter Tribal*, 133 S. Ct. 2247, 2253 (2013) (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).

[52] *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).

[53] *See* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018).

[54] 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.").

[55] *Katzenbach*, 383 U.S. at 324.

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."[56] Moreover, the Clause "act[s] as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."[57]

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.[58] 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.[59] 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.[60] 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.'"[61]

---

[56] Arizona State Legis. v. Arizona Independent Redistricting Commission, 576 U.S. 787 (2015).
[57] *Id.*
[58] 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 violate the Constitution before Congress can act).
[59] *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).
[60] *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.
[61] 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

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 doctrine.[62] 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."[63] 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 coverage, 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 narrower grant of authority than these three sources of authority, collectively. The

---

the choice of candidates for election as representatives in Congress'" (quoting United States v. Classic, 313 U.S. 299, 320 (1941)).

[62] *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 53 (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.

[63] U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

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.[64] Authorization based on multiple constitutional provisions has, in some cases, proven to be the difference between invalidation and constitutionality for some federal statutes.[65] 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.[66]

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*,[67] 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.[68] 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.[69] Similarly, in *Woods v. Cloyd W. Miller Co.*,[70] 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."[71] 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."[72]

Uncertainty about the actual source of federal authority was on full display in *Jones v. Alfred H. Mayer*,[73] 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.[74] 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.[75] 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.

---

[64] *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 power/power combination analysis" because most decisions focus on one source of authority "as independently sufficient to sustain the federal enactment under review").
[65] 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).
[66] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563-66 (2012).
[67] 448 U.S. 448 (1980).
[68] *Id.* at 490.
[69] *See id.* at 473-76.
[70] 333 U.S. 138 (1948).
[71] *Id.* at 144.
[72] *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.").
[73] 392 U.S. 409 (1968).
[74] *Id.* at 413.
[75] *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).

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 Puerto Rico who have completed at least the sixth grade. In *Katzenbach v. Morgan*,[76] the Court upheld Section 4(e) as an appropriate exercise of Congress' authority to enforce the Fourteenth Amendment.[77] 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.[78] 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.[79] 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,[80] a position that received the Court's full-throated endorsement in the *Legal Tender Cases*[81] and *McCulloch v. Maryland*.[82]

As this caselaw illustrates, the Court's review of the legislative record of The VRAA 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 coverage, warrants greater judicial deference to the underlying legislative record than if Congress is proceeding based on the Fourteenth or Fifteenth Amendments alone.[83]

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 coverage formula that not only singled out some jurisdictions for preclearance while excluding equally offending jurisdictions from oversight, but that also required jurisdictions to

---

[76] 384 U.S. 641 (1966).
[77] *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).
[78] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53-54 (1959) (holding that literacy tests are constitutional absent discriminatory intent).
[79] 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).
[80] 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)).
[81] 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").
[82] 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).
[83] Tolson, *The Spectrum of Congressional Power*, *supra* note 60.

preclear *all* changes to their election laws (even the most innocuous regulations).[84] The VRAA addresses these concerns, first, by narrowing the scope of coverage to jurisdictions with substantial minority populations, and second, by focusing only on specific practices that jurisdictions use (and have used) to undermine the political influence of these groups.

A. 20% Demographic Trigger Tailors Coverage to Jurisdictions with Substantial Minority Populations

The demographic trigger limits the reach of preclearance for covered practices to jurisdictions with minority populations of at least 20%. As the number of minorities increases in a jurisdiction, history has shown that 20% approaches the threshold that tends to trigger backlash by the majority and make the jurisdiction more likely to engage in the covered practices to diminish minority political power. Scholars refer to this number as the "tipping point"—or the threshold at which the presence of minorities in previously all white spaces, such as schools, workplaces, or residential areas, will trigger either defections from these spaces or, importantly, backlash by members of the majority.[85] The tipping point dynamic does not involve a fixed number and varies depending on the context – the tipping point for a school or a place of employment might be 30% to 40% minority whereas it might only be 9-12% for a previously all white neighborhood. [86]

Importantly, the tipping point concept also applies to the political domain.[87] In one study, scholars noted that the black voting age population of a majority-minority district in the south during the 1990s needed to be at least forty-one percent for the probability of electing a black representative to exceed the likelihood of electing a white one.[88] Later studies have confirmed that, as the minority population grows in a district, the elected representative is more likely to be a person of color.[89] Thus, as jurisdictions become increasingly minority and racial bloc voting increases, the likelihood that white voters will be able to elect their candidate of choice decreases proportionately.

Given this, the majority often takes steps to prevent minority groups from effectively utilizing their political power once they have reached numbers sufficient to affect the outcome of an election. In *League of United Latin American Citizens (LULAC) v. Perry*, for example, the Supreme Court held that the state of Texas violated Section 2 of the Voting Rights Act by dismantling a 57.5% majority-Latino legislative district in its mid-decade 2003 redistricting, just as residents in the district were set

---

[84] Shelby County v. Holder, 570 U.S. 529, 544-45 (2013).

[85] *See* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 47 (1985).

[86] *See, e.g,* Christine H. Rossell & Willis D. Hawley, *Understanding White Flight and Doing Something About It, in* EFFECTIVE SCHOOL DESEGREGATION 157, 165-71 (Willis D. Hawley ed., 1981) (arguing that the tipping point for schools is between thirty and forty percent minority); Manal Totry-Jubran, *Law, Space and Society: Legal Challenges of Middle-Class Ethnic Minority Flight*, 34 Harv. J. Rachial & Ethnic Just. 57, n.37 (2018) (arguing that "neighborhoods tip after reaching a 9% to 12% minority"). *See also* Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, n.37 (2005) (discussing the tipping point dynamic in the context of juries noting that, "Electoral minorities need not constitute a majority of the jury in order to affect the verdict; they need only have enough members so that one of them sits at the 'tipping point of the jury.'").

[87] *See, e.g.,* Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U. L. REV. 89, 128 (2015) ("In the voting rights context, the tipping point concept has been used to measure the percentage of the minority population at which the probability of electing a black candidate exceeds that of electing a white candidate. In the related context of partisan gerrymandering, tipping point probability can measure the likelihood of electing a Democrat of whatever race versus a Republican.").

[88] Charles S. Bullock, III and Richard E. Dunn, *The Demise of Racial Redistricting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1237 (1999).

[89] Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FL. ST. L. REV. 659, 667 (2010).

to vote out the Republican incumbent. The Latino voters in this district—District 23—had consistently voted against the incumbent, almost voting him out in the 2002 elections.

The Court held that, while the state's decision to redistrict mid-decade was not prima facie evidence of an unlawful partisan gerrymander, the state's desire to protect the incumbent nonetheless violated Section 2 of the VRA. The Court noted that "the State took away the Latinos' opportunity because Latinos were about to exercise it," [90] diminishing "the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive."[91]

Notably, minorities do not have to be the majority, or anywhere close to the majority, to generate backlash like that experienced by the Latino voters in District 23. The same 2003 mid-decade redistricting of Texas that sought to stymie the political power of the Latino voters in District 23 also broke apart racially diverse District 24, which was 49.8% white, 25.7% African American, and 20.8% Latino. While African Americans were not a majority of the voters in the district, they were the swing bloc that had consistently elected the incumbent Democratic representative to Congress because they comprised over 64% of the voters in the Democratic primary.[92]

As the dismantling of District 24 shows, it is not uncommon for jurisdictions to take affirmative steps to diminish the political power of minorities, even when their numbers are relatively small. As influential election law scholar Pamela Karlan has argued, "blacks are more likely to occupy a pivotal position when they are a relatively small share of the electorate, because white voters are then less likely to perceive them as a threat. As the possibility that blacks might be a dominant component of a biracial coalition grows, white backlash increases as well."[93] She goes on to conclude that, "black influence grows as blacks increase to roughly 30% of the electorate; black voters face increasing resistance when they constitute between 30% and 50% of the electorate; and beyond 50%, the relationship between presence and influence is again positive," allowing the black voting majority to dictate electoral outcomes.[94] By setting the threshold for practice based preclearance at 20% minority population, the VRAA seeks to protect minority groups just as they have reached numbers that are meaningful enough to influence the political process and that, notably, approaches the threshold in which backlash will increase as the majority perceives their growing political influence.[95]

Because the use of racial criteria in the demographic trigger is designed to tailor the reach of a statute that the Supreme Court had once deemed to be both overbroad and underinclusive,[96] its 20% threshold is arguably a constitutional use of race that should not trigger strict scrutiny under the Court's caselaw. The Supreme Court has held that strict scrutiny applies regardless of whether the

---

[90] LULAC v. Perry, 548 U.S. 399, 428-35 (2006).
[91] *Id.* at 438.
[92] *Id.* at 443-444.
[93] Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 312-13 (1997).
[94] *Id.* at 313.
[95] *Cf.* Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tx. 2017) (detailing that city's discriminatory redistricting plan enacted where Latino had increased from 18.7% of city's voting age population in 1990 to 50.6% by 2015).
[96] Shelby County v. Holder, 570 U.S. 529 (2013).

government is trying to harm racial minorities,[97] or benefit them.[98] However, just because a statute mentions race does not mean that strict scrutiny is warranted. For example, in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court upheld a provision of the Michigan constitution, Section 26, that prohibited state entities and public universities from using race based preferences in admissions and other decisions. Although Section 26 is clearly written in racial terms by prohibiting the use of race in official governmental decision making, the Court declined to view this provision as the equivalent of "[g]overnment action that classifies individuals on the basis of race [which] is inherently suspect" and would therefore trigger strict scrutiny under the Equal Protection Clause.[99] The same rationale applies to the VRAA's demographic trigger, which is not a racial classification designed to help or harm racial minorities, but is instead a benchmark designed to confine coverage to jurisdictions that are likely to offend given the size of their minority populations.

Even if the Court determines that strict scrutiny applies, the trigger is narrowly tailored, consistent with the Court's precedents. In recent decades, the Court has sustained the government's power to use racial percentages for the purpose of protecting minority political power, most notably in permitting states to create majority-minority districts at a threshold necessary for minority groups to elect their candidate of choice.[100] The VRAA's demographic trigger is fairly modest by comparison, using a 20% threshold only for purposes of reducing the number of jurisdictions that would be subject to preclearance and further tailoring the scope of the statute.

B. *The VRAA's Preclearance Requirement for Specific Discriminatory Practices Further Narrows the Statute*

Instead of relying on outdated practices to determine coverage, Congress has 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 as their political influence increases. A quick canvas of some of the changes that would be subject to preclearance under the VRAA illustrates why the abuse of these particular practices, right when minority groups are at number sufficient to exercise meaningful political power, raise unique concerns pursuant to the Fourteenth and Fifteenth Amendments and the Elections Clause.

1) Changes in Method of Election/Redistricting

---

[97] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (finding that a state law that prohibited interracial marriage violated the Equal Protection Clause of the Fourteenth Amendment); Strauder v. West Virginia, 100 U.S. 303 (1879) (invalidating state statute that prohibited African Americans from serving on juries).

[98] *See, e.g.*, City of Richmond v. J.A. Crosan, 488 U.S. 469 (1989) (invalidating minority set-aside provision for city contracts); Adarand Constructors v. Pena, 515 U.S. 200 (1995) (same for federal contracts).

[99] Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014).

[100] *See* Bush v. Vera, 517 U.S. 952 (1996) (finding that a state can create a majority-minority district for the compelling purpose of avoiding liability under Section 2 of the Voting Rights Act, but the districts must be narrowly tailored to further that purpose); United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (rejecting constitutional challenge to majority-minority districts that were 65% minority because that was the threshold needed for minority community to elect their candidate of choice). The Supreme Court has held that these racial targets are flexible and must focus on the threshold at which the minority group can elect their candidate of choice. *See* Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254 (2015) (rejecting the argument that compliance with Section 5 of Voting Rights Act, even though a compelling governmental interest, required Alabama to maintain specific numerical minority percentages for its majority-minority districts; instead, Section 5 required districts to be at a percentage sufficient for the minority group to elect their candidate of choice).

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."[101] 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 several 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.[102] 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."[103] 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]."[104]

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.[105] 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 must 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 also

---

[101] Fortson v. Dorsey, 379 U.S. 433 (1965). *See also* Practice-based Preclearance, *supra* note 106, 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.").
[102] Allen v. State Bd. Of Elections, 393 U.S. 544 (1969).
[103] *Id.* at 569.
[104] *Id.*
[105] Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tx. 2017).

abridged or denied the right to vote in violation of the Fourteenth Amendment in the absence of discriminatory intent.[106]

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.[107] 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 the African American voters from the City of Tuskegee. Practice based preclearance would prevent states from using de-annexations, 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."[108] 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.[109]

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

---

[106] *See* Asian Americans Advancing Justice (AAAJ), *Practice Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes*, Nov. 2019, *available at* https://www.advancingjustice-aajc.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.")

