

S. HRG. 117-854

PROTECTING A PRECIOUS, ALMOST
SACRED RIGHT: THE JOHN R. LEWIS
VOTING RIGHTS ADVANCEMENT ACT

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

OCTOBER 6, 2021

Serial No. J-117-40

Printed for the use of the Committee on the Judiciary



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PROTECTING A PRECIOUS, ALMOST SACRED RIGHT: THE JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT

WEDNESDAY, OCTOBER 6, 2021

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to notice, at 2:00 p.m., in Room G50, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chair of the Committee, presiding.

Present: Senators Durbin [presiding], Leahy, Klobuchar, Coons, Blumenthal, Hirono, Padilla, Ossoff, Grassley, Lee, Cruz, Hawley, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. Good afternoon. The hearing of the Senate Judiciary Committee on “Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Act—Advancement Act” will come to order. Today, this is the fourth hearing on protecting the right to vote, which we introduced yesterday. Before we begin, I’d like to turn to a video to put this legislation in historic perspective.

[Video presentation.]

Right now, public officials across the country are carrying out a process known as redistricting. It’s happening in my State and virtually every other state: every 10 years, following the decennial census. At this moment, State legislatures, county commissions, town councils are redrawing the lines that’ll help determine who the American people elect to represent them in Congress and in their State capitals.

That means for the first time since the days before Dr. King’s March on Washington, congressional, State, and local government legislative districts will be drawn without the key protections of the Voting Rights Act because, in 2013, the Supreme Court issued its 5-to-4 decision, *Shelby County v. Holder*, that essentially nullified a key provision of the Voting Rights Act of 1965, Section 5.

That Section 5 required localities with records of discrimination against voters of color through racist policies like poll taxes and literacy tests to ensure any changes to the voting rules were vetted by the Justice Department before they could be enforced. This requirement is known simply as “preclearance,” and it applied to redistricting. That preclearance requirement, the guarantee of accountability to the voters and adherence to the law, was eliminated by the Supreme Court in *Shelby*.

As today's witness, Assistant Attorney General Kristen Clarke, has explained, in the absence of a preclearance requirement, jurisdictions have less incentive to involve community contacts in the elections process and the process of considering and adopting voting changes. Losing this avenue of participation is particularly harmful for minority voters. Americans have every reason to be concerned about the lack of transparency in this year's redistricting. Without full protections of the Voting Rights Act, State legislators could redraw districts in ways that unlawfully diminish the power of voters of color.

The truth is, State lawmakers have already taken unprecedented steps to silence the voices of American voters. This year alone, legislators throughout the country have introduced more than 425 bills with provisions to make it harder for people, particularly people of color, to vote. Nineteen states have gone on to enact 33 of these laws. Some of them set new limits on voting by mail. Others cut hours on polling locations. All of them are designed to achieve the same outcome: new barriers to the ballot box. The proponents of these laws claim they are designed to help prevent so-called voter fraud, but facts show that claims of voter fraud are nothing more than grist for the mill of the big lie.

Remember when the former President insisted he actually won the election last year? He's still at it. That election was branded by his Department of Homeland Security as the most secure in American history. Earlier this month, a team of Republican-backed, quote, "cyber ninjas"—that's what they call themselves—completed a months-long audit. They collected millions of dollars from right-wing organizations to fund this undertaking. This was going to be a months-long audit of the 2020 election results in Arizona, to prove once and for all that Donald Trump finally won.

What did they find? More votes for Joe Biden and fewer votes for Donald Trump. Despite this overwhelming evidence, the myth of voter fraud persists. Sadly, it's being weaponized by those who hope to advance their own political ambitions by discrediting our electoral process. If State legislators and others are going to defame and diminish our democracy, we in the Congress have a duty to defend it. With the John Lewis Voting Rights Advancement Act, the Senate has an opportunity to reinvigorate one of the most important pieces of legislation in American history.

I've been here a few years. I can actually remember, and I'll bet Senator Leahy could, too. This was a big bipartisan issue. Over the years, Democrats and Republicans voted the same way on the Voting Rights Act. In the words of Senator Mitch McConnell when he voted for it once, quote, "This is a piece of legislation which has worked." I think he's right. Let's keep it working.

In our Nation, there is no freedom more fundamental than the right to vote. As our old friend John Lewis said before his passing, "It's the most powerful nonviolent tool we have. Our democracy is strongest when every eligible voter votes."

I'll now turn to Senator Leahy, the lead sponsor of the John—I'm sorry. First, it looks like I'm going to turn to my friend Senator Chuck Grassley, and then Patrick Leahy. Senator Grassley, I'm sorry.

**STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. H.R. 4 was crafted in the memory of the late Congressman John L.—John Lewis, and it's about voting rights that he fought for and appropriately honored for. The unfortunate reality is that this hearing is another attack on the Supreme Court, and this bill is yet another attempt at Federal takeover of State and local elections. It wrestles control of elections away from the State and into the hands of the Biden-Harris Department of Justice and partisan lawyers backed by dark-money groups.

Before discussing the matter at hand, I want to say that we are grateful to have a number of extraordinary busy State officials, and former State and Federal officials we heard from who were eager to testify against this bill. This was even more impressive for this hearing, given that the second panel was unsettled until just last Friday. We truly appreciate all their efforts and their outreach.

Revising and reviewing this bill, I can see why so many experts were willing to rearrange their schedules. This bill is a disaster. It penalizes states for voter ID laws, which an overwhelming majority of Americans support. Even Democrats claimed to support ID laws earlier this year. It fundamentally changes who is responsible for elections in America, replacing States with the Federal Government. Why change what has worked for 240 years and which the Constitution is very clear that the manner of holding elections is up to State legislatures?

This is the fourth hearing regarding voting rights in the U.S. Senate this Congress. We had a Subcommittee hearing two weeks ago on the same topic, but this did not seem like a process designed to learn more from the experts and State officials responsible for running elections. It seemed rushed so that we could say that we had another hearing.

Look at this bill's history. This bill has been proposed, in various names and with slightly different provisions, all the way back to 2015. It was proposed in direct response to the Supreme Court's 2013 decision, *Shelby County*. That case recognized that the landscape in America looked very different in 2013 than in 1965, when the Voting Rights Act was passed, and the Supreme Court concluded that Congress couldn't keep requiring states to preclear with the Federal Government election law changes based on data going back to 1965.

Fast-forward, then, 8 years, and the Supreme Court again issued a decision, this time, the *Brnovich v. Democratic National Committee*. This case, the Supreme Court set forth a list of substantive guideposts to determine whether, considering the totality of the circumstances, changes to voting rules are lawful under Section 2 of the Voting Rights Act.

Unsurprisingly, Democrats immediately set about revising this bill to overrule the Supreme Court's commonsense decision. The latest version doesn't just revive the preclearance procedures in place before *Shelby County*. It massively expands preclearance.

Democrats also want to erase the very reasonable factors that the Court outlined in *Brnovich* to guide lower courts as they look at the totality of circumstances for changes to voting laws. H.R. 4 replaces those Supreme Court guideposts with a list of undefined

and far more vague factors, such as difficulty complying with voting requirements. These factors don't provide any legal clarity. What they do provide is enormous opportunity for mischief by Democrat lawyers. If activist lawyers, backed by an unending flow of dark money, can find a few violations under this amorphous standard, then a State is subject to preclearance. That gives DOJ control over jurisdiction for a period of 10 years.

As written, H.R. 4 would also give the Department of Justice the power to retroactively look back at a jurisdiction—determine whether, in the past 25 years, the jurisdiction has sufficient number of violations to warrant imposing preclearance right now. Preclearance worked wonders in 1965. It was needed to ensure the vote for minority communities that were denied the right to vote by poll taxes and literacy tests. Those laws have, thankfully, been erased from the books. We have recently had record turnout for minority voters. Why are we expanding preclearance in 2021?

Do we really want the Department of Justice exerting this level of control over our States? This is the same DOJ that only yesterday distributed a memorandum vaguely threatening to use the FBI to investigate parents protesting school teaching Critical Race Theory in the classroom if those protests, quote, unquote, “intimidate” school board members. Do we really want to give partisan activists—who claim that paying for postage stamps to mail in a ballot is a poll tax—the ability to subject a State to burdensome Federal regulations and oversight? Do we really want to give Democratic operatives unfettered power to bring States under preclearance with lawsuits—lawsuits resting on vague notions of, quote, unquote, “violations”?

To that end, I hope to hear from Attorney General Rokita, who was previously Indiana's Secretary of State, why it's so important for States to manage their own elections and why Federalized election laws are bad for election integrity and, most importantly, voter participation. I hope to hear from Hon. Ken Cuccinelli, who was the Attorney General of the Commonwealth of Virginia when preclearance was outlawed, the impact of imposing preclearance procedures would have moving forward.

Before I wrap up, I'd like to take a moment to introduce, for the record, two written statements that I believe warrant recognition.

Lieutenant Governor Mark Robinson's described the flaws in H.R. 4 and noted that, quote, “this legislation is nothing more than an attempt to ensure that one party control the machinery of our government in perpetuity, by mandating an unconstitutional Federal takeover of elections in our country”, end of quote. I also appreciate that a legal advisor to the bipartisan Carter-Baker Commission, Thor Hearne, noted that H.R. 4 is, quote, “the antithesis of the Carter-Baker Commissions' bipartisan recommendations for election reform”, end of quote. We would be wise to heed their concerns with regard to H.R. 4.

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

Sadly, my Democrat friends seem to disagree. They're pushing H.R. 4 to take away the ability of States to establish their own voting rules. We should all agree that participating in American democracy at the ballot box is a fundamental right. It's a right that

we should want to protect and not outsource to political operatives and DOJ and activist outside groups. Thank you.

Chair DURBIN. Thanks, Senator Grassley. Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY,
A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. I know that my friend, Iowa Senator Grassley was talking about H.R. 4, but I would note that we're here to discuss my bill, S. 4, which has dramatic changes from the bill he was talking about. It's the John Lewis Voting Rights Advancement Act. I've championed this for years. The Voting Rights Advancement Act, as you've noted, Mr. Chairman, has been bipartisan for many years, just like all the efforts to restore the Voting Rights Act before it. I hope it continues to get bipartisan support, as it has always had.

Like the evolving decisions from the Court that impact the Voting Rights Act, well, then, this legislation also must evolve to address emerging concerns. It may be surprising to some, when they hear the rhetoric, to learn that the Voting Rights Act—improving and strengthening and reauthorizing it—has been an overwhelming bipartisan effort for decades. We seem to be in an era of toxic partisanship, and I hope that will not obscure what has for decades united us across party lines. Republican and Democratic Members of this Committee voted in support of reauthorizing the Voting Rights Act in 2006.

In fact, it wasn't long ago we stood side by side to unanimously approve the 2006 reauthorization of the Voting Rights Act. We even stood together, with the House and Senate Members, Republicans and Democrats alike, on the steps of the Capitol. You have about as broad a spectrum of ideologies among the Republicans and Democrats in that picture as you can imagine.

I wonder what's changed in such a short time. The belief that protecting our right to vote is bigger than party or politics. That's not novel or new. In my State of Vermont, we fight to make sure everybody has a chance to vote. It's a belief that a system of self-government, a government of, by, and for the people, is one that is worth preserving for generations to come.

That's why the John Lewis Voting Rights Act that's here—it seeks to ensure that Americans of all parties, all races, all backgrounds, have their right to vote protected. It's not, nor has it ever been, an effort to empower one party over the other. You know, we insist on all people being able to vote in Vermont. It's not for one party or the other. In the last election, we elected a Republican Governor. We elected a Democrat Lieutenant Governor. It's not about a Federal takeover of elections. It's not about empowering fraudulent voting. It's about empowering citizens to fulfill their constitutional duty and exercise their legal right to vote. We, as elected representatives of the people, ought to be able to agree that that's a right worth protecting.

The legislation I introduced yesterday is the culmination of many months of negotiation, both here in the Senate and the House, and consultation with the Department of Justice, and I couldn't help but think that's the sort of process Congressman Lewis would have embraced. The Supreme Court's *Shelby County* decision decreed

that Congress has to build a fulsome record of current voting conditions and then premise any legislation restoring the Voting Rights Act on that record. We've methodically, for years, done just that.

What does that record show? It demonstrates action from Congress is needed and demanded to defend against efforts to restrict the right to vote in States across the country. The House answered that call. They passed a bold version of the John Lewis VRAA, this summer. We did our part by introducing a Senate version that stayed true to the goals of the House-backed legislation and incorporated input we've received through the ongoing bipartisan conversation.

This shouldn't be a partisan issue. It never has been, not in all my years here in the Senate. I'll continue to work in good faith with Senators of both parties to find common ground. Remember, we have one thing that goes beyond Democrats or Republicans, and that's protecting our precious right to vote. That's what gives democracy its name. That's more important than any party.

Every one of us should recognize the sacrifices of people like our friend and hero John Lewis. The question is, are we willing to live up to his example, put aside our differences, and do what's right for democracy? I know we can. The question is, do we have the will to try? I hope we do. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Leahy. Senator Cruz.

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

Senator CRUZ. Thank you, Mr. Chairman. The hearings that Democrats decide to hold demonstrate their priorities, what they care about. We have a crisis raging on our southern border right now because of Joe Biden's lawless and open border policies. The head of the Biden Department of Homeland Security is informing its staff to prepare for up to 400,000 illegal immigrants crossing this month, and yet the Senate Judiciary Committee has not had a single hearing on the crisis on our southern border.

Over two million illegal immigrants streaming into America. Democrats don't care. Hundreds of thousands of kids in cages. Democrats don't care. Every Democrat on this Committee went on TV, on and on about kids in cages, kids in cages. You now know what they were saying they didn't believe because if they believed it, there are more kids in more cages that are more full now than there ever were, and not a Democrat on this Committee cares.

Hundreds of thousands of illegal immigrants with COVID. Democrats don't care. Children, by the thousands, being physically and sexually abused by human traffickers. Democrats don't care. Drugs streaming across our border. Democrats don't care. Young women being trapped in sexual slavery by human traffickers. Democrats don't care.

What do they care about? This illustrates what they care about. Democrats have one priority, and that is power. Staying in power. That's why Democrats have had four hearings on amnesty. They look at two million illegal immigrants, and they think, "Ooh, future Democratic voters. Let's give them all amnesty." Never mind the abuses that happen. This is about power for our Democratic friends.

But you know what? There's something they've had more hearings on than amnesty, and that is the Federal takeover of election law and the Democratic power grab. There is nothing that is a higher priority for Democrats than staying in power. The Corrupt Politicians Act was so brazenly political, it was such a naked power grab, that Democrats have abandoned it when they realized they couldn't defend it with a straight face.

This is their fallback provision. Senator Leahy mentioned his version of the bill in the Senate. That was filed at 12:45 last night—is when Committee Members were notified of it. There are a lot of terrible provisions in the bill, but let me just cover two, briefly. Department of Justice preclearance for everyone Democrats don't like and Department of Justice preclearance for everything Democrats don't like.

Here's how it would work. Every State and local government across the country would have to submit certain voting changes. What voting changes? Anything like imposing voter ID on elections or preventing ballot harvesting, to Kristen Clarke and Vanita Gupta, two partisan activists who haven't been shy about their hatred of voter integrity laws, before those changes can go into effect.

All right, spoiler alert. If it is a law protecting the integrity of the election, if it's a voter ID law, if it's prohibiting balloted harvesting, the partisan activists at the Department of Justice are going to object, because they've been explicit they oppose all those laws. Similarly, any State and local government that the Democrats don't like, they have to submit every voting change to the same partisan activists.

Let me give you an example of how crazy this is, just by analogy. Can you imagine if Republicans proposed a law that said that States like California and New York and Illinois have to submit every law or policy affecting religious liberty or affecting firearms to a brand-new division of the Department of Justice staffed almost entirely by activists who have been fighting in favor of religious liberty and in favor of the Second Amendment their entire time, and if these activists objected to the California or New York law, then the States couldn't implement it? That would be absurd. That's what the Democrats have done. And, ironically, the Democrats claim they're protecting the right to vote.

This bill is an assault on the right to vote. Why? Number one, ballot integrity acts like VOTER ID Acts prevent voter fraud. Sadly, Democrats have looked at the bipartisan Carter-Baker provision, shared by former Democratic President Jimmy Carter, and just about every recommendation on how to prevent voter fraud they've turned on its head, and said, "We want more fraud because fraud benefits Democrats."

Second, the laws that they want unelected bureaucrats to strike down are laws adopted by democratically elected legislatures in the States. You don't get to claim, as Senate Democrats do, that you favor democracy when you propose measures to stop democracy. Democracy means the voters decide. This bill is an assault on democracy, because it says, "We don't care that 29 million people in the State of Texas decide, 'We want voter ID,' in accordance with the views of 80 percent of Americans. We don't care." One unelected bureaucrat at the Department of Justice who happens to

be a radical left-wing Democratic activist has the power to say, “To hell with democracy. We’re striking down laws passed by democratically elected legislatures.” This is a power grab, it’s cynical, and it’s wrong.

Chair DURBIN. We will now turn to the first panel. On our first panel, we welcome the Assistant Attorney General for Civil Rights, Kristen Clarke, back to the Committee. Assistant Attorney General Clarke is a lifelong civil rights lawyer, spent her entire career in public service. At the Justice Department, she oversees Federal civil rights enforcement efforts and works to uphold civil and constitutional rights. She first began her career as a trial lawyer in the Civil Rights Division. Before her confirmation to her current role, she served as president and executive director of the Lawyers’ Committee for Civil Rights Under the Law.

Let me lay out the mechanics for the rest of the hearing. After we swear in the Assistant Attorney General, she’ll have five minutes for an opening statement, then rounds of questions. I hope each Senator will abide by our standard, to try to keep their questions to five minutes or less, as we have some roll-call votes which will call some Senators out of the Committee from time to time.

Following that, we will switch to our second panel, and Senator Ossoff will take over presiding. We will once again have 5-minute opening statements from each witness and 5 minutes of questions per Senator.

Assistant Attorney General Clarke, could you please stand, to be sworn in?

[Witness is sworn in.]

Chair DURBIN. Let the record reflect that she answered in the affirmative. Please proceed with your opening statement.

**STATEMENT OF KRISTEN CLARKE, ASSISTANT
ATTORNEY GENERAL, CIVIL RIGHTS DIVISION,
DEPARTMENT OF JUSTICE, WASHINGTON, DC**

Assistant Attorney General CLARKE. Chairman Durbin, Ranking Member Grassley, and Members of the Senate Judiciary Committee, my name is Kristen Clarke, and I serve as the Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice. Thank you for the opportunity to testify on the Department’s work to implement and enforce the Voting Rights Act and the need to revitalize and restore the Act.

The Voting Rights Act is, as President Johnson said, one of the most monumental laws in the entire history of American freedom. It is a law that has helped to truly transform American democracy. However, the progress we have made is fragile. Recently, there’s been a resurgence in attacks on voting rights, including cuts to early voting periods, burdensome restrictions to register or vote, racially gerrymandered redistricting plans, polling sites eliminated or consolidated in communities of color, eligible voters purged from the rolls, and more.

I am here today to sound an alarm. For the Justice Department, restoring and strengthening the Voting Rights Act is a matter of great urgency. The Supreme Court’s 2013 *Shelby County v. Holder* ruling suspended the preclearance process, eliminating the Justice Department’s single most powerful and effective tool for protecting

the right to vote. Before *Shelby*, the preclearance process enabled the Department to swiftly block the implementation of many discriminatory and unconstitutional voting practices. Through Section 5, the Department blocked over 3,000 voting changes, helping protect the rights of millions of citizens. In over 60 percent of blocked voting changes, there was evidence of intentional discrimination. We also know that the preclearance requirement deterred many jurisdictions from adopting discriminatory changes in the first place.

Too many jurisdictions have viewed the *Shelby* ruling as an invitation to adopt rules that disadvantage minority voters. Today, jurisdictions that want to restrict voting rights have what the Supreme Court memorably described “the advantage of time and inertia.” These new laws can be challenged only through long, protracted, resource-intensive, case-by-case litigation which we have pursued in states like Texas and North Carolina.

We are on the cusp of another potentially transformational moment. A new redistricting cycle has commenced. 2020 census numbers show the U.S. has become an increasingly diverse nation, with population growth attributable to increases in the number of people of color. Absent congressional action, this redistricting cycle would be the first in half a century without the full protections of the Voting Rights Act, and jurisdictions may be poised to dilute the increased minority voting strength that has resulted from these natural demographic changes. Without preclearance, the Justice Department will have limited tools to obtain documents and to assess where voting rights are being restricted, thereby hampering enforcement efforts.

The John Lewis Voting Rights Advancement Act addresses several of the barriers I’ve referenced which are impeding the Department’s efforts to protect American citizens’ right to vote. First, the Act responds to the elimination of the preclearance coverage formula by updating the relevant criteria, so that Section 5 coverage is tied to current conduct by jurisdictions. Second, the bill provides greater clarity regarding the appropriate legal standard in Section 2 vote denial cases. Third, the legislation gives the Department authority to compel the production of documents and materials relevant to investigations of potential voting rights violations. Fourth, the bill places new measures to safeguard the rights of Native American and Alaskan Native voters.

In 1965, Congress enacted, and in 1975, 1982, and 2006, reauthorized, a statute that provided the strong medicine needed to remedy voting discrimination and to enforce our Constitution’s commitment to ensuring that no citizen’s right to vote would be abridged on account of race or color. Congress must act now to restore the Voting Rights Act, to prevent us from backsliding into a nation where millions of citizens, particularly citizens of color, find it difficult to register, cast their ballot, and elect candidates of their choice. The Justice Department welcomes this opportunity to work with Congress to revive this bedrock civil rights law. Thank you.

[The prepared statement of Assistant Attorney General Clarke appears as submission for the record.]

Chair DURBIN. Thanks, General Clarke. Let me start the questioning. Texas is the largest legislature—pardon me, the latest legislature this year to attack the right to vote based on the lie of

widespread voter fraud. Last month, Texas Governor Abbott signed S.B. 1 into law. It banned—it banned voting opportunities that made voting more accessible, particularly during the pandemic, such as drive-through voting and 24-hour voting options. It increased access for partisan poll watchers. It prohibited local election officials from proactively distributing applications to request mail-in ballots.

The legislation also restricts the state's vote-by-mail access, including new ID requirements for absentee voters. These voting restrictions come after voters of color used all of these same options at historic levels in the last election. Supporters of the bill—and we've heard it this afternoon in the Committee—claim you've got to do it. It's the only way to stop voter fraud.

The Texas attorney general spent 22,000 hours looking for evidence of fraud. You'd think they really would've made their case. What they found to try to justify S.B. 1 was the following. Only 16 potential cases of fraud out of 17 million registered voters. You remember what happened in Arizona. \$5.7 million spent on the Ninja Turtles who were going through all these ballots, and the net result was more votes for Biden, fewer votes for Trump. This notion of voter fraud is a ruse, as far as I'm concerned. Where there is fraud and waste, we should oppose it, whatever party is trying to make an excuse for it, but in this case, there is no basis for it.

I would like to ask you to put into perspective for just a moment—we know the discrimination based on voting throughout history. It's a horrible chapter, more than one chapter, in our Nation's history, when it comes to civil rights after the Civil War. The question today is, does it take on a different context in light of the big lie; in light of the argument of the previous President that he, in fact, won the last election, though there's no evidence of that; and the attempt to discredit our electoral voting process?

Assistant Attorney General CLARKE. Thank you for the question, Chairman. The Justice Department believes that elections in our country should be open, fair, and free from fraud. We have observed that claims of fraud are exceedingly rare. Should the Justice Department encounter evidence of fraud, the Department stands ready to investigate that fraud.

What the Justice Department has observed is that voting discrimination is widespread. It is a current day problem across our country, in Texas, and in many other parts of the country. The Justice Department spent several years tackling the State's voter ID law. We know that the State of Texas spend about \$3.5 million defending that law. The Justice Department is here to make the case for restoring the preclearance provision so that we can ensure that elections are free, open, and fair across our country.

Chair DURBIN. It seems, when you read *Shelby County and Brnovich*, that the argument being made by the Supreme Court is, sure, it was a problem in the old days, but it's just no longer a problem that would require preclearance. Yet, you look back not that far in history, a three-judge panel in 2016 examining a 2013—2013 North Carolina voting law that required strict voter ID and limited early voting, the judges wrote, quote “targeted African Americans with almost surgical precision.” This was no coincidence, the Court found, noting that before enacting the law, the

legislature request data on the use, by race, of a number of voting practices. Upon receipt of the race data, the general assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affect African Americans. That's 8 years ago.

The question I have for you, is there evidence now, what we're seeing in the States, of recurrence of this theme?

Assistant Attorney General CLARKE. Yes. In the Department's view, voting discrimination is a current day problem. The Justice Department has found that Section 2 litigation which it brought in the States that you reference, North Carolina and Texas, have proven to be an inadequate substitute for the important protections that had long been provided by Section 5. The advantage with Section 5 is that it blocks these discriminatory laws from ever taking root in our electoral process. While the Department had Section 5 in place, the Department blocked 3,000 discriminatory voting changes, about 60 percent of them having evidence of intentional discrimination. Our hope is that these hearings will lead to a restoration of what has been one of the most important and powerful tools for the Department to do its work of safeguarding the right to vote in our country.

Chair DURBIN. Thank you. Senator Grassley.

Senator GRASSLEY. Yes. General Clarke, I'm going to quote some polls that you probably know exist, but I'm going to quote them anyway. Monmouth, 84 percent of non-white respondents said that they supported requiring photo ID. Sixty-two percent of the Democrats said they supported requiring photo ID. That number rose to 87 percent among Independents, 91 percent among Republicans.

Two questions for you. How do you square prevailing public sentiment with your comments that photo ID is a burdensome proof of citizenship required and, your words, a "bag of tricks" to suppress Black votes?

Assistant Attorney General CLARKE. Thank you, Ranking Member Grassley. The Department does not believe that voter ID laws, on their face, are unlawful. The Department carries out its work by looking at the particular photo ID law that may have been adopted in a particular State. It looks at data, with the support of experts, to determine who has access to the particular forms of ID that are deemed qualifying under a particular law. We follow the facts and apply the law.

Photo ID laws are not, on their face, invalid. It really depends on where that photo ID law has been instituted. It depends on the form of the ID and the kinds of ID that may be permissible on that law, and whether or not there are disparities in who has access to the particular category of IDs called for by a law.

Senator GRASSLEY. The overwhelming majority of Americans, as according to these polls, support ID requirements. Do you think most Americans support voter suppression? Because you said it would suppress Black votes.

Assistant Attorney General CLARKE. The Department believes that our elections should be free from discrimination. Particular photo ID laws or purge programs or decisions to shut down polling sites may have a discriminatory impact on minority voters. What we have found in the course of our work at the Department is that

these are fact-specific, fact-intensive, and context-specific inquiries, Senator. These kinds of analyses are conducted by the career employees at the Department who will look at a particular law, a particular photo ID law, to determine whether or not it runs afoul of the Voting Rights Act or the Constitution.

Senator GRASSLEY. You gave me a Department answer, and that's appropriate, but my question is whether you think these ID requirements—that because Americans say they're for them, and you say they're a way of suppressing Black votes, you think Americans support voter suppression?

Assistant Attorney General CLARKE. Senator, I think that these polls are helpful, but the Department conducts its work by looking at the facts——

Senator GRASSLEY. Okay. Let——

Assistant Attorney General CLARKE [continuing]. And applying the law.

Senator GRASSLEY. Let me go on to another question. The Department of Justice recently filed a lawsuit against Georgia's election reforms. Will the Department of Justice bring enforcement action against New York for only allowing 10 days of in-person voting, or Delaware for never permitting early in-person voting? If you say no to that, if you don't plan to bring an action, then how can you challenge Georgia's Senate Vote Bill 202, which has more lenient provisions than both New York and Delaware?

Assistant Attorney General CLARKE. Senator, I can't comment on pending investigations and if any such investigation exists, but what I can tell you is that the Department is committed to protecting the right to vote in every corner of our country. In New York, for example, we recently resolved a matter involving a county that ran afoul of the National Voter Registration Act and the Help America Vote Act. We're committed to eliminating discrimination, root and branch, wherever it rears its head across our country.

Senator GRASSLEY. I was very gratified to see that the 2020 Presidential election, despite the pandemic, quote, “featured the largest increase in voters between two Presidential elections on the record, with 17 million more people voting than in 2016”, end of quote. Additionally, in 2020, non-Hispanic Blacks had a higher voting turnout than in 2016, 63 percent, as compared to 60 percent. It would seem to me that we should be encouraging these high turnouts without restrictions. What, about these statistics, justify the imposition of preclearance?

Assistant Attorney General CLARKE. Thank you, Senator. The statistics that you share certainly reflect a story of progress. What the Department has found is that in particular communities across our country, voting discrimination remains a real and ongoing problem. We saw this in Texas, in North Carolina, where the Department was engaged in longstanding Section 2 litigation against discriminatory measures in those places. We saw this recently in New York, in the matter that I referenced involving violations of HAVA and the NVRA. We saw this in New Jersey, where we recently resolved a statewide NVRA claim. While there has been progress, we know that voting discrimination remains alive and well in many local, State, and other jurisdictions across the coun-

try, and Section 5 has proven to be an important tool to identify and block voting discrimination.

Senator LEAHY. [Presiding.] Thank you. I have a couple of questions, and as you know, some of us have been running in and out.

Senator BLACKBURN. Mr. Chairman, do we have an order, so that we will know when we're in the queue? Senator Blackburn, here.

Senator LEAHY. No, I know who you are. We've met before. Yes.

Senator BLACKBURN. No, I was just asking if——

Senator LEAHY. Well, the——

Senator BLACKBURN [continuing]. We have an order in the queue.

Senator LEAHY. The Republican side would——

Senator BLACKBURN. Okay.

Senator LEAHY [continuing]. Determine who——

Senator BLACKBURN. You got——

Senator LEAHY [continuing]. They're supposed to——

Senator BLACKBURN. Okay. Thanks.

Senator LEAHY [continuing]. Have, and if we go by order of arrival, of course, Senator Durbin and I and Senator Grassley are the three here ahead of everybody else, but what—so, if we could start my time over again?

Assistant Attorney General Clarke, I am glad you're here. I think this is important that we all be here. As the lead sponsor of the John Lewis Voting Rights Act, I'm alarmed by the toxic and partisan rhetoric around restoring the Voting Rights Act. As a child, I remember going with my parents, when they would go to vote, and they told me, "This is a sacred right. Everybody should have it."

For decades, since I've been here in the Senate, Republicans and Democrats come—came together to strengthen this landmark law, and so I can't understand the partisan rancor that's going around with it now. Why is it so important for Americans of all parties, all backgrounds, to believe that this issue should unite us, not divide us?

Assistant Attorney General CLARKE. Thank you for that question, Senator. The right to vote is one of the most central rights in American democracy, and we know that the Voting Rights Act has enjoyed tremendous bipartisan support throughout the years, during its authorization in 1965, during subsequent reauthorizations in 1970, 1982, and 2006. I am recalling the statement that President Bush made when he signed the bill into law in 2006. He observed that he was renewing a bill that helped to bring a community on the margins into the life of American democracy.

The Justice Department knows that partisanship has no place when it's come to enforcement of the Voting Rights Act. This work has been about ensuring that all Americans enjoy equal access to the ballot, regardless of race; that all Americans enjoy an electoral process that is free from discrimination. The Justice Department welcomes this opportunity to work with Congress now to restore a law that truly has proven to be one of the most effective laws ever passed by Congress.

Senator LEAHY. For those of us—and I know you do, and I do believe that everybody should have the right to vote, Republicans, Democrats, Independents, whoever they are, if we're going to preserve a democracy. Some would say this is a—and some have

claimed, even from this Committee, that there's some kind of nefarious attempt by Democrats to usurp States' rights and sovereignty. If so, I would—nobody in my State would allow me to vote for it. Nothing could be further from the truth.

Can you explain in simple terms why the John Lewis Voting Rights Advancement Act is a balanced approach and that safeguards are included in the legislation to ensure that States have ample opportunity to assert their rights and defend their procedures?

Assistant Attorney General CLARKE. The Department has observed a number of important features about this bill. It makes bailout easier, so that jurisdictions that have a clean record and a clean bill of health can exempt themselves from the preclearance obligation. We observed that there are States, throughout time, such as North Carolina and Mississippi, that joined an amicus brief in the *Shelby* case, who indicated they enjoyed the benefits of preclearance, that they appreciated the flexibility and latitude that the process provided.

The career employees at the Justice Department who handle the preclearance process have had good working relationships with local and State election officials. Jurisdictions also have the option of bypassing the Justice Department and going to the courts for judicial review instead. There's been a long history of good collaboration between the Justice Department and local and State jurisdictions in administering the preclearance process. This is a process that has, at the end of the day, helped to block voting discrimination and has helped to rid discrimination from our electoral process.

Senator LEAHY. Thank you. I hope we can continue to work together on this, to make sure we can find a path to enactment. I'm including in the record now the House Judiciary Committee's record addressing voting rights and the Voting Rights Act of the Senate Judiciary Committee record, and without objection that will be included.

[The information appears as submission for the record.]

Continue to work with us, because I was thrilled to be standing with leading—if I could have that photograph back, just for a moment, and then I'll yield the floor. I was thrilled to be standing with leading Republicans and Democrats when we last signed this bill, in saying, "See, it's for America. It's not for either political party. It's for America." And that's what we want.

To answer Senator Blackburn's question, actually, Senator, I'm told Senator Lee will be recognized and then Senator Klobuchar. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Ms. Clarke, let's talk for a minute about what States can do. Does California have the authority, and should it have the authority, to adopt more stringent air quality standards than the Federal standards in place without receiving preclearance from the United States Government?

Assistant Attorney General CLARKE. Senator, this is not an area that I work in. I suppose, but this is not an area that I work in.

Senator LEE. What about areas that are protected by the Bill of Rights? Let's suppose that a State wants to pass laws dealing with COVID-19 that might have the impact of restricting religious free-

dom by, for example, restricting the number of people who may congregate in a church or otherwise. Should laws like that have to first receive preclearance before they can be enacted by a State?

Assistant Attorney General CLARKE. Senator, I'm here to talk about the right to vote, which falls to the 14th and 15th Amendments, and Congress has broad—

Senator LEE. Thank you.

Assistant Attorney General CLARKE [continuing]. Powers to—

Senator LEE. Sure. Sure.

Assistant Attorney General CLARKE [continuing]. Enforce—

Senator LEE. I assume you'd also agree that, through the 14th Amendment, Congress also has broad powers to protect other fundamental individual rights, including religious freedom. What about the Second Amendment? What about gun laws? Should a State be required to receive preclearance from Federal officials before adopting gun restrictions?

Assistant Attorney General CLARKE. This is not an area that I work in, in the Civil Rights Division, but I do know that the right to vote is unique. It's special, and it's something that the Supreme Court has routinely said that Congress has broad enforcement powers under the 14th and 15th Amendments to protect.

Senator LEE. Sure. Those broad powers also extend to other rights that people have. You know, I think that it's important for us to remember that our Nation is built on this principle of respect for the sovereign entities that our States are and for the ability of each sovereign State, for the people, through their elected representatives, to be able to adopt laws that they deem fit, because of course the sovereigns in our republic are, in fact, the people. The people have yielded some of their sovereignty up to the States. In other areas, they've yielded it to the Federal sovereign.

The Supreme Court of the United States has made this very clear in a number of cases over the years, including the Supreme Court ruling in the *Shelby County* case, in which the Supreme Court of the United States said, quote, "The Federal Government does not have a general right to review and veto State enactments before they go into effect." In fact, the founding fathers considered—and expressly, decidedly rejected—giving the Federal Government the power to provide what they referred to as a negative, or a veto, over any and all State laws.

We don't advocate for preclearance even in areas surrounding our constitutional rights and the constitutional rights belonging to individuals. If the laws passed by a State happen to violate the Constitution, we do, of course, have a procedure in place for challenging those. They go to the Federal judiciary. The parties can litigate those after, of course, the constitutional arguments are made to the legislative body considering them. If they fail there, they can raise them with the judiciary after they become law.

We've got to be very careful that we don't neglect this principle of federalism in our lawmaking processes, and we can't do this here. We can't sacrifice this principle, even for rights that we consider important, because the sovereignty of the people is also important. But there again, if the States do something unconstitutional, their enactments can be deemed unconstitutional, and the

enforcement of those laws and their implementation can be enjoined.

Unfortunately, we've had a number of politicians, including some progressives, who aren't satisfied with merely dictating voting procedures to the states. In fact, then-Senator Kamala Harris, in 2019, proposed using preclearance to usurp State control over regulations involving health, safety, and welfare situations arising in the context of abortion.

Ms. Clarke, when I hear from you, your remarks and your testimony—and one of the things that I hear from you is that the average American's concern about the integrity of our elections is somehow based in racism. Fortunately, the facts don't support that premise. Progressives have tried to label any integrity election protection procedure, such as the laws that have been passed, for example, in Georgia of late, as somehow amounting to racist voter suppression, and yet these provisions have strong support from voters across the political spectrum, including among minority voters. Can you tell me, Ms. Clarke, what exactly is racist about requiring a person to provide a voter ID when participating in the precious, sacred, constitutionally protected process of voting?

Assistant Attorney General CLARKE. Thank you, Senator. The inquiry is whether or not a particular law is discriminatory, and we won't know that until we actually look at the facts. We look at the particular law at issue, and we look at where is it being applied, and are there racial disparities in terms of who has access to, example, to the limited forms of ID that might be called for by a law? I think the inquiry is about discriminatory effect and discriminatory purpose.

Senator LEAHY. I would note that the Senator's gone considerably over his time. I didn't want to interrupt him, but—

Senator KLOBUCHAR. Yes.

Senator LEAHY [continuing]. I'll turn to Senator Klobuchar. I do that because we're having votes going on, and people are trying to go back and forth.

Senator LEE. Thank you, Mr. Chair.

Senator LEAHY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you, Mr. Chair. Thank you very much for being here today, Ms. Clarke. I just want to get some basic facts, here. In the Supreme Court's 5–4 decision in *Shelby County v. Holder*, the majority wrote that when Congress establishes a process for preclearance, it must do so in a way—and this is the Court decision—that makes sense in light of current conditions. It cannot rely simply on the past.

How do the updates to the Voting Rights Act in the John Lewis bill respond to the Supreme Court's critique, and do you agree that it's relevant to our evaluation of current conditions that this year alone over 400 bills have been introduced across the country to roll back voting rights, and at least 31 of them have been signed into law?

Assistant Attorney General CLARKE. Thank you, Senator. The bill does a number of things. It tethers the preclearance formula to current conditions, which as you note, is the instruction from the Supreme Court in the *Shelby* ruling. I also deem these hearings that Congress has been conducting since at least 2019 to be impor-

tant because they've provided an opportunity for Congress to hear about those current conditions on the ground across the country.

The rule—bill also provides stronger protections for Native American and Alaskan Native voters, which is important, and does a number of other things including clarifying the standards to be applied in Section 2 vote denial cases and more.

Senator KLOBUCHAR. Thank you very much. Do you agree, and I know you're familiar with the Freedom to Vote Act. We know the John Lewis Bill—let me just step back—will stop States with a history of racial discrimination from rolling back voting rights in the future. It would also counteract some of the laws that States have already passed through a new provision in section two that would apply to changes in voting laws made this year.

Do you agree that in order to protect Americans' right to vote, Congress must pass both the John Lewis Bill and the Freedom to Vote Act, which as you know, is a negotiation Senator Manchin, and myself, and Senator Padilla, on this Committee, Senator Warnock, Senator Merkley, Senator Kaine and King, and Senator Schumer put together.

Assistant Attorney General CLARKE. Thank you, Senator. The Department is here to speak to the importance of the John Lewis Voting Rights Advancement Act today and welcomes the opportunity to work with Congress on other ways and other bills that might strengthen voting rights in our country.

Senator KLOBUCHAR. All right. I was listening to Senator Lee's questions, and it made me think of my own real-world experience here going down to Georgia. I took the Rules Committee, which I Chair, to Georgia for a field hearing, our first one in decades, about its new voting law, which includes egregious provisions, which is why major companies have come out against it, like reducing the number and availability of ballot drop boxes, putting new limits on early voting, allowing politicians to fire local election officials, changing the time of the runoff to 28 days and then not allowing for any weekend voting during that time period. Making voters put their birthdate on the outside of the envelope. That's the internal envelope instead of the day they cast the ballot, which is meant to sow confusion. Not allowing for registration during the runoff period.

What is the impact of laws like the one in Georgia on voter participation, especially among voters of color in both urban and rural areas?

Assistant Attorney General CLARKE. Senator, the Department has pending litigation against the State of Georgia, and so I can't comment on pending litigation. What I can say is that the case-by-case work that the Department has been engaged in has not been an adequate substitute for the important work that we've been able to do when we had Section 5 in place, blocking thousands of discriminatory voting changes from ever taking root in the country.

Senator KLOBUCHAR. Very good. Finally, Congressman John Lewis called voting, "the most powerful nonviolent tool we have to create a more perfect union," and that's how I see it. I have a State that has the highest voter turnout nearly every single election, including the last one. Honestly, Mr. Chairman, with voting laws that allow for things like same-day registration, we have elected

Democratic Governors like our Governor Tim Walz, Republican Governors like Tim Pawlenty, and independent Governors like Jesse Ventura.

I just see the difference. It's not what party gets elected. The changes that people feel like they're part of the franchise, and that we're making it easier for them to vote. Why is it important, Ms. Clarke, to strengthen and restore the Voting Rights Act, particularly after several Supreme Court decisions have rolled back the Justice Department's ability to enforce the law's protection?

Assistant Attorney General CLARKE. Senator, the right to vote is one of the most important Civil Rights in our country. It is the right from which other Civil Rights are derived. It speaks to principles that lie at the heart of our Constitution. We know that the Constitution vests this body with broad powers under the 14th and 15th Amendment to ensure that our elections are free from racial discrimination. We welcome this opportunity to work with you and other Members of the Committee to achieve that goal.

Senator KLOBUCHAR. Thank you very much.

Chair DURBIN. [Presiding.] Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. Ms. Clarke, you're in charge of policing the Civil Rights Division at the Federal level. Does it raise civil rights concerns when the Government attempts to intimidate citizens who are exercising their First Amendment freedom of speech?

Assistant Attorney General CLARKE. Thank you, Senator. We do not want intimidation in our society.

Senator BLACKBURN. It would concern you if there was an exercise against an individual's free speech, correct?

Assistant Attorney General CLARKE. The First Amendment is important, and we also do not want a society with intimidation.

Senator BLACKBURN. Did President Biden promise to keep the DOJ apolitical?

Assistant Attorney General CLARKE. He has. Attorney General Garland has made clear his commitment to ensuring that partisanship will not impact our enforcement work.

Senator BLACKBURN. Okay. Yes or no. Did the Teachers Union write a letter to DOJ asking you to use the Patriot Act to target concerned parents who voice their opposition to the indoctrination of their children, yes or no?

Assistant Attorney General CLARKE. This is not a matter that the Civil Rights Division handled. I'm aware of the memorandum issued by the Attorney General, which speaks to threats and intimidation that some school officials have experienced in our country, and that's not activity protected by the First Amendment.

Senator BLACKBURN. You're saying a parent going to a school board and expressing their dismay with CRT, or with the mask mandate, is not protected speech. Is that what you're saying?

Assistant Attorney General CLARKE. I believe the Attorney General's memorandum deals with threats and intimidation and harassment.

Senator BLACKBURN. Okay. Let me ask you this then. Did DOJ issue the directive to the FBI to target parents in direct response to this letter from the Teachers Union, yes or no?

Assistant Attorney General CLARKE. Again, this is not a matter that the Division handled, but what I can tell you is that the Attorney General said that, quote, "Threats against public servants are not only illegal, they run counter to our Nation's core values."

Senator BLACKBURN. Do you believe it's appropriate to treat parents as domestic terrorists for daring to ask elected school board members questions about what is being taught to their children?

Assistant Attorney General CLARKE. Senator, while this is not a matter that the Civil Rights Division handled, this is a memorandum issued by the Attorney General. I know that the Department is committed to ensuring robust civil discourse.

Senator BLACKBURN. Do you see any difference in somebody being a concerned parent and going to a school board meeting and asking questions, and then that individual being labeled a domestic terrorist, and this being carried out by the FBI and the DOJ? Is that not a problem or a concern to you?

Assistant Attorney General CLARKE. The Attorney General's memorandum is focused on threats, on intimidation, harassment—

Senator BLACKBURN. Do you see parents as a threat?

Assistant Attorney General CLARKE. I don't.

Senator BLACKBURN. Do you see parents asking questions as a threat? Does DOJ see parents asking questions as a threat? Because we've seen reports from teachers, parents, and other members of a private Facebook group in Loudoun County, Virginia that have been accused of compiling a list of names of district parents who oppose Critical Race Theory in order to track, hack, and dox them, or even intimidate them into self-censorship. Should these teachers and other members of this private Facebook group be pursued by the FBI as domestic terrorists as well?

Assistant Attorney General CLARKE. Senator, free speech is a hallmark value.

Senator BLACKBURN. It's free speech for teachers that want to track parents, but it's not free speech for parents that want to show up at a school board meeting and make their displeasure known and engage in public discourse because those parents, taxpayers, are paying the bill for that.

Let me ask you this. Attorney General Garland. I've seen reports of his family connection to Panorama Education over data harvesting and holding data on students and having contracts with school boards. We've had quite a bit of discussion about Facebook and the way they market and data mine children as young as 8 years old. Are you aware of that?

Assistant Attorney General CLARKE. This is not an issue that the Civil Rights Division works on, but I'm generally aware.

Senator BLACKBURN. Okay. You all work in stovepipes is what you're telling me, and that you have no knowledge or information about what is being done to parents and how they are being labeled, and this directive for the FBI to go and investigate parents who are standing up for what their children are being subjected to in some public school systems. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Blackburn. For the sake of everyone here, circumstances on the floor are fluid, and there's negotiations and conversations back and forth at the leadership level.

The Democrat leader is asking for a caucus immediately after the end of this first roll call, which will be soon. I would like in fairness to have two last witnesses before we recess, both of whom have been here before this announcement clearly, Senator Coons and Senator Cruz. I recognize Senator Coons.

Senator COONS. Thank you, Chairman Durbin, and thank you Attorney General Clarke. Thank you. Thank you for a lifetime of dedication to the Constitution, to voting, to finding a way where there seems to be now no way to fighting for the foundation of our democracy, which is the right to vote.

I have a picture on my iPad, and I'm smiling in this picture. I'm with Congressman John Lewis. I'm at the foot of the Edmund Pettus Bridge, and I'm holding up a piece of legislation. It's a piece of legislation that then Chairman Leahy and I and our staff had worked tirelessly on over a year. It was to fix the hole blown in the preclearance section of the Voting Rights Act by the *Shelby County* decision, a carefully balanced, sensible approach toward restoring the effectiveness of preclearance in the modern era, the way that it is in this bill. In a minute, I'll just ask you to walk us through what that balance is that the now John Lewis Voting Rights Restoration Act would do.

I have to say I'm sick at heart. I was smiling that day because I was so hopeful, and because I was in the presence of a living saint; someone who had borne the blows and given his own blood in a dozen places across our country, in a dozen instances. Set upon by howling mob when he was on a Greyhound bus as part of the Freedom Rides; attacked by a Klansman when he dared to stand up and speak for his rights; challenged by folks who spit on him, or beat him, or attacked him, or jailed him. Yet in the time I got to spend with John on five different pilgrimages like this, both in our country and to South Africa, he struck me as one of the most generous, kindhearted, humorous, spirited people.

The thing that always challenged me about John was that he believed in America far long before America believed in him; that he grew up in a town that was struggling, sweltering under racial oppression, and he never gave up hope. I must confess there are moments now listening to my colleagues, and the ways in which they are ignoring or mischaracterizing or maligning or misstating the work of the Department of Justice, the intention of this bill that I am struggling to remain hopeful.

I'll just say this. If John could remain hopeful, if Congressman Lewis could remain hopeful, oddly confident, supremely, even serenely at times, certain that in the end, democracy would win out, so must we, even at a moment when it seems so difficult, so even hopeless. I will challenge my Republican colleagues to be true to the decades-old tradition of this Voting Rights Act won by so much sacrifice, being reauthorized and reauthorized, improved and improved over decades from 1965 to its most recent reauthorization.

By negotiating together and finding a way forward, we have right in front of us a tremendous vehicle. The John Lewis Voting Rights Advancement Act could be the path forward for that next step toward a more perfect union. If you would, we've heard today at this hearing objections that somehow subjecting certain localities

to preclearance is fundamentally unfair. It's unfair to its citizens. It's an undue burden on their State sovereignty.

My recollection was, as we first crafted it, this formula doesn't punish or shame any particular locality. It ensures voters within a jurisdiction with a demonstrated pattern of discrimination over 25 years are protected from a further erosion of their rights, and the formula permits a jurisdiction to emerge from preclearance after 10 years of a clean record.

Can you just remind us briefly in the minute I've given you, Ms. Clarke, how that preclearance framework balances local government prerogatives to manage and control their electoral arrangements and decisions with protections for that most important and foundation constitutional right, the right to vote?

Assistant Attorney General CLARKE. Thank you, Senator. If I may, I just wanted to share a recollection of Congressman John Lewis. I recall him being on the Senate floor shaking the hands of many Members of this body in 2006, leading up to that 98-to-0 vote in favor of reauthorization. I hope and believe that that level of bipartisan support for one of this body's most important Federal civil rights laws remains possible today.

The John Lewis Voting Rights Advancement Act contains a number of provisions. It contains a bailout provision that would allow jurisdictions with a clean bill of health a way to exempt themselves from the preclearance obligation. Judicial review is available to jurisdictions that want to bypass the Justice Department, and instead proceed to court. There's a long history of good and strong collaboration between the Justice Department and local and State election officials.

The Justice Department has carried out its review of voting laws in 60 days or less. It's done so in a transparent manner, publishing guidelines that walk the public and officials through the process that it undertakes when reviewing a voting law. We've heard from states like Mississippi and North Carolina that told the Supreme Court in the *Shelby* case that DOJ is flexible and has latitude in how they handle the Section 5 process.

I think this bill, again, makes clear that there is flexibility and latitude and respect for local and State jurisdictions that are administering their local law. The goal is simply about blocking and deterring discriminatory voting changes so that they would never take root in a community.

Senator COONS. Thank you. Thank you so much for your testimony today, and thank you for your determined and capable leadership of the Civil Rights Division.

Assistant Attorney General CLARKE. Thank you.

Senator COONS. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Coons. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. Ms. Clarke, when you testified before this Committee and when Attorney General Garland testified before this Committee, you both promised to be non-partisan and impartial. I'm sorry to say that I think neither of you have lived up to that promise.

Within weeks of President Biden being sworn in, the Department of Justice dismissed a Civil Rights Division lawsuit it had against Yale University for explicit racial discrimination. Yale has a policy

that discriminates against Asian Americans at admissions. It does so brazenly and openly. Yet, the Department of Justice decided that preventing racial discrimination did not fit within the purview of the Biden DOJ.

In your defense, you were not yet there. Neither was Merrick Garland. That was merely the initial political operatives of the Biden administration doing what they believed was consistent with the preferences of the President.

Just this week, after you were there, after Merrick Garland was there, the Department of Justice issued a memorandum to the FBI instructing them to mobilize against parents across the country, parents of school kids, who have the temerity to show up at school boards and express their opposition to the teaching of Critical Race Theory, a pernicious theory that divides us on racial lines, that tell school children the lie that America is fundamentally racist, that American is irredeemably racist, that all white people are racist. It spreads racial division. Many parents are understandably quite dismayed at schools that are teaching this to their children, sometimes as young as five. Yet the Department of Justice looked at that issue and decided to label the parents objecting to this teaching as domestic terrorists. Did you participate in discussions about the memo before it was issued?

Assistant Attorney General CLARKE. Senator, I can't talk about internal deliberations inside the Department.

Senator CRUZ. You can't talk about whether you participated in discussions about the memo?

Assistant Attorney General CLARKE. No, but what I can tell you is that the Civil Rights Division will play a role going forward. The Attorney General has asked the Department to undertake a review, and the Division will participate in that review to determine how Federal enforcement tools can be used to prosecute crimes.

Senator CRUZ. Do you believe parents objecting to the teaching of Critical Race Theory have civil rights in the democratic process?

Assistant Attorney General CLARKE. I don't follow the question, Senator.

Senator CRUZ. You don't understand the question, whether parents objecting to Critical Race Theory have civil rights?

Assistant Attorney General CLARKE. The First Amendment is a core value in our democracy and—

Senator CRUZ. I didn't say free speech. I said civil rights. School board meetings are democratic. They are petitioning your local government. Do they have civil rights that the voting rights gives a damn about?

Assistant Attorney General CLARKE. Yes, they have the right to express their view to challenge the school boards, to ask school boards—

Senator CRUZ. Is it beneficial for the Attorney General to label them as domestic terrorists and direct the FBI to target them?

Assistant Attorney General CLARKE. The Attorney General's memo deals with threats against public servants and says that threats against public servants are not only illegal, they run counter to our Nation's core value.

Senator CRUZ. Do you believe parents objecting at school boards are domestic terrorists?

Assistant Attorney General CLARKE. I don't, Senator.

Senator CRUZ. Do you believe Antifa are domestic terrorists?

Assistant Attorney General CLARKE. I don't have a view about Antifa.

Senator CRUZ. Do you believe the Black Lives Matter protestors who burned shops, who firebombed police cars, who murdered police officers, do you believe they're domestic terrorists?

Assistant Attorney General CLARKE. Senator, I believe that we live in a society where people espouse different views, but what we don't want are threats of violence.

Senator CRUZ. You know, Ms. Clarke, it is amazing that you're not willing to condemn people who are murdering police officers and firebombing cities because your politics aligns with them, but at the same time when it comes to parents at school boards, you're perfectly comfortable with calling a mom at a PTA meeting a domestic terrorist.

Ms. Clarke, with all due respect, this demonstrates why the Democrat proposal to take someone with as long a partisan record as you have and to put you in charge of striking down any voting rights law in the country that you disagree with is nothing but a partisan power grab.

Let me give another example, because your Division has operated in a purely partisan way. The Department of Justice dismissed the civil rights lawsuits against the State of New York, the State of Pennsylvania, the State of Michigan for those Governors' policies that sent COVID-positive patients into nursing homes, forced the nursing homes to take those patients, a political decision that resulted in tens of thousands of deaths. One of those Governors, Andrew Cuomo, has now resigned in disgrace and his staff had admitted they lied, underreporting the deaths that policy caused. Yet, your division dismissed the lawsuit against those Democratic Governors. How are we to see that as anything other than a purely partisan decision?

Assistant Attorney General CLARKE. The letters that were issued to officials in the matters that you reference were put together by career officials inside the Department.

Senator CRUZ. Career officials can't be partisan?

Assistant Attorney General CLARKE. This Department carries out its work free from political interference.

Senator CRUZ. Are you testifying to this Committee that there are no career officials in the Department of Justice who are partisan?

Assistant Attorney General CLARKE. Partisanship does not impact the way that we carry out our enforcement work.

Senator CRUZ. Except miraculously, you dismissed the lawsuits against Democratic Governors, even when their policies may have caused the deaths of tens of thousands of people. You also dismissed a lawsuit that was brought against a medical center that had a pattern of discriminating against healthcare providers that for conscience reasons, didn't want to implement abortions, even though clear Federal law protects their civil rights. Why did you dismiss that civil rights lawsuit in contravention of Federal law?

Assistant Attorney General CLARKE. General Garland has made clear, and I agree, that partisanship has no place in the enforcement work of the Justice Department.

Senator CRUZ. Except every decision you make is partisan. Your actions contradict those statements.

Chair DURBIN. Your time has expired. We're going to stand in recess, and subject to the call of the Chair, I want to apologize to the witnesses on both sides that this Caucus has been called at the last minute, and it relates to an issue, very timely issue of the debt ceiling. We will return, and I ask you to stand at ease until that opportunity presents itself. Committee stands in recess.

[Whereupon the hearing was recessed and reconvened.]

Chair DURBIN. Welcome back, everybody. General Clarke, thank you. I see Senator Blumenthal is here, and I'm going to recognize you next. Committee comes to order.

Senator BLUMENTHAL. Thank you, Mr. Chairman. Thank you, Ms. Clarke, for your service. One of the chief objections we hear about preclearance is that it imposes substantial burdens on State and local policymakers and election officials to wade through a bureaucracy before making innocent, legitimate policy decisions about how to run their elections. I'm sure you've heard that objection numerous times. We also hear that preclearance empowers activists, unelected, unaccountable bureaucrats at DOJ to make decisions at the expense of local officials.

As the leader of the Civil Rights Division, I'd like to give you a chance to respond to those criticisms. I know— think they were raised before the break, and I'm not sure that you've had a chance to respond to them in detail. I'd like to hear you on that score.

Assistant Attorney General CLARKE. Thank you, Senator. The Department finds that the John Lewis Voting Rights Advancement Act contains a number of provisions that help ensure that the bill is truly focused and tailored on the current problems and current conditions in the country when it comes to voting discrimination. There is a bailout provision in the bill that would make it easy for jurisdictions that have had a clean bill of health to exempt themselves from the preclearance obligation. Judicial review remains available to jurisdictions that want to bypass the administrative process led by the Justice Department, and instead go to the courts. There is a very long and deep history of collaboration between the career officials who administer Section 5, and the States and localities that routinely makes submissions.

The process is also fair and transparent. The Department has published guidelines that outline for the public how the Justice Department undertakes its section review obligation. So, in many respects, this bill is responsive to that concern, Senator.

Senator BLUMENTHAL. By the way, just so everyone understands, the career attorneys in the Department of Justice are responsible to you as the head of the Division, correct?

Assistant Attorney General CLARKE. That's correct. They've undertaken this work for decades across both Republican and Democratic administrations.

Senator BLUMENTHAL. They're accountable to you, and you are accountable to the Attorney General, who in turn reports to the

President of the United States, who was elected by the people of our country.

Assistant Attorney General CLARKE. That is correct. Most importantly, they undertake this work free from political interference, and without any consideration of partisanship at all.

Senator BLUMENTHAL. As you've just said, I understand that any jurisdiction that wanted to avoid the Department of Justice could seek preclearance directly from a district court.

Assistant Attorney General CLARKE. That's correct.

Senator BLUMENTHAL. That's a kind of check and balance, if you will.

Assistant Attorney General CLARKE. That's correct, Senator.

Senator BLUMENTHAL. Thank you. Thanks, Mr. Chairman.

Chair DURBIN. Thank you. Senator Ossoff.

Senator OSSOFF. Thank you, Mr. Chairman. Thank you, Ms. Clarke, for your continued service at the Department of Justice.

Mitch McConnell says the John Lewis Voting Rights Advancement Act is quote, "unnecessary." According to him, "It's already illegal to discriminate in voting based on race, so no one's rights are threatened." Georgia just recently passed a law restricting voting access that targets voting by mail, just after an election where, I don't think incidentally, voters of color relied on absentee ballots at unprecedented levels, and in the case of Black and Asian voters, at higher rates than white voters.

When the preclearance provisions were established in 1965, was it not, Ms. Clarke, precisely because ad hoc litigation proved too costly, time consuming, too easy to obstruct, too easy to delay for the Civil Rights Division to effectively prevent States and local jurisdictions from enacting voting policies that targeted voters of color?

Assistant Attorney General CLARKE. That's correct, Senator. In many respects, we've turned the clock back, because today we are left to case-by-case litigation to challenge voting discrimination that we continue to encounter. The case-by-case litigation that we bring is costly, time-intensive, resource-intensive.

Section 2 litigation under the Voting Rights Act has proven to be an inadequate substitute for the important prophylactic protections that had long been provided by Section 5.

Senator OSSOFF. In fact, by 1963, on the basis of the authorities that the Voting Rights Act of 1957 had afforded the Department of Justice, the Department had filed 35 suits challenging either discrimination or threats against registration applications filed by Black voters. As I believe you quoted in your testimony, then Attorney General Robert Kennedy said that those case-by-case suits were, quote, "a painfully slow way of providing what is after all a fundamental right of citizenship, the right to vote."

Assistant Attorney General CLARKE. That is correct, Senator. While we had Section 5 in place between 1965 and 2013, the Department blocked over 3,000 voting changes. Sixty percent of those changes also had evidence of intentional discrimination. It's a remarkable and sweeping number of discriminatory voting changes that would have taken root, but for the important protections that have been provided by Section 5.

Senator OSSOFF. Thank you, Ms. Clarke. Fueled by Donald Trump's big lie, threats against election workers skyrocketed during the 2020 election. In Georgia, the election workers and officials at all levels, including the Republican Secretary of State and his staff, were harassed and targeted with death threats, as were members of their family. Polling places around the State received bomb threats, from Atlanta to Jackson and Franklin Counties in the Northeast, to Floyd County in the Northwest, and Bullock in the South.

Election workers and election officials being able to work free from intimidation and threats is vital to free and fair elections. That's why earlier this week, I introduced legislation, the Election Worker and Polling Place Protection Act, to expand and strengthen protections for election workers, their families, polling places, and other election infrastructure. I want to thank the Chairman and my colleagues on this Committee for swiftly including my legislation, now in the full text of the John R. Lewis Voting Rights Advancement Act.

My question for you, Ms. Clarke, is do you expect that these threats against election workers and polling places may continue to grow in intensity and become more frequent? Why is it important that we strengthen Federal protections for election workers and polling places in the law?

Assistant Attorney General CLARKE. Thank you, Senator. Attorney General Garland recently convened a meeting of over 1400 election officials across the country, a bipartisan group. We know that threats, harassment of poll workers and election officials is a real issue. We also know that these individuals work tirelessly to run elections in our country, and Americans deserve a process which is fair and open, and poll workers and election officials who conduct these elections in their communities deserve to be able to do their job free from harassment.

The Attorney General has convened an Elections Threat Taskforce to deal with this issue, and the Department welcomes the provisions of this bill, which would put in place important protections to counter this very real threat.

Senator OSSOFF. Thank you, Madam Assistant Attorney General, for your testimony and your service. Mr. Chairman, I yield.

Chair DURBIN. Thank you, Senator. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. It's good to see you, Ms. Clarke. Thank you for the work that you're doing.

Last week, this Committee held a hearing on the Supreme Court's use of the shadow docket to practically overturn *Roe v. Wade* by allowing Texas' unconstitutional abortion ban to take effect. Abortion isn't the only area where the Supreme Court has used the shadow docket to push its radical agenda.

In the leadup to the 2020 election, the Supreme Court used the shadow docket time and again to restrict voters' access to the polls in Wisconsin, Alabama, Florida among other States, each time claiming it was improper for courts to protect the right to vote so close to an election.

Here are three Supreme Court shadow docket rulings that continue, as Justice Sotomayor put it, the Court's, quote, "trend of condoning disenfranchisement." In *Republican National Committee*

v. *Democratic National Committee*, the Supreme Court, in a shadow docket by a 5-to-4 vote overturned a district court's injunction that gave Wisconsin voters six extra days to receive and mail back absentee ballots, many of which had not been received because State authorities had been overwhelmed by record requests for such ballots due to the COVID pandemic.

The Supreme Court did not allow Wisconsin voters those six extra days. It was astounding, because they were trying to use a deadline for returning those ballots or mailing the ballots that had not even been received, so that was pretty hard to explain in my view. The Supreme Court in a 5-to-4 ruling did that.

In *Merrill v. People v.*—I'm sorry—*People First of Alabama*, the court stayed again by a 5-to-4 vote, a lower court order that sought to ensure that citizens with a high risk of contracting COVID-19 could safely exercise their fundamental right to vote. The district court preliminarily enjoined a pair of Alabama laws that enabled persons in these situations to be able to vote safely, but the Supreme Court said no. The Court's controversial—conservative, I'm sorry—majority stayed that relief, forcing high-risk voters to risk their health in order to vote by mail.

In *Racer v. DeSantis*, the court refused to vacate a stay of a lower court ruling that held unconstitutional Florida's scheme of disenfranchising voters too poor to pay outstanding fines and fees. This is like a poll tax. This was the shadow ruling that Justice Sotomayor said it continues the trend of condoning disenfranchisement.

We know that there are some 523 anti-voter bills that have been introduced in some 47 States this year alone. Ms. Clarke, can you think of any time when it's more important to protect voting rights than in the leadup to an election in an environment where hundreds of voter suppression bills are being introduced and where the Supreme Court is continuing its trend to disenfranchise voters? Would you like to talk a little bit about what we're facing and the importance of the kind of legislation we're contemplating?

Assistant Attorney General CLARKE. Thank you, Senator. The Department has observed that since 2013, something has changed. The Supreme Court issued its *Shelby* ruling, and we've started to see States and localities interpret the ruling as essentially a green light to move forward with discriminatory voting measures. The Department has brought litigation in Texas and North Carolina, and currently has pending litigation in Georgia. This case-by-case approach has not proven adequate to confront all of the voting discrimination that we are up against.

Moreover, that case-by-case approach is time-intensive, leads to long, protracted litigation. During the course of the litigation, the discriminatory voting measure is actually allowed to take effect and infects the electoral process. Our hope is that Congress will move quickly and swiftly to restore the Section 5 preclearance process, 8 years after the *Shelby* ruling.

Senator HIRONO. I am running out of time, but the other case, of course, is the *Brnovich* case, which made it hard to even bring a Section 2 case. The more recent Supreme Court case after *Shelby* just created, but basically, I think that the Supreme Court decided to write its own law and set up some criteria that's not even in Sec-

tion 2 so that it makes it that much harder, and again, the reason why we need to pass the kind of legislation we're contemplating. Thank you, Mr. Chairman.

Chair DURBIN. Thanks, Senator Hirono. Senator Padilla.

Senator PADILLA. Thank you, Mr. Chair. Colleagues, when the Voting Rights Act was enacted in 1965, voter registration rates for Black Americans in the South were abysmal up until that point because of the discriminatory laws and policies that made it effectively impossible for them to register.

I point this out because, largely because of the Voting Rights Act, things have undoubtedly improved since 1965. Indeed, more Black voters were added to the rolls in the first 2 years following passage of the VRA than in the previous century. Significant barriers to ballot access remain, and some communities, particularly communities of color, feel the effects of these barriers more than others.

After four decades of—and I want to underscore this. After four decades of overwhelming bipartisan majorities of Congress affirming the need for the Voting Rights Act with several reauthorizations, and in reauthorizing, acknowledging the need for Federal protection of the right to vote, including through preclearance. Protecting the right to vote through preclearance. That happened repeatedly over the course of more than 40 years.

Today, we find ourselves in a place where the Republican Party line is now that Federal protection of the right to vote is tantamount to an unconstitutional Federal takeover of State elections.

My question, Ms. Clarke, is this. In *Shelby County*, the Supreme Court struck down the coverage formula to determine which jurisdictions have to submit to the preclearance requirement. Has the Supreme Court ever held preclearance itself to be unconstitutional?