[107] Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

[108] Practice Based Preclearance, *supra* note 106.

[109] 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.[110] 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)."[111] Professor Natelson further concluded that "Americans ascribed the same general content to the phrase 'manner of election' as the English, Irish, and Scots did."[112] As the next section shows,[113] 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.[114]

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,[115] but

---

[110] 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").

[111] 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.

[112] *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.").

[113] *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").

[114] *Cf.* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[115] *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,[116] 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.[117]

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 must 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.[118]

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.[119] 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.[120] 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.[121]

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).

[116] *See* Tolson, Spectrum of Congressional Authority, *supra* note 60.

[117] *See* Tolson, Elections Clause "Federalism," *supra* note 53, 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").

[118] 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.

[119] *Id.*

[120] *Id.*

[121] *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.[122]

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 the VRAA. 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.[123]

Like 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.[124] 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 has disparate racial impacts and burden the fundamental right to vote. Moreover, these requirements have an ugly history. According to the Brennan Center,

---

[122] *Id.*

[123] J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

[124] 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.[125]

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.[126] 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.[127] 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.[128]

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. The VRAA 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.[129] 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

---

[125] Brennan Center for Justice, *Proof of Citizenship*, Sept. 2006, *available at* https://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Citizenship.pdf.

[126] 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/.

[127] 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).

[128] *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

[129] 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.[130] 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.[131]

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 . . . ."[132] 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."[133] 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 the VRAA.[134]

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*,[135] also held that Congress' authority under the Elections Clause is not diminished simply

---

[130] *Id.* at 191. *See also id.* (noting a similar pattern for Asian Americans in New York state).

[131] *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.").

[132] *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").

[133] *Yarbrough*, 110 U.S. at 665.

[134] *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 132, 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.").

[135] 127 U.S. 731 (1888).

because a federal regulation may affect state and local elections.[136] 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.[137] 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."[138] 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 coverage provision of the VRAA.

Conclusion

The practice-based coverage 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 central to the invalidation of Section 4(b) in *Shelby County*, but this proposed legislation also addresses the steadily increasing threats to the right to vote that necessitate federal action, particularly as the number of states seeking to make voting harder grows.[139] The list of covered practices is 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 practice-based coverage because those provisions empower Congress to enact legislation to prevent local, state, and federal election regulations that abridge or deny the right to vote, or that have a racially discriminatory impact. Because the VRAA can be justified based on multiple sources of constitutional authority, the Supreme Court must be more deferential to the legislative record than if Congress was acting pursuant to the Fourteenth and Fifteenth Amendments alone.

---

[136] *See id.* at 752 (stating that federal government may regulate Congressional elections, regardless of state and local elections taking place); *Yarbrough*, 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").
[137] In re Coy, 127 U.S. 731, 749-50, 753 (1888).
[138] *Id.* at 755; *see also* Valelly, *supra* note 132, 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").
[139] *Cf.* Shelby County v. Holder, 570 U.S. 529 (2013).

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

For

Hearing on "Restoring the Voting Rights Act: Combating Discriminatory Abuses"

U.S. Senate
Committee on the Judiciary
Subcommittee on The Constitution
September 22, 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 their 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 of the Supreme Court in *Shelby County v. Holder*, 570 U.S. 2 (2013) (*Shelby County*). This testimony will discuss the need to restore and strengthen the VRA through modernizing coverage determinations for Section 5 preclearance, including the importance of the complementary practice-based preclearance to protect Asian American voters. While Asian Americans are among the nation's fastest growing groups and are quickly becoming a significant electoral force in jurisdictions across the country, they will not be able to maximize their political power without the full and meaningful 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 their 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 today, as evidenced by 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 to silence their growing political power.

Practice-based preclearance, in conjunction with a restored coverage formula, is critical to protecting the emerging political voice of Asian American voters. In targeting practices that have been used through history to silence the political voice of emerging minority communities as they reach critical mass and are able 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 particularly vulnerable. That is, when Asian Americans and other communities of color are reaching the point where they are perceived as threats to incumbent power structures and review will 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 its 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 Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

Need to Restore Section 5 to Protect Asian American Voters

Section 5 of the VRA 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.[1] This "geographic" or "history-based" preclearance system identified covered jurisdictions if a) the state or political subdivision of the state maintained a "test or device," restricting the opportunity to register and vote, and b) less than 50 percent of persons of voting age were registered to vote or vote in presidential election of 1964 (this date was updated with each extension of the VRA).[2] Section 5 applies to all voting changes in covered jurisdictions, including redistricting, annexation of other territories or political subdivisions, and polling place changes. Voting changes with a discriminatory purpose or with a retrogressive effect (i.e., where the change puts minorities in a worse position than if the change did not occur) will not be pre-cleared and the submitting jurisdiction would be prohibited from adopting the voting change.

In enacting the VRA in 1965, Congress recognized that previous efforts to litigate discriminatory voting practices were limited in their effectiveness as particularly recalcitrant jurisdictions would simply replace the struck-down discriminatory practice with another, newer discriminatory practice. Responding to the persistent nature of discriminatory schemes in voting, Congress developed a mechanism in the VRA to provide a "check" on whether proposed voting changes by particularly bad actors would be problematic for minority voters – Section 5 preclearance. This infrastructure (preclearance) has been critical to a) prevent discriminatory voting practices from going into effect, b) provide notice to the community about potential discriminatory changes and c) provide a cost-effective and swift mechanism to determine whether a proposed voting change should be approved. As a result, voting became more accessible to all communities.

[1] 52 U.S.C. § 10304.

[2] 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. *See also*, https://www.justice.gov/crt/about-section-5-voting-rights-act.

Unfortunately, the U.S. Supreme Court weakened the VRA in *Shelby County*. The sharply divided Court ruled that the formula used to determine Section 5 jurisdictions was based on "decades-old data and eradicated practices," despite the extensive Congressional record confirming that these areas continued committing acts of voting discrimination.[3] Thus, while the Court did not invalidate Section 5, it rendered it useless by invalidating the formula that determined which jurisdictions must 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.[4]

Aftermath of Shelby County v. Holder Decision

Since the Court invalidated the key enforcement provision of the VRA in 2013, voting discrimination is 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 82.7% between 2010 and 2020 – 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."[5] If Section 5 of the VRA was in full force, this litigation would not have been necessary. 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 the bill would never have received approval 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—passed new voting restrictions that included strict photo ID requirements and voter registration restrictions in place for the first time in a presidential election.[6]

---

[3] *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2627 (2013).
[4] *Id.* at 2619.
[5] 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).
[6] Brennan Center for Justice, Webpage on New Voting Restrictions in America, https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf.

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 in an erratic and non-transparent legislative process, eliminated many of these options and made 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.[7] The challenged provisions include decreasing the time frame to request and receive absentee-by-mail ballots, limiting access to secure drop boxes, prohibiting election officials from proactively mailing absentee-by-mail ballot applications, impose additional identification requirements for absentee-by-mail ballots, 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 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

[7] *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).

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 hours 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 2020 that disproportionately affect communities of color, would not have passed muster under a Section 5 review, as voters of color would be 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.[8]

Ongoing Demographic Changes Coupled with Discrimination against Asian Americans Highlight the Need for Restoring and Modernizing the VRA in response to Shelby County v. Holder

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.[9] Additionally, it was not until the passage of the 1965 Immigration Act and the end of race-based immigration quotas that Asian Americans were able to immigrate to the U.S. in large numbers. Since 1965, Asian American communities in the U.S.

---

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

[9] *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).

have grown dramatically. According to Census 2020, Asian Americans continued to be among the nation's fastest growing racial group, with a national growth rate of 45.5% between 2000 and 2010; growing to over 24.0 million Asian Americans and making up 7.2% of the total population.[10]

Often viewed as a monolithic group, Asian Americans are exceedingly diverse with different needs. The previous decade showed the country's fastest growing Asian American ethnic groups as South Asian, with the Bangladeshi and Pakistani American populations doubling in size between 2000 and 2010.[11] Between 2010 and 2019, eleven Asian groups more than doubled in size, with some of the smaller groups growing the fastest.[12] 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.[13] In fact, these five groups plus Japanese accounted for 85% of all Asian Americans in 2019.[14]

Asian Americans are also geographically diverse and are growing fastest in non-traditional gateway communities. Asian American populations in Nevada, Arizona, North Carolina, and Georgia were the fastest growing nationwide between 2000 and 2010.[15] Since 2010, the top 10 fastest growing Asian American populations were in North Dakota, South Dakota, Montana, Idaho, District of Columbia, Nebraska, Utah, Indiana, North Carolina, and South Carolina, with growth rates ranging between 81.3% to 137.2%.[16] California had an Asian population of over 7.0 million in 2020, by far the nation's largest. It was followed by New York (2.2 million), Texas (1.8 million), New Jersey (1.0 million) and Washington (almost 940,000).[17]

---

[10] Author's calculation based on U.S. Census Bureau Redistricting Data (PL 94-171) Table P1: Race from the 2010 (national at https://data.census.gov/cedsci/table?q=table%20p1&tid=DECENNIALPLNAT2010.P1 and states at https://data.census.gov/cedsci/table?g=0100000US%240400000&y=2010&d=DEC%20Redistricting%20Data%20%28PL%2094-171%29&tid=DECENNIALPL2010.P1&hidePreview=true and) and the 2020 (https://data.census.gov/cedsci/table?q=redistricting&g=0100000US,%240400000&tid=DECENNIALPL2020.P1&hidePreview=true).

[11] Asian Pacific American Legal Center & Asian American Justice Center, *A Community of Contrasts: Asian Americans in the United States: 2011*, 9, 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).

[12] 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").

[13] *Id.*

[14] *Id.*

[15] Community of Contrasts at 8.

[16] Author's calculation based on U.S. Census Bureau Redistricting Data (PL 94-171) Table P1: Race from the 2010 (national at https://data.census.gov/cedsci/table?q=table%20p1&tid=DECENNIALPLNAT2010.P1 and states at https://data.census.gov/cedsci/table?g=0100000US%240400000&y=2010&d=DEC%20Redistricting%20Data%20%28PL%2094-171%29&tid=DECENNIALPL2010.P1&hidePreview=true and) and the 2020 (https://data.census.gov/cedsci/table?q=redistricting&g=0100000US,%240400000&tid=DECENNIALPL2020.P1&hidePreview=true).

[17] Pew Key Facts.

A similar increase among Asian American voters can be seen. The number of eligible Asian American voters 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).[18] The growth rate of eligible Asian Americans registering to vote (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.[19] 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.[20] This represents a 27.1% increase in registered Asian Americans and 36.4% increase in Asian Americans who voted between the 2016 and 2020 presidential elections.[21] 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.[22]

The ongoing and rapid growth of the Asian American community, and their political salience, combined with the historical and ongoing discrimination against Asian Americans to heighten the need for a responsive legislative solution in light of the *Shelby County v. Holder*. In particular, discrimination against Asian Americans has long been rooted in the false stereotype of Asian Americans as "outsiders," "aliens," and "perpetual foreigners."[23] 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, despite being a presence since the mid-1800s.

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.[24] The end of the

---

[18] 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).

[19] *Id.*

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

[21] *Id.*

[22] Karthick Ramakrishnan & Farah Z. Ahmad, State of Asian Americans and Pacific Islanders, Center for American Progress and AAPI Data (2014), http://ampr.gs/AAPIreports2014.

[23] *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").

[24] *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").

19th century marked the rise in anti-Chinese sentiment as Chinese immigrants were scapegoated for the lack of economic opportunity.[25] This scapegoating resulted in the 1875 Page Act, which barred immigrants deemed as "undesirable" and primarily targeted Asian immigrants.[26] Rooted in anti-Asian sentiment, the bill intended "to stop the flow of the 'yellow peril' to American shores."[27]

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.[28] The Act also barred all persons of Chinese descent from gaining citizenship.[29] The Geary Act of 1892 extended the Chinese Exclusion Act of 1882 for another ten years.[30] 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.[31] Instead, only a "credible white witness" could testify for them.[32] 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.[33] 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 decent in America.[34]

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.[35] Later legislation such as the Naturalization Act of 1906,[36] 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

---

[25] *See* George Anthony Peffer, *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").
[26] 18 Stat. 477, 43 Cong. Ch. 141.
[27] *See* Forbidden Families at 29, 28–46.
[28] 22 Stat. 58, 47 Cong. Ch. 126.
[29] *Id.*
[30] Pub. L. No. 52-60, 27 Stat. 25.
[31] 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-awall-of-14494875.php.
[32] *Id.*
[33] Office of the Historian.
[34] S. Res. 201, 112th Cong. (2011) (enacted), https://www.congress.gov/bill/112th-congress/senate-resolution/201/text.
[35] *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
[36] Pub. L. 59-338, 34 Stat. 596.

immigrants were not free white people and therefore, ineligible for naturalized citizenship.[37] The Immigration Act of 1924[38] 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.[39] Exclusionary laws changed the changed the face of America. As a result, by 1960, only 877,934 Asian Americans lived in the United States.[40] That figure represented a mere half of one percent of the American population.[41]

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.[42] And more than 5,000 American babies were born in detention.[43] 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.[44] 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.[45]

---

[37] *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).
[38] Pub. L. 68-139, 43 Stat. 153.
[39] Pub. L. 78-199, 57 Stat. 600.
[40] Asian Americans Advancing Justice, Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander communities 20 (2019), https://www.advancingjustice-aajc.org/sites/default/files/2019-06/1153_AAJC_Immigration_Final_Pages_LR-compressed.pdf.
[41] *Id.*
[42] Gisela Perez Kusakawa, *The Korematsu Legacy: "Stand up for what is right!"*, AAJC (Jan. 30, 2020), https://medium.com/advancing-justice-aajc/the-korematsu-legacy-stand-up-for-what-is-right-4a19c5af491d.
[43] *Id.*
[44] 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.
[45] 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

Today, we see that the racist sentiments 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.[46] Numerous hate crimes have been directed against Asian Americans either because of their minority group status or because they are perceived as unwanted immigrants.[47] These attacks have grown exponentially with the COVID-19 pandemic, with racist harassment and violence directed toward Asian Americans who are wrongly blamed for the COVID-19 pandemic.[48] The current wave of anti-Asian racism and hate is not a new phenomenon but rather a part of the deep structural racism that has long impacted communities of color, and comes on the heels of years of attacks on immigrant communities by the Trump administration. 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.

Practice-Based Preclearance Addresses Need to Modernize the VRA to Address Emerging and Growing Communities

Because of the changing demographics of this country, a fully restored and modernized VRA is needed more than ever.[49] A legislative solution to the *Shelby County* decision must include both a substitute coverage formula for jurisdictions based on a history of voting discrimination and a

---

public health or comfort. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (describing San Francisco ordinance). They were denied the right to own land and related real property rights. *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 toInternment*, 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"). They faced a number of other discriminatory laws ranging from foreign miner taxes, directed at Chinese gold miners, to anti-Asian business regulations. *See* Sucheng Chan, *Asian Americans: An Interpretative History* 46-47 (1991). Both immigrant and native-born Asian Americans also experienced pervasive discrimination in everyday life. *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).

[46] *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.

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

[48] Since February 2020, almost 10,000 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.standagainsthatred.org/) since the beginning of the pandemic.

[49] 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-aajc.org/press-release/advancing-justice-aajc-brnovich.

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. While Section 5 preclearance has served a powerful role in addressing voting discrimination conducted by persistent and perpetually bad actors with a history of engaging in voting discrimination, a history-based coverage formula alone is not enough to protect the voting rights of emerging minority populations. The reality is that more and more of the most rapidly growing racial, ethnic, and language-minority communities are found in cities and states where they were not previously in significant numbers.[50]

History has borne out that "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" because that is when "they will be more likely to have substantial influence on election outcomes."[51] An assessment by Professor Luis Fraga in testimony before the House Judiciary Committee shows that the U.S. has a long history of restricting the vote to specific segments of the population across the nation, which were often identified as a group based on race, ethnicity, national origin, and gender.[52] The effort to exclude certain groups of voters was tied to a political advantage by other voters, often those in power. This was often resulted in "the expansion of the franchise to broader segments of the population occur[ing] simultaneously with both the maintenance of past restrictions for other segments of the population and new restrictions for growing segments of the population."[53]

Racial tensions often occur when groups of minorities grow rapidly in an area and where there is an increase in political relevance of that minority community, such as Asian American communities across the country.[54] This can lead to fear of and resentment toward Asian

[50] *See* U.S. Census Bureau, America Counts Stories, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html.

[51] Hearing on "The Need to Enhance the Voting Rights Act: Practice-Based Coverage" Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Judiciary Comm., 117th Cong. (July 27, 2021) (prepared statement of Professor Bernard L. Fraga) ("B. Fraga Testimony"), http://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaB-20210727.pdf.

[52] Hearing on "The Need to Enhance the Voting Rights Act: Practice-Based Coverage" Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Judiciary Comm., 117th Cong. (July 27, 2021) (prepared statement of Professor Luis Ricardo Fraga) ("L. Fraga Testimony"), http://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaL-20210727.pdf and http://docs.house.gov/meetings/JU/JU10/20210727/113962/HHRG-117-JU10-Wstate-FragaL-20210727-SD001.pdf.

[53] B. Fraga Testimony.

[54] *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

Americans by those in power, which can then result in hampering Asian Americans exercising their right to vote free of harassment and discrimination. Discriminatory attitudes toward Asian Americans and the aforementioned "perpetual foreigner" stereotype have been 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 in response to concerns about the growing political influence and opportunities of the community by attempting 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.[55]

- In November 2005, a candidate of South Asian descent, Tom Abraham, running for City Council Seat 4 in Orange City, Florida was mocked by his opponent for his accent at a community forum. His opponent, Dan Sherrill, claimed that he could not understand him and was quoted by the *Orlando Sentinel* as saying, "I'm usually not prejudiced, but I don't want an Indian in my government. As far as I know, he could be a nice guy, but these kind of people get embedded over here. You remember 9/11." The *St. Petersburg*

---

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).

[55] 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).

Times further reported that Sherrill said that voters wouldn't support Abraham if they saw and heard him.[56]

- 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.[57]

- 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.[58]

These racist attitudes continue unabated over the last several election cycles. For example, 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.[59] The mailers said that "[t]he Chinese and Indians are taking over our town," and "Chinese school! Indian school! Cricket fields! Enough is enough."[60] 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.[61] 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

[56] 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").
[57] *Id.* at 17.
[58] SAALT Report at 19.
[59] 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.
[60] *Id.*
[61] 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/.

"'Not one of us' are words that make many Asian Americans constantly feel like we are seen as foreigners in our own country."[62]

We have also seen efforts to undermine the political voice of Asian Americans, 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.[63] The losing incumbent's rationale was "if they couldn't speak good English, they possibly weren't American citizens."[64] DOJ's investigation found the challenges racially motivated and prohibited interference from the challengers during the general election.[65] That year, Bayou La Batre elected its first Asian American to the City Council.[66] 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.[67] 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.[68]

Other discriminatory actions and comments aimed at Asian Americans and Asian American voters include:

- 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.[69] In one of the counties

[62] 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/.
[63] *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.
[64] *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).
[65] *See id.*
[66] *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.").
[67] *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.
[68] *See id.*; Thao L. Ha, *The Vietnamese Texans*, in *Asian Texans: Our Histories and Our Lives*, 263, 284-85 (Irwin A. Tang ed., 2007).
[69] *Id.*

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.[70]

- 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.[71] 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."

- 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."[72] A few 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."[73]

The Asian American community's population growth will only lead to increased efforts to undermine the political voice of Asian Americans. Asian Americans are potential swing voters[74] 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.

Practice-Based Preclearance is Designed to Target Specific Practices in Specific Situations With a Likelihood for Inappropriate Use

Recognizing that throughout American history certain practices have historically been utilized to silence the political voice of communities of color, practice-based preclearance would require preclearance review (performed by either the Department of Justice or the federal District Court in Washington, D.C.) prior to implementation of certain suspect practices where it

---

[70] Letter dated April 5, 2005 from Franklin County Auditor to Martin Ringhofer.
[71] 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.
[72] Tim Mak, *Report: Marion Barry: 'Dirty' Asian Stores,* Politico, Apr. 5, 2012, http://www.politico.com/news/stories/0412/74866.html.
[73] 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/gIQAX9WXfT_story.html.
[74] *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.

would be most likely to be used in a discriminatory fashion.[75] Practice-based preclearance is particularly important for Asian American communities that are growing exponentially in numerous different cities and counties, and where they are beginning to emerge as a potential political power.

The coverage for practice-based preclearance would apply to diverse jurisdictions throughout the country, generally defined as those states and political subdivisions in which two or more racial, ethnic, or language minority groups each represent 20% or more of the voting-age population or in which a single language minority group represents 20% or more of the voting-age population on Indian lands located in whole or in part in the political subdivision.

The targeting of practice-based preclearance to those states and political subdivisions with these particular demographics ensures that the preclearance mechanism is aimed at those scenarios where the covered practices are more likely to be used in a discriminatory fashion and adapts to the ever-shifting demographics of our nation. As Professor Bernard Fraga noted in his testimony before, "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."[76] The delineated 20% threshold is rooted in the historical evidence 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%."[77] In analyzing voting rights actions under any federal or state statutes or constitutional provisions, Professor Bernard Fraga noted that since 1982, at least one potential violation occurred "in every state where a single racial/ethnic group has been at least 10% of the state's voting-age population" and the first violation occurring in 61% of counties "when a single racial/ethnic minority group was 20% or more of the jurisdiction voting-age population."[78]

Setting the threshold to 20% of the voting-age population is reasonable as a point where there was a likelihood of voting violations "with diminishing returns to further increases in single minority group population size" before the probability begins to decrease after 50% minority" that also "minimizes the *overall* number of counties with violations that are missed and covered counties that have not had potential violations in the past."[79] That is, the 20% threshold is "the point of equal likelihood of having a potential violation versus not[,]" with the likelihood of violation being more likely "until roughly 75% when the likelihood of a violation drops below 50-50 once again."[80] To that end, having a demographic threshold that requires two groups comprised of 20% each of the voting-age population address both the fact that "in places

[75] *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. Note that practice-based preclearance could only apply in areas where history-based preclearance coverage is not in effect.
[76] B. Fraga Testimony.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*

where a single minority group is more than 80% of the population, and therefore (numerical) minority racial/ethnic group is less than 20%, disenfranchisement is … unlikely" and the changing current and future demographics of our nation.[81]

These jurisdictions would only be required to seek preclearance if they are making one of the covered changes, not all voting changes. These certain practices were targeted for their frequent use over the decades to silence an emerging community. Professor Luis Fraga in his testimony explores the different tactics of voter suppression used throughout the history of the U.S.[82] What Professor Luis Fraga's recounting of the sordid history shows is the repeated use of certain tactics to silence the burgeoning political power of certain communities that aligns with the covered practices under practice-based preclearance in the John R. Lewis Voting Rights Advancement Act.[83] These changes include changes related to

- methods of election
- annexations and deannexations
- redistricting
- documentation or proof of identity to vote or to register to vote such
- reduction in multilingual voting materials
- voting locations and availability and
- voter purges.

It is important to note that the practices have been designed to narrowly address the scenarios that would be most likely to be problematic.[84] Congress has continued refining the definitions of the covered practices, including more specificity in the most recently version of practice-based preclearance as passed by the House in August 2021.[85]

Impact of Covered Practices on Asian Americans

The covered practices currently contemplated by practice-based preclearance have been shown to be used against Asian Americans. For example, Section 5 of the VRA 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 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 voted as a bloc with Latino and African American voters to elect Hubert

[81] *Id.*
[82] L. Fraga Testimony.
[83] *Id.*
[84] *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 (also attached to testimony).
[85] Comparing HR4 as passed by the U.S. House of Representatives on August 24, 2021 to the version passed out of the U.S. House of Representatives during the 116th Congress shows changes, such as narrowing the definition of when practice-based preclearance would apply to redistricting.

Vo, a Vietnamese American, as their state representative. District 149 has a combined minority citizen voting-age population of 62%.[86] Texas is home to the third-largest Asian American community in the United States, growing 72% between 2000 and 2010.[87] 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.[88] 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.[89]

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.[90] In fact, in the entire existence of the city's history (beginning when it was founded in 1887), only two Asian Americans severed on the city 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.[91] 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 abound. 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

---

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

[87] *See* Community of Contrasts, Appendix B.

[88] *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.

[89] 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*.

[90] 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.

[91] 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 a s 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.*

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.[92]

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.[93]

With over two out of three Asian Americans being born outside of the U.S. today,[94] 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.[95] 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."[96] 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

---

[92] Settlement Agreement, *Paik v. Fullerton* (July 7, 2015), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/07/Settlement-Agreement-1.pdf.
[93] 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.
[94] 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.
[95] *Id.*
[96] *Id.*

multilingual support today.[97] 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 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.[98] 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.[99]

Additionally, while not as prevalent, there are some states 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.[100] 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.[101] After a lawsuit was filed challenging this law following an increase in enforcement of the century-old law, Louisiana's governor signed a bill that repealed the discriminatory requirement in 2016.[102] More recently, in Mississippi, a lawsuit was filed in November 2019 challenging state law that imposes a documentary proof-of-citizenship requirement for voter

---

[97] Hearing on "Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual 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").