Assistant Attorney General CLARKE. Thank you, Senator. No. It essentially gave Congress the task to go back to the drawing board to fashion an approach to coverage that tethers the preclearance process to current conditions. We know that Congress has been carefully studying this issue over the last few years, developing a record that makes clear, ongoing voting discrimination remains rampant across the country, and it is not unusual for Congress to respond to a Court ruling. We saw that with the Civil Rights Restoration Act and the Lilly Ledbetter Fair Pay Act. The Department welcomes this opportunity to work with you to update the coverage formula in response to the Court's *Shelby* ruling.

Senator PADILLA. Because conditions have changed since 1965?

Assistant Attorney General CLARKE. Conditions have changed, Senator. We know that voting discrimination remains ongoing today.

Senator PADILLA. No, I understand. At the risk of going off on a tangent here, because I think we can apply that logic even more strongly when it comes to the electoral college, but that's a conversation for another day.

Back on this topic, from a resource and a timing perspective—I'll call it a damage done perspective, can you spend just a minute on the benefits of a preclearance requirement versus a post-enactment litigation?

Assistant Attorney General CLARKE. Senator, the burden on voters is undeniable. A discriminatory voting tactic may have taken

root and infect the electoral process that's playing out in a community. We know that States have spent millions of dollars defending suits. In Texas they spent \$3.5 million defending the discriminatory voter ID law. In North Carolina, more than \$10.5 million spent defending their omnibus bill that the Fourth Circuit found discriminated with almost surgical precision.

The Section 5 preclearance process is swift. It is easy. It is cheap for jurisdictions to comply with it, and it leaves Americans with the benefit of an electoral process that is free from discrimination.

Senator PADILLA. Great. Thank you. Mr. Chair, I want to ask one more question of what may seem to some as not necessarily a voting rights element of this, but it is fundamentally one. Not how people can cast their ballots, but as it pertains to the census and the redistricting process which is pivotal from a voting rights perspective.

Census data shows that the Latino population growth over the last decade fueled the population growth of States throughout the country. In California, for example, data shows that between 2010 and 2020, Latinos accounted for more than two-thirds of the State's population growth. Places like Texas similarly experienced significant growth of their Latino communities. Accounting for Latino population growth and redistricting is therefore critical to ensuring fair representation. This redistricting cycle is unlike any other in the past five decades.

For the first time since 1965, in light of the Supreme Court's decisions in *Shelby County* and *Brnovich*, States will conduct redistricting without the full protections of the Voting Rights Act.

Ms. Clarke, my question is what remaining tools does the Department of Justice have to help ensure a fair redistricting process, and how would the Department's efforts be enhanced by the passage of the John Lewis Voting Rights Advancement Act?

Assistant Attorney General CLARKE. Thank you, Senator. Essentially, we would have Section 2 of the Voting Rights Act at our disposal, and this is not an adequate substitute for the important protections that had long been provided by Section 5. This case-by-case approach simply is not enough to stand up to the breadth and scope of voting discrimination that we see today.

If I may, I just want to underscore the importance of Section 5 when it comes to redistricting. The Department had issued an objection in East Feliciana Parish, Louisiana in 2011, involving a proposed redistricting plan that would have reduced the Black voting age population of a particular district. The Department found evidence that the demographer in this matter worked exclusively with white elected officials in coming up with a plan in which they reduced the Black population and increased the white population, and they excluded Black elected officials in the course of drawing this map.

This example illustrates the important role that Section 5 plays at the local level—at the local and county levels that are often places that are not under a microscope, but places where the Department has found that voting discrimination has been rampant throughout the test of time.

Senator PADILLA. Thank you. Thank you, Mr. Chair.

Chair DURBIN. Thanks, Senator Padilla. Again, General Clarke, I want to apologize for the interruption. It wasn't planned, and we had a rather important caucus. I hope you'll understand. You're certainly always welcome before this Committee and we thank you for your testimony today. Since there are no other Senators seeking recognition at this point, you may be dismissed, as they say. Thank you so much for your testimony.

Assistant Attorney General CLARKE. Thank you, Senator.

Chair DURBIN. There may be written questions sent your way. We'll contact your staff if that's the case, okay?

Assistant Attorney General CLARKE. Thank you.

Chair DURBIN. We're going to call the second panel. I want to welcome Wendy Weiser, who directs the Democracy Program at the Brennan Center for Justice at NYU. She founded and directed the program's voting rights and elections project. Directed litigation, research, and advocacy to enhance political participation, and prevent voter disenfranchisement.

We've also been joined by Jon Greenbaum, who serves as the chief counsel and senior deputy director for the Lawyers Committee for Civil Rights Under The Law, where he is responsible for overseeing the organization's legal project, including voting rights.

In a departure from custom and practice, I have been given the introductions of the two Republican witnesses, and so I am going to give the script that Senator Grassley would give without prejudice.

I'd like to welcome our two witnesses to the Senate Judiciary Committee this afternoon. If we can connect up with him virtually, we're going to have the Attorney General of Indiana Todd Rokita, and Hon. Ken Cuccinelli.

Mr. Cuccinelli, are you still with us? Are you going to be with us virtually?

Mr. CUCCINELLI. I am, Senator.

Chair DURBIN. Good. Thank you. I'm glad you're here. Attorney General Rokita, are you onboard yet? We'll keep reaching out to his office.

Let me say a few words about these two witnesses. The Honorable Ken Cuccinelli, currently National Chairman of the Election Transparency Initiative, decades of experience in Government, Acting Director of U.S. Citizenship and Immigration Services, Acting Deputy Secretary for the Department of Homeland Security during the Trump administration, leading spokesman for a variety of issues including election security, served in the Virginia Senate from 2002 to 2010, and as the Virginia attorney general from 2010 to 2014. He was the last attorney general of Virginia to handle the issue of preclearance. Welcome.

Attorney General Todd Rokita I hope can join us, has a wealth of experience serving the Hoosiers in Indiana. He served as attorney general since he was elected with the highest number of votes of any State office holder in Indiana last year. Prior to that, served as Indiana's Fourth District Congressman from 2011 to 2019. He also served as Indiana Secretary of State from 2002 to 2010. While serving as the Indiana Secretary of State, he led the passage and implementation of the first-in-the-Nation voter ID law, which be-

came a model. Following his success, 35 States followed suit implementing similar laws to protect the integrity of our elections.

First item of business is the swearing in of the witnesses. Could the witnesses present please stand, and those at home stand virtually? I've got to administer the oath.

[Witnesses are sworn in.]

Chair DURBIN. Record will reflect that the witnesses all answered in the affirmative. Senator Ossoff of Georgia is going to join me here in a moment and may be presiding over part of this. We'll start with opening statements of 5 minutes, and the first one we'll recognize is Wendy Weiser. Thank you for coming.

**STATEMENT OF WENDY WEISER, VICE PRESIDENT,
DEMOCRACY PROGRAM, BRENNAN CENTER FOR JUSTICE,
NEW YORK, NEW YORK**

Ms. WEISER. Thank you, Chairman Durbin, Ranking Member Grassley, and Senators of this Committee. Thank you for the opportunity to testify today on strengthening the Voting Rights Act, one of the foundational texts of American democracy, and a critical bulwark against discrimination in our voting system.

Unfortunately, as we've heard at length, in the last 8 years, the Supreme Court has dealt two serious blows to the law, and it is simply no longer strong enough to protect Americans from increasingly aggressive voting discrimination. I thank Senators Leahy and Durbin for their exhaustive work in refining and updating the John Lewis Voting Rights Act. It couldn't come at a more critical time.

The scale of the current assault on voting rights is staggering. At least 19 States have passed 33 laws this year making it harder to vote according to the Brennan Center's latest count. Many of these laws target voters of color, exacerbating persistent racial disparities in access.

Turnout for non-white voters is now substantially lower than that for white voters and has been for over 25 years. Despite record voter turnout in 2020, only 58 percent of non-white voters participated compared to 71 percent of white voters.

We are at the start of a redistricting cycle that is already showing signs of gerrymandering targeting communities of color, and an alarming wave of efforts to sabotage elections compounds these problems. Only Congress can solve this crisis.

I will focus today on one aspect of the John Lewis Act, the geographic preclearance formula. The key point, it is new, updated, and laser focused. It is necessary because even though discrimination is now widespread, it is much more prevalent in some places than others. According to our count, there were over 120 voting rights violations over the past 25 years in the seven States likely to be covered under this bill for preclearance, but fewer than 50 in the 39 States that are not close to coverage.

Without preclearance, discrimination has become impossible to root out in these places. States have piled voting restriction upon voting restriction, passing new ones as old ones are struck down in what amounts to legal whack-a-mole. For instance, the new Georgia and Texas vote suppression laws, the worst in the country, come after years of earlier voting hurdles in those States. States routinely devise devious new ways to discriminate in voting, what

President Lyndon Johnson called “ingenious discrimination” when first enacting the Voting Rights Act.

The geographic coverage formula has been updated and tailored with precision to meet current conditions following the Supreme Court’s guidance. To ensure that the formula targets illegal discrimination, it relies on the best evidence: established violations of voting discrimination laws. To ensure that it targets states with a persistent pattern of discrimination, it captures only those States that meet a high numeric threshold of violations over the past 25 years. That 25-year review period is critical, ensuring enough time to identify where discrimination is persistent. To ensure that it targets where discrimination is current, the review period is not frozen in time, but rolls forward.

The duration of preclearance coverage is limited to 10 years, so jurisdictions without recent violations will automatically drop out, and they can easily bail out before then. Of course, stronger tools are needed to address discrimination in other places too, and that’s why it’s important that the bill also strengthens Section 2 and expands other national protections, as well.

As Justice Kagan observed in her recent dissent in the *Brnovich* case, this is a perilous moment for the Nation’s commitment to equal citizenship, an era of voting rights retrenchment. Safeguarding our democracy and protecting voting rights is one of the most sacred responsibilities this body has. The House has passed its bill, and it’s now up to the Senate to act without delay to pass both the John Lewis Act and the Freedom to Vote Act. Thank you very much.

Senator OSSOFF. [Presiding.] Thank you, Ms. Weiser. Do we have Attorney General Rokita remotely? Okay. We’re still waiting on Attorney General Rokita. Mr. Greenbaum, you may proceed with your opening statement for 5 minutes.

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

**STATEMENT OF JON GREENBAUM, CHIEF COUNSEL
AND SENIOR DEPUTY DIRECTOR, LAWYERS’ COMMITTEE
FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, DC**

Mr. GREENBAUM. Thank you to Chairman Durbin, Ranking Member Grassley, and the Members of the Committee for giving me the opportunity to testify today on ways in which Congress can restore and improve one of the Nation’s most important laws, the Voting Rights Act.

It is vitally important that Congress pass the John R. Lewis Voting Rights Advancement Act of 2021 to remedy the damage to voting rights caused by the Supreme Court’s decisions in *Shelby County v. Holder*, and *Brnovich v. Democratic National Committee*.

My written testimony goes into detail about a number of the provisions of the VRAA. My oral statement, I’m going to focus on two items in the Senate bill that amended Section 2 of the Voting Rights Act.

The first Section 2 amendment addresses the *Shelby* decision by importing the retrogression concept from Section 5 into Section 2. This amendment to Section 2 would enable the United States, or an aggrieved party, to be granted the right to bring an action if a

voting change is retrogressive. In other words, voting changes that worsen the voting opportunities of persons of color would violate Section 2.

The retrogression cause of action provides an additional reasonable and necessary weapon in the fight against suppressive and discriminatory voting practices. In response to current needs, which are not limited to those States and political subdivisions that may be subject to geographic coverage, or which attempt to implement practices known to be susceptible to discriminatory applications. It would fill a gap, because the Supreme Court has repeatedly made clear that the retrogression analysis under Section 5 and the Section 2 discriminatory results analysis are analytically distinct.

This amendment is constitutional under the current framework set forth in *Shelby County* that the current needs for law outweigh the current burdens. Regarding the current needs to voters these modifications would serve, we have seen a proliferation of retrogressive voting changes that are often difficult and time consuming to challenge otherwise.

Conversely, the constitutional burdens on jurisdictions is modest. Retrogression is a concept that the Supreme Court has found to be constitutionally acceptable in permitting plaintiffs to prove a case of discriminatory effect is standard under Civil Rights Laws. Because the law would be national in application, the equal sovereignty principle set forth by the Supreme Court in *Shelby County* would not come into play.

The second amendment in the Senate bill that I will discuss addresses the *Brnovich* decision and restores vote denial results claims under Section 2 of the Voting Rights Act to the pre-*Brnovich* standard that several Circuit Courts of Appeals had adopted.

When Congress amended Section 2 in 1982 to explicitly allow for discriminatory results claims, it did so as part of a legislative scheme to eradicate discrimination in voting. In the 1982 Senate report, Congress stated that Section 2 was intended to capture the complex and subtle practices that may seem part of the everyday rough and tumble of American politics, but are clearly the latest in a line of repeated efforts to perpetuate the results of past voting discrimination.

1986 in *Thornburg v. Gingles*, the Supreme Court had said that the essence of a Section 2 claim is that a certain electoral law practice or structure interacts with social and historical conditions to cause an inequality in the voting opportunities enjoyed by Black and white voters. Since *Gingles*, four different circuit courts addressing vote denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test. One, there must be a disparate burden on the voting rights of minority voters, and two, that burden must be caused by the challenged voting practice because the practice interacts with social and historical conditions of racial discrimination.

In answering the second question, the courts have used factors identified in the Senate's 1992 Committee report. The Supreme Court decision in *Brnovich* provided guidelines for future treatment of Section 2 vote denial results cases that were not only new, but

also contrary, or at least dilutive of the decades-long accepted standards.

My written testimony sets forth the various ways that the *Brnovich* decision runs contrary to Congress' intent from 1982 that the VRA eliminate discrimination voting and how Congress should go about restoring Section 2 claims to the pre-*Brnovich* standard. The 8 years since the Supreme Court's decision in *Shelby County v. Holder* have left voters of color the most vulnerable of to discrimination they've been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared, that without Section 5, voting discrimination would increase substantially.

The *Brnovich* decision, by creating new hurdles for Section 2 claimants to overcome, raises the stakes appreciably. Congress must act. Thank you for providing the opportunity to testify today. I look forward to your questions.

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

Senator OSSOFF. Thank you, Mr. Greenbaum. Mr. Cuccinelli, you're recognized for five minutes.

**STATEMENT OF HON. KEN CUCCINELLI,
NATIONAL CHAIRMAN, ELECTION TRANSPARENCY
INITIATIVE, NOKESVILLE, VIRGINIA**

Mr. CUCCINELLI. Thank you. Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for inviting me today to discuss the quality and integrity of our voting systems.

I'm Ken Cuccinelli. I served as Virginia's last attorney general under the prior preclearance process. I currently serve as the National Chair of the Election Transparency Initiative, where we work every day to help improve the transparency, security, accessibility, and accountability of elections in every State so that every American has confidence in the outcome of every election, regardless of party or race, and regardless of whether one's chosen candidate won or lost.

Today it's easier to register and to vote than ever before in our history, regardless of where you live, what color you are, or any political party you affiliate with. This is a great accomplishment, worthy of celebrating, while always looking to improve.

Instead, many in this body seek to advance propaganda in place of truth. They accuse everyone who wants clean and transparent elections of the most despicable names, or suggesting they want to suppress the votes of their fellow Americans. As evil as this course of conduct is, it is not new. It's been a long-term strategy.

For example, in 2003, a New York Times editorial called election integrity a, quote, "code phrase for voter suppression", unquote. That summarizes the false narrative very succinctly.

The next year in 2004, in Colorado, the DNC election manual suggested launching a quote, "preemptive strike by encouraging minority leadership to denounce voter suppression, issue press releases, and place stories when no signs of intimidation techniques have emerged yet", end quote. I wonder if the minority leaders being used in that way were told they were being used.

In 2010, my former AG colleague Martha Coakley, was caught red-handed in her losing Senate race practicing the tactic of pre-emptive accusation without evidence by issuing a press release alleging voting irregularities that had been drafted and dated the day before the election. Of course, her mistake was dating it the day before the election, unless you consider making up an accusation a mistake.

In 2017 following the 2016 Presidential election, the Democrats carried their false voter suppression narrative into court. Obama-appointed District Judge Vasquez rejected those claims saying, quote, “As far as what’s before this court, you’ve presented me with no evidence of actual voter suppression efforts on the day of the election, much less tying it to the RNC.” Quote, “The DNC has a lot of resources, and I know this was a big concern. Where is the evidence that there was suppression going on on election day? Then a reasonable inference that the RNC was involved in those”, end quote. He found that there was none.

More directly related to the history of the bill focused on here today, in 2019, Republicans offered to support that year’s version of the bill if it included objective measures of voter suppression, such as low voter registration by minorities or low voter turnout by minorities. There was no interest in such objective standards on the left, and that offer was rejected, as that would not accomplish their actual goals of facilitating cheating nationwide. Not to mention the worst-performing States today under subject object standards would be States like Massachusetts and Oregon, not the states originally covered by the Voting Rights Act.

The left advances this false narrative as a voter turnout message to rile up their base, period. As an example, in 2004, in an attempt to address the stated concerns of both parties, then RNC Chairman Ed Gillespie made a detailed proposal to then DNC Chairman Terry McAuliffe about how both parties could work together to address concerns about potential voter suppression and fraud, thereby attacking any such problems, and at the same time, by working together, dramatically increasing the confidence of all Americans in the 2004 election. I have put these two letters back and forth into the record.

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

Consistent with the later discovered McAuliffe DNC strategy of intentionally making false accusations of voter suppression, as seen in the 2004 Colorado DNC Manual, Terry McAuliffe and the DNC declined to work together to actually address even their own alleged concerns about voter suppression, presumably because their only interest was in the false narrative, as there was no longer a voter suppression problem to address, thankfully, for America.

I would also note the entire direction of this effort flies in the face of the Carter-Baker Commission’s Recommendations, the most comprehensive and bipartisan election analysis ever done. With that, I’d appreciate the chance to answer your questions.

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

Senator OSSOFF. Thank you, Mr. Cuccinelli. I understand that Attorney General Rokita has joined us remotely. Mr. Rokita, you’re recognized for 5 minutes for your opening statement.

**STATEMENT OF HON. TODD ROKITA, ATTORNEY GENERAL,
STATE OF INDIANA, INDIANAPOLIS, INDIANA**

Mr. ROKITA [continuing]. Members of the Committee for inviting me to speak to you today on S. 4. Given my experience, both as Indiana's Chief Election Officer and as attorney general, and even with my experience as a candidate for both Federal and State election, I know how elections can and should be run to ensure transparency and public confidence in them.

In March this year, I was able to testify—testify before the Senate Rules Committee on Senate Resolution 1. I'm here today to share with Americans and Hoosiers about how S. 4 now seeks to achieve the same end as S. 1, which was simply a partisan power grab of our election. Really, it accomplishes this left-wing agenda through different means.

Now, S. 1 mandated States to adopt among other things early voting, automatic voter registration, no-fault absentee ballots. It's basically live balloting, while also prohibiting protective measures such as State voter ID laws and voterless maintenance laws meant to clean up the names that shouldn't be on the list. It sounds okay, but really without the balance of the accountability and the access, you don't have confidence in the election, and you don't have, you know, right results a lot of the times.

Now, S. 4 would allow the Biden Justice Department to usurp the authority States rightly possess over their own election by resurrecting and expanding the Voter Rights Act to places it never should be. Both S. 1 and now S. 4 seek to do the same thing: place power over local elections in the hands of partisan, unelected bureaucrats in Washington. I happen to know bureaucrats in Washington, having been in Congress.

What does S. 4 do? This partisan legislation creates new Federal preclearance requirements for certain election reforms. Voter ID or common voterless maintenance, for example, to be cleared by a partisan Department of Justice. The simple fact is S. 4 is a partisan power grab that erodes trust in our electoral system.

This legislation is not honest. It's a politically motivated effort to circumvent the will of the American people, undermining their confidence in our election. Unfortunately, the Biden Justice Department, seeking more power as self-declared Federal elections czar, has already signaled they will seek unlimited authority over State election. I note this because this is the same partisan Department of Justice that would be given unnecessary, unconstitutional, and nearly unlimited power over the State elections if S. 4 were to become law.

I'll quickly run through the top five issues that I see with this legislation, and it's outlined further in my written testimony which was submitted yesterday. The Constitution reserves for the State the primary role of establishing the time, manner, and place of holding elections for Senators and Representatives—U.S. Senators and Representatives only. S. 4 seeks to flip this constitutional mandate on its head, turning the Department of Justice into a strengthened Federal election czar, wielding the power to challenge any new or existing election law based on the whim of the party in power, whoever controls the Justice Department. That should never be.

It is important to note that States create laws based on what works best for their jurisdiction, most recently to respond to a crisis of confidence in our election system like several States have done, and several more will do. Why? The principles of federalism seek to give voters the most impact possible in their elections and policy outcomes. You can't do that with an unelected election czar that the Department of Justice proposes to be.

S. 4 seeks to reinstate and expand outdated portions of the Voting Rights Act. When the VRA was enacted in 1965, Federal oversight over State election laws was necessary to combat discrimination in some jurisdictions. Physical inaccess to polling places, other gross barriers to the ballot box that we have, we have overcome. The original intent was to ensure that the rights of Americans were not infringed upon at the ballot box based on their race. That has been accomplished for decades now. Thankfully, the VRA did exactly what it was intended to accomplish, like I said.

However, instead of acknowledging these developments, S. 4 looks backward to the conditions of—conditions at 1965, not the current condition that exists in 2021. I've never seen a bill, or, frankly, a party, that looks backward so much in order to keep themselves relevant.

The U.S. Supreme Court recognized in *Shelby*, not the case, that this dramatic change noting how widely accessible voting is today said there's nothing to see here, and they're right. That court was correct. Proving this point, the aggregate effects of *Shelby* showed Black and Hispanic voters are participating at higher rates, the highest it's been. S. 4 dramatically lowers the burden of proof for plaintiffs in vote denial and vote dilution claims under Section 2 of the VRA. S. 4 encourages courts to consider subjective factors, and vote denial claims, and dilution claims that weigh heavily in favor of plaintiffs and are unpreventable by election officials.

Most shockingly, S. 4 pressures judges to consider the factor of whether a jurisdiction uses photo ID requirements for voting and analyzing vote denial claims, directly attacking the Supreme Court's standard in the *Crawford* case, the case that I was a part of when I was Indiana Secretary of State. However, without the photo ID requirements and other similar security measures, legal citizen voters are disenfranchised by the fraud and illegal voting that will result and dilute legal citizen vote. Voter fraud goes both ways.

S. 4 focuses on vote dilution of protected minorities, but it does nothing to address vote dilution of legal voters and fails to take any real action against illegal voting. S. 4 excessively expands the coverage formula with potential to subject numerous States to preclearance requirements, draconian and unneeded at this stage of our democracy.

State laws stand in jeopardy over mere preliminary judgments and consent decrees. To this point, S. 4 requires, quote, "practice-based," unquote, preclearance for certain election laws in all 50 States, not just the States subject to the new coverage formula. If States enact election laws within any of these areas such as voter ID requirements, voting locations, redistricting, or maintenance of voter registration lists, the reform is automatically subject to the preclearance process, unfair and unneeded, and unconstitutional.

All practices having to be approved by a partisan Justice Department allowing politically appointed bureaucrats to meddle in the elections of State, it's not right.

I'll end with this. S. 4 would interfere with the State legislators' ability to protect their voters and the integrity of the election process in direct violation of the United States Constitution. In 2005, a bipartisan commission headed by former President Carter and Secretary of State James Baker recognized the existence of in-person voting fraud and endorsed a photo identification requirement. Few would say that President Carter is any kind of conservative, yet he endorsed it. In the wake of these endorsement, States like Indiana began passing voter ID laws, and over a decade ago, the Supreme Court upheld Indiana's voter ID law, a commonsense and non-discriminatory protection for our elections in our free republic.

While serving as Indiana Secretary of State, I led the passage, and then implementation, of the first-in-the-Nation voter ID law. Indiana's voter ID law became a model for the Nation. Our voter turnout went up. Since then, because of that, 35 States have followed suit in enacting laws to protect the integrity of our election. Indiana has seen no as applied challenges to our voter ID law since the U.S. Supreme Court upheld our law. It is constitutional. It is common sense. Yet S. 4 would still likely put Indiana in a preclearance status due to its overreach and litany of reasons why the Federal Department of Justice would claim the need for preclearance review.

S. 4 gives partisan bureaucrats in the Justice Department the power to veto those exact commonsense protection. Here's the bottom line. S. 4 is a clumsy and heavy-handed partisan effort to circumvent the will of the people. Earlier this month, 22 of my attorney general colleagues joined me in a letter to congressional leadership opposing this very legislation. If S. 4 were to become law, I am prepared to seek all legal remedies possible to protect the Constitution, the sovereignty of all our States, our election, and the rights of American citizens and Hoosiers.

I'm confident other States are going to join. Americans know there must be confidence in our election process. It's common sense. Yet partisan proposals such as this or any Federal power grab seek to undermine further the American people's trust in our elections.

Let's not do this. We don't need to do this. We shouldn't do this. The American people will not allow this radical power grab to move forward, and I'm going to be on their side. Thank you.

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

Senator OSSOFF. Thank you, Mr. Rokita. Thank you to all of the witnesses for joining us today. Thank you to Senator Durbin and Senator Leahy for your tireless work to advance this legislation.

Congressman John Lewis was my mentor for nearly 20 years. For those of us from the State of Georgia, for all Americans, for people around the world, he represents the very best of public service and self-sacrifice in advancing civil rights, voting rights, and human rights.

It was on March 7th, 1965, in Selma, Alabama when Congress Lewis, and Hosea Williams, and Maria Boynton, and hundreds of

others marched across the Edmund Pettus Bridge in Selma, Alabama into a storm of violence, and Congressman Lewis that day had his skull fractured for daring to demand equal access to the ballot for Black Americans in the American South. That was March 7th, 1965. Inspired and motivated by the example of John Lewis and the others who gave so much that day, just 10 days later, the Voting Rights Act was introduced in the United States Senate. It was signed into law by President Johnson on August 6th, 1965, thanks to the sacrifices of patriots like John Lewis.

In 2013, the Supreme Court invited the U.S. Congress to update this vital voting rights statute. Thanks to the efforts of Senator Durbin and Leahy and so many others, we are here to restore and strengthen the Voting Rights Act, to recommit to protecting voting rights and ballot access for voters in Georgia and across the country, no matter the color of their skin.

It is essential that we pass this legislation. At this time, I would yield to Senator Durbin for his questions.

Senator DURBIN. Thank you, Senator Ossoff. I just want to say at the outset that I listened to the comments made by the Indiana Attorney General and Mr. Cuccinelli, and I thought to myself these are echoes of the same arguments that we have always heard. Leave it to the States. Things will turn out just fine.

History tells us otherwise. History tells us that unless we carefully guard the right to vote for every American, some will tend to exploit that situation.

Ms. Weiser, in your testimony, you talk about the findings of Professor McCrory. Staggering 143 violations over the last 25 years in the eight States likely to be covered by the 2019 formula. Another 32 violations in three States that were close to meeting the coverage requirements. It suggests that there is still a challenge, that the Supreme Court didn't get it right in *Shelby*. Is there evidence to back up the fact that we still are facing threats that go to the heart of a person's civil rights in America?

Ms. WEISER. Thank you very much for that question. Absolutely, yes, there is overwhelming evidence in the record before this Congress of an ongoing persistent and growing threat of discrimination, threatening the right to vote of many, many Americans.

I mentioned already that we are facing a huge surge in legislative efforts to restrict access to voting across the country, and this is actually the biggest legislative push since reconstruction. We are also seeing an increase in successful litigation across the country, as these jurisdictions are piling voting restriction upon voting restriction. These are precisely the reasons why the constitution gives Congress the power under the 14th and the 15th Amendments to protect the right to vote from discrimination, to put in place prophylactic measures to deter and remedy discrimination in voting, and to enforce the constitution's guarantee of equal voting rights.

Senator DURBIN. Mr. Greenbaum, you've heard the statements that have been made by two of the other witnesses of this panel. It seems to me to be an echo of the argument of States' rights, which has been used historically, and as a justification for discrimination, or at least for the Government—Federal Government to take its hands off of State matters. It's a recurrent theme. Is there any more validity today than there has been in the past?

Mr. GREENBAUM. I think you're absolutely right, Senator. If you want to talk about the progress that has been made in the last several decades, actions by Congress have been a critical part of that. The Voting Rights Act of 1965, but I wouldn't leave it there.

Mr. Cuccinelli referred to the increases in voter registration, how it becomes easier to register to vote. Why is that? The National Voter Registration Act, which Congress passed in 1993, enabled and put a floor and put some requirements that States had—that States had to implement with giving people increased voter registration opportunities, including to being able to vote, to register to vote at driver's license offices, at public assistance offices, et cetera.

With respect to voting discrimination, which the Voting Rights Act covers, we've seen the void in the last 8 years after *Shelby County* in terms of what States have done to discriminate against voters of color. In States like Georgia for example, you have a demographic change going in in Georgia. In 2004, whites were 67 percent of the registered voters. Today, whites are 53 percent of the registered voters. What is happening is, as voters of color in Georgia are able to assert more power at the ballot, you're seeing actions by the Georgia Legislature to make it more difficult, particularly for voters of color, to participate at the ballot box.

Senator DURBIN. Let me say this in closing with the last 30 seconds here. We should never tolerate any fraud, voter fraud, or abuse of our electoral system by either party or any, candidate, period. I will tell you that we have scant, if any, evidence of voter fraud that would justify some of the actions that are being asked by some of these activists on the other side.

Time and again, when they spend thousands, even millions of dollars as in Arizona, it turns out to be a joke. Looking for bamboo fibers, for God's sake, in the ballots and whatever else they were up to. Turned out they found more votes for Joe Biden than the official count initially. This voter fraud excuse is no reason unless they can clearly prove it, and in most cases, they're not even close. I yield, Mr. Grassley.

Senator OSSOFF. Thank you, Chair Durbin. Ranking Member Grassley, you're recognized for 5 minutes.

Senator GRASSLEY. Yes, thank you. I'm going to start with Mr. Rokita because I'm told he has to go. You wrote a letter on September the 13th to congressional leadership, I quote, "If passed, H.R. 4 would resurrect and enact new Federal preclearance requirements in jurisdictions targeted for litigation by activist groups." What is the danger of moving away from the vote denial factor set forth in *Brnovich* in favor of the focus on litigation tactics? The second part of the question, please tell us about your experience with activist groups and others and how these groups could use litigation tactics to successfully force select States into preclearance.

Mr. ROKITA. Thank you, Senator. The *Brnovich* case offered several factors to consider for future courts to consider in vote denial claims. The usual burdens of voting are legitimate. That's what they found and reaffirmed how long an election procedure has been lawfully and historically used, whether identical or similar election procedures are used by other jurisdictions, the availability or alter-

native means of voting, and the State's interest in preventing fraud.

S. 4 factors will make it challenging for future plaintiffs to win vote denial cases under Section 2, as I understand it. S. 4 vastly prohibits courts from considering commonsense factors that have been outlined by the Supreme Court now for a long time. The enumerated factors in S. 4 are to determine whether a violation occurred are completely subjective, and they're unreasonable. You're basically allowing an election czar to—like it was said I think by Senator Cruz and maybe others, if that election czar likes you, maybe you're a liberal, you know, because you're a liberal State, well, then you're going to be okay. If it doesn't like you in their own discretion, they get to decide if you need to be precleared.

Activist groups drive up cost for the States. They browbeat. They force. Sometimes they collude with other elected officials, maybe in a State, maybe elsewhere, to force, embarrass, out of fear, out of intimidation, whatever, to enter into a consent decree. Again, it's violative of the U.S. Constitution, where our founders said time, manner, and place is to be decided by the States and we have the primary role.

Senator GRASSLEY. Thank you for that answer. I'm going to go to Cuccinelli. I think I know the answer, that nothing in H.R. 4 would bother what we are very jealously guarding in Iowa, both for Republicans and Democrats, to be first-in-the-Nation caucus status, but I'm going to ask it anyway. Is there anything in this bill that might impact that?

Mr. CUCCINELLI. Certainly the expansive reading that I would expect to see from a Biden-Harris DOJ, and led by Kristen Clarke, who you heard from earlier, would not simply deal with general elections. They will certainly wade into primaries. Primaries can historically—I think of the Jayhawk case—be discriminatory. We have to guard against discrimination in those nominations, as well.

The authority granted to the Department of Justice under this bill, you can fully expect to play a role. One of the complaints about Iowa and New Hampshire being early in the calendar for each of the parties is that they are more white than the Nation as a whole. Under this legislation, those are two States that were not under the Voting Rights Act previously, the preclearance meaning that would be subject to preclearance. I would extend Attorney General Rokita's comments to say those outside activist groups can simply target these two States with litigation, and the occurrence of litigation can be a basis to be brought into preclearance.

Ms. Weiser's comment that the best evidence is violations might be true if it were limited to violations. That is not the standard in this bill. I would note that the Democrats rejected the ultimate goal being the standard, the goal being minority voter turnout and registration. That was rejected as an ongoing standard on their part. It gives away the fact that this is a partisan power grab, not an attempt to solve a problem with minority voting.

Senator GRASSLEY. Okay. You were attorney general with preclearance before it was outlawed by *Shelby*. Could you talk to us about the standards for preclearance that were in place for Virginia then versus the standards that would force Virginia into preclearance if H.R. 4 were passed? That's my last question.

Mr. CUCCINELLI. Senator, preclearance as it existed pre-*Shelby*, you go back to 1965. It certainly was needed and required. I grant you that entirely. It worked as the Supreme Court found. As it continued on, and up to 2013, there's no question the burden was quite significant. Preclearance for those States meant preclearance of everything. If you moved a polling place, if you moved within a school for where you voted, you had to get that precleared by the Federal Government.

Each of those opportunities, as the Federal Government would view it, is an opportunity to bend your State selection system to the will of those in the Justice Department. Even the—President Obama's Inspector General found that the voting section was hiring those from the radical left. They were predominant even back then. You've heard the commitments by Attorney General Garland. You can fully expect that trend to get worse.

The place where these questions will be judged is not an objective set of professional career lawyers. These are literally the most rabid left-wing partisan lawyers you could find in the Federal Government.

Senator OSSOFF. Thank you, Ranking Member Grassley. Ms. Weiser, in the *Shelby County* decision, did not the Supreme Court expressly invite Congress to update the preclearance formulas?

Ms. WEISER. That is absolutely correct.

Senator OSSOFF. Ms. Weiser, can you address how the preclearance coverage formula and other provisions in the John Lewis Bill as introduced to this Congress are carefully crafted to encompass the States' localities and voting practices that pose the greatest threat of voter discrimination, avoiding either over-inclusion or under-inclusion, please?

Ms. WEISER. Yes. Thank you for your question. Absolutely. As I noted, the States come into preclearance based on their actions, actual proven violations of the law against race discrimination in voting. It is not based on things in 1965. It is current and ongoing and rolls forward. It is not the case that these are just mere lawsuits. They actually have to result in either judicial findings or admissions of liability or consent decrees, which are actually entered by courts, and actually require courts to consider the strength of the plaintiff's case and whether the finding is fair.

In addition, it is tailored to get jurisdictions that not only have proven violations, but that have a persistent pattern of violations over a long period of time. It is tailored also by limiting the coverage period and offering very easy bailout to ensure that jurisdictions will not stay covered if they haven't had violations within the last decade.

I will add, it is not partisan officials within the Department of Justice. It's not just that it's career officials. It is also the jurisdiction can choose whether or not they want to go to the Department of Justice or to the three-judge Federal court to submit their preclearance request.

Senator OSSOFF. Thank you, Ms. Weiser. Mr. Greenbaum, the John Lewis Bill includes a critical provision that under Section 2 would allow the Attorney General the opportunity to challenge changes in voting practices anywhere in the country that diminish voting rights for voters of color. I'm referring to what's known as

the retrogression provision of the bill. Why is this retrogression provision so important? How does it differ from existing Section 2 authorities, and how is it different from retrogression under preclearance?

Mr. GREENBAUM. Sure. Thank you, Senator. The concept of retrogression is one that through Section 5, we're quite familiar with in terms of how to actually apply retrogression. In basic terms, what it means is does the law make things worse for voters of color, which is a much more straightforward test than the existing results test under Section 2, which requires a number of factors and takes longer time to litigate and are harder cases to resolve.

Retrogression itself is a much more simple concept. It's one that the Supreme Court has signed off on through Section 5. In fact, the Supreme Court in the *Beer* case largely created the standard of retrogression.

The retrogression under Section 2 would be different than under Section 5 in that it would cover all areas of the country. It would not be limited to particular places. It would not be limited to particular types of voting changes. It could apply to any voting change anywhere in the country. It would, unlike Section 5 preclearance, require the plaintiffs, whether they be the Department of Justice or a private party, to go into court and prove to a Federal judge that a particular voting change puts voters of color in a worse position than before.

What we've seen with a lot of the laws that have been passed this year including in your State, Georgia, a number of the changes appear to be clearly retrogressive such as changes that make it more difficult for people to vote by mail. What we saw in 2020, is that Black voters and Asian voters particularly were the ones who voted by mail the most frequently, as well as limitations on the use of drop boxes, which again, voters of color use in a disproportionate number. It creates a clear, easy to administer, or at least easier to administer standard for the Federal courts to follow.

Senator OSSOFF. Thank you, Mr. Greenbaum. Senator Klobuchar is recognized for 5 minutes.

Senator KLOBUCHAR. Thank you very much, Mr. Chair. Let me start with you, Ms. Weiser. Justice Ginsburg's dissent in *Shelby County* noted that the constitution uses the words right to vote in five separate places, the 14th, 15th, 19th, 24th, and 26th Amendment. Each of these amendments contains the same broad empowerment of Congress to "enact appropriate legislation"—that's the Constitution words—to enforce the protected right. The implication is unmistakable. Under our constitutional structure, Congress holds the lead rein in making the right to vote equally real for all U.S. citizens.

Can you explain why time and time again, the constitution recognizes a role for the Federal Government? Why is that Congress, and not State legislature, is entrusted with making the right to vote equally real for all U.S. citizens?

Ms. WEISER. Thank you for that question.

Senator KLOBUCHAR. Thank you, Ms. Weiser. Thank you.

Ms. WEISER. It is absolutely the case that the Constitution empowers Congress to make real the guarantee for the right to vote against discrimination. The Constitution also grants Congress

broad powers over—to regulate Federal elections, even to create an entire code of voting for Federal elections as Justice Scalia—the late Justice Scalia recently affirmed under the Constitutions Elections Clause.

One of the main concerns that the framers of the Constitution had was that voting rights and including elections for Federal elections would be manipulated by factions and partisans at the State level who might try to disenfranchise or engage in practices like gerrymandering. Under the 14th and 15th Amendment, which grow out of the unfortunate history of brutal slavery and disenfranchisement of large swaths of the population of Black Americans, it was Congress that took the reins to actually enforce equality after the brutal Civil War. It was States were not trusted with that.

Senator KLOBUCHAR. Very good. I know in your testimony, Ms. Weiser, you mentioned the Freedom to Vote Act, which I appreciate. You noted in your testimony to the Committee that Section 2 cases are extremely time consuming and resource intensive, which you experience as a litigator at the DOJ. Taking proactive steps like Section 5 of the VRA's preclearance formula is an important measure to prevent voter suppression laws from ever having to be litigated in a courtroom.

That is one of the reasons why Chair of the Rules Committee, we worked on the Freedom to Vote Act, which sets these basic national standards. Could you talk about why it is important to pass both the John Lewis Bill and the Freedom to Vote Act in order to proactively prevent discriminatory laws from being enacted, as well as put some basic Federal rights into law?

Ms. WEISER. Absolutely. The preclearance requirement has long worked to—or before the *Shelby County* decision, was the most successful provision at actually stopping the worst discriminatory measures from going into place in the jurisdictions with the worst histories of discrimination. It stopped them in their tracks before they were put in place. That was only for new voting changes, and the rest of the country where there wasn't that same history of discrimination had to rely on Section 2 of the Voting Rights Act, as you note.

Bringing case-by-case litigation is time consuming, expensive, slow, and while it is pending, discriminatory measures can continue and go into effect. What the For the People Act also does is puts bright line standards, a set of rules that every American can rely on, regardless of race, and that can't be manipulated for discriminatory or partisan reasons. It's much easier for courts to enforce and administer, because they are clear and don't require this multiparty inquiry. Together, these bills work to fill the hole and meet the crisis that we're facing today in voting rights in American.

Senator KLOBUCHAR. Very good. My last question, Mr. Greenbaum, I actually was quoting you, but she also mentioned it. Ms. Weiser mentioned it in her opening. Do you want to comment on what I just asked Ms. Weiser?

Mr. GREENBAUM. Sure. You know, what we've—really what we've seen since *Shelby County* is an incredible proliferation on discrimination against people of color in terms of voting, beginning with the day that *Shelby* was announced when the attorney general of

Texas where their voter ID law had been prevented from going into place under Section 5 said, “Okay. We’re going to intervene—move forward with that voter ID law.” We spent the next several years—my organization, Ms. Weiser’s, Department of Justice, other organizations, going to court to get that law struck down, that it was discriminatory under the Voting Rights Act.

Ultimately, getting a Fifth Circuit en banc decision in our favor, and then we went for our fees. The Fifth Circuit, in the last month, affirmed our fee award of \$6.8 million. We know that Texas spent at least three and a half million dollars on that lawsuit. We spent several years litigating, finally brought—preventing that law from going into effect, which affected people during those 3 years in between, and ultimately, between—ultimately is going to cost the State of Texas more than \$10 million for moving forward with that discriminatory law.

Senator KLOBUCHAR. Very good point. Thank you very much. Thank you, Mr. Chair.

Senator OSSOFF. Thank you, Senator Klobuchar. Senator Hirono, you’re recognized for 5 minutes.

Senator HIRONO. Thank you, Mr. Chairman. It’s not a coincidence that shortly after *Shelby County*, some 13 States passed voter suppression laws. Now with the conservative majority firmly ensconced in the Supreme Court with three Trump justices, we are seeing dozens of voter suppression laws being enacted supposedly to prevent widespread voter fraud, which has not been shown to be the case at all.

Earlier, I noted three Supreme Court shadow docket rulings that continue the court’s trend, as Justice Sotomayor put it, of condoning disenfranchisement by the court. Ms. Weiser and Mr. Greenbaum, do you agree with Justice Sotomayor’s dissent, noting that the court is condoning disenfranchisement?

Ms. WEISER. Thank you for that question. The courts play—continue to play a critical role in protecting voting rights for all Americans. Unfortunately, it is the case that the Supreme Court has consistently rolled back the strength of voting rights protections, making it much harder for litigants, voters to enforce those rights, and seems to be portending that there might be more to come.

That is why it is absolutely critical for Congress to step in and protect voting rights. The court has actually said that Congress has broad powers to enact legislation to protect Americans’ voting rights, and where the Court is not fulfilling its obligation, Congress can really meet that constitutional obligation for America.

Mr. GREENBAUM. I absolutely agree with that. We’ve seen a number of times, including the cases you cited, Senator Hirono, as well as the decisions that we’ve been talking about, *Shelby* and *Brnovich*.

One of the things that I find especially disturbing about the *Brnovich* case is it clearly flies in the face of congressional intent by the Court’s decision in that case adding a whole new set of factors that courts are supposed to consider that none of that appears in the statute itself. None of it appears in the congressional history in 1982. It flies in the face of what this—what this body did in 1982 to try to eradicate discrimination voting. There are aspects of that decision that seem to almost encourage jurisdictions to move

forward with mechanisms that are discriminatory. It's a tremendous concern. Thank you, Senator Hirono.

Senator HIRONO. That's exactly what happened. In fact, Justice Alito, who is a Justice who signals certain things such as he'd like to revisit border fail, for example. There he is, writing in that case, which I found astounding because he creates—I think he writes laws—he creates what he calls a non-exhaustive list of guideposts for Section 2 cases including, “the size of the burden imposed by a challenged voting rule, the degree to which a voting rule departs from what was standard practice when Section 2 was amended in 1982, the size of any disparities and arose impact on members of different racial or ethnic groups, the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision, and the strength of a State interest served by a challenged voting rule in requiring courts to compare the voting restrictions being challenged in a Section 2 case to the burdens of voting as existing in 1982.” My gosh, I find this case to be completely astounding, and talk about judicial activism.

I can see where Section 2 cases was made even harder after this decision, and why we need the legislation that we're talking about.

When we talk about some of the kinds of voter suppression laws that have been enacted by the States, I think sometimes we don't understand quite how, with surgical precision, some of these voter suppression laws are. Ms. Weiser, can you give a specific example of a voter ID law, for example, that is surgically targeted so that it makes it a lot harder for Black voters, for example, to vote?

Ms. WEISER. Yes, thank you. And as you note, the inquiry into voter ID laws, it's not whether or not all voter ID laws are discriminatory.

Senator HIRONO. Yes.

Ms. WEISER. It is a case-by-case examination based on the actually particular design of the law. Some of the laws are very clearly both intended to discriminate based on race and are designed very clearly to do so.

One that comes to mind is in North Dakota. There was a voter ID law that required a residential address on the identification itself, despite the fact that 19 percent of the Native American citizens in North Dakota lived on reservations without residential addresses. They tried to change that, but that was found to be intentionally discriminatory.

The Texas voter ID law that Mr. Greenbaum referred to was found to be intentionally discriminatory by the district court and was ultimately found to have a discriminatory result. It surgically chose identification so as to have that impact. It famously included concealed carry licenses as acceptable forms of ID, but not State employee IDs or State university IDs, which were disproportionately held by Black and Latino voters in Texas.

Senator HIRONO. Those legislatures that are enacting these kinds of laws know very well whose votes they are suppression—suppressing, and that is why they're doing it. I think it's just so nefarious. It's just voting is a fundamental right. I am a naturalized U.S. citizen, and one of the first things I did when I turned 18 was to vote because I considered that so foundational and fundamental, and we should do everything we can to make sure that everyone

can exercise their right to vote. Thank you very much for what you are doing at the Center. Thank you, Mr. Chairman.

Senator OSSOFF. Thank you, Senator Hirono. Seeing no other Senator seeking recognition, I'll in closing just ask each one more question.

In the *Shelby County v. Holder* decision, again, the Supreme Court, as you affirmed in your testimony, Ms. Weiser, expressly invited the U.S. Congress to update the coverage formulas necessary for the Department of Justice to execute its authorities under Section 5 of the Voting Rights Act. We have taken that seriously and done that work, and based upon the evidence, we have drafted those updates. They are included in this legislation. It is, in my view, vital that we restore those vital protections for American voters.

My question beginning with you, Ms. Weiser, if we in the U.S. Congress, do not use the authority that we have under Article 1, Section 4, and the 14th and 15th Amendments to protect ballot access by enacting this legislation, what do you see for the future of voting rights, especially for minority voters of the United States?

Ms. WEISER. Thank you for that question. There's no question, we are at a critical moment with respect to a tax on voting rights with vote suppression, voting discrimination, even efforts to sabotage election results achieving fever pitch, discriminatory redistricting abuses, and court rollbacks of rights. If Congress does not act, I fear that there's no question that this vote suppression is not only going to continue to proliferate, but that Americans of color are going to be disenfranchised in large numbers because of their race, and that is fundamentally at odds with the promise of our constitution, of our democracy.

This is something that Congress emphatically has the power and duty to stop. I'll say that when preclearance was in effect beforehand, as Justice Ginsburg noted famously in dissent in the *Shelby County* decision, it was working very well in the throwing away preclearance. Just because we're not seeing a spike in discrimination is like throwing away an umbrella in a rainstorm because you're not getting wet.

We saw what happened after the preclearance went away. We got very, very wet. There was a deluge of voting discrimination measures, and that has continued, and it's getting more brazen. There is an urgency, and we strongly urge Congress to act quickly to pass this vital legislation, as well as the Freedom to Vote Act.

Senator OSSOFF. Thank you, Ms. Weiser. Mr. Greenbaum.

Mr. GREENBAUM. I would agree with my colleague. I mean, I think we're seeing the greatest attack on the right to vote since the Voting Rights Act was passed. It's not surprising, because you have this state of affairs where there's a big hole in the enforcement power of the Federal Government, and private parties to fight against voting discrimination that you're seeing that because of this gap, what you're seeing is seeing legislatures and others using this as an opportunity to introduce measures that are specifically designed to go after voters of color. This is particularly true in those States where voters of color can make the difference in terms of who wins and who loses elections.

You know, we're seeing these laws being proposed and enacted in certain States. A disproportionate amount of the activity are in those States where voters of color really are exercising their opportunity to vote and can make a difference in who wins and who loses elections. Unfortunately, it's coming from a very cynical place. It's really disturbing for me as a career civil rights and voting rights lawyer to see sort of the cynicism. That—I think what you're seeing is you're seeing people putting—putting their own interest ahead of the fundamental right to vote and being willing to do things that are in a lot of ways intentionally designed to make it more difficult for voters of color.

It's absolutely critical as Congress did in 1965, to go after eliminating discrimination voting. It's absolutely critical that Congress, in 2021, fill that gap that the Supreme Court has created and enact legislation that is going to allow people to exercise their most fundamental of rights, and that's the right to vote. Thank you, Senator.

Senator OSSOFF. Thank you, Mr. Greenbaum. Thank you again to all of the witnesses appearing before the Committee today.

Before we adjourn, I'd like to enter into the record a report from the Leadership Conference on Civil and Human Rights documenting voting conditions in States and jurisdictions previously covered under preclearance. This report covers New York and that'll be entered in the record without objection.

As referenced in the title of this hearing, my friend, Congressman John Lewis, and if you're a Georgian, an American, still feel his presence profoundly though he's gone, and we have an obligation to live up to and honor his example. He said that the right to vote is, quote, "precious, almost sacred." I can think of no better way to honor the life and legacy of Congressman John Lewis, as our country still mourns his passing last year, than to restore the Voting Rights Act of 1965 for which he bled and nearly died to protect that precious, almost sacred right to vote. And the hearing is adjourned.

[Whereupon, at 6:14 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows]

Witness List
Hearing before the
Senate Committee on the Judiciary

“Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act”

Wednesday, October 6, 2021
Dirksen Senate Office Building Room G50
2:00 p.m.

Panel I

The Honorable Kristen Clarke
Assistant Attorney General
Department of Justice
Washington, D.C.

Panel II

Mr. Jon Greenbaum
Chief Counsel and Senior Deputy Director
Lawyers’ Committee for Civil Rights Under Law
Washington, D.C.

Ms. Wendy Weiser
Vice President, Democracy Program
Brennan Center for Justice
New York, NY

The Honorable Todd Rokita
Attorney General
State of Indiana
Indianapolis, IN

The Honorable Ken Cuccinelli
National Chairman
Election Transparency Initiative
Nokesville, VA



Department of Justice

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

**BEFORE THE
SENATE JUDICIARY COMMITTEE**

**FOR A HEARING ENTITLED
PROTECTING A PRECIOUS, ALMOST SACRED RIGHT:
THE JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT**

**PRESENTED
OCTOBER 6, 2021**

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

Before the Senate Judiciary Committee

**For a Hearing Entitled
“Protecting a Precious, Almost Sacred Right:
The John R. Lewis Voting Rights Advancement Act”**

October 6, 2021

Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the Senate Judiciary Committee. My name is Kristen Clarke, and I serve as the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice (“Department”). Thank you for the opportunity to testify today on the Department’s work to implement and enforce the Voting Rights Act of 1965 and the need for legislation to revitalize and restore the Act.

The Voting Rights Act truly is, as President Johnson said when he signed it into law, “one of the most monumental laws in the entire history of American freedom.”¹ It reflected bold action by Congress when bold action was needed to confront the fact that nearly a century after the Reconstruction Amendments, millions of citizens were still denied the ability to register, to vote, and to participate fully in American democracy because of their race. The Act’s most innovative provisions—for example, the appointment of federal examiners to put people on the rolls in recalcitrant jurisdictions and the preclearance provision that prevented jurisdictions from adopting new provisions to roll back hard-won gains—transformed American democracy.

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

The issues of fairness and democracy we face today are different, but equally pressing. If the end of the twentieth century was a period of dramatic expansion in voting rights, the twenty-first century has, so far, been a period of rising attacks on the voting rights of people of color. We have seen cutbacks to early voting periods; imposition of additional requirements to cast ballots, either at polling places or with respect to absentee ballots; and new restrictions on the right of civic groups to assist citizens in participating fully in the electoral process. Often, courts have found that jurisdictions adopted such changes for racially discriminatory reasons, applying the same substantive legal standard used to assess discriminatory purpose under Sections 2 and 5

of the Voting Rights Act that apply under the anti-discrimination provisions of the U.S. Constitution. Congressional action is necessary to prevent us from backsliding into a nation where millions of citizens, particularly citizens of color, find it difficult to register, to cast their ballot, and to elect candidates of their choice to offices from the Presidency to members of their local school board.

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

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

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

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

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

Second, preclearance worked well. Covered jurisdictions knew that if they could not show that a proposed voting change—from moving a polling place, to requiring voters to reregister, to deannexing minority neighborhoods, to diluting minority voting strength—had neither a discriminatory purpose nor a discriminatory effect, the Department would block that change. So most jurisdictions decided not to propose such changes in the first place. The deterrence effect of Section 5 was undeniable. But when jurisdictions *did* try those sorts of discriminatory changes, over the half-century preclearance was in effect, the Department's 3,000+ objections protected the rights of millions of citizens.

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

Third, the costs of losing preclearance have been profound. The *Shelby County* decision has given jurisdictions a green light to adopt new restrictive practices and then sit back until costly litigation proves that the new laws have a discriminatory purpose or effect. I will describe for you how the Department's enforcement efforts over the past eight years have been negatively affected by the current legal landscape—one in which we have lost a key tool at the very time that the United States has experienced a groundswell of restrictive voting laws.

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

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

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

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

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

The first case against a county registrar for violating the act, *United States v. Lynd*, was brought by John Doar, an attorney who began serving in the Civil Rights Division during the Eisenhower administration.² By 1963, the Department had filed 35 suits challenging discrimination or threats against Black registration applicants in individual counties. But as then-Attorney General Robert Kennedy said, that was a “painfully slow way of providing what is after all a fundamental right of citizenship.” As the Supreme Court later acknowledged in *South Carolina v. Katzenbach*, the Department's efforts to protect the right to vote were seriously hindered by the burdens inherent in bringing case by case challenges:

Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to

discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and [Black] registration.

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

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

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

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

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

One of the Act’s most powerful innovations involved a preclearance requirement, administered by the Department and targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest. Under Section 5, jurisdictions covered by these special provisions could not implement any change affecting voting until the Attorney General or the United States District Court for the District of Columbia determined that the change did not have a discriminatory purpose and would not have a discriminatory effect. The Act authorized the Attorney General to bring civil actions in response to violations of the Act’s provisions, including Section 5. The Act also permitted the Attorney General to designate jurisdictions subject to Section 5 preclearance for the deployment of trained federal examiners, who could require that qualified persons be added to voter registration lists. Further, in those counties where a federal examiner was serving, the Attorney General could request that trained federal observers monitor activities within polling places. Finally, the Act directed the Attorney General to challenge the use of poll taxes; Virginia’s poll tax was struck down by the Supreme Court on constitutional grounds shortly thereafter.³

Of all the tools available to the Department to protect the right to vote and prevent racial discrimination, Section 5 proved to be the most effective. And in the nearly fifty years of

implementing Section 5, the Department showed itself to be up to the task of enforcing the statute in a manner that respected the effective administration of elections by state and local jurisdictions.

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

The Attorney General has historically delegated responsibility for preclearance decisions to the Assistant Attorney General who heads the Civil Rights Division.⁴ Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights, called the "Voting Section," which conducted the factual review for preclearance submissions and made detailed recommendations to the Assistant Attorney General.⁵

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

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

The administrative route provided a swift, non-costly path to a preclearance determination. If jurisdictions were unsatisfied with the administrative route, they could choose an alternative path, which involved obtaining a declaratory judgment. That track allowed state or local officials to obtain a de novo determination by filing a declaratory judgment action against the United States, which was heard by a three-judge district court. Unsurprisingly, and showing covered jurisdictions' confidence in the fairness and efficiency of the Department's process, covered jurisdictions chose the administrative route for over 99 percent of covered changes.

The Attorney General based his or her Section 5 determination on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any additional investigation conducted by the Department. The submitting jurisdiction had the burden of demonstrating that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race, color or membership in a language minority group.⁶ The effects of proposed voting changes were measured against the previous, or "benchmark," practice to determine whether they would "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁷ The discriminatory purpose analysis was based on a number of factors established by the Supreme Court, including the sequence of events leading up to the adoption of the change, the historical background of the action, the impact of the change, and any deviations from normal procedure.⁸

The Attorney General would then respond to the submitting jurisdictions in writing to (1) “preclear” the proposed change, allowing the change to be implemented; (2) request more information from the jurisdiction; or (3) object to the proposed change, providing the reasons supporting that decision.⁹ In those instances where the Attorney General interposed an objection, the submitting jurisdiction had various options, including asking the Attorney General to reconsider its decision, seeking judicial preclearance in the United States District Court for the District of Columbia, abandoning the proposed change and adhering to the benchmark practice, or submitting a new change for review.

The list of covered jurisdictions was not static, as previously covered jurisdictions could be “bailed out” from the special provisions such as the preclearance requirement if they wished to do so and met certain requirements, such as complying with Section 5 for the previous ten years, laid out in the statute. Dozens of jurisdictions did so successfully while Section 5 remained in effect.¹⁰ Section 4(a) of the Act sets out the requirements for the termination of coverage (bailout) under Section 5. At the same time, new jurisdictions could be “bailed in” to the preclearance requirement under Section 3(c) of the Act if a court found violations of the Fourteenth or Fifteenth Amendments justifying equitable relief. Eighteen jurisdictions have been required to seek preclearance for certain changes as a result of Section 3 orders issued by federal courts.¹¹

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

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

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

The mere presence of Section 5 discouraged some jurisdictions from implementing changes that would be certain to raise objections. Out of necessity, the preclearance requirement caused some covered jurisdictions to be more prudent in their approach to adopting voting changes or procedures than they otherwise would have been.

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

More than 800 proposed changes were altered or withdrawn in the period after 1982.¹² Empirical studies demonstrate that the Department’s requests for more information had a significant effect on the degree to which covered jurisdictions complied with their obligation to protect minority voting rights.¹³ For example, a study conducted by Luis Ricardo Fraga and Maria Lizet Ocampo of Stanford University found that between 1999 and 2005, more

information requests stopped more than six times as many changes as formal objection letters did.¹⁴

To see how this process worked in the real world, consider the example of Alaskan election officials' submission of a series of precinct and polling place consolidations. These changes – some of which impacted areas with a substantial number of Alaska Native voters – were submitted for Section 5 review in May of 2008. In July, a couple of months later, the Attorney General sent Alaska officials a letter that precleared one polling place change but also stated that additional information was necessary with regard to three remaining consolidations before they could be precleared.¹⁵ The Department requested maps of the consolidations and descriptions of the State's process for determining which precincts and polling places to merge, the purpose of the consolidations, and the State's efforts to seek input from members of the minority community. The State withdrew the proposed consolidations less than three weeks later, meaning that those proposed changes were never used in an election.¹⁶

The preclearance process often resulted in jurisdictions deciding to voluntarily mitigate the impact of potentially discriminatory changes even when the Department did not issue a written request for additional information. One example involves a judicial preclearance case filed in the United States District Court for the District of Columbia in which South Carolina officials sought approval for a 2011 voter identification law. During the trial, South Carolina officials made a major change. They decided to interpret the photo identification requirement in a way that effectively inserted a "reasonable impediment" exception for certain voters who had difficulties obtaining identification, thereby making it "far easier than some might have expected or feared" for South Carolina citizens to cast a ballot.¹⁷ A three-judge panel precleared the law after adopting that interpretation as an express "condition of preclearance."¹⁸ Two of the judges commented that the case demonstrated "the continuing utility of Section 5 of the Voting Rights Act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws."¹⁹

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

When jurisdictions decided to proceed with racially discriminatory voting changes, the preclearance requirement proved to be effective at halting them before they ever went into effect. Through the Section 5 review process, the Attorney General and the United States District Court for the District of Columbia blocked numerous racially discriminatory voting changes before jurisdictions ever implemented them in an election.

The statistical evidence speaks for itself. Although the Attorney General objected to only about one percent of voting changes submitted under Section 5, this meant that more than 3,000 discriminatory voting changes were blocked between 1965 and June 25, 2013, the date of the *Shelby County* decision.²⁰ The post-2000 Section 5 objection letters, along with an accompanying chart, are attached as an exhibit to this testimony. The Division also includes here certain additional materials for your consideration as part of the record under the Voting Rights Act, including more information request letters, Section 5 enforcement actions and

declaratory judgment actions, and cases under Section 203 and Section 2. All of these materials date from the Civil Rights Division's last submission of similar materials in October 2005 leading up to the 2006 reauthorization of the Act by Congress.

A majority of the Department's Section 5 objections included findings of discriminatory intent.²¹ Congress found that many of the changes blocked by preclearance were "calculated decisions to keep minority voters from fully participating in the political process."²² Critically, the legal framework used by the Department for assessing whether voting changes were enacted with a discriminatory purpose in violation of Section 5 since 2006 – the *Arlington Heights* factors – is the same one traditionally used by federal courts to assess intent claims under the racial discrimination provisions of the U.S. Constitution and Section 2.²³

That said, the vast majority of submitted voting changes were precleared, allowing jurisdictions to institute new voting changes or rules. The Department exercised its authority to object or to ask for additional information judiciously under Republican and Democratic administrations alike, reserving the use of those tools for instances when the purpose or effect of the voting change was actually problematic or truly in doubt. But when jurisdictions failed to submit changes, the Department and affected voters prevailed in more than 100 "coverage" actions that temporarily enjoined voting changes that jurisdictions had been implementing without obtaining preclearance.²⁴

By freezing voting procedures in place until the submitting jurisdiction successfully obtained preclearance, Section 5 often saved voters from having to bear the brunt of racially discriminatory voting changes while litigation was pending or while the impact of a jurisdiction's proposed changes was being sorted out. Because litigation brought under Section 2 or other federal statutes occurs only after a (potentially illegal) voting scheme has already been put in place, voters have already been burdened or disenfranchised and electoral outcomes have been locked in place.²⁵ An illegal voting restriction or redistricting plan might be in place for several election cycles before a plaintiff can gather the evidence necessary to challenge it and succeed in litigation.²⁶

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

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

One Section 5 objection restored a municipal election that had been cancelled in Kilmichael, Mississippi.²⁷ After several decades in which no Black candidate had been elected to municipal office due to racially polarized voting, Kilmichael's 2001 general election stood to be a potential watershed moment. Black residents had recently emerged as a majority of the town's registered voters and a number of Black candidates qualified to run for both the mayoral

and board positions. White town officials responded by cancelling the election with no notice to the community. The Department denied the city's preclearance request, concluding that the cancellation was motivated by an intent to diminish minority voting strength. The election ultimately went forward and, in a historic moment, the town elected its first Black mayor as well as three Black aldermen.

Another objection prevented the proposed 2007 closure of a voter registration office in Buena Vista Township, Michigan, which was used heavily by minority voters. The next closest office was an 18-mile round trip away, which, using public transportation, would take at least one hour and 40 minutes to traverse.²⁸

Preclearance also prevented a polling place change by McComb, Mississippi.²⁹ A large group of Black residents in the city had long voted at the Martin Luther King Jr. Community Center, which was close to their homes on the east side of railroad tracks that run through the city. In response, the city tried to move that group's assigned polling place to the American Legion Hut on the west side of the tracks. To cross those tracks, Black voters on the east side—many of whom lacked transportation—would have had to travel substantial distances to find a safe crossing. Recognizing the increased difficulty that Black voters would encounter in exercising their right to vote, the Department blocked the change.

Other Department objections halted statewide changes. One such objection stopped a 2007 Texas statute, which would have imposed a landownership requirement to be able to run for some elected offices.³⁰ The evidence showed that there were Hispanic supervisors who were non-landowning residents of their district who would have been barred from running for reelection if the proposed candidate qualifications were implemented. Moreover, the significant disparity in home and agricultural land ownership rates between white residents and residents of color in Texas meant that a disproportionate number of racial and language minority Texans, many of whom could have been the candidates of choice of racial and language minority voters, would have been barred from running for office in these districts.

Another objection prevented the implementation of a 2009 Mississippi statute that would have imposed a majority-vote requirement for the election of school board candidates in certain school districts, a change that raised substantial concerns regarding a retrogressive effect on racial and language minority voters given the prevalence of racially polarized voting in Mississippi elections.³¹

The Department objected to multiple proposed redistricting plans that improperly reduced minority strength before and during the post-2010 redistricting cycle. In 2007, an objection prevented the imposition of discriminatory changes to the method of electing county commissioners sought by Charles Mix County, South Dakota, shortly after successful Section 2 litigation resulted in the election of the first Native American commissioner in county history.³² After that commissioner was elected, the county pursued a referendum measure expanding the size of the board of commissioners and a redistricting plan that, in tandem, would dilute the voting strength of the county's Native American voters. The Charles Mix County sheriff had actively circulated the referendum petition, collecting signatures while in uniform.

In 2011, the Department interposed an objection to a proposed redistricting plan for East Feliciana Parish, Louisiana's police jury—the legislative and executive governing body of the parish.³³ That plan would have cut the Black voting age population in District 5, thereby eliminating minority voters' opportunity to elect a candidate of choice. The cut came after the parish's demographer met separately with a group of four white "police jurors" at the beginning of the redistricting process but failed to invite the Black police jurors. At that closed-door meeting, the demographer and the white police jurors agreed to move overwhelmingly white population from the "Lakeshore" neighborhood into District 5, while excluding nearby Black population from the district. After the Department interposed an objection, the parish adopted a different plan, which increased the Black voting age population in District 5. Today, District 5 is represented by a Black police juror.

The Department also blocked a 2011 redistricting plan proposed by Nueces County, Texas. That plan would have moved Latino population out of, and Anglo population into, a County Commissioner District, apparently to protect an Anglo incumbent who was not the candidate of choice of the Latino community but had unseated a Latino candidate in the previous election by a very small margin.³⁴ Similarly, a proposed 2012 redistricting plan from Long County, Georgia, sought to dilute the Black population percentage in District 3 by nearly seven percentage points by adding majority-white voting precincts to the district— even though the county could have avoided that result by adding different precincts instead.³⁵ Following the Department's objection, Long County officials adopted a plan that remedied the problem and, today, District 3 is represented by a Black commissioner.

D. Section 5 Was Effective In Addressing Repeat Offenders' Frequent Adoption of Discriminatory Voting Changes

Section 5 has served an important function by preventing the frequent imposition of discriminatory voting changes by "repeat offenders" – jurisdictions that make multiple or recurring efforts to make it harder for minority voters to participate in elections on an equal footing. While the Attorney General has repeatedly denied preclearance to several state actors – the States of Mississippi, Louisiana, and Texas have each received 23, 21, and 18 objections, respectively – Section 5's greatest utility might arguably lie in its ability to thwart the recurring and sometimes innovative efforts of local jurisdictions to discriminate that otherwise would have evaded scrutiny.