[98] *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.

[99] Minnis Testimony.

[100] 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).

[101] 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.

[102] *Id*.

registration on only naturalized citizens.[103] 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 on voter rolls if their voter registration data does not match exactly the same information as it appears in other state databases, such as driver services. 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 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.[104]

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 an increase of U.S.-born Asian Americans in the coming years. It is likely that voter

[103] Emily Wagster Pettus, *Voting suit challenges Mississippi law on citizenship proof*, AP (Nov. 18, 2019), https://apnews.com/article/4ffbbd691734447baf51f72c65824142.
[104] 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-aajc.org/sites/default/files/2017-09/16-980%20bsac%20Asian%20Americans%20Advancing%20Justice%20et%20al.pdf.

participation rates among the Asian American community, and indeed their political visibility, will only increase, particularly in new areas across the country. 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 Advancing Justice-AAJC.

"Restoring the Voting Rights Act: Combatting Discriminatory Abuses"

Hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution

September 22, 2021

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Mr. Thomas Saenz:

1. Statements at the hearing reflected that there was record turnout by white and minority voters in recent elections, undermining the need for preclearance and to restore the Voting Rights Act more generally.

    a. Did the statistics cited in support of this argument present a fair and representative assessment of the state of voter access during the 2020 election? If not, why not?

Answer: Record turnout relates to the specific nature of the election, in this case a highly contested presidential race with one candidate who had significantly alienated Latino voters through racialized rhetoric and punitive policies. Within the context of the specific election, higher rates of participation, particularly within minority communities, should surprise no one. There are many specific reasons that turnout and participation may increase among all voters, and among subgroups of voters, from one election to another; the absence of success in minority-vote suppression is not an explanation for increased turnout in comparison to prior elections. Differential vote suppression manifests in other ways, as explained below. Overall turnout ebbs and flows across elections for many reasons; unless and until turnout reaches 100 percent for all groups, an increase in turnout from one election to another can, as a matter of clear logic, shed no light on the presence or absence of racially-differential vote suppression.

    b. Is overall turnout the appropriate metric to use to evaluate whether Congress should enact voting protections specifically for minority communities? If not, why not and what other metrics should be considered?

Answer: As explained above, the specific nature of a particular election determines overall turnout. Of course, measures to facilitate participation – including some measures undertaken in some states in 2020 in response to the COVID-19 pandemic – do likely increase overall turnout, but such race-neutral measures should generally have the same proportional impact on all groups. The better measure of whether we have overcome differential vote suppression efforts is the difference in turnout between groups. Only when such differentials are virtually eliminated

can we say that voting protections for minority communities may no longer be necessary; only after the elimination of such differentials has persisted for a significant period of time should we begin to eliminate such protections. Our constitutional principles and our belief in racial equality should cause us to expect and to strive for equity in participation among all racial communities. When such equity does not exist, we know there is a problem that still needs to be addressed. According to the Census Bureau, in 2020, there was still a significant gap between Latino voter participation and white voter participation. Indeed, Latinos experienced the largest gap in turnout compared to white voters of any group. Nor was the gap appreciably lower than prior elections. In fact, the gap was higher than several elections measured by the Census Bureau in the last 40 years. In other words, nothing in the 2020 turnout gap for Latinos suggests any diminution in the need for vigorous protections against vote suppression.

c. How has the racial turnout gap been affected since the Supreme Court's *Shelby County* decision in 2013?

Answer: In the elections since 2013, the Census Bureau data show a voter turnout gap between Latinos and whites that is on average about one percent higher than the average turnout gap reported by the Bureau for the 18 election years before 2013. There have only been four election years since the *Shelby County* decision, but that one percent increase is a matter of concern for the Latino community, particularly if it persists in future elections. It suggests that, at least for the Latino community, the absence of pre-clearance in Texas, Arizona, and other states may have begun to manifest in an increasing racial turnout gap.

"Restoring the Voting Rights Act: Combatting Discriminatory Abuses"

Hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution

September 22, 2021

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Prof. Franita Tolson:

1. Statements at the hearing reflected that there was record turnout by white and minority voters in recent elections, undermining the need for preclearance and to restore the Voting Rights Act more generally.

    a. Did the statistics cited in support of this argument present a fair and representative assessment of the state of voter access during the 2020 election? If not, why not?

The statistics cited in support of this argument did not present a fair and representative assessment of the state of voter access during the 2020 elections for several reasons. First, turnout statistics only provide information about voters who were able to successfully cast a ballot, and not information on whether all voters (and potential voters) are being treated equally as they navigate the political process. The Voting Rights Act has always focused on the ability of minority communities to participate in the entirety of our political system on equal terms as white voters, and not just during the sole act of casting a ballot. Notably, a plaintiff can establish a violation of Section 2 of the Voting Rights Act if they show that "based on a totality of the circumstances…the political processes leading to the nomination or election in the State or political subdivision are not equally open to members of the class of citizens protected…".[1] Section 2 can be violated even if a minority voter is able to overcome various obstacles (i.e., lack of polling places, long wait times, difficulty registering, etc.) and cast a ballot. Thus, turnout statistics only tell us that some finite number of people successfully voted, but they reveal no other relevant information regarding the qualitative experience of those who voted. Despite high levels of turnout during the 2020 election cycle, it remains true that the political process was "not equally open" to everyone since minorities often had to overcome obstacles that white voters did not to vote.

Second, voter turnout statistics do not capture the number of voters who did not vote because of restrictive voting laws. In any given election cycle, tens of millions of legally eligible voters do not register or cast a ballot. Reasons that individuals fail to vote range from antipathy about the political process to outright voter suppression. Voter turnout statistics not only obscure that minority voters are not participating in the political process on equal terms as white voters, but these statistics also do not account for those potential voters unable to cast a ballot because of unduly restrictive voting laws.

[1] 52 U.S.C. § 10301(b). Given that Section 2 litigation is expensive and time consuming, Sections 4(b) and 5 of the Voting Rights Act were an efficient and effective means of preventing the implementation of restrictive laws that make it more difficult for minority voters to participate in the political process on equal terms with white voters.

b. Is overall turnout the appropriate metric to use to evaluate whether Congress should enact voting protections specifically for minority communities? If not, why not and what other metrics should be considered?

Voter turnout is an important metric, but it should not be the sole metric used to evaluate whether Congress should enact voting protections for minority communities. Instead, Congress should focus on the impact of restrictive laws on the voting eligible population, which includes both registered voters and unregistered potential voters. Turnout statistics ignore portions of the former group (i.e., registered voters who were unable to successfully cast a ballot) and completely ignore the latter group altogether.

This distinction has significant implications for debates regarding the need for more federal voting protections. For example, a recent study by political scientist Emily Rong Zhang investigated why voter identification laws have a negligible effect on voter turnout despite the substantial number of eligible voters who lack the required identification.[2] This phenomenon can be explained by the fact that courts tend to focus on the impact of these laws on registered voters (information that can be partially extracted from turnout statistics), and not their effect on unregistered voters.[3]

As Professor Zhang notes, the determination of whether a law is suppressive often turns on whether we are asking the right questions, and to take the point further, relying on the right data. Turnout data will be insufficient to gauge the impact of a suppressive law on both registered voters who were not able to successfully vote and unregistered potential voters. If a law discourages otherwise eligible voters from registering in the first instance or results in registered voters being turned away at the polls, these outcomes are, in some ways, more pernicious than when voting laws make it difficult for voters who are nonetheless able to successfully cast a ballot. Thus, the story that voter turnout statistics tell is, at best, incomplete, and Congress should broaden its focus to include metrics that gauge the impact of voting restrictions on the voting-eligible population in determining whether additional protections are needed.[4]

c. How has the racial turnout gap been affected since the Supreme Court's *Shelby County* decision in 2013?

---

[2] Emily Rong Zhang, *Questioning Questions in the Law of Democracy: What the Debate over Voter ID Laws' Effects Teaches About Asking the Right Questions*, 69 UCLA L. REV. (forthcoming 2022).

[3] *Id.*

[4] Qualitative and survey data could communicate powerful stories about registered voters being turned away from the polls, but states also possess large amounts of data on the unregistered voters who will be most harmed by voting restrictions. *See Id.* at 43 (noting that "States could easily learn, as they possess the richest data sources to do so, about the characteristics of vulnerable populations who are most likely to feel the effect of electoral changes").

In the years since the *Shelby County v. Holder* decision, the racial turnout gap grew significantly in jurisdictions formerly covered by Sections 4(b) and 5 of the Voting Rights Act.[5] This gap was evident during the 2020 election cycle,[6] and it persists because minority voters have faced new obstacles in casting a ballot since *Shelby County*. Covered and noncovered jurisdictions have instituted a number of changes that make it more difficult to register and cast a ballot including the closure of polling places, more restrictive voter identification laws, and cutbacks in early voting, to name just a few changes. These restrictions will likely cause the racial gap in turnout to worsen for election cycles to come.

[5] Kevin Morris et al., *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, Brennan Center, Aug. 20, 2021, available at https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights (noting that "between 2012 and 2020, the white-Black turnout gap grew between 9.2 and 20.9 percentage points across five of the six [formerly covered] states").
[6] Kevin Morris et al., *Large Racial Turnout Gap Persisted in 2020 Election*, Brennan Center, Aug. 6, 2021, available at https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election (stating that, in 2020, "70.9 percent of white voters cast ballots compared with only 58.4 percent of nonwhite voters").

"Restoring the Voting Rights Act: Combatting Discriminatory Abuses"
Hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution
September 22, 2021

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Mr. John Yang:

1. Statements at the hearing reflected that there was record turnout by white and minority voters in recent elections, undermining the need for preclearance and to restore the Voting Rights Act more generally.

    a. Did the statistics cited in support of this argument present a fair and representative assessment of the state of voter access during the 2020 election? If not, why not?

The 2020 election must be understood in the context of our country's history of political participation as well as the historical nature of the 2020 election itself. In addition to an exceedingly contentious presidential race, the 2020 election was held during the COVID-19 pandemic, which resulted in increased voter access in many states as states sought to address voter access in a publicly safe manner (e.g., expanding access to voting by mail, utilization of drop boxes, etc.). The fervor of the presidential race as well as the expanded options to participate likely boosted the participation of all voters in 2020. And it is unquestionable that voter turnout was at a record high in 2020 at nearly 158.4 million votes. Simply because voters of color were motivated and managed to proverbially walk to the polls in a rainstorm without an umbrella – while other communities drove to the polls in a raincoat – does not mean that the federal government no longer has a duty to provide that umbrella. All communities deserve equal protection and access to the polls, and none should face additional barriers and obstacles.

Even with historical rates of participation and increases across the board for different groups, we continue to see the *unequal* participation between voters of color and non-Latino White voters. For example, the 2020 election saw 70.9 percent of white voters cast ballots while only 58.4 percent of nonwhite voters voted. *See* Brennan Center for Justice, "Large Racial Turnout Gap Persisted in 2020 Election," https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election. This pattern can also be seen at the state level. For states with a large enough base of Asian Americans to show a derived measure, Asian Americans continue to lag behind non-Latino White voters, often by double digits for the 2020 election, indicating that this is not a partisan issue for Asian Americans. Pennsylvania, Michigan and Colorado had the largest gaps for voter registration (at 26.4, 25.6 and 24.5 respectively) and Colorado, Massachusetts, and Michigan with the largest gaps for voter turnout (28.7, 27.5, and 23.1 respectively) in the Asian American community for the 2020 election. Although voting rights laws alone will not eliminate the disparity, there is no question that the existing laws exacerbate the problem for our community. *See* Table 1.

Table 1: Gap Between Asian American voters and non-Latino White Voters by state

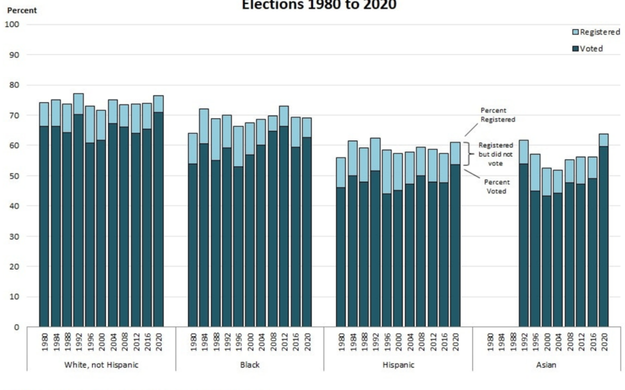
	Voter Registration	Voter Turnout
ARIZONA	9.9	9.1
CALIFORNIA	**15.3**	**14.7**
COLORADO	24.5	28.7
CONNECTICUT	**16.8**	**14.4**

FLORIDA	14.8	11.2
GEORGIA	18.2	17
HAWAII	**8.9**	**11.3**
ILLINOIS	**6.1**	**3.6**
INDIANA	4.6	2.1
MARYLAND	**8.6**	**8.2**
MASSACHUSETTS	**20.5**	**27.5**
MICHIGAN	25.6	23.1
MINNESOTA	4.7	15.9
NEVADA	**3.4**	**0.8**
NEW JERSEY	**1.7**	**3.2**
NEW YORK	**15.8**	**17.1**
NORTH CAROLINA	-4.7	-4.3
OHIO	17.8	14.4
OREGON	17.9	17.1
PENNSYLVANIA	26.4	22.6
TEXAS	15	13.3
VIRGINIA	**14.8**	**15.5**
WASHINGTON	**15.8**	**14.2**

Source: U.S. Census Bureau, Current Population Survey, Table 4b. Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, https://www2.census.gov/programs-surveys/cps/tables/p20/585/table04b.xlsx.