Waller County, Texas, provides a textbook example of a jurisdiction that has repeatedly attempted, over the course of decades, to undermine the rights of Black voters in the City of Prairie View and at Prairie View A&M, the county's HBCU. Local officials' efforts to deter and reduce student voting strength have included pursuing improper prosecutions of eligible voters, imposing discriminatory voter registration "residency" requirements, cutting early voting opportunities, and adopting racially dilutive redistricting plans, among others. These discriminatory practices have been thwarted only by a combination of three Section 5 objections and repeated case-by-base litigation.³⁶

But Waller County is far from the only repeat offender. Several jurisdictions have adopted numerous racially discriminatory changes within the span of a few years, prompting

multiple objections from the Attorney General to prevent their implementation. Here are some examples:

- Northampton County, Virginia, adopted three discriminatory redistricting plans (and a method of elections change) to which the Attorney General interposed three objections between 2001 and 2003.³⁷
- Beaumont Independent School District in Texas sought to implement several changes relating to the method of electing its school board trustees – including two redistricting plans – that diluted minority voting strength and to which the Attorney General interposed separate objections in 2012 and 2013.³⁸
- Gonzales County, Texas, tried twice to seek preclearance for reductions to the robustness of their Spanish language election procedures, to which the Attorney General interposed separate objections in 2009 and 2010.³⁹

Without Section 5, repeat offenders are free to implement discriminatory voting changes, at least in the short term. Even if such changes are ultimately struck down through expensive, resource-intensive litigation brought under Section 2 or the U.S. Constitution, jurisdictions can then repackage their discriminatory changes and reenact slightly altered versions to evade the prior injunction. Moreover, successful voting rights litigation often takes years to play out before an injunction is issued. In the meantime, minority voters will be disenfranchised or have their rights burdened, causing them to suffer injuries that can never be redressed.

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

To facilitate and expedite the review process, the Attorney General endeavored to make the preclearance process as user-friendly as possible. The “Procedures for the Administration of Section 5 of the Voting Rights Act of 1965” issued by the Attorney General brought transparency and ease to the process. It informed both submitting authorities and other interested parties of the standards by which the Department would be guided in evaluating proposed changes under Section 5.⁴⁰

Jurisdictions could submit their Section 5 submissions by mail, fax, or, in the internet age, an online portal. Department staff worked cooperatively with local officials to make sure preclearance submissions that had neither a discriminatory purpose nor a discriminatory effect would be approved quickly and efficiently. In fact, attorneys general for various states, including Mississippi and North Carolina, which were covered (at least in part) under Section 5 filed an *amicus* brief in the *Shelby* case acknowledging that “DOJ has administered the Section 5 review process with a significant degree of flexibility and latitude, taking into account the unique circumstances and crises that sometimes emerge within the covered jurisdictions.”⁴¹

The Department’s administrative preclearance process did not require covered jurisdictions to retain a lawyer or rely on employees with legal expertise. Over the course of decades, Department staff established positive relationships with local officials such as city

secretaries, town clerks, and county officials who often submitted changes for review. These officials' Section 5 submissions were often brief; voting changes that were clearly beneficial in nature could be precleared based on a page or two of documentation. Department staff would only ask for additional information or documentation when it was truly necessary to determine whether or not the change had a racially discriminatory purpose or effect.

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

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

The Supreme Court's decision in *Shelby County v. Holder* has had a substantial effect on the ability of the Department to respond quickly and effectively to prevent the implementation of discriminatory voting changes. That decision struck down the formula provided by Section 4 of the Act for determining which jurisdictions were covered by the preclearance obligation. Without the protections of Section 5 of the Voting Rights Act, voting changes in jurisdictions with documented histories of discrimination go into effect before they can be challenged, disenfranchising many racial or language minority voters and substantially burdening their exercise of the right to vote. The Department has been forced to bring lengthy, resource-intensive litigation under Section 2, which has proven no substitute for the critical prophylactic protection afforded by Section 5. The result is that discriminatory policies have been used in elections and remained in effect for years while legal challenges have been litigated. The loss of the right to vote in those elections, even if subsequently vindicated, can never be fully remedied – nor can the results of elections conducted under racially discriminatory redistricting plans.

A. *Shelby County* Had an Immediate Negative Impact

States wasted no time passing laws that had not or would not have survived the preclearance requirement. On June 25, 2013, the very day that the Supreme Court issued the *Shelby County* opinion, Texas officials announced that they would move forward with implementing a discriminatory and burdensome photo identification statute. That particular photo identification requirement had already been stopped twice due to concerns that it violated the Voting Rights Act: once by a Section 5 objection interposed by the Attorney General and again when a three-judge panel of the U.S. District Court for the District of Columbia denied Texas's request for judicial preclearance following a full trial on the merits.⁴²

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

The North Carolina Legislature acted with similar haste to enact an omnibus law imposing multiple voting restrictions. At the time *Shelby County* was before the Supreme Court, North Carolina had been publicly considering a relatively narrow election bill, which included a different voter ID requirement that was much less restrictive than the one that was eventually adopted.⁴³ However, on June 26, 2013, the day after the Supreme Court issued the *Shelby County* opinion, Senator Tom Apodaca, Chairman of the North Carolina Senate Rules Committee, publicly stated that “I think we’ll have an omnibus bill coming out” and that the Senate would move forward with a “full bill.”⁴⁴ The legislature then swiftly expanded its 16 page bill into 57 pages of omnibus legislation that cut early voting hours, imposed a burdensome, strict photo identification requirement, eliminated same-day registration during the early voting period, and eliminated provisional voting for out-of-precinct voters, among other restrictions.⁴⁵ The Department, along with private parties, again was forced to bring a Section 2 challenge in the absence of preclearance. During the pendency of the case, the challenged provisions were in effect for at least one major election (and some provisions were in effect for three years), limiting the rights of North Carolina’s citizens to participate in the political process.

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

B. There Is Reduced Advance Notice of Potentially Discriminatory Voting Changes

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

There are tens of thousands of jurisdictions, many of them small towns, school districts, or other local jurisdictions, which conduct elections and change practices and laws in ways that can have a retrogressive effect on minority voters. The Department does not have the resources to constantly monitor these jurisdictions to identify discriminatory or unconstitutional voting changes. Such a monitoring program would be less efficient and effective than preclearance. The Civil Rights Division’s investigatory tools are simply insufficient to obtain this information on a broad scale, let alone provide adequate redress for impacted voters. The impossibility of this task means that an assortment of subtle yet critical voting changes made at the local level may be jeopardizing the right to vote of racial and language minority voters in a way that violates the Voting Rights Act and the U.S. Constitution. We cannot know the full extent to which local jurisdictions might be making changes that are discriminatory, for example,

consolidating polling places to increase wait times and make it more difficult for minority voters to vote, annexing or deannexing territory so as to dilute minority voting strength, drawing election districts in ways that deny minority voters the ability to elect candidates of their choice, curtailing early voting hours that would have restricted access for low-income voters of color, or disproportionately purging minority voters from voting lists under the pretext of “list maintenance.”

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

C. The Election Administration Process Is No Longer Transparent

The notice resulting from the Section 5 preclearance process provided transparency and benefits to voters, election officials, and communities in covered jurisdictions. Before the *Shelby County* decision, the Department published information regarding Section 5 submissions it received on a weekly basis, pursuant to the Attorney General’s Procedures for the Administration of Section 5 of the Voting Rights Act.⁴⁶ This information was posted online and was publicly available. Interested parties could see when changes had been submitted for preclearance, request copies of submissions and provide written or telephonic comments or input to Civil Rights Division staff, and receive notice of the Attorney General’s preclearance decisions.

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

D. The Public No Longer Has A Structured Process For Participating In The Review Of Proposed Voting Changes In Many Cases

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

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

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

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

The Department's election monitoring program has traditionally been one of the important components of its efforts to protect voting rights. The Department's experience over several decades has shown that when trained nonpartisan monitors watch the electoral process and collect evidence about how elections are being conducted, they have a unique ability to help deter wrongdoing, defuse tension, promote compliance with the law and bolster public confidence in the electoral process.⁴⁷ The *Shelby County* decision, however, has significantly hampered the Department's ability to perform these critical functions in support of fair and impartial elections.

The Civil Rights Division typically conducts election monitoring for election days around the country each year. Prior to *Shelby County*, much of that monitoring activity involved sending federal election observers to jurisdictions with a need certified by the Attorney General, based in part on the Section 4(b) coverage formula.⁴⁸ Once the Supreme Court struck down the coverage formula in *Shelby County*, the Department stopped deploying federal observers unless they were expressly authorized by a relevant court order under Section 3 of the Voting Rights Act. And there were few such orders in place. As a result, the Department has sent substantially fewer federal observers to watch the voting process in real time since the *Shelby County* decision was issued. The Department looks forward to working with Congress so that it may reinstitute the federal observer program in support of future elections, where appropriate.

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

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

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

The elimination of Section 5 has increased the cost of protecting voting rights on an order of magnitude similar to the cost of a Ford Fiesta compared to a Boeing 737. Before the *Shelby*

decision, the Department was able to review proposed voting changes quickly and efficiently. The vast majority of Section 5 submissions were handled by small teams consisting of a staff analyst or attorney and a reviewer and were completed within 60 days.

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

The greater costs of protracted litigation also accrue to governmental entities defending against discrimination claims and are ultimately paid by taxpayers, who include those voters who have been discriminated against. North Carolina lawmakers spent more than \$10.5 million defending their 2013 voting bill, which the Fourth Circuit found to have been enacted with a racially discriminatory intent. Texas spent more than \$3.5 million defending its burdensome photo identification law, which the full Fifth Circuit concluded had a racially discriminatory effect.⁴⁹

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

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

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

In 2011, the Texas legislature passed a statute severely limiting the number of identifying documents for purposes of voting to six forms of photo identification.⁵⁰ As described earlier, because Section 5 was then in effect, Texas sought pre-clearance from the Department, which interposed an objection, blocking Texas from implementing the change.⁵¹ Texas also sought preclearance from the United States District Court for the District of Columbia. That court also refused to preclear the change, finding that it would have a retrogressive effect on Black and Hispanic voters who would be disproportionately burdened in obtaining the required IDs compared to white voters.⁵²

Two days after the decision in *Shelby County*, the Supreme Court vacated the district court's judgment because preclearance was no longer required.⁵³ By that time, Texas had already started moving forward with implementing the statute.⁵⁴

The Department filed a Section 2 lawsuit in federal court, which was consolidated with parallel litigation filed by private parties. The parties then embarked on months of discovery. Ultimately, a two-week trial was held in Corpus Christi in September 2014, where dozens of witnesses testified, including 16 experts—many of whom were retained by the Department.⁵⁵ Months later, the district court ruled that the photo identification bill violated the “results” prong of Section 2 of the Voting Rights Act, because it had a discriminatory effect.⁵⁶ The Court found that Black and Hispanic voters were two to three times less likely to possess the limited forms of identification required by the statute and that it would be two to three times more burdensome for them to get approved IDs than for white voters, due in part to the continuing impacts of past discrimination.⁵⁷

But even so, the statute remained in effect, due to a stay of the District Court’s injunction pending Texas’s appeal to the Fifth Circuit.⁵⁸ Subsequently, a three-judge panel and later the *en banc* Fifth Circuit affirmed the district court’s holding regarding the Section 2 results claim.⁵⁹ In the meantime, voters in all elections in Texas between June 25, 2013 and July 20, 2016 (the date of the Fifth Circuit *en banc* opinion) were subjected to the discriminatory voter identification statute.

Litigation continued on the merits until September 2018, when the district court entered its final judgment in the matter. Meanwhile, the Fifth Circuit just issued an opinion on September 3, 2021, affirming that the private plaintiffs are entitled to the attorney’s fees awarded to them by the district court—more than eight years after Texas decided to move forward with implementing the statute.⁶⁰

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

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

While the *Shelby County* case was pending in front of the Supreme Court, North Carolina legislators asked state officials for racial data regarding the use of a number of voting practices. Shielded from public view, they were quietly laying the groundwork for a major election bill.⁶¹ On the day after the Supreme Court effectively eliminated North Carolina’s preclearance obligations, a leading state senator suddenly announced an intention to move forward with what he characterized as the “full bill.”⁶² Overnight, an essentially single-issue bill was transformed into omnibus legislation that, among other things, imposed a draconian photo identification requirement, eliminated a week of early voting, ended same-day registration, and eliminated out-of-precinct provisional voting.⁶³ Each of these restrictions disproportionately affected Black voters.

Shortly thereafter, in September 2013, the United States filed a Section 2 lawsuit against the State, alleging that four provisions of the new law were adopted with the purpose, and had the result, of denying or abridging the right to vote on account of race.⁶⁴ Prior to the 2014

midterm election, the Department and other plaintiffs moved for a preliminary injunction against several provisions.⁶⁵ After the district court denied the motion, the Fourth Circuit reversed in part, effectively blocking the elimination of same-day registration and out-of-precinct voting; the Supreme Court then stayed the Fourth Circuit's injunction mandate pending its decision on certiorari, over the dissent of two justices, leaving the law entirely in effect during the 2014 elections.⁶⁶ On April 6, 2015, the Supreme Court denied certiorari, automatically reinstituting the preliminary injunction and thereby restoring same-day registration and out-of-precinct voting pending the outcome of trial.⁶⁷

A few weeks before the 2015 trial was scheduled to begin, the North Carolina Legislature enacted a new statute that changed the photo ID requirement by inserting a provision allowing voters to cast a provisional ballot that would count if they completed an affidavit affirming that they had a reasonable impediment to obtaining ID.⁶⁸ Following the addition of this last-second "reasonable impediment" exception, the district court switched course and held two separate trials.⁶⁹ The first, in July 2015, dealt with all provisions except the photo ID requirement; the second, in January 2016, addressed the photo ID requirement as modified by the reasonable impediment exception.⁷⁰ On April 25, 2016, the district court entered judgment rejecting all claims of discrimination.

The Department and the other plaintiffs appealed that decision. On July 29, 2016, nearly three years after the Department had filed its Section 2 lawsuit, the Fourth Circuit held that the challenged provisions were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act; the court concluded that the plaintiffs had proved that the legislation was drafted with "surgical precision" to discriminate against minority voters.⁷¹ On May 15, 2017, the Supreme Court denied North Carolina legislative leaders' petition for review.⁷²

V. The Need For Section 5 Preclearance Is Particularly Urgent Now Because It Thwarts Redistricting Plans That Dilute Minority Voting Strength Accruing From Natural Demographic Changes Since The Last Census

The full protections of the Voting Rights Act are particularly critical at the present moment, given that the Census Bureau recently released 2020 Census data and jurisdictions are in the process of redistricting. States, counties, cities, and other localities are not drawing districts on a blank slate; 2020 Census data shows that population growth in the United States over the past ten years is largely attributable to increases in racial and language minority residents:

Percent Population Change By Race, 2010-2020, U.S. Census⁷³

Race	Percent change, 2010-2020
White alone	- 8.6%
Black or African American alone	+ 5.6%
Am. Indian/Alaska Native alone	+ 27.1%
Asian alone	+ 35.5%
Nat. Hawaiian/Pac. Islander alone	+ 27.8%
Two or More Races	+ 275.7%
Hispanic or Latino	+ 23.0%

An analysis of census data by the Brookings Institute shows that “declining white population shares are pervasive across the nation.” The White alone share of the total population declined in all 50 states, 381 (99.2%) of the nation’s 384 metropolitan areas, and 2,982 (95.0%) of its 3,140 counties.⁷⁴ Moreover, “Black population gains also favor the Sun Belt, led by Texas, Georgia, and Florida.”

Many states have experienced substantial or even transformative demographic changes. In California, the Hispanic or Latino population became the largest racial or ethnic group, increasing from 37.6 percent of the total population in 2010 to 39.4 percent in 2020, while the White alone population declined from 40.1 percent to 34.7 percent, according to decennial census data.⁷⁵ In Texas, the Hispanic or Latino population increased to 39.3 percent of the total population in 2020, nearly matching the state’s White alone population (39.7%) for the first time. The increase in Texas’s Black, Latino, and Asian residents far outpaced that of the state’s White population, according to census data:

Texas Population Change By Race, 2010-2020, U.S. Census⁷⁶

Race	Texas pop change, 2010-2020
White alone	+ 187,252 residents
Black/African Am. alone	+ 557,877 residents
Asian alone	+ 613,092 residents
Hispanic or Latino	+ 1,980,796 residents

Unfortunately, history has shown that, in the context of similar past racial demographic shifts, states have drawn redistricting plans that diluted or thwarted minority voters’ emerging strength. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), for example, the Supreme Court reviewed a redistricting plan that decreased the Latino population in a Texas congressional district in south and west Texas that had seen an “increase in Latino voter registration and overall population” since the last redistricting cycle. *Id.* at 428-29. The Court found that removing Latino voters from that district and eliminating their opportunity to elect a candidate of choice violated Section 2 and raised constitutional concerns, stating:

In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.

Id. at 438-49. Similarly, during the last redistricting cycle, lower courts applied this principle to strike down, on intentional discrimination grounds, state legislative and local redistricting plans that diluted minority voting strength in areas experiencing substantial minority population growth. Examples include Texas state house districts in Nueces, Hidalgo, and Bell and Lampasas Counties, as well as the City of Pasadena's redistricting plan.⁷⁷ These cases accord with the bedrock equal protection principle that governments cannot employ policies for the purpose of thwarting or reversing gains accruing (or about to accrue) to its minority residents.⁷⁸

A strengthened Section 5 is an important tool for combatting efforts to reverse or thwart gains in minority voting strength that had naturally accrued due to normal demographic changes since the last redistricting cycle, in contexts where the risk of discrimination is particularly prominent. Indeed, much of the case-by-case litigation that occurred during the last redistricting cycle would not have been necessary if Section 5 had been in place.

VI. The John Lewis Voting Rights Advancement Act

The bill being considered by this Committee today, the John Lewis Voting Rights Advancement Act ("JLVRAA"), addresses many of the problems described above. Some of the key issues or problems that the legislation responds to are as follows:

- (1) The elimination of the preclearance coverage formula: The coverage formula struck down by the Supreme Court, which had been reenacted by Congress in 2006, relied on voter registration and turnout statistics from elections held in 1964, 1968, and 1972.⁷⁹ The *Shelby* Court criticized that formula as being "based on 40-year-old facts having no logical relation to the present day" and it held that Congress failed "to shape a coverage formula grounded in current conditions," while observing that "Congress may draft another formula based on current conditions."⁸⁰ The JLVRAA responds to that call by updating the relevant criteria so that Section 5 coverage is based on more contemporary conduct by state and local jurisdictions and addresses practices that current experience shows may have the potential to discriminate; it also strengthens the "bail in" and "bail out" provisions to better ensure that coverage is narrowly tailored and based on current conditions.
- (2) Need for clarity regarding the appropriate legal standard in Section 2 vote denial cases: In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the Supreme Court heard its first-ever Section 2 vote denial case or, in its words, "our first § 2 time, place, or manner case."⁸¹ In *Brnovich*, the Court "identif[ied] certain guideposts" relevant to the consideration of Section 2 vote denial cases.⁸² At the same time, the *Brnovich* Court stated that the appropriate legal test for assessing whether or not a Section 2 violation exists requires considering the "totality of the circumstances" and noted that its own set of guideposts was not "an exhaustive list."⁸³ In fact, "any circumstance that has a logical bearing on whether voting is 'equally open' and affords

‘equal opportunity’ may be considered” as part of the analysis.⁸⁴ Because, under *Brown*, Section 2 vote denial claims remain open to multiple potential interpretations by lower courts, the Department believes that further clarification of the substantive legal standard in the JLVRAA is advisable to focus, as the Voting Rights Act has always focused, on the specific context in which the challenged provision is being implemented.

- (3) Impediments to the Attorney General’s authority to investigate voting rights violations:
As described above, in the absence of Section 5, it has become much harder for the Department to learn of and investigate voting-related changes that might run afoul of the Voting Rights Act. Post-*Shelby*, the Department has frequently encountered challenges obtaining documents and information about voting changes through voluntary requests. The JLVRAA would grant much-needed authority to the Department to compel the production of documentary materials relevant to investigations of potential voting rights violations prior to filing an enforcement action.

The JLVRAA includes other important reforms that are critical for strengthening the Department’s enforcement work in the post-*Shelby* environment. Those changes include strengthening the federal observer program, reaffirming that private parties have a right of action under the VRA, and providing a funding source to small jurisdictions to help them comply with transparency requirements. The Department is committed to assisting however possible as Congress considers the JLVRAA and other reforms to address these issues, further protect voting rights, and strengthen our democracy.

Conclusion

The right to vote is sacred, particularly to people of color and historically disenfranchised communities for whom voting and participation in the democratic process is a declaration of citizenship and belonging. Their activism in Selma, Alabama and elsewhere was instrumental in animating the passage of the Voting Rights Act of 1965, which transformed American democracy. Ninety-five years after the Fifteenth Amendment’s ratification, the Voting Rights Act breathed life into the Amendment’s promise that the right to vote should not be denied because of race, color or previous condition of servitude.

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

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

¹ <https://www.congress.gov/116/crec/2020/08/04/modified/CREC-2020-08-04-pt1-PgS4731.htm>

² *United States v. Lynd*, 301 F.2d 818 (5th Cir. 1962).

³ *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

⁴ Peyton McCrary, Christopher Seaman, & Richard Valelly, *The End Of Preclearance As We Knew It: How The Supreme Court Transformed Section 5 Of The Voting Rights Act*, 11 Mich. J. of Race & Law 275, 281 (2006). For the sake of consistency and simplicity, I refer to enforcement by the “Attorney General” in my testimony today.

⁵ *Id.*

⁶ *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52.

⁷ *Beer v. United States*, 425 U.S. 130, 141 (1976).

⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁹ In rare instances, the Attorney General might also make no determination regarding the change (often because the submission was unnecessary or inappropriate for some reason).

¹⁰ For a list of jurisdictions that successfully bailed out from coverage, see Section 4 of the Voting Rights Act, *available at* <https://www.justice.gov/crt/section-4-voting-rights-act#bailout>. The list includes jurisdictions from Alabama, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Massachusetts, Maine, North Carolina, New Hampshire, New Mexico, Oklahoma, Texas, Virginia, and Wyoming.

¹¹ See Br. for the Federal Respondents Appendix A, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96), 2013 WL 315242.

¹² H.R. Rep. No. 109–478, at 40–41.

¹³ 2 Evidence of Continued Need 2555.

¹⁴ Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effects of Section 5*, in Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power, 65 (Ana Henderson ed., 2007), *available at* http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf.

¹⁵ DOJ File No. 2008-2739. Ltr. From Chief Christopher Coates to Dir., Div. of Elections Gail Fenumiai, Esq., July 14, 2008. This letter can be found in the supplemental materials appended to this testimony along with other letters requesting additional information.

¹⁶ See DOJ File No. 2008-2739. Ltr. From Chief Christopher Coates to Dir., Div. of Elections Gail Fenumiai, Esq., Sept. 10, 2008.

¹⁷ *South Carolina v. United States*, 898 F. Supp. 2d 30, 37 (D.D.C. 2012).

¹⁸ *Id.* at 37–38.

¹⁹ *Id.* at 54 (opinion of Bates, J.).

²⁰ Section 5 Objection Letters, United States Department of Justice, *available at* <https://www.justice.gov/crt/section-5-objection-letters>.

²¹ *Shelby County, Ala. v. Holder*, 679 F.3d 848, 867 (D.C. Cir. 2012), *rev’d on other grounds*, 570 U.S. 529 (2013).

²² H.R. Rep. 109–478, at 21 (2006), 2006 U.S.C.C.A.N. 618, 631.

²³ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

²⁴ 1 Voting Rights Act: Evidence of Continued Need, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary (“Evidence of Continued Need”), 109th Cong., 2d Sess., p. 186, 250 (2006).

²⁵ 1 Evidence of Continued Need 97.

²⁶ 1 Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong., 1st Sess., p. 92 (2005).

²⁷ DOJ File No. 2001-2130. Ltr. From Ass't Att. Gen. Ralph F. Boyd, Jr. to J. Lane Greenlee, Esq., Dec. 11, 2001, *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/MS-2680.pdf>.

²⁸ DOJ File No. 2007-3837. Ltr. From Acting Ass't Att. Gen. Grace Chung Becker to Director of Elections Christopher Thomas & Chief Operating Officer Brian DeBano, December 26, 2007, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_071226.pdf.

²⁹ DOJ File No. 1997-3795. Ltr. From Acting Ass't Att. Gen. Bill Lann Lee to John H. White, Jr., Esq., June 28, 1999, *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/MS-2670.pdf>.

³⁰ DOJ File No. 2007-5132. Ltr. From Ass't Att. Gen. Thomas E. Perez to Texas Sec'y of State Phil Wilson, Aug. 21, 2008, *available at* <https://www.justice.gov/crt/voting-determination-letter-28>.

³¹ DOJ File No. 2009-2022. Ltr. From Ass't Att. Gen. Thomas E. Perez to Special Ass't Att. Gen. Margarette L. Meeks, Mar. 24, 2010, *available at* <https://www.justice.gov/crt/voting-determination-letter-19>.

³² DOJ File No. 2007-6012. Ltr. From Acting Ass't Att. Gen. Grace Chung Becker to Sara Frankenstein, Feb. 11, 2008, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_080211.pdf. Notably, Charles Mix became subject to the preclearance requirement as a result of the county's having consented to "bail in" under Section 3 as part of a settlement of a separate voting rights case. *See* Consent Decree, *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. Dec. 4, 2007).

³³ DOJ File No. 2011-2055. Ltr. From Ass't Att. Gen. Thomas E. Perez to Nancy P. Jensen, Oct. 3, 2011, *available at* <https://www.justice.gov/crt/voting-determination-letter-5>.

³⁴ DOJ File No. 2011-3992. Ltr. From Ass't Att. Gen. Thomas E. Perez to Joseph M. Nixon, Dalton L. Oldham, & James E. Trainor, Feb. 7, 2012, *available at* <https://www.justice.gov/crt/voting-determination-letter-31>.

³⁵ DOJ File No. 2012-2733. Ltr. From Ass't Att. Gen. Thomas E. Perez to Andrew S. Johnson & B. Jay Swindell, Aug. 27, 2012, *available at* <https://www.justice.gov/crt/voting-determination-letter-51>.

³⁶ *See, e.g.,* Consent Decree, *United States v. Waller Cty.*, No. 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008) and Consent Order, *Prairie View Chapter of NAACP v. Kitzman*, No. 04-459 (S.D. Tex. Feb. 24, 2004); *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge court), *aff'd mem. sub nom. Symm v. United States*, 439 U.S. 1105 (1979); *see also Veasey v. Perry*, 71 F. Supp. 3d 627, 635-36 (S.D. Tex. 2014), *aff'd in part, and rev'd in part on other grounds* 830 F.3d 216 (5th Cir. 2016) (en banc) (aggregating cases and instances of discrimination); DOJ File No. 2001-3951, Ltr., from J. Michael Wiggins, Acting Ass't Att. Gen., to Atty. for Waller Cty., June 21, 2002, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_020621.pdf; DOJ File No. A4416, Ltr. From Drew S. Days III, Ass't Att. Gen., to Richard G. Sedgeley, Mar. 10, 1978, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1450.pdf>; DOJ File No. X2129, Ltr. From Stanley Pottinger, Ass't Att. Gen., to Atty. for Waller Cty., to Hayden Burns, July 27, 1976, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1250.pdf>.

- ³⁷ DOJ File No. 2001-1495, Ltr. From Ralph F. Boyd, Jr., Ass't. Att. Gen., to Bruce D. Jones, Jr., Cty. Att'y, Sept. 28, 2001, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1280.pdf>; DOJ File No. 2002-5693, Ltr. From Ralph F. Boyd, Jr., Ass't. Att. Gen., to Bruce D. Jones, Jr., Cty. Att'y, May 19, 2003, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1310.pdf>; DOJ File No. 2003-3010, Ltr. From J. Michael Wiggins, Acting Ass't. Att. Gen., to Bruce D. Jones, Jr., Cty. Att'y, May 19, 2003, Oct. 21, 2003, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/VA-1320.pdf>.
- ³⁸ DOJ File No. 2012-4278, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Melody T. Chappell, Wells, Peyton Greenberg & Hunt, Dec. 21, 2012, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_121221.pdf; DOJ File No. 2013-0895, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Melody T. Chappell, Wells, Peyton Greenberg & Hunt, Apr. 8, 2013, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_130408.pdf.
- ³⁹ DOJ File No. 2008-3588, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Robert T. Bass, Allison, Bass & Associates, Ms. Lee Riedel, Cty. Clerk, Mar. 24, 2009, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090324.pdf; DOJ File No. 2009-3078, Ltr. from Thomas E. Perez, Ass't Att. Gen., to Robert T. Bass, Allison, Bass & Associates, Mar. 12, 2010, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_100312.pdf.
- ⁴⁰ Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended, 28 C.F.R., Part 51, <https://www.ecfr.gov/cgi-bin/text-idx?SID=49999f502e2e525507274fa4e433b622&mc=true&node=pt28.2.51&rgn=div5#sp28.2.51.f>.
- ⁴¹ Brief for the States of New York, California, Mississippi, and North Carolina in Support of Respondents 7, *Shelby County, Ala. v. Holder*, 2013 WL 432966 (No. 12-96).
- ⁴² *Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013). The U.S. Supreme Court vacated and remanded the decision when it issued *Shelby County*.
- ⁴³ *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 227 (4th Cir. 2016).
- ⁴⁴ *Id.*
- ⁴⁵ *Id.* at 216-18.
- ⁴⁶ Part 51 of Title 28 of the Code of Federal Regulations.
- ⁴⁷ Fact Sheet On Justice Department's Enforcement Efforts Following *Shelby County* Decision, *available at* <https://www.justice.gov/crt/file/876246/download>.
- ⁴⁸ *Id.*
- ⁴⁹ Jim Malewitz & Lindsay Carbonell, *Texas' Voter ID Defense Has Cost \$3.5 Million*, The Texas Tribune, June 17, 2016, <https://www.texastribune.org/2016/06/17/texas-tab-voter-id-lawsuits-more-35-million/>.
- ⁵⁰ *Veasey v. Abbott*, 830 F.3d 216, 225-26 (5th Cir. 2016) (en banc).
- ⁵¹ *Texas v. Holder*, 888 F. Supp. 2d 113, 144-45 (D.D.C. 2012), *vacated and remanded*, 570 U.S. 928 (2013). The U.S. Supreme Court vacated and remanded the decision when it issued *Shelby County*.
- ⁵² *Id.*
- ⁵³ *Texas v. Holder*, 570 U.S. 928 (2013).

⁵⁴ *Veasey*, 830 F.3d at 227 & n. 7.

⁵⁵ *See, e.g., Veasey v. Perry*, 71 F. Supp. 3d 627, 659-67 (2014), *aff'd in part*, *Veasey*, 830 F.3d at 265.

⁵⁶ *Id.* at 633.

⁵⁷ *Id.* at 661.

⁵⁸ *See Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014) (granting stay).

⁵⁹ *Veasey*, 830 F.3d at 265.

⁶⁰ *See Veasey v. Abbott*, --- F.4th ---, 2021 WL 4022650 (5th Cir. Sept. 3, 2021), *aff'g*, *Veasey v. Abbott*, No. 2:13-cv-00193, 2020 WL 9888360 (S.D. Tex. May 27, 2020) (awarding attorneys' fees to private plaintiffs).

⁶¹ *Id.* at 214-16.

⁶² *Id.* at 216.

⁶³ *Id.*

⁶⁴ *Id.* at 218.

⁶⁵ *Id.*

⁶⁶ *League of Women Voters of N.C. v. North Carolina*, 997 F. Supp. 2d 322, 339 (M.D.N.C. 2014), *rev'd in part*, 769 F.3d 224, 248-49 (4th Cir. 2014), *stayed pending appeal*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014).

⁶⁷ *North Carolina v. League of Women Voters of N.C.*, 575 U.S. 950 (2015).

⁶⁸ 831 F.3d at 219.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 214.

⁷² *North Carolina v. North Carolina State Conference of NAACP*, 137 S.Ct. 1399 (2017).

⁷³ Nicholas Jones, et. al, 2020 Census Illuminates Racial and Ethnic Composition of the Country, U.S. Census Bureau, Aug. 12, 2021, *available at* <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>; 2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity, U.S. Census Bureau, Aug. 12, 2021, *available at* <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html>.

⁷⁴ William H. Frey, *New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations*, Brookings Institute, Aug. 13, 2021, *available at* <https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/>.

⁷⁵ Eric Jensen et. al, *2020 U.S. Population More Racially and Ethnically Diverse Than Measured in 2010*, U.S. Census Bureau, Aug. 12, 2021, *available at* <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html>. Note that this data comes from the race/Hispanic cross, whereas the data in the table labeled "Percent Population Change By Race, 2010-2020, U.S. Census" are not crossed.

⁷⁶ William H. Frey, *New 2020 census results show increased diversity countering decade-long declines in America's white and youth populations*, Brookings Institute, Aug. 13, 2021, *available*

at <https://www.brookings.edu/research/new-2020-census-results-show-increased-diversity-countering-decade-long-declines-in-americas-white-and-youth-populations/>.

⁷⁷ See, e.g., *Perez v. Abbott*, 250 F. Supp. 3d 123, 174-76, 217 (W.D. Tex. 2017) (holding that mapdrawer “intentionally racially gerrymandered [two Texas House] districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in, thus cracking and diluting the minority vote” after “Anglo CVAP [had] decreased in HD54 [] due to the fact that minority population growth accounted for more than 70% of the growth in Bell and Lampasas Counties”); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 725 (S.D. Tex. 2017) (finding “a substantial reason—the intended purpose—of enacting [the redistricting plan] was to dilute Latino voting strength” and “to delay the day when Latinos would . . . have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats” in Pasadena, which experienced “[r]ecent population shifts and growth in the Latino citizen voting-age . . . population”).

⁷⁸ See, e.g., *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 994, 1011-13 (11th Cir. 2018) (rejecting secession effort from public school district by predominantly white community, following significant demographic changes in the school district’s student body, which would ensure “a less racially diverse student population”); *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016) (affirming finding that shift in zoning policy “reflected race-based animus” in light of the city’s “racial makeup” and “the likely number of minorities that would have lived in affordable housing” absent the change); see also *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (en banc) (noting district court’s intent finding supported by “the fact that the extraordinary measures accompanying the passage of SB 14 occurred in the wake of a ‘seismic demographic shift,’ as minority populations rapidly increased in Texas”).

⁷⁹ See 52 U.S.C. § 10303(b).

⁸⁰ *Shelby County*, 570 U.S. at 555, 557.

⁸¹ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2337 (2021).

⁸² *Id.* at 2336.

⁸³ *Id.* at 2338.

⁸⁴ *Id.*

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Statement of Hon. Kenneth T. Cuccinelli, II
Chairman, Election Transparency Initiative
Former Virginia Attorney General
Former Acting Deputy Secretary, Department of Homeland Security

Chairman Durbin, Ranking Member Grassley and Members of the Committee, thank you for inviting me today to discuss the quality and integrity of our voting systems. I am Ken Cuccinelli and I served as Virginia's last attorney general under the prior preclearance process. I currently serve as the national chairman of the Election Transparency Initiative, where we work every day to help improve the transparency, security, accessibility and accountability of elections in every state, so that every American has confidence in the outcome of every election, regardless of party or race and regardless of whether one's chosen candidate won or lost.

Today it is easier to register and vote than ever before in our history, regardless of where you live, what color you are, or any political party you affiliate with. This is a great accomplishment worthy of celebrating, while always looking to improve.

Instead, many in this body seek to advance propaganda in place of truth. They accuse everyone who wants clean and transparent elections of the most despicable names, such as "racists" or suggesting they want to suppress the votes of their fellow Americans. As evil as this course of conduct is, it is not new. It has been a long-term strategy.

For example, in 2003, a *New York Times* editorial called 'election integrity' a "code phrase for voter suppression." That summarizes the false narrative very succinctly.

In 2004, in Colorado, the DNC election manual suggested launching a "pre-emptive strike by encouraging minority leadership to denounce voter suppression, issue press releases and place stories when no signs of intimidation techniques have emerged yet."

In 2010, my former attorney general colleague, Martha Coakley, was caught red-handed in her losing Senate race practicing the tactic of "pre-emptive accusation" (without evidence) by issuing a press release alleging voting "irregularities" that

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had clearly been drafted the day before the election. How do we know they drafted the accusations with no evidence before Election Day? Because they foolishly left the date they drafted the lies on the press release.

In 2017, following the 2016 presidential election, the Democrats carried their false 'voter suppression' narrative into court, alleging nationwide voter suppression by the RNC, and Obama-appointed District Judge Vazquez said the following about their claims: "As far as what's before this court, you've presented me with no evidence of actual voter suppression efforts on the day of the election, much less tying it to the RNC." The judge went on to point out that "[t]he DNC has a lot of resources and I know this was a big concern. Where is the evidence that there [was] suppression going on on Election Day, and then a reasonable inference that the RNC was involved in those?" And he found that there was none.

More directly related to the history of the bill focused on here today, in 2019, a number of Republicans offered to support that year's version of the John Lewis bill if it included objective measures of voter suppression such as low voter registration by minorities or low voter turnout by minorities, but the radical leftists driving that legislation had no interest in objective standards, as that would not accomplish their actual goals of facilitating cheating nationwide. Not to mention, the worst performing states today under such objective standards would be states like Massachusetts and Oregon, not the states originally covered by the Voting Rights Act. That doesn't fit the false narrative of fake 'voter suppression,' and so such reasonable proposals were rejected out of hand.

It is no secret why this narrative is advanced by those on the Left. Simply put, they view it as a voter turnout message to rile up their base. Do Democrats sincerely believe that election integrity and today's laws forming the most free, fair, and inclusive voting system in the world are akin to the scourge of "Jim Crow"-era oppression? Perhaps they have convinced themselves of it, but such allegations are really just part of the false narrative that I have described here.

In 2004, in an attempt to address the concerns of both parties, then-RNC-Chairman Ed Gillespie made a detailed proposal to then-DNC-Chairman Terry McAuliffe about how both parties could work together to address concerns about potential voter suppression and fraud; thereby attacking any such problems and

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at the same time, dramatically increasing the confidence of all Americans in the 2004 election.

But consistent with the later-discovered McAuliffe/DNC strategy of intentionally making false accusations of voter suppression – as seen in the 2004 Colorado DNC manual – Terry McAuliffe and the DNC declined to work together to actually address even their own alleged concerns about voter suppression, presumably because their only interest was in the false narrative, as there no longer was a voter suppression problem to address – thankfully for America.¹

It is also worth noting that in 2005, at a time when election security and transparency was somewhat more of a bipartisan concern, the Carter-Baker Commission, peopled with luminaries of both political parties, warned of the risks of mail-in and absentee voting, as well as the need to avoid duplicate voter registrations and other problems with the voter rolls. At the same time, commonsense measures like voter I.D., ready access by election observers and the prosecution of voter fraud were all praised by that bipartisan commission.²

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As a testament to the common sense of everyday Americans, those things that make for a secure and reliable election are generally agreed upon by ordinary Americans, and they tend to track very closely with many of the recommendations from the Carter-Baker Commission, though many such measures are targeted and undermined by the legislation proposed here in the Senate.

75% of Americans think only U.S. citizens should be participating in American elections.³

Polling consistently shows that 70-80+% of Americans believe that voter I.D. is an essential element of a well-run election – despite the continual targeting and vilification of this particular security and confidence-building measure.

¹ Attached are the two referenced letters.

² See <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>

³ See <https://onlycitizens.vote/wp-content/uploads/2021/10/ACV-National-Public-Opinion-101719-1.pdf>.

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Such support includes majorities of minority voters along with every other category of Americans.⁴ And such support similarly extends to voter I.D. for absentee and early voting.⁵

Questionable practices such as ‘ballot harvesting’ or ‘ballot trafficking’ are disfavored by the American people, yet H.R. 4, S. 1 and other currently-proposed federal legislation seek to force ballot trafficking on the states.⁶

Not surprisingly, Americans favor consistency in the application of the rules of elections across their states. For example, by substantial margins, Americans believe election clerks should use the same standards everywhere in their state for correcting absentee ballot errors, and they favor in-person early voting hours being the same everywhere within their state.⁷

Yet H.R. 4, the deceptively named “John Lewis Voting Rights and Advancement Act,” would let unelected left-wing bureaucrats essentially veto commonsense election safeguards and voter integrity measures passed by duly elected state legislators.

Through H.R. 4, Democrats would like to impose a federal preclearance requirement nationwide – suggesting access to voting is actually worse today than it was in 1965, a patently ridiculous position.

In truth, the lying demagoguery coming from the radicals is not constructive and represents a large-scale attempt to knowingly convince the American people of a false narrative – namely, that since the *Shelby County* ruling by the Supreme Court in 2013, America has been suffering from a rash of voter suppression.

Thankfully, the data demonstrates that this narrative is blatantly false.

⁴ See, e.g., <https://www.honestelections.org/wp-content/uploads/2021/03/Memo-on-Voters-and-Elections-1.pdf> (national); <https://www.detroitchamber.com/wp-content/uploads/2021/06/June-2021-Michigan-Statewide-Voter-Survey-Report.pdf> (Michigan); <https://www.fandm.edu/uploads/files/109736436702240144-fmpolljune2021-summary.pdf> (Pennsylvania); https://will-law.org/wp-content/uploads/2021/09/WILL_FINAL-Memo.pdf (Wisconsin).

⁵ Id.; see also <https://www.ajc.com/politics/interactive-poll-of-georgia-voters-january-2021/TWP2L.TEGFZEGNFUPMS3NIWPDWU/> (Georgia); https://www.texaspolicy.com/wp-content/uploads/2021/07/Rasmussen_toplines.pdf (Texas).

⁶ See, e.g., https://will-law.org/wp-content/uploads/2021/09/WILL_FINAL-Memo.pdf (Wisconsin).

⁷ See https://will-law.org/wp-content/uploads/2021/09/WILL_FINAL-Memo.pdf (Wisconsin).

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And rather than make general allegations, let me be specific about some of the radical leftists who are lying to the American people.

It starts at the top, with President Biden. Even the leftist *Washington Post* had to give President Biden their strongest liar rating of “four Pinocchios” for his blatantly false statements about Georgia’s recent election reform efforts.⁸

Not to be left out, Vice President Harris flip-flopped from her anti-voter I.D. position in an interview on BET, an interview in which that flip-flop was overshadowed by her comment that people who live in rural communities aren’t capable, i.e., smart enough, to use voter I.D.s to conduct their voting.

Vice President Harris’s ‘rural people are stupid’ view is no less prejudiced than her view – shared implicitly by so many others on the Left – that minorities are somehow incapable of getting and using voter I.D.s like everyone else.

In addition to the data simply not supporting this prejudiced view, it is one of the most offensive aspects of the entire contemporary public discussion.

Congressman Clyburn not only flip-flopped on his previous position that requiring voter I.D. is racist, but he even denied ever holding such a position. And beyond just that, he further denied that anyone in Congress ever held such a position! Given that members of this very committee have suggested that requiring voter I.D. is suppressionist at the least or racist at worst, you all know Congressman Clyburn’s denial was without foundation. And like President Biden, Congressman Clyburn also earned “four Pinocchios” from the leftist *Washington Post* for his lies on this subject.⁹

Of course, our list would be incomplete without Stacey Abrams, who, like Congressman Clyburn, both flip-flopped on her “voter I.D. is racist” position AND denied ever holding such a position.¹⁰

Pennsylvania Governor Tom Wolf staged a spectacular flip-flop of his own, suddenly declaring he is now open to changing the state’s voter I.D. laws. Less than three weeks earlier, Wolf enthusiastically vetoed commonsense voter I.D.

⁸ See <https://www.washingtonpost.com/politics/2021/03/30/biden-falsely-claims-new-georgia-law-ends-voting-hours-early/>

⁹ See <https://www.washingtonpost.com/politics/2021/07/15/clyburns-false-claim-that-no-democrat-has-opposed-voter-id-laws/>

¹⁰ See <https://www.washingtonpost.com/politics/2021/06/21/democrats-voter-id/>

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provisions contained within the *Voting Rights Protection Act* passed by the state's General Assembly.¹¹

What do the flip-flopping race baiters have in common? Two things: their timing and their polling.

What do I mean?

First, because of the political necessity of getting federal legislation through a 50-50 Senate, following West Virginia Senator Manchin's indication that he would require some kind of voter I.D. to support national legislation, President Biden, Vice President Harris, Congressman Clyburn, Stacey Abrams and many others on the Left, had to cast aside their false "voter I.D. is racist" mantra, as they could not be calling Senator Manchin a racist (at least for now) while they were trying to get his vote for their extreme H.R.1/S.1 legislation in the U.S. Senate or its follow-on, H.R. 4.

Second, even after six solid months of relentless, false, ad hominem attacks on election reform efforts, including voter I.D. requirements, by left-wing national leaders and their media puppets, the American people still overwhelmingly hold the position that voter I.D. requirements – and other ballot integrity measures – should be an integral part of the election processes in our states.

I will use Stacey Abrams as an example of the role of persistently positive polling in favor of election integrity reforms. Given that Stacey Abrams will likely run for governor of Georgia again next year, being on the bottom side of issues that poll in the range of 2-to-1 in favor is not a comfortable place for any aspiring politician to be.

Abrams flip-flop/denial regarding voter I.D is very similar to her handling of first encouraging Major League Baseball to boycott her own home state of Georgia by moving the All-Star game out of Atlanta, then denying that she had done so.

In that case, amazingly, allegedly in the name of fighting racism, Major League Baseball, with encouragement from Stacey Abrams and others, moved the All-Star

¹¹ See <https://www.inquirer.com/politics/election/pennsylvania-voter-id-tom-wolf-interview-20210720.html>

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game from the 51% black city of Atlanta to the 9% black city of Denver, doing incalculable damage to the black small business owners of Atlanta.

This example epitomizes – in one action – how far off the mark those opposing transparent election reforms have been in this entire debate.

To drive home how so many on the Left are more interested in perpetuating a false narrative, rather than having a full discussion of what makes for the best election, I would note that I was jointly invited to debate, first, Stacey Abrams and then former congressman and presidential hopeful “Beto” O’Rourke, respectfully, on the issues of election reform. While I gladly accepted the opportunity, both of my proposed challengers declined. Why? They have no interest or intention to engage these issues on the merits.

Let’s look at this from a different perspective.

Imagine an election with no rules. Just a table with a stack of empty ballots. Nobody is watching the table. Nobody is dispensing the ballots. Anyone who comes along can fill out a ballot (and since nobody is watching, as many as they choose), and drop those ballots into a drop box. For good measure we will mail a blank ballot to every single name listed in an outdated pollbook and let anyone return those ballots to unsecured drop boxes.

No one would trust the outcome of that “unrestricted,” voting process.

We need rules, i.e., time, place and manner rules. And we find that when Americans talk about the mechanics of what makes a good election – outside the umbrella of partisanship – there is broad agreement on good rules for elections.

Only citizens can vote. A reasonable rule.

Citizens have to register and registrars have keep pollbooks up to date. A reasonable rule.

One ballot per registered voter. A reasonable rule.

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Enforceable transparency is required so everyone can see the election is clean and secure from start to finish – every step of the way. A reasonable rule.

Ensure each voter is who they say they are. A reasonable rule. The Carter-Baker Commission recommended it and overwhelming majorities of Americans support it.

So, on the basic mechanics of how elections should best be run, when you take the discussion out of the overcharged political atmosphere of the day, Americans tend to agree on what it takes to run good elections.

We have seen that one does not need fraud to shake confidence in an election. In *Bush v. Gore* in 2000, Florida's election system was held up before the world as a sad joke – incompetence, election breakdowns, untrustworthy ballots and machines, and haphazard and inconsistent rules. Americans' confidence was shaken.

In 2000, the Left was screaming its lack of confidence in our elections. And again in 2016 and 2018 Democrats questioned election results.

Highly regarded pollster Scott Rasmussen wrote an article this year in which he recorded that, while 31% of Americans lacked confidence that America swore in the correct person as president following the election of 2020, 26% held the same view in 2016 – and there is not much overlap between those two groups.¹²

Furthermore, most voters (56%) believe at least one of the last two presidents was illegitimately put into office. That includes 26% who believe Hillary Clinton was the legitimate winner in 2016 and 31% who believe Donald Trump was the legitimate winner in 2020.¹³

Here, in the U.S. Senate, you can learn from Florida. How did the people of Florida respond to the shocking revelation of just how poor their election system was in 2000? They set about fixing their laws and procedures, and in many parts of the state, they improved the quality of their personnel.

¹² See <https://scottrasmussen.com/just-26-believe-the-right-person-was-declared-winner-in-last-two-presidential-elections/>

¹³ *Id.*

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And given the atmosphere flowing from 2020 into 2021, it is worth recognizing that even though the Republican candidate won that contested election in Florida in 2000, it was largely Republicans – though by no means only Republicans – that set about to improve their election processes.

States can and are working to upgrade and improve their elections systems, but it is important that Washington not step in to dictate its own one-size-fits-all approach that is really more about control of elections by one party than achieving the confidence of the American people in the outcome of our elections.

The first and most important thing the Senate can do, is stick with the Voting Rights Act in its current form to fight actual discrimination where it occurs, as noted by the Supreme Court in *Brnovich*, and not go beyond it to a partisan federal takeover of our elections.

One need only look back at Florida 20 years after *Bush v Gore*. When much of the country suffered election breakdowns in their states, Florida – the third largest state, and the largest swing state – smoothly tallied its votes on election night 2020, with no significant complaints from either side.

Citizens can have confidence in their elections, but only if the federal government doesn't force them to eliminate basic rules of fair and accurate elections.

Many on the Left want to overturn the *Shelby County* and *Brnovich* decisions by the U.S. Supreme Court. It should be noted that the simple reason the *Shelby County* and *Brnovich* decisions are right is because they are based on facts, not left-wing hysteria.

Given the pure volume of hysteria, I think that bears repeating: The reason the *Shelby County* and *Brnovich* decisions are right is because they are based on facts, not left-wing hysteria.

I would reiterate that both H.R. 1/S. 1 and H.R. 4's nationwide preclearance with no objective basis both require a false assumption that America is worse off today as it relates to voting access than it was in 1965, but also one directly at odds with the Supreme Court's conclusion in the *Shelby County* decision of 2013.

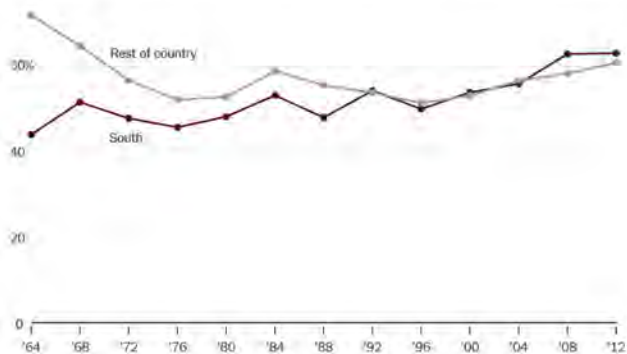
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In *Shelby County*, the Supreme Court noted that the preclearance requirements of the Voting Rights Act constituted an “uncommon exercise of congressional power” that was warranted by the “exceptional conditions” existing in 1965, including tests and hurdles to registering to vote and voting in some parts of the country, particularly the South, including my home state of Virginia. The result of those obstacles was substantially lower black voter participation.

As you can see in the graph below (from the *New York Times*, using Census Bureau data), once the restrictions targeted in the Voting Rights Act were removed, black adults in the South began to engage in elections at rates that quickly approached the rest of the country, actually surpassing black voters in the rest of the country by 1992.

Voting Rights Act's Benefit Seen in South

The results of the presidential elections of 1964 and beyond clearly show the effect of the Voting Rights Act of 1965. In 1964, black turnout outside the South hit 72 percent, a level not seen since, but in the South it was only 44 percent. Since then, black turnout has converged in all regions of the country.



Source: U.S. Census Bureau

Beyond equalizing access to voter registration and voting, the Supreme Court noted that in 2013 “...discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” Under those circumstances, federal preclearance could not be constitutionally sustained as it was not based on “current political conditions.”

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Those ‘current political conditions’ are shown in the steady, positive changes in the voting and registration data compiled by the Census Bureau over the years to see that while we are not perfect, America has – thankfully – left its days of racially suppressive voting laws behind.¹⁴

This summer, in the completely unsurprising *Brnovich* decision, the Supreme Court further noted that Section 2 of the Voting Rights Act is alive and well and available to the federal government to use to attack actual instances of discrimination – as it should be.

I mention this because I am concerned that many leaders on the Left talk about the *Shelby County* decision as if the federal government’s authority to stop discrimination was held unconstitutional, which I hope everyone on this committee knows is not the case. Only the outdated preclearance formula was found to be unconstitutional. But it seems that some on the Left want to mislead the American people in an effort to build artificial pressure for a federal takeover of elections.

As it relates to the amendments to the Voting Rights Act put forward in H.R. 4, the federal takeover via nationwide preclearance is clearly intended to position the extreme partisans in the Voting Section of the Department of Justice¹⁵ to block voting integrity efforts. In fact, it is these very efforts that have been histrionically referred to by members of the Senate and even the president of the United States as so-called “Jim Crow 2.0.”

Recent evidence of the problem is the politicized lawsuit recently filed against Georgia by the Department of Justice (Voting Section) asserting – in unusually political terms – that Georgia’s recent modest reforms to its election system were enacted in order to discriminate against black voters in Georgia. In light of the complaints in Georgia about election administration – dating back to 2018 (by Democrats) – it should be no surprise to anyone that Georgia’s General Assembly would seek to make improvements. That those improvements have been the subject of some of the most brazen and dishonest attacks seen in American politics in years, including by President Biden, indicates that cleaning up Georgia’s

¹⁴ See <https://www.census.gov/topics/public-sector/voting.html>

¹⁵ See <https://oig.justice.gov/reports/2013/s1303.pdf>, page 209

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elections is deemed by those doing the attacking, i.e., Democrats, to somehow disadvantage their "side."

When someone thinks cleaner and smoother elections are disadvantageous, I am hard pressed to discern a defensible reason for such a position.

Finally, I would share a bit of my experience as an attorney general of a covered jurisdiction – Virginia. We always had to struggle with the never-well-delineated, conflicting demands of Section 2 and Section 5 of the Voting Rights Act when it came to redistricting. To put it in simple terms, Section 2 reasonably demands that a state's laws be developed and implemented without regard to race, while Section 5 required covered states to take into account race when drawing district lines, with the general goal of no retrogression. Needless to say, it is actually impossible to do both. It is possible to do both yet not discriminate, but the preclearance requirement made this arrangement subject to great arbitrariness on the part of the Department of Justice.

And that is just redistricting. With over 100 election jurisdictions in Virginia, the aggregate burden of complying with preclearance was enormous. I completely agree that that burden made sense when the VRA was put in place, but it cannot be justified today.

Again, for those of you who have not had to contend with preclearance in your careers, it covers the smallest of trivia. For example, we have approximately 2,500 voting precincts in Virginia. They are in schools, churches, government buildings, and the list goes on. To do something as pedestrian as moving a voting location from the local school to the local firehouse – for one, single precinct – a locality had to ask permission of the federal government for that change, and thus had to go through the preclearance process. While the overwhelming majority of such requests end up being approved, the process often comes with requirements for information and what amount to interrogatories. All for one of the simplest elements of election administration. Then multiply that through all of the different aspects of an election and you begin to see the extraordinary burden involved.

And when you realize that the extreme left-wing lawyers that inhabit the Voting Section at DOJ view every one of these as opportunities to negotiate a state or

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locality into election process positions that they – the unelected bureaucrats – want for your state, you can see the opportunities for mischief.

The term “federal takeover” describes such a situation very accurately, and it cannot be justified as achieving anything other than political control of elections, perhaps one of the only results that could actually take America’s shaky confidence in its elections to an even lower place. I would ask the Senate not to go down that path.

Finally, given the outrageous propaganda being spewed by so many on the Left about so-called “Jim Crow 2.0” election reforms, I thought it would be helpful for me to put into the record a number of items that are examples of real Jim Crow laws.

The 1902 Virginia Constitution imposed poll taxes, literacy tests and even a civics test as hurdles to voter registration and voting.¹⁶ All intended to deny as many black citizens access to voting as possible.¹⁷ One might also look at the other then-contemporary rewrites of other Southern states’ constitutions to see similar provisions.

In addition to the taxes, tests and hurdles of these constitutions, there were also devices to allow illiterate whites onto the voter rolls. These included going easy on the civics tests for prospective white voters who couldn’t read, as well as so-called “grandfather clauses,” by which illiterate whites whose father or grandfather fought for either the Union or Confederacy (virtually always the Confederacy) would also be admitted to register to vote.

One example of the kind of civics tests used to bar black citizens from voting can be seen in the below footnote – a 1958 Georgia civics test that I am confident not one single member of this committee could get a 100% score on even if you had a localized version.¹⁸

And it was not only Southern states. California, Connecticut, Delaware, and the list goes on had either or both constitutional or statutory provisions to impede black citizens from voting.

¹⁶ See https://vagovernmentmatters.org/archive/files/vaconstitution1902_6885e65b9d.pdf

¹⁷ See <http://www.virginiaplaces.org/government/constitution1902.html>

¹⁸ See <https://dp.la/primary-source-sets/voting-rights-act-of-1965/sources/1387>

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This is a history we must never forget. But those who suggest that one side of what should be an honest debate about how best to run elections today are engaged in a new round of "Jim Crow" legislation either do not know their history, or more likely, are abusing that history for their own political ends. A sad commentary on those who engage in such abuse – regardless of their exalted rank.

H.R. 4 is nothing but a power grab by congressional Democrats aimed at taking election powers away from the states. The takeover of all election reforms and redistricting by federal bureaucrats with a radical agenda under the guise of voter protection would set America back.

H.R. 4 should be rejected in favor of using the current Voting Rights Act – Sections 2 and 3 – which has already proven to be effective in fighting true discrimination where and when it has existed.

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STATEMENT OF JON GREENBAUM

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U.S. SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

"PROTECTING A PRECIOUS, ALMOST SACRED RIGHT:
THE JOHN R. LEWIS VOTING RIGHTS ADVANCEMENT ACT"

OCTOBER 6, 2021

Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the U.S. Senate Committee on the Judiciary, my name is Jon Greenbaum and I serve as the Chief Counsel for the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for the opportunity to testify today on "Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act." My testimony will focus on ways in which Congress can remedy the damage to racial equality in voting caused by the Supreme Court's decisions in *Shelby County v. Holder*¹ and *Brnovich v. Democratic National Committee*² and discuss other provisions that update the Voting Rights Act to address current discrimination.

In 2013, the *Shelby County* decision effectively immobilized the preclearance provisions of Section 5 of the Voting Rights Act by finding its underlying coverage formula unconstitutional. The more recent *Brnovich* decision, while not gutting Section 2 vote denial "results" claims, makes it unnecessarily more difficult for plaintiffs to bring these cases, which runs directly counter to Congress' intent in first enacting the Voting Rights Act in 1965, and then in broadening the scope of Section 2 of the Act in 1982. The weakening of Section 2 protections by the Court in *Brnovich* is particularly and sadly ironic, as the Court in *Shelby County* had pointed to the continued existence of Section 2's "permanent, nation-wide ban on racial discrimination" when it eviscerated the Section 5 protections.³

The harm caused by *Shelby County* has been well-documented. The effects of *Brnovich* remain to be seen. It is time for Congress to act. The full protections of the Voting Rights Act are desperately needed today, particularly given the steps already taken—or about to be taken—by legislatures in states such as Georgia, Florida, and Texas in the aftermath of the 2020 election to raise additional barriers to the vote that will impact voters of color more severely than white voters. Moreover, there is a legitimate concern that some state legislatures will be emboldened by their reading of *Brnovich*, as they were by the decision in *Shelby*, and view it as a signal from the Court to take even more suppressive action. Congress should immediately reassert its intention to fully protect the voting rights of voters of color in Sections 2 and 5 of the Voting Rights Act.

I come to this conclusion based on twenty-four years of working on voting rights issues nationally. From 1997 to 2003, I served as a Senior Trial Attorney in the Voting Section at the United States Department of Justice, where I enforced various provisions of the Voting Rights Act, including Section 2 and Section 5, on behalf of the United States. In the eighteen years since, I have continued to work on voting rights issues at the Lawyers' Committee for Civil Rights Under Law as Chief Counsel, where I oversee our Voting Rights Project, and prior to that, when I served as Director of the Voting Rights Project.

The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to pursue racial justice through mobilization of the private bar. Voting rights has been an organizational core area since the inception of the organization. During my time at the Lawyers' Committee, among other things, I was intimately involved in the constitutional defense of Section 5 and its coverage formula in *Shelby County* and its predecessor

¹ 570 U.S. 529 (2013).

² 2021 WL 2690267 (2021).

³ 570 U.S. at 556.

case *Northwest Austin Municipal Utility District No. 1 v. Holder*.⁴ I also staffed the National Commission on the Voting Rights Act, which issued a report entitled *The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (2006). The report and record of the National Commission on the Voting Rights Act, which was submitted to the House Judiciary Committee at the Committee's request, was the largest single piece of the record supporting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("2006 VRA Reauthorization").

Our recommended responses to the *Shelby County* and *Brnovich* decisions stem from the different scope and rationales of the decisions themselves. The complete evisceration of Section 5 wrought by the *Shelby County* decision necessitates a comprehensive remedy, but one that is instructed by the reasoning of that decision and therefore considers both the unfortunate history of discrimination in voting in particular states and the current need for prophylactic measures to ensure that no state or sub-jurisdiction can implement a change in voting practices that discriminates against voters of color. The more limited impact of the *Brnovich* decision calls for a correspondingly focused response, one that zeroes in on the specific deviations of the Court from the clear intent of Congress in its 1982 amendments to Section 2.

Thus, our recommended response to the *Shelby County* decision starts with our support for provisions similar to those in the Senate bill, which parallel many of the provisions in H.R. 4, the John Lewis Voting Rights Advancement Act, which the U.S. House of Representatives passed on August 24, 2021. These provisions include a replacement coverage formula that would be applied to the preclearance provisions of Section 5 and the federal observer provisions of Section 8, and a transparency provision that requires all jurisdictions – irrespective of any coverage formula – to provide public notice of changes in voting practices. H.R. 4 included an additional amendment to Section 2: the creation of a "retrogression cause of action," which allows the Attorney General or private parties an opportunity to stop changes in voting practices anywhere in the country before they diminish the voting rights of voters of color. As I will discuss more fully in my testimony, the retrogression cause of action would meet the current need to stop suppressive laws that discriminate against voters of color, using a tried and true standard, with limited interference with state sovereignty, and without implicating issues relating to differentiation among the states.

Our recommended congressional response to *Brnovich* is more limited, as Congress does not have to completely rewrite Section 2. It simply has to remove any ambiguity in the statute caused by the *Brnovich* opinion, which gave short shrift to a substantial legislative record and decades of jurisprudence which run counter to the *Brnovich* majority's constricted view of this remedial statute. Congress originally enacted and later amended Section 2 to stymie not only blatant, explicit discrimination, but also facially neutral voting laws that, through ingenious, sophisticated methods, had a significant impact on minority citizens' right to vote. Consistent with this purpose, prior to *Brnovich*, the Supreme Court and several of the Circuit Courts of Appeal had adopted a standard to ensure the effective implementation of those protections. That standard recognized not only that the Act applies broadly to all voting procedures and policies that abridge the right to vote—whether expressly or subtly—but also that a challenged law cannot be viewed in isolation, because a seemingly innocuous voting practice can interact with underlying social conditions to result in

⁴ 557 U.S. 193 (2009).

pernicious discrimination.⁵

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

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

Like H.R. 4, the Senate bill includes other important provisions. It amends Section 3(c) of the Act to authorize federal judges to bail-in jurisdictions where any voting discrimination against racial, ethnic or language minority voters is established. Consonant with that discretion and their broad remedial powers, judges will continue to have the authority to set the time frame and the scope of voting changes to which bail-in applies. At the same time, the bill facilitates the removal of jurisdictions in which voting discrimination no longer is present. Amendments to Section 4(a) of the Voting Rights Act enhance it to exempt previously bailed out jurisdictions and to streamline the process for political subdivisions with no recent voting discrimination to exit from coverage for Section 5 preclearance.

The bill also responds to the Supreme Court’s decision in *Buckhamton Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁶ by clarifying congressional intent to apply a broad definition of “prevailing party” through the well-established catalyst theory. This simple, but important, amendment reaffirms the Act’s purpose to make whole private attorneys general who successfully stop voting discrimination by allowing them to recover their reasonable attorneys’ fees.⁷

Finally, I will discuss the critical protections included in the Senate bill through its addition of the Native American Voting Rights Act, or NAVRA. The provisions in NAVRA target the most persistent obstacles faced by Native voters in elections: so-called “first generation” voting barriers that prevent Native Americans from registering to vote, casting a ballot and having their ballot counted.⁸ As one of the founding members of the Native American Voting Rights Coalition, or NAVRC, the Lawyers’ Committee applauds the Senate for including this important piece of

⁵ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); accord *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

⁶ 532 U.S. 598 (2001).

⁷ See 52 U.S.C. § 10310(c).

⁸ For a comprehensive discussion of first generation barriers to American Indian and Alaska Native voters, see James Thomas Tucker, Jacqueline De Léon & Dan McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* (NARF June 2020) <<https://vote.narf.org/obstacles-at-every-turn/>>.

legislation needed to secure the fundamental right to vote for indigenous voters.

I. Why and How Congress Must Respond to *Shelby County*

A. The State of Affairs Prior to the *Shelby County* decision

Prior to the *Shelby County* decision, the combination of Section 2 and Section 5 of the Voting Rights Act provided an effective means of preventing and remedying minority voting discrimination. Section 2, which is discussed more fully below, remains as the general provision enabling the Department of Justice and private plaintiffs to challenge voting practices or procedures that have a discriminatory purpose or result. Section 2 is in effect nationwide.⁹ Section 5 required jurisdictions with a history of discrimination, based on a formula set forth in Section 4(b), to obtain preclearance of any voting changes from the Department of Justice or the District Court in the District of Columbia before implementing the voting change.¹⁰ From its inception, there was a sunset provision for the formula, and the sunset provision for the 2006 Reauthorization was 25 years.¹¹

Section 5 covered jurisdictions had to show federal authorities that the voting change did not have a discriminatory purpose or effect. Discriminatory purpose under Section 5 was the same as the Fourteenth and Fifteenth Amendment prohibitions against intentional discrimination against minority voters.¹² Effect was defined as a change which would have the effect of diminishing the ability of minority voters to vote or to elect their preferred candidates of choice.¹³ This was also known as retrogression, and in most instances was easy to measure and administer. For example, if a proposed redistricting plan maintained a majority black district that elected a black preferred candidate at the same black population percentage as the plan in effect, it would be highly unlikely to be found retrogressive. If, however, the proposed plan significantly diminished the black population percentage in the same district, it would invite serious questions that it was retrogressive.