This gap between voters in communities of color as compared to non-Latino white voters has been a persistent and consistent imbalance seen election after election. Every presidential election since 1980 has seen higher voter participation rates (i.e., both registration and turnout) for non-Latino White voters, except for the 2012 election when Black voters voted at a slightly higher rate (2.1%). *See* Figure 1 (for each election, there is a gap between different communities of color with non-Latino white voters).

Figure 1. Historical Voting Patterns in Presidential Elections by Race



Note: Percent of the citizen civilian noninstitutionalized population, age 18 and over.
Source: Current Population Survey, Voting and Registration Supplements 1980 to Present, historical table A-6.
Available: https://www2.census.gov/programs-surveys/cps/tables/time-series/voting-historical-time-series/

This persistent gap in voter participation has also been egregious in the Asian American community. *See* Table 2; *see also* Figure 2. Since the 1990 election, Asian Americans have consistently seen a double-digit gap nationally for both voter registration and voter turnout as compared to non-Latino White voters. For example, even with the increase in voter engagement by Asian Americans in the 2020 election, there still existed a 11.2% gap between Asian Americans who voted compared to non-Latino White voters, and a gap of 12.7% for registration. These are virtually the same statistics from the 1990 elections, which is when data on Asian Americans voter participation first became available.

Table 2: Historical Voting Patterns of Asian American Voters as compared to non-Latino (NL) White Voters

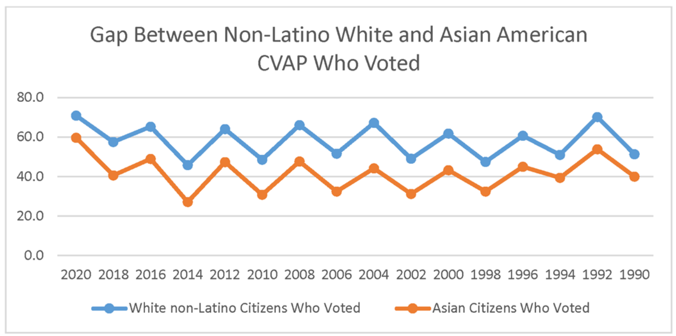
Year	NL White Voted	Asian[1] Voted	Gap between Asian and NL White Voted	NL White Registered	Asian[1] Registered	Gap between Asian and NL White Registered
2020	70.9%	59.7%	11.2%	76.5%	63.8%	12.7%
2018	57.5%	40.6%	16.9%	71.0%	53.0%	18.0%
2016	65.3%	49.0%	16.3%	73.9%	56.3%	17.6%
2014	45.8%	27.1%	18.7%	68.1%	48.8%	19.3%
2012	64.1%	47.3%	16.8%	73.7%	56.3%	17.4%
2010	48.6%	30.8%	17.8%	68.2%	49.3%	18.9%
2008	66.1%	47.6%	18.5%	73.5%	55.3%	18.2%
2006	51.6%	32.4%	19.2%	71.2%	49.1%	22.1%
2004	67.2%	44.2%	23.0%	75.1%	51.8%	23.3%
2002	49.1%	31.2%	17.9%	69.4%	49.2%	20.2%
2000	61.8%	43.3%	18.5%	71.6%	52.4%	19.2%
1998	47.4%	32.4%	15.0%	69.3%	48.9%	20.4%
1996	60.7%	45.0%	15.7%	73.0%	57.2%	15.8%
1994	51.0%	39.4%	11.6%	69.4%	51.9%	17.5%
1992	70.2%	53.9%	16.3%	77.1%	61.6%	15.5%
1990	51.3%	40.0%	11.3%	69.8%	56.0%	13.8%

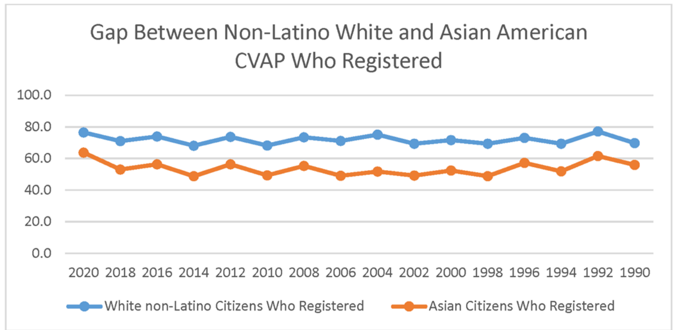
[1] ***Prior to 2004, this category was 'Asian and Pacific Islanders', therefore rates are not directly comparable with prior years.***

**** Note data not available prior to 1990 election for Asian voters***

Source: U.S. Census Bureau, Current Population Survey, Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: November 1964 to 2020, https://www2.census.gov/programs-surveys/cps/tables/time-series/voting-historical-time-series/a1.xlsx.

Figure 2. Persistent Gap in Voting Patterns Between Non-Latino White CVAP and Asian American CVAP





Focusing merely on increases in absolute participation rates misses the point and the need for strong voting protections today – the reality is voting discrimination is still prevalent today. In fact, the increased participation by voters of color in the 2020 election has sparked an increase in retractions in the types of policies that would make voting more accessible, such as universal absentee voting, vote by mail opportunities, and expanded voter registration opportunities. As the Brennan Center reported, in 2021, 18 states passed 34 laws restricting access to voting and as of May 4, 2022, at least 34 bills with restrictive provisions were moving through 11 state legislatures. At least 393 restrictive bills were being considered in 39 states for the 2022 legislative session. *See* Brennan Center for Justice, "Voting Laws Roundup: May 2022," https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022. These restrictive measures will harm communities of color, who are often the targets for these restrictions. For example, vote by mail has been a major target for these restrictions precisely because this method of voting has been utilized by many voters of color, such as 64% of Asian Americans who chose to vote by mail in the 2020 elections.

Voting discrimination is not a thing of the past; simply looking at improvements to engagement by voters of color does not tell the appropriate story. The reality is that voters of color turned out IN SPITE OF all the barriers. And the rollback of many of the more flexible voting options precisely because they allowed for record turnout suggests that we still have a problem. Stated another way, in 2020, umbrellas were provided by the government because of COVID-19 and many people used them to prevent themselves from getting wet. Now, many jurisdictions are taking away the 2020 umbrellas through state legislation while at the same time saying that umbrellas are unnecessary because people did not get wet in 2020. Such circular and self-serving arguments result in the continued unequal engagement of voters of color, which shines the light on the continuing inequities of our democracy and the need for voting rights legislation to address the needs of our communities, including the need to restore and modernize the Voting Rights Act.

b. Is overall turnout the appropriate metric to use to evaluate whether Congress should enact voting protections specifically for minority communities? If not, why not and what other metrics should be considered?

Overall turnout is a metric to use for consideration of the question on whether Congress should enact voting protections specifically for minority communities, but high turnout rates should not lead to the conclusion that voting rights protections are unnecessary. As evidenced by data shared in other parts of this response, there continues to be a persistent gap in voter participation by communities of color, regardless of increased engagement by the community. That is, even when our communities' numbers and participation increase (in spite of existing barriers), so do the barriers and obstacles that keep our community members from participating as freely and fully as non-Latino White voters. There should be no question that voting discrimination still exists, and Congress must fulfill its duty by enacting voting rights legislation that protects the rights of voters of color. There is a separate, but related, question about whether overall turnout is the appropriate metric to use to trigger voting protections, such as via a coverage formula as the previous Section 5 coverage formula did. To that end, a more sophisticated approach, which addresses the current moment and how the current generation of voting discrimination plays out, could be utilized. Such an approach can be found in the John R. Lewis Voting Rights Advancement Act via its geographic coverage formula and practice-based preclearance regime.

c. How has the racial turnout gap been affected since the Supreme Court's *Shelby County* decision in 2013?

An analysis conducted by the Brennan Center found that "[b]etween 2012 and 2020, the white-Black turnout gap grew between 9.2 and 20.9 percentage points across five of the six states originally covered by Section 5 of the Voting Rights Act." The analysis further found that "[t]he total white-nonwhite turnout gap has grown since 2012 in all of the eight states likely to be covered under the VRAA... [with] sufficient data to conclude that the gap has increased for Blacks, Hispanics, and Asians in Florida, Georgia, North Carolina, South Carolina, and Texas." Observing that the increase was even more drastic in states likely to be subject to preclearance under the VRAA, the analysis noted seven out of the eight states saw white-nonwhite turnout gaps that grew more than the national rate between 2012 and 2020. *See* Brennan Center for Justice, "Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act," https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights.

Written Statement of Steve Marshall
Attorney General of Alabama

Senate Judiciary Committee's Subcommittee on the Constitution

"Things Have Changed in the South": Alabama's Response to the Misleading and Misguided Attempt to Reimpose Preclearance Over State Election Laws

September 22, 2021

In 1965, Congress responded to the persistent and widespread denial of voting rights in Alabama and elsewhere by enacting the Voting Rights Act. As the Supreme Court explained, the remedy enacted by Congress marked "an extraordinary departure from the traditional course of relations between the States and the Federal Government."[1] But the departure was necessary to counter an "insidious and pervasive evil": the "unremitting and ingenious defiance of the Constitution."[2]

In 1969, only 19.3% of black Alabamians were registered to vote, compared to 69.2% of whites. Nearly a half century later, Alabama—home of the heroic fight for civil rights—had the second highest black voter registration rate *in the nation*—behind Mississippi.[3] In 2016, black voters in Alabama turned out at higher rates than white voters by 4.6%—60.2% compared to 55.6%.[4] By comparison, Connecticut that year saw a racial divide of 13.1% *the other way*: 61% of whites voted compared to just 47.9% of black voters.[5]

This progress is evident in the recent report on voting rights in Alabama released by the Southern Poverty Law Center—though certainly that was not the goal of its authors.[6] The Alabama-based group is one of the largest and best-funded activist organizations in the nation.[7]

---

[1] *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500-01 (1992).
[2] *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).
[3] The 1969 figure comes from the Congressional report as recounted by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 529, 548 (2013). The 2018 rates come from the U.S. Census Bureau. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2018*, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2018, https://www.census.gov/topics/public-sector/voting/data/tables.html. The comparisons are drawn from looking at the "percent registered" of total population for the "black alone" number for each State. If the rate is measured as percent registered among citizens, Alabama's rate is still eighth highest among the thirty-five States reporting sufficient data, and under either metric, Alabama's rate of voter registration is higher than the national average for black Americans.
[4] *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2016, https://www.census.gov/topics/public-sector/voting/data/tables.html.
[5] *Id.*
[6] *See* Southern Poverty Law Center, *Selma,* Shelby County, *& Beyond: Alabama's Unyielding Record of Racial Discrimination in Voting, the Unwavering Alabamians Who Fight Back, & the Critical Need to Restore the Voting Rights Act*, Report to the H. Comm. on the Judiciary (Aug. 16, 2021) ("SPLC Report"), available at https://perma.cc/R596-VXAL.
[7] The SPLC's recent audited financial statement reports that as of October 31, 2020, the SPLC and its affiliated SPLC Action Fund held assets valued at over **$616 million**, and in FY 2020 spent over **$97 million.** *See* Southern Poverty Law Center, Inc. and SPLC Action Fund October 31, 2020 Consolidated Financial Statements, *available at* https://perma.cc/E3C5-Z6BF.

Other contributors to the report include the Leadership Conference on Civil & Human Rights and the Brennan Center for Justice. The report spans 117 pages and includes hundreds of pages more of declarations from Alabama voters. The argument of the report is simple: that preclearance is again justified because (the report ludicrously contends) Alabama's goal is "to establish white supremacy in th[e] State."[8]

This accusation would be laughable were it not so serious. Simply put, the Alabama of 2021 is not the Alabama of 1965, and the report's repeated reliance on misleading narratives, glaring omissions, and easily debunked contentions demonstrate that there simply is no legitimate case to be made for preclearance.

In 1965, voting rates between black and white Alabamians were a mile wide. Today, black and white Alabamians register and vote at similar rates to each other—and at rates routinely higher than their counterparts in States that were never subject to preclearance.

In 1965, Congress had before it a record of "pervasive," "flagrant," "widespread," and "rampant" discrimination.[9] Today, the SPLC supports its claim of widespread discrimination by relying on a declaration from an Alabama voter whose chief complaints are that (1) he does "not trust the absentee ballot system" for undisclosed reasons, (2) a poll worker had trouble finding his name on the voter rolls when he went to vote in 2018, but he was able to vote when the worker located his name, and (3) the voter dislikes the party voting option on the ballot and prefers to mark a candidate for each race.[10] This declaration is not an outlier in the group. It is the best evidence the SPLC could come up with.

In 1965, Congress confronted poll taxes and literacy tests. Today, the SPLC's chief complaint about Alabama law is a photo ID requirement that has been upheld by both federal courts that considered it.[11] In two years of litigation, the challengers could not identify one single voter in the State who lacked an ID and could not get one. Now, neither has the SPLC. That is because the State makes photo IDs available for free, and the Secretary of State's Mobile Unit will literally drive to a voter's house to provide a free ID if requested.

In 1965, Congress had to contend with a litany of state and local officials who shamelessly encouraged voter suppression. Today, the SPLC identifies the Alabama Secretary of State as a modern-day "champion[]" of "voter suppression."[12] The reason seems to be because of the Secretary's efforts to fight voter fraud,[13] which the SPLC labels a "well-documented myth."[14]

But what is well documented—in courts, in arrest files, in the press, in overturned election results—is that voter fraud happens in Alabama, and it is that fraud that necessitates the voter ID law. In 2016, for example, *two* mayoral elections in Alabama were affected by voter fraud; the

---

[8] SPLC Report at 1 (citation and quotation marks omitted).
[9] *Katzenbach*, 383 U.S. at 308, 315, 331.
[10] SPLC Ex. 24.
[11] *See Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018), *aff'd*, *Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299 (11th Cir. 2021).
[12] SPLC Report at 82.
[13] *See* SPLC Report at 30-31, 82-83.
[14] SPLC Report at 83.

elections were overturned, the mayors removed from office, and one of mayors was convicted of falsifying ballots.[15] In 2013, four campaign volunteers for a Dothan city commissioner were arrested for voter fraud; their candidate had lost the in-person vote 154 to 109, but (thanks to their "volunteering") received 131 of the 140 absentee votes. In 2006, a black candidate in Mobile nearly lost his election for State House because of voter fraud. Two years before that, a mayoral election in Greensboro was overturned because of voter fraud. The list goes on—even as the SPLC promises that voter fraud is a "myth" and that efforts to fight it are Jim Crow 2.0. And all too often, of course, the victims of voter fraud in Alabama are black voters and black candidates whose right to vote or hold office were stolen from them, but one searches the SPLC report in vain for any mention of the rights of *these* Alabamians.

In sum, in 1965, the evidence of voter suppression was legitimate, and the facts on the ground justified extraordinary action by Congress. Today, as all nine members of the Supreme Court recognized over a decade ago, "[t]hings have changed in the South"[16]—dramatically. Alabama, like our Union, is not perfect, and the State will continue to work to improve its voting system and to make voting easy and secure for *all* Alabamians. But as the SPLC's nearly 400-page compendium demonstrates, even when some of the best capitalized activist groups in the country take aim at Alabama to justify reimposing preclearance, they miss the mark by a mile. Congress should recognize as much and reject these unsupported calls for the reimposition of preclearance.

[15] *See Alabama mayor convicted of fraud, removed from office*, The Associated Press, Jan. 17, 2019, https://www.al.com/news/2019/01/alabama-mayor-convicted-of-fraud-removed-from-office.html; Ivana Hrynkiw, *Brighton Mayor Brandon Dean ordered to vacate office, run-off election ordered*, AL.com, Sep. 25, 2017, https://www.al.com/news/birmingham/2017/09/brighton_mayor_brandon_dean_or.html.

[16] *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (majority op.); *id.* at 226-27 (Thomas, J., concurring in part and dissenting in part). Only 8 Justices joined this particular sentence, but Justice Thomas agreed with the substance; he wrote separately to note that he would have found Section 5 of the VRA unconstitutional because things had changed so much since its enactment.

ACTIVE CASE

HARRIET TUBMAN FREEDOM FIGHTERS, CORP., ET AL. V. LAUREL LEE, ET AL.

The Southern Poverty Law Center and Fair Elections Center filed a lawsuit to challenge a Florida law that, among other things, requires groups engaged in voter registration activities to provide misleading information to voters that the organization "might not" submit the voter's registration application on time and to direct voters to the state's online registration portal.

The law imposes this requirement even though Florida already has some of the most onerous third-party voter registration laws in the country, imposes hefty penalties on groups that do not return voter registration forms on time, and has not had significant issues with untimely applications submitted by these groups.

The lawsuit was filed on behalf of Harriet Tubman Freedom Fighters, Corp., a nonprofit, nonpartisan organization that focuses its registration efforts on new voters, particularly youth, communities of color, and returning citizens. In an updated complaint, the Paralyzed Veterans of America Florida and the Paralyzed Veterans of America Central Florida chapters joined individual voters with disabilities as new plaintiffs.

The complaint challenges the law's misleading disclaimer and disclosure requirements. It alleges that the new law is void for vagueness under the due process clause of the 14th Amendment, compels speech in violation of the First Amendment and prevents organizations from exercising their First Amendment rights of expression and association.

The lawsuit was filed in the U.S. District Court for the Northern District of Florida.

ISSUE AREA

VOTING RIGHTS VOTING RIGHTS - FL

CASE DETAILS

Date Filed: June 14, 2021

Status: Active

Co-Counsel:
Fair Elections Center

RELATED DOCUMENTS

- Complaint
- Amended Complaint

* * *

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., white 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 be 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 agued, 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. One 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. *Grovey 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 Texas[110] 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

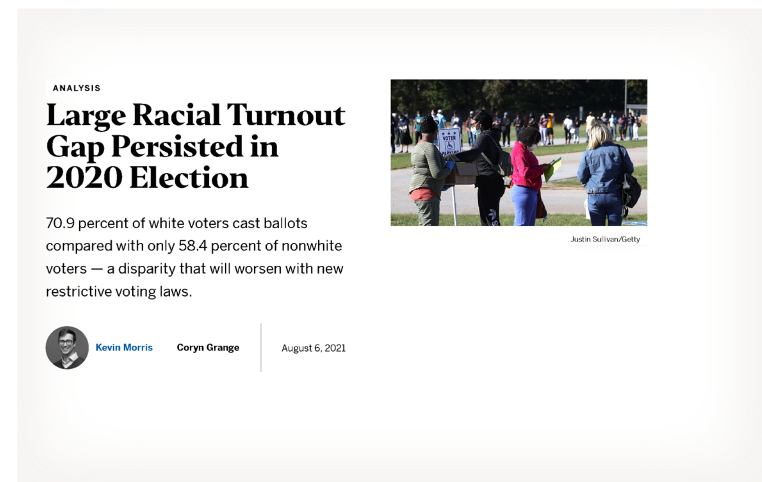
[127] Ibid.

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.



ANALYSIS

Large Racial Turnout Gap Persisted in 2020 Election

70.9 percent of white voters cast ballots compared with only 58.4 percent of nonwhite voters — a disparity that will worsen with new restrictive voting laws.

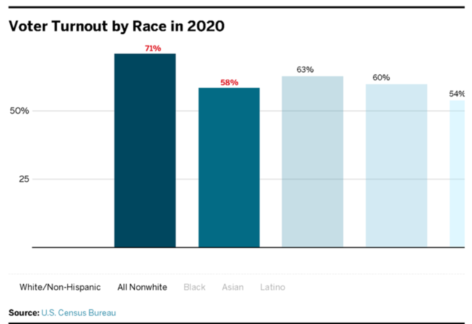
Justin Sullivan/Getty

Kevin Morris Coryn Grange August 6, 2021

In the 2020 election, voter **turnout surged** as more Americans cast ballots than in any presidential election in a century, despite a global pandemic. This was true for the entire electorate as well as for each racial group — more Black Americans voted in 2020 than any presidential election since 2012, and Latino Americans and Asian Americans also surpassed their previous turnout records. (Unfortunately, we don't have comparable figures for Native Americans.)

These successes have been and should be celebrated. However, they must not be mistaken for signs that racial discrimination in voting is no longer an enormous problem, one that continues to advantage white voters to a degree that must be remedied.

The 2020 election must also be remembered for another turnout statistic: 70.9 percent of white voters cast ballots while only 58.4 percent of nonwhite voters did. As the graph below shows, 62.6 percent of Black American voters, 53.7 percent of Latino American voters, and 59.7 percent of Asian American voters cast ballots in 2020.

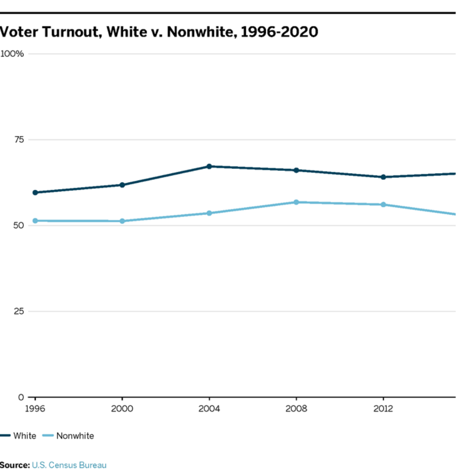


There is **ample evidence** that the **sorts of barriers** being introduced this year **disproportionately reduce turnout** for **voters of color**. The gaps between white and nonwhite voters are bound to get worse. That's why it's necessary to reverse these new voting restrictions.

Narrowing the gap, but only temporarily

The difference between white and nonwhite voter turnout has remained relatively unchanged over the last six presidential elections, with a few notable fluctuations. In 2008 and 2012, Barack Obama was on the ballot, and turnout among Black voters in those elections was higher than at any point since 1996. And in 2012, the gap between white and nonwhite voter turnout narrowed to 8 percentage points, the lowest since 1996.

The graph below shows that after reaching that record low in 2012, the turnout gap expanded once again between white voters and nonwhite voters, reaching 12.6 percentage points in the 2016 presidential election and 12.5 in 2020.



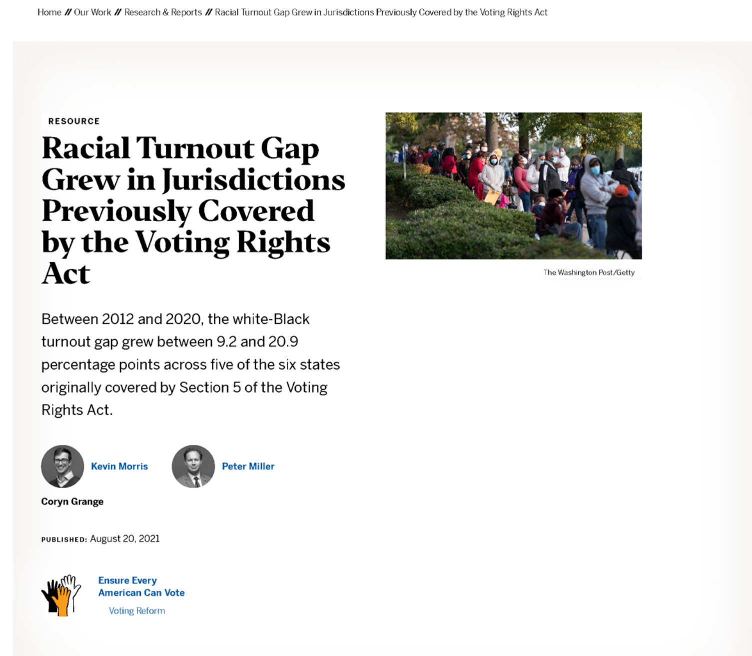
The graph also shows a decrease in nonwhite voter turnout between the 2008 and 2012 elections. After the record turnout in 2008, many state legislatures reacted by quickly passing a spate of **new restrictive voting laws** that made it disproportionately difficult for voters of color to cast ballots.

In 2013, the Supreme Court used the narrowing of the turnout gap between white and Black voters in 2008 and 2012, as seen in the following graph, to justify gutting key protections against racial discrimination in the Voting Rights Act of 1965. That ruling in *Shelby County v. Holder* made it easier for states to enact restrictive policies.

The gaps between white voters and individual racial groups

2021 looks like 2009 in that high nonwhite voter turnout in the presidential election has been followed by restrictive voting laws, but there's a crucial difference. As the graph above indicates, the racial turnout gap narrowed between 2004 and 2008, but not between 2016 and 2020. The 2021 backlash is coming at a point when the disparities in turnout between racial groups are significantly larger than they were in 2008 and 2012.