Except in rare circumstances, covered jurisdictions would first submit their voting changes to the Department of Justice. DOJ had sixty days to make a determination on a change, and if DOJ precleared the change or did not act in 60 days, the covered jurisdiction could implement the change.¹⁴ The submission of additional information by the jurisdiction, which often happened because DOJ requested such information orally, would extend the 60 day period if the submitted information materially supplemented the submission.¹⁵ DOJ could extend the 60 day period once by sending a written request for information to the jurisdiction.¹⁶ This often signaled to the jurisdiction that DOJ had serious concerns that the change violated Section 5. If DOJ objected to a change, it was blocked, but jurisdictions had various options, including requesting reconsideration from DOJ using Section 5 Procedures,¹⁷ seeking preclearance from the federal court,¹⁸ and modifying the

⁹ 52 U.S.C. § 10301.

¹⁰ 52 U.S.C. §§ 10303(b), 10304.

¹¹ 52 U.S.C. § 10303(b).

¹² 52 U.S.C. § 10304(c).

¹³ 52 U.S.C. § 10304(b), (d).

¹⁴ 52 U.S.C. § 10304(a).

¹⁵ *Id.* Procedures for the Administration of Section 5 of the Voting Rights Act ("Section 5 Procedures"), 28 C.F.R. § 51.37.

¹⁶ Section 5 Procedures, 28 C.F.R. § 51.37.

¹⁷ 28 C.F.R. § 51.45

¹⁸ 52 U.S.C. § 10304(a)

change and resubmitting it.

In the nearly seven years I worked at DOJ, I witnessed first-hand how effective Section 5 was at preventing voting discrimination and how efficiently DOJ administered the process to minimize the burdens to its own staff of attorneys and analysts, and to the covered jurisdictions. The Section 5 Procedures cited above provided transparency as to DOJ's procedures and gave covered jurisdictions guidance on how to proceed through the Section 5 process. Internal procedures enabled DOJ staff to preclear unobjectionable voting changes with minimal effort and to devote the bulk of their time to those changes that required close scrutiny.

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

By any measure, Section 5 was responsible for preventing a very large amount of voting discrimination. From 1965 to 2013, DOJ issued approximately 1,000 determination letters denying preclearance for over 3,000 voting changes. This included objections to over 500 redistricting plans and nearly 800 election method changes (such as the adoption of at-large election systems and the addition of majority-vote and numbered-post requirements to existing at-large systems). Much of this activity occurred between 1982 (when Congress enacted the penultimate reauthorization of Section 5) and 2006 (when the last reauthorization occurred); in that time period approximately 700 separate objections were interposed involving over 2,000 voting changes, including objections to approximately 400 redistricting plans and another 400 election method changes.

Each objection, by itself, typically benefited thousands of minority voters, and many objections affected tens of thousands, hundreds of thousands, or even (for objections to statewide changes) millions of minority voters. It would have required an immense investment of public and private resources to have accomplished this through the filing of individual lawsuits.¹⁹

In addition to the changes that were formally blocked, Section 5's effect on deterring discrimination cannot be understated. Covered jurisdictions knew that their voting changes would be reviewed by an independent body and they had the burden of demonstrating that they were non-discriminatory. By the time I began working at DOJ, Section 5 had been in effect for several decades and most jurisdictions knew better than to enact changes which would raise obvious concerns that they were discriminatory – like moving a polling place in a majority black precinct to a sheriff's office. In the post-*Shelby County* world, a jurisdiction is likely to get away with implementing a discriminatory change for one election (or more) before a plaintiff receives relief from a court, as the Hancock County, Georgia voter purge and Texas voter identification cases detailed later illustrate.

The Section 5 process also brought notice and transparency to voting changes. Most voting changes are made without public awareness. DOJ would produce a weekly list of voting changes that had been submitted, which was automatically sent to individuals and groups that electronically subscribed to receive the list.²⁰ For submissions of particular interest, DOJ would provide public

¹⁹ 2014 National Commission Report at 56.

²⁰ Section 5 Procedures, 28 C.F.R. §§ 51.32-51.33.

notice of the change if it believed the jurisdiction had not provided adequate notice of the change.²¹ But even more important, the Section 5 process incentivized jurisdictions to involve the minority community in voting changes. DOJ's Section 5 Procedures requested that jurisdictions with a significant minority population provide the names of minority community members who could speak to the change,²² and DOJ's routine practice was to call at least one local minority contact and to ask the individual whether they were aware of the voting change and had an opinion on it. Moreover, involved members of the community could affirmatively contact DOJ and provide relevant information and data.²³

B. The *Shelby County* Decision

In the *Shelby County* case, the Supreme Court decided in a 5-4 vote that the Section 4(b) coverage formula was unconstitutional. The majority held that because the Voting Rights Act “impose[d] current burdens,” it “must be justified by current needs.”²⁴ The majority went on to rule that because the formula was comprised of data from the 1960s and 1970s, it could not be rationally related to determining what jurisdictions, if any, should be covered under Section 5 decades later.²⁵ The four dissenting justices found that Congress had demonstrated that regardless of what data was used to determine the formula, voting discrimination had persisted in the covered jurisdictions.²⁶ The majority made clear that “[w]e issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”²⁷

Shelby County effectively immobilized Section 5 because following the decision preclearance is limited only to those jurisdictions where it is imposed by a court after a court previously made a finding of intentional voting discrimination. As a result, Section 5 is essentially dead without a modernized coverage formula, such as the one in the John Lewis bill pending before the Senate. There are compelling reasons for the Senate to act because voting discrimination has increased in the absence of Section 5, and Section 2 cannot adequately substitute for Section 5.

C. The Effect of the *Shelby County* Decision

The year after the *Shelby County* decision was issued, the Executive Summary and Chapter 3 of the 2014 National Commission Report discussed what was lost in the *Shelby County* decision. We identified the following impacts:

- Voting rights discrimination would proliferate, particularly in the areas formerly covered by Section 5;
- Section 2 would not serve as an adequate substitute for Section 5 for numerous reasons:

²¹ *Id.* at 28 C.F.R. § 51.38(b).

²² *Id.* at 28 C.F.R. § 51.28(h).

²³ *Id.* at 28 C.F.R. § 51.29.

²⁴ *Shelby County*, 570 U.S. at 536 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 at 203).

²⁵ *Shelby County*, 570 U.S. at 545-54.

²⁶ *Id.* at 560 (Ginsberg, J. dissenting).

²⁷ *Id.* at 556.

- The statutes are not identical but were instead intended to complement one another;
- Section 5 prevents a discriminatory voting change from ever going into effect whereas discrimination can affect voters in a Section 2 case prior to a court decision or a settlement;
- Section 2 litigation is time-consuming and expensive compared to Section 5 which is efficient and less-resource intensive;
- Section 2 is less likely to prevent discrimination than Section 5 because:
 - Under Section 2 plaintiffs have the burden whereas under Section 5, jurisdictions have the burden of proof;
 - Section 2 has a complicated multi-factor test that provides numerous defenses for jurisdictions, whereas Section 5 has a simple retrogression test.
- The *Shelby County* decision, and DOJ's interpretation that it also bars use of the coverage formula for sending federal observers, has left voting processes vulnerable to discrimination.²⁸

The subsequent years have demonstrated that all of the negative impacts we anticipated have come to pass.

D. Voting Rights Discrimination has Proliferated Since *Shelby County*, Particularly in the Areas Formerly Covered by Section 5

The Lawyers' Committee's Voting Rights Project has never been busier than in the post-*Shelby County* years, where we have participated as a counsel to a party or as amici in more than 100 voting rights cases. Because the Lawyers' Committee has a specific racial justice mission, all of the cases we have participated in implicate race in some fashion in our view, even if there are no race claims in the case.

In my 2019 testimony before this Subcommittee, I did a deeper dive into the 41 post-*Shelby County* voting rights cases the Lawyers' Committee had filed up to that time. My testimony reflected that voting discrimination remains alive and well, particularly in the states formerly covered by Section 5. The findings included the following:

- In the thirty-seven cases where we sued state or local governments, twenty-nine (78.3%) involved jurisdictions that were covered by Section 5, even though far less than half the country was covered by Section 5. Moreover, we sued seven of the nine states that were covered by Section 5 (Alabama, Arizona, Georgia, Louisiana, Mississippi, Texas, Virginia), as well as the two states that had were not covered but had a substantial percentage of the population covered locally (North Carolina and New York).

²⁸ 2014 National Commission Report at 12, 55-64.

- We achieved substantial success. Of the thirty-three cases where there had been some result at the time, we achieved a positive result in 26 of 33 (78.8%). In most of the seven cases where we were not successful, we had filed emergent litigation – either on Election Day or shortly before – where achieving success is most difficult.²⁹

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

In 2019, the Lawyers' Committee did a 25 year look back on the number of times that an official entity made a finding of voter discrimination.³⁰ This analysis of administrative actions and court proceedings identified 340 instances between 1994 and 2019 where the U.S. Attorney General or a court made a finding of voting discrimination or where a jurisdiction changed its laws or practices based on litigation alleging voting discrimination. We found that the successful court cases occurred in disproportionately greater numbers in jurisdictions that were previously covered under Section 5.

E. Why Section 2 is an inadequate substitute for Section 5

Prior to the *Shelby County* decision, critics of Section 5 frequently minimized the negative impact its absence would have by pointing out that DOJ and private parties could still stop discriminatory voting changes by bringing affirmative cases under Section 2 of the Voting Rights Act. Indeed, in the same paragraph of *Shelby County* where the Supreme Court majority states that Congress could adopt a new formula for Section 5, it also notes that its "decision in no way affects the permanent, nation-wide ban on racial discrimination in voting found in §2."³¹

During the *Shelby County* litigation and the reauthorization process preceding it, defenders of Section 5 repeatedly pointed out why Section 2 was an inadequate substitute. Eight years of experience demonstrate this.

This is hardly a surprise given that Section 5 and Section 2 were designed by Congress to complement one another as part of a comprehensive set of tools to combat voting discrimination. Section 5 was designed to prevent a specific problem – to prevent jurisdictions with a history of discrimination from enacting new measures that would undermine the gains minority voters were able to secure through other voting protections, including Section 2. The Section 5 preclearance process was potent, but also efficient and surgical in its limited geographic focus and sunset provisions. It was also relatively easy to evaluate because the retrogressive effect standard – whether minority voters are made worse off by the proposed change – is simple to determine in all but the closest cases. Section 5 is designed to protect against discriminatory changes to the status quo.

Section 2, as it currently exists, is quite different. It evaluates whether the status quo is

²⁹ The difficulty in successfully challenging voting procedures adopted or implemented close to an election results from judicial application of the "Purcell Principle," in which the Supreme Court cautioned federal courts against issuing injunctions in voting rights cases close to an election. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). The Senate bill addresses the Purcell Principle by clarifying the circumstances under which it is appropriate for federal courts to grant relief in emergent voting rights litigation.

³⁰ Preliminary Report on Voting Discrimination Against Racial and Ethnic Minorities 1994-2019, https://lawyerscommittee.org/wp-content/uploads/2019/11/LC_VOTER_DISCRIM_RPT_H.pdf

³¹ *Shelby County*, 570 U.S. at 556.

discriminatory and thus must be changed. The test for liability should be, and is, rigorous because it is a court-ordered change. Although Section 2 (results) and Section 5 (retrogression) both have discriminatory impact tests, they are distinct. As discussed above, the Section 5 retrogression test is quite straightforward in determining whether a jurisdictional-generated change should be blocked — will minority voters be worse off because of the change?

In contrast, the Section 2 results inquiry is complex and resource intensive to litigate. As will be discussed in greater detail below in the context of the *Brnovich* decision, the “totality of circumstances” test set forth in the statute is fact-intensive by its own definition. The Senate Report supporting the 1982 amendment to Section 2 lists factors that courts have used as a starting point in applying the totality of circumstances test to include seven such factors (along with two factors plaintiffs have the option to raise).³² On top of the Senate factors, courts have introduced additional requirements. For example, in vote dilution cases, which typically involve challenges to redistricting plans or to a method of election, the plaintiff must first satisfy the three preconditions set forth by the Supreme Court in *Thornburg v. Gingles*,³³ before even getting to the Senate factors. These *Gingles* preconditions require plaintiffs to show that a minority group is compact and numerous enough to constitute a majority of eligible voters in an illustrative redistricting plan and whether there is racially polarized voting (minority voters are cohered in large number to support certain candidates and those candidates are usually defeated because of white bloc voting) and are necessarily proven by expert testimony. In vote denial cases, which involve challenges to practices such as voter identification laws, circuit courts prior to the *Brnovich* decision also added an additional test, with the developing majority view requiring that plaintiffs demonstrate that the challenged law imposes a discriminatory burden on members of a protected class and that this “burden must be in part caused by or linked to social conditions that have or currently produce discrimination against members of the protected class.”³⁴

The result is that Section 2 cases are extremely time-consuming and resource-intensive, particularly when defendants mount a vigorous defense. For example, *United States v. Charleston County*,³⁵ which I litigated at the Department of Justice, was a successful challenge to the at-large method of electing the Charleston (South Carolina) County Council. The litigation took four years, and it involved more than seventy witness depositions and a four-week trial, even though we had prevailed on the *Gingles* preconditions on summary judgment,³⁶ and needed to litigate only the totality of circumstances in the district court.

³² See e.g., *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

³³ *Id.* at 50-51.

³⁴ *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015)); see also *Ohio State Conference for the NAACP v. Husted*, 786 F.3d 524, 554 (6th Cir. 2014).

³⁵ 316 F. Supp. 2d 268 (D.S.C. 2003), aff’d, 365 F.3d 341 (4th Cir.), cert. denied, 543 U.S. 999 (2004).

³⁶ *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002).

Four specific examples from the Lawyers' Committee's litigation record illustrate why Section 2 is an inadequate substitute for Section 5. The first and most prominent example is the Texas voter identification law, which illustrates the time and expense of litigating a voting change under Section 2 that both DOJ and the federal district court found violated Section 5 prior to the *Shelby County* decision.³⁷ The afternoon that *Shelby County* was decided, then-Texas Attorney General Greg Abbott announced that the State would immediately implement the ID law.³⁸ Several civil rights groups, including the Lawyers' Committee, filed suit in Texas federal court, challenging SB 14 under several theories, including Section 2, and DOJ filed its own suit under Section 2, and ultimately all of the cases were consolidated. The parties then embarked on months of discovery, leading to a two-week trial in September 2014, where dozens of witnesses, including 16 experts — half of whom were paid for by the civil rights groups — testified. Prior to the November 2014 election, the District Court ruled that SB 14 violated the "results" prong of Section 2 of the Voting Rights Act, because it had a discriminatory result in that Black and Hispanic voters were two to three times less likely to possess the SB 14 IDs and that it would be two to three times more burdensome for them to get the IDs than for white voters. The District Court's injunction against SB 14, however, was stayed pending appeal by the Fifth Circuit, so the law — now deemed to be discriminatory — remained in effect.³⁹ Subsequently, a three-judge panel and later an en banc panel of the Fifth Circuit Court of Appeals, affirmed the District Court's finding.⁴⁰ As a result, elections that took place from June 25, 2013 until the Fifth Circuit en banc opinion on July 20, 2016 took place under the discriminatory voter ID law. Had Section 5 been enforceable, enormous expense and effort would have been spared. The district court awarded private plaintiffs \$5,851,388.28 in attorneys' fees and \$938,945.03 in expenses, for a total of \$6,790,333.31. The fee award was recently unanimously by the Fifth Circuit.⁴¹ As of June 2016, Texas had spent \$3.5 million in defending the case.⁴² Even with no published information from DOJ, more than \$10 million in time and expenses were expended in that one case.

Second, in *Gallardo v. State*,⁴³ the Arizona legislature passed a law that applied only to the Maricopa County Community College District and added two at-large members to what was previously a five-member single district board. The legislature had submitted the change for Section 5 preclearance. The Department of Justice issued a more information letter based on concerns that the addition of two at-large members, in light of racially polarized voting in Maricopa County, would weaken the electoral power of minority voters on the board. After receiving the more information letter, Arizona officials did not seek to implement the change. Only after the *Shelby County* decision did they move forward, precipitating the lawsuit brought by the Lawyers' Committee and its partners. We could not challenge the change under Section 2, especially because we would not have been able to meet the first *Gingles* precondition. Instead we made a claim in state court alleging that the new law violated Arizona's constitutional prohibition against special laws because the board composition of less populous counties was not changed. Reversing the intermediate court of appeal, the Arizona Supreme Court rejected our argument, holding that the special laws provision of the state constitution

³⁷ *Veasey*, 830 F.3d at 227 n.7.

³⁸ *Id.* at 227.

³⁹ *Id.* at 227-29, 250.

⁴⁰ *Id.* at 224-25.

⁴¹ *Veasey v. Abbott*, 2021 WL 4022650 (5th Cir. Sept. 3, 2021).

⁴² Jim Malewitz & Lindsay Carbonell, *Texas' Voter ID Defense Has Cost \$3.5 Million*, THE TEX. TRIB. (June 17, 2016), <https://www.texastribune.org/2016/06/17/texas-lab-voter-id-lawsuits-more-35-million/>.

⁴³ 236 Ariz. 84, 336 P.3d 717 (2014).

was not violated. Unsurprisingly, the Latino candidate who ran for the at-large seat in the first election lost and the two at-large members are white.

Third, in 2015, the Board of Elections and Registration, in Hancock County, Georgia, changed its process so as to initiate a series of “challenge proceedings” to voters, all but two of whom were African American. This resulted in the removal of 53 voters from the register. Later that year, the Lawyers’ Committee, representing the Georgia State Conference of the NAACP and the Georgia Coalition for the Peoples’ Agenda and individual voters, challenged this conduct as violating the Voting Rights Act and the National Voter Registration Act, and obtained relief which resulted in the placement of unlawfully-removed voters back on the register.⁴⁴ Ultimately, plaintiffs and the Hancock County Board agreed to the terms of a Consent Decree that would remedy the violations, and required the county’s policies to be monitored for five years. But after the purge and prior to the court order, Sparta, a predominantly black city in Hancock County, elected its first white mayor in four decades. And before the case was settled, and the wrongly-purged voters placed back on the rolls, at least one of them had died.

The fourth matter is ongoing and reflects the significant present-day impact of the *Shelby County* decision and the loss of Section 5. It involves a law that Georgia, a previously covered jurisdiction, enacted this year, SB 202, a 53 section, 98-page law that changes many aspects of Georgia elections. It has spawned several federal lawsuits, most of which include voting discrimination claims. The Lawyers’ Committee is counsel in the one of these suits.

The litigation will unquestionably be resource intensive even if the various cases are fully or partially consolidated and the Plaintiffs engage in substantial coordination. It will require numerous experts and extensive fact discovery. There will be elections – and possibly multiple cycles of elections – that will occur before Plaintiffs will have the evidence needed to establish a constitutional or Section 2 violation and the court will set aside the time to hear and decide the claims. If Plaintiffs prevail, Georgia will undoubtedly appeal and even more time will pass.

But for the *Shelby County* decision, there would be no SB 202, at least not in its current form, because at least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place. This is perhaps most clearly demonstrated by Georgia introducing several restrictions focused on voting by mail:

- The new absentee ballot ID requirements mandate that voters include a Georgia Driver’s license number or Georgia State ID number on their absentee ballot application. If they have neither, voters are required to copy another form of acceptable voter ID and attach the copies of ID documents along with other identifying information to both their absentee ballot applications and inside the absentee ballot envelope when returning the voted ballot.
- The bill also prohibits public employees and agencies from sending unsolicited absentee ballot applications to voters, yet threatens private individuals and organizations who are not so prohibited with a substantial risk of incurring hefty fines

⁴⁴ *Georgia State Conference of the NAACP v. Hancock County*, Case No. 15-cv-414 (M.D. Ga. 2015).

for every application they send to an individual who has not yet registered to vote or who has already requested a ballot or voted absentee.

- SB 202 significantly limits the accessibility of absentee ballot drop boxes to voters. While all counties would be required to have at least one, the placement of drop boxes is limited to early voting locations and drop boxes are available only to voters who can enter the early voting location during early voting hours to deposit their ballot inside the box. Thus, drop boxes are essentially useless to voters who can vote early in-person or who cannot access early voting hours at all due to work or other commitments during early voting hours.
- The bill also mandates an earlier deadline of 11 days before an election to request an absentee ballot, leaving some voters who become ill or have to travel out of the area in the lurch if they cannot vote during early voting and are unable to meet the earlier deadline to apply for a ballot.⁴⁵

These restrictions were adopted right after the November 2020 election, where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.⁴⁶ Given this seemingly disproportionate impact on voters of color, I believe that if Georgia were subject to Section 5, these provisions would have been found retrogressive, and never would have been in effect. Instead, these provisions will be contested through time and resource intensive litigation under complex legal standards.

F. The Impact of *Shelby County* on the Loss of Observer Coverage

A less discussed impact of the *Shelby County* decision is on the loss of federal observer coverage. Under Section 8 of the Voting Rights Act,⁴⁷ the federal government had the authority to send federal observers to monitor any component of the election process in any Section 4(b) jurisdiction provided that the Attorney General determined that the appointment of observers was necessary to enforce the guarantees of the 14th and 15th Amendments.⁴⁸ A federal district court can also authorize the use of observers when the court deems it necessary to enforce the guarantees of the 14th or 15th Amendments as part of a proceeding challenging a voting law or practice under any statute to enforce the voting guarantees under the 14th or 15th Amendment.⁴⁹ Federal courts have concluded that the observer provisions are a constitutional exercise of congressional enforcement powers.⁵⁰

In the 2014 National Commission report, we determined that the Attorney General had certified 153 jurisdictions in eleven states for observer coverage⁵¹ and that the Department of Justice

⁴⁵ *Georgia State Conference of the NAACP, et al. v. Raffensperger, et al.*, N.D. GA, no. 1:21-cv-1250-JPB, First Amended Complaint, Doc. 35, ¶¶ 134-158.

⁴⁶ *Id.*, ¶¶ 92-100.

⁴⁷ 52 U.S.C. § 10305.

⁴⁸ 52 U.S.C. § 10305(a)(2).

⁴⁹ 52 U.S.C. §§ 10302(a), 10305(a)(2).

⁵⁰ See *United States v. Executive Committee of Democratic Party of Greene County*, 254 F. Supp. 543, 546-47 (N.D. Ala. 1966); *United States v. Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966).

⁵¹ See U.S. Dep't of Just., Civ. Rts. Div., Voting Sec., *About Federal Observers and Election Monitoring* ("About Federal Observers") (last modified Sept. 11, 2020) <<https://www.justice.gov/crt/about-federal-observers-and-election-monitoring>>

had sent several thousand observers to observe several hundred elections from 1995 to 2012.⁵²

While officially not stating this, the practice of the Department of Justice has been to apply the Supreme Court's finding that the Section 4(b) coverage formula is unconstitutional not just to preclearance, but to observer coverage. The *Shelby County* decision has reduced observer coverage to a trickle. In 2020, for the first time in decades, the Justice Department did not deploy a single federal observer for a Presidential Election. The Department of Justice has instead employed what it calls "monitors."⁵³

The difference between federal observers and monitors is dramatic. Under the Voting Rights Act, "Observers shall be authorized to- (1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote; and (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated." Monitors have no such rights: a jurisdiction does not need to provide any access to the voting process to any monitor.

By 2020, just five jurisdictions were covered for federal observers under Section 3(a) of the Voting Rights Act: Evergreen (Conecuh County), in Alabama;⁵⁴ the Dillingham, Kusilvak and Yukon-Koyukuk Census Areas in Alaska;⁵⁵ and St. Landry Parish in Louisiana.⁵⁶ Despite its continued coverage under Section 3(a), it does not appear that the Justice Department has been as active in sending federal observers to St. Landry Parish after the vote-buying issues that precipitated the litigation in the 1970s were resolved.⁵⁷ Consequently, by the end of 2020, federal observers were available in only a handful of jurisdictions covered under Section 3(a) of the VRA.

It is not difficult to see the difference in how this plays out in practice. In a year where legislatures in formerly covered states like Arizona⁵⁸ and Texas⁵⁹ are conducting audits of election results or considering restricting the ability of election officials to limit the conduct of partisan poll

monitoring>. The covered jurisdictions included the following number of political subdivisions in the identified states: "Alabama (22 counties), Alaska (1), Arizona (4), Georgia (29), Louisiana (12), Mississippi (51), New York (3), North Carolina (1), South Carolina (11), South Dakota (1) and Texas (18)." *Id.*

⁵² 2014 National Commission Report at 180-82.
⁵³ See e.g., Press Release, U.S. Dep't. of Justice, "Justice Department Again to Monitor Compliance with the Federal Voting Rights Laws on Election Day," (Nov. 2, 2020), <https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day>.

⁵⁴ See *Allen v. City of Evergreen*, 2014 U.S. Dist. LEXIS 191739, at *4 (S.D. Ala. Jan. 13, 2014) (authorizing the "appointment of federal observers to monitor elections of the City of Evergreen" through December 21, 2020).

⁵⁵ See *Toiyukak v. Mallott*, Case No. 3:13-cv-00137-SLG, Dkt. 282, Stip. and Order at 7-8 (D. Alaska Sept. 30, 2015) ("Pursuant to Section 3(a) of the VRA, 52 U.S.C. § 10302(a) ... Election Observers are appointed and are authorized to attend and observe elections and election activities that federal law authorizes, including training" for the three census areas through December 31, 2020).

⁵⁶ See *United States v. St. Landry Parish Sch. Bd.*, Case No. 76-1062 (W.D. La. Dec. 5, 1979) (authorizing federal observers "until further order of this Court"); see also U.S. COMM'N ON CIVIL RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 37 (Sept. 1981) (describing the vote-buying scheme that led to the Justice Department's litigation against the county).

⁵⁷ See generally GAO, *Department of Justice's Activities to Address Past Election-Related Voting Irregularities*, GAO-04-1041R, at 69 (Sept. 14, 2004) ("Data from the Voting Section shows that as of August 23, 2003, the court order was still in effect and that no elections were monitored at this parish during calendar years 2000 through 2003.").

⁵⁸ Arizona Rev. Stat. § 16-602.

⁵⁹ Texas Senate Bill 7 (online at <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00007E.pdf#navpanes=0>).

watchers, it becomes vitally important for the federal government to have discretion to send observers to places with a history of voting discrimination for the purpose of ensuring that processes are fair and that voters of color are not disenfranchised.

The Senate bill will renew and restore the vitality of the federal observer provisions in several ways. First, it will revitalize Section 5 by enacting a new coverage formula. The effect of that new formula would make the covered states and political subdivisions subject to the preclearance requirements. Once subject to preclearance, a jurisdiction would be eligible for certification by the Attorney General under Section 8 of the Voting Rights Act. This fix, by itself, would lead to the restoration of much of the federal observer coverage lost from *Shelby County* because the vast majority of that coverage was due to the Attorney General's certifications.

Second, the bill includes a modest, but important, conforming amendment to observer coverage by federal courts under Section 3(a) of the Act. Currently, that section authorizes federal observer coverage "for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment..."⁶⁰ The bill would amend Section 3(a) by striking "violations of the fourteenth or fifteenth amendment" and inserting "violations of the 14th or 15th Amendment, violations of this Act, or violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group,".

That change would make it easier for federal courts to authorize observers because it would relieve the Attorney General or private litigant from having to establish the likelihood of a constitutional violation, which implicates a higher burden of proof. Under the modified language, a violation of the Voting Rights Act or any federal law prohibiting voting discrimination on the basis of race, color or language minority status would suffice. As long as a litigant establishes the requisite voting rights violation, including those under federal laws such as the Voting Rights Act, they would be entitled to the appointment of federal observers unless the jurisdiction establishes that voting rights violations "(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."⁶¹

Third, the bill would amend Section 8 of the Voting Rights Act⁶² to expand the Attorney General's discretion to assign federal observers in jurisdictions covered by the Act's preclearance provisions. It would leave Section 8(a)(1) intact, but would amend Section 8(a)(2)(B) to include as a basis for sending observers violations of "any provision of this Act or any other Federal law protecting the right of citizens of the United States to vote." Furthermore, it would add a new subparagraph 8(a)(3) to duplicate the process for certification by the Attorney General to also include instances in which "in the Attorney General's judgment, the assignment of federal observers is necessary to enforce the guarantees of section 203" of the VRA.

Fourth, the bill shifts responsibility for the federal observer program from the Director of the Office of Personnel Management to the Attorney General. This update reflects the impact that *Shelby County* has had on the federal observer program. Because few (and in the case of 2020 no) federal

⁶⁰ 52 U.S.C. § 10302(a).

⁶¹ 52 U.S.C. § 10302(a).

⁶² 52 U.S.C. § 10305.

observers have been deployed for elections in the past eight years due to the loss of Section 5 coverage, much of the expertise and experience built up by OPM in the first five decades under the Voting Rights Act has been lost. Moreover, the change recognizes that the program can be run more efficiently by the Attorney General, who has the primary authority for certifying jurisdictions for federal observer coverage. Importantly, the bill makes clear that the OPM Director will continue to be able to “assist in the selection, recruitment, hiring, training, or deployment of these or other individuals authorized by the Attorney General for the purpose of observing whether persons who are entitled to vote are being permitted to vote and whether those votes are being properly tabulated.”

Taken together, the Senate bill makes these much-needed changes to the Voting Rights Act to restore and renew the federal observer protections, which were severely undermined by the *Shelby County* decision.

G. Addition of a Retrogression Standard to Section 2

In August, the House passed the John Lewis Voting Rights Advancement Act, named after one of the true giants of our lifetimes, a person who literally put his life on the line so that others could vote free of discrimination on the basis of the color of their skin. Now is the time for Congress to honor his memory with passage of a bill that resuscitates Section 5 and includes complimentary protections from voting discrimination.

Like H.R. 4, the Senate bill includes a “transparency” requirement, which enhances opportunities to protect voters of color from voting discrimination. The “transparency” provision requires that any State or political subdivision that makes any change in a voting practice or procedure in any election for Federal office that results in a difference with that which has been in place 180 days before the date of the Federal election must provide reasonable and detailed public notice of the change within 48 hours. Additional, specific requirements for notice are provided as for polling place changes for Federal elections and for the changes in the constituency that will participate in any election through redistricting or reapportionment.⁶³

We agree that notice by any state or political subdivision of changes in voting practices or procedures and to any prerequisite to voting is essential to any effective response to the *Shelby County* decision, but we see no reason to limit the notice requirement to changes affecting Federal elections.⁶⁴

We are pleased to see that the bill strengthens Section 2 to protect against voting rules that make voters of color worse off in terms of their voting rights than the status quo. This is a vital amendment for protecting voters.

The bill amends Section 2 to provide that a violation is established if a challenged voting qualification, prerequisite, standard, practice or procedure has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race, color or language minority status to participate in the electoral process or elect their preferred candidates of choice. This standard is known as “retrogression,” or backsliding, which simply means that the voting change “will make members of such a group worse off than they had been before the change.”⁶⁵

⁶³ See H.R. 4, 116th Congress, Sec. 6.

⁶⁴ See, e.g., *Katzbach*, 383 U.S. at 310–15.

⁶⁵ 28 C.F.R. § 51.54(b); *Beer v. United States*, 425 U.S. 130, 140–42 (1976).

Retrogression is already incorporated in Section 5's preclearance review, applying well-defined standards established by federal courts that are set forth in U.S. Department of Justice regulations. The current standards have been in effect for over three decades.⁶⁶

The amendment is necessary because the retrogression standard is not encompassed in Section 2 currently. As the Supreme Court has explained, "[t]he inquiries under §§ 2 and 5 are different. Section 2 concerns minority groups' opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b) (2000 ed.), while the more stringent § 5 asks whether a change has the purpose or effect of 'denying or abridging the right to vote,' § 1973c."⁶⁷ The differences relate in large measure to the nature of the voting change:

In § 5 preclearance proceedings – which uniquely deal only and specifically with changes in voting procedures – the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied, and the status quo (however discriminatory it may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the status quo 'results in [an] abridgement of the right to vote' or 'abridge[s] [the right to vote]' relative to what the right to vote ought to be, the status quo itself must be changed."⁶⁸

In other words, "Section 2 concerns itself with the possibility of a minority group's present, but *unrealized*, opportunity to elect. . . ." In contrast, "[t]he question of retrogressive effect under Section 5 looks at gains that have already been realized by minority voters and protects them from future loss."⁶⁹

To summarize, as written "§ 2 does not prohibit retrogression," by itself. "Dilution under § 2 is measured against a hypothetical undiluted practice rather than against a [jurisdiction's] prior practice (as it would be in a § 5 analysis)."⁷⁰ Adding the retrogression standard to Section 2 will help ensure that regardless of whether a jurisdiction is covered by Section 5, minority voters are protected from the future loss of voting opportunities they have already, which is an issue both with respect to redistricting and changes that create restrictions on the right to vote.

The proposed retrogression cause of action provides an additional, reasonable, and necessary weapon in the fight against suppressive and discriminatory voting practices. First, and most important, it responds to current needs, which are not limited to those states and political subdivisions that may be subject to geographic coverage or which attempt to implement practices known to be susceptible to discriminatory applications. As of July 14, 2021, at least 18 states had enacted laws this year that made it harder to vote.⁷¹ These laws were passed not only in states like Georgia and Arizona, that were previously covered by Section 4 of the Voting Rights Act, but also by states not previously covered, such as Indiana, Idaho, Kansas, Montana, Nevada, Oklahoma, Utah, and

⁶⁶ See 28 C.F.R. Part 51, originally published in 52 Fed. Reg. 490 (Jan. 6, 1987).

⁶⁷ *Bartlett v. Strickland*, 556 U.S. 1, 24-25 (2009).

⁶⁸ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (1997).

⁶⁹ *Texas v. United States*, 831 F. Supp.2d 244, 261-62 (D.D.C. 2011) (italics in original).

⁷⁰ *Paino v. City of Pasadena*, 230 F.Supp.3d 667, 712 (W.D. Tex. 2017).

⁷¹ "Voting Laws Roundup: July 2021." www.brennancenter.org, Aug. 12, 2021.

Wyoming,⁷² and included provisions not captured in the “known practices” category, including those that make mail voting and early voting more difficult.⁷³

Second, the amendment to Section 2 would impose a minimal federal burden on the States in several ways. All States would be treated alike by this retrogression provision because Section 2 has nationwide application. Unlike Section 5, under the new provision proposed voting changes would not have to be submitted for preclearance before going into effect. Neither the U.S. Department of Justice nor any federal court will be involved in approving a voting change unless it is challenged through litigation. Moreover, the enacting jurisdiction will not be required to establish that the voting change has neither the purpose nor the effect of making minority voters worse off. Instead, retrogression under the proposed amendment to Section 2 places the burden of proof on the plaintiff alleging a violation as with other federal voting rights protections.

Third, the standards for reviewing a retrogression claim are well established. The relevant factors to be considered in evaluating a retrogression claim under the proposed amendment to Section 2 include those used for decades by the Department of Justice, such as: “The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change”; “The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change”; and “The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.”⁷⁴

We believe that these amendments, individually and collectively, are constitutional under the current constitutional framework for the Fourteenth and Fifteenth Amendments. These amendments would respond to the current problems of jurisdictions enacting retrogressive voting changes that may be difficult to challenge under other provisions. In comparison to the needs addressed under the bill’s other proposed amendments to the Voting Rights Act, the burdens they create are relatively modest. The requirement of providing notice of changes provides almost no burden, as it would take little effort to provide notice.

Furthermore, the burden of creating a cause of action prohibiting retrogressive voting changes is constitutionally acceptable under the circumstances. The Supreme Court has stated that Congress has the enforcement authority to address voting changes that have a discriminatory effect.⁷⁵ In addition, because numerous other civil rights laws allow for discriminatory effect causes of action, including Title VII of the Civil Rights Act of 1964,⁷⁶ involving employment discrimination, and the Fair Housing Act of 1968,⁷⁷ permitting such a cause of action is hardly unusual.

Finally, creating a cause of action for retrogression nationally does not implicate the concerns about the equal sovereignty of the States, expressed by the majority in the *Shelby County* decision.⁷⁸ The retrogression cause of action should not be a threat to those jurisdictions whose proposed voting

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 28 C.F.R. § 51.57.

⁷⁵ *City of Rome*, 446 U.S. at 173-79.

⁷⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁷⁷ *Texas Dept., of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015).

⁷⁸ *Shelby County*, 570 U.S. at 544-45.

practices changes are intended to make it easier for voters to vote, because a party would have to successfully bring suit in order to stop the change, which seems implausible under the circumstances. The burden is placed on the party challenging the change. Proving retrogression is not as complicated as proving discriminatory results under Section 2, but it is a high standard, and history has taught us that it is perfectly suitable to assess the discriminatory effects of proposed changes in voting practices.

II. Why and How Congress Must Respond to *Brnovich*

A. Section 2 of the Voting Rights Act

From the ratification of the Fifteenth Amendment in 1870 through the 1960s, the federal government tried—and failed—to defeat the “insidious and pervasive evil” of “racial discrimination in voting,” which had been “perpetuated . . . through unremitting and ingenious defiance of the Constitution.”⁷⁹ Although Justice Frankfurter wrote long ago that the Fifteenth Amendment targeted “contrivances by a state to thwart equality in the enjoyment of the right to vote” and “nullifie[d] sophisticated as well as simple-minded modes of discrimination[.]”⁸⁰ prior to the VRA’s passage, this language proved largely aspirational.⁸¹

Responding to the states’ tenacious “ability . . . to stay one step ahead of federal law,” Congress passed the VRA to provide a “new weapon[] against discrimination.”⁸² The Act “reflect[ed] Congress’ firm intention to rid the country of racial discrimination in voting.”⁸³ The essence of the VRA’s protections was exemplified in Section 2, which provided: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁸⁴

Notwithstanding Section 2’s broad language, jurisdictions sought to evade its reach by placing “heavy emphasis on facially neutral techniques.”⁸⁵ These “techniques” included everything from “setting elections at inconvenient times” to “causing . . . election day irregularities” to “moving polling places or establishing them in inconvenient . . . locations.”⁸⁶ In one Mississippi county, voters were forced to “travel 100 miles roundtrip to register to vote.”⁸⁷ In one Alabama county, “the only registration office in the county [was] closed weekends, evenings and lunch hours.”⁸⁸ These regulations ostensibly governed the time, place, and manner of voting in a neutral way, but they “particularly handicap[ed] minorities.”⁸⁹

⁷⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966).

⁸⁰ *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

⁸¹ See, e.g., *Katzenbach*, 310–15 (describing pre-VRA efforts to enforce the Fifteenth Amendment).

⁸² Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 524–25, 550 (1973) (hereinafter *Right to Vote*).

⁸³ *Katzenbach*, 383 U.S. at 315.

⁸⁴ Voting Rights Act of Aug. 6, 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

⁸⁵ *Right to Vote*, supra at 552.

⁸⁶ *Id.* at 557–58.

⁸⁷ Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies Under the Voting Rights Act Amendments of 1982*, 52 FORD L. REV. 93 (1983).

⁸⁸ *Id.* at 93–94.

⁸⁹ *Id.* at 96.

Against this backdrop, and responding to this Court's plurality decision in *City of Mobile v. Bolden*, which had read into Section 2 a "discriminatory purpose" element,⁹⁰ Congress expressly expanded Section 2, now codified at 52 U.S.C. § 10301. As amended, Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."⁹¹ Congress further specified that, under Section 2, a violation is established if, "based on the totality of [the] circumstances," the political processes leading to an election are not "equally open to participation" by minority voters so that they have less opportunity than white voters "to participate in the political process and to elect representatives of their choice."⁹² By adopting this "results test," Congress captured the "complex and subtle" practices which "may seem part of the everyday rough-and-tumble of American politics" but are "clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination."⁹³

Section 2 provides relief for both *vote dilution*—schemes that reduce the weight of minority votes—and *vote denial*—standards, practices, or procedures that impede minority citizens from casting votes or having their votes counted. Vote-denial cases were the paradigmatic, "first generation" cases brought under Section 2. Later the Supreme Court "determine[] that the Act applies to 'vote dilution' as well."⁹⁴

Thirty-five years ago, in *Gingles v. Thornburg*,⁹⁵ the Court recognized that Congress inserted the words "results in" to frame the Section 2 inquiry. Instead of asking whether, in a vacuum, a voting practice facially sounds as if it denies or abridges the rights of minority voters, the question is: in context, does the practice "interact" with pre-existing social and historical conditions to *result in* that burden? Answering this question requires courts to examine the challenged practice not as a theoretical postulate, but as a law or regulation that interacts with real-world conditions and must be evaluated through a fact-heavy, "intensely local appraisal,"⁹⁶ that accounts for the "totality of [the] circumstances."⁹⁷

⁹⁰ 446 U.S. 55, 62 (1980).

⁹¹ Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. at 131, 134 (emphasis added).

⁹² *Id.* A claim for violation of Section 2 (and the Fourteenth Amendment) can still be based on a finding of intentional discrimination, by application of the settled standards for proving intentional discrimination as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which includes (1) the historical background; (2) the sequence of events leading to the challenged practice, including procedural and substantive deviations from normal process; (3) relevant legislative history; and (4) whether there is a disparate impact on any group. See, e.g., *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016).

⁹³ S. Rep. No. 97-417, at 12 (1982), reprinted in 1982 U.S.C.A.N. 177, 189 ("Senate Report").

⁹⁴ See Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 423 (1995). The congressional record accompanying the 1982 Amendments is replete with examples of the discriminatory practices that concerned Congress. The House Judiciary Committee noted that counties in Virginia and Texas had instituted "inconvenient location and hours of registration" and other restrictive practices that acted as "continued barriers" to racial minorities. H.R. Rep. No. 97-227, at 14, 17 (1981) ("House Report"). The Senate Judiciary Committee similarly identified states' "efforts to bar minority participation" through "registration requirements and purging of voters, changing the location of polling places[,] and insistence on retaining inconvenient voting and registration hours." Senate Report at 10 n.22. For example, a Georgia county "adopted a policy that it would no longer approve community groups' requests to conduct voter registration drives, even though only 24 percent of black eligible voters were registered, compared to 81 percent of whites." *Id.* at 11.

⁹⁵ 478 U.S. 30, 47 (1986).

⁹⁶ *Id.* at 79 (quotation marks omitted).

⁹⁷ 52 U.S.C. § 10301(b).

In *Gingles*, the Court explained the “essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters.”⁹⁸ Recognizing Section 2’s command that courts consider the “totality of circumstances,” the *Gingles* Court looked to the Senate Report accompanying the 1982 amendments to compile a list of relevant “circumstances.”⁹⁹ These nine social and historical conditions—the “Senate Factors”—include considerations such as the history of official discrimination in the jurisdiction (Factor One); the extent of discrimination in the jurisdiction’s education, employment, and health systems (Factor Five); and whether the challenged practice has a tenuous justification (Factor Nine).¹⁰⁰

Since *Gingles*, four different Circuits addressing vote-denial cases have used the foundation laid in *Gingles* to analyze these matters. This formulation distills Section 2 liability into a two-part test: (1) there must be a disparate *burden* on the voting rights of minority voters (“an inequality in the opportunities enjoyed”); and (2) that burden must be *caused* by the challenged voting practice (“a certain electoral law, practice, or structure . . . cause[s] an inequality”) because the practice “interacts with social and historical conditions” of racial discrimination.¹⁰¹ No other Circuit has put forth an alternative formulation.

B. The Facts of *Brnovich*

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

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

As to the out-of-precinct policy, the Ninth Circuit identified several factors, acknowledged by the district court, leading to a higher rate of OOP voting by voters of color than by white voters: frequent changes in polling locations (polling places of voters of color experienced stability at a rate 30 percent lower than the rate for whites);¹⁰² confusing placement of polling locations (indigenous populations in particular lived farther from their assigned polling places than did white voters,¹⁰³);

⁹⁸ 478 U.S. at 47.

⁹⁹ 478 U.S. at 36.

¹⁰⁰ *Id.* at 36–37 (citing Senate Report at 28–29).

¹⁰¹ *Gingles*, 478 U.S. at 47; accord *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *DNC v. Hobbs*, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009, 1011–12 (9th Cir. 2003).

¹⁰² *Brnovich v. Democratic National Committee*, Joint Appendix, at 590 (online at https://www.supremecourt.gov/DocketPDF/19/19-1257/162052/20201130133300128_19-1257%20-1258%20Joint%20Appendix.pdf).

¹⁰³ *Id.* at 592.

and high rates of residential mobility.¹⁰⁴ As a result, 1 in every 100 Black voters, 1 in every 100 Latinx voter, and 1 in every 100 indigenous peoples voter cast an OOP ballot, compared to 1 in every 200 white voters.¹⁰⁵

As to the absentee-ballot collection limitation, the Ninth Circuit relied on the district court's finding that voters of color were more likely than white voters to return their early ballots with the assistance of third parties.¹⁰⁶ The disparity was the result of the special challenges experienced by communities that lack easy access to outgoing mail services, socioeconomically disadvantaged voters who lacked reliable transportation, and voters who had trouble finding time to return mail because they worked multiple jobs or lacked childcare services, all burdens that disproportionately fall on Arizona's minority voters.¹⁰⁷

Applying the "totality of circumstances" test, with primary reliance on the Senate factors that demonstrated a history of discrimination in Arizona that persists to this day, the Ninth Circuit found that both the OOP policy and the absentee-ballot collection law violated the "results" prong of Section 2 of the VRA. The court also found that the absentee ballot law had been enacted with discriminatory intent, based on statements of the sponsor and a racist video used to promote passage of the law.¹⁰⁸

C. The *Brnovich* Decision: Its Meaning, and Its Consequences

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

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

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

First, *Brnovich* purports to cure a non-existent problem. One of the premises of *Brnovich* is that "[i]n recent years, [Section 2 vote denial claims] have proliferated in the lower courts."¹⁰⁹ In support of this statement, the Court relies on the amicus curiae briefs of Sen. Ted Cruz, the State of Ohio, and the Liberty Justice Center.¹¹⁰ However, those briefs describe a total of perhaps 16 cases, dating back over 7 years, and only 3 of them led to a finding of Section 2 liability.

¹⁰⁴ *Id.* at 594.

¹⁰⁵ *Id.* at 595-96.

¹⁰⁶ *Id.* at 597.

¹⁰⁷ *Id.* at 598.

¹⁰⁸ *Id.* at 681.

¹⁰⁹ *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *8 (2021).

¹¹⁰ *Id.* at n.6.

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

2. Brnovich reads a remedial statute narrowly

One of the most important canons of statutory construction – and one that gives the greatest deference to congressional intent – is that remedial statutes are to be broadly construed,¹¹¹ and there are few statutes in this Nation’s history more remedial than the Voting Rights Act of 1965. Yet, rather than read the Act expansively, the Court created new stringent “guideposts,” most prominently suggesting higher standards for both the size of the burden and the size of the disparity, and a lower standard for the State to meet to justify the burdens it is placing on the right to vote.

The purported touchstone of the *Brnovich* opinion is the Court’s construction of the requirement in Section 2(b) that the political process be “equally open” as the “core” requirement of the law.¹¹² The concept of equal “opportunity” as used in the same statute, the Court acknowledged somewhat grudgingly, “may stretch that concept to some degree to include consideration of a person’s ability to use the means that are equally open.”¹¹³ In that context, the Court turned to the “totality of the circumstances” test, and said that “any circumstance that has a logical bearing on whether voting is ‘equally open’ and afford equal ‘opportunity’ may be considered,” and proceeded to list five “important circumstances” that were relevant.¹¹⁴

Some of these “important circumstances” seem fairly innocuous on their face: e.g., the size of the burden, the size of the disparity. Others not so much: e.g., the degree of departure of the challenged practice from practices standard when Section 2 was amended in 1982 or which are widespread today, and the opportunities provided by the electoral process as a whole. Another has never been deemed relevant to Section 2 analysis: the strength of the state’s justification for the practice – except in connection with assessment of the tenuousness of that justification. Overall, however, the devil is in the details, and in the ambiguities created by the Court’s specific choice of language that may pave the way for state legislatures to enact additional discriminatory laws and for lower courts to apply Section 2 parsimoniously in vote denial “results” cases.

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

The first factor that Justice Alito highlighted was the “size of the burden,” emphasizing that voters “must tolerate the usual burden of voting.”¹¹⁵ The application of this “guidepost” by legislatures and lower courts might be colored by a footnote at the end of the paragraph on burden,

¹¹¹ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (broadly construing the VRA as “aimed at the subtle, as well as the devious, state regulations which have the effect of denying citizens their right to vote”); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (stating general rule of statutory construction).

¹¹² *Brnovich v. Democratic National Committee*, 2021 WL 2690267, at *12; 52 U.S.C. § 10301.

¹¹³ *Brnovich*, 2021 WL 2690267, at *12 (emphasis in original).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

where Justice Alito expounded on what “openness” and “opportunity” might mean (as, say, with museums or school courses that are open to all) as compared to the “absence of inconvenience” (such as lack of adequate transportation or conflicting obligations).¹¹⁶ The vagueness with which the Court left this issue, and its relegation to a footnote, may limit its precedential impact, but its practical impact may be substantial.

What Justice Alito does not acknowledge is that some of these indicia of what he calls “inconvenience” are themselves not simply subjective to an individual, but, are reflective of a group’s socio-economic circumstances, that are themselves the product of a history of discrimination. In the Texas Photo ID case, for example, we were able to demonstrate that not only were Black and Latinx voters more likely than white voters not to possess the required photo ID, but that they were more likely than white voters not to be able to get the ID because of, among other reasons, lack of access to transportation.¹¹⁷

The same logic might apply to polling place location and closure decisions that might make it just that much more burdensome for voters of color than for white voters to vote. Or, as in the new Georgia statute, SB 202, prohibiting line relief - the provision of food and water to those waiting in line to vote - particularly when voters of color are much more often confronted with long wait-times than are white voters.¹¹⁸

Mandating additional voter ID requirements in order to submit an application for an absentee ballot or to return a voted absentee ballot is another new hurdle voters will now face in Georgia under its new omnibus bill. Under this provision, voters requesting an absentee ballot must submit with their application their driver’s license number, their personal identification number on a state-issued personal identification card, or a photocopy of other specified forms of identification. For voters who do not have a Georgia’s driver license or state ID card number, voting absentee will now require access to photocopy technology. Voters without such access to technology will face a higher burden in complying with these ID requirements. Recent data shows that Black Georgians are 58% more likely and Latinx Georgians are 74% more likely to lack computer access in their homes as compared to their white counterparts.¹¹⁹ Thus, we can expect voters of color to face a significantly higher burden than white voters in complying with the ID requirements for requesting and returning absentee ballots.

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

¹¹⁶ *Id.*

¹¹⁷ *Teasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc).

¹¹⁸ Georgia Senate Bill 202 (online at <https://www.legis.ga.gov/api/legislation/document/20212022/201498>); Georgia State Conference of the NAACP v. Raffensperger, First Amended Complaint, at 36; Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, Georgia Public Broadcasting, Oct. 17, 2020, accessible at <https://www.npr.org/2020/10/17/924527679/why-do-nonwhitegeorgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

¹¹⁹ Georgia State Conference of the NAACP v. Raffensperger, First Amended Complaint, at 44.

4. 1982 Standards and Widespread Practice Are Not Important

Second, Justice Alito said that other relevant factors included the degree of departure of the challenged practice from the “standard practice when §2 was amended in 1982,” a choice which is largely left unexplained, other than in rebuttal to Justice Kagan’s dissent, in which he writes, somewhat tautologically, that “rules that were and are commonplace are useful comparators when considering the totality of the circumstances.”¹²⁰ Although the Court acknowledges that this would not apply to practices that themselves were discriminatory in 1982, the fact is that such benchmarks are neither necessary nor productive. If the history of voter discrimination in this country has taught us anything, it is that those who want to stop voters of color from voting change their methods with the times, and with the change in the ways voters of color are voting.

Again, Georgia is illustrative. In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots. These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.¹²¹ But, Justice Alito’s reasoning may be construed as supporting the proposition that, if in 1982, Georgia did not make absentee ballots universally available, that could be a “highly important” consideration, even if voters of color are more heavily impacted than white voters by these changes. State legislatures should not be led to believe that they can get away with erecting new barriers to vote based on what they did 40 years ago.

Further, Justice Alito also observed that the “widespread” present day acceptance of the voting practice could justify its use. But it was precisely because certain discriminatory practices were “widespread” that the Voting Rights Act was necessary. It seems incongruous, if not irrational, to justify discrimination by the majority population against minority populations on the basis of “widespread” acceptance.

5. So-called “small differences” can be important.

Third, in explaining the importance of the size of the disparities, Justice Alito indicates that “small differences should not be artificially magnified,”¹²² again dealing obliquely with the consequences of the differences being caused by differences in wealth – which may themselves be the result of historic racial discrimination. Specifically, the Court criticized the Ninth Circuit for finding disproportionate impact based on a relative comparison of the percentage of voters whose votes were rejected because they were cast out of precinct. In the case of Indigenous, Black, and Latinx voters, the percentage was 1% for each group; in the case of white voters, the percentage was .05.¹²³

¹²⁰ 2021 WL 2690267, at n.15.

¹²¹ *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 47.

¹²² 2021 WL 2690267, at *13.

¹²³ *Id.* at *4.

The Court neglected to note that the discriminatory out of precinct practice meant that almost 4,000 votes cast by voters of color had been rejected – and that if their circumstances were equivalent to those of white voters, 2,000 of their votes would have counted.

The Texas Photo ID case is illustrative. There, the court found that, even though over 90% of all groups had the required ID, Black voters were twice as likely as white voters not to have the ID, and Latinx voters were about three times as likely. In fact, the court found that 608,470 Texas voters lacked the ID.¹²⁴ Obviously, the Texas numbers are meaningful no matter how viewed. But the point is that smaller numbers may be too. Legislatures and lower courts should not be led to believe that they can chip away at electoral margins by reducing the likelihood of voters of color being able to cast their votes, no matter how small the effect. We need not dwell on the closeness of the 2020 presidential election in Arizona, Georgia, and Wisconsin to underscore the importance of even small differentials in impact.

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

Fourth, Justice Alito explained that the opportunities provided by the entire electoral system should be factored into the equation, implying that, for example, access to absentee ballots may be curtailed, as long as the voter can still vote in person.¹²⁵ But, if an advantageous means of voting is curtailed as to one group more than it is to another, what difference does it make that there may be other methods of voting? If all methods of voting made voting equally accessible, there would have to be only one method. Obviously, expanding methods of voting makes it more likely that people will vote. And, equally obviously, contracting them makes it less likely that people will vote. Contracting them in a way that affects some racial or ethnic groups more than others is inconsistent with the language and Congressional intent of Section 2. States should not be led to believe that they have carte blanche to target specific voting practices, when the effect is discriminatory, and try to justify it by the availability of other means of voting.

7. Justification for discriminatory practices must be based on reality

And, fifth, in explaining the state justification factor, the Court seemed to open the door to a state's justifying virtually any discriminatory action simply by parroting the words "fraud prevention."¹²⁶ Again, while the Court did not say so explicitly, the fear is that state legislatures and the lower courts may so interpret the Court's opinion.

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

¹²⁴ *Veasey v. Perry*, 71 F.Supp.3d 627, 659 (S.D. Tex. 2014).

¹²⁵ 2021 WL 2690267, at *13.

¹²⁶ *Id.*

8. The Senate Factors are relevant

The *Brnovich* majority went on to raise questions as to whether the Senate Factors are relevant to a Section 2 vote denial case, implying they are not, but leaving ambiguous precisely what the Court means as to how the few Factors the Court deems potentially relevant fit in, other than superficially.¹²⁷

Although *Gingles* involved vote dilution, the decision addressed Section 2 writ large, recognizing that “Section 2 prohibits *all* forms of voting discrimination, not just vote dilution.”¹²⁸ Further, *Gingles* recognized the applicability of the various Senate Factors would naturally turn on the type of Section 2 claim at issue.¹²⁹ The *Gingles* Court’s statement that the Senate Factors will “often be pertinent to *certain types* of § 2 violations,” such as dilution,¹³⁰ cannot be reconciled with a conclusion that the Factors “*only*” inform one specific type of Section 2 claim.

D. The Growing Present Need

As with the need for the resuscitation of Section 5, recent events reflect the significant present-day need for an immediate response to *Brnovich*. As detailed throughout this testimony, for example, the recently enacted Georgia voter suppression law, SB 202 increases the burdens for virtually every aspect of voting from voting by mail through voting in person. At least some aspects of SB 202 appear to be clearly retrogressive and probably would not have been proposed in the first place were it not for the decision in *Shelby County*. The effect of the *Brnovich* decision on the challenge to SB 202 remains to be seen, but already defendants have moved to dismiss the complaints on the basis of *Brnovich*. Although, we strongly believe that the complaints as drafted fully and adequately plead a “results” claim under Section 2 even post-*Brnovich*, the very making of these arguments demonstrates how those who support the erection of barriers to vote intend on using that opinion.

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

¹²⁷ *Id.*

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

¹²⁹ See *id.* at 45.

¹³⁰ *Id.* (emphasis added).

intimidating effect to which voters of color are often the target.”¹³¹

As with Georgia’s SB 202, some of these provisions might have been stopped by an effective Section 5 and challenges to some of them may be hampered by the effect of the *Brnovich* decision. The bottom line, however, is that recent events have only underscored the need for a robust Voting Rights Act.¹³²

E. The bill’s response to *Brnovich*

The impact of *Brnovich* has yet to be measured, but common sense and history instruct us that those who wish to target voters of color will undoubtedly feel emboldened by a decision that can be read as making it more difficult for plaintiffs to prove a Section 2 violation, giving state legislatures a “Get Out of Jail” card to pass voter suppressive legislation and justify it simply by claiming “voter fraud.” Although we firmly believe that the courts should not apply *Brnovich* in such a manner, the threat is there. Continued commitment to the core purpose of the Voting Rights Act should not be left in the uncertainty created by the ambiguous and problematic language of *Brnovich*.

The Senate bill responds to *Brnovich* by clarifying congressional intent on the scope and application of Section 2. It maintains the existing structure for vote dilution cases in Section 2(b) of the VRA, including use of a totality of circumstances test to determine whether “the political processes leading to nomination or election in the State or political subdivision are not equally open” to groups of voters on the basis of their race, color or language minority status “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” It codifies the legal standards in *Gingles* as governing vote dilution claims. Importantly, it provides that the class of citizens protected under Section 2 “may include a cohesive coalition of members of different racial or language minority groups.”

The bill codifies vote denial claims in Section 2, consistent with the scope and application recognized by federal courts pre-*Brnovich*. The standard for vote denial claims focuses on whether a voting law or procedure “imposes a discriminatory burden” on protected voters such that they “face greater difficulty” than non-minority voters “in complying with the standard, practice, or procedure, considering the totality of the circumstances.” To meet that burden of proof, plaintiffs would have to establish “such greater difficulty is, at least in part, caused by or linked to social and historical conditions that have produced or currently produce discrimination against members of the protected class.”

Applying longstanding jurisprudence interpreting Section 2 vote denial or abridgment claims, the bill sets out those Senate factors that may be applicable to establishing such claims. Consistent with the intensely local appraisal for Section 2 claims, no “particular combination or number of factors” is required to establish a violation. The bill further clarifies congressional intent that many of the factors identified by Justice Alito are not relevant to vote denial or abridgment claims,

¹³¹ *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff’d and reversed on other grounds*, *Veasey v. Abbott*, 830 F. 3d 216 (5th Cir. 2016) (en banc).

¹³² See, e.g., *Shelby Cnty.*, 570 U.S. at 536 (“[V]oting discrimination still exists; no one doubts that.”); *Nomination of the Hon. Amy Coney Barrett to the Supreme Court: Hearing Before S. Comm. on the Judiciary* (Oct. 14, 2020) (“[R]acial discrimination still exists in the United States and I think we’ve seen evidence of that this summer.”) (statement of Amy Coney Barrett).

including: “the total number or share of members of a protected class on whom a challenged standard, practice, or procedure does not impose a material burden”; whether the challenged practice “has a long pedigree or was in widespread use at some earlier date”; whether that practice is used in other States or political subdivisions; alternative methods of voting, unless the State or political subdivision is “simultaneously expanding” them “to eliminate any disproportionate burden imposed by the challenged procedure; as well as the invocation of preventing vote fraud or other criminal activity as a justification for the challenged procedure without proof it has occurred in the jurisdiction.

Finally, the bill’s *Brnovich* fix makes clear that Section 2 also encompasses intentional voting discrimination. The factors included in the bill track those long used by federal courts to identify circumstantial evidence of discriminatory purpose, through application of the criteria described in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹³³

We identify here a number of issues for consideration to strengthen the language of the bill in clarifying congressional intent in response to *Brnovich*:

- Clarify that, in determining the extent to which a challenged voting rule burdens minority voters, the absolute number or the percent of voters affected or the presence of non-minority voters in the affected area will not be dispositive. H.R. 4 had that language, and defined “affected area,” to avoid the present ambiguity in the Senate bill that may cause federal courts to misinterpret the standards for vote denial or abridgment in cases involving thousands of minority voters by denying them relief for so-called “de minimis” violations.
- Clarify that in determining whether the policy underlying the use of a voting rule is tenuous – one of the Senate factors – the court should consider whether the voting rule in question was actually designed to advance and in fact materially advances a valid and substantiated state interest. That preventing voter fraud may be a valid state interest should not lead to a determination that any voting practice alleged to have been enacted to protect fraud is valid, particularly if the instances of voter fraud are rare, if not virtually non-existent, and the means chosen to combat the alleged fraud scarcely further that aim, and, further, do so at the expense of preventing eligible voters from voting.
- Clarify that a discriminatory law cannot be justified on the basis that it was a standard practice at a particular date, such as 1982, or is widespread today, but must be judged solely on the totality of the circumstances in the particular jurisdiction, as viewed at the time the action under Section 2 is brought.
- Put an end to any doubt, as raised by the concurring opinion of Justices Gorsuch and Thomas in *Brnovich*, that there is a private cause of action for a Section 2 violation, as every Circuit Court of Appeals has held.

¹³³ 429 U.S. 252 (1977).

With these proposed changes to the Senate bill, we believe it will restore Section 2 to the standards that were widely used by federal courts to address vote denial or abridgment claims before the *Brnovich* decision misinterpreted congressional intent for those claims.

III. Adjusting the contours of Section 5 coverage to address over- and under-inclusiveness

When Congress enacted the Voting Rights Act in 1965, it was aware that the coverage formula could be both over-inclusive and under-inclusive. It resolved these issues by including the Act's "bailout"¹³⁴ and "bail-in" provisions, respectively.¹³⁵ The Senate bill makes important changes to both of those provisions to more narrowly target the VRA's remedies to those jurisdictions where they are most needed.

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

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

The bail-in provision addresses the under-inclusiveness of the coverage determinations under Section 4(b) of the Act by applying preclearance to the "so-called 'pockets of discrimination ... outside the States and political subdivisions as to which the prohibitions of [the Act] were in effect.'"¹³⁶ A permanent provision of the VRA, the Section 3(c) bail-in mechanism applies nationwide to reach "denials and abridgements of the right to vote on account of race or color [or language minority status]"¹³⁷ wherever they may occur throughout the United States."¹³⁸

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

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does

¹³⁴ Bailout is codified in Section 4(a) of the VRA. See 52 U.S.C. § 10303(a) (transferred from 42 U.S.C. § 1973b(a)).

¹³⁵ Bail-in is codified in Section 3(c) of the VRA. See 52 U.S.C. § 10302(c) (transferred from 42 U.S.C. § 1973a(c)).

¹³⁶ H.R. Rep. No. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2454. For that reason, Section 3(c) often is referred to as "the pocket trigger" for Section 5 preclearance coverage.

¹³⁷ The current language of Section 3(c) applies not just to discrimination "on account of race or color," but also includes "or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title." 52 U.S.C. § 10302(c). The latter language was added in the 1975 amendments to the VRA, in which Congress expressed its intent to apply the Act's protections to language minority voters. See Pub. L. 94-73, § 206, 89 Stat. 402 (Aug. 6, 1975). The bracketed addition reflects the current statutory language.

¹³⁸ H.R. Rep. No. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2454.

not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 4(f)(2)....¹³⁹

Federal courts interpreting the bail-in provision's language have concluded that it requires the reviewing court to "determine (1) whether violations of the Fourteenth or Fifteenth Amendments justifying equitable relief have occurred within the State or any of its political subdivisions; and (2) whether, if so, the remedy of preclearance should be imposed."¹⁴⁰ Stated another way, Section 3(c) "requires that (a) violations of the Fourteenth or Fifteenth Amendments (b) justifying equitable relief (c) have occurred (d) within the State or its political subdivisions."¹⁴¹ Therefore, the bail-in provision applies relief, including the determination of which voting changes are to be subject to preclearance, using the "traditional case-by-case approach."¹⁴²

For much of the VRA's history, Section 3(c) was used sparingly. During the first decade after the VRA was enacted in 1965, no jurisdiction was bailed-in under the provision.¹⁴³ By 2013, approximately eighteen jurisdictions had bailed-in under Section 3(c): two states, Arkansas¹⁴⁴ and New Mexico¹⁴⁵; twelve counties¹⁴⁶, two municipalities¹⁴⁷, and two school districts.¹⁴⁸ Over half of those jurisdictions, ten, were bailed in for discrimination against American Indians, for whom there was little coverage under Section 4(b) and Section 4(f)(4) of the VRA.¹⁴⁹ All but two of the jurisdictions, the State of Arkansas and the Gadsden County School District in Florida, were bailed in as a result of consent decrees.

¹³⁹ 52 U.S.C. § 10302(c).

¹⁴⁰ *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (three-judge panel); see also *Perez v. Abbott*, 390 F. Supp.3d 803, 813 (W.D. Tex. 2019) (recognizing that *Jeffers* provides the "most thorough analysis and discussion in the case law of § 3(c) and its requirements" and applying "this same general framework.").

¹⁴¹ *Id.*

¹⁴² H.R. Rep. No. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2475.

¹⁴³ See generally TEN YEARS AFTER at 11 n.3 ("No court has yet used the authority of section 3, however, to impose the special coverage remedies on jurisdictions not covered by the act.").

¹⁴⁴ *Jeffers*, 740 F. Supp. at 585.

¹⁴⁵ *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (consent decree).