While the gap between nonwhite voters and white voters has stayed about the same in the 2016 and 2020 elections, the gaps between white voters and voters of specific racial groups have varied. As the graph below demonstrates, the white-Asian gap narrowed significantly, from 16.3 percentage points in 2016 to 11.3 points



RESOURCE

Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act

Between 2012 and 2020, the white-Black turnout gap grew between 9.2 and 20.9 percentage points across five of the six states originally covered by Section 5 of the Voting Rights Act.

The Washington Post/Getty

Kevin Morris Peter Miller

Coryn Grange

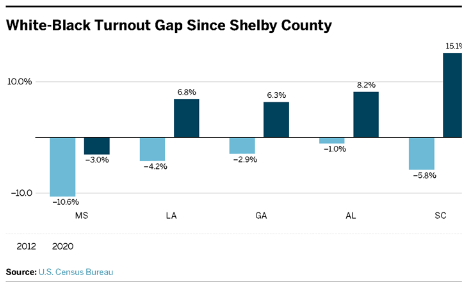
PUBLISHED: August 20, 2021

Ensure Every American Can Vote

Voting Reform

In 2013, when Chief Justice John Roberts delivered the Supreme Court's majority opinion in *Shelby County v. Holder,* he **argued** that the Voting Rights Act of 1965's **preclearance requirement** under Section 5 was no longer needed because "African-American voter turnout has come to exceed white voter turnout in five of the six States [Alabama, Georgia, Louisiana, Mississippi, and South Carolina] originally covered by §5 with a gap in the sixth State of less than one half of one percent [Virginia]." Although this was true in 2012 — and only 2012 — the white-Black turnout gap in these states reopened in subsequent years, and by 2020, white

turnout exceeded Black turnout in five of the six states.



Replicating the Shelby County opinion methods

Using the same source of census data that was used in the *Shelby County* opinion, we show that the racial turnout gap has increased in most jurisdictions that were previously covered by preclearance. Racial turnout rates are calculated by dividing the number of ballots cast by the estimated citizen population above the age of 18. This analysis was compiled from the past 24 years of general-election voter data from eight states. The states used are based on the **eight states the Voting Rights Advancement Act (VRAA), as introduced in 2019, will likely cover,** according to recent congressional testimony by George Washington University law professor Peyton McCrary. Those states are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas — all of which were covered in whole or in part by the preclearance provisions of the Voting Rights Act before S*helby County*.

Broad conclusions made about the turnout of eligible Latino and Asian voters in states where they are underrepresented can be imprecise due to the small sample size provided by census data. We controlled for this deficiency in data by only analyzing states' Latino and Asian American turnout for years that had **at least 30** Latino and Asian American eligible voters accounted for. Overall, we found that the larger the Latino and Asian American population of states, the closer the size the white-nonwhite turnout gap mirrored the results of the **Brennan Center's examination of the same gap at a nationwide level**, due to the greater representation of these undercounted groups. When this wasn't the case, the white-nonwhite gap more closely mirrored the white-Black gap.

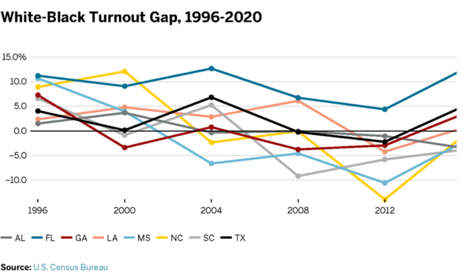
We also believe the white-nonwhite gap may be underestimated, as the census data we use for analysis fails to provide information on Native American voter turnout, a group that is significantly impacted by discriminatory voting laws. However, we do know from the **National Congress of American Indians** that registered voters in this group have a lower turnout rate than other racial groups, which provides the basis for our assumption.

Racial turnout gaps in jurisdictions to be covered by the Voting Rights Advancement Act

While in 2012, just before the *Shelby County* decision, the white-Black turnout gap was shrinking in the states we analyzed, and in many instances even briefly closed, this trend has reversed in the years since. In 2012, seven out of the eight states had Black voter turnout higher than that of white voters. In 2020, the reverse is true — in only one of the eight states was Black turnout higher than white turnout.

In a few states, this reversal is especially alarming. Louisiana, South Carolina, and Texas had higher turnout gaps in 2020 than at any point in the past 24 years. South Carolina's white-Black turnout gap widened the most, expanding by a staggering 20.9 percentage points within the eight years since *Shelby County*. While Black turnout exceeded white turnout in 2012, white turnout was more than 15 percentage points higher than Black turnout in 2020.

White-Black Turnout Gap, 1996-2020

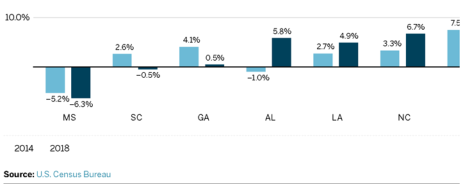


Source: U.S. Census Bureau

A similar trend can be seen in the gap between white voters and all nonwhite voters. The total white-nonwhite turnout gap has grown since 2012 in all of the eight states likely to be covered under the VRAA. There is sufficient data to conclude that the gap has increased for Blacks, Hispanics, and Asians in Florida, Georgia, North Carolina, South Carolina, and Texas. In Alabama, Louisiana, and Mississippi, the sample sizes in the available 2020 census data are too small for Hispanic and Asian voters to make much of a difference in an overall white-nonwhite turnout gap estimation that is distinct from the white-Black turnout gap in those states. Notably, North Carolina went from having a larger share of nonwhite voters represented in 2012 with a white-nonwhite gap of -9.3 percentage points to having a gap of 5.4 percentage points, a jump of 14.7 percentage points, far greater than the **national average of 4.6 percentage points**.

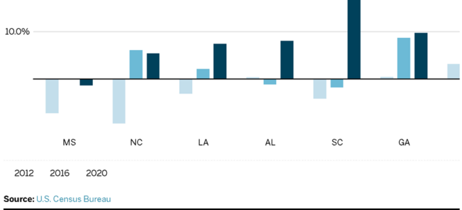
Overall, we see that the growth in the racial turnout gaps between 2012 and 2020 were even starker in the states likely to be subject to preclearance under the VRAA than those seen nationwide. Seven out of the eight states had white-nonwhite turnout gaps that grew more than the national rate of 4.6 percentage points between 2012 and 2020. And in four out of the eight states to be subject to preclearance under the VRAA, the white-Black turnout gap grew more than the national rate of 10.3 percentage points from 2012 to 2020.

White-Nonwhite Turnout Gap Since Shelby County, 2012-2020
Midterm Elections



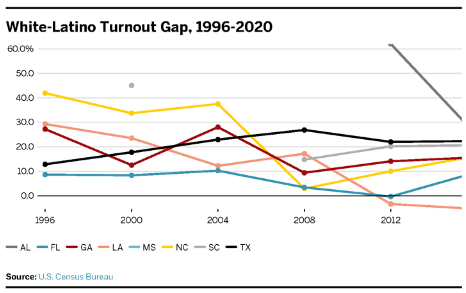
Source: U.S. Census Bureau

White-Nonwhite Turnout Gap Since Shelby County, 2012-2020
Presidential Elections



Source: U.S. Census Bureau

Expanding the analysis to other nonwhite groups also reveals that, even in 2012, progress on closing racial turnout gaps was not as significant as the *Shelby County* decision suggested. The Court only examined the white-Black turnout gap, which did temporarily close in many states in 2012, likely due to Barack Obama being on the ballot and Black voter turnout subsequently surging. But with the exception of Latino voter turnout briefly surpassing white turnout in Florida in 2012 and Louisiana in 2012 and 2016, Latino voter turnout has lagged behind white voter turnout for the last 24 years in every state where those rates are measurable.



Shelby County's aftermath

In 2013, the Supreme Court suggested that the closing of the racial turnout gap supported the conclusion that the need for preclearance was over. As this analysis shows, in the years following the *Shelby County* decision, these racial turnout gaps widened once again. The reopening of the racial turnout gap likely has many causes, and it is possible that the ending of the preclearance condition has played a role. What is clear, however, is that the trends identified by the Supreme Court have reversed themselves with alarming speed.

Related Resources

Q&A

Breaking Down the Freedom to Vote Act

The bill provides essential reforms needed to protect our democratic system.

September 23, 2021

Wendy R. Weiser Daniel I. Weiner

Emil Mella Pablo

FACT SHEET

The Freedom to Vote Act
September 20, 2021

TESTIMONY

Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms
August 16, 2021 Wendy R. Weiser

TESTIMONY

Testimony on Voting in America Before the Committee on House Administration's Subcommittee on Elections
June 24, 2021 Michael Waldman

SEE ALL IN LIBRARY ▶

Erin Zwiener

District 45 · Hays & Blanco Counties

September 22, 2021

U.S. Senate Judiciary Committee — Subcommittee on the Constitution
c/o Chair Richard Blumenthal
224 Dirksen Senate Office Building
Washington, DC 20510

Dear U.S. Senate Judiciary Subcommittee Members,

The State of Texas has a track record of suppressing the right to vote for students and communities of color. This is occurring at both the statewide and local level. Certain communities face an unjust burden in exercising their right to vote when officials restrict the number and location of polling sites and duration of early voting. The right to vote is fragile and restrictions that ostensibly deter communities of color and students blatantly suppress voting rights.

There is a demonstrated record of suppressing the college student vote in Texas, both through statewide actions and local actions. In 2018, Texas State University received national attention when access to voting was severely limited. As the state representative for Hays County and a candidate in 2018, I witnessed this firsthand.

Hays County is the second fastest growing county in the nation. Until 2018, the county was widely considered Republican, but rapid growth and increased turnout have resulted in the county becoming competitive.

College students often have limited access to transportation, and many work non-traditional schedules. Because of this, the location of early voting locations can be especially critical for them to have fair access to the ballot box.

In 2018, early voting on the Texas State University campus was restricted to 3 days at a single voting site—the LBJ Student Center from 11 am - 7 pm. Almost every other early voting location in Hays was open the full two weeks. The limited days were justified by a claim of lower historical use of the site than other locations in the county. However, this claim is not supported by a comparison of voting numbers at early voting locations in 2012, 2014, and 2016.

During those three days, 2,965 students voted and, because of inadequate equipment and staffing, waited up to three hours to cast their ballot. Students and nonprofit organizations like Move Texas and Texas Rising began to ask for additional time to vote. U.S. Rep. Lloyd Doggett

and local Democratic candidates (including myself) also asked the commissioners to extend hours on-campus, saying they were concerned that the extended wait times were "suppressing the vote."

Students stated:

> "Students are missing class to go," said Catherine Wicker, a student. "They're missing work. Many are being turned away because their voter registration cards -- they're saying they're not active. They're not actively in the system yet."
>
> "I just don't have the time," said Bryson Williams. "I really do want to vote, and I'm registered to vote but it's just not convenient for me, especially during the weekdays."

Hays County Republican leaders organized to block extension of early voting on campus. North Hays Republican Party President Wally Kinney sent the following email:

> "Please email Commissioner Mark Jones TODAY, and urge him NOT to allow extended voting times or days for students at Texas State University. If we are to change the rules in the middle of the game it favors Democrats and we sure don't want to do that in this-what is going to be-a close election as it is... The students had Monday, Tuesday, and today to vote early, AND they have the Government Center close by campus to vote 8-5 all week this week plus Sat and Sun, and they can vote 7-7 at the Government Center all next week M-F. Then they have voting boxes all over San Marcos on election day, so..."

Hays County officials responded:

> "Some candidates for office recently requested an extension of dates and/or times at the temporary branch polling place on campus at Texas State University, which was scheduled for the first three days of early voting. Due to the "public notice" requirements for the branch voting schedule, extension of dates and times for any branch location is not practicable at this time."

The Texas Civil Rights Project and League of Women Voters submitted a letter to Hays County asking officials to reopen the site and add another voting location. The letter stated:

> "The burdens imposed by closing the on-campus early voting location fall particularly and disproportionately on the county's young voters, who are significantly more likely to live on or near campus and are less likely to have easy, immediate access to reliable transportation to vote off-campus..."

The letter also alleged that the closure of the on-campus polling site violates two portions of the Texas election code — one that limits the number of temporary polling places in a county commissioner's precinct and another that regulates the number of polling locations that must be

set up for each voting precinct.

On 10/26, under threat of lawsuit from Texas Civil Rights Project, the Hays County Commissioners Court voted unanimously to give Texas State two additional days of voting on Thursday, Nov. 1 and Friday, Nov. 2 from 7 a.m. until 7 p.m. Another 1,954 individuals voted at the Texas State early voting location on those two days.

Without the threat of a lawsuit, the early voting days at Texas State University wouldn't have been extended, and those almost 2,000 voters would have had to find another option or miss their opportunity to cast their ballots.