¹⁴⁶ *United States v. Thurston Cty.*, No. 78-0-380 (D. Neb. May 9, 1979) (consent decree); *McMillan v. Escambia Cty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979) (consent decree); *Woodring v. Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983) (Alexander County, Illinois) (consent decree); *United States v. McKinley Cty.*, No. 86-0029-C (D.N.M. Jan. 13, 1986) (consent decree); *United States v. Sandoval Cty.*, No. 88-1457-SC (D.N.M. May 17, 1990) (consent decree); *United States v. Los Angeles Cty.*, Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991) (consent decree); *United States v. Cibola Cty.*, No. 1:93-1134-LH/LFG (D.N.M. Apr. 21, 1994) (consent decree), ECF No. 72; *United States v. Socorro Cnty.*, No. 1:93-1244-JP (D.N.M. Apr. 13, 1994) (consent decree), ECF No. 46; *United States v. Alameda Cty.*, No. 3:95-cv-1266 (SAW) (N.D. Cal. Jan. 27, 1996) (consent decree), ECF No. 13; *United States v. Bernalillo Cty.*, No. 1:98-0156-BB/LCS (D.N.M. Apr. 27, 1998) (consent decree), ECF No. 6; *Kirkie v. Buffalo Cty.*, No. 3:03-cv-3011 (D.S.D. Feb. 12, 2004) (consent decree), ECF No. 23; *Blackmoon v. Charles Mix Cty.*, No. 4:05-cv-4017 (D.S.D. Dec. 4, 2007) (consent decree), ECF No. 144.

¹⁴⁷ *Brown v. Bd. of Comm'rs of Chattanooga*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (consent decree); *United States v. Vill. of Port Chester*, No. 1:06-cv-15173 (S.D.N.Y. Dec. 22, 2009) (consent decree), ECF No. 119.

¹⁴⁸ *N.A.A.C.P. v. Gadsden City Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984) (Gadsden Cty. Sch. Dist.); *Cuthair v. Montezuma-Cortez Sch. Dist. No. RE-1*, No. 1:89-cv-0964 (D. Col. Apr. 9, 1990) (consent decree).

¹⁴⁹ The ten jurisdictions covered for American Indians include the State of New Mexico; Thurston County, Nebraska; Bernalillo, Cibola, McKinley, Sandoval, Socorro Counties in New Mexico; Buffalo and Charles Mix Counties in South Dakota; and the Montezuma-Cortez School District RE01 in Colorado.

The lack of more widespread Section 3(c) coverage can be explained in at least three ways. First, many of the States and political subdivisions that engaged in voting discrimination were covered by Section 5 already.¹⁵⁰ Second, non-covered jurisdictions that engaged in voting rights violations often were under one or more court orders that remedied that discrimination.¹⁵¹ Third, the legal standards for securing bail-in can be inordinately difficult for jurisdictions that do not voluntarily consent to the remedy.

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

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

In *Allen v. City of Evergreen, Alabama*, after the plaintiffs successfully challenged a redistricting plan for the city council and the system for determining voter eligibility, they moved for remedies including the appointment of federal observers and bail-in.¹⁵² The City agreed to the relief, which “would restore a preclearance requirement which is limited in scope.”¹⁵³ The federal court ordered preclearance to be in place until December 31, 2020, limiting it to two voting changes: any change in the redistricting plan or method of election for members of the city council and any change in the standards for determining voter eligibility.¹⁵⁴ In granting the stipulated relief, the court retained jurisdiction through the end of 2020.¹⁵⁵

In *Patiño v. City of Pasadena, Texas*, the court found that the city adopted a plan for electing members of its council that intentionally diluted the votes of Latino citizens in violation of Section 2 of the VRA and the Fourteenth Amendment.¹⁵⁶ As a result of the finding of intentional discrimination, the court granted the plaintiffs’ request to require the city to submit future changes to its redistricting plan to the Attorney General for preclearance.¹⁵⁷ In addition, the court retained jurisdiction to review any other voting change different from what was in force in the 2013 election.¹⁵⁸ The court referred to the six year preclearance period in the *Evergreen* consent order, suggesting that “five years, or through the 2021 election, might be appropriate” for Section 3(c) coverage “because it is likely enough time for demographic trends to overcome concerns about dilution from redistricting.”¹⁵⁹ Subsequently, the court adopted a six year preclearance period

¹⁵⁰ See U.S. Dep’t of Just., *Jurisdictions previously covered by Section 5 at the time of the Shelby County decision* <<https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>> (updated Sept. 11, 2020).

¹⁵¹ For examples of voting rights violations that were remedied already and therefore were found a federal court not to be the proper subject of preclearance, see generally *Jeffers*, 740 F. Supp. at 601 (ordering a limited bail-in for Arkansas for any majority-vote requirements and the state’s 1990 redistricting plans because the remaining “constitutional violations found . . . have already been remedied by judicial action.”).

¹⁵² Civ. Act. No. 13-0107-CG-M, 2014 U.S. Dist. LEXIS 191739, at *#1-2 (S.D. Ala. Jan. 13, 2014).

¹⁵³ *Id.* at *4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at **4-6.

¹⁵⁶ 230 F. Supp. 3d 667 (S.D. Tex. 2017).

¹⁵⁷ *Id.* at 729.

¹⁵⁸ *Id.* at 729.

¹⁵⁹ *Id.* at 730.

through June 30, 2023.¹⁶⁰ The court explained that would encompass four election cycles and redistricting following the 2020 Census.¹⁶¹

Requests for Section 3(c) relief have not been granted in other cases for a variety of reasons. One cause is the difficulty in obtaining a finding of discriminatory intent. In *Jeffers*, the court held that to establish a violation of the Fourteenth or Fifteenth Amendment necessary to support bail-in, it required “proof of conscious racial discrimination.”¹⁶² The court in *Perez v. Abbott* agreed, concluding that “triggering violations for bail-in relief must be violations of Fourteenth and Fifteenth Amendment protections against racial discrimination in voting.”¹⁶³

For example, in *Toyukak v. Treadwell*, the plaintiffs developed a strong record supporting a finding of discriminatory intent, including: Alaska’s contention that the Fifteenth Amendment did not apply to Alaska Natives; its position that Alaska Natives were entitled to less voting information than other voters because they were Alaska Natives; purposeful failure to translate ballots into covered languages and dialects; and what state officials euphemistically referred to as “policy decisions” not to provide voting materials and assistance to Alaska Native voters in areas covered by Section 203 of the Act.¹⁶⁴ The federal court held that the plaintiffs established a Section 203 violation, while also suggesting it was the product of discriminatory intent. The court explained that Alaska’s voting program was “not designed to transmit substantially equivalent information in the applicable minority... languages.”¹⁶⁵

Nevertheless, the court declined to reach the question of whether the plaintiffs established that Alaska intentionally discriminated against Native voters, taking under advisement the constitutional claim that served as the basis for the Section 3(c) request to focus on other remedies.¹⁶⁶ Later, the court directed the parties to mediation to try to resolve the litigation.¹⁶⁷ The *Toyukak* court’s reluctance to make a finding of discriminatory intent sufficient to support Section 3(c) relief is consistent with what has occurred since Congress amended Section 2 to explicitly permit results claims – judges will sometimes not reach intent claims when they find liability on a results claim.¹⁶⁸ It is inherently difficult for a federal judge to find that officials in the community in which they reside have engaged in purposeful discrimination, regardless of a voting procedure’s discriminatory impact.¹⁶⁹ The *Toyukak* plaintiffs settled and obtained court oversight over Alaska’s language program for three census areas through the end of 2020, recently extended until 2022, in lieu of

¹⁶⁰ *Patiño v. City of Pasadena*, No. H-14-3241, 2017 U.S. Dist. LEXIS 229191, at **5-6 (S.D. Tex. Jan. 16, 2017).

¹⁶¹ *Id.* at *5 n.4.

¹⁶² 740 F. Supp. at 589.

¹⁶³ 390 F. Supp. 3d 803, 813-14 (W.D. Tex. 2019).

¹⁶⁴ See James Thomas Tucker, Natalie Landreth & Erin Dougherty Lynch, “Why Should I Go Vote Without Understanding What I am Going to Vote For?”: The Impact of First Generation Voting Barriers on Alaska Natives, 22 MICH. J. RACE & LAW 327, 358-72 (2017).

¹⁶⁵ *Id.* at 372 (emphasis added).

¹⁶⁶ *Id.* at 374.

¹⁶⁷ *Id.* at 375-76.

¹⁶⁸ 446 U.S. 55 (1980).

¹⁶⁹ The Senate reached a similar conclusion in its report accompanying the 1982 amendments to the VRA, noting that because of the reluctance among federal judges to make a finding of intentional discrimination after *Bolden*, “litigators virtually stopped filing new vote dilution cases.” S. REP. NO. 417, at 26 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 203.

pressing their Section 3(c) claim.¹⁷⁰

Perez added another wrinkle to the difficulty for plaintiffs seeking bail-in by limiting the evidence outside of the underlying violation that the court considered as part of the bail in determination to that of constitutional voting violations. This, the court rejected consideration of Section 2 results violations¹⁷¹ and decided that the only Section 5 objections that could support bail-in were those based upon discriminatory intent, reasoning that a “mere finding of discriminatory effect or ‘retrogression’ does not amount to a constitutional violation...”¹⁷²

Perez also interpreted the broad language of Section 3(c) narrowly to further limit the geographic scope of constitutional violations that may be considered. The statute provides that the relevant violations are those that “have occurred within the territory of such State or political subdivision.”¹⁷³ In *Jeffers*, the court construed Section 3(c) as meaning what it says:

We agree with plaintiffs that both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account. The statute does not say that the State or its officials must be guilty of the violations, but only that the violations must “have occurred *within the territory*” of the State... And besides, as we have already held, officials of local governments are State officials for present purposes; local governments are arms of the State and only exist at its sufferance.¹⁷⁴

In contrast, *Perez* found that “these violations should at most provide relevant context” to whether a court should grant equitable relief, “and not be used as a trigger for bail-in relief.”¹⁷⁵ It read the statute differently than *Jeffers*, explaining “it simply makes clear that political subdivisions such as cities may be subjected to § 3(c) relief based on their own violations, and does not mean that a State may be subjected to bail-in based on violations by its political subdivisions.”¹⁷⁶

Moreover, even where intentional discrimination has been established in violation of the Fourteenth or Fifteenth Amendment, that may be insufficient to result in bail-in. In *Jeffers*, the court emphasized that Section 3(c) requires “violations *justifying equitable relief*.”¹⁷⁷ Like any other form of equitable relief, a court has considerable discretion, taking into consideration the public interest codified in the VRA. The court suggested several factors to weigh in making that determination:

Have the violations been persistent and repeated? Are they recent or distant in time? Are they the kind of violations that would likely be

¹⁷⁰ See *Tucker, Landreth & Dougherty v. Lynch* at 376.

¹⁷¹ 390 F. Supp. 3d at 813.

¹⁷² *Id.* at 817-18.

¹⁷³ 52 U.S.C. § 10302(c).

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

¹⁷⁵ 390 F. Supp. 3d at 817.

¹⁷⁶ *Id.*

¹⁷⁷ 740 F. Supp. at 601 (emphasis in original).

prevented in the future, by preclearance? Have they already been remedied by judicial decree or otherwise? How likely are they to recur? Do political developments independent of this litigation, make recurrence more or less likely?¹⁷⁸

Those factors are to be balanced between “the interest of the plaintiffs in vindication of their constitutional right to vote” against “the interest of the defendants in maintaining the sovereignty of the State.”¹⁷⁹

Perez cited the *Jeffers* factors with approval, applying them to reach its holding that Section 3(c) bail-in should not be imposed on Texas.¹⁸⁰ The court made that determination despite its conclusion that there were “recent, statewide violations of the Fourteenth Amendment by the State” that were “the type to appropriately trigger the bail-in remedy against the State, and the bail-in remedy sought by Plaintiffs would appropriately redress the violation.”¹⁸¹ In particular, the court described the case as involving

findings of intentionally discriminatory behavior affecting minority voters statewide... Numerous counties were drawn with the purpose to dilute minority voting strength in the Texas House plan, as well as CD23 and numerous congressional districts in the Dallas-Fort Worth metroplex in the Congressional plan.¹⁸²

Compounding those violations, the court concluded that although “it could and should also consider the intentional discrimination findings made in the underlying voter ID litigation, it does little to bolster the foundation for bail-in.”¹⁸³ The court explained that the purposeful discrimination “affected only a small portion of minority voters (indigent minority voters),” with “no indication that its effects had not been fully remedied.”¹⁸⁴

Remarkably, *Perez* noted its “grave concerns about Texas’s past conduct,” but nevertheless concluded “that ordering preclearance on the current record would be inappropriate...”¹⁸⁵ The court attempted to justify its holding by explaining, “Even without being subject to preclearance, Texas must still comply with the requirements of the Fourteenth Amendment and § 2 of the VRA in the upcoming redistricting cycle, and undoubtedly its plans will be subject to judicial scrutiny.”¹⁸⁶ That conclusion is certainly true, but it severely undermines the legislative purpose of Section 3(c): to prevent discriminatory voting changes that are enacted by knowing bad actors *before* they go into effect.

The reluctance of federal courts to order bail-in to remedy even a strong record of

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 390 F. Supp. 3d at 818-21.

¹⁸¹ *Id.* at 816.

¹⁸² *Id.*

¹⁸³ *Id.* at 820.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 820-21.

¹⁸⁶ *Id.* at 821.

discrimination such as the one in *Perez* goes far to explain why Section 3(c) relief rarely has been granted where it is contested.¹⁸⁷ It may be laudable that many jurisdictions agree to bail-in to cure their intentional discrimination against minority voters. But conditioning coverage for preclearance on a jurisdiction's consent does little to provide redress from the worst offenders, who, like Texas officials, are recidivists engaging in repeated acts of intentional discrimination designed to suppress the votes of racial, ethnic and language minorities. It goes far to explain why Section 3(c) is an inadequate remedy for the broader Section 5 coverage proposed by H.R. 4 under a new geographic formula. It also highlights the need for the modest, yet crucial, amendment that the bill makes to the violations that qualify for bail-in under Section 3(c).

3. The Senate bill clarifies Congressional intent on bail-in

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

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

B. The Need for More Flexible “Bail-out” under Section 4(a) of the VRA

The bailout provisions, codified in Section 4(a) of the Voting Rights Act, strive to strike the right balance between continuing Section 5 coverage of jurisdictions with a present record of voting discrimination, while allowing those jurisdictions that have been free of voting discrimination for a sufficient time are allowed to exit from coverage. The current version of the bailout provisions is this designed to “recogniz[e] and reward[] ... good conduct” of covered jurisdictions, “rather than require[] them to await an expiration date which is fixed regardless of the actual record.”¹⁸⁸

¹⁸⁷ See also *North Carolina State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016) (“As to the other requested relief, we decline to impose any of the discretionary additional relief available under § 3 of the Voting Rights Act, including imposing poll observers during elections and subjecting North Carolina to ongoing preclearance requirements... Such remedies ‘[are] rarely used’ and are not necessary here in light of our injunction.”) (quoting *Conway Sch. Dist. v. Wilhoit*, 854 F. Supp. 1430, 1442 (E.D. Ark. 1994)).

¹⁸⁸ Senate Jud. Comm. Report on the Voting Rts. Act Amds. Act of 1982, S. Rep. No. 97-417, 97th Cong., 2d Sess. 16, 44 (1982), reprinted in 1982 U.S.C.A.N. 177, 222.

Congress has periodically reassessed the effectiveness of the bailout provisions to strike the balance between covering jurisdictions with an ongoing record of voting discrimination and those that have taken sufficient steps to eradicate voting discrimination.¹⁸⁹ As originally enacted, the bailout provisions permitted a covered jurisdiction to bailout if it established that no test or device had been used since the VRA was enacted “in a manner that was racially discriminatory in either purpose or effect.”¹⁹⁰ This provision proved to be too expansive, allowing jurisdictions that subsequently had judicial findings of longstanding voting discrimination to bail out from coverage, such as the State of Alaska and Apache County in Arizona.¹⁹¹ In 1970, Congress further refined the standard by requiring that a jurisdiction seeking to bailout had to show it had been free of voting discrimination for at least ten years.¹⁹²

The most significant changes to the bailout provisions came in 1982 through two amendments. For the first time, political subdivisions covered as a result of statewide coverage were given a path to bailing out; previously, such coverage only could be removed if the covered state itself bailed out. Second, Congress clarified that to establish that it had been free of voting discrimination for ten years, a covered jurisdiction seeking bailout had to establish factors such as: (1) no test or device had been used to determine voter eligibility with the purpose or effect of discrimination; (2) there had been no final judgments, consent decrees, or settlements entered against the jurisdiction for racially discriminatory voting practices; (3) timely submission of voting changes for Section 5 preclearance; and (4) the absence of objections by the Department of Justice or the District Court of the District of Columbia to any submitted voting changes. Other criteria that had to be submitted at the time of bailout included the elimination of any dilutive voting or election procedures, constructive efforts to eliminate any known harassment or intimidation of voters, and other constructive efforts to expand registration and voting opportunities for minority voters.¹⁹³

Consonant with the overall intent to apply preclearance to the jurisdictions where it is most needed, the Senate bill makes some additional adjustments to provide for a more flexible bailout standard. Generally, we support these adjustments. For example, the bill makes clear that “any plaintiff seeking a declaratory judgment” under Section 4(a) “may request that the Attorney General consent to entry of judgment.” That is a reasonable addition, which reflects longstanding Department of Justice practice to work cooperatively with covered jurisdictions to facilitate their bailout if they are eligible to do so.

The Senate bill also includes a reasonable modification to allow certain political subdivisions covered as a result of statewide coverage to bailout. In particular, if a political subdivision is covered solely as the result of statewide coverage, that political subdivision “may seek a declaratory judgment” if it “demonstrates that the subdivision meets the criteria” for bailout “for the 10 years preceding” the date it became covered. This amending language carefully tailors Section 5 coverage

¹⁸⁹ For a more detailed discussion of the legislative history of the bailout provisions of the VRA, see generally Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 393-94 (1985) and J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, reprinted in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 257-75 (Ana Henderson ed. Berkeley 2007).

¹⁹⁰ Hebert, *supra*, at 259.

¹⁹¹ See *id.* at 260.

¹⁹² *Id.*

¹⁹³ *Id.* at 262-63.

by permitting that in covered states, those political subdivisions that have no record of recent voting discrimination in the previous ten years are eligible for bailout.

We are concerned that the final amendment proposed in the Senate bill could permit jurisdictions with a present record of voting discrimination to bailout. It provides, “[i]f a political subdivision was not subject to the application of this subsection by reason of a declaratory judgment entered prior to the date of enactment” of the Senate bill, and “is not, subsequent to that date of enactment, subject to the application” of bailout by virtue of being covered in its own right, then the political subdivision will not be covered by Section 5. We understand this provision is meant to address political subdivisions that bailed out previously, exempting them from coverage if they are in a state covered statewide. We strongly recommend that such jurisdictions be exempted from statewide coverage only if they have been completely free of voting discrimination in the previous ten years, instead of the current language that would not cover them unless they have at least three voting rights violations in the previous 25 years.

With the amendments in the Senate bill, as modified by our suggestion for bailout of jurisdictions that previously have bailed out, the bill takes a reasoned approach to ensuring that the new geographic coverage formulas are constitutional.

IV. Facilitating Recovery of Attorneys’ Fees for Prevailing Parties in VRA Cases

The Senate bill also includes a very important fix to clarify congressional intent on the standard of review to be applied to attorneys’ fees applications in cases successfully litigated under the Voting Rights Act. Since its enactment in 1965, the VRA has codified the intent to incentive private litigants to enforce the Act through a strong attorneys’ fees provision.¹⁹⁴ Congress included the provision because it recognized that the Attorney General alone did not have the resources to bring enforcement actions for every violation of the Act. It was necessary to offer broad reimbursement for enforcement by “private attorneys general,” particularly given how expensive and time-consuming voting rights litigation is. I have offered examples of the tremendous costs of litigation elsewhere in my testimony.

“Like most civil-rights statutes, the Voting Rights Act contains a fee-provision that changes the so-called ‘American rule’ for attorney fees by allowing victorious citizen plaintiffs to recover their attorney fees from the losing party.”¹⁹⁵ Initially, it was unclear whether parties who secured an agreement or settlement also were eligible for attorneys’ fees. Federal courts responded overwhelmingly by acknowledging that such out-of-court success resulting in a jurisdiction’s change in conduct for a voting procedure or method was enough to qualify the plaintiff as a “prevailing party” under the statute. Applying the “catalyst theory,” courts reasoned that the litigation brought by the plaintiff was the catalyst for the jurisdiction to change its conduct, such that it would not have happened absent the lawsuit.

¹⁹⁴ See generally 52 U.S.C. § 10310(e) (“Attorneys’ fees. In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.”).

¹⁹⁵ Testimony of Bryan L. Sells before the Subcomm. on the Const., Civil Rts., and Civil Liberties of the House Comm. on the Judiciary 21 (Oct. 17, 2019).

In 2001, however, the Supreme Court rejected the “catalyst theory” in *Buckhammon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.¹⁹⁶ The Court narrowly construed the term “prevailing party” in the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act. A majority reasoned that under the FHA and ADA, “the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees.”¹⁹⁷ According to the Court, some “judicially sanctioned” victory was necessary to be eligible for an attorneys’ fees award.¹⁹⁸

The Supreme Court’s “rejection of the catalyst theory has had ‘a profoundly negative impact on civil rights litigation.’”¹⁹⁹ “*Buckhammon* reduces plaintiffs’ leverage in settlement negotiations because defendants are aware that they can often avoid a fee award by capitulating, and it also makes settlement more difficult by taking away the potential for face-saving out-of-court settlements in which the defendants do not admit liability.”²⁰⁰ Some federal courts have applied *Buckhammon* to fee applications in voting rights cases, even where the plaintiffs have devoted considerable resources to secure a hard-won victory against a jurisdiction unwilling to cure voting rights violations short of litigation.

A case in South Dakota brought by the Lawyers’ Committee, *Poor Bear v. Jackson County*,²⁰¹ is illustrative of the impact of *Buckhammon* on private litigants bringing enforcement actions under the VRA:

The parties litigated the case for more than two years. The district court had rejected the counties primary defenses, and the plaintiffs had filed a motion for summary judgment on the merits. Rather than defend their position on the merits or engage in settlement discussions with the plaintiffs, the County entered into a temporary agreement with the State to offer a satellite voting location for four election cycles. The County then immediately sought to dismiss the case on ripeness grounds, and the district court granted the motion.

The plaintiffs still moved for an award of fees, but the district court rejected the motion under *Buckhammon*. There was no dispute that the plaintiffs had been the catalyst for the defendants’ capitulation, that was no longer enough to qualify for fees as a prevailing party. The plaintiffs in *Poor Bear* were represented by a non-profit civil rights organization and private counsel that had undoubtedly devoted hundreds of hours to the case. Although they obtained excellent results for their clients, they recovered nothing.²⁰²

¹⁹⁶ 532 U.S. 598 (2001).

¹⁹⁷ *Id.* at 610.

¹⁹⁸ *Id.*

¹⁹⁹ Sells Testimony, *supra*, at 22 (quoting Rebecca Glenberg, *Attorney’s Fees and Buckhammon*, J. VA. TR. LAWYERS’ ASSOC., Vol. 20, No. 4, at 13 (2009)); see also Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhammon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007) (same).

²⁰⁰ Sells Testimony, *supra*, at 22.

²⁰¹ 5:14-CV-5059-KES (D.S.D. filed 2014).

²⁰² Sells Testimony, *supra*, at 22.

The bill responds to *Buckhammon* by clarifying congressional intent to apply a broad definition of “prevailing party” through the well-established catalyst theory. It provides, “The term ‘prevailing party’ means a party to an action that receives at least some of the benefit sought by such action, states a colorable claim, and can establish that the action was a significant cause of a change to the status quo.” This amendment to the attorneys’ fees provision of the VRA fulfills the desire of Congress to encourage private litigants to enforce the Act. It likewise discourages jurisdictions from needlessly running up fees and expenses through a war of attrition against resource-scarce civil rights organizations and individuals in a manner that undercuts the fundamental right to vote.

V. NAVRA is needed to secure equal voting rights in Indian Country

Title III of the Senate bill incorporates the Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021, or NAVRA. Originally introduced bicamerally in the 115th Congress by Senator Tom Udall (S. 3543) and then Representative Ben Ray Lujan (H.R. 7127), NAVRA was the product of efforts by the Native American Voting Rights Coalition, of which the Lawyers’ Committee is a founding organizational member. Led by the Native American Rights Fund, NAVRC conducted a series of nine field hearings in seven states on the state of voting rights in Indian Country.²⁰³ Approximately 125 witnesses from dozens of tribes in the Lower Forty-Eight testified about the progress of the First Americans in non-tribal elections, and the work that remains to be done.²⁰⁴ The updated version of NAVRA was introduced bicamerally in mid-August with bipartisan support of Rep. Tom Cole and Rep. Sharice Davids (H.R. 5008) and Senator Lujan (S. 2702). The Lawyers’ Committee supports the inclusion of NAVRA in the Senate bill to address many of the most basic barriers to political access and participation by Native American voters.

Many of the obstacles in Indian Country were considered previously in a pre-introduction roundtable hearing in 2018 that was jointly held by the Senate Committee on Indian Affairs and the Senate Committee on Rules and Administration.²⁰⁵ We strongly believe that a post-introduction hearing on NAVRA would provide additional context for how the remedies are carefully tailored to address voting discrimination faced by Native voters. We encourage the Senate to convene a separate hearing on NAVRA that will allow witnesses from Tribes, Native organizations and Native voters to further develop that record.

I will provide an overview of the factual and legal basis for NAVRA and the broad constitutional power of Congress to enact it.

²⁰³ The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseno Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March 8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018.

²⁰⁴ Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway.

²⁰⁵ See Senate Comm. on Indian Affairs & Senate Comm. on Rules & Admin., Roundtable on “Voting Rights, Access, and Barriers in Indian Country” (July 17, 2018), available at <https://www.indian.senate.gov/hearing/roundtable-voting-rights-access-and-barriers-indian-country-webcast>.

A. Congress has broad authority to remedy voting discrimination on Tribal Lands

Like the other provisions in the Senate bill, NAVRA is grounded in part in congressional authority to remedy voting discrimination through the Fourteenth and Fifteenth Amendments and to regulate the conduct of federal elections through the Election Clause of Article I, Section 4 of the Constitution. But as the findings in the bill make clear, Congress also has other broad powers that allow it to regulate elections in Indian Country through passage of NAVRA.

“The Constitution explicitly and implicitly grants Congress broad general powers to legislate on issues relating to Indian Tribes, powers consistently described as plenary and exclusive. These powers arise from the grant of authority in the Indian Commerce Clause and through legislative matters arising under the Treaty Clause.” The bill further explains, “The Federal Government is responsible for upholding the obligations to which the Federal Government has agreed through treaties, legislation, and executive orders, referred to as the Federal trust responsibility toward Indian Tribes and their members.”

The Supreme Court has interpreted congressional authority in regulating relations between the United States and Tribal Nations expansively. As the bill notes in its findings, “The Supreme Court has repeatedly relied on the nature of this ‘government to government’ relationship between the United States and sovereign Indian Tribes for congressional authority to enact ‘legislation that singles out Indians for particular and special treatment.’”²⁰⁶ Legislation that removes barriers to Native American voting “is vital for the fulfillment of Congress’ ‘unique obligation’” towards Native Americans, particularly to ensure “that Native American voters are fully included as ‘qualified members of the modern body politic.’”²⁰⁷

B. General factors negatively impacting Native American registration and voting

Members of the 574 federally recognized tribes²⁰⁸ face numerous barriers to political participation. Although many other American voters share some of these obstacles, no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native population. I will briefly describe some of the general factors that impede participation by Native voters, with a particular emphasis on challenges resulting from non-traditional addresses. A more detailed discussion is in NARF’s *Obstacles* report.

1. Historical distrust of the federal government

Antipathy and distrust among Native voters persist towards Federal, State, and local governments because of past (and in some cases, ongoing) actions that discriminate against Natives

²⁰⁶ *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

²⁰⁷ *Bd. of Civ. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943).

²⁰⁸ See National Congress of American Indians (NCAI), *Tribal Nations & the United States: An Introduction* (2020 ed.), available at <https://www.ncai.org/about-tribes>. As NCAI explains, “There are 574 federally recognized Indian Nations (variously called tribes, nations, bands, pueblos, communities and native villages) in the United States. Approximately 229 of these ethnically, culturally and linguistically diverse nations are located in Alaska; the other federally recognized tribes are located in 35 other states. Additionally, there are state recognized tribes located throughout the United States recognized by their respective state governments.” *Id.*

or that undermine the preservation of their culture and heritage. In the fall of 2016 and spring of 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.²⁰⁹ In all four states, Native voters expressed the greatest trust in their Tribal Governments. Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.²¹⁰ Those negative experiences often are exacerbated and reinforced when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted.

2. Geographical isolation

The isolated locations of tribal lands contribute to the political exclusion of Native Americans. Approximately one-third of all American Indians and Alaska Natives (AIAN) live in Hard-to-Count Census Tracts – roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.²¹¹ Hard-to-Count Census Tracts include those Census Tracts “in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method.”²¹² The states with the greatest percentage of the AIAN population in Hard-to-Count Census Tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent), and Alaska (65.6 percent).²¹³ Geographical isolation is one of the most significant reasons for why those states have such a large percentage of their AIAN population in Hard-to-Count areas.

Isolation due to physical features such as mountains, canyons, oceans, rivers, and vast expanses of unoccupied land are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable transportation to travel the vast distances to elections offices and county seats. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held.

²⁰⁹ See The Native American Voting Rights Coalition, Survey Research Report: Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota 8, 38, 67 (Jan. 2018) (“NAVRC Report”), available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf>. The Executive Summary of the NAVRC Report is available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf>. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.

²¹⁰ See NAVRC Report, *supra*, at 15, 45, 77, 111. Respondents were asked, “Which government do you trust most to protect your rights?” *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. See *id.* at 77, 111.

²¹¹ See The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-AIAN-HTC.pdf>.

²¹² *Id.*

²¹³ See The Leadership Conference Education Fund, Table 1b: States Ranked by Percent of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <http://civilrightsdocs.info/pdf/census/2020/Table1b-States-Percent-AIAN-HTC.pdf>.

3. Non-traditional mailing addresses, homelessness, and housing instability

Access to voting in Indian Country is made substantially more difficult because of the prevalence of non-traditional mailing addresses, homelessness, and housing instability. The Census Bureau's 2015 National Content Test (NCT) Report illustrates these points. Among all of the population groups included in the 2015 NCT, the AIAN population experienced the lowest 2010 Census mail response rate, at 57.8 percent.²¹⁴

Non-traditional mailing addresses are prevalent among American Indians and Alaska Natives residing on tribal lands. Non-traditional mailing addresses encompass "noncity-style addresses, which the Census Bureau defines as those that do not contain a house number and/or a street name."²¹⁵ Examples of noncity-style mailing addresses include:

- General delivery
- Rural route and box number
- Highway contract route and box number
- Post office box only delivery

Noncity-style addresses used by the Census Bureau also include location descriptions such as "BRICK HOUSE with ATTACHED GARAGE ON RIGHT," structure points (geographic coordinates), and census geographic codes including state code, county code, census tract number, and census block number.²¹⁶

It is commonplace for homes on tribal lands to use noncity-style mailing addresses. Many homes can only be identified by a geographic location (e.g., "hogan located three miles down dirt road from Hardrock Chapter House"). Others may be located by reference to a BIA, state, or county road mile marker (e.g., "the house located on the right side of BIA-41 between highway marker 17 and highway marker 18") or intersection (e.g., the house at the intersection of BIA-41 and BIA-15"). Additionally, mailboxes may be on the side of the road far from where the home(s) associated with them are located, with the mailbox identified only by a General Delivery number, Rural Route, or box number. Many AIAN residents of tribal lands only receive their mail by post office box. Often, several families or generations of a single family might share a post office or general delivery box to get their mail.

The disproportionately high rate of homelessness in Indian Country is another major factor that prevents Native Americans from registering to vote and casting a ballot. According to the 2016 ACS, only 52.9 percent of single-race American Indian and Alaska Native householders owned their own home, compared to 63.1 percent of the total population.²¹⁷ According to data from the U.S. Department of Housing and Urban Development, although "only 1.2 percent of the national

²¹⁴ See U.S. Census Bureau, 2015 National Content Test Race and Ethnicity Analysis Report 32, table 2 (Feb. 28, 2017) ("NCT Report").

²¹⁵ U.S. Census Bureau, 2020 Census Local Update of Census Addresses Program Improvement Project Recommendations 2 (Apr. 13, 2015) ("2020 LUCA Recommendations"), available at https://www2.census.gov/geo/pdfs/partnerships/2020_luca_recommendation.pdf.

²¹⁶ *Id.*

²¹⁷ U.S. Census Bureau, Facts for Features: American Indian and Alaska Native Heritage Month: November 2017 (Oct. 6, 2017), available at <https://www.census.gov/newsroom/facts-for-features/2017/ai-an-month.html> ("2017 AIAN Summary").

population self-identifies as AI/AN . . . 4.0 percent of all sheltered homeless persons, 4.0 percent of all sheltered homeless individuals, and 4.8 percent of all sheltered homeless families self-identify as Native American or Alaska Native.”²¹⁸ The AIAN population likewise experiences higher rates of homelessness among veterans than other population groups. Specifically, “2.5 percent of sheltered, homeless Veterans were American Indian or Alaska Native, although only 0.7 percent of all Veterans are American Indian or Alaska Native.”²¹⁹ Frequently changing residences, with no single permanent residence, can prevent many American Indians and Alaska Natives from being able to register to vote and casting a ballot.²²⁰

4. Socio-economic barriers

Socio-economic barriers likewise make the voting process less accessible for Native Americans. Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.²²¹ The poverty rate was even higher on federally recognized Indian reservations and Alaska Native villages, at 38.3 percent.²²² The median household income of single-race American Indian and Alaska Native households in 2016 was \$39,719, far below the national median household income of \$57,617.²²³

Native Americans also have lower rates of educational attainment. Among the American Indian Alaska Native population 25 years of age and older, 20.1 percent had less than a high school education.²²⁴ The unemployment rate of those aged 16 and older in the workforce was 12 percent.²²⁵ Approximately 19.2 percent lacked health insurance,²²⁶ and 13.4 percent of all occupied households lacked access to a vehicle, making it impossible to travel great distances to register and vote.²²⁷

5. Language barriers and illiteracy among Tribal Elders

Dozens of different dialects are widely spoken among those speaking the major American Indian and Alaska Native languages. Over a quarter of all single-race American Indian and Alaska

²¹⁸ Substance Abuse and Mental Health Services Administration (SAMHSA), Expert Panel on Homelessness among American Indians, Alaska Natives, and Native Hawaiians 5 (2012), available at https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf.

²¹⁹ *Id.* at 8 (citing HUD & VA, Veteran Homelessness: A Supplemental Report to the 2010 Annual Homeless Assessment Report to Congress).

²²⁰ U.S. Department of Housing and Urban Development, “Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report From the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs (Jan. 2017), available at <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

²²¹ U.S. Census Bureau, Profile America Facts for Features: CB16-FF-22, American Indian and Alaska Native statistics, available at <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html> (Nov. 2, 2016) (“2016 AIAN FFF”).

²²² U.S. Census Bureau, Table B17001C: Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates (last visited on Feb. 7, 2018), available at https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/B17001C/0100000US0100089US.

²²³ 2017 AIAN Summary, *supra*.

²²⁴ See 2016 AIAN Profile, *supra*.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

Natives speak a language other than English at home.²²⁸ Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,²²⁹ including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.²³⁰

Alaska, Arizona, and New Mexico have the largest number of Limited-English Proficient (LEP) persons voting-age citizens (that is, U.S. citizens who are 18 years of age and older). Between them, they account for approximately 87 percent of all American Indians and Alaska Natives who reside in an area required to provide language assistance in an Alaska Native or American Indian language. Nationally, 357,409 AIAN persons reside in a jurisdiction covered by Section 203 of the Voting Rights Act, where assistance must be provided in the covered Native language.²³¹ Alaska Native language assistance is required in 15 political subdivisions of Alaska, which “is an increase of 8 political subdivisions from 2011.”²³² Assistance in American Indian languages is required in 35 political subdivisions in nine states, “up from the 33 political subdivisions of five states covered in the 2011 determinations.”²³³

Moreover, the difficulty in preparing complete, accurate, and uniform translations of voting materials (including instructions) is compounded by the absence of words in Native languages for many English terms. Frequently, that requires that concepts be interpreted to communicate the meaning of what is being asked, rather than word-for-word translations. Identification of those concepts usually requires closely coordinating with trained linguists from Native communities to provide effective translations.

Illiteracy also is very prevalent among LEP American Indians and Alaska Natives, especially among Tribal Elders. In areas covered by Section 203 of the Voting Rights Act, illiteracy among LEP voting-age citizens is many times higher than the national illiteracy rate of 1.31 percent in 2016.²³⁴ In Alaska, in covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabascan-speakers, 15 percent for Yup’ik-speakers, and 8.2 percent for Inupiat-speakers.²³⁵ In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.²³⁶ In Mississippi, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians

²²⁸ 2016 AIAN FFF, *supra* (27 percent).

²²⁹ See U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

²³⁰ See U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, available at https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).

²³¹ U.S. Census Bureau, Press Release: Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act (Dec. 5, 2016), available at <https://www.census.gov/newsroom/press-releases/2016/cb16-205.html>.

²³² AAJC, NALEO & NARF, Voting Rights Act Coverage Update 3 (Dec. 2016) (“Section 203 Update”), available at <https://advancingjustice-ajjc.org/sites/default/files/2016-12/Section%20203%20Coverage%20Update.pdf>.

²³³ *Id.*

²³⁴ See U.S. Census Bureau, Flowchart of How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act 2 (Dec. 5, 2016), available at https://www.census.gov/rdo/pdf/2_PrescribedFlowFor203Determinations.pdf. “Illiteracy” is defined as including those persons who “have less than a 5th grade education.” *Id.*

²³⁵ See U.S. Census Bureau, Voting Rights Determination File: Section 203 Determinations (Dec. 5, 2016), Public Use Data File and Technical Documentation (Excel spreadsheet of “Determined Areas Only”) (“Section 203 Determination File”), available at https://www.census.gov/rdo/data/voting_rights_determination_file.html.

²³⁶ See Section 203 Determination File, *supra*.

of voting age is 34 percent for Choctaw-speakers.²³⁷ Finally, in New Mexico, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 19.1 percent for Navajo-speakers and 6.7 percent for Apache-speakers; data was not available for speakers of the Pueblo languages.²³⁸

C. Election officials exploit barriers to discriminate against Native voters

Native Americans were among the last to obtain their fundamental right to participate in non-tribal elections. It was not until 1948 that Arizona and New Mexico granted Native Americans the right to vote, which came only as the result of litigation by veterans who were denied the right to vote after returning from World War II.²³⁹ The litigation was necessary even though Congress already had twice recognized the truism that our Nation's first people were United States citizens: in the Indian Citizenship Act of 1924, and again in the Nationality Act of 1940. But Arizona and New Mexico were not the last states to recognize the fundamental right of Native voters. Utah would not do so until 1956.

State recognition did not lead to equal voting rights. Disabling literacy tests prevented hundreds of thousands of Native voters who were denied schooling the ability to register to vote. Language barriers resulting from the absence of schools on tribal lands compounded that disenfranchisement. County and local governments also actively targeted tribal lands for political exclusion by gerrymandering practices such as in Apache County, Arizona, which packed Natives comprising a majority of the eligible voters into a single district, violating equal population (one person, one vote) requirements. Only with the passage of the 1970 and 1975 amendments to the federal Voting Rights Act, which banned literacy tests and required assistance be provided to limited-English speaking Native voters, did some of those barriers begin to unravel. The 1982 amendments to the Voting Rights Act, which added protection for voter assistance in Section 208 and codified the discriminatory effects test in Section 2, also have been vital to efforts by Native Americans to obtain equal access to the political process.

It is not possible to fully summarize all of the recent litigation in Indian Country, in which state and local election officials have exploited disabling barriers faced by Native voters to disenfranchise them. As described in NARF's *Obstacles* report, those cases have successfully challenged, among other things: the lack of voter registration and in-person voting locations on Tribal lands; disparate early voting opportunities compared to non-Native voters; denial of drop boxes; shortened mailing timeframes in which election deadlines pass before Native voters receive mail-in ballots and can return them; imposition of voter ID requirements they cannot meet because they lack traditional mailing addresses or documents that are needed to register to vote; prohibitions on ballot collection that allows Native voters to overcome their lack of transportation, such as the challenge to Arizona's ballot collection ban in *Brnovich*; denial of voter assistance; and imposition of witness signature requirements, among many others.

The Lawyers' Committee has been counsel in some of those cases, two of which I will summarize. San Juan County, Utah eliminated all three of the polling places located on the Navajo

²³⁷ See *id.*

²³⁸ See *id.*

²³⁹ See *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948); *Trujillo v. Garley*, Case No. 1353 (D.N.M. 1948).

Nation tribal lands in the southern part of the county. The County switched to a mail-in ballot that was printed in English, providing no language assistance in Navajo despite being covered for the language under Section 203. In 2018, the County settled after being sued by the Lawyers' Committee, agreeing to restore the three closed polling places and to provide the mandated language assistance.²⁴⁰

More recently, an Alaska state court issued a preliminary injunction for the 2020 election, suspending Alaska's requirement that any person voting by absentee ballot sign the ballot envelope in the presence of a witness and obtain the witness's signature on the grounds that this requirement it impermissibly burdened Alaskans' right to vote in light of the COVID-19 pandemic. The court specifically noted COVID-19's disparate impact on Alaska Natives living in remote villages with stay-at-home orders. The evidence showed that an estimated one-in-three Alaska Natives living alone would have been required to access a non-household-member to witness their ballots, effectively disenfranchising them. The Alaska Supreme Court ultimately required that Alaska count unsigned ballots as well as to conduct voter outreach to inform residents of the change in policy.²⁴¹

C. NAVRA provides targeted remedies for obstacles Native voters face

NAVRA addresses the obstacles experienced by Native voters in several targeted ways, consistent with the broad authority Congress has in its government-to-government relationship with Tribal Nations. These measures are essential to removing many of the first generation voting barriers limiting access of Native Americans to opportunities to register to vote, to cast a ballot, and to have their ballot counted.

Section 304 of NAVRA establishes a Native American Voting Task Force Grant Program designed to improve voter registration and ballot access in Native American communities through several means, including: outreach and education; providing additional satellite, early voting and absentee voting locations; providing culturally and linguistically appropriate election materials and information; election worker training to ensure compliance with federal law; development of best practices for elections in Indian Country; nonpartisan observation and evaluation of election procedures; improving broadband access; establishing mailing addresses that allow Native voters to receive voting materials and ballots; and facilitating collaboration between Tribal Governments and federal, state and local governments responsible for elections in Native American communities.

NAVRA also includes several provisions to make voter registration and voting more accessible for Native voters. Section 305 amends § 7 of the National Voter Registration Act of 1993²⁴² by adding as designated voter registration sites those federally funded facilities located on Indian land or primarily engaged in providing services to Native Americans. Section 306 would allow Tribal Governments to designate at least one in-person polling site on the Tribe's Indian lands, prevent the reduction of polling places on Indian lands, and provide additional polling sites based upon several criteria such as the number of voters assigned to polling places, travel distances and time to reach polling sites, transportation barriers, waiting times, and other factors.

²⁴⁰ *Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).

²⁴¹ *Arctic Village Council vs. Meyer*, No. 3AN-20-7858 CIL, 2020 WL 6120133 (Alaska Oct. 5, 2020).

²⁴² 52 U.S.C. § 20506(a).

Recognizing the increasing use of alternatives to in-person voting, especially mail-in voting, NAVRA responds to the addressing barriers that effectively disenfranchise many Native voters including those at issue in *Brnovich*. Tribal Nations are permitted to designate at least one building per voting precinct as ballot pickup and collection sites. At the request of Tribes, mail-in and absentee ballots are to be provided to registered Native voters without requiring a residential address or completed application for the ballot. Tribally designated buildings may be substituted for required residential or mailing addresses. At least one ballot drop box must be provided for each Tribal Nation's lands, with additional drop boxes provided if the totality of the circumstances demonstrates their need. In-person early voting opportunities must be offered on Tribal lands if a State or political subdivision offers them elsewhere, which must provide at least a 10-hour period to vote for each day early voting sites are open.

In addition, NAVRA responds to many of the problems that Native voters have experienced with disenfranchising provisional ballot procedures. In much of Indian Country, resolution of provisional ballots so they will be counted requires Native voters to travel extensive distances, in some cases as much of a day of driving, to a county seat. Often, Native voters receive insufficient notice and time to cure any issues. NAVRA addresses those issues by requiring clear notice be given to Native voters, and providing that resolution of any issues with their ballot may be done at any polling place on Indian lands or through alternative means such as facsimile. The bill also resolves a barrier created by the Help America Vote Act by creating a private cause of action for Native voters to enforce the provisional ballot requirements in NAVRA.

Section 307 of NAVRA requires that any State or political subdivision seeking to remove a voter registration or polling site on Indian lands must meet certain requirements. Specifically, it creates a process of Tribal administrative review that requires either that the Tribe consent to the change or after consulting with the Tribe to institute a declaratory judgment action in the U.S. District Court for the District of Columbia. Alternatively, the change may be submitted for review and approval by the Attorney General after consultation with the Tribal Government.

Voter identification problems faced by Native voters are the focus of Section 308 of NAVRA. Under that provision, if a State or political subdivision requires identification to register to vote or to cast a ballot, they must accept an identification card issued by a federally recognized Tribe, the Bureau of Indian Affairs, the Indian Health Service, or any other Tribal or Federal agency that issues identification cards to eligible Native voters. This remedy cannot be circumvented by requiring multiple forms of identification. Election officials also must consult with Tribes to ensure that any identification that must be submitted online is accessible to Native voters.

NAVRA also facilitates ballot collection from Native voters who often lack access to reliable and affordable transportation to get to voting locations, post offices or drop boxes. Section 309 permits any person to return a sealed ballot of a voter residing on Indian lands, as long as the person returning the ballot receives no compensation. There is no limit placed on the number of ballots that may be returned. Organizations collecting and returning sealed ballots are required to keep a record of the materials collected and the location and date the ballot materials were submitted.

Section 310 of NAVRA includes a simple, but important, fix to the language assistance provisions of the Voting Rights Act. As currently written Section 203 provides that covered

jurisdictions do not have to provide written translations for languages that are “historically unwritten.”²⁴³ Federal courts have consistently applied that proviso to find that covered American Indian and Alaska Native languages are “historically unwritten” even for Native languages that are written and widely used by Native voters.²⁴⁴ This section of NAVRA cures this problem by providing that Native voters in jurisdictions covered by Section 203 for their language may receive written translations in their language if their Tribal Government determines that written translations are needed.

The remaining provisions of NAVRA facilitate Native voting in several ways. Section 311 allows Tribes to request that the Attorney General send federal observers by identifying one or more instances in which a voting rights violation is expected to occur in an election. Section 312 recognizes Tribal jurisdiction to detain or remove any non-Indian unaffiliated with the Federal or a State or local government who intimidates, harasses or impedes the conduct of an election or voting. Section 313 requires the Attorney General annually consult with Tribal Nations regarding Federal elections. Section 314 provides for recovery of attorneys’ fees, litigation expenses and expert fees to a prevailing party in any enforcement action brought under NAVRA. Section 315 directs the GAO to conduct a study and report on the prevalence of nontraditional or nonexistent mailing addresses for Native voters and to identify alternatives to resolve those barriers. Finally, Section 316 requires consultation with the U.S. Postal Service to resolve addressing problems.

The Lawyers’ Committee commends the Senate for including NAVRA in the bill. They offer a very reasoned, targeted, and constitutional approach to resolving some of the most basic access barriers that Native Americans face in registering to vote and casting a ballot that it is counted.

Conclusion

The eight years since the Supreme Court’s decision in *Shelby County v. Holder* have left voters of color the most vulnerable to voting discrimination they have been in decades. The record since the *Shelby County* decision demonstrates what voting rights advocates feared – that without Section 5, voting discrimination would increase substantially. The *Brnovich* decision – by creating new hurdles for Section 2 claimants to overcome – raises the stakes appreciably. Congress must act.

²⁴³ See generally 52 U.S.C. § 10503(c) (“... Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”).

²⁴⁴ See generally JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* 91-98, 280-85 (2009). Examples of Native languages that are widely used in written form include Choctaw, Navajo and Yup’ik, among others. See *id.*

**WRITTEN TESTIMONY OF INDIANA ATTORNEY GENERAL TODD ROKITA ON
H.R. 4
Senate Judiciary Committee
October 6, 2021**

Thank you, Chair Durbin, Ranking Member Grassley, and members of the Committee for inviting me to speak to you today on H.R. 4. My name is Todd Rokita, and I serve as the Attorney General for the State of Indiana. Prior to serving as Indiana's chief legal officer, I spent several years in the private sector as General Counsel for a company with over 100 employees. I had specific duties over all aspects of employment law and other legal matters for the company and for the company's clients. I served as a Member of Congress for 8 years representing Indiana's 4th District. I've also had the honor of serving as Indiana's Secretary of State for 8 years. Given my experience both as Indiana's chief elections officer and as a candidate for both state and federal office, I know how elections can and should be run to ensure transparency and public confidence.

On March 24, 2021, I testified before the Senate Rules Committee on S. 1. H.R. 4 achieves the same ends as S. 1—federalizing elections—but accomplishes this goal through different means. S. 1 directly micromanaged the election process administered by the states by mandating, among other things, early voting, automatic voter registration, and no-fault absentee ballots while also prohibiting protective measures such as state voter ID laws and voter list maintenance laws. Here, H.R. 4 would allow the United States Department of Justice to usurp the authority states rightly possess over their own elections. H.R. 4 resurrects and expands the Voting Rights Act's ("VRA") provisions that were previously struck down by the United States Supreme Court¹ and creates new federal preclearance requirements in jurisdictions targeted for litigation by activist groups. H.R. 4 implements practice-based preclearance that would require all states and political subdivisions, regardless of whether they are covered, to preclear certain election reforms such as voter identification ("ID") requirements and voter list maintenance laws before they can be enacted.

The simple fact is H.R. 4 is a power grab that erodes trust in our electoral system. It would open the door to fraud by preventing common sense safeguards, and result in chaos in 2022 and beyond. It gives partisan bureaucrats in the Justice Department the power to veto those commonsense protections that courts have upheld and that have endured in many states for more than a decade. The elections of 2020 had numerous irregularities and last-minute modifications issued by judges and election officials which did nothing but sow mistrust with the American public. Enacting many of those misguided policies into law further alienates the electorate and invades states' rights.

While serving as Indiana's Secretary of State and chief elections officer, I led the passage and then the implementation of the first-in-the-nation voter ID law. The law requires in-person voters to present an unexpired government-issued photo ID in order to vote. Despite attacks from out-of-state activists, my team helped defend the law all the way to the United States Supreme Court and won. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006). Indiana's voter ID law became a

¹ See *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321 (2021).

model for the nation. Since then, 35 states have followed suit in enacting laws to protect the integrity of our elections.

Yet H.R. 4 would brand such laws as discriminatory while lacking any actual evidence to back up such claims. The House of Representatives simply relied on the testimony of 35 partisan witnesses.² In reality, a study the National Bureau of Economic Research conducted between 2008-2018 found that strict voter ID laws have had “no negative effect on registration or turnout, overall or for any specific group defined by race, gender, age or party affiliation.”³

Indiana’s voter ID law did not suppress the vote among Democratic-leaning voters or *any* voter for that matter. Rather, it protected their votes. Since Indiana’s law went into effect in 2006, the Hoosier State has held 16 statewide elections, 8 municipal elections, and dozens of special elections. Not a single legitimate voter has been turned away from the polls due to the inability to produce a photo ID. However, without the photo ID requirements and other similar security measures, legal citizen voters are disenfranchised by the fraud and illegal voting that will result and dilute legal citizen votes. While H.R. 4 focuses on vote dilution of protected minorities, it does nothing to address vote dilution of legal voters and fails to take any real action against illegal voting.

It is clear to me that voters are concerned about their elections and want to have a voice. Citizens are concerned about their votes diluted by illegal votes. States across the country are considering changes to their voting systems. If H.R. 4 passes, states will have to seek approval from the Department of Justice before effecting their new election laws and procedures. There will be numerous lawsuits further muddying the electoral waters. Some might say that states should wait for Congress to act, or do not view it as a problem as long as their preferred policy is passed. However, a federal takeover of elections will impose unconstitutional mandates on states and reverse the decentralization of the American election process and open the door to fraud and abuse.

Earlier this month, 22 of my attorney general colleagues joined me in a letter to Congressional leadership opposing H.R. 4. As we wrote in that letter, the Act has several deficiencies that, if passed, would federalize state elections, and impose burdensome costs and regulations on state and local officials.

1. The Constitution reserves to the states the primary role of establishing “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives.” Const. Art. I, § IV. The founding fathers purposely and thoughtfully gave Congress a secondary role in election decision-making. That distinction is not an accident. H.R. 4 seeks to flip this Constitutional mandate on its head, turning the Department of Justice into a federal “election czar”, wielding the power to challenge any new or existing election law based on the whims of the party in power and its desire to manipulate election laws to increase its chances to remain in power. The exclusivity of state power to

² Chair G.K. Butterfield, “Voting In America: Ensuring Free And Fair Access To The Ballot,” *Subcommittee on Elections of the Committee on House Administration*, July 2021, https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf.

³ Enrico Cantoni and Vincent Pons, “Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018,” *National Bureau of Economic Research*, February 2019, https://www.nber.org/system/files/working_papers/w25522/w25522.pdf.

define the time, place, and manner of holding elections means that Congress may not decide which election procedures are valid or require approval of those procedures. These changes would give the Biden Administration and administrations to follow (Republican and Democrat) the power to exert considerable control over state and local election laws without *any* finding of intentional discrimination. “[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Gregory v. Ashcroft*, 501 U.S. 452, 461–62, (1991) (citing *Oregon v. Mitchell*, 400 U.S. 112, 124–125 (1970)). Not only does H.R. 4 undermine the integrity of meaningful legislation reform duly passed in state legislatures around the country designed to address issues specific to each state, but it also subverts the will of the people to govern *their own states* through their chosen representation in those state legislatures. H.R. 4 flies in the face of state sovereignty, and “there is nothing democratic about the [] attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts.” *Brnovich*, 141 S. Ct. at 2343.

2. H.R. 4 seeks to reinstate and expand the VRA. When the VRA was enacted in 1965, federal oversight over state election laws was necessary to combat discrimination in a limited number of jurisdictions. The original intent was to ensure that the rights of Americans were not infringed upon at the ballot box based on their race. The law rightfully targeted states and jurisdictions that used tests and other devices that “[restricted] the opportunity to register and vote”, but it was always intended to be temporary legislation.⁴ Thankfully the VRA did exactly what it was intended to accomplish: “voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers.” *Shelby Cty. v. Holder*, 570 U.S. 529, 553 (2013). However, instead of acknowledging these developments when it came time to reauthorize the bill in 2006, Congress kept “the focus on decades-old data relevant to decades-old problems, rather than current data reflecting on current needs.” *Id.* Ultimately, the Supreme Court in *Shelby* held that “Congress must ensure that the legislation it passes to remedy [racial discrimination in voting] speaks to current conditions.” *Id.* at 557. Times have changed, and Congress, as a living embodiment of the country, must legislate in accordance with those changes.

H.R. 4 looks backwards to the conditions of 1965, not the “current conditions” that exist in 2021. In the way the Supreme Court did, we must recognize “[n]early 50 years later, things have changed dramatically.” *Shelby*, 570 U.S. at 547. Today, the ability to vote is widely accessible. Despite claims that “key protections” were “gutted by the Supreme Court” through the *Shelby* decision, there is no evidence that voter suppression is on the rise.⁵ On the contrary, it has been found that “[in] the wake of *Shelby* ... minority registration and turnout in formerly preclearance counties have been flat or increasing relative to counties that were not covered” and “the aggregate affect appears to be a small increase in registration and voting among Black and Hispanic voters.”⁶ The Census Bureau’s May 2013 report on the 2012 election showed that blacks voted at a higher

⁴ “About Section 5 of the Voting Rights Act,” *The United States Dept. of Justice*, September 11, 2020, <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

⁵ “Rep. Sewell Introduces H.R. 4, the John R. Lewis Voting Rights Advancement Act, to Restore Protections of the Voting Rights Act of 1965,” *U.S. House of Representatives*, August 17, 2021, <https://sewell.house.gov/media-center/press-releases/rep-sewell-introduces-hr-4-john-r-lewis-voting-rights-advancement-act>.

⁶ Mayya Komisarchik and Ariel White, “Throwing Away the Umbrella: Minority Voting after the Supreme Court’s *Shelby* Decision,” *Massachusetts Institute of Technology*, July 8, 2021, https://arwhite.mit.edu/sites/default/files/images/vra_post_shelby_current.pdf.

rate than whites nationally.⁷ 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 of the VRA.⁸ In another example, Georgia, a previously covered state, had a higher turnout of black Americans than white Americans in 2018 and 2020 than in New York for both elections.⁹

Today, the main concern among citizens is no longer voter discrimination; it is in preventing voter fraud, safeguarding the right to vote, and ensuring that every legal vote is counted undiluted by illegal votes. Public confidence in our election system is at record lows with more than 30% of the electorate believing that the 2020 election was stolen due to voter fraud.¹⁰ H.R. 4, which is more concerned with political rhetoric, instead has no interest in addressing criminal activity in cases of vote dilution and vote denial.¹¹ If courts cannot consider states' interests in curbing voter fraud, their hands will be forever tied in favor of the Department of Justice and the desires of the federal government.

3. H.R. 4 dramatically lowers the burden of proof for plaintiffs in vote denial and vote dilution claims under Section 2 of the VRA. Under H.R. 4, vote denial would occur when a person faces greater difficulty in complying with the requirements and this greater difficulty is, *at least in part*, caused by or linked to social and historical conditions that have produced or currently produce such challenged discrimination against them. While a vote dilution violation occurs essentially if “the residents of that district who are not the members of the protected class usually vote sufficiently as a bloc to enable them to defeat the preferred candidates of the members of the protected class.” In essence, if white voters vote as a bloc which enables minority candidates to be defeated, this equates to vote dilution. This directly attacks the “ordinary burdens of voting” standard that has long been used by courts to uphold common-sense reforms and essentially stacks the deck in favor on any plaintiff filing under the VRA.

H.R. 4 encourages courts to consider specific factors for vote denial and vote dilution claims that weigh heavily in favor of plaintiffs and are unpreventable by election officials, including, among other factors: the existence of discrimination outside of voting processes—such as in employment, education, and health care—the use of overt or subtle racial appeals in political campaigns, and the extent to which members of the protected class have been elected to public office in the jurisdiction. The factors allow a court to consider any “history” of voter discrimination in a state or political subdivision, not even limited to the past 50 years, in determining whether a vote denial or vote dilution violation occurred. Most shockingly, H.R. 4 pressures judges to consider the factor of whether a jurisdiction uses photo ID requirements for voting in analyzing vote denial claims—directly attacking the Supreme Court’s standard in *Crawford*. These factors to determine whether a violation occurred are completely subjective and frankly unreasonable—it will be difficult for any state or political subdivision to prevail.

⁷ Hans A. von Sparkovsky, “The Myth of Voter Suppression and the Enforcement Record of the Obama Administration,” 49 U. Mem. L. Rev. 1147, 1155 (2018-2019).

⁸ *Id.*

⁹ “2020 Presidential Election Voting and Registration Tables Now Available,” U.S. Census Bureau, Press Release (April 29, 2021).

¹⁰ *Infra*, Monmouth Poll, Question “No. 23 - Do you believe Joe Biden won the 2020 election fair and square, or do you believe that he only won it due to voter fraud? Fair and square 61%; Due to voter fraud 32%.”

¹¹ H.R.4 at 10.

H.R. 4 unabashedly prohibits courts from considering vital factors that have been outlined by the Supreme Court in vote denial claims, such as the overwhelming degree to which members of a class are *not* burdened by an election procedure, how long an election procedure has been lawfully and historically used, whether identical or similar election procedures are used by other jurisdictions, the availability of alternative means of voting, and the state's interest in preventing fraud. Instead, courts would be required to consider factors that weigh heavily in favor of prospective plaintiffs in addition to only having to meet a watered-down burden of proof to show a violation of the law. This severely hinders states' ability to defend their laws, including those that have been on the books for years. Attorneys General have an uphill battle defending any election reforms if H.R. 4 is passed. This will lead to even more litigation, including a dramatic increase in frivolous lawsuits designed to slow the election process, and which will be litigated with a heavy federal thumb on the scales of justice.

4. Moreover, H.R. 4 excessively expands the coverage formula with the potential to subject numerous states to preclearance requirements. First, it expands traditional preclearance that would specifically target state election law violations within the last 25 years. The threshold coverage is as few as *three* violations in jurisdictions where the state administers the elections. A state government and all of its political subdivisions will be placed under preclearance for ten years if there are 15 voting rights violations by a local jurisdiction in the previous 25 years. So, a state government could have preclearance imposed upon it even if that state has no supervision or authority over the local elections. In the same way, a local government that has never engaged in discriminatory actions and has no control over the state legislature or other local governments decisions, will have preclearance imposed upon them for ten years if ten voting rights violations occurred in the prior 25 years.

H.R. 4 establishes that VRA violations occur where a United States court finds an election procedure contradicts either the 14th or 15th Amendments or H.R. 4, specifically any violation that results in vote dilution, denial, or abridgement. "Voting rights violations" are not just final court judgments, but H.R. 4 would also create violations where there is a denial of a declaratory judgment, including temporary or preliminary injunctions, where there is an objection of the Attorney General, or when any consent decree, settlement, or agreement in favor of plaintiffs is approved by an official or adopted by a court of the United States. Settlements of meritless litigation that a state or local jurisdiction enters into to avoid the cost of litigation counts as a voting rights violation for the purpose of triggering preclearance. State laws stand in jeopardy over mere preliminary judgments and consent decrees. The new formula unfortunately looks at wins in court, even temporary or preliminary ones that may later be reversed by the trial court itself on the full merits or on appeal, rather than the entire record regarding whether intentional discrimination exists. H.R. 4 will incentivize frivolous lawsuits by plaintiffs to rack up VRA violations by states and political subdivisions. It encourages the Department of Justice to scrutinize each state and political subdivision with the intention and hope of uncovering a new violation.

Second, H.R. 4 requires "practice-based" preclearance for certain election laws in all 50 states, not just the states subject to the new coverage formula. If States enact election laws within any of these areas after enactment of H.R. 4, such as voter ID requirements, voting locations, redistricting, or maintenance of voter registration lists, the reform is automatically subject to the preclearance process. If a state currently has voter ID requirements in place, as Indiana does, and

individual does not present identification to vote, H.R. 4 allows the individual to vote by sworn written statement. This effectively nullifies the law. These “practices” that would have to be approved by the Department of Justice before taking effect are so broad and cover such a wide spectrum of election administration procedures and rules that every state would be under federal control. States must seek a declaratory judgement from the United States District Court for the District of Columbia or submit the law to the Department of Justice before implementation. The VRA was never intended to require every jurisdiction in the country to submit to this federal control. H.R. 4 permits politically appointed bureaucrats to meddle in state affairs, is unlawful, and violates state sovereignty.

H.R. 4 would permit the federal government to install federal election monitors in states that are subject to the preclearance requirements. The attorney general would have discretion to install such monitors, and one can imagine the hoops a state or political subdivision would have to jump through to terminate their presence.

5. H.R. 4 would interfere with state legislatures’ ability to protect their voters and the integrity of the election process. State election laws, such as voter ID and voter registration list maintenance, should, as intended by the Constitution, be made and implemented at the state level.

Government-issued photo identification has been the global standard for documentary identification for decades, and, as previously noted, there are numerous occasions which require Americans to show identification. In most instances, one has to show proof of identification to receive a COVID-19 vaccine.¹² One also needs to show identification when purchasing cold medicine.¹³ In addition, Americans need to show ID when going through security to board a flight. Why shouldn’t the same be true for voting? Increasing access to voting and increasing the security of the ballot are not mutually exclusive, and reduced oversight dilutes the value of each valid vote and makes a mockery of our system.

Nearly twenty years ago, in the Help America Vote Act, Congress required first-time voters who register by mail without proof of identification to present identification either to the county voter-registration office or at the polls.¹⁴ It thereby acknowledged the potential for voter fraud and the capacity of documentary identification to prevent it.¹⁵ Then, in 2005, a bi-partisan commission headed by former President Jimmy Carter and Secretary of State James Baker recognized the existence of in-person voter fraud and endorsed a photo-identification requirement. In the wake of these endorsements, states, like Indiana, began passing voter ID laws, and over a decade ago the Supreme Court upheld Indiana’s voter ID law—one of the most robust in the nation.¹⁶

¹² <https://www.latimes.com/california/story/2021-03-03/how-to-sign-up-to-get-your-covid-19-vaccine-appointment-in-los-angeles>

¹³ See The Combat Methamphetamine Epidemic Act of 2005 (Title VII of Pub. L. 109-177).

¹⁴ 42 U.S.C. § 15483(b).

¹⁵ 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) (“By passage of this legislation, Congress has made a statement that vote fraud exists in this country.”).

¹⁶ See *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Allowing someone inclined to vote illegally to do so only by signing a statement does little to ensure that voters are who they say they are. Worse, it vitiates the capacity of voter ID requirements to protect against improper interference with voting rights. Before the advent of voter ID laws, partisans stationed at polling places could challenge voters based only on suspicions about identity, a process that prompted concerns about voter intimidation. Robust voter ID laws, however, require *all* voters to present photo identification, *i.e.*, objective, on-the-spot confirmation of the right to vote that immediately refutes bad-faith challenges based on vaguely articulated suspicions. Fair election laws treat all voters equally. Thus, requiring all voters to show proof of identity is, by definition, a fair election law.

Limiting states' ability to maintain accurate voter registration rolls erodes the integrity of elections. States and localities work to keep voter registration rolls up to date to account for voters who move or pass away. It should come as a surprise to no one that most citizens are not vigilant about keeping their state and local election boards apprised of changes to residency that may affect the validity of their voter registrations. Consequently, as citizens move about the country, their voter registrations become out-of-date and transform into seedbeds for voter fraud. As a fraud-prevention measure, states and localities routinely remove the registrations of individuals who (1) have not voted in many consecutive elections, and then (2) fail to respond to multiple efforts to verify current residency. Under the H.R. 4, "any change to the maintenance of voter registration lists that adds a new basis for removal" or "incorporates new sources of information in determining a voter's eligibility to vote" requires approval. With out-of-date voter rolls and a lack of voter ID laws, any individual who wishes to vote in-person under someone else's name will be a slip of paper away from making that a reality.

Finally, this legislation is a misguided, clumsy, and heavy-handed effort to circumvent Supreme Court decisions, state sovereignty, and the will of the people. Unfortunately, the Department of Justice, seeking to undertake its new role as a federal elections czar, has already explicitly admitted, in regard to states updating their election laws after the 2020 election, that it "will review a jurisdiction's changes in voting laws or procedures for compliance with all federal laws regarding elections, as the facts and circumstances warrant."¹⁷ States that create laws based on what works best for their jurisdiction to respond to a crisis of confidence in our elections systems will inevitably be targeted by the Department of Justice leading to more confusion, litigation, and concerns over the validity of elections going forward. Because the Department of Justice "[does] not consider a jurisdiction's re-adoption of prior voting laws or procedures to be presumptively lawful," it shows that the federal bureaucrats are actively looking for opportunities to circumvent the will of the people.¹⁸ Giving the Department of Justice unlimited authority over state election laws is not only unnecessary but also unconstitutional.

Despite recent calls for political unity, H.R. 4 takes a one-sided approach to governing and usurps states' authority over elections. With confidence in elections at a record low, the country's focus should be on building trust in the electoral process.¹⁹ Around the country, the 2020 general

¹⁷ "Guidance Concerning Federal Statutes Affecting Methods of Voting," *U.S. Department of Justice*, July 28, 2021, http://cdn.dni.com/cni/2021/images/07/28/voting_methods_guide.pdf.

¹⁸ *Id.*

¹⁹ Justin McCarthy, *Confidence in Accuracy of U.S. Elections Matches Record Low* <https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx> (last visited February 19, 2021).

elections generated mass confusion and distrust—problems that the Act would only exacerbate. Should the Act become law, I am prepared to seek legal remedies to protect the Constitution, the sovereignty of all states, our elections, and the rights of our Indiana citizens.



**TESTIMONY OF
WENDY WEISER**

**VICE PRESIDENT FOR DEMOCRACY AT THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW¹**

**HEARING ON PROTECTING A PRECIOUS, ALMOST SACRED RIGHT: THE JOHN
R. LEWIS VOTING RIGHTS ADVANCEMENT ACT**

BEFORE THE SENATE JUDICIARY COMMITTEE

October 6, 2021

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. I am the Vice President for Democracy and Director of the Brennan Center's Democracy Program. I have authored numerous nationally recognized reports and articles on voting rights and elections. My work has been featured in academic journals and numerous media outlets across the country. I have served as counsel in many voting rights lawsuits, including lawsuits under Sections 2 and 5 of the Voting Rights Act. I have testified previously before Congress, and before several state legislatures, on a variety of issues relating to voting rights and elections, including the Voting Rights Act. My testimony does not purport to convey the views, if any, of the New York University School of Law.

Thank you for the opportunity to testify in support of strengthening the Voting Rights Act (“VRA”), a law that has played a critical role in safeguarding American democracy against persistent discrimination in the election system. The Brennan Center for Justice at NYU School of Law strongly supports Congress’s efforts to restore and revitalize the VRA, through the John R. Lewis Voting Rights Advancement Act (the “Act” or “John Lewis Voting Rights Act”).²

The need to strengthen the Voting Rights Act is urgent. A decade’s worth of efforts to restrict voting rights sharply escalated this year, with at least 19 states passing 33 laws in 2021 to make it harder for Americans to vote, according to the Brennan Center’s latest count released this week.³ Many of these new state laws target voters of color,⁴ piling layer upon layer of discriminatory voting practices and exacerbating persistent racial and ethnic disparities in voting access. Even during the 2020 general election, an election with historically high turnout, participation remained starkly unequal: 70.9 percent of white voters cast ballots, compared to 58.4 percent of voters of color.⁵

At the same time, we are at the start of a redistricting cycle that is expected to be rife with racial discrimination and severe gerrymandering targeting communities of color.⁶ Indeed,

² I, along with my Brennan Center colleagues, have previously testified in support of the John Lewis Voting Rights Act and I incorporate that testimony herein. See *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-WeiserW-20210816.pdf>; *Hearing on the Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights & Civil Liberties*, 117th Cong. (2021) (testimony of Wendy Weiser, Vice President for Democracy, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210527/112700/HMTG-117-JU10-Wstate-WeiserW-20210527.pdf>; *Hearing on Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*, 117th Cong. (2021) (testimony of Kevin Morris, Researcher, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/Morris%20-%20Written%20Testimony.pdf>; *Hearing on Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Before the H. Comm. on House Administration, Subcomm. on Elections*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice), <https://www.brennancenter.org/sites/default/files/2021-06/2021-06-22%20Waldman%20-%20Testimony.pdf>; *Hearing on the Implication of Brnovich v. Democratic National Committee and Potential Legislative Responses, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Sean Morales-Doyle, Acting Director, Voting Rights and Elections Program, Brennan Center for Justice), <https://docs.house.gov/meetings/JU/JU10/20210716/113905/HHRG-117-JU10-Wstate-Morales-DoyleS-20210716.pdf>.

³ Brennan Center for Justice, “Voting Laws Roundup: October 2021,” October 4, 2021,

<https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

⁴ See, e.g., Brennan Center for Justice, “How New State Voting Laws could Impact Voters,” September 1, 2021, <https://www.brennancenter.org/our-work/research-reports/how-new-state-voting-laws-could-impact-voters>.

⁵ Kevin Morris and Coryn Grange, “Large Racial Turnout Gap Persisted in 2020,” *Brennan Center for Justice*, August 6, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

⁶ Michael Li, “The Redistricting Landscape, 2021-22,” *Brennan Center for Justice*, 2021, <https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

the redistricting state plans released to date are proving the predictions correct.⁷ This wave of vote suppression and redistricting abuse is part of an alarming effort to whittle down the American electorate and subvert the democratic process. It strikes at the foundation of our democracy and demands a response.

Unfortunately, the current Voting Rights Act is not sufficient to meet the challenge, in part because the U.S. Supreme Court has seriously hampered its effectiveness. In its 2013 decision in *Shelby County v. Holder*,⁸ the Court gutted the law's most powerful provision, the preclearance requirement of Section 5. For decades, preclearance had stopped hundreds of discriminatory voting practices from ever going into effect in states and localities where discrimination was most pervasive.⁹ More recently, in *Brnovich v. Democratic National Committee*, the Court further weakened the ability of voters to combat voting discrimination by making it harder to challenge discriminatory practices in court under the nationwide protections in Section 2 of the law.¹⁰

Although *Shelby County* and *Brnovich* seriously damaged the Voting Rights Act, both decisions make clear that Congress has the power to restore and bolster the law. In *Shelby County*, the Court invited Congress to reinstate Section 5 preclearance by crafting a new coverage formula that was responsive to current conditions.¹¹ In *Brnovich*, a decision based on statutory interpretation, the Court made clear that Congress is responsible for shaping Section 2 of the law.¹² And in both cases, the Court recognized that the Fourteenth and Fifteenth Amendments gave Congress the power to design a robust VRA to root out the entrenched

⁷ In Ohio, for example, the state's newly enacted legislative maps create a durable Republican supermajority by, in part, targeting and diluting the voting strength of Black and Muslim communities. See Michael Waldman, "Ohio's New Voting Maps Violate Its Own Constitution," *Brennan Center for Justice*, September 29, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/ohios-new-voting-maps-violate-its-own-constitution>. Meanwhile, in Texas, the state senate just this week passed a redistricting plan for that body that aggressively fractures minority communities in Tarrant County, joining large portions of the Latino and Black communities in Fort Worth to a district spanning seven rural counties and destroying a functioning coalition or crossover district. See *Hearing of Senate Select Comm. on Redistricting*, September 24, 2021 (testimony of Michael C. Li, Senior Counsel, Brennan Center for Justice), https://www.brennancenter.org/sites/default/files/2021-09/Texas%20Senate%20Select%20Committee%20on%20Redistricting%2009.24.21_0.pdf. Similarly, the state's proposed congressional plan would not create any new electoral opportunities for Latino, Black, or Asian communities, despite the fact that communities of color accounted for over 95 percent of the state's population growth last decade. See James Barragán et al., "Texas reduces Black and Hispanic majority congressional districts in proposed map, despite people of color fueling population growth," *The Texas Tribune*, September 27, 2021, <https://www.texastribune.org/2021/09/24/texas-congressional-redistricting/>.

⁸ 570 U.S. 529, 556–57 (2013).

⁹ For example, between 1999 and 2005, 153 voting changes were withdrawn and 109 were superseded by altered submissions. See Myrna Pérez and Vishal Agraharkar, "If Section 5 Falls: New Voting Implications," 5, *Brennan Center for Justice*, June 12, 2013, https://www.brennancenter.org/sites/default/files/2019-08/Report_Section_5_New_Voting_Implications.pdf. That figure does not include the hundreds of voting changes that were deterred because jurisdictions knew they would not withstand VRA review. See also *Shelby Cty.*, 570 U.S. at 571 (Ginsburg, J., dissenting) (noting that VRA stopped almost 1200 voting laws in covered areas from taking effect between 1965 and 2006).

¹⁰ 141 S. Ct. 2321 (2021).

¹¹ *Shelby Cty.*, 570 U.S. at 557 ("Congress may draft another formula based on current conditions.").

¹² See generally *Brnovich*, 141 S. Ct. 2321 (holding premised on an interpretation of the current text of Section 2).

problem of race discrimination in voting.¹³ That is precisely what Congress has done in the John Lewis Voting Rights Act.

My testimony today explains how the John Lewis Voting Rights Act is an appropriate, carefully tailored exercise of congressional authority to combat the ongoing scourge of voting discrimination. First, I argue that geographic coverage for preclearance is essential to stopping voting discrimination because the problem is especially acute and intractable in certain states and localities. Second, I argue that the bill's geographic coverage formula is extremely well designed to identify the regions where voting discrimination is most persistent, pervasive, and current, hewing closely to the standards Supreme Court articulated in *Shelby County*. In particular, I explain why it is appropriate and necessary for the formula to include a twenty-five-year review period (coupled with a ten-year coverage period and strong bail-out provisions), to take account of consent decrees as key evidence of voting rights violations, and to subject political subdivisions in covered states to preclearance. Finally, I explain why Congress must also restore Section 2 of the Voting Rights Act, to ensure powerful tools to fight voting discrimination in jurisdictions not subjected to preclearance.

The crisis facing our democracy today can only be solved by Congress. Congress has broad authority under the Constitution to ensure free and fair access to the ballot box and equal voting power for all Americans. We strongly urge you to exercise that power to pass the John Lewis Voting Rights Act, alongside the Freedom to Vote Act (S. 2747), to protect Americans from ongoing and novel attempts to sabotage elections and discriminate in the voting process.

I. Geographic Preclearance Is Necessary Because Discrimination is Especially Widespread and Persistent in Certain Jurisdictions

The John Lewis Voting Rights Act would revive the law's preclearance requirements for voting changes in two sets of circumstances: (1) when those changes are made in jurisdictions where voting discrimination is particularly pervasive and persistent ("geographic coverage"), and (2) when the voting changes at issue are of a type frequently adopted for discriminatory purposes wherever they occur ("known practices coverage").

To determine which jurisdictions would be subject to geographic coverage, the Act replaces the previous static coverage formula with an updated, dynamic formula that covers jurisdictions based on a recent, widespread, and persistent record of violations of the law against race discrimination in voting. Specifically, the formula counts the jurisdiction's legal violations reflected in court orders, objection letters by the Department of Justice, and settlements, consent decrees, or other agreements that indicate there was discrimination and led to a change in voting practices. A state is only covered if there have been fifteen violations in the state in the last twenty-five years, or ten violations if at least one of them was a violation by the state itself. A subdivision is only covered if it commits three violations in the same period.

Historian Peyton McCrary, who served in the Department of Justice for 26 years, previously testified in the House Judiciary Committee to the exhaustive study he conducted

¹³ *Id.* at 2331; *Shelby Cty.*, 570 U.S. at 553.

analyzing the number of violations committed in each state and locality.¹⁴ Based on the standards articulated in the House of Representatives' version of the bill in the 116th Congress, Professor McCrary concluded that eight states were likely to be covered under that formula (Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas)¹⁵ and that three more states were on the cusp (California, New York, and Virginia).¹⁶ He also found that five counties would likely be covered under the earlier bill.¹⁷ Under the standards in the bill currently before the Senate, the Brennan Center estimates that Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia would likely be covered, along with Cook County, Illinois, and that Alabama and Florida are on the cusp. The record before Congress shows that preclearance is sorely needed in these states and localities, and that race discrimination in voting is a much more significant problem in these jurisdictions than in the rest of the country.

In 1965, Congress wisely recognized that it could not rely on a mere prohibition on “tests and devices” to effectively stamp out racial discrimination in jurisdictions that were determined to keep voters of color from the polls. Nor could it rely solely on affirmative litigation under Section 2 of the VRA, which is costly, slow, and often allows discriminatory rules to govern pending a decision.¹⁸ As I describe below, certain jurisdictions continue to demonstrate a determination to restrict voting access and to do so in ways that target voters of color. They adapt their discriminatory tactics to adjust to court decisions, demographic shifts, and voting habits. As a result, Congress cannot rely solely on legislation that targets pre-identified discriminatory practices or litigation to stop voting discrimination. So long as states and localities remain determined to discriminate, only preclearance can effectively remedy race discrimination in these jurisdictions.

A. Voting Discrimination is Widespread in States Likely to be Covered

The Brennan Center and others have submitted reams of evidence of recent and persistent race discrimination in states likely to be covered by the John Lewis Voting Rights Act. That evidence was collected in the June 24, 2021 testimony of Brennan Center president, Michael

¹⁴ Peyton McCrary is a Professorial Lecturer at George Washington University Law School, where he co-teaches a course on voting rights. He served as a Historian with the Voting Section of the Department of Justice's Civil Rights Division for 26 years, from 1990 to 2016. He has worked extensively as a consultant and expert witness in voting rights litigation and has published at least twenty book chapters, journal articles, and law review articles on the subject. See *Hearing on the Oversight of the Voting Rights Act: Potential Legislative Reforms Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCrary-1-20210816.pdf>.

¹⁵ *Id.* at Exhibit 1.

¹⁶ *Id.* at Exhibit 2. Note that Virginia would, in fact, almost certainly be covered under the House bill that passed earlier this summer, because of changes between that bill and the one from 2019.

¹⁷ Those are: Los Angeles County, California; Cook County, Illinois; Westchester County, New York; Cuyahoga County, Ohio; and Northampton County, Virginia. *Id.* at Exhibit 3.

¹⁸ See Wendy Weiser, testimony on *Oversight of the Voting Rights Act: A Continuing Record of Discrimination* (detailing why Section 2 litigation is inadequate and inefficient).

Waldman, before the House of Representatives,¹⁹ as well as in prior testimony I and my colleagues delivered before Congress this year.²⁰ It was also collected in the extensive reports that the Leadership Conference on Civil and Human Rights submitted laying out the record of discrimination in these states,²¹ among other testimony.

But perhaps the most compelling evidence of the extent of discrimination in those states is the list of voting rights violations that will be considered under the new formula itself. Professor McCrary found that there were a staggering 143 violations over the last 25 years in the eight states likely to be covered by the 2019 formula, and another 32 violations in the three states that were close to meeting the coverage requirements (for a total of 175 violations).²² (Professor McCrary prepared his analysis based on the definition of violations in the 2019 version of the bill that passed the House; because that definition was expanded somewhat this year, the number of violations is likely even larger.) Under the formula in the bill before this Senate, the Brennan Center estimates that there are more than 150 violations over the past 25 years in the 11 states over or near the threshold for coverage.

B. The Problem of Voting Discrimination is Worse in States Likely to Be Covered

There is also ample evidence that the scourge of voter suppression is worse in the states and localities expected to be covered than in the rest of the country. Again, the list of state violations illustrates this clearly. Professor McCrary's analysis found 143 violations over the past 25 years in the 8 states likely to be covered under the 2019 bill, but only 54 combined violations

¹⁹ Michael Waldman, testimony on *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*.

²⁰ See *Hearing on S.1, The For the People Act, Before the S. Comm. on Rules & Administration*, 117th Cong. (2021) (testimony of Michael Waldman, President, Brennan Center for Justice).

<https://www.brennancenter.org/sites/default/files/2021-03/2021-03-22%20Waldman%20-%20Testimony.pdf>; Wendy Weiser, testimony on *Oversight of the Voting Rights Act: A Continuing Record of Discrimination*; Kevin Morris testimony on *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*; Michael Waldman, testimony on *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*; Sean Morales-Doyle, testimony on *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*; Wendy Weiser, testimony on *Oversight of the Voting Rights Act: Potential Legislative Reforms*.

²¹ *Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms, Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Wade Henderson, Interim President and CEO, The Leadership Conference on Civil and Human Rights and Exhibits 1a–10, incorporated by reference therein), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-HendersonW-20210816.pdf>; see also Exhibits 1a–10, <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4688>.

²² *Hearing on the Oversight of the Voting Rights Act: Potential Legislative Reforms Before the H. Comm. on Judiciary, Subcomm. on the Constitution, Civil Rights, & Civil Liberties*, 117th Cong. (2021) (testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School), <https://docs.house.gov/meetings/JU/JU10/20210816/114010/HHRG-117-JU10-Wstate-McCraryJ-20210816.pdf> at Ex. 1. AL (14), FL (10), GA (25), LA (16), MS (18), NC (11), SC (15), TX (34); CA (12), NY (12), VA (8).

in the 39 states not above or close to the threshold for coverage.²³ In fact, there were more violations in Georgia and Texas alone than there were in those 39 states combined.²⁴ The Brennan Center estimates that under the current bill before the Senate, the 7 states that are likely to meet the coverage threshold have at least 120 total violations over the past 25 years, while the 39 states that are not close to coverage have fewer than 50.

In addition, the Brennan Center has submitted multiple studies for the record that demonstrate that vote suppression and discriminatory voting outcomes are worse in the states likely to be covered by preclearance:

- After the *Shelby County* decision, jurisdictions formerly subject to preclearance increased their voter purge rates more than noncovered jurisdictions. Two million fewer voters would have been purged between 2012 and 2016 if formerly covered jurisdictions continued to remove voters at the same rate as noncovered jurisdictions.²⁵ And 1.1 million fewer individuals would have been removed from voter rolls between 2016 and 2018 if formerly covered jurisdictions continued to remove voters at the same rate as non-covered jurisdictions.²⁶
- Racial and ethnic turnout gaps are growing faster in the eight states likely to be subject to preclearance than in the rest of the country. Seven of these states had white-nonwhite turnout gaps that grew more than the national rate of 4.6 percentage points between 2012 and 2020. South Carolina's gap widened the most, expanding by a staggering 21.2 percentage points in that period.²⁷
- This rapid growth is a complete reversal of a trend that the Supreme Court pointed to in the *Shelby County* decision as evidence that racial discrimination was abating.²⁸ In 2012, seven of these eight states had Black voter turnout higher than that of white voters, and the Court noted that the Black-white gap was closed or closing. In 2020, the reverse was true—in only one of the eight states was Black turnout higher than white turnout. Louisiana, South Carolina, and Texas had higher turnout gaps in 2020 than at any point in the past 24 years.²⁹

²³ *Id.* at Ex. 2. AK (2), AR (2), AZ (4), CO (2), HI (1), IL (4), MA (5), MI (3), MO (1), MT (5), NE (2), NV (1), NJ (2), NM (3), ND (2), OH (4), PA (2), SD (2), TN (2), WA (3), WI (1), WY (1). In addition, Professor McCrary lists no violations for CT, DE, ID, IN, IA, KS, KY, ME, MD, MN, NH, OK, OR, RI, UT, VT, WV.

²⁴ *Id.*

²⁵ Kevin Morris et al., "Purges: A Growing Threat to the Right to Vote," 3–4, *Brennan Center for Justice*, July 20, 2018, <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

²⁶ Kevin Morris, "Voter Purge Rates Remain High, Analysis Finds," *Brennan Center for Justice*, August 1, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

²⁷ Kevin Morris, Peter Miller, and Coryn Grange, "Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act," *Brennan Center for Justice*, August 20, 2021, <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights> (see chart detailing "White-Nonwhite Turnout Gap Since Shelby County, 2012-2020 Presidential Election").

²⁸ *Shelby Cty.*, 570 U.S. at 548 ("Census Bureau data from the most recent election indicate that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.")

²⁹ Morris, Miller, and Grange, "Racial Turnout Gap Grew."

- The worst “monster” vote suppression bills passed this year—omnibus bills that restrict voting in multiple ways—were in Texas and Georgia, two states expected to be covered by preclearance.³⁰ North Carolina—another state likely to be covered—modeled this practice of adopting a “monster” vote suppression law when it began working on its omnibus bill the day after the *Shelby County* decision was handed down in 2013.³¹ The bill was later struck down as racially discriminatory.³² Florida, which could soon come into coverage because of its multiple violations (and which would likely be covered under the House version of the bill), also passed a “monster” bill this year. Iowa, which will likely not be covered, did the same.
- According to 2019 testimony by Professor J. Morgan Kousser, 82.6 percent of successful Section 2 actions since the passage of Voting Rights Act in 1965 concerned jurisdictions previously subject to preclearance.³³

C. Absent Preclearance, Voting Discrimination Remains Intractable in States Likely to be Covered

Further, the record in the formerly covered jurisdictions since the *Shelby County* decision demonstrates both that these jurisdictions continue to pose a high risk of discrimination absent preclearance and that they were appropriately targeted for coverage in the first place. As soon as the Supreme Court invalidated the previous coverage formula in *Shelby County*, many of these jurisdictions rushed to enact intentionally discriminatory laws.³⁴ Infamously, Texas announced less than 24 hours after the decision that it would implement an extremely restrictive voter identification requirement that had previously been blocked by preclearance and was later found by a court to be intentionally discriminatory.³⁵ Less than two months later, North Carolina enacted its omnibus voting law that prompted the oft-repeated finding by the Fourth Circuit Court of Appeals that the law was intentionally discriminatory and “target[ed] African Americans with almost surgical precision.”³⁶ It took years of resource-intensive litigation to

³⁰ Brennan Center for Justice, “Voting Laws Roundup: October 2021.”

³¹ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); see also Brennan Center for Justice, “Voting Laws Roundup 2013,” December 19, 2013, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2013>.

³² *McCrory*, 831 F. 3d at 215.

³³ *Legislative Proposals to Strengthen the Voting Rights Act, Before the H. Comm. On Judiciary, Subcomm. On the Constitution, Civil Rights & Civil Liberties*, 116th Cong. (2019) (testimony of Professor J. Morgan Kousser, California Institute of Technology), <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>. Professor Kousser included settlements and consent decrees as successes. He also found that 81.7 percent of successful voting rights actions brought under the Fourteenth or Fifteenth Amendments, and Section 2, Section 203, or Section 208 of the VRA concerned jurisdictions previously subject to preclearance.

³⁴ Tomas Lopez, “Shelby County: One Year Later,” *Brennan Center for Justice*, June 24, 2014, <https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later>; see also *Bronovich*, 594 U.S. ___, slip. op. at 9 (2021) (Kagan, J., dissenting).

³⁵ “Statement by Texas Attorney General Greg Abbott,” June 25, 2013, <https://perma.cc/SL53-AFSG>; *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc).

³⁶ *McCrory*, 831 F.3d. at 214. *McCrory* was not the only case where a federal court found that a jurisdiction acted with discriminatory intent post-*Shelby County*. In 2017, the Southern District of Texas found that the city of Pasadena, Texas’s post-*Shelby County* city council electoral scheme was enacted with an intent to discriminate against Latino voters. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 721 (S.D. Tex. 2017) (“Each *Arlington Heights* factor supporting finding discriminatory intent . . . is present in this case.”).

block these laws; during those years, millions of voters faced unconstitutional barriers to the right to vote, with more burdens directed at minority voters.

This recent history demonstrates that, for jurisdictions with an extensive record of voting discrimination, preclearance is a necessary tool for rooting out that discrimination. As the record amply shows, lawmakers and officials in those states tend to be both persistent and creative in their efforts to discriminate against voters of color. Many of the states and localities likely to be covered under preclearance have now piled voting restriction upon voting restriction, even as earlier restrictions have been struck down by the courts in what amounts to judicial whack-a-mole.³⁷ In other words, they engage in exactly the sort of “ingenious discrimination” that President Johnson described as he called for passage of the VRA in 1965.³⁸ This ingenuity is why case-by-case adjudication and practice-based preclearance are insufficient tools, on their own, for preventing discrimination as it is practiced today.

For example, even after a voter ID law was struck down by a federal court in 2017 because it was found to be discriminatory (and intentionally so), the state of Texas adopted different restrictive laws when it returned to session in both 2019 and 2021. This year, for instance, the legislature’s omnibus voting law prohibits practices like 24-hour voting and drive-through polling places that have been used by local election officials in the state’s large, diverse counties to facilitate voting. The new law also creates over-broad and vague criminal offenses that will chill efforts of those seeking to assist voters to ensure real, practical access to the ballot, making it more difficult for voters with limited English proficiency to obtain the help they need (and to which they are entitled under federal law)—a burden that will fall disproportionately on Latino and Asian voters.³⁹

Georgia too has persisted in its efforts to suppress the vote. From the enactment of the nation’s first strict voter ID law in 2005⁴⁰ through the passage of the “monster” bill S.B. 202 in 2021,⁴¹ the state legislature has repeatedly enacted laws to make voting harder.⁴² The Secretary of State has also adopted aggressive policies blocking registrations by eligible voters or

³⁷ See, e.g., *Veasey*, 830 F.3d 216 (invalidating strict voter ID law that had previously been blocked by preclearance), but see TX S.B. 5 (2017) (imposing similar but less strict voter ID requirements), TX H.B. 1888 (2019) (restricting mobile early voting), TX S.B. 2930 (2021) (limiting voters who can vote by mail), TX S.B. 1111 (2021) (increasing risk of faulty voter purges), TX S.B. 1 (2021) (omnibus bill with several restrictive provisions).

³⁸ Lyndon B. Johnson, “Special Message to the Congress: The American Promise,” *The American Presidency Project*, March 15, 1965, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-american-promise>.

³⁹ Complaint for Declaratory and Injunctive Relief, *LUPÉ v. Abbott*, (W.D. Tex 2021) (No. 5:21-cv-844).

⁴⁰ GA Act No. 53 (H.B. 244) (2005).

⁴¹ GA S.B. 202 (shortening window to apply for a mail ballot, prohibiting the unsolicited distribution of mail ballot applications, limiting the availability of mail ballot drop boxes, and imposing harsher voter ID requirements on mail voting).

⁴² See also GA H.B. 92 (2011) (cutting back early voting); GA H.B. 268 (2017) (making voter registration more difficult).

removing them from the rolls.⁴³ And when litigation has halted or stalled one law or practice, the legislature has been quick to replace it with another.⁴⁴

But Georgia's lawmakers are not just dogged in their efforts to engage in vote suppression and discrimination; they are also adaptive and innovative. In 2020, the demographics of mail voting shifted dramatically. The percentage of mail voters that were white dropped precipitously while the percentage of mail voters who were Black surged.⁴⁵ Nearly 30 percent of Georgia's Black voters cast their ballot by mail in 2020, while just 24 percent of white voters did.⁴⁶ The legislature's response was quick: just months after the 2020 elections, it passed S.B. 202, a bill that placed a number of new restrictions on mail voting.⁴⁷ S.B. 202 also included a number of fairly novel restrictions, such as a ban on handing out water and snacks to voters waiting in line—a particularly sinister method of burdening voters of color by exploiting the fact that they already wait in disproportionately long lines to cast their ballots.⁴⁸ In short, Georgia provides another example of “ingenious discrimination” that requires Congress to act.

* * *

In short, a robust preclearance regime is necessary to combat the ongoing assault on voting in key states and localities. If preclearance had been in effect in Georgia and Texas and the other likely covered states this year, as it was before *Shelby County*, the restrictive voting bills that these states recently enacted would not have been able to go into effect unless and until the states proved that those laws would not discriminate against racial, ethnic, or language

⁴³ Stanley Augustin, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” *Lawyers’ Committee for Civil Rights Under Law*, February 10, 2017, <https://www.lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>; Morris, “Purges: A Growing Threat to the Right to Vote;” Morris, “Purge Rates Remain High.”

⁴⁴ When a federal court blocked Georgia’s original voter ID law, *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366, 1370 (N.D. Ga. 2005), the legislature passed an amended law in 2006. That law was also temporarily enjoined, *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1360 (N.D. Ga. 2006), but eventually upheld by the district court and the Eleventh Circuit, in part, after the state conducted a voter education campaign. *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1380 (N.D. Ga. 2007); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009). When litigation spelled an end to the Secretary’s “exact match” registration policy, Stanley Augustin, “Voting Advocates Announce a Settlement of ‘Exact Match’ Lawsuit in Georgia,” *Lawyers’ Committee for Civil Rights Under Law*, February 10, 2017, <https://www.lawyerscommittee.org/voting-advocates-announce-settlement-exact-match-lawsuit-georgia/>, the Georgia legislature enacted a similar policy into law only months later, GA H.B. 268 (2017), which it has since largely abandoned after further litigation, Stanley Augustin, “Georgia Largely Abandons its Broken Exact Match Voter Registration Process,” *Lawyers’ Committee for Civil Rights Under Law*, April 5, 2019, <https://www.lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process/>.

⁴⁵ Kevin Morris, “Georgia’s Proposed Voting Restrictions Will Harm Black Voters Most,” *Brennan Center for Justice*, March 16, 2021, <https://www.brennancenter.org/our-work/research-reports/georgias-proposed-voting-restrictions-will-harm-black-voters-most>.

⁴⁶ *Id.*

⁴⁷ GA S.B. 202 (shortening window to apply for a mail ballot, prohibiting the unsolicited distribution of mail ballot applications, limiting the availability of mail ballot drop boxes, and imposing harsher voter ID requirements on mail voting).

⁴⁸ See Hannah Klain, et al., “Waiting to Vote: Racial Disparities in Election Day Experiences,” 4, *Brennan Center for Justice*, 2020, https://www.brennancenter.org/sites/default/files/2020-06/6_02_WaitingtoVote_FINAL.pdf (finding that Latino and Black voters were more likely than white voters to report long wait times, and waited longer generally).

minorities. Preclearance will also be critical to protecting communities of color from discriminatory decision-making during the redistricting process at the congressional, state, and local levels this year.

II. The Geographic Coverage Formula Meets the Constitutional Standards Set by the Supreme Court in *Shelby County v. Holder* and is Necessary to Root Out Discrimination

The Supreme Court has repeatedly affirmed Congress' broad powers under the Fourteenth and the Fifteenth Amendments to craft legislation to root out discrimination in voting.⁴⁹ But, as the extensive record before this Congress shows, existing legal protections are currently woefully insufficient "to remedy the 'insidious and pervasive evil' of racial discrimination"⁵⁰ as states and localities across the country step up their attacks on voting rights. A preclearance regime is the sort of "strong medicine" that is necessary and constitutionally justified to combat the pervasive race discrimination in voting, especially in those areas where discrimination is most persistent.⁵¹

Indeed, many of the touchpoints for justifying preclearance that the Supreme Court identified in *Shelby County* are present today, especially in the jurisdictions that would likely be covered under the John Lewis Voting Rights Act. Apart from the anomalous surge in Black voter turnout in 2012, there is and has long been a dramatic racial voter turnout gap.⁵² In addition, states consistently engage in "[b]latantly discriminatory evasions of federal decrees," passing new voter restrictions soon after old ones are struck down by the courts.⁵³ And minority candidates remain dramatically underrepresented relative to their population in legislatures and courts across the country.⁵⁴ In short, the justification for preclearance remains powerful.

As the Court explained in *Shelby County*, a geographic coverage formula must be rationally related to the problem it is trying to address and "justified by current needs."⁵⁵ The updated coverage formula clearly meets that test.

First, the formula is more than "sufficiently related to the problem that it targets."⁵⁶ Indeed, in targeting jurisdictions for coverage, the Act's formula relies on the best evidence available to determine where the problem of discrimination is greatest: established violations of law. Rather than relying on proxies like the old formula, this formula identifies discrimination by looking to specific findings of violations of federal voting rights laws, as described in Section I. A high volume of litigation in and of itself is a probative way to identify where persistent

⁴⁹ *Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of the 1965 preclearance regime); *Georgia v. United States*, 411 U.S. 526 (1973) (upholding the constitutionality of the 1970 preclearance regime); *City of Rome*, 446 U.S. 156 (1980) (upholding the constitutionality of the 1975 preclearance regime); *Lopez v. Monterey Cnty.*, 525 U.S. 266 (1999) (upholding the constitutionality of the 1982 preclearance regime); *Shelby Cty.*, 570 U.S. at 553; *Brnovich*, 141 S. Ct. at 2331.

⁵⁰ *Shelby Cty.*, 570 U.S. at 535 (quoting *Katzenbach* at 309).

⁵¹ *Id.*

⁵² *See id.* at 540.

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *Id.* at 536; *see also Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203.

⁵⁶ *Shelby Cty.*, 570 U.S. at 551.

discrimination is taking place; where a jurisdiction is repeatedly discriminating against its citizens, one would expect those citizens to file repeated lawsuits. The Act goes further and actually requires successful litigation. Requiring actual violations of the law to build a record of discrimination ensures that jurisdictions will only fall into coverage because of objective evidence produced by the Department of Justice or sanctioned by a federal court. And, as I flesh out in greater length below, consent decrees are one of those critical pieces of evidence of discrimination.

Second, the Act's formula is justified by current needs. It "limit[s] its attention to the geographic areas where immediate action seem[s] necessary" by requiring that a jurisdiction show a pattern of proven instances of voter discrimination in recent years.⁵⁷ By looking at proven acts of discrimination, which are self-evidently "relevant to voting discrimination," the law targets only those places where proven discrimination against voters of color not only exists, but exists "on a pervasive scale."⁵⁸ And through other design mechanisms, described below, the law targets only those jurisdictions where the problem of discrimination is "current" and persistent.

For these reasons, and for the reasons set forth below, the Act's preclearance regime is more than justified to target the constitutional evil of race discrimination in voting.

A. The Review Period Is Well-Tailored to Identify States and Localities Where Discrimination Is a Persistent, Acute, and Current Risk

The Act's review formula is well-designed to identify and cover those jurisdictions where voting discrimination is pervasive, systematic, and recent. It provides for a dynamic and limited review period and considers objective, verifiable evidence to identify jurisdictions with a recent pattern of voting discrimination. Its key design features—a rolling 25-year review period, a 10-year coverage period, and a streamlined process for jurisdictions that have not committed discriminatory acts in the past 10 years to be released from coverage—ensure that the law targets only those jurisdictions where the problem of discrimination is current and persistent.

1. Twenty-Five Years Is a Well-Established Review Period

First, the Act's preclearance coverage formula uses a 25-year review period to determine which states will be subject to up to 10 years of preclearance coverage. It covers states where, in the previous 25 years, the state and its political subdivisions have committed 10 voting rights violations if at least one violation was committed by the state, or in which political subdivisions within the state have committed 15 voting rights violations.

This framework for identifying pervasive patterns of discriminatory activity within a state is consistent with the history of the Voting Rights Act, which has long relied on 25-year increments. Congress twice previously determined that 25 years is an appropriate benchmark for preclearance coverage. In 1982, it reauthorized the preclearance provisions of the VRA for 25

⁵⁷ *Id.* at 546 (quoting *Katzenbach*, 383 U.S. at 328).

⁵⁸ *Id.* (quoting *Katzenbach*, 383 U.S. at 308).

years until 2007.⁵⁹ In 2006, it again reauthorized the law for an additional 25 years.⁶⁰ Congress overwhelmingly passed these extensions—indeed, the Senate vote in 2006 was unanimous.⁶¹

In twice extending preclearance coverage for 25 years, Congress necessarily determined that discriminatory conditions at the beginning of that period were probative of a high risk of discrimination over the next 25 years. In fact, the 25-year review period in this bill is actually *shorter* than the effective review period previously adopted by Congress in 1982. The 1982 VRA reauthorization subjected states and localities to preclearance coverage through 2007 based on discriminatory activity from 1972, effectively using a review period of 35 years.

Twenty-five years is also a judicially-approved period. The Supreme Court affirmed the constitutionality of the 1982 VRA reauthorization—including its 25-year extension—in *Lopez v. Monterey County*.⁶² And while the Court did later strike down the preclearance coverage formula that Congress reauthorized in 2006, it did not base its decision on the length of the coverage period Congress chose.⁶³

2. The Coverage Formula Is Fine-Tuned to Identify Persistent Discrimination

The Act's formula is well-tailored to capture jurisdictions where voting discrimination is persistent and ongoing by combining a representative review period with a high threshold for coverage.

First, the review period needs to cover a long enough time period to identify jurisdictions with a persistent pattern of discrimination, when federal election and redistricting cycles happen in two-, four-, six- and ten- year increments. Twenty-five years fits the bill: it covers two redistricting cycles, four senate elections, and six presidential elections. That is enough time to ensure that a jurisdiction is not covered based on a small number of recent violations, but rather based on a consistent pattern of violations. The Supreme Court has recognized that it is appropriate to look to multiple elections to identify patterns of polarized voting, which is key to understanding and addressing voting discrimination.⁶⁴ The same principle applies to patterns of discrimination.

Professor McCrary's analysis bears out the reasonableness of this approach: each of the covered states has at least one violation within the past twelve years, as well as at least one

⁵⁹ History of Federal Voting Rights Laws, U.S. Dep't of Just. (last updated July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

⁶⁰ *Id.*

⁶¹ The 2006 reauthorization of the Voting Rights Act passed the U.S. House of Representatives 390-33, and the U.S. Senate 98-0, Actions Overview: H.R. 9 – 109th Congress (2005–2006), U.S. Congress, accessed October 5, 2021, <https://www.congress.gov/bills/109th-congress/house-bill/9/actions>; see also Actions Overview: H.R. 3112 – 97th Congress (1981-1982), U.S. Congress, accessed October 5, 2021, <https://www.congress.gov/bills/97th-congress/house-bill/3112/actions>; Office of the Press Secretary, "Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006," George W. Bush White House, July 27, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-1.html>.

⁶² 525 U.S. 266 (1999).

⁶³ *Shelby Cty.*, 570 U.S. 529.

⁶⁴ *Thornburg v. Gingles*, 478 U.S. 30, 52–53 (1986).

violation by the state—as opposed to only violations by subdivisions—and most have multiple violations.⁶⁵ In addition, each covered state has seen violations spread over a long time period; in no state are the violations concentrated in a time period shorter than 13 years.⁶⁶

Second, the review period works together with the bill’s high numeric thresholds for violations to capture only places where the problem is longstanding and persistent. Requiring 15 violations before a state is covered—or 10 where at least one was committed by the state itself—guarantees that states only come into coverage when they have repeatedly engaged in discrimination. For example, North Carolina and its subdivisions received six violations through DOJ objection letters between 1996-2011 (one of which contains multiple independent violations).⁶⁷ Since the *Shelby County* decision in 2013, courts have entered three more judgments against the state for discriminatory voting laws (one of which contained several independent violations).⁶⁸ A shorter period of review would not be long enough to identify such a sustained pattern of misconduct. (A shorter review period would require a lower numeric threshold to be applied in any practical reality, as 10 violations in 15 years would be a shockingly high number of violations in such a short time period.)

Third, including a formula shorter than 25 years will miss repeat redistricting offenders due to the once-a-decade nature of redistricting. A 25-year review period, for example, reveals that Texas not only enacted discriminatory redistricting plans after the 2010 census but that it also did so after the 2000 census, in some cases discriminatorily targeting the same districts in *both* decades.⁶⁹ Congress should address such clear patterns of discrimination, and only a 25-year review period ensures that it can.

Fourth, a 25-year review period helps compensate for the lack of record-building and enforcement of voting rights over the last decade since *Shelby County*. Since 2013, litigation has been the only means for jurisdictions to accrue violations that count towards coverage. Litigation is a far cry from the preclearance process when it comes to identifying discrimination. It is reactive, costly, and time consuming. Litigants can only accomplish the kind of in-depth review of a policy required under the preclearance process *after* they file suit, which they can only do *after* they have identified a harmful policy. Even then, successful challenges often take years to make their way through the courts and the appeals process.

⁶⁵ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*.

⁶⁶ *Id.*

⁶⁷ *Id.*; see also Thomas E. Perez to Robert T. Sonnenberg, Esq., April 30, 2012, <https://www.justice.gov/crt/voting-determination-letter-84> (DOJ objection letter issuing three violations against proposed comprehensive changes to school district reorganization).

⁶⁸ *Id.*; see also *North Carolina Conf. of NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016) (issuing five violations against an omnibus voting bill).

⁶⁹ *Texas v. United States*, 887 F.Supp.2d 133 (2012) (finding intentional discrimination in Texas congressional and state senate plans and retrogression in the 23rd Congressional District, among others); Ralph F. Boyd, Jr. to Geoffrey Connor, November 16, 2001, <https://www.justice.gov/crt/voting-determination-letter-26> (objecting to the Texas House of Representatives redistricting plan); *LULAC v. Perry*, 548 U.S. 399, 439-40 (2006) (discussing Texas’ dismantling the 23rd Congressional District in 2003 in response to increased Latino political effectiveness)..

3. At the Same Time, the Bill Targets Only Recent Discrimination

There are three additional design features of the John Lewis Voting Rights Act that make sure it only captures jurisdictions with a current risk of discrimination.

First, the Act's framework is not frozen in time. It provides for a rolling review period, so that only states with a recent record of discrimination are covered. Once a violation is more than 25 years in the past, it will no longer count against the state. Not only does this ensure that only recent violations are used to trigger preclearance, it also provides a significant incentive for states on the cusp of coverage to straighten up their acts.

Second, preclearance coverage, even if triggered, lasts only for 10 years. After 10 years, DOJ reanalyzes the state's record of violations over the previous 25 years. If the jurisdiction no longer meets the threshold number of violations, it exits coverage. This is in contrast to the prior preclearance formula, which only allowed states to exit coverage via the "bailout" process in Section 4(c) of the law or upon expiration of the provision's 25-year renewal.

Third, as in the past, once a jurisdiction has not had any violations within the past decade, it is eligible to seek "bailout" from preclearance coverage. Thus, for example, if a state's last violation was in 2011, it would be eligible for bailout in 2022. Prior to Shelby County, the bailout process was efficient and effective; since 1997, 50 jurisdictions across seven states have successfully bailed out of preclearance, according to the Department of Justice.⁷⁰ All but one of these jurisdictions did so via a consent decree with the Department of Justice, without contested litigation.⁷¹ The Act further streamlines the bailout process to make it easier for eligible jurisdictions to seek and obtain bailout expeditiously.

In short, these provisions of the geographic coverage formula work together to ensure that preclearance coverage is limited to jurisdictions with recent, pervasive, and continuing records of discrimination.

B. It Is Necessary and Appropriate to Cover Local Jurisdictions

The John Lewis Voting Rights Act appropriately covers all subdivisions in covered states. The evidence from past practice under the VRA demonstrates that doing so is necessary to root out discrimination. Indeed, the vast majority of DOJ objection letters in states previously covered as a whole were directed to local and county governments within those states rather than to the state itself.⁷² For example, all but 18 of the 104 voting changes that the Department of Justice objected to in Alabama while preclearance was in effect were to policies adopted in the state's political subdivisions.⁷³ Similarly, in Louisiana, of the 13 voting changes that the

⁷⁰ 5 U.S. Department of Justice, "Section 4 of the Voting Rights Act," accessed August 13, 2021, <https://www.justice.gov/crt/section-4-voting-rights-act>.

⁷¹ *Id.* The exception was a utility district in Texas, which was ultimately bailed out after a Supreme Court ruling in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

⁷² U.S. Department of Justice, "Section 5 Objection Letters," accessed October 5, 2021, <https://www.justice.gov/crt/section-5-objection-letters>.

⁷³ U.S. Department of Justice, "Section 5 Objection Letters," accessed October 5, 2021, <https://www.justice.gov/crt/voting-determination-letters-alabama>.

Department of Justice objected to during the 25-year review period, all but one of those were local and county-level policies.⁷⁴

The analysis of voting rights violations by Professor McCrary further demonstrates that discrimination pervades the local communities in the states likely to be covered. Every jurisdiction that Professor McCrary deemed likely to be covered by the John Lewis Voting Rights Act has at least one statewide violation, violations across at least five local jurisdictions in a broad geographic area, and violations distributed across the 25-year period.⁷⁵ Take Georgia, for example. Professor McCrary estimates that Georgia has 25 total violations over the 25-year period. These include four statewide violations and violations involving 19 different cities, counties, and school boards.⁷⁶

That discrimination is prevalent in political subdivisions of covered states is no surprise. After all, the state and local government officials who perpetrate voting discrimination are all elected by or responsive to the same voters. When an area has a demonstrated record of discrimination, it is not unreasonable to presume that it pervades the political culture and that all jurisdictions within it are likely to be at significant risk of the same behavior.⁷⁷

Moreover, although legislative acts by a state are high visibility affairs, it is harder to monitor the actions of the thousands of political subdivisions in a state in real time to identify discrimination. Absent preclearance for subdivisions, adverse changes enacted by local jurisdictions are much more likely to slide under the radar. And when they are found out and brought to light, the burden then falls on cash-strapped local groups to seek to block the change in court through a lengthy, time-consuming, and expensive process. Preclearance would level the playing field and make it harder for repeat offenders to evade sanction.

For these reasons, covering subdivisions is a well-established and court-approved approach under the Voting Rights Act. As noted above (*see supra* Sec. II), the Supreme Court repeatedly upheld the prior geographic coverage formula, including the provisions that consistently required all political subdivisions to seek preclearance based on a statewide inquiry. That choice is just as justified and necessary today.

C. Consent Decrees Are Important, Judicially-Approved Tools for Fighting Discrimination and Should Count as Violations

It is appropriate and necessary to count consent decrees as evidence of discrimination. That is because as legal remedies, consent decrees are just as forceful and authoritative as the other types of violations counted in the VRA, including final judgments, DOJ objection letters, and other settlements. They cause changes in voting laws or practices to eliminate discrimination and protect voting rights and are enforceable in court.

⁷⁴ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*. As there have been no DOJ objection letters since the *Shelby County* decision, all 13 of these objections took place by 2013.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ I use the word “presumptively” because, as I discuss further *infra*, jurisdictions with no actual record of recent discrimination will be able to avoid preclearance through the Act’s bailout process.

Consent decrees are strong indicators of states and localities where voting discrimination has occurred. Before entering a consent decree, a court must first determine that the agreement “‘is fair, adequate and reasonable’ and ‘is not illegal, a product of collusion, or against the public interest.’”⁷⁸ In so doing, “the court must assess the strength of the plaintiff’s case.”⁷⁹ A proposed decree is substantively fair if “it requires that a party bear the cost of the harm for which it is legally responsible.”⁸⁰ Applying this fairness analysis in the voting context, courts do not enter consent decrees unless there is a reasonable likelihood that a violation has occurred.⁸¹ Courts do not simply “rubber stamp” consent decrees.⁸² To the contrary, courts often reject proposed consent decrees for any number of reasons, demonstrating just how serious the inquiry is.⁸³ When a court enters a consent decree, it agrees to exercise ongoing jurisdiction and to supervise the parties’ implementation and compliance with that decree; it would not do so absent a clear showing that such supervision is needed.

Consent decrees have long been vital tools to stamp out discrimination. Indeed, past practice shows that many egregious voting rights violations have ended in consent decrees. For example, the *Dillard* cases in Alabama challenging discriminatory redistricting schemes in the mid-1980s resulted in a consent decree negotiated by plaintiffs and a class of defendants that resulted in voting changes in 197 political subdivisions.⁸⁴ This led to significant increases in Black elected officials throughout the state. In 1985, the year the litigation began, there were only 264 Black elected officials in political subdivisions in Alabama. By 1989, that number had risen to almost 560.⁸⁵ Other examples of consent decrees remedying blatant discrimination abound. In Long County, Georgia, a consent decree required the county to reform its voter challenge procedures after candidates baselessly challenged the citizenship status of voters solely because they had Hispanic or Spanish surnames.⁸⁶ Alameda County, California agreed to a consent decree in 2011 requiring it to provide language access materials required by Section 203 of the VRA—a consent decree that was necessary because it had failed to provide them

⁷⁸ *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)).

⁷⁹ *United States v. North Carolina*, 180 F.3d at 581; see also *League of Women Voters of Va. v. Virginia State Bd. of Elec.*, 481 F. Supp. 580, 586 (W.D. Va. 2020); *Dillard v. City of Foley*, 926 F. Supp. 1053, 1062 (M.D. Ala. 1995).

⁸⁰ *United States v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213 (M.D.N.C. 2020) (quoting *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 86 (1st Cir. 1990)).

⁸¹ See, e.g., *Dillard*, 926 F. Supp. at 1063–64.

⁸² See, e.g., *U.S. S.E.C. v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014).

⁸³ See, e.g., *United States v. New York Housing Authority*, 347 F. Supp. 3d 182, 216–17 (S.D.N.Y. 2018) (rejecting a proposed consent decree because entering it was “not fair and reasonable and . . . its entry would disserve the public interest.”); *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1185 (9th Cir. 2013) (vacating a consent decree because it would have “effectively amended [agency rules] without going through” proper administrative procedures); *St. Charles Tower, Inc. v. Kurtz*, 643 F.3d 264, 270 (8th Cir. 2011) (vacating a consent decree because it improperly circumvented state law obligations, stating that litigants “cannot consent to do something that they lack the power individually to do”); *Phelps-Roper v. Heineman*, 710 F. Supp. 2d 890, 898–900 (D. Neb. 2010) (noting that “[e]ntry of a consent decree is a judicial act and is left to the district court’s informed discretion” and refusing to enter the proposed decree that would have barred police officers from arresting plaintiff because the court would not “place its judicial force behind a decree that expressly purport[ed] to abrogate” the city’s duty to arrest lawbreakers).

⁸⁴ See Jerome Gray and James U. Blacksher, “The Dillard Cases and Grassroots Black Political Power,”

Cumberland Law Review 46 (2016): 312.

⁸⁵ *Ibid.*

⁸⁶ *United States v. Long County*, No. 2:06-cv-040, Dkt. No. 6 (S.D. Ga. 2006), available at <https://www.justice.gov/crt/united-states-district-court-southern-district-georgia-brunswick-division>.

according to the terms of a 1995 settlement.⁸⁷ Although they are strong indicators of discrimination, because they are court orders rather than private agreements, the vast majority of consent decrees do not contain admissions of liability.

Finally, counting consent decrees as violations does not create undesirable incentives. *First*, it does not create an incentive for plaintiffs to litigate weak claims because courts cannot enter consent decrees absent a strong case from the plaintiffs. A jurisdiction that believes it has a winning case would not agree to alter its voting policy based on a weak claim, regardless of the coverage formula. *Second*, counting consent decrees does not encourage defendants to litigate unnecessarily because all methods of resolving a lawsuit against a discriminatory law—judicial decisions, consent decrees, or settlements—count towards coverage. If a jurisdiction thinks it is likely to lose a voting discrimination case, it makes more sense to enter a consent decree rather than expend resources to litigate to a final judgment, as that judgment would still count towards coverage. *Third*, federal court rules ensure that plaintiffs cannot bully defendants into accepting consent decrees to avoid long litigation. For example, the possibility of court sanctions strongly discourages litigation of frivolous claims. On the other hand, *excluding* consent decrees from the coverage formula would create an undesirable incentive for plaintiffs to continue litigating strong claims to final judgment, where winning could result in greater relief and a judgment counting towards coverage. Such outcomes would waste party and judicial resources.

In short, consent decrees are vital components of any geographic coverage formula designed to identify where discrimination is occurring. We recommend that they be included without qualification.

III. The John Lewis Voting Rights Act Restores the Strength of Section 2, a Vital Tool to Stop Voter Discrimination Not Prevented By Preclearance

The Act's amendments to Section 2 of the VRA are critical to restore the ability to fight voting discrimination that is not prevented by preclearance. The Supreme Court's recent *Brnovich v. DNC* decision diminished Section 2's strength, making it a much less effective tool for rooting out modern discriminatory voting laws and practices. The decision undermined Congress's clear intent in creating a powerful remedy to attack electoral laws and practices that interact with the ongoing effects of discrimination to produce discriminatory results in the voting process. However, the Supreme Court was explicit that its *Brnovich* ruling was based in statutory interpretation. Congress can therefore easily correct the Court's misinterpretation and restore Section 2 to its intended strength.

While the evidence is clear that voting discrimination is most pervasive in jurisdictions likely to be covered under the geographic coverage formula, the problem is by no means limited to those jurisdictions. As noted above, even though there were far fewer violations in states unlikely to be covered based on Professor McCrary's analysis of the 2019 bill, there were still 54 violations in those states in the last 25 years.⁸⁸ In fact, the problem is growing nationwide, as we

⁸⁷ *United States v. Alameda County*, No. 3:11-cv-3262, Dkt. No. 21 (N.D. Cal. 2011), available at <https://www.justice.gov/crt/case-document/file/1176851/download>.

⁸⁸ Peyton McCrary, testimony on *Oversight of the Voting Rights Act*, Exhibit 2 (finding 54 violations during the review period in states not likely to be covered).

are witnessing a wave of voter suppression that is both larger and more widespread than any in recent memory. So far in 2021, 19 states have enacted 33 laws making it harder to vote.⁸⁹ Most of those are not likely to be covered under the formula in the bill before this Committee.⁹⁰ Among these are the “monster” vote suppression bills passed in Florida and Iowa (though Florida is close to meeting the threshold for coverage). The Brennan Center has also submitted to the congressional record a report summarizing the many instances of race-based vote suppression during the 2020 election and its aftermath, which demonstrates that voting discrimination extends well beyond states likely to be covered.⁹¹ Preclearance alone cannot prevent all of these discriminatory laws and practices, but a robust Section 2 gives voters an opportunity to fight them.

We also know from past cases that Section 2 has been an effective tool for advancing voting rights across the country. According to a recent Brennan Center analysis, there were more than 20 successful redistricting cases just since 2006.⁹² And while Professor Kousser’s 2019 review of successful voting rights actions demonstrated that they were concentrated in previously covered jurisdictions, he identified 225 successful Section 2 actions in non-covered jurisdictions.⁹³

As the Brennan Center has been tracking, voting rights advocates continued to file suits under Section 2 in 2020 and 2021, including in jurisdictions not likely to be covered.⁹⁴ Although these cases are much harder to win after the *Brnovich* decision, at least one of the cases filed in a jurisdiction not likely to be covered by the Act has been successful so far—*Blackfeet Nation v. Stapleton*.⁹⁵ That case also provides a reminder about the significant role that Section 2 plays in addressing discrimination against Native American voters, the majority of whom live outside jurisdictions likely to be covered by preclearance.⁹⁶ The suit ended in a settlement providing an in-person voting location on the Blackfeet Indian Reservation.⁹⁷ The *Brnovich* case itself also concerned practices that imposed an outsized burden on those living on reservations. (Because the geographic coverage formula will only provide limited protection to Native American voters,

⁸⁹ Brennan Center for Justice, “Voting Laws Roundup: October 2021.”

⁹⁰ *Ibid.*; Peyton McCrary, testimony on *Oversight of the Voting Rights Act*, 18–25.

⁹¹ William Wilder, “Voter Suppression in 2020,” *Brennan Center for Justice*, August 20, 2021, https://www.brennancenter.org/sites/default/files/2021-08/2021_08_Racial_Voter_Suppression_2020.pdf.

⁹² Brennan Center for Justice, “The Use of Section 2 to Secure Fair Representation,” August 13, 2021, <https://www.brennancenter.org/our-work/research-reports/use-section-2-secure-fair-representation>.

⁹³ Morgan Kousser, testimony on *Legislative Proposals to Strengthen the Voting Rights Act*.

⁹⁴ The Brennan Center tracked voting rights litigation across the country in 2020 and 2021 and found that plaintiffs brought 36 suits under Section 2 last year, when there were essentially no jurisdictions subject to preclearance. Twenty-one of these suits were filed against jurisdictions that are not likely to be covered by the Act. See Brennan Center for Justice, “Voting Rights Litigation Tracker 2020,” July 8, 2021, <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020>. So far in 2021, there have been Section 2 suits filed in Florida (which is not likely to be covered), Georgia, and Texas. See Brennan Center for Justice, “Voting Rights Litigation Tracker 2021,” August 2, 2021, <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021>.

⁹⁵ *Blackfeet Nation v. Stapleton*, No. 4:20-cv-00095 (D. Mont. 2020).

⁹⁶ Census Bureau, “Decennial Census Data: Race,” <https://data.census.gov/cedsci/table?q=redistricting&tid=DECENNIALPL2020.P1&hidePreview=true>, last accessed October 5, 2021.

⁹⁷ *Blackfeet Nation*, No. 4:20-cv-00095, Dkt. No. 10 (D. Mont., Oct. 15, 2020), available at <https://storage.courtlistener.com/recap/gov.uscourts.mtd.65114/gov.uscourts.mtd.65114.10.0.pdf>.

the Brennan Center also wholeheartedly supports the inclusion of the Native American Voting Rights Act in the John Lewis Voting Rights Act.)

The revised Section 2 has two critical components to fight discriminatory voting laws and practices. *First*, it would codify the standard long used by most appellate courts for analyzing cases (the standard that the Supreme Court radically cut back in *Brnovich*). Under the previously applicable standard, first articulated by the Supreme Court in *Thornburg v. Gingles*,⁹⁸ courts conducted the “totality of the circumstances” analysis required by the 1982 Amendments to the VRA by looking to a non-exhaustive list of relevant factors set forth in this Committee’s report on those amendments (known as the “Senate Factors”).⁹⁹ In *Brnovich*, the Court departed from the clear intent of Congress, and this Committee, by suggesting that the Senate Factors were of limited relevance in evaluating “vote denial” claims.¹⁰⁰

In turning away from the Senate Factors, the Supreme Court did not just depart from Congress’s intent, it also departed from a well-established test that was well designed to target discrimination. Under that test, courts examined “the impact of the challenged practice and the social and political context in which it occurs” by conducting “a searching practical evaluation of the ‘past and present reality.’”¹⁰¹ They conducted an “intensely local appraisal” of how race functioned in the jurisdiction to determine whether a racially disparate impact should in fact be deemed a “discriminatory result,” or if it was merely a statistical anomaly.¹⁰² In “vote denial” cases,¹⁰³ courts applied the Senate Factors to assess whether a challenged policy or practice that resulted in a disparate burden on a protected class of voters was “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”¹⁰⁴ The test did not stop every discriminatory practice.¹⁰⁵ In fact, even under the *Thornburg v. Gingles* standard, it was already difficult and expensive to bring a successful action under Section 2.¹⁰⁶ But it was an effective test used for years in almost every circuit that

⁹⁸ 478 U.S. 30, 44.

⁹⁹ See, e.g., *Veasey*, 830 F.3d 216; *Mich. APRI v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

¹⁰⁰ 141 S. Ct. at 2340.

¹⁰¹ S. Rep. No. 97-417 at 30, 67.

¹⁰² *Thornburg*, 478 U.S. at 79 (quoting S. Rep. No. 97-417 at 190).

¹⁰³ See, e.g., *Veasey* 830 F.3d 216; *Mich. APRI*, 833 F.3d 656; *League of Women Voters of NC*, 769 F.3d 224; *Gonzalez*, 677 F.3d 383; *Sanchez*, 214 F. Supp. 3d 961.

¹⁰⁴ See, e.g., *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

¹⁰⁵ See, e.g., *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (denying a Section 2 challenge to a voter ID law despite the fact that voters of color were far more likely to lack the requisite ID than white voters and assuming *arguendo* that the Senate Factors applied).

¹⁰⁶ Between the *Shelby County* decision and 2018, only 61 cases were filed under Section 2 nationwide. Only 23 of these were successful, and only 9 of those 23 alleged “vote denial” claims. Successfully litigating a Section 2 “vote denial” claim is difficult and expensive, and thus rare. See Br. of State and Local Election Officials, 15–19, *Brnovich v. Democratic National Committee*, 594 U.S. ____ (2021), available at https://www.supremecourt.gov/DocketPDF/19/19-1257/1666687/20210119142504286_Brnovich%20-%20State%20and%20Local%20Officials%20Amicus%20with%20Appendix.pdf.

considered a Section 2 vote denial case.¹⁰⁷ Under that test, courts would engage with the way that race—and modern race discrimination—actually functioned and interacted with voting in a particular jurisdiction. In *Brnovich*, the Court did the opposite, expressly diminishing the importance of taking into account the persistent “differences in employment, wealth, and education” created by centuries of discrimination.¹⁰⁸ By codifying the Senate Factors, the John Lewis Voting Rights Act will refocus courts on the facts that matter.

Second, the Act expressly disclaims the so-called “guideposts” that the *Brnovich* majority created. Those guideposts make it more difficult for courts to identify and prohibit race discrimination in voting. As opposed to the Senate Factors, which directed courts to determine how race interacts with other factors to produce voting disparities, these guideposts downplay the significance of the hallmarks of modern voter suppression.¹⁰⁹ The guideposts suggest that truly discriminatory practices should be ignored if they impact a relatively small number of voters, ignoring the fact that modern vote suppression is often accomplished by layering a series of discriminatory provisions on top of one another.¹¹⁰ One guidepost inexplicably freezes the voting practices of 1982 in time as a benchmark against which to judge modern practices, even though there was no early voting and virtually no mail voting in 1982, and there was plainly still a problem with race discrimination at the time.¹¹¹ Finally, the Court’s guideposts sanction a state legislature’s use of the specter of voter fraud to justify discriminatory rules.¹¹²

The John Lewis Voting Rights Advancement Act corrects course, putting courts back on the path originally intended by Congress in its quest to root out discrimination from our nation’s elections. The Act restores a body of federal case law that effectively complemented the preclearance regime for decades to accomplish marked improvements to our democracy.

IV. Conclusion

As the record before this Committee shows, the scourge of voting discrimination has exploded across the country, and it is especially acute and pervasive in selected jurisdictions. The John R. Lewis Voting Rights Advancement Act is carefully crafted to target and root out that discrimination where it is most persistent. The Act’s preclearance provisions are not only eminently reasonable, justified, and consistent with the Constitution; they are also necessary to stem the relentless rise of discriminatory voting changes. Those preclearance provisions, coupled with new provisions to strengthen Section 2 of the VRA, would restore the VRA to its full strength before the Supreme Court dramatically weakened the law in *Shelby County* and *Brnovich*. That strength is badly needed now.

¹⁰⁷ See, e.g., *Veasey* 830 F.3d 216; *Mich. APRI*, 833 F.3d 656; *League of Women Voters of NC*, 769 F.3d 224; *Gonzalez*, 677 F.3d 383; *Sanchez*, 214 F. Supp. 3d 961. In *Frank v. Walker*, 768 F.3d at 755, the Seventh Circuit assumed for the sake of argument that the Senate Factors applied, but expressed skepticism about the test.

¹⁰⁸ 141 S. Ct. at 2343.

¹⁰⁹ See Sean Morales-Doyle, testimony on *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses*.

¹¹⁰ *Brnovich*, 141 S. Ct. at 2338–39.

¹¹¹ *Id.* at 2338.

¹¹² *Id.* at 2340.

Both Sections 2 and 5 of the Act would work in tandem with another critical piece of legislation, the Freedom to Vote Act (S. 2747),¹¹³ to protect voting rights for every American. The Freedom to Vote Act would set national bright-line standards for fair, secure, and accessible elections, including universal access to early and mail voting, automatic and same day voter registration, and a ban on partisan gerrymandering. These and other key provisions address barriers that disproportionately affect Black, Latino, Asian, and Native voters, but without requiring litigants to prove racial discrimination, which is not always feasible. And by making it easier for everyone to vote, they would also address harmful voting restrictions not covered by the VRAA—such as those targeting students and other young voters. The Freedom to Vote Act would immediately override existing discriminatory laws and practices, in most cases allowing them to be addressed prior to an election, which will not always be possible even under Section 2. And the VRAA would provide a mechanism to challenge discriminatory changes that were not previously anticipated in the Freedom to Vote Act's national standards. In short, both bills are necessary to guarantee all Americans the freedom to vote.¹¹⁴

We strongly urge Congress to enact the John Lewis Voting Rights Act, as well as the Freedom to Vote Act, into law.

¹¹³ S. 2747, 117th Cong. (2021).

¹¹⁴ For more on why it is essential to pass both the John Lewis Voting Rights Act and the reforms in the Freedom to Vote Act, see Letter of Support – The For the People Act and the John Lewis Voting Rights Advancement Act (June 8, 2021), <https://civilrights.org/resource/letter-of-support-the-for-the-people-act-and-the-john-lewis-voting-rights-advancement-act/>.

Senator Marsha Blackburn
Questions for the Record to Hon. Kristen Clarke
Assistant Attorney General for Civil Rights

1. Tennessee has a Voter ID law, and the state has had great success in reforming elections, cleaning voter rolls, requiring an ID to vote, and restoring accountability. You have been an outspoken critic of Voter ID laws, stating that photo ID requirements and “burdensome” proof of citizenship requirements are a “bag of tricks to suppress Black votes.”

Noting this:

- a. Your own agency requires an ID to enter the building. Do you believe the DOJ’s ID requirement for entrance is designed to “suppress Black [visitors]”? Given that visiting the DOJ to petition your government for redress is covered by the First Amendment, please explain the distinction between this and requiring an ID to cast a ballot.
 - b. The White House requires an ID to enter. Is President Biden attempting to “suppress Black [visitors]”? Given that visiting the White House to petition your government for redress is covered by the First Amendment, please explain the distinction between this and requiring an ID to cast a ballot.
 - c. The TSA checks IDs at the airport. Is the TSA trying to “suppress Black [travelers]”? Given that there is a constitutional right to travel, please explain the distinction between this and requiring an ID to cast a ballot.
2. Do you agree that an illegally cast vote disenfranchises legal voters?
 3. Do states have legitimate interests in keeping elections secure?
 4. Did you tweet that “voter fraud is a myth and a LIE”? If so, how can states trust you to exercise oversight authority to prevent voter fraud?

Senator Marsha Blackburn
Questions for the Record to Hon. Ken Cuccinelli
National Chairman for the Election Transparency Initiative

1. Do you agree that an illegally cast vote disenfranchises legal voters?
2. H.R. 4 and similar bills are purportedly focused on targeting supposed voter suppression. Why doesn't the federal government make voter fraud a priority as well?

Senator Marsha Blackburn

Questions for the Record to Jon M. Greenbaum

Chief Counsel & Senior Deputy Director, Lawyer's Committee for Civil Rights under Law

1. Your organization supports H.R. 4, which would prevent states from making many changes to their election laws without federal approval. Do you disagree with the Supreme Court's consistent view that the Constitution grants the States "broad powers" to oversee elections (*Shelby County v. Holder*)?

Senator Marsha Blackburn
Questions for the Record to Hon. Todd Rokita
Attorney General of Indiana

1. H.R. 4 would federalize much of election law. Please describe the impact that legislation, if passed, would have on your state's ability to ensure free and fair elections.

Senator Marsha Blackburn
Questions for the Record to Wendy R. Weiser
Vice President, Democracy, Brennan Center

1. Your organization supports H.R. 4, which would prevent states from making many changes to their election laws without federal approval. Do you disagree with the Supreme Court's consistent view that the Constitution grants the States "broad powers" to oversee elections (*Shelby County v. Holder*)?