Early voting access was particularly critical in 2018 and prior, because Election Day voting locations in Hays County were limited to the precinct where a voter resided. Because of gerrymandered congressional, state senate, and county commissioner lines (the line between TX-21 and TX-35 cuts through the center of campus), it's difficult for residents to know which voting precinct they live in. On Election Day, I observed students struggling to identify their voting location, and many reported being turned away from the first location they tried, some of whom were not able to vote. Beginning in 2019, Hays County switched to countywide voting on Election Day, so this particular difficulty has now been removed.

Since the 2019 passage of HB 1888, which requires that early voting locations either be open the entire early voting period or not at all, the Hays County Commissioners Court has provided an early voting location for the full early voting period on the Texas State University campus for most subsequent elections, including the 2020 primary and general elections. However, every cycle there are efforts to move the location to the edge of campus, and students have to organize to keep the voting location somewhere that's convenient for them to access.

This is a story with a happy ending, but only because of individuals on the ground, a diligent advocacy community, and luck. Similar stories occur around universities and colleges all over Texas, many with not-so-happy endings. In addition, there are other systematic barriers to young people casting their ballots, in particular the lack of online voter registration and lack of acceptance of college and high school IDs for voter identification. We need stronger baselines to ensure that young Americans can exercise their sacred right to vote and have the opportunity for redress when that right is violated.

Thank you for your work to protect the freedom to vote for every single American.

Erin Z

State Representative Erin Zwiener
Texas House District 45, Hays and Blanco Counties

Sources:
https://www.texastribune.org/2018/10/25/student-voting-rights-fight-erupts-texas-state-university/
https://www.kvue.com/article/news/politics/vote-texas/high-voter-turnout-at-texas-state-leaves-students-in-need-of-more-time-to-vote/269-607850493
https://www.kxan.com/news/local/hays/texas-state-students-claim-voter-suppression-during-early-voting/

ACTIVE CASE

SIXTH DISTRICT OF THE AFRICAN METHODIST EPISCOPAL CHURCH V. KEMP

After Georgia voters turned out in record numbers for the 2020 presidential election and U.S. Senate elections in early 2021, state legislators passed a sweeping – and unconstitutional – voting law that threatened to massively disenfranchise voters, particularly voters of color. The SPLC and its allies filed a federal lawsuit against the state of Georgia and Gov. Brian Kemp.

The lawsuit challenges multiple provisions of the law, also known as SB 202, including the following items.

- A ban on "line warming," where volunteers provide water and snacks to people waiting in long lines to vote, a common occurrence at precincts with a large population of voters of color.
- A severe restriction on the use of mobile voting units, which have been used to address a shortage of accessible and secure polling locations that previously resulted in long lines of voters at existing and traditional polling locations.
- Additional and onerous identification requirements for requesting and casting an absentee ballot.
- A compressed period for requesting absentee ballots.
- Restrictions on the use of secure ballot drop boxes.
- Disqualification of provisional ballots cast in a voter's county of residence but outside the voter's precinct before 5 p.m. Previously, votes for all the races to which the person was eligible to vote on that precinct's provisional ballot were counted.
- A drastic reduction of early voting in runoff elections.

The law was debated and passed by both houses of the Georgia Legislature and signed by Gov. Brian Kemp, all in under seven hours. The legislation was passed despite state officials praising the recent elections for their integrity, safety and security.

The lawsuit describes how the law violates voter protections under the 14th and 15th Amendments as well as Section 2 of the Voting Rights Act. It also outlines how the "line warming" ban violates the First Amendment right to freedom of expression.

The plaintiffs represented in the case include organizations whose get-out-the-vote activities will be negatively impacted by SB 202 and people most directly affected, such as Black voters, new citizens, religious communities and people with limited English proficiency. The plaintiffs include: the Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority Inc., Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, The Arc of the United States, Georgia ADAPT, Georgia Advocacy Office and Southern Christian Leadership Conference.

ISSUE AREA

VOTING RIGHTS VOTING RIGHTS - GA

CASE DETAILS

Date Filed: March 29, 2021

Status: Active

Co-Counsel:
American Civil Liberties Union, ACLU of Georgia, NAACP Legal Defense and Educational Fund Inc. and the law firms of Davis Wright Tremaine and WilmerHale

RELATED DOCUMENTS

- Complaint
- Motion to Intervene
- Plaintiffs' Opposition to Motion to Intervene
- Reply in Support of Motion to Intervene
- State Defendants' Motion to Dismiss
- Amended Complaint
- State Defendants' Reply to Plaintiffs' Motion to Dismiss
- Plaintiffs' Response in Opposition to State Defendants' Motion to Dismiss
- Plaintiffs' Response in Opposition to County Defendants' Motion to Dismiss
- Motion to Dismiss by State Defendants
- Motion to Dismiss by Georgia Republican Party Intervenors
- County Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint

* * *

September 22, 2021

U.S. Senate Judiciary Committee — Subcommittee on The Constitution
c/o Chair Richard Blumenthal
224 Dirksen Senate Office Building
Washington, DC 20510

Dear U.S. Senate Judiciary Subcommittee Members,

American democracy can no longer be taken for granted. This month, Governor Greg Abbott signed Senate Bill 1 — Texas Republicans' sweeping voter suppression legislation — into law. We expect the GOP-led Texas Legislature to move discriminatory redistricting plans quickly during the legislative special session that just began this week. That is why we are urging you to do everything possible to push for swift passage and enactment of the John Lewis Voting Rights Act.

As Democratic Members in the Texas House of Representatives, we have long been on the front lines of this struggle. Ten years ago, redistricting maps for Congress and the two houses of the Texas Legislature were ultimately revised by the Courts, having been found to intentionally discriminate against racial minorities. That same session, the Legislature passed SB 14, then the most restrictive photo voter identification law in the country. The law permitted the use of a concealed handgun license ID but prohibited the use of state employee IDs, even though both were issued by the same agency with the same rules. SB 14 was struck down by federal courts and revised to allow a reasonable impediment declaration. With this ruling, approximately 800,000 registered Texas voters – disproportionally racial minorities – regained the right to vote. But, that same session, the Legislature passed revisions to the state's voter registration procedures, effectively banning voter registration drives. This law too was struck down by a federal district court, only to be revived by the Fifth Circuit Court of Appeals.

Many of the 2011 state laws were successfully challenged under Section 5 of the 1965 Voting Rights Act. Unfortunately for our constituents, the Supreme Court struck down this provision of the Act in *Shelby County v. Holder,* a case supported and celebrated by our then-Attorney General and current Governor, Greg Abbott. Immediately thereafter, local counties and school districts eliminated minority officeholders and enacted voting procedures designed to harm racial minorities.

As we begin another redistricting cycle, Texas is now free to enact any racially discriminatory election practice it desires, stymied only by the remote chance that the Fifth Circuit or the United States Supreme Court will stop them. Article I, Section 4, Clause 1 of the U.S. Constitution 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 Senators." Congress must exercise this authority immediately by passing a new voting rights act that includes preclearance, as well as other important safeguards binding courts to protect the right to vote.

In the last ten years, additional criminalization of the voting process in Texas has continued. The state Attorney General has proceeded with public fanfare and haste to prosecute racial minorities for voting related "crimes." When the pandemic hit, the state schemed the electoral rules to benefit white voters over all others. In-person voting was made mandatory for nearly all citizens under age 65 except those with disabilities. Voters over the age of 65 in Texas are disproportionately white. The Texas Supreme Court then ruled that a disability under the statute did not include lack of immunity to COVID-19.

Meanwhile, the Fifth Circuit ruled in a case challenging the restriction of vote by mail to persons over age 65 as a violation of the 26th Amendment's ban on age discrimination in voting that the Constitution does not prohibit state laws that preference some voters over others (*See TDP v. Abbott,* 978 F.3d 168, 191 (5th Cir. 2020), "a law that makes it easier for others to vote does not abridge any person's right to vote... [under the Constitution]"). Therefore, in the 2020 election, voters over age 65, disproportionally white, could vote safely by mail while the more diverse younger voters were required to do so in person. Texas was one of only four states to make this racially discriminatory choice.

In this last election, local election officials, operating within state law, took various steps to facilitate voting, including offering drive-through voting centers and community drop boxes for mail ballots. In each case, the state executive and judicial branches overrode them. Governor Abbott, after voting was already underway, ordered large counties, such as Harris and Dallas, to have the same number of mail ballot drop locations as the most sparsely populated counties in our state: one.

The state's recent efforts to preference voting for the white electorate did not stop in November. Texas Attorney General Ken Paxton filed the ill-fated lawsuit in the U.S. Supreme Court seeking to overturn the elections of other states because the other states had not limited voting as Texas had done. The Attorney General then spoke at the rally that preceded the January 6 insurrection at the United States Capitol. One of Texas's U.S. Senators led the fight on the Senate floor to overturn the election results.

Having failed to void the will of voters, the state leadership has now opened a slew of criminal investigations related to voting and the Attorney General is seeking statewide prosecutorial authority. Over the past year, there have been scores of proposals to limit voting by racial minorities filed in the Legislature. The Governor has made passing these restrictions a top priority – even giving it an official "emergency" designation, a rare maneuver designed to fast-track legislation. Now signed into law, Senate Bill 1 is calculated to benefit Republican-leaning white voters over Asian-Americans, African Americans and Latinos.

Our state has struggled to live up to its democratic promise from the very start. But Texas has also been a leader at times. President Lyndon Johnson pushed for and secured the passage of the 1965 Voting Rights Act and Barbara Jordan led the effort a few years later to see Texas fully covered under the Act and to recognize the importance of protecting Latino voting rights. A Republican president from Texas, George W. Bush, signed the reauthorization of the Voting Rights Act in 2006. In the 1970s and the early 1980s, Texas led with some progressive reforms, including being one of the first states to adopt an early voting period.

Nevertheless, at this moment, Texas is diversifying and those who are in power remain steadfast in their conviction to manipulate the voting rules to ensure they remain in power by limiting access to the ballot by minority Texans.

As legislative leaders, we have fought, and continue to fight, against these onerous policies in every way we can. Many Texas House Democrats spent several weeks this past summer in Washington, D.C. pushing for the immediate passage of federal voter protection legislation. It is absolutely necessary that, as our representatives in Congress, you do what it takes to pass the John Lewis Voting Rights Advancement Act.

U.S. Senate Judiciary Subcommittee on the Constitution
September 22, 2021
Page 3

We stand ready to work shoulder to shoulder with you to ensure that voting rights are protected. Our Democracy depends on it.

Sincerely,

Rep. Chris Turner
Chair, Texas House Democratic Caucus

Rep. Alma Allen

Rep. Rafael Anchía

Rep. Michelle Beckley

Rep. Diego Bernal

Rep. Rhetta Andrews Bowers

Rep. John Bucy, III

Rep. Liz Campos

Rep. Terry Canales

Rep. Sheryl Cole

Rep. Garnet Coleman

Rep. Nicole Collier

Rep. Philip Cortez

Rep. Jasmine Crockett	Rep. Joe Deshotel	Rep. Alex Dominguez
Rep. Harold Dutton	Rep. Art Fierro	Rep. Barbara Gervin-Hawkins
Rep. Jessica González	Rep. Mary González	Rep. Vikki Goodwin
Rep. Bobby Guerra	Rep. Ana Hernandez	Rep. Abel Herrero
Rep. Gina Hinojosa	Rep. Donna Howard	Rep. Celia Israel
Rep. Ann Johnson	Rep. Jarvis Johnson	Rep. Julie Johnson

U.S. Senate Judiciary Subcommittee on the Constitution
September 22, 2021
Page 5

Rep. Jarvis Johnson	Rep. Oscar Longoria	Rep. Ray Lopez
Rep. Eddie Lucio, III	Rep. Armando Martinez	Rep. Trey Martinez Fischer
Rep. Terry Meza	Rep. Ina Minjarez	Rep. Joe Moody
Rep. Christina Morales	Rep. Eddie Morales	Rep. Penny Morales Shaw
Rep. Sergio Muñoz	Rep. Victoria Neave	Rep. Claudia Ordaz Perez
Rep. Evelina "Lina" Ortega	Rep. Mary Ann Perez	Rep. Ana Maria Ramos

U.S. Senate Judiciary Subcommittee on the Constitution
September 22, 2021
Page 6

Rep. Richard Peña Raymond	Rep. Ron Reynolds	Rep. Eddie Rodriguez
Rep. Ramon Romero, Jr.	Rep. Toni Rose	Rep. Jon Rosenthal
Rep. Carl Sherman, Sr.	Rep. James Talarico	Rep. Shawn Thierry
Rep. Senfronia Thompson	Rep. John Turner	Rep. Hubert Vo
Rep. Armando Walle	Rep. Gene Wu	Rep. Erin Zwiener