Senator Marsha Blackburn
Questions for the Record to Hon. Ken Cuccinelli
National Chairman for the Election Transparency Initiative

1. Do you agree that an illegally cast vote disenfranchises legal voters?
Answer: Yes, without question. Every illegal vote may be viewed as either diluting all legal votes, or as ‘canceling out’ a legal voter’s votes that are the opposite of each illegal voter’s votes.

2. H.R. 4 and similar bills are purportedly focused on targeting supposed voter suppression. Why doesn’t the federal government make voter fraud a priority as well?
Answer: This has been a question many people have asked for a long time; however, while true voter suppression has taken place in American history, such efforts have now been defeated – an accomplishment every American can be proud of. Today the phrase “voter suppression” is primarily used by those on the radical left as an *ad hominem* attack against efforts to protect election integrity and increase transparency.

A good example of such an ad hominem attack was undertaken by President Biden, V.P. Harris, Cong. Clyburn, and Stacey Abrams, just to name a few, against the 2021 Georgia election law reforms. Georgia’s reforms were fairly modest, but increased security and accessibility of elections, yet the aforementioned individuals (and many others) attacked such reforms as “voter suppression.” Fast forward to the 2022 primaries in Georgia and turnout was substantially higher than the equivalent elections in Georgia just four years previous. In other words, following Georgia’s election law reforms, voter turnout went UP, not down, thus proving that the voter suppression attack was – to put it mildly – not well founded. Of course, this was known at the time the attacks were being made. Perhaps that is why even the left-wing Washington Post rated the claim that Georgia’s election laws were – as the attack went at the time – “Jim Crow 2.0” as a complete lie.

Americans continue to support updating our outdated election codes, as well as making our elections more secure and transparent.

**“Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights
Advancement Act”
Senate Committee on the Judiciary Hearing
Wednesday, October 6, 2021**

**Senator Marsha Blackburn
Questions for the Record to Jon M. Greenbaum
Chief Counsel, Lawyers’ Committee for Civil Rights under Law**

1. Your organization supports H.R. 4, which would prevent states from making many changes to their election laws without federal approval. Do you disagree with the Supreme Court’s consistent view that the Constitution grants the States “broad powers” to oversee elections (*Shelby County v. Holder*)?

Answer: The power of the States to oversee elections is broad, but the Constitution confers powers to the federal government related to elections, as the Supreme Court has routinely recognized. For example, the Election Clause of Article I, Section 4 of the Constitution gives Congress the authority to make or alter state rules regarding the time, place and manner of holding federal elections. “The Elections Clause has two functions. Upon the States it imposes the duty (*shall* be prescribed’) to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether.” *Arizona v. ITCA*, 570 U.S. 1, 8 (2013) (emphasis in original).

State power is also subject to the Constitutional prohibitions on racial discrimination in voting found in the Fifteenth and Fourteenth Amendments and the authority granted to Congress under those Amendments. The Voting Rights Act is the prime example of Congress using its enforcement authority.

From the time the Voting Rights Act was passed in 1965, Section 5 has required states and local governments covered by a coverage formula intended to identify jurisdictions with a history of discrimination under Section 4(b) to obtain federal preclearance before implementing voting changes by showing the changes are nondiscriminatory. These provisions were challenged as going beyond Congress’ Reconstruction Amendment enforcement authority and the Supreme Court upheld them on multiple occasions. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) *City of Rome v. United States*, 446 U.S. 156 (1980), *Lopez v. Monterey County*, 526 U.S. 266 (1999).

In *Shelby County v. Holder*, 570 U.S. 529, 557 (2013), the Supreme Court found that the coverage formula under Section 4(b) was unconstitutional but it “issue[d] no holding on § 5 itself.” Far from stating that Congress did not have the authority to employ a preclearance regime, the Court stated that “Congress may draft another formula based on current conditions.” *Id.* Indeed, H.R. 4, the John Lewis Voting Rights Advancement Act is, among other things, a Congressional response to the

Court's statement in *Shelby County* that Congress could enact a new coverage formula for preclearance based on current conditions. This component of H.R. 4 is not only consistent with, but furthers the Constitutional prohibition on racial discrimination in voting and Congress's duty to enact legislation to enforce that prohibition. Under the preclearance scheme, states retain their broad powers of overseeing elections but they are prevented from instituting new laws or practices that discriminate.

Senator Marsha Blackburn
Questions for the Record to Hon. Todd Rokita
Attorney General of Indiana

1. H.R. 4 would federalize much of election law. Please describe the impact that legislation, if passed, would have on your state's ability to ensure free and fair elections.

H.R. 4 resurrects and expands provisions of the Voting Rights Act's ("VRA") the United States Supreme Court previously struck down for usurping states' authority over elections. H.R. 4 implements practice-based preclearance that requires states and political subdivisions, regardless of whether they are currently covered under VRA, to preclear certain election laws, such as voter identification ("ID") requirements and voter list maintenance laws *before* they can be enacted. Moreover, Indiana may be forced into traditional voting rights act preclearance depending on the number of voting rights violations within the past 25 years. H.R. 4 gives the DOJ new control over state legislatures' ability to pass certain election laws.

The Constitution and the federalist system prohibit the federal government from meddling in states' lawmaking process. H.R. 4 upends this relationship by creating a "Mother May I" process under which states must ask permission from partisan bureaucrats in the Justice Department before certain election laws can go into effect. This would open the door to fraud by preventing commonsense safeguards in the election process.

Indiana's voter ID law became a model for the nation. Since then, 35 states have followed suit in enacting laws to protect the integrity of our elections. H.R. 4 would brand such laws as discriminatory while lacking any actual evidence to back up such claims. H.R. 4 will nullify our photo ID law by allowing those without identification to vote with a sworn statement. And, if Indiana wants to amend or pass nearly any new election law in areas such as voting location, redistricting, or maintenance of voter lists, to name just a few, then Indiana will have to seek approval from DOJ, which is certainly a harm to our republic. A federal takeover of elections will impose unconstitutional mandates on states and reverse the decentralization of the American election process and open the door to fraud and abuse.

Senator Marsha Blackburn
Questions for the Record to Wendy R. Weiser
Vice President, Democracy, Brennan Center

1. Your organization supports H.R. 4, which would prevent states from making many changes to their election laws without federal approval. Do you disagree with the Supreme Court's consistent view that the Constitution grants the States "broad powers" to oversee elections (*Shelby County v. Holder*)?

While the Constitution contemplates states regulating federal elections, the same constitutional provision that authorizes states to pass laws regulating congressional elections—the Elections Clause in article I, section 4—also makes clear that Congress may, “at any time,” “make or alter” such laws. As recently as 2013, the Court said, in an opinion by Justice Scalia, that Congress’s power under the Elections Clause is so “broad” and “paramount” that it includes the “authority to provide a complete code for congressional elections.”¹ And, as the Supreme Court has held, Congress enjoys similarly broad power over presidential elections.²

The Constitution’s Fourteenth and Fifteenth Amendments likewise vest Congress with broad power to deter and remedy racial discrimination in *all* elections, not just federal elections.³ The Supreme Court has described this enforcement power as “a broad power indeed,” one that gives Congress a “wide berth” to devise appropriate remedial and preventative measures for discriminatory actions.⁴ The John R. Lewis Voting Rights Advancement Act (VRAA, H.R. 4) and the Freedom to Vote: John R. Lewis Act (FTVA) are well within the constitutional authority delegated to Congress under these provisions.⁵

¹ See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 9 (2013). Congress has exercised its Elections Clause power to enact, among other laws, the Voting Rights Act (1965 and subsequent reauthorizations and amendments through 2006), the Federal Election Campaign Act (1972), the Uniformed and Overseas Citizens Absentee Voting Act (1986), the National Voter Registration Act (1993), the Bipartisan Campaign Reform Act (2002), the Help America Vote Act (2002), and the Military and Overseas Voter Empowerment Act (2009).

² See *Burrighs v. United States*, 290 U.S. 534, 545 (1934); see also *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (“The broad power given to Congress over congressional elections has been extended to presidential elections . . .”).

³ See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 536 (2013) (quoting U.S. CONST. amend. XV); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (“Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”).

⁴ *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

⁵ The Supreme Court decision recognizing the states’ “broad powers” to regulate federal elections in the first instance expressly noted that those powers are limited by the federal constitution as well as “any restriction that Congress acting pursuant to its constitutional powers, has imposed.” *Lassiter v. Northampton*, 360 U.S. 45, 5051 (1959). The VRAA and FTVA would therefore supersede any state authority.



Republican
National
Committee

Ed Gillespie
Chairman

June 15, 2004

Chairman Terry McAuliffe
Democratic National Committee
430 South Capitol Street, SE
Washington, DC 20003

Dear Chairman McAuliffe:

As we cast our votes this November, I know you agree that no American should believe that he or she will be intimidated from voting or that his or her vote won't count because of fraud. As both you and I have noted, there is a problem with American elections if the process is not perceived as fair.

The challenges of properly implementing the new Help America Vote Act (HAVA) gives us a unique opportunity to try to correct some of the systemic problems our process faces. I'd like to propose a program under which we can work together as the chairs of our respective Parties to protect the integrity of the voting process for every American.

You have falsely and unfairly charged the Republican Party with trying to intimidate voters. The Republican National Committee is not, and will not be, engaged in any effort to suppress or intimidate voters. Our Party finds such conduct reprehensible and if we receive any evidence that such conduct is occurring, I will take all steps necessary to ensure that it ceases immediately. Rather, our goal in this election is an unprecedented effort to register new voters and encourage participation in the political process.

The other side of the coin is that, just as Democrats apparently believe that Republicans are engaged in voter intimidation, many in my Party believe Democrats engineer voter fraud. I know you feel about these charges the way I feel about the charges of voter intimidation.

The unfortunate reality – and why I am writing you today – is that these charges and counter-charges reflect two sides of a coin that create an atmosphere of divisiveness across our country. As Chairs of the parties, I know you feel as I do that we have an obligation to make this situation better.

Paid for by the Republican National Committee. www.rnc.org
310 First Street, SE • Washington, DC 20003 • (202) 863-8500 • Fax: (202) 863-8820
Not authorized by any candidate or any candidate committee.

What I hope we can do is join together for a program to bring transparency and openness to every voting place in the country where either of us believes there is a potential for voter intimidation, fraud or mistrust of the tabulation process. The proposal, which I look forward to discussing and refining further with you, is an unprecedented and massive undertaking but worth it.

Each of us would list every precinct where we fear there could be a problem on Election Day. To put some limits on it, we could begin with Presidential battleground states, as well as those with contested Senatorial and Gubernatorial races.

Next, each of us would be responsible for recruiting a volunteer for each named precinct. The Republican and Democratic volunteers would work as an observation team.

We would recruit similarly bipartisan teams assigned to cover multiple precincts to respond to and investigate reports of problems. The teams would agree on avenues of appeals that could be taken to the courts, if needed.

We would invite members of the media to be present either in a central location or embedded with the teams.

The goal is to provide a mechanism where the problems that have occurred in the past with voting, and will face a major test this election with the implementation of HAVA, have a transparent, bipartisan solution.

Sincerely,



Ed Gillespie

JUL-01-2004 17:06 FROM:

TO: 98638774

P. 2/4



DEMOCRATIC NATIONAL COMMITTEE

July 1, 2004

Chairman Ed Gillespie
 Republican National Committee
 310 First Street, SE
 Washington, DC 20003

Dear Chairman Gillespie:

The Democratic National Committee (DNC) and the Voting Rights Institute applaud your commitment to openness and fairness in the electoral process for 2004 and beyond; the citizens of this country deserve nothing less. We also agree that eligible voters should be able to exercise their right to vote without fear of harassment or intimidation, and we strongly oppose any fraudulent behavior or activity at polling places.

As you know, Congress passed the Help America Vote Act (HAVA) in response to the tremendous voting irregularities that occurred in 2000 – most memorably in Florida. Its goal is to help ensure the very openness and fairness that we all agree is fundamental to the credibility of the electoral process. This is to be done, in part, by allocating funds to states to improve their election systems and by establishing uniform standards that should be employed by those systems, to ensure that money is being spent wisely and effectively.

DeForest "Buster" Soaries, Jr., Chair of the bi-partisan Election Assistance Commission (EAC) that has been charged with the immense task of implementing HAVA, has said that the Commission lacks the funding to ensure that these standards – which are so crucial to the success of bringing more openness to our electoral process – are developed and implemented. Further undermining the EAC's efforts is the fact that President Bush has requested a \$10 million budget cut for this fiscally strapped Commission in FY2005, under the unsupportable assumption that there will somehow be unobligated balances in this amount carried over from FY2004. We ask therefore, that you and the RNC join us in calling on Congress to appropriate the funds needed to fulfill the promise of HAVA.

Funding alone, of course, is not the solution to the problems so many voters have faced in attempting to vote. Systemic changes that address these issues should be encouraged and supported. The League of Women Voters, the Leadership Conference on Civil Rights and other leading civil rights organizations, have identified the top five risks to eligible voters in 2004: voter registration problems, erroneous purging, problems with the new ID requirement, difficulties with the new electronic voting systems and failure to count provisional ballots.

To deal with some of the problems facing voters this fall, the League of Women Voters have recommended the following steps be implemented to ensure that no eligible

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citizen is disenfranchised. We agree with many of their conclusions and would encourage the RNC to support the implementation of these procedures:

1. Ensure that voter registration applications or forms are processed in a timely fashion prior to Election Day. State and local election officials should be encouraged to update their voter registration lists and to maintain open lines of communication between polling sites and the registrar's central office.
2. Provide timely notice to any citizen who has been purged from a state felon list so he or she may register to vote prior to Election Day if they are eligible. The list should be made public to ensure that these citizens are notified prior to the statewide deadline for voter registration. We also encourage state and local officials to cut off or stop any purging after August 1, 2004.
3. Every citizen should be educated on what form, if any, of ID they may be required to produce at their polling place and this information should be widely published prior to Election Day.
4. Educate citizens on the new voting systems that will be used in their local jurisdiction this fall. We also encourage that security standards be set to maintain the integrity of our voting systems.
5. Every polling site in America should have provisional ballots available to citizens who may show up at the wrong site. We also encourage a non-discriminatory process for issuing and counting these provisional ballots.

We believe it is necessary to remove every barrier that impedes or denies an eligible vote. The RNC and its allies should work with its state parties and affiliates to encourage campaign and election workers to help protect and promote the rights of all citizens to have a voice in their democracy. And the Republican Party should stand firmly and publicly against any group, whether or not affiliated, that devises schemes to impede lawful registration and access to the polls.

We are also calling on the RNC to urge the Department of Justice to follow up on existing voting rights violation cases that have not been adequately addressed. The Justice Department has been given the task of implementing some important HAVA provisions. We encourage the Department to not only vigorously enforce the Voting Rights Act, as amended, but to safeguard the electoral process by working with state and local officials to ensure no one is harassed or intimidated while attempting to participate in the electoral process.

Forty years ago this summer, activists from across America converged in Mississippi to help educate and register tens of thousands of previously disenfranchised American citizens. In the spirit of their leadership and determination to expand the franchise, the DNC calls upon the RNC to do its part in ensuring no American citizen is denied the right to participate in the electoral process.

We appreciate your suggestion of novel means of achieving this goal, which you envision in part as a joint initiative in targeted jurisdictions by the two political parties.

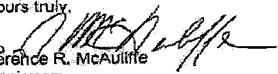
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But what matters is not a public relations gambit by the two political parties, but rather a commitment equally shared by both that the laws will be enforced by those federal and state agencies charged with protecting the constitutional and statutory rights of all our citizens. We look forward to your embrace of this fundamental proposition, and your active support for its fulfillment in practice at all levels of the Republican party and among its allies.

Yours truly,


Terence R. McAuliffe
Chairman
Democratic National Committee
Donna Brazile
Chair
Voting Rights Institute



Current Conditions of Voting Rights Discrimination

A Report Prepared by

2021 REPORT ON VOTING RIGHTS IN CALIFORNIA

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About States United Action

[States United Action](#) is a nonpartisan section 501(c)(4) nonprofit organization with a mission to protect our elections and our democracy. States United Action advocates for policies that protect election integrity, hold democracy violators accountable, and prevent political violence that threatens to undermine the will of the American people, and amplifies the voices of state leaders and law enforcement leaders who share these values.

I. Introduction

This report reviews the overall trends regarding minority voter participation and discrimination against minority groups in California. We evaluate the impact of the Supreme Court's decision in *Shelby County v. Holder* and review California's election laws and their impact on minority voter participation. The report supplements and updates the still-relevant foundational report [VOTING RIGHTS IN CALIFORNIA, 1982-2006](#), by Renew the VRA.Org, published in 2006.

Our supplemental report reveals that 15 years later, despite continued gains in minority voter participation since 2006, there remain obstacles to full voter participation of minority voters in California. Recent elections have seen increases in voter turnout both statewide, including among some minority groups, and in some of the jurisdictions previously subject to preclearance under Section 5 of the Voting Rights Act (VRA). The evidence we review demonstrates the benefits that preclearance provided to the four counties that had been subject to Section 5 prior to *Shelby*. Yet significant concerns persist, including about whether the increased turnout statewide by Latinos signals greater participation by Latino voters in the electoral system or just a matter of population growth. In addition, members of minority communities have been elected in increasing numbers but still at a level lower than those groups' percentage of the overall population. The expansion of California election laws that make voter registration and voting easier, such as the expansion of mail ballot delivery, motor voter registration, same day registration, early voting and the use of vote centers, appears to have eased access to the polls for many Californians, particularly as evidenced by greatly increased voter participation in the 2020 election. Yet the inequality of the increased turnout is also evident inasmuch as the increase in Latino and Asian American turnout lags behind state turnout. Additionally, instances of racially polarized voting stubbornly persist as do significant language access issues. Certain voting procedures still result in the dilution of minority participation, with continued litigation under the VRA and the California Voting Rights Act (CVRA) that we analyze in depth.

While California has made meaningful strides towards the eradication of voting discrimination and violations of voting laws, this does not signal an end to the need for federal legislation protecting these rights. It demonstrates the opposite. As the largest and most diverse state in the nation, California faces particular challenges ensuring voting rights for its diverse and multilingual

electorate. The federal Voting Rights Act of 1965, in conjunction with the California Voting Rights Act, has been the cornerstone of voting rights protections in California and a vital ingredient for the recent successes in the state in terms of minority participation and the election of minority community members to local and state offices.

II. Impact of *Shelby County v. Holder* in California

In 2013, the U.S. Supreme Court in *Shelby County v. Holder* issued a 5-4 decision authored by Chief Justice Roberts holding that certain provisions of the Voting Rights Act of 1965 were unconstitutional.¹ The majority found that the formula used to determine which jurisdictions were subject to preclearance under Section 5 of the VRA was outdated and that there was insufficient evidence showing pervasive discrimination in the covered jurisdictions to justify the continuation of the preclearance requirements.

Prior to the Supreme Court's decision in *Shelby*, there were four counties in California that had been subject to the pre-clearance requirements under Section 5 of the Voting Rights Act: Monterey, Kings, Yuba, and Merced.² Most of these counties have a large percentage of minority residents relative to their overall populations³ and had instances of very low voter turnout. As

¹ Section 4 provided for a formula that determined which jurisdictions were subject to coverage under certain provisions of the VRA, and Section 5 provided that the covered jurisdiction as determined under the formula used in Section 4 were required to submit changes to their voting procedures to the U.S. Department of Justice for approval. This was known as "preclearance." Under the coverage formula in Section 4, several states in the South as well as certain jurisdictions in other states, including California, were subject to the preclearance procedures in Section 5.

² 28 C.F.R. Part 51, Appendix. Merced eventually was removed from the preclearance requirement in 2012 and some localities within Yuba County also received a so-called "bail out" from preclearance, leaving Kings, Yuba, and Monterey Counties, or parts thereof, as the jurisdictions within California under Section 5 of the VRA as of 2013. See Seth Nidever, *Kings still punished under Voting Rights Act*, THESENTINEL (Aug. 18, 2012), https://hanfordsentinel.com/news/local/kings-still-punished-under-voting-rights-act/article_cb8df624-e8d3-11e1-8cfd-001a4bcf887a.html; see also David Bienick, *Yuba, Monterey, Kings counties may no longer need election oversight*, KCRA 3 (June 25, 2013, 10:46 PM), <https://www.kcra.com/article/yuba-monterey-kings-counties-may-no-longer-need-elections-oversight-1/6405805#>.

³ For example, although Kings County is the 33rd largest county of California's 58 counties in terms of overall population, the percentage of Hispanic residents rates Kings County the 8th highest in California and the percentage of African American residents rates it the 9th highest. Monterey County has the 5th highest percentage of Hispanic residents by county in California. See *Kings County, California*

Several studies have shown that since *Shelby* there has been a drop in minority participation across elections in many of the jurisdictions nationally that had been subject to Section 5 preclearance.⁴ There do not appear to be any available studies specifically focused on the effects of *Shelby* in terms of minority voting in the four California counties previously subject to preclearance. There is some evidence of increased participation statewide by Latino voters in the 2016 and 2020 presidential elections,⁵ and some of the formerly covered jurisdictions saw increases in voter turnout during this same time, particularly in the 2020 election,⁶ as well as the election of a more diverse field of officeholders.⁷ But there is also evidence of a widening and concerning gap between the turnout for the total population and turnout for minority voters. The Center for Inclusive Democracy found that “Latinos and Asian Americans also experienced a significant

⁴ *Impacts of the Voting Rights Act and the Supreme Court's Shelby Ruling*, Harvard Kennedy School (Oct. 26, 2018), <https://www.hks.harvard.edu/research-insights/policy-topics/politics/impacts-voting-rights-act-and-supreme-courts-shelby-ruling>; Coryn Grange, Peter Miller, & Kevin Morris, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, Brennan Center for Justice (Aug. 20, 2021), available at <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-in-jurisdictions-previously-covered-voting-rights>.

⁶ *Monterey County voters make 2020 a historic year for local elections*, SALINAS CALIFORNIAN (Nov. 5, 2020), <https://www.msn.com/en-us/news/politics/monterey-county-election-updates-56-of-registered-monterey-county-voters-have-cast-their-ballots/ar-BB1afJlt>; Shawn Jansen, *2020 Election update: Merced County sets voter turnout record; Los Banos has new mayor*, MERCED SUN-STAR (Nov. 25, 2020, 1:29 PM), <https://www.mercedsunstar.com/news/politics-government/election/article247416160.html>.

⁷ Jonathan Whitaker, *Diversity wins in vote for new Merced leaders*, MERCED CNTY TIMES (Nov. 14, 2020), <https://mercedcountytimes.com/diversity-wins-after-2020-vote-for-new-merced-leaders/>.

increase in their eligible voter turnout rate compared to the prior presidential general election. However, this increase was not as high as the increase seen in turnout for the total population.”⁸

III. Pre-2006 Voting Discrimination in California

As we have noted, this report supplements the 2006 report [VOTING RIGHTS IN CALIFORNIA, 1982-2006](#), by Renew the VRA.Org (2006 Report). The 2006 Report provided an extensive assessment of discrimination against minority voters and minority voting strength in California from 1982 to 2006. It identified specific instances of voter discrimination in California, including relating to the four jurisdictions that were subject to preclearance under Section 5 of the VRA, and detailed patterns of racially polarized voting in California. The 2006 Report concluded that voting discrimination was still “a persistent hallmark of California electoral politics that ha[d] prevented minority communities from completely achieving an equal opportunity to participate in the political process and elect candidates of their choice despite electoral gains by minority communities.”⁹ The 2006 Report emphasized the continuing need for both preclearance as well as language-access issues relating to Section 203 of the VRA.

IV. Voting Discrimination in California Since 2006

A. Statistical Analysis Regarding Voting Issues in California

i. Current Demographics of California

Based upon data from the 2020 Census, California had a population of 39,538,223 in 2020, making it the most populous state in the Union as well as the largest majority-minority state.¹⁰ The

⁸ See NOVEMBER 2020 GENERAL ELECTION: LATINO AND ASIAN-AMERICAN VOTE, USC PRICE SCH. OF PUB. POL’Y & CTR FOR INCLUSIVE DEMOCRACY (Mar. 2021), *available at* <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/6065611a7e8307754dc70763/1617256731383/USC+CID+California%E2%80%99s+Latino+and+Asian-American+Vote+-+2020+General+Election+FACT+SHEET.pdf>.

⁹ See generally VOTING RIGHTS IN CALIFORNIA 1982-2006, RENEWTHEVRA.ORG (2006).

¹⁰ See 2020 Census Data, <https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html> (last visited Sept. 16, 2021). It should be noted that there remains uncertainty as to whether the 2020 Census undercounted the population in California, particularly minority groups, due to the effects of the COVID-19 pandemic as well as political rhetoric in connection with the 2020 election. See, e.g., Les Dunseith, *UCLA research pinpoints where 2020 census undercounts were most likely in L.A. County*, UCLA NEWSROOM (Aug. 19, 2021),

population grew at approximately 6% from the 2010 Census, primarily based upon increases in those identifying as Hispanic origin or Asian.¹¹ More particularly, those identifying as Hispanic now constitute 39.4% of the general population of California, and those identifying as Asian, either alone or in combination with other identities, now constitute 17.8% of California's overall population.¹² California remains a relatively young state, with over 22% of the population under age 18 and less than 15% of the population over 65.¹³

ii. Information Regarding Turnout by Demographics

Despite the changing demographics of California, there are indications that, statewide, minority turnout still lags. Latinos¹⁴ and Asian Americans continue to be among the fastest growing communities in the state but continue to have the lowest voter turnout.¹⁵ This includes the 2020 election, which featured increased turnout among most demographic groups but during which Latinos and Asian Americans experienced a lower increase in turnout than the general population.¹⁶

<https://newsroom.ucla.edu/releases/2020-census-undercounts-los-angeles-county>; Christian Spencer, *Census controversy brewing over 'systemic undercount' of Latinos*, THE HILL (Apr. 28, 2021), [https://thehill.com/changing-america/respect/accessibility/550697-census-controversy-brewing-over-systemic-undercount-of-but-see Michael Wines, Despite Many Obstacles, the 2020 Census Gets a Cautious Thumbs-Up](https://thehill.com/changing-america/respect/accessibility/550697-census-controversy-brewing-over-systemic-undercount-of-but-see-Michael-Wines-Despite-Many-Obstacles-the-2020-Census-Gets-a-Cautious-Thumbs-Up), N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/09/14/us/census-analysis-apportionment.html>.

¹¹ *2020 Census Data*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html> (last visited Sept. 16, 2021).

¹² *Id.*

¹³ *Id.*

¹⁴ Maria Luisa Arredondo, *Latino Population Growth Outpacing Latino Voter Turnout in California*, CA FWD (June 4, 2013), <https://cafwd.org/news/latino-population-growth-outpacing-latino-voter-turnout-in-california/>.

¹⁵ Andrea Briseno & Phillip Reese, *California Latino population grew in last decade while number of whites fell, census shows*, THE SACRAMENTO BEE (Aug. 24, 2021), <https://www.sacbee.com/news/politics-government/capitol-alert/article253446644.html#:~:text=From%202010%20to%202020%2C%20the%20number%20of%20Latinos,there%20are%20about%2015.6%20million%20Latinos%20in%20California> (noting the Latino population grew 11% higher than the statewide average and the Asian population grew 25% higher).

¹⁶ See *November 2020 General Election: Latino and Asian-American Vote*, USC PRICE SCH. OF PUB. POL'Y & CTR FOR INCLUSIVE DEMOCRACY (Mar. 2021), available at <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/6065611a7e8307754de70763/161725>

According to Census data, Latino registration and turnout has increased for each presidential election from 2008 to 2020. Specifically, Latino registration increased by 54% during this time period, and Latino turnout, among those eligible, increased by 53%.

California- Voter Registration and Turnout From 2008 to 2020¹⁷

Election	Latino VAP	Total	Latino CVAP	Total	Latino Registered	Total	Latino Turnout
2008	8,859		5,193		3,263		2,961
2012	9,935		6,510		3,684		3,157
2016	10,221		7,092		3,882		3,345
2020	11,165		8,305		5,014		4,539
Increase 2008-2020	26%		60%		54%		53%

A similar trend of overall increase in registration and turnout is seen for Asian American voters. According to Census data, voter registration for Asian Americans grew by 64% from 2008 to 2020 and voter turnout grew by 76%.

California- Voter Registration and Turnout From 2008 to 2020¹⁸

	Asian VAP	Total	Asian CVAP	Total	Asian Registered	Total	Asian Turnout
2008	3,473		2,562		1,522		1,343
2012	3,915		2,839		1,645		1,380
2016	4,838		3,585		2,080		1,859
2020	5,072		3,958		2,491		2,370

6731383/USC+CID+California%E2%80%99s+Latino+and+Asian-American+Vote+-+2020+General+Election+FACT+SHEET.pdf.

¹⁷ Data on reported voting and registration is collected by the U.S. Census Bureau in the Current Population Survey. See *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Apr. 2021), <https://www.census.gov/topics/public-sector/voting/data/tables.html>. Figures are in the thousands except for percentages.

¹⁸ Data on reported voting and registration is collected by the U.S. Census Bureau in the Current Population Survey. See *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Apr. 2021), <https://www.census.gov/topics/public-sector/voting/data/tables.html>. Figures are in the thousands except for percentages.

Increase 2008-2020	46%	54%	64%	76%
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While Latino and Asian American voters have increased in both registration and turnout, they are still far behind the total population. This is evident when looking at the most recent election. In the 2020 presidential election, 55% of eligible Latino voters cast their ballot as did 60% of eligible Asian American voters. Overall, California experienced a 65% turnout among eligible voters, much higher than the turnout rates for both Latino voters and Asian American voters. When looking across other demographic groups, Latino and Asian American voters fall even farther behind. In the 2020 presidential election, white voters turned out at the highest rates, with 75% of eligible voters casting a ballot, and Black voters also exceeded Latino and Asian American voters with 64% of eligible Black voters casting a ballot. “Latinos and Asian Americans continue to be underrepresented in California’s voting electorate compared to their share of the state’s eligible voter population (adult citizens).”¹⁹ As discussed below, these two demographics also saw higher instances of rejection of vote-by-mail, as well as continuing problems with language access issues.

iii. Minority Office Holding

California has continued to elect more officeholders from minority groups since the 2006 Report, although the number of minority office holders is still disproportionately low in comparison with those groups’ percentages of the overall population. For example, a 2019 report by the National Association of Latino Elected and Appointed Officials (NALEO) Education Fund counted 1,640 Latino elected officials in California, including 48 at the federal or state level,²⁰ which is an increase from past levels. Nonetheless, the approximately 30 members of the California Latino Legislative Caucus²¹ constitute only 25% of California legislators while those identifying as Hispanic in California comprise nearly 40% of the general population. Similarly, reports indicate

¹⁹ See *November 2020 General Election: Latino and Asian-American Vote*, USC PRICE SCH. OF PUB. POL’Y & CTR FOR INCLUSIVE DEMOCRACY (Mar. 2021), available at <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/6065611a7e8307754dc70763/161725>

²⁰ See NALEO 2019 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS, NAT’L ASS’N OF LATINO ELECTED AND APPOINTED OFFICIALS EDUC. FUND 8 (2019), available at https://naleo.org/wp-content/uploads/2019/12/2019_National_Directory_of_Latino_Elected_Officials.pdf.

²¹ See *Member Directory*, CAL. LATINO LEGIS. CAUCUS, <https://latinocaucus.legislature.ca.gov/member-directory> (last visited Sept. 19, 2021).

that the number of Asian and Pacific Islander office holders has increased over the years.²² One publication counted approximately 393 members of the Asian and Pacific Islander community elected to offices statewide in California, including 14 members of that community elected to the state legislature.²³ This constitutes approximately 11% of the elected members of the state legislature. In contrast, as noted above, those identifying as Asian, either alone or in combination with other races, are 17.8% of California's overall population.

iv. Application of Section 203 to California

The last publication of states and political subdivisions covered by Section 203 according to the Census Bureau was in December 2016.²⁴ Based on that publication, the entire state of California was required to provide language assistance for Spanish speakers, and several counties also were required to provide access and assistance in one or more Asian languages as well as American Indian languages under Section 203. This includes the addition of two jurisdictions between 2002 and 2015, so that 27 political jurisdictions in California are covered by Section 203.²⁵ Further, several jurisdictions were newly required in 2016 to provide language assistance for additional language groups, predominantly Asian languages.²⁶

²² Agnes Constante, *In California, Asian Americans find growing political power*, NBC NEWS (Aug. 19, 2018), <https://www.nbcnews.com/news/asian-america/california-asian-americans-find-growing-political-power-n866611>; Ricardo Vazquez, *Number of Asian American public officials has reached historic levels, UCLA study shows*, UCLA NEWSROOM (June 2, 2014), available at <https://newsroom.ucla.edu/releases/number-of-asian-american-public-officials-has-reached-historic-levels-ucla-study-shows>; see also *California Asian Pacific Islander Legislative Caucus Membership*, <https://apicaucus.legislature.ca.gov/california-asian-pacific-islander-legislative-caucus> (visited Sept. 16, 2021).

²³ See *AAPIC Current Elected Officials*, ASIAN PACIFIC AMERICAN INST. FOR CONG. STUDIES, <https://www.apaics.org/aapi-current-elected-officials> (last visited Sept. 16, 2021).

²⁴ UNITED STATES OF AMERICA, SECTION 203 DETERMINATIONS EFF. DECEMBER 2016, U.S. CENSUS BUREAU, available at <https://www2.census.gov/programs-surveys/decennial/rdo/reference-maps/2016/8c-section203map2016.pdf> (last visited Sept. 16, 2021).

²⁵ *Section 203 Determinations Table*, U.S. CENSUS BUREAU (Dec. 5, 2016), <https://www.census.gov/data/tables/2016/dcc/rdo/section-203-determinations.html>.

²⁶ *Id.*

California:	
State Coverage	Hispanic.
Alameda County	Chinese (including Taiwanese).
Alameda County	Filipino.
Alameda County	Hispanic.
Alameda County	Vietnamese.
Colusa County	Hispanic.
Contra Costa County	Chinese (including Taiwanese).
Contra Costa County	Hispanic.
Del Norte County	American Indian (All other American Indian Tribes).
Fresno County	Hispanic.
Glenn County	Hispanic.
Imperial County	Hispanic.
Kern County	Hispanic.
Kings County	Hispanic.
Los Angeles County	Cambodian.
Los Angeles County	Chinese (including Taiwanese).
Los Angeles County	Filipino.
Los Angeles County	Hispanic.
Los Angeles County	Korean.
Los Angeles County	Vietnamese.
Madera County	Hispanic.
Merced County	Hispanic.
Monterey County	Hispanic.
Orange County	Chinese (including Taiwanese).
Orange County	Hispanic.
Orange County	Korean.
Orange County	Vietnamese.
Riverside County	Hispanic.
Sacramento County	Chinese (including Taiwanese).
Sacramento County	Hispanic.
San Benito County	Hispanic.
San Bernardino County	Hispanic.
San Diego County	American Indian (All other American Indian Tribes).
San Diego County	Chinese (including Taiwanese).
San Diego County	Filipino.
San Diego County	Hispanic.
San Diego County	Vietnamese.
San Francisco County	Chinese (including Taiwanese).
San Francisco County	Hispanic.
San Joaquin County	Hispanic.
San Mateo County	Chinese (including Taiwanese).
San Mateo County	Hispanic.
Santa Barbara County	Hispanic.
Santa Clara County	Chinese (including Taiwanese).
Santa Clara County	Filipino.
Santa Clara County	Hispanic.
Santa Clara County	Vietnamese.
Stanislaus County	Hispanic.
Tulare County	Hispanic.
Ventura County	Hispanic.

B. Voting Rights Legal Landscape in California

i. Objections, Declaratory Judgments or Bail-Ins in California Under Sections 5 and 3(c) of the Voting Rights Act prior to 2013

As discussed in the 2006 Report, prior to the *Shelby* decision, the Section 5 preclearance requirement had a tangible impact on covered jurisdictions in California. The preclearance requirements allowed county residents to hold county supervisors accountable for transparent and accurate representation. Thanks to a Section 5 enforcement action, local voters elected the first

Latino to the Monterey County Board of Supervisors in more than a century.²⁷ Similar results occurred in Merced County where a new redistricting plan that received Section 5 approval resulted in the election of a Latina supervisor.²⁸ Both of these examples demonstrate how the Section 5 preclearance requirements allowed for meaningful changes in political representation on a local level.

One enforcement judicial action occurred after 2006 and before the *Shelby* decision in 2013.²⁹ In *Lopez v. Merced County, California*, the plaintiffs, a group of Hispanic, Spanish-speaking voters, challenged a series of annexations, detachments, consolidations and/or formations to cities and special districts in Merced County, which at the time was a covered jurisdiction under the Act.³⁰ The plaintiffs alleged these moves unlawfully denied them their voting rights in part based on race and language because the county did not obtain either administrative or judicial preclearance as required under Section 5.³¹ While the defendants had not yet received preclearance approval for the annexations and other boundary changes, all defendants had submitted preclearance requests.³² When the approvals finally were processed, the court ultimately dismissed the case as moot because the defendants had, in fact, complied with the Section 5 requirements even if they did so later than desired.³³

When looking at the other enforcement route—administrative preclearance through the U.S. Attorney General’s office—the Attorney General did not file an objection action against a California covered political subdivision after 2002.³⁴ The DOJ was active with other states, such as Alabama and Georgia, both of which received objection notices to their submissions as recently

²⁷ VOTING RIGHTS IN CALIFORNIA 1982-2006, RENEWTHEVRA.ORG 10 (2006).

²⁸ *Id.* at 12.

²⁹ *Lopez v. Merced County, California*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007).

³⁰ *Id.* at 1074, 1076.

³¹ *Id.* at 1074.

³² *Id.* at 1077.

³³ *Lopez v. Merced County, California*, No. 06-CV-01526-QWW-DLB (E.D. Cal. June 8, 2007).

³⁴ *Voting Determination Letters for California*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/voting-determination-letters-california> (last updated Aug. 7, 2015).

as 2008 and 2012 respectively.³⁵ While there may not have been objection notices in California after 2002, that is not to say that California did not engage in preclearance submission in the roughly ten years before *Shelby* came about. For example, in the roughly six months leading up to the *Shelby* decision, California counties filed 33 preclearance notices for Section 5 approval.³⁶

ii. New Laws in California Regarding Voting Rights.

The California state legislature has worked to dramatically increase voting opportunities and engagement for eligible citizens. While some state statutes have strengthened and even bolstered federal law, other laws have resulted in unequal benefits for some minority communities. When looking across demographics, as seen in the 2020 presidential election, California's new laws have not resulted in equal improvements for voter turnout for Latinos or Asian Americans.

California enacted the California Voting Rights Act in 2002,³⁷ and over the years has added provisions strengthening that important law that supplement and, in some cases, surpass the VRA in terms of protecting the rights of California voters.³⁸ For example, in 2016, the legislature added

³⁵ *Voting Determination Letters for Alabama*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/voting-determination-letters-alabama> (last updated May 18, 2020); *Voting Determination Letters for Alabama*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/voting-determination-letters-georgia> (last updated Aug. 7, 2015).

³⁶ See *Notices of Section 5 Activity under the Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-1965-amended> (last updated Aug 6, 2015) (reviewing the individual notice submissions from January to June 2013).

³⁷ The California Voting Rights Act recently survived a constitutional challenge brought in federal court, with the Ninth Circuit Court of Appeals affirming a lower court's decision that the Act did not violate the Equal Protection Clause of the 14th Amendment, and the United States Supreme Court declining to review the Ninth Circuit's decision. *Federal Appeals Court Dismisses Challenge to California Voting Rights Act*, THE LATINO LEGAL VOICE FOR CIVIL RIGHTS IN AMERICA (Dec. 19, 2019), <https://www.maldef.org/2019/12/federal-appeals-court-dismisses-challenge-to-the-california-voting-rights-act/>; Maria Dinezo, *High Court Leaves in Place California Election Boundaries*, COURTHOUSE NEWS SERVICE (May 26, 2020), <https://www.courthousenews.com/supreme-court-denies-petition-to-hear-california-voting-rights-act-challenge/>.

³⁸ "While modeled after the federal Voting Rights Act of 1965 ("FVRA"), the CVRA lowers the threshold required to establish a voting rights violation. For example, unlike the FVRA, a protected class does not have to be geographically compact or concentrated to allege a violation of CVRA. Moreover, proof of intent on the part of the voters or elected officials to discriminate against a protected class is not required. The CVRA also eliminates the "totality of circumstances" test set forth in the FVRA, precluding introduction of other evidence as to why preferred candidates of the protected class lost elections. The deletion of the totality of circumstances factors makes CVRA litigation purely a statistical exercise." THE CALIFORNIA VOTING RIGHTS ACT. RECENT LEGISLATION & LITIGATION OUTCOMES,

provisions to the CVRA that allowed municipalities to transition to district-based voting by ordinance without necessitating approval by a costly ballot measure.³⁹ The legislature also created safe-harbor provisions to encourage municipalities and jurisdictions to adopt district-based voting in response to complaints of voter dilution caused through at-large voting systems.⁴⁰

Additionally, in 2018, California joined five states and the District of Columbia in implementing automatic voter registration (AVR). AVR expands voter registration by allowing eligible voters to seamlessly register to vote when they apply or renew their state identification or driver's license, or update their address, essentially, "[w]hen eligible voters visit a government office, such as a state's department of motor vehicles, they are automatically registered to vote unless they decline."⁴¹ Further, the state extended voter registration through election day to allow voters who faced registration challenges to still participate.⁴² The state also expanded early voting at specific locations, with early voting beginning 29 days before the election and ending the day before the election.⁴³ Such an expansion in the time frame of voting allows individuals more flexibility when determining their voting availability. The idea behind such measures is that by decreasing

LEAGUE OF CALIFORNIA CITIES 3 (2018) (citing Cal. Elec. Code § 14026(e), §§ 14028(b)-(d)), available at <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Spring-Conference-2018/5-2018-Spring-Aziz-Johnson-Markman-California-Vot.aspx>.

³⁹ CAL. GOV'T CODE § 34886.

⁴⁰ CAL. ELEC. CODE § 10010. Effective 2017, a person challenging a jurisdictions' electoral system as violating the CVRA must give notice to a jurisdiction of a potential violation of CVRA, after which the jurisdiction has a certain time period to respond as well as to propose changes to their electoral system. *Id.* at § 10010(e). This includes provisions requiring the jurisdiction to hold public hearings on the matter to seek input on changes to the electoral system. *Id.* at § 10010(a).

⁴¹ Wendy Weiser and Max Feldman, *The State of Voting 2018*, BRENNAN CTR. FOR JUS. (June 5, 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf.

⁴² John Myers, *More eligible Californians voted in November's election than any time since 1952*, L.A. TIMES (Dec. 11, 2020, 4:54 PM), <https://www.latimes.com/california/story/2020-12-11/record-turnout-california-november-2020-election>; see John Myers, *Californians can register to vote on election day at any polling place under new law*, L.A. TIMES (Oct. 8, 2019, 8:33 PM), <https://www.latimes.com/california/story/2019-10-08/californians-register-to-vote-any-polling-place-2020-new-law> (noting that roughly six million Californians at the time were not registered to vote despite being eligible meaning laws like this can have significant impacts on races at all levels, most importantly the local level).

⁴³ *State Laws Governing Early Voting*, NAT'L CONF. OF STATE LEGS. (June 11, 2021), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

potential barriers to voting registration, more voters will register and in turn there will be greater voter engagement.

Another significant change in California election law is the adoption of the Voter's Choice Act (VCA) in 2016. The new law "modernizes elections in California by allowing counties to conduct elections under a model which provides greater flexibility and convenience for voters."⁴⁴ The law requires that every active registered voter receive a ballot in the mail, expands in-person early voting and allows voters to cast their ballot at any voting location in their county. Voters also have the option to return their ballot at a drop box or by mail.⁴⁵ The California Secretary of State's report to the State Legislature on the VCA's implementation during the November 2018 General Election found that while turnout in VCA counties was higher than non-VCA counties, preliminary data on race and ethnicity showed that white voters turned out at the highest rates (75.3%) and Latino voters turned out at lower rates (61.8%). Additionally, even though voters had the option to mail back their ballots, 48% of ballots were dropped off, while 43% were returned by mail.⁴⁶ Five counties adopted the VCA in the 2018 election cycle representing 6.96% of the state's registered voters, and 15 counties adopted the model for the 2020 election cycle, representing over half of the electorate. However, due to the COVID-19 pandemic, only the 2020 Primary Election was held under the Voter's Choice Act model; counties had a slightly modified VCA model for the 2020 General Election.

The most recent and notable change to California election law came in the form of expanding the state's mail ballot delivery program in light of the COVID-19 pandemic. California sent every active registered voter a ballot by mail for the 2020 General Election, regardless of whether they requested one.⁴⁷ To further support voters during the pandemic, the state extended the cutoff date

⁴⁴ *California Voter's Choice Act*, CAL. SEC'Y OF STATE, <https://www.sos.ca.gov/elections/voters-choice-act> (last visited Oct. 6, 2021).

⁴⁵ CALIFORNIA VOTER'S CHOICE ACT QUICK FACTS, CAL. SEC'Y OF STATE 1 (2021), available at <https://elections.cdn.sos.ca.gov/vca/vca-quickfacts.pdf>.

⁴⁶ CALIFORNIA VOTER'S CHOICE ACT NOVEMBER 6, 2018 GENERAL ELECTION REPORT, CTR FOR ELECTION INNOVATION & RSCH 40 (2018), available at <https://elections.cdn.sos.ca.gov/vca/2020/vca-november-2018-general-election-report.pdf>.

⁴⁷ Jeremy White, *California enacts November mail-ballot law—with surprising GOP support*, POLITICO (June 18, 2020, 1:10 PM), <https://www.politico.com/states/california/story/2020/06/18/california-lawmakers-pass-november-mail-ballot-bill-with-surprising-gop-support-1293679>.

for receiving ballots and allowed for those ballots postmarked by election day and received within 17 days of the election to count as valid.⁴⁸ These changes had a dramatic impact on the state voting process, as more than 87% of California voters cast a ballot via the mail-in method in the 2020 general election, and overall the state had a historic turnout of 71% of eligible voters casting a ballot.⁴⁹ (However, it is important to note that while there was an increase in vote-by-mail use, Latino voters had a higher use of in-person voting compared to the general population.⁵⁰) The success of these laws in increasing voter access motivated further action: The Governor recently signed a bill making permanent the emergency safety measures and ensuring that active registered voters in California receive a ballot in the mail for all future elections.⁵¹ Additionally, the new law allows ballots received no later than seven days after election day to count.⁵²

⁴⁸ John Myers, *More eligible Californians voted in November's election than any time since 1952*, L.A. TIMES (Dec. 11, 2020, 4:54 PM), <https://www.latimes.com/california/story/2020-12-11/record-turnout-california-november-2020-election>.

⁴⁹ Reid Wilson, *California governor extends all-mail voting through a potential recall*, THE HILL (Feb. 22, 2021), <https://www.msn.com/en-us/news/politics/california-governor-extends-all-mail-voting-through-a-potential-recall/ar-BB1dUk30>; *Historical Voter Registration and Participation in Statewide General Elections 1910-2020*, CAL. SEC'Y OF STATE, <https://www.sos.ca.gov/elections/statistics> (last visited Aug. 25, 2021).

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See generally CALIFORNIA'S CHANGING ELECTORATE: A 2020 POSTELECTION ANALYSIS OF VOTING BEHAVIOR, CTR OF INCLUSIVE DEMOCRACY (2021), *available at* <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/612dd3632b33f91f9853933f/1630393191825/USC+CID+2020+GENERAL+ELECTION+RESEARCH+REPORT+8-27-21+WEBSITE+RELEASE.pdf>. ("In California, Asian-American voters (40.1%; 729,303 ballots) sent their VBM ballots through the mail at higher rates than Latino voters (30.1%; 1,256,219 ballots) and all voters (33.5%; 5,772,616 ballots). Latino voters voted in person (15.9%; 663,921 ballots) and by dropping off their VBM ballot at a voting location (19.5%; 814,045 ballots) at higher rates than Asian-American voters (8.7%; 159,078 ballots and 12.9%; 234,158 ballots respectively) and all voters (12.6%; 2,167,488 ballots and 16.4%; 2,822,061 ballots respectively). Asian-American voters (38.3%; 696,086 ballots) had similar drop box use rates as the general population (37.6%; 6,474,134 ballots), while Latino voters had lower drop box use rates at 34.6% (1,445,456 ballots).")

⁵¹ *Governor Newsom Signs Landmark Elections Legislation Making Vote-by-Mail Ballots Permanent for Every Registered Voter, Strengthening Elections Integrity*, OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 27, 2021), <https://www.gov.ca.gov/2021/09/27/governor-newsom-signs-landmark-elections-legislation-making-vote-by-mail-ballots-permanent-for-every-registered-voter-strengthening-elections-integrity/>.

⁵² CAL. ELEC. CODE § 3000.5.

In Colorado, where vote-by-mail has been used widely since at least 2013, Stanford University researchers found that mail ballot delivery programs have positive effects among voters aged 30 and younger, voters without a high school diploma, voters with less wealth, and minority voters. The Stanford political scientists looked *inter alia* at election results from elections conducted through mail ballot delivery, and found that this model makes it easier for eligible individuals to vote and increases electoral participation.⁵³ For those voters without transportation, childcare, time off from work, or financial means to drive to polling places and wait in line, mail-in voting has offered a tangible answer to increase voter engagement across all communities in the state.⁵⁴ Similarly, a September 2020 study by the Public Policy Institute of California found increases in turnout in the 2018 and 2020 primary elections in California in those counties that enacted reforms under the VCA, including increases in turnout for both in-person and through mail ballot delivery.⁵⁵ That same study also indicated, however, that turnout was not consistent across all demographic groups over both elections, as “young people showed stronger turnout under the VCA in 2018 but lower turnout in 2020, while by-mail Latinos and Asian Americans saw turnout decline in 2018 but increase in 2020.”⁵⁶

California enacted further laws to support the growing use of mail-in ballot voting in the state. In addition to sending mail-in ballots to every eligible voter, election officials are also required to deliver all supplies necessary for the use and return of the ballot, including prepaid postage and an

⁵³ See Melissa DeWitte, *Stanford scholars find no partisan advantage of mail-in, absentee voting but other challenges lie ahead*, STANFORD NEWS (Sept. 3, 2020), <https://news.stanford.edu/2020/09/03/examining-effects-challenges-mail-in-voting/> (“Colorado’s experience demonstrates that all-mail voting is not only safer than in-person voting but also better for democratic representation, with all age, income, race, occupational and education groups benefitting from its introduction.”).

⁵⁴ All preliminary at the time of this report, indications are that the September 14, 2021 recall election also saw relatively high turnout for an off-cycle election, including millions of votes cast by mail. See Nate Cohn, *With polls still open in California, millions of votes have been received so far*, THE N.Y. TIMES (Sept. 14, 2021), available at <https://www.nytimes.com/2021/09/14/us/elections/recall-election-democratic-voter-turnout.html>.

⁵⁵ HOW GREATER VOTE-BY-MAIL INFLUENCES CALIFORNIA VOTER TURNOUT, PUB. POL’Y INSTITUTE OF CAL. (2020), available at <https://www.ppic.org/wp-content/uploads/how-greater-vote-by-mail-influences-california-voter-turnout-september-2020.pdf>.

⁵⁶ *Id.* The authors of the report concluded that “[t]hrough their turnout is not consistently lower, the potential for lower turnout in these groups suggests they should receive more outreach as well.” *Id.* at 10.

identification envelope.⁵⁷ Individuals can track their mail-in ballots and receive information about their ballot through a state run system, increasing transparency of the voting process and reassuring voters that their votes are counted.⁵⁸ Election officials are also not allowed to exclude ballots solely because of a missing or mismatched signature.⁵⁹ Instead election officials are required to send voters a signature verification statement and provide voters the opportunity to provide a corrected signature.⁶⁰ With these new laws, California lawmakers have aimed to expand access, increase transparency, and decrease barriers that otherwise have hindered or prevented individuals from all communities from voting.

However, the future continuation of this trend of easing access to the ballot in California is not a foregone conclusion. Prior to the 2020 election, lawmakers from Orange County proposed legislation in the California State Assembly that would have required county courts to provide juror information to local elections boards with the intent to potentially purge voter rolls based on the information received from the county courts.⁶¹ The putative reason for the proposed legislation was to prevent “voter fraud” despite the absence of evidence that fraud was occurring in connection with California elections. This proposed law is one example of why overarching voting rights legislation is still vitally important in all states. Even with the additional measures put in place, there are still tangible threats to voting rights that need both state and federal protection.

⁵⁷ Samantha Solomon, *California’s new voting laws, explained*, ABC 10 (Dec. 12, 2018, 1:19 PM), <https://www.abc10.com/article/news/politics/elections/californias-new-voting-laws-explained/103-623207200>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ CAL. ELEC. CODE § 3019.

⁶¹ Brooke Staggs, *New bill takes aim at voter fraud; raises concern about voter suppression*, THE ORANGE CNTY REG. (Feb. 27, 2020, 5:57 PM), <https://www.ocregister.com/2020/02/27/new-bill-takes-aim-at-voter-fraud-raises-concerns-about-voter-suppression/>.

iii. Court findings regarding voting rights in California.

Outside of Section 5 enforcement actions and litigation, other provisions of the VRA and the CVRA consistently present plaintiffs with the vehicle to remedy voting rights violations. Indeed, in California, activity under the CVRA regarding voter dilution remains prevalent.⁶²

(a) *Voter Discrimination and Dilution Litigation*

In *Luna v. County of Kern*, plaintiffs alleged that the county's 2011 redistricting plan violated Section 2 of the Voting Rights Act because it impermissibly diluted the Latino vote in Kern County by depriving Latino voters of a second district in which they would constitute a majority of eligible voters and elect a candidate of their choice.⁶³ At trial, Stanford University historian Albert Camarillo explained the history of racism in Kern County, which included extensive influence from the Ku Klux Klan and numerous atrocities that Latinos, Blacks, and other individuals of color faced.⁶⁴ The court agreed with the plaintiffs and found that the county's redistricting plan deprived Latino voters equal opportunity to elect representatives of their choice and equal opportunity in the voting process, violating Section 2 of the Act.⁶⁵ This lawsuit, which was settled in 2018 and was the first in California since 2001 to claim a VRA violation, shows the importance of providing individuals an avenue to seek redress.⁶⁶

⁶² See generally THE CALIFORNIA VOTING RIGHTS ACT, RECENT LEGISLATION & LITIGATION OUTCOMES, LEAGUE OF CAL. CITIES (2018), available at <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Spring-Conference-2018/5-2018-Spring-Aziz-Johnson-Markman-California-Vot.aspx>.

⁶³ *Luna v. County of Kern*, 291 F. Supp. 3d 1088, 1104 (E.D. Cal. 2018).

⁶⁴ *Luna v. County of Kern: MALDEF and Latino Voters Achieve Landmark Victory*, MALDEF (Mar. 26, 2019), <https://www.maldef.org/2019/03/kern-country-voting-rights/#:~:text=LUNA%20V.%20COUNTY%20OF%20KERN%3A%20MALDEF%20AND%20LATIN O,rigged%20political%20system%20to%20exploit%20Latinos%20for%20decades>.

⁶⁵ *Luna*, 291 F. Supp. 3d at 1044.

⁶⁶ *Luna v. County of Kern: MALDEF and Latino Voters Achieve Landmark Victory*, MALDEF (Mar. 26, 2019), <https://www.maldef.org/2019/03/kern-country-voting-rights/#:~:text=LUNA%20V.%20COUNTY%20OF%20KERN%3A%20MALDEF%20AND%20LATIN O,rigged%20political%20system%20to%20exploit%20Latinos%20for%20decades>.

In addition to cases alleging violations of the VRA,⁶⁷ California also saw numerous cases alleging violations of the CVRA since the 2006 Report. Many of these cases deal with the election systems themselves and the disadvantages they place on minority voters.⁶⁸ In *Jauregui v. City of Palmdale*, plaintiffs claimed that Palmdale's at-large election of city council members resulted in racially polarized voting, diluting the votes of Latino and Black residents and denying them effective political participation in elections to the city council.⁶⁹ "Plaintiffs' expert and defendant's expert studied the [council] and mayoral election results for [defendant] since 2000. During that period, only one Latino candidate was elected and no African-American candidates were elected. [T]he one Latino candidate was elected in 2001, and none since. The failure of minority candidates to be elected to office does not by itself establish the presence of racially polarized voting. However, the regression analysis undertaken by both experts nevertheless established a clear history of a difference between choice of candidates preferred by the protected class in the choice of the non-protected class."⁷⁰ The trial court found that such a system and the resulting dilution effects violated California law, and the court preliminarily enjoined the city from holding an upcoming at-large election.⁷¹

⁶⁷ In a pre- *Shelby County v. Holder* decision, the plaintiff in *Wooten v. City of Stockton* alleged that the City of Stockton, as a political subdivision of San Joaquin County, California, altered its voting practices and procedures after 1968, without first obtaining "preclearance" from the federal government in violation of the VRA. On summary judgment, the Court held that neither San Joaquin County nor the City of Stockton were covered jurisdictions subject to the preclearance provisions of section 5, and that plaintiff's claim that defendant failed to comply with section 5 failed as a matter of law. See *Wooten v. City of Stockton*, No. CIVS062789FCDEFBPS, 2008 WL 364609, at *3 (E.D. Cal. Feb. 11, 2008), *report and recommendation adopted*, No. CIV-S-06-2789FCDEFBP, 2008 WL 595884 (E.D. Cal. Mar. 3, 2008).

⁶⁸ See *Higginson v. Becerra*, 363 F.Supp.3d 1118 (S.D. Cal. 2019) (finding there was no racial gerrymandering despite plaintiff's complaint that the city of Poway adopting by-district elections diluted the ability of Latinos to elect candidates of their choice and influence elections); *see also Yumori-Kaku v. City of Santa Clara*, 273 Cal. Rptr. 3d 437 (Cal. Ct. App. 2020) (holding that at-large elections for Santa Clara violated the California Voting Rights Act because it denied Asian American residents the ability to elect their preferred candidates).

⁶⁹ *Jauregui v. City of Palmdale*, 266 Cal.App.4th 781 (Cal. Ct. App. 2014).

⁷⁰ *Id.* at 790.

⁷¹ *See id.* at 791 ("Plaintiffs' evidence established that racially polarized voting occurred in the city council elections.").

In *Le v. City of Santa Ana*, the plaintiff brought an action for declaratory and injunctive relief against the City of Santa Ana for violation of the CVRA. The plaintiff alleged that because of the racially polarized voting in Santa Ana elections, the City's at-large method electoral system prevented Asian American voters from electing their candidates of choice and influencing the outcome of City elections.⁷² The plaintiff argued that although Asian Americans in Santa Ana made up approximately 11% of the population and 17.2% of the citizen voting age population, no Asian American served on Santa Ana's City Council.⁷³ The plaintiff further argued that the overall absence of any Asian American representatives on the City Council, even though prior Asian American candidates were the preferred candidate of Asian American voters, revealed the Asian American community's lack of meaningful access to the political process in Santa Ana.⁷⁴ The plaintiff sought declaratory relief that the defendants' imposition or application of an at-large method of election to elect its City Council violated the CVRA and that the adoption of an alternative election system that complied with the CVRA was required to remedy the violation.⁷⁵ The plaintiff further sought injunctive relief: 1) prohibiting the defendants from imposing or applying the current at-large method of election to elect the City Council, as well as declaring and/or certifying the results of such an at-large election; and 2) mandating that the defendants imposed and/or applied a district-based election system, including the adoption of fairly constituted districts that did not dilute or abridge Asian American voting strength or otherwise discriminate against Asian Americans, or other alternative relief tailored to remedy the defendants' violation of the CVRA.⁷⁶ In October 2018, the parties entered into a settlement agreement.⁷⁷ The settlement agreement required the city defendants to adopt a by-district electoral map, which they did on December 4, 2018 through a city ordinance.⁷⁸ Further, due to the lawsuit and subsequent

⁷² Complaint at 1-2, *Theresa Le v. City of Santa Ana and Maria D. Huzar*, Case No. 30-2018-00988425-CU-CR-CJC 2 (Cal. Super. Ct. Apr. 25, 2018).

⁷³ *Id.* at 2.

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.*

⁷⁷ Joint Stipulation at 1, *Theresa Le v. City of Santa Ana and Maria D. Huzar*, Case No. 30-2018-00988425-CU-CR-CJC 2 (Cal. Super. Ct. Dec. 18, 2018).

⁷⁸ *Id.*

settlement, the first by-district elections for council seats took place in November 2020 for half of the city wards, resulting in the election of an Asian American councilmember.⁷⁹ By-district elections will take place in the remaining city wards in November 2022.⁸⁰

Pico Neighborhood Association v. City of Santa Monica also addressed the question of whether at-large elections in that city violated the CVRA.⁸¹ In this case the plaintiffs claim that the city enacted an at-large election system to intentionally dilute Latino voting power and to deny Latinos effective political participation in city council elections, preventing Latino residents from electing candidates of their choice or influencing election outcomes.⁸² Expert witnesses for both the plaintiffs and defendants revealed “a consistent pattern of racially polarized voting.”⁸³ The court noted that “[i]n most elections where the choice is available, Latino voters strongly prefer a Latino candidate running for Defendant’s city council, but despite that support, the preferred Latino candidate loses.”⁸⁴ While the trial court found for the plaintiffs that these actions violated both the CVRA and the California Constitution, the Court of Appeals reversed the trial court’s decision.⁸⁵ The Court of Appeals found that an at-large voting system did not dilute Latino votes because the result with a district-based and at-large based voting system would be the same because there is

⁷⁹ *City Ward Map Re-Boundary Process and Information*, THE CITY OF SANTA ANA, <https://www.santa-ana.org/cc/ward-map-re-boundary> (last visited Oct. 7, 2021); *Councilmember Thai Viet Phan*, THE CITY OF SANTA ANA, <https://www.santa-ana.org/mayor-and-city-council/thai-viet-phan> (last visited Oct. 7, 2021).

⁸⁰ *City Ward Map Re-Boundary Process and Information*, THE CITY OF SANTA ANA, <https://www.santa-ana.org/cc/ward-map-re-boundary> (last visited Oct. 7, 2021).

⁸¹ *Pico Neighborhood Ass’n v. City of Santa Monica*, 265 Cal. Rptr. 3d 530 (Cal. Ct. App. 2020).

⁸² *Pico Neighborhood Ass’n*, 265 Cal. Rptr. 3d at 533-34; Brief for the UCLA Voting Rights Project as Amicus Curiae, p. 16-17, *Pico Neighborhood Association v. City of Santa Monica*, No. S263972 (June 11, 2021). “Evidence of racially polarized voting is sufficient to prove vote dilution because the existence of racially polarized voting in a political subdivision demonstrates harm that is contemporaneously occurring to the minority group. Evidence of racial polarization in voting reveals that minority votes and/or the ability of the minority to influence elections are being diluted. If minority voters in an at-large system—of any race or ethnicity—are trying to elect their candidates of choice or influence the outcome of elections through cohesive voting patterns, but the majority voting population bloc votes against their choice, that is evidence of vote dilution.”

⁸³ *Pico Neighborhood Ass’n*, 265 Cal. Rptr. 3d at 541.

⁸⁴ Sam Catanzaro, Judge Orders Santa Monica to Switch to District Elections, WESTSIDETODAY.COM (Feb. 18, 2019), <https://westsidetoday.com/2019/02/18/santa-monica-crva-ruling/>.

⁸⁵ *Pico Neighborhood Ass’n*, 265 Cal. Rptr. 3d at 556.

not a big enough percentage of Latino voters either way to determine the outcome of the election.⁸⁶ As this report goes to publication, the parties await a decision from the California Supreme Court after the Court granted review in late 2020.⁸⁷

Most recently, in December 2020, a California appellate court unanimously affirmed a trial court decision finding that the City of Santa Clara's at-large voting procedure did violate the CVRA. In *Yumori-Kaku et al. v. City of Santa Clara*, the Superior Court found that system violated voting rights laws by diluting minority votes and ordered the City to replace its at-large City Council election system with six single-member districts.⁸⁸ The appellate court affirmed the Superior Court's findings of statistical evidence of racially polarized voting and rejected Santa Clara's arguments, including that the CVRA violated the U.S. and California Constitutions.⁸⁹

(b) Language Access

1. Litigation

Section 203 of the VRA requires that certain jurisdictions provide language assistance to language minority groups so they have adequate access to the ballot. Since the reauthorization of the VRA in 2006, there have been three cases brought by the DOJ to enforce Section 203 in California.

In 2011, the DOJ filed a Section 203 complaint against Alameda County for failing to implement an effective language assistance program for Spanish and Chinese-speaking voters, including the

⁸⁶ *Id.* at 555-56.

⁸⁷ *Pico Neighborhood Ass'n v. City of Santa Monica*, 270 Cal. Rptr. 3d 45 (Cal. 2020); Petitioner's Opening Brief, p. 72-73, No. S263972. Plaintiffs argue in their brief to the California Supreme Court that the California Voting Rights Act prompted immense progress in wiping out discriminatory at-large voting schemes, but the Court of Appeals' decision threatens to erase that progress. "This case presents the Court with its first and best opportunity to make crystal clear what the CVRA stands for and requires—that no at-large system may deny the rights of minority voters through racially polarized voting when there is an alternative election system that will allow these voters to elect candidates of their choice or to influence the outcome of the elections."

⁸⁸ Carolyn Schuk, *CVRA Appeal: Santa Clara's Challenge To Voting Rights Law Loses, Court Upholds Established Precedent*, THE SILICON VALLEY VOICE (Dec. 30, 2020, 3:08 PM), <https://www.svvoice.com/cvra-appeal-santa-claras-challenge-to-voting-rights-law-loses-court-upholds-established-precedent/>.

⁸⁹ *Yumori-Kaku v. City of Santa Clara*, JUSTIA, <https://law.justia.com/cases/california/court-of-appeal/2020/h046105.html> (last visited Sept. 1, 2021).

failure to hire, train and properly assign qualified bilingual poll workers, and to translate and disseminate all written election material and information.⁹⁰ Alameda County had been continuously covered under Section 203 for Spanish and Chinese languages since 1992. The resulting consent decree required the County to provide more robust language assistance in Spanish and Chinese, as well as any new languages that become covered under Section 203.⁹¹ The consent decree included federal observers to monitor future elections.

In 2010, the DOJ filed a complaint against Riverside County alleging Section 203 noncompliance for the failure to implement an effective language assistance program for Latino voters.⁹² A memorandum of agreement was filed at the same time as the complaint, which provided for translation and dissemination of translated election-related materials, language assistance in Spanish throughout the election process, including at the poll sites on election days, federal observers, a program coordinator and outreach to, and engagement of, community groups, among other requirements.⁹³ On April 30, 2010, the three-judge panel entered an order granting the joint motion for extension of time for defendants to answer the complaint and authorizing federal observers to monitor Riverside County elections through March 31, 2013.⁹⁴

In 2007, the DOJ filed a Section 203 complaint against the City of Walnut, California for the failure to translate election materials, provide language assistance, and publicize the availability of language assistance for Limited English Proficiency (LEP) Chinese and Korean voters.⁹⁵ The court entered a consent decree that provided for: 1) translation of election-related materials; 2) dissemination of minority language information; 3) oral language assistance, including at poll sites

⁹⁰ Complaint, *United States v. Alameda County*, CA 3 (N.D. Cal. 2011), *available at* https://www.justice.gov/crt/about/vot/sec_203/documents/alameda_comp11.pdf.

⁹¹ *Id.*

⁹² Complaint, *United States v. Riverside County*, CA (C.D. Cal. 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/riverside_comp.pdf.

⁹³ Memorandum of Agreement, *United States v. Riverside County*, CA (C.D. Cal. 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/riverside_moa2.pdf.

⁹⁴ Order, *United States v. Riverside County*, CA (C.D. Cal. 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/riverside_order.pdf.

⁹⁵ Complaint, *United States v. City of Walnut*, CA (C.D. Ca. 2007), *available at* https://www.justice.gov/crt/about/vot/sec_203/documents/walnut_comp.php.

on election days; 4) the hiring of a program coordinator for each language; and 5) the creation of an advisory committee per language for LEP Chinese and Korean voters.⁹⁶ The consent decree further provided for the development of plans to provide assistance to other language groups in accordance with the agreement, specified specific poll worker training requirements and a mechanism to address complaints about poll workers, and the appointment of federal observers.⁹⁷

A notable case during this time period related to language access in California came in 2019 in *Asian Americans Advancing Justice-Los Angeles v. Padilla*.⁹⁸ The plaintiffs claimed that the California Secretary of State improperly conflated the state threshold requirement for language assistance for minority voters with the federal threshold which improperly denied thousands of residents language assistance during voting and in turn violated California election code.⁹⁹ The plaintiffs further alleged that the Secretary of State only applied language assistance to certain precincts where the threshold was met, rather than county-wide which resulted in “the denial of language assistance to an estimated 80,141 Californians” that were eligible for assistance under state law.¹⁰⁰ The plaintiffs also claimed that referencing the VRA when determining the definition of “single language minority” was improper as the federal definition is both under- and over-inclusive and would exclude multiple minority groups from assistance.¹⁰¹

While both the trial court and Court of Appeals found that the precinct-based focus of language determination was consistent with the statutory framework, the Secretary was found ultimately to have erred when imputing federal requirements onto state requirements.¹⁰² Because state law does

⁹⁶ Consent Decree, *United States v. City of Walnut, CA* (C.D. Ca. 2007), available at https://www.justice.gov/crt/about/vot/sec_203/documents/walnut_cd.php.

⁹⁷ *Id.*

⁹⁸ *Asian Americans Advancing Justice-Los Angeles v. Padilla*, 41 Cal.App.5th 850 (Cal. Ct. App. 2019).

⁹⁹ See *id.* at 854, 858. Under California election law, the Secretary of State determines the number of eligible voters in each county and precinct who are members of a single language minority and who need language assistance in voting. If this number equals or is above three percent, the Secretary of State needs to provide language assistance materials, which include a facsimile copy of the ballot with the instructions and measures printed in the applicable language in the specific affected polling places, and a copy of the ballot made available to voters for reference when casting their own ballot.

¹⁰⁰ *Id.* at 860.

¹⁰¹ *Id.* at 860-61.

¹⁰² *Id.* at 870-71.

not define “single language minority,” “language minorities,” or “language minority groups,” the Secretary properly referenced the federal Act’s definitional language according to the court.¹⁰³ The problem was that in addition to referencing the language requirements from the VRA, the Secretary also applied the 5% federal percentage threshold for precinct language assistance to certain precincts or counties instead of the 3% state percentage threshold, confusing the definitional language and the coverage requirements.¹⁰⁴ The court found that by grounding the threshold determination in the VRA’s language, the Secretary violated state law by not following the clear directive of the California statute and erred in the coverage determinations, declining thousands of Californians language coverage in the process.¹⁰⁵ The ruling expanded coverage to 14 Asian languages that had not been covered under state or federal law.¹⁰⁶

In *Heredia v. Santa Clara County*, the plaintiffs alleged that the promotion of an initiative to limit development violated Section 203 of the VRA because the initiative was not presented to the public in Spanish, Chinese, Vietnamese, and Tagalog.¹⁰⁷ Plaintiffs moved for a preliminary injunction.¹⁰⁸ The District Court recognized that Section 203 was passed to remedy the exclusion of citizens of language minorities from participation in the electoral process.¹⁰⁹ However, the Court ultimately

¹⁰³ *Id.* at 871-75.

¹⁰⁴ *See id.* at 876-77. California’s statutory percentage threshold for language assistance is 3% of eligible voters in a county or precinct, while the federal requirements are 5%.

¹⁰⁵ *Id.* at 877.

¹⁰⁶ *Court Rules to Expand Language Access for California’s Limited-English Proficient Voters*, ASIAN AMERICANS ADVANCING JUST.-ASIAN LAW CAUCUS (Nov. 4, 2019), https://www.advancingjustice-alc.org/news_and_media/court-rules-to-expand-language-access-for-californias-limited-english-proficient-voters/.

¹⁰⁷ *Heredia v. Santa Clara Cty.*, No. C-06-04718 RMW, 2006 WL 2547816 at *2 (N.D. Cal. Sept. 1, 2006).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at fn. 4 (“Plaintiffs Kirk and Stone lack standing to pursue claims under section 203. For a plaintiff to have standing, ‘the [Supreme] Court has required that the plaintiff’s complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’” *Smelt v. County of Orange*, 447 F.3d 673, 683 (9th Cir. 2006) (internal quotation marks omitted). Congress described the problem it sought to remedy with section 203 as “citizens of language minorities have been effectively excluded from participation in the electoral process.” 42 U.S.C. § 1973aa-1a(a). Section 203 was designed to include non-English-speakers in the electoral process. Kirk and Stone are (presumably English-speaking) landowners, and their allegations of harm center on restrictions the initiative, if passed,

opined that it was not likely that plaintiffs would demonstrate a likelihood of success on the merits of their claim because it was not likely that the promotion of the private initiative would be found to involve “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process provided by Santa Clara County within the meaning of Section 203.”¹¹⁰ The court denied the injunction and reasoned that although the plaintiffs demonstrated some threat of irreparable harm in that two of the plaintiffs would be illegally excluded from the electoral process if the initiative was subject to the VRA, the balance of hardships favored the defendants.¹¹¹ Specifically, if the court incorrectly enjoined the defendants from including the initiative on the ballot, the County would incur additional expenses of reprinting the election materials and notifying voters of the change.¹¹² Further the public interest did not favor an injunction because if the court incorrectly enjoined defendants from including the initiative, the Court would have improperly interfered with the voting rights of Santa Clara County voters.¹¹³

In *Padilla v. Lever*, the Ninth Circuit considered whether recall petitions violated the VRA when they were provided only in English.¹¹⁴ The court held that the recall petitions circulated by proponents of the recall were not subject to the VRA’s requirements because they were not “provided” by Orange County or the State.¹¹⁵ The court reasoned that although those who circulated recall petitions had an incentive to gather as many signatures as they could, they were under no legal duty to do so, just as they were under no legal duty to launch a recall process in the first place. Further, since the VRA created no duty to present a petition to the plaintiffs in the first place, it was difficult to reason why the VRA would require the petition to be translated into other languages. Finally, the court opined that, “a translation requirement is very likely to have a chilling effect on the petition process itself. If translation is required in Orange County, recall petitions

would place on development of land they own. Their interests are not those Congress sought to protect when passing section 203.”).

¹¹⁰ *Id.* at *2.

¹¹¹ *Id.* at *3.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Padilla v. Lever*, 463 F.3d 1046, 1049 (9th Cir. 2006).

¹¹⁵ *Id.* at 1050.

will have to be printed, at a minimum, in English, Spanish, Vietnamese, Korean and Chinese. There is no provision in state law or the Voting Rights Act requiring the County to bear the costs; printing of recall petitions is done at the expense of the proponents, as in the present case. The expense and trouble of fulfilling the translation requirements are likely to deter proponents who otherwise would launch petitions. When that happens, then application of § 1973aa-1a will have had a perverse effect: it will have prevented, rather than promoted, participation in the electoral process.”¹¹⁶

Relying on the Ninth Circuit’s decision in *Padilla v. Lever*, the District Court in *In re County of Monterey Initiative Matter*, held that although Monterey County was subject to the VRA and required to provide voting materials in English and Spanish, the citizen-sponsored petitions at issue in Monterey County were not required to be in Spanish and English.¹¹⁷ The Court reasoned that the referendums at issue were privately initiated, drafted, and circulated by its proponents and thus not subject to Section 203’s language requirements for states or political subdivisions.¹¹⁸

2. Failure to Provide Language Assistance

Extensive engagement with elected officials and poll monitoring operations in California have shown that the failure to adequately provide language assistance is an ongoing problem, even when it does not give rise to litigation.

For example, in the months leading up to the November 2020 election, Arabic-speaking residents of Fresno County voiced their concerns about their ability to vote when the county does not provide Arabic language voting materials.¹¹⁹ Despite multiple letters from the Council on American-Islamic Relations and the American Civil Liberties Union of Northern California outlining the need for these materials, county and state officials noted that they could not provide the materials

¹¹⁶ *Id.* at 1053.

¹¹⁷ *In re Cty. of Monterey Initiative Matter*, No. C 06-01407 JW, 2007 WL 9811086, at *1 (N.D. Cal. Mar. 29, 2007).

¹¹⁸ *Id.* at *7-9.

¹¹⁹ Crensencio Rodriguez-Delgado, *Should Fresno County allow Arabic-language voting information on the 2020 ballot?*, THE FRESNO BEE (Aug. 19, 2020, 2:19 PM), <https://www.fresnobee.com/news/local/article244934427.html>.

in 2020.¹²⁰ Currently, only one California county requires Arabic language voting materials, even though the state has the largest Arab American population in the country according to the Census Bureau.¹²¹ Despite the potential for adding these materials in the future, the status quo has resulted in many Arabic-speaking voters lacking the necessary support to cast their ballots.

Additionally, during the November 2010 election, Asian American advocacy groups conducted a poll monitoring project to assess the VRA compliance of four counties: Alameda County, San Francisco County, San Mateo County, and Santa Clara County. They found that the compliance varied across the counties, with San Francisco County having the best performance of the four, and Alameda County having the greatest difficulties. And while the report found that the Bay Area counties were making strides to improve their language assistance programs, each county still encountered problems and challenges in ensuring their LEP voters had unfettered access to the ballot. For example, while San Francisco developed a promising language assistance program through active planning, recruitment of bilingual workers, and poll worker trainings, it still experienced language access related problems at poll sites with large numbers of Chinese American voters such as physically inaccessible poll sites and failure to provide provisional ballots. San Mateo and Alameda Counties both experienced challenges related to a limited number of bilingual poll workers, failure of existing bilingual poll workers to make their presence and assistance readily known, and failure to provide translated materials at polling locations. Santa Clara County was the only county of the four required to provide language assistance in four languages (Spanish, Chinese, Vietnamese and Tagalog). While they made a concerted effort to meet their requirements, such as providing a large number of bilingual poll workers, there were

¹²⁰

Id.

¹²¹

California, YALLA COUNT ME IN!, <https://yallacountmein.org/states/california#:~:text=The%20Census%20Bureau%20estimates%20the%20statewide%20Arab%20American,to%20California%20came%20from%20Iraq%2C%20Egypt%20and%20Syria.> (last accessed Oct. 6, 2021).

still areas of improvement noted, such as ensuring the display of multilingual materials at poll sites and providing more visible and prominent indications of language assistance availability.¹²²

A national poll monitoring project conducted by Asian Americans Advancing Justice for the 2012 election found that there continued to be problems with the provision of language assistance, even as improvements were being made in counties across California.¹²³ The poll monitoring report found a number of problems across the state including the below.

- Alameda County – Poorly trained poll workers.
- Los Angeles County – Missing bilingual poll workers; missing language signs or translated materials in Khmer and Hindi; incidents of poll workers unnecessarily asking for voters identifications.
- Orange County – Poll workers refusing to provide bilingual materials or indicating none available; missing or hidden translated ballots and voter guides; 31% of precincts targeted had no translated ballots in Vietnamese displayed.
- Sacramento County – Missing or insufficient space to display translated materials.
- San Mateo County – “XX Language spoken here” signs improperly displayed; poll workers refused to display Chinese language materials.
- Santa Clara County – Voters not offered provisional ballots.

More recent elections continue to show this pattern of uneven compliance with language assistance requirements as well as areas of improvement for the different counties in California.

A statewide poll monitoring project for the 2016 general election by Asian Americans Advancing Justice – Asian Law Caucus found that problems with the provisions of language assistance

¹²² See generally STRENGTHENING DEMOCRATIC PARTICIPATION, ASIAN LAW CAUCUS & ASIAN LAW ALLIANCE (2011), available at <https://www.advancingjustice-alc.org/wp-content/uploads/2012/11/PollMonitoringFINAL.pdf>.

¹²³ See generally VOICES OF DEMOCRACY: ASIAN AMERICANS AND LANGUAGE ACCESS DURING THE 2012 ELECTIONS, ASIAN AMERICANS ADVANCING JUST. (2013), available at <https://futureofcaliforniaelections.org/wp-content/uploads/2020/12/Voices-of-Democracy.pdf>.

remain. Specifically, the report found that while Section 203 translated ballots were readily available at most polling locations, “the additional materials LEP voters might need when voting those ballots” were missing. This was especially pronounced for languages covered by state law.¹²⁴

Generally, the problems identified for the 2016 general election that were related to language access included a lack of sufficient bilingual poll workers, missing or poorly displayed translated materials, and missing or poor signage at voting locations directing voters where to go and explaining what their rights are.

Poll monitors visited communities with concentrations of LEP voters and found that election officials were generally successful in recruiting bilingual poll workers, especially for Section 203 languages. There was less success in finding bilingual poll workers for languages covered by the California Elections Code. While only 8.2% of polling places were missing bilingual poll workers under federal law, 62.1% of locations were missing bilingual poll workers in the languages covered under state law.¹²⁵ A number of problems were found including:

- Alameda County – Elderly Chinese voters needed language assistance, but none of the poll workers present spoke Chinese.
- Kings County – Poll workers sent those who needed bilingual assistance to another polling place.
- Marin County – A voter needed assistance in Spanish, but none of the poll workers present spoke it, so the voter left with intention of coming back later.

¹²⁴ See VOICES OF DEMOCRACY: THE STATE OF LANGUAGE ACCESS IN CALIFORNIA’S NOVEMBER 2016 ELECTIONS, ASIAN AMERICANS ADVANCING JUST. (July 5, 2017), *available at* https://www.advancingjustice-alc.org/wp-content/uploads/2017/05/05042017_AJ_State_of_Language_Report_DIGITAL_FINAL.pdf

¹²⁵ *Id.*

- San Mateo County – Poll monitors reported that many voters were Spanish speakers, but there was no bilingual poll worker on site; poll workers said they were trying to get one by 5:00 PM.
- Los Angeles County – The county had mixed success recruiting and placing bilingual poll workers at the precincts it had targeted for language assistance.

While the poll monitoring project found that translated Section 203 ballots were provided consistently, the translated supplementary Section 203 materials were frequently missing. Poll monitors found that materials such as translated copies of the Voter Bill of Rights, state voter guide, and county sample ballots were not available in 21.9% of polling places observed statewide.¹²⁶ For example:

- Contra Costa County – Lead poll worker indicated they had translated materials “in the back” and that they would display them when they had more time.
- Fresno County – Poll monitors observed two Spanish speakers not being offered Spanish materials; when poll monitor told voters that they could ask for a Spanish ballot, poll monitor was reprimanded and told she could not talk to voters inside the polling place; one Spanish speaker left frustrated but returned with an assister, the assister was told she could only fill out pink provisional form for voter and that she could not help with ballot.
- Orange County – Due to limited table space, translated election materials were on the floor, still in the packaging; LEP voters would have to bend down and pick up materials off the floor if they needed them.
- Riverside County – Poll monitors reported the location was too small to accommodate proper display of materials.
- San Bernardino County – The location was too small to accommodate proper display of translated materials.

¹²⁶ *Id.*

- San Diego County – Poll workers refused to display some translated materials; poll workers at one location reasoned that they did not have to display translated materials since voters in prior years had not requested them.

Additionally, poll monitors found that there was missing or poor signage at voting locations directing voters in covered languages where to go and explain what their rights are. Below are some examples:

- Contra Costa County – Signage not posted.
- Kings County – Poll workers refused to display multilingual materials when advised.
- Mendocino County – No translated signage to inform voters of the languages in which they could receive assistance.
- Sutter County – Poll inspector informed the poll monitor that the “entire community is aware of the location and there was no reason to place” directional signs.¹²⁷

The poll monitoring project also observed some concerning comments from poll workers discriminating against LEP voters.

- Marin County – Lead poll worker made comments to poll monitors that problems did not occur at the polling place but during the registration process, specifically “they let illegals register to vote” and “they think they can come across the border and vote.”¹²⁸
- Santa Cruz County – A Spanish-speaking voter struggled with an English ballot, so poll monitors approached poll workers about offering Spanish assistance; poll workers refused, saying they cannot profile voters or offer any language assistance unless the voter asks for it.

¹²⁷ *Id.*

¹²⁸ *Id.*

- Los Angeles County – One poll worker made a disparaging remark saying that voters should speak some English if they want to vote and should be able to ask for assistance in English.

The next set of Section 203 determinations are scheduled for December 2021. As new jurisdictions and new languages are covered, particularly in a rapidly changing state like California, these issues will continue to impede the ability of LEP voters in California to fully participate in the democratic process.

iv. Consent Decrees & Settlements Regarding Voting Rights in California

Since 2006 there have also been some notable consent decrees and settlements in connection with voting rights in California, primarily in connection with voter dilution and the CVRA. In 2007, plaintiffs in *Avitia, et al. v. Local Healthcare District*,¹²⁹ brought a suit under the CVRA. Like Section 2 of the VRA, the CVRA contains a cause of action for vote dilution. However, the CVRA is broader and not as restrained by the recent judicial limits on Section 2. For example, under the CVRA, plaintiffs are not required to demonstrate that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. In *Avitia*, the plaintiffs complained that even though 47.3% of the district's population had been Latino since 2000, there had only been one Latino member of the Tulare Local Healthcare District's Board of Directors since it was established in 1946. During the litigation, plaintiffs' expert testified that voting was racially polarized in a number of Healthcare District elections and propositions since 1994. However, the Superior Court expressed concern with plaintiffs' statistical data, and denied a preliminary injunction on this ground. After substantial litigation, including motions for summary judgment, to compel, and to dismiss, the parties eventually reached a settlement. The parties agreed to put a proposal on the ballot no later than June 2012 for district, or "zone," elections for the Board of Directors. Upon approval of the proposal, the new plan would go into effect for the November 2012 elections. The court approved this settlement on February 16, 2010.

In 2015, the Mexican American Legal Defense and Educational Fund (MALDEF) sent a demand letter alleging that the Placentia City Council in Orange County, California was in violation of the

¹²⁹ *Avitia, et al. v. Local Healthcare District*, No. 07-224773 (2007).

CVRA due to its practice of using an at-large system for electing city council members. MALDEF alleged that although the city's population was 36% Latino, there were no Latinos on the City Council, and that in the last twenty years, there had only been one Latino member on the Council. In 2016, the parties reached a settlement that required Placentia to convert to district-based elections and adopt a map with traditional districting criteria. The map was also to include one district where Latinos could elect candidates of their choice. In 2018, MALDEF filed a breach of contract action alleging that the City of Placentia had adopted a map that breached the 2016 settlement because the map contained a non-contiguous Latino-majority district, intentionally split up the neighborhoods and communities of interests, and the Latino majority district was not designed to provide Latino voters a meaningful opportunity to elect a candidate of their choice to the City Council.¹³⁰ After the parties reached a settlement on July 18, 2019, on July 23, 2019, the City Council approved a new map, which addressed the issues in MALDEF's lawsuit.¹³¹

Indeed, since the passage of the CVRA, various interest groups and private individuals have used the CVRA to address voter dilution and minority representation in various California municipalities and counties. For example, in April 2021, the City of Santa Clara settled a CVRA lawsuit brought by five Asian Americans in 2017 who alleged that the at-large elections diluted Asian American votes.¹³² Prior to the settlement, the Superior Court in 2018 held that the at-large elections in Santa Clara violated the CVRA and required the city to implement six council districts for council elections.¹³³ The City appealed this decision and lost in December 2020.¹³⁴ Thus, as part of the settlement, the City was required to hold an election for voters to choose whether to amend the City's charter and make the six districts permanent.¹³⁵ Prior to the 2018 Superior Court

¹³⁰ Joseph v. Aguirre v. City of Placentia, 30-2018-00999734-CU-BC-NJC (2018).

¹³¹ MUTUAL RELEASE AND SETTLEMENT AGREEMENT, MALDEF, *available at* <https://www.maldef.org/wp-content/uploads/2019/07/Placentia-Aguirre-Settlement-Agreement-Fully-Executed-with-Exhibit...pdf> (last accessed Sept. 16, 2021).

¹³² *Santa Clara Settles Voting Rights Lawsuit After Spending \$6 Million, Four Years on Legal Battles*, THE MERCURY NEWS, <https://www.mercurynews.com/2021/04/23/santa-clara-settles-voting-rights-lawsuit-after-spending-6-million-four-years-on-legal-battles/> (last accessed Sept. 17, 2021).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

decision, no Asian American had ever been elected to the Santa Clara City Council since the city charter was adopted in 1951.¹³⁶ After the lawsuit and the Superior Court decision, at least three Asian Americans were voted into office as council members.¹³⁷

In 2016, Southwest Voter Registration Education Project filed a challenge against the City of Rancho Cucamonga alleging that the city's at-large district voting system violated the CVRA.¹³⁸ The city ultimately settled with the plaintiff to place a proposal for a transition to district-based voting before voters, who passed the measure in 2016.¹³⁹

In December 2019, Palm Desert, whose population numbers about 51,700 and is 26% Latino, reached a settlement that required it to create two districts and move to a ranked-choice voting system in response to a CVRA lawsuit by two individuals alleging that the "city's at-large voting system prevented Latino residents from electing candidates of their choice or influencing the outcome of Palm Desert's City Council elections."¹⁴⁰

Other California cities that faced voter dilution lawsuits under the CVRA and were subsequently required to adopt district-based voting systems pursuant to a settlement agreement including

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Southwest Voter Registration Education Project, et al. v. City of Rancho Cucamonga, San Bernardino Superior Court Case No. CIVDS1603632.

¹³⁹ THE CALIFORNIA VOTING RIGHTS ACT. RECENT LEGISLATION & LITIGATION OUTCOMES, LEAGUE OF CAL. CITIES 11-12 (2018), available at <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Spring-Conference-2018/5-2018-Spring-Aziz-Johnson-Markman-California-Vot.aspx>. Under the current version of the CVRA, Rancho Cucamonga would not have been required to submit the proposal as a ballot measure but could have enacted an ordinance.

¹⁴⁰ Sherry Barkas, *Lawsuit Seeks Voting Districts In Palm Desert. Other Valley Cities Have Made The Switch. Desert Latest Coachella Valley City Accused Of Violating State Voting Rights Act*, DESERT SUN (June 7, 2019, 4:44 PM), <https://www.desertsun.com/story/news/local/palm-desert/2019/06/07/palm-desert-sued-over-california-voting-rights-act/1387272001/>; Sherry Barkas, *Palm Desert Lawsuit Settlement Includes Two-District Elections; Ranked-Choice Voting System Possible For 2020*, DESERT SUN (Dec. 12, 2019, 5:08 PM), <https://www.desertsun.com/story/news/local/palm-desert/2019/12/12/palm-desert-reaches-california-voting-rights-act-settlement/4410780002/>.

Fullerton, Garden Grove, Buellton, Anaheim, and Morgan Hill.¹⁴¹ Overall, according to a report prepared for the League of California Cities, as of 2018, “[a]t least 88 cities have made the change to by-district elections and two more, the City of Goleta and the City of Carpinteria, agreed to make the change for 2022,” to remedy potential voter dilution issues under the CVRA.¹⁴² As noted in the report, prior to the CVRA, “only 28 cities employed by-district elections.”¹⁴³ Additionally, “[t]hirty two community college districts, over 165 school districts, and at least 12 other special districts have made the change to by-district elections.”¹⁴⁴ Challenges based upon potential voter dilution issues remain very active in California, albeit primarily under the CVRA.¹⁴⁵

C. Other Indicia of Voting Discrimination and Voter Suppression

There remain indicia of potential discrimination in California despite the significant strides described above. For example, an analysis of the 2020 general election by the USC Price School of Public Policy, Center for Inclusive Democracy found that Latino voters—as well as young voters, new voters, and previous polling place voters—had higher rates of rejection of their vote-

¹⁴¹ *City Of Fullerton Settles Voting Rights Lawsuit*, ACLU SOUTHERN CAL. (July 8, 2015), <https://www.aclusocal.org/en/press-releases/city-fullerton-settles-voting-rights-lawsuit>; SETTLEMENT AGREEMENT AND GENERAL RELEASE OF ALL CLAIMS, *available at* <https://ggcity.org/city-files/fully-executed-settlement-agreement-montoya.pdf> (last accessed Sept. 17, 2021); SETTLEMENT AGREEMENT AND GENERAL RELEASE, CITY OF BUELLTON, *available at* <https://cityofbuellton.com/government/documents/Settlement%20Agreement%20-%20SVREP.pdf>, (last accessed Sept. 17, 2021); *City of Anaheim Announces Settlement in California Voting Rights Act Case*, CITY OF ANAHEIM (Jan. 8, 2014), <https://www.american towns.com/news/city-of-anaheim-announces-settlement-in-california-voting-rights-act-case-17596182-anaheim-ca.html>; Michael Moore, *City settles Voting Rights Act lawsuit for \$25K*, THE MORGAN HILLS TIMES (Nov. 22, 2017), <https://morganhilltimes.com/city-settles-voting-rights-act-lawsuit-for-25k/>.

¹⁴² THE CALIFORNIA VOTING RIGHTS ACT. RECENT LEGISLATION & LITIGATION OUTCOMES, LEAGUE OF CAL. CITIES 1 (2018), *available at* <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Spring-Conference-2018/5-2018-Spring-Aziz-Johnson-Markman-California-Vot.aspx>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ MALDEF has threatened legal action in connection with potential voter dilution in the Bueno Park Library District under the CVRA. *See Voting Rights*, MALDEF, <https://www.maldef.org/category/voting-rights/> (last visited Sept. 16, 2021). As noted above, the US Department of Justice does not report any cases raising claims under Section 2 of the Voting Rights Act in California since *United States v. City of Santa Paula, CA* in 2000.

by-mail ballots than the general population.¹⁴⁶ The most common reason attributed to rejection of ballots was a determination of signatures not matching, with Latino and previous polling place voters having the highest rates of ballots being rejected for allegedly non-matching signatures.¹⁴⁷ Asian and Latino voters also saw a greater percentage of their vote-by-mail ballot rejected due to missing signatures.¹⁴⁸ Although further study is warranted to better understand the correlations between race and rejection of ballots, the history of racial discrimination in voting, including involving the Latino population in California, cannot be ignored. Additionally, the evidence indicates that better outreach to historically under-represented communities to educate voters regarding the requirements for vote-by-mail procedures is necessary.¹⁴⁹

Additionally, potential voter suppression activities still exist. The 2016 poll monitoring project by Asian Americans Advancing Justice California found 41 instances of polling places in counties throughout California where poll workers requested to see identification prior to providing voters a ballot despite the fact that California law does not require identification to obtain a ballot.¹⁵⁰ California law requires a voter to present their identification only in one situation: when the voter is voting for the first time and did not present an identification card when registering to vote. The report found that poll workers justified their actions to protect the “integrity” of the election or used the ID cards as a shortcut to confirm the spelling of the voter’s name or address.¹⁵¹ This reasoning creates a particularly worrisome trend where only immigrant voters or voters with non-Anglo names may be asked to present an identification card. The result is potential suppression of lawful voters in contravention of California law. There were also failures to comply with

¹⁴⁶ See CALIFORNIA’S CHANGING ELECTORATE: A 2020 POST ELECTION ANALYSIS OF VOTING BEHAVIOR, EXECUTIVE SUMMARY, USC PRICE SCH. OF PUB. POL’Y & CTR FOR INCLUSIVE DEMOCRACY (2021), available at <https://static1.squarespace.com/static/57b8c7ce15d5dbf599fb46ab/t/612c9c13370f78775422fe36/1630313499115/USC+CID+2020+GENERAL+ELECTION+RESEARCH+REPORT+8-27-21+WEBSITE+RELEASE.pdf>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *Voices of Democracy: The State of Language Access in California’s November 2016 Elections*, ASIAN AMERICAN’S ADVANCING JUST. (July 5, 2017), available at https://www.advancingjustice-alc.org/wp-content/uploads/2017/05/05042017_AJ_State_of_Language_Report_DIGITAL_FINAL.pdf

¹⁵¹ *Id.*

Section 203 of the VRA, including in some of the counties that had been previously subject to preclearance under Section 5, and this impacted members of the Asian community.¹⁵²

D. Persistence of Racially Polarized Voting and Racial Appeals in California

Despite the efforts to increase access to voting, minority voters still face voting challenges in the state. During the 2020 primary elections, some Los Angeles voting locations suffered technical breakdowns and rule changes that resulted in voters waiting for several hours to cast their ballot.¹⁵³ The League of United Latin American Citizens (LULAC) denounced the long lines and breakdowns as an assault on Latino voters because these issues disproportionately impacted Latino voters.¹⁵⁴ The National President of LULAC, Domingo Garcia, noted that “Latinos have become the largest minority voting bloc in 2020, and our community is at the heart of the voting base in states like California ... Yet, it is precisely in the largest minority communities around the country—specifically districts where the Latino vote makes the difference—that we are witnessing the biggest barriers for people to vote.”¹⁵⁵

Additional racial disparities were noted at local levels, including several Native American reservations in Riverside County that had no early vote centers, no ballot drop box locations, or no voting centers at all.¹⁵⁶ Lacking physical access points presents a problem to Indigenous communities specifically as more than half of Native American communities in the U.S. live in rural areas, and in more than 150 Indigenous areas more than a quarter of people do not have access to a car.¹⁵⁷ Natalie Landreth, a senior staff attorney and litigator at the Native American Rights

¹⁵² *Id.*

¹⁵³ See Edwin Rios, *California Voters Face Long Lines, Glitches, and Dysfunctional Voting Machines*, MOTHER JONES (Mar. 3, 2020), <https://www.motherjones.com/2020-elections/2020/03/california-primary-lines-voting-machines/> (reporting lines with up to 3 hour waits).

¹⁵⁴ William Wilder, *Voting Suppression in 2020*, BRENNAN CTR FOR JUST. (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020>.

¹⁵⁵ Rafael Bernal, *Top Latino group denounces voting irregularities on Super Tuesday*, THE HILL (Mar. 5, 2020, 10:23 AM), <https://thehill.com/latino/486091-top-latino-group-denounces-voting-irregularities-on-super-tuesday>.

¹⁵⁶ William Wilder, *Voting Suppression in 2020*, BRENNAN CTR FOR JUST. (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020>.

¹⁵⁷ Nzinga Blake, Grace Manthey, & Adriana Aguilar, *Despite record voter turnout, Indigenous communities face different kinds of voter suppression*, ABC 7 EYEWITNESS NEWS (Nov. 11, 2020),

Fund, highlighted how Indigenous communities still face participation challenges, most notably access to voting centers. “Voter suppression in the Native American community looks different than it does elsewhere. What it usually looks like is moving your polling place so far away that you just can’t get there.”¹⁵⁸

The recent appellate decision in *Yumori-Kaku* and other litigation under both the VRA and the CVRA also illustrates that there remain many instances of polarized voting in California, including in jurisdictions that were not covered by the preclearance requirements of the VRA. Such occurrences potentially implicate provisions of both the VRA and the CVRA, including the use of at-large district elections that dilute minority voting power.

V. Conclusion

While California has made strides, as this report shows, significant issues remain including in language access and voter dilution. Voter turnout lags for both Asian and Latino populations; vote-by-mail ballots were rejected more frequently for these populations; and, there remain challenges to minority representation. Challenges to discriminatory practices under the VRA and CVRA have been critical tools to combatting discrimination and lack of access to the polls. Though some of those legal challenges have resulted in meaningful change, there is more work to be done to ensure that non-English speakers have access to the ballot, that signature matching is not done in a discriminatory way, and that all populations in the state are represented in government office.

As the most diverse state in the nation, the ability of people of all backgrounds in California to vote and achieve adequate representation is critical. The significant challenges outlined throughout this report underscore the pressing need to have a strong Voting Rights Act. Given continued language assistance issues and California’s broad language diversity, the enforcement of Section 203 in the state continues to be critical. The post-*Shelby* drop in minority representation could be remedied by a new coverage formula that brings key counties back into coverage under Section 5.

<https://abc7chicago.com/native-american-voter-suppression-indigenous-supreme-court-georgia-2018/7865678/>.

¹⁵⁸ *Id.*

In short, Congress's passage of the John Lewis Voting Rights Advancement Act could have a powerful effect in ensuring access to the vote and representation for all Californians.

CONCERNED
WOMEN *for* **AMERICA**
 LEGISLATIVE ACTION COMMITTEE

October 5, 2021

The Honorable Dick Durbin
 Chairman
 Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510

The Honorable Chuck Grassley
 Ranking Member
 Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510

Dear Chairman Durbin, Ranking Grassley, and Members of the Committee,

On behalf of the hundreds of thousands of women of Concerned Women for America Legislative Action Committee (CWALAC), I write in opposition to the so-called John R. Lewis Voting Rights Advancement Act of 2021 (JLVRAA).

At a time when Americans are forcefully rejecting efforts to divide our nation based on race with efforts, like the aggressive promotion of Critical Race Theory, that betray the very essence of justice by judging people according to the color of their skin, the JLVRAA would further aggravate race relations by inserting political calculations into this critical area.

Rev. Martin Luther King Jr. inspired Americans of all races and served as the catalyst for much advancement in race relations by famously saying, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character." Unfortunately, proposals today, including JLVRAA, turn that principle on its head. This law would force racial gerrymandering and make race the predominant factor in considering any new effort to protect election integrity.

At a time when election integrity issues are at the very top of voting concerns for millions of Americans,¹ (they are certainly at the top of our members' concerns) JLVRAA, as currently written, is designed as a political tool that will only intensify, not remedy, those concerns.

A recent *Rasmussen Reports* survey found 74% of voters support Photo I.D. requirements,² for example, but under JLVRAA, such efforts would automatically become suspect and subjected to a series of tests under the highly partisan direction of the Voting Section of the United States Department of Justice. The very language used in this debate, with proponents of JLVRAA calling a voter photo ID law a "voting suppression effort," shows the divisive, partisan nature of the subject.

¹ Paul Bedard, "Election cheating surges to top US issue, most want photo ID," *Washington Examiner* (August 04, 2021), available at <https://www.washingtonexaminer.com/washington-secrets/election-cheating-surges-to-top-us-issue-most-want-photo-id>.

² "Election Integrity: 74% Of Voters Support Photo ID Requirement," *Rasmussen Reports* (August 4, 2021), available at https://www.rasmussenreports.com/public_content/politics/general_politics/august_2021/election_integrity_74_of_voters_support_photo_id_requirement.

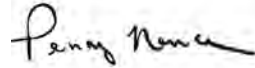
This law's expansion of the unchecked power of the U.S. Attorney General (AG) to object to legitimate voter integrity efforts among the states is most undoubtedly objectionable. This is concerning at a time when we are seeing the AG's efforts to use his power to target parents who are concerned with their children's education and voice those concerns through the proper channels at their local school boards. The federalization of these matters is not congruent with our constitutional framework.

In its most basic form, JLVRAA is a cheap alternative to H.R. 1/S. 1, which tried to take power away from the individual states who are constitutionally charged with this role in voting and transferring that power to the federal government to second guess their every move for political gain.

Under this law's new calculations, more and more jurisdictions would be subject to preclearance based on amorphous "voting rights violations" at the discretion of political operatives. It is a partisan law written out of power-hungry frustration in direct response to *Shelby County v. Holder*, 570 U.S. 529 (2013), but which addresses no rational concern given the current high level of unprecedented voter engagement at every level of the election process.

For these reasons, CWALAC strongly objects to the premise and partisan political purposes of the John R. Lewis Voting Rights Advancement Act of 2021 and urges the Senate to reject it.

Respectfully,



Penny Young Nance
CEO and President



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September 13, 2021

The Honorable Nancy Pelosi
 Speaker of the House of Representatives
 1236 Longworth House Office Building
 Washington, DC 20515

The Honorable Kevin McCarthy
 Minority Leader
 2468 Rayburn House Office Building
 Washington, DC 20515

The Honorable Chuck Schumer
 Majority Leader
 U.S. Senate
 322 Hart Senate Office Building
 Washington, D.C. 20510

The Honorable Mitch McConnell
 Minority Leader
 U.S. Senate
 317 Russell Senate Office Building
 Washington, D.C. 20510

Dear Madam Speaker Pelosi, Minority Leader McCarthy, Majority Leader Schumer, and
 Minority Leader McConnell:

As the chief legal officers of our states, we write regarding the *John Lewis Voting Rights Advancement Act* ("H.R. 4") to express our concerns regarding the devastating impact this reckless piece of legislation would have on our election systems. The bill, as introduced, would allow the United States Department of Justice to usurp the authority states rightly possess over their own elections, essentially federalizing the election system. If these provisions are enacted, rest assured that the undersigned will aggressively defend our citizens' rights to participate in free and fair elections without unconstitutional federal intrusion.

The Supreme Court rejected the coverage formula requirements in *Shelby County v. Holder*, 570 U.S. 529 (2013). The drafters of H.R. 4 seek to change the Voting Rights Act's ("VRA") coverage formula under Section 4(b) to resurrect and enact new federal preclearance requirements in jurisdictions targeted for litigation by activist groups. H.R. 4 implements practice-based preclearance that would require all states and political subdivisions, regardless of whether they are covered, to preclear certain election reforms such as voter identification ("ID") requirements and voter list maintenance laws before they can be enacted. Thus, the legislation seeks to overturn common sense election integrity reforms approved by the United States Supreme Court in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), enacted in most states,¹ and of which 80% of Americans support.²

¹ 36 states as of January 1, 2021 - <https://www.nesl.org/research/elections-and-campaigns/voter-id.aspx>.

² "Public Supports Both Early Voting And Requiring Photo ID to Vote", June, 21, 2021 Monmouth Poll - "31. In general, do you support or oppose requiring voters to show a photo I.D. in order to vote? Support 80%; Oppose 18%; (VOL) Depends 2%; (VOL) Don't know 1%." <https://www.monmouth.edu/polling-institute/reports/monmouthpoll-us-062121>.

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H.R. 4 further amends Section 2 of the VRA, establishing new requirements for vote denial claims. This new version of H.R. 4 is an obvious attempt to overrule the Supreme Court's recent decision in *Brnovich v. DNC*, 141 S. Ct. 2321 (2021). H.R. 4's new requirements under Section 2 would open the flood gates to litigation in states as opponents of secure elections try to overturn common-sense election laws in court or force state election officials to concede, settle, or abandon their election integrity efforts. Why? Because such efforts would qualify as violations, which would be compiled by the Department of Justice and then used against the states in order for the Department to subvert any and all election laws the states may try to enact in the future. Thus, H.R. 4 imposes an unnecessary and undue burden on states, particularly on the part of state legislatures, state election officials, and the chief legal officers of the states. H.R. 4, as it currently exists, contains serious constitutional defects.

The Constitution reserves to the states the primary role of establishing "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives." Const. Art. I, § IV. The founding fathers purposely and thoughtfully gave Congress a secondary role in election decision-making. H.R. 4 seeks to flip this Constitutional mandate on its head, turning the Department of Justice into a federal "election czar," wielding the power to challenge any new or existing election law based on the whims of the party in power and its desire to manipulate election laws to increase its chances to remain in power. H.R. 4 seeks to do just that. These changes would give the Biden Administration and administrations to follow (Republican and Democrat) the power to exert considerable control over state and local election laws without *any* finding of intentional discrimination. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461–62, (1991) (citing *Oregon v. Mitchell*, 400 U.S. 112, 124–125 (1970)). Not only does H.R. 4 undermine the integrity of meaningful legislation reform duly passed in state legislatures around the country designed to address issues specific to each state, but it also subverts the will of the people to govern *their* own states through their chosen representation in those state legislatures. H.R. 4 flies in the face of state sovereignty, and "there is nothing democratic about the [] attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts." *Brnovich*, 141 S. Ct. at 2343.

When the VRA was enacted in 1965, federal oversight over state election laws was necessary to combat discrimination in a limited number of jurisdictions. The original intent was to ensure that the rights of Americans were not infringed upon at the ballot box based on their race. The law rightfully targeted states and jurisdictions that used tests and other devices that "[restricted] the opportunity to register and vote", but it was always intended to be temporary legislation.³ Thankfully the VRA did exactly what it was intended to accomplish: "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers." *Shelby* at 553. However, instead of acknowledging these developments when it came time to reauthorize the bill in 2006, Congress

³ "About Section 5 of the Voting Rights Act." *The United States Department of Justice*. September 11, 2020. <https://www.justice.gov/ert/about-section-5-voting-rights-act>.

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kept “the focus on decades-old data relevant to decades-old problems, rather than current data reflecting on current needs.” *Id.* Ultimately, the Supreme Court in *Shelby* held that “Congress must ensure that the legislation it passes to remedy [racial discrimination in voting] speaks to current conditions.” *Id.* at 557. Times have changed, and Congress, as a living embodiment of the country, must legislate in accordance with those changes.

H.R. 4 looks backwards to the conditions of 1965, not the “current conditions” that exist in 2021. Today, the ability to vote is widely accessible. Despite claims that “key protections” were “gutted by the Supreme Court” through the *Shelby* decision, there is no evidence that voter suppression is on the rise.⁴ On the contrary, it has been found that “[in] the wake of *Shelby* ... minority registration and turnout in formerly preclearance counties have been flat or increasing relative to counties that were not covered” and “the aggregate affect appears to be a small increase in registration and voting among Black and Hispanic voters.”⁵ Today, the main concern among citizens is no longer voter discrimination, it is in preventing voter fraud, safeguarding the right to vote, and ensuring that every legal vote is counted undiluted by illegal votes. Public confidence in our election system is at record lows with more than 30% of the electorate believing that the 2020 election was stolen due to voter fraud.⁶ H.R. 4, which is more concerned with political rhetoric, instead has no interest in addressing criminal activity in cases of vote dilution and vote denial.⁷ If courts cannot consider states’ interests in curbing voter fraud, their hands will be forever tied in favor of the Department of Justice and the desires of the federal government.

In the Committee on House Administration’s Subcommittee on Elections report in support of H.R. 4, it was concluded that “[the] testimony and data show definitively that the voting and election administration practices examined can and do have a discriminatory impact on minority voters and can impede access to the vote.”⁸ The report, in part, refers to state voter ID laws, which have repeatedly been a target of this Congress, even though such laws have stood the test of time and have become best practice for election administration. The Supreme Court upheld Indiana’s voter ID law, one of the most robust in the nation, in *Crawford, supra*, and 35 other states have enacted their own voter ID laws. H.R. 4 brands such laws discriminatory while lacking any actual evidence to back up such claims. The House of Representatives simply relied on the testimony of 35 partisan witnesses.⁹ In reality, a study the National Bureau of Economic Research conducted

⁴ “Rep. Sewell Introduces H.R. 4, the John R. Lewis Voting Rights Advancement Act, to Restore Protections of the Voting Rights Act of 1965,” *U.S. House of Representatives*, August 17, 2021, <https://sewell.house.gov/media-center/press-releases/rep-sewell-introduces-hr-4-john-r-lewis-voting-rights-advancement-act>.

⁵ Mayya Komisarchik and Ariel White, “Throwing Away the Umbrella: Minority Voting after the Supreme Court’s *Shelby* Decision,” *Massachusetts Institute of Technology*, July 8, 2021, https://arwhite.mit.edu/sites/default/files/images/vra_post_shelby_current.pdf.

⁶ *Infra*, Monmouth Poll, Question “No. 23 - Do you believe Joe Biden won the 2020 election fair and square, or do you believe that he only won it due to voter fraud? Fair and square 61%; Due to voter fraud 32%.”

⁷ H.R. 4 at 10.

⁸ Chair G.K. Butterfield, “Voting In America: Ensuring Free And Fair Access To The Ballot,” *Subcommittee on Elections of the Committee on House Administration*, July 2021, https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf.

⁹ *Id.*

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between 2008-2018 found that strict voter ID laws have had “no negative effect on registration or turnout, overall or for any specific group defined by race, gender, age or party affiliation.”¹⁰

H.R. 4 dramatically lowers the burden of proof for plaintiffs in vote denial claims under Section 2 of the VRA. Under H.R. 4, vote denial would occur when a person faces greater difficulty in complying with the requirements and this greater difficulty is, *at least in part*, caused by or linked to social and historical conditions that have produced or currently produce such challenged discrimination against them. This directly attacks the “ordinary burdens of voting” standard that has long been used by courts to uphold common-sense reforms and essentially stacks the deck in favor of any plaintiff filing under the VRA. H.R. 4 encourages courts to consider specific factors in vote denial claims that weigh heavily in favor of plaintiffs and are unpreventable by election officials, including, among other factors: the existence of discrimination outside of voting processes—such as in employment, education, and health care—the use of overt or subtle racial appeals in political campaigns, and the extent to which members of the protected class have been elected to public office in the jurisdiction. Most shockingly, H.R. 4 pressures judges to consider the factor of whether a jurisdiction uses photo ID requirements for voting in analyzing vote denial claims—directly attacking the Supreme Court’s standard in *Crawford*.

H.R. 4 unabashedly prohibits courts from considering vital factors that have been outlined by the Supreme Court in vote denial claims, such as the overwhelming degree to which members of a class are *not* burdened by an election procedure, how long an election procedure has been lawfully and historically used, whether identical or similar election procedures are used by other jurisdictions, the availability of alternative means of voting, and the state’s interest in preventing fraud. Instead, courts would be required to consider factors that weigh heavily in favor of prospective plaintiffs in addition to only having to meet a watered-down burden of proof to show a violation of the law. This severely hinders states’ ability to defend their laws, including those that have been on the books for years. Attorneys General have an uphill battle defending any election reforms if H.R. 4 is passed. This will lead to even more litigation, including a dramatic increase in frivolous lawsuits designed to slow the election process, and which will be litigated with a heavy federal thumb on the scales of justice.

Moreover, H.R. 4 excessively expands the coverage formula with the potential to subject numerous states to preclearance requirements. First, it expands traditional preclearance that would specifically target state election laws enacted within the last 25 years. The threshold coverage is as few as three violations in jurisdictions where the state administers the elections. H.R. establishes that VRA violations would occur where a United States court finds a procedure contradicts either the 14th or 15th Amendments or H.R. 4. But H.R. 4 would also create violations where there is a denial of a declaratory judgement, including temporary or preliminary injunctions, where there is an objection of the Attorney General, or when any consent decree, settlement, or agreement in

¹⁰ Enrico Cantoni and Vincent Pons, “Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018,” *National Bureau of Economic Research*, February 2019, https://www.nber.org/system/files/working_papers/w25522/w25522.pdf.

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favor of plaintiffs is approved by an official or adopted by a court of the United States. State laws stand in jeopardy over mere preliminary judgments and consent decrees. The new formula unfortunately looks at wins in court, even temporary or preliminary ones that may later be reversed by the trial court on the full merits or on appeal, rather than the entire record regarding whether intentional discrimination exists.

Second, H.R. 4 requires “practice-based” preclearance for certain election laws in all 50 states, not just the states subject to the new coverage formula. If States enact election laws within any of these areas, such as voter ID requirements, voting locations, redistricting, or maintenance of voter registration lists, the reform is automatically subject to the preclearance process. States must seek a declaratory judgment from the United States District Court for the District of Columbia or submit the law to the Department of Justice before implementation. The VRA was never intended to require every jurisdiction in the country to submit to this federal control. H.R. 4 permits politically appointed bureaucrats to meddle in state affairs, is unlawful, and violates state sovereignty.

This legislation is a misguided, clumsy, and heavy-handed effort to circumvent Supreme Court decisions, state sovereignty, and the will of the people. Unfortunately, the Department of Justice, seeking to undertake its new role as a federal elections czar, has already signaled, in regard to states updating their election laws after the 2020 election, that they “will review a jurisdiction’s changes in voting laws or procedures for compliance with all federal laws regarding elections, as the facts and circumstances warrant.”¹¹ States that create laws based on what works best for their jurisdiction to respond to a crisis of confidence in our elections systems, will inevitably be targeted by the Department of Justice leading to more confusion, litigation, and concerns over the validity of elections going forward. Because the Department of Justice “[does] not consider a jurisdiction’s re-adoption of prior voting laws or procedures to be presumptively lawful,” it shows that the federal bureaucrats are actively looking for opportunities to circumvent the will of the people.¹² Giving the Department of Justice unlimited authority over state election laws is not only unnecessary but also unconstitutional.

Though “[state] legislation may not contravene federal law . . . [the] Federal Government does not, however, have a general right to review and veto state enactments before they go into effect.” *Shelby* at 542. We strongly urge you, our nation’s highest leaders, to model the leadership this country needs and to prevent any further division between the states and the federal government. Please be advised that should H.R. 4 become law, we will seek action to protect the sovereignty of all states and the rights of our citizens.

¹¹ “Guidance Concerning Federal Statutes Affecting Methods of Voting,” *U.S. Department of Justice*, July 28, 2021, <http://cdn.cnn.com/cnn/2021/images/07/28/voting.methods.guidc.pdf>.

¹² *Id.*

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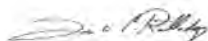
Sincerely,



Todd Rokita
Indiana Attorney General



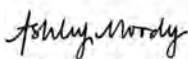
Steve Marshall
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Leslie Rutledge
Arkansas Attorney General



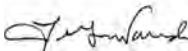
Mark Brnovich
Arizona Attorney General



Ashley Moody
Florida Attorney General



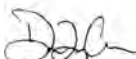
Christopher M. Carr
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Idaho Attorney General



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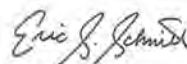
Daniel Cameron
Kentucky Attorney General



Jeff Landry
Louisiana Attorney General



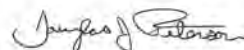
Lynn Fitch
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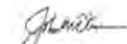


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Jason Ravnsborg
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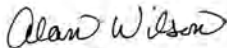
Ken Paxton
Texas Attorney General



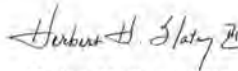
Patrick Morrisey
West Virginia Attorney General



David Yost
Ohio Attorney General



Alan Wilson
South Carolina Attorney General



Herbert H. Slatery, III
Tennessee Attorney General and Reporter



Sean D. Reyes
Utah Attorney General



To: Members of Congress and State Legislators
 From: Jason Snead, Executive Director
 Date: 18 August 2021
 Re: New Polling: Bipartisan support for photo ID laws and voting safeguards grows

The American public continues to back election reforms that make it easy to vote *and* hard to cheat. According to a new HEP Action (HEPA) poll¹, **81% of voters back laws requiring every voter to show a photo ID when they vote.** In fact, despite six months of concerted effort by progressives to turn public opinion away from voter ID and other election safeguards, public support for photo ID laws is *higher* today than it was when HEPA asked voters the same question in March. **In fact, support for photo ID laws among Democrats rose by 4 points, Independents by 7 points, and support among Black voters rose 13 points.**

The public consensus on voting reform stands in stark contrast to the renewed progressive demands for Congress to eliminate safeguards like voter ID laws and protections for mail-in ballots nationwide. Only 22% of voters want to eliminate ballot protections; 64% want election reform to focus on building confidence by adding safeguards to elections. The left's signature legislation, the "For the People Act" (HR 1) and the "John Lewis Voting Rights Advancement Act" (HR 4), both embrace policies that bipartisan majorities of Americans reject. Meanwhile, 56% of voters worry that progressives' strategy to build support for them with hyperbolic claims of "Jim Crow" voter suppression are leading voters to doubt the legitimacy of future elections.

For most people, it's about making it easy to vote *and* hard to cheat.

When asked to choose between the "conservative" and "progressive" visions for election reform—preserving election credibility through stronger safeguards or making voting "easier" by eliminating them—most voters (65%) continue to back the conservative position. Black voter support for stronger safeguards is up since March, from 51% to 57%. Support among independents has increased from 61% to 69%.

Only 22% of respondents want to make voting "easier" by getting rid of safeguards like voter ID laws and absentee ballot protections. This position defines progressive voting reforms like HR1, but it remains underwater with every racial, age, income, and ideological group tested.

For most people, the right to vote is about more than just access; 85% of voters think a fair process that guards against fraud is equally important. Three-fourths of voters (76%) recognize that fraud disenfranchises people and casts doubt on the legitimacy of the democratic process, and 76% do not believe the nation should wait for it to become widespread to take the risk seriously.

Public support for photo ID laws is overwhelming and growing, despite unprecedented efforts to malign these laws as discriminatory.

Americans continue to decisively embrace photo ID requirements when voting, even as HR1 would expressly eliminate them, and HR4 would let the federal government overrule them. Despite an unprecedented progressive effort to malign ID laws, public support has *grown* from an already

¹ Online survey among 1,200 registered voters nationwide conducted July 8–17, 2021. Respondents were selected randomly from opt-in panel participants. Sampling controls were used to ensure that a proportional and representative number of respondents were interviewed from such demographic groups as age, gender, race, and geographic region. Gender breakdown: 48% men—52% women. The survey included 1200-respondent oversamples of Independents and Republicans. ±2.83% overall margin of error at the 95% confidence interval for overall survey. M.O.E.s for subgroups are larger.

overwhelming 77% in March, to 81% today. Voters reject the argument that showing an ID to vote is a “burden” (72%).

Most striking is the sustained support for photo ID requirements among voters whom progressives insist are being deliberately disenfranchised by them. Some 77% of Black voters, 78% of Hispanic voters, and 81% of lower-income voters believe voters should have to show a photo ID to vote. Black voter support for photo ID laws is up 13 points since the March survey. Strong majorities of Republicans (97%), Independents (82%), and Democrats (67%) favor photo ID laws, and support has risen in all three categories since March.

Americans support providing free photo IDs, not eliminating photo ID requirements when voting.

One common objection to photo ID laws is that some voters lack them. Only 12% of respondents support eliminating voter ID laws on that basis; 74% prefer preserving identification requirements while ensuring that voters have opportunities to get free IDs if they need them. Every state with a voter ID law offers voters the chance to get one for free, and the existence of a free ID makes 43% of voter ID opponents more likely to favor these laws. With better education and greater awareness of these programs, public support for ID laws may climb even higher.

Voters want identification requirements for mail-in ballots, too.

This year, states like Georgia and Florida have adopted new laws bringing photo ID requirements to absentee voting. Liberal activists and politicians attacked lawmakers for taking this step, yet almost three-quarters (71%) of respondents back these policies. Absentee ID laws are broadly supported by Black (70% vs. 21%), Hispanic (73% vs. 19%), and lower-income voters (72% vs. 19%), and overall support for absentee ID has grown since March (66%). Some 77% of respondents reported it would be easy to comply with an ID law that required a voter to hand write an ID number or a portion of their social security number—the mechanism chosen by states like Georgia, Florida, and Texas. Support for absentee ID laws has the strong potential to continue to grow.

The public wants meaningful protections for mail-in ballots, including bans on vote trafficking.

Americans understand that voting by mail is the most vulnerable way to cast a ballot. Only 6% of voters back keeping or expanding absentee voting without safeguards to protect their security and the credibility of elections. Four-fifths of voters (80%) think that mail voting needs safeguards.

Only 13% of voters think that political operatives should be able to collect voters’ ballots, a tactic known as vote trafficking. Nearly two-thirds (61%) think it should be illegal. Progressives claim that vote trafficking is necessary to aid poor and minority voters, yet only 10% of low-income voters, nine percent of Hispanics, and 18% of Black voters back it. HR1 would legalize vote trafficking nationwide, overruling the wishes of most voters and laws that ban or limit it in roughly half the states.

Americans do not want COVID policies to be the new normal for elections.

Many states temporarily changed voting laws and relaxed safeguards during the pandemic, or had changes forced on them through partisan litigation. Voters want to return to pre-pandemic voting standards, but progressives argue that doing so is actually “voter suppression.” The U.S. Department of Justice based part of its lawsuit against Georgia on this issue and has implied it will sue other states should they roll back pandemic responses.

Only 17% of voters want COVID policies to persist after the pandemic ends. Some 69% of the public want voting to return to pre-COVID standards, including 55% of Democrats and 66% of Independents, 60% of Black and 72% of Hispanic voters, and 54% of people for Joe Biden in 2020.



Written Testimony of
NAACP Legal Defense and Educational Fund, Inc. (LDF)

Submitted to
the United States Senate Committee on the Judiciary
In connection with its October 6, 2021 hearing entitled
“Protecting a Precious, Almost Sacred Right:
The John Lewis Voting Rights Advancement Act”

Introduction

Chair Durbin, Ranking Member Grassley, Senator Ossoff, and members of the Committee,). Thank you for the opportunity to submit this written testimony on the critical importance and firm constitutional grounding for federal legislation which fully restores the Voting Rights Act of 1965.

Since its founding in 1940 by Thurgood Marshall, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color.¹ LDF was launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality in every area of life. Through litigation, public policy, and public education, LDF's mission has remained focused on seeking structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. In advancing that mission, protecting the right to vote for African Americans has been positioned at the epicenter of our work. Beginning with *Smith v. Allwright*,² LDF's successful U.S. Supreme Court case challenging the use of whites-only primary elections in 1944, LDF has been fighting to overcome a myriad of obstacles to ensure the full, equal, and active participation of Black voters.

The importance of the right to vote to the integrity of our democracy cannot be overstated. Indeed, Thurgood Marshall—who litigated LDF's watershed victory in *Brown v. Board of Education*,³ which set in motion the end of legal segregation in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright* as his most consequential case. He held this view, he explained, because he believed that the vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for more than 80 years—representing Martin Luther King Jr. and the marchers in Selma, Alabama in 1965, litigating seminal cases interpreting the scope of the Voting Rights Act, and working in communities across the South to strengthen and protect the ability of Black citizens to participate in the political process free from discrimination.

As part of this work, LDF has monitored elections for more than a decade through our Prepared to Vote initiative (“PTV”) and, more recently, through our Voting Rights Defender (“VRD”) project. Our PTV and VRD initiatives place LDF

¹ LDF has been an entirely separate organization from the NAACP since 1957.

² 321 U.S. 649 (1944).

³ 347 U.S. 483 (1954).

staff and volunteers on the ground for primary and general elections every year to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South. Prior to election day, PTV equips voters with non-partisan educational materials answering questions about how to register to vote, what identification is needed on election day, and providing information on local voting laws and practices that may affect voters in the election process. On election day, PTV volunteers visit polling sites to ensure voters are informed of their state’s voting requirements, answer questions about how to comply with election laws, and, when necessary, engage in rapid response actions to ensure every eligible voter is able to cast a ballot. This rapid response work often includes direct communication with election officials and, where necessary, litigation. Critical to this work is connecting local community partners with national organizations, advocates, and resources to support ongoing non-partisan election protection work.

LDF is also a founding member of the non-partisan civil rights Election Protection Hotline (1-866-OUR-VOTE), administered by the Lawyers’ Committee for Civil Rights Under Law. The Election Protection hotline coalition works year-round to ensure that all voters have an equal opportunity to vote and have that vote count. Election Protection provides Americans from coast to coast with comprehensive information and assistance at all stages of voting—from registration to absentee and early voting, to casting a vote at the polls, to overcoming obstacles to their participation.

Despite the guarantees of the 14th and 15th Amendments, the Voting Rights Act of 1965 (“VRA”), and other federal voting rights statutes, racial discrimination and targeted suppression of the rights of Black voters persists, and the need for litigation by LDF and other civil rights organizations has not abated. Indeed, in the years since the infamous 2013 Supreme Court decision in *Shelby County, Alabama, v. Holder*,⁴ methods of voter suppression have metastasized across the country. LDF helped to litigate the *Shelby* case, including presenting argument in the Supreme Court in defense of the constitutionality of Section 5 of the Voting Rights Act and importance of pre-clearance to the protection of voting rights. The Supreme Court’s decision in *Shelby*, disabling this key provision, has had a devastating effect on the voting rights of racial, ethnic, and language minorities in this country. In that decision, Chief Justice John Roberts invited Congress to update the Voting Rights Act to respond to modern conditions. In the eight years since *Shelby* was decided,

⁴ 570 U.S. 529 (2013).

however, Congress has failed to do so, leaving voters of color—and our democracy—unprotected.

Just this year the Supreme Court again weakened the Voting Rights Act, this time through flawed statutory interpretation in its *Brnovich v. DNC* ruling.⁵ This has only increased the urgent need for action, and Congress now has the opportunity to act decisively to restore the Voting Rights Act to its full strength and modernize it to meet the current pervasive threats to the voting rights of Black Americans and other voters of color.

The Constitutional Authority and Affirmative Obligation of Congress to Protect the Right to Vote for All Americans

The end of the Civil War has been described as this nation’s “Second Founding.”⁶ It was then that the United States undertook efforts to amend our Constitution to provide Congress with substantial, affirmative power to finally enforce the principle espoused by the Founders, that *all* are created equal, and that access to the franchise is the cornerstone of citizenship and democracy.

The Fourteenth Amendment, ratified in 1868, forbids States from discriminating on the basis of race:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty of property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.⁷

The Fifteenth Amendment, ratified in 1870, even more specifically prohibits the denial or abridgement of the “right of citizens of the United States to vote . . . by any State on account of race, color, or previous condition of servitude.”⁸

Importantly, both provided new, specific authority for Congress to defend equal rights, stating that Congress *shall* have power to enforce the Amendments through appropriate legislation.⁹ There is no question that these Amendments give Congress

⁵ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

⁶ See generally Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019).

⁷ U.S. Const. amend. XIV.

⁸ U.S. Const. amend. XV.

⁹ U.S. Const. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”); U.S. Const. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. Const. amend. XV, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

the power to enforce the guarantee of equal protection and the constitutional protection against voting discrimination based on race.¹⁰

The Reconstruction Amendments¹¹ fundamentally altered our Constitution and Republic for the better; they gave Congress not just the clear authority but also the affirmative obligation to act. Yet, for nearly 100 years, Congress failed to live up to its sacred obligation as State and private actors blatantly obstructed the collective promise of equality for Black Americans. Post-Reconstruction, undermined by the courts¹² and ignored by Congress, Black Americans were left susceptible to racial violence and flagrant discrimination in all areas of life, including education, employment, healthcare, housing, and transportation. With a clear understanding of the power of the franchise, white supremacists focused their most intensive campaigns of State sanctioned racial terrorism on Black citizens who attempted to vote.

With the Supreme Court's refusal to intervene, white people in the South terrorized Black voters, disenfranchised them, and enacted State laws to codify their place at the bottom of a racial hierarchy.¹³ Black people were systematically disenfranchised by poll taxes,¹⁴ literacy tests,¹⁵ threats,¹⁶ and lynching.¹⁷ Discrimination across every sector of society increased the suppressive force of many voting policies, whose very success was premised on the existence of racial

¹⁰ As the Supreme Court has recognized, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Fifteenth Amendment]." *South Carolina v. Katzenbach*, 383 U.S. at 326. "The Constitution 'empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it.'" *Northwest Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193, 205 (2009); see also *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (where "Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments").

¹¹ U.S. Const. amend. XIII, XIV, XV.

¹² See *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1889); *United States v. Cruikshank*, 92 U.S. 542 (1876); and *United States v. Reese*, 92 U.S. 214 (1875).

¹³ Referring to a white mob that murdered more than 100 Black voters: "It does not appear that it was their intent to interfere with any right granted or secured by the constitution." *United States v. Cruikshank*, at 556 (1876).

¹⁴ Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004).

¹⁵ Jason Morgan Ward, *Hanging Bridge: Racial Violence and America's Civil Rights Century* (New York: Oxford University Press, 2016).

¹⁶ Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (New Haven, CT: Yale University Press, 2010); U.S. Commission on Civil Rights, *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report*: Chapter 3, Voting Rights and Political Representation in the Mississippi Delta" (last accessed Aug. 12, 2021), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

¹⁷ Brad Epperly, et. al., *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South*, (Mar. 1, 2016), <https://ssrn.com/abstract=3224412>.

discrimination in other aspects of social, economic, and political life.¹⁸ Yet, like the Court, Congress abdicated its duty to use its enforcement powers to protect the right to vote.

Significance of the Voting Rights Act

Almost a century after the Reconstruction Amendments were ratified, Congress—compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically¹⁹—finally took its constitutional duty seriously by passing the Voting Rights Act of 1965 (“VRA”).

The VRA’s purpose was ambitious: to finally “banish the blight of racial discrimination in voting,”²⁰ and for the first time make the promise of the Reconstruction Amendments a lived reality for Black and brown people in the United States. The VRA sought to actualize the Fifteenth Amendment’s directive that the right to vote must not be denied because of race, color or previous condition of servitude, as well as the Fourteenth Amendment’s guarantee of equal protection under the law. It enshrined our most fundamental values by guaranteeing to all citizens the right to vote, which the Supreme Court has called “preservative of all rights.”²¹ Among the most transformative of the civil rights statutes passed in the 1960s,²² the Voting Rights Act has been justly described as “the crown jewel” of the Civil Rights Movement.

¹⁸ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 & nn.9–10 (1966) (observing that the effectiveness of literacy tests at blocking Black Americans from voting resulted, in significant part, from the pervasiveness of racial discrimination in education); *Underwood v. Hunter*, 730 F.2d 614, 619 & n.10 (11th Cir. 1984) (explaining that, after 1890, Southern state legislatures “resort[ed] to facially neutral tests that took advantage of differing social conditions” between Black and white voters”).

¹⁹ See Lyndon B. Johnson, *Special Message to the Congress: The American Promise, March 15, 1965*, Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, vol. I, entry 107, at 281–87 (1966) (“At times history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.”); Lyndon B. Johnson, *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, August 6, 1965*, Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, vol. II, entry 394, at 811–15 (1966) (“And then last March, with the outrage of Selma still fresh, I came down to this Capitol one evening and asked the Congress and the people for swift and for sweeping action to guarantee to every man and woman the right to vote. In less than 48 hours I sent the Voting Rights Act of 1965 to the Congress. In little more than 4 months the Congress, with overwhelming majorities, enacted one of the most monumental laws in the entire history of American freedom.”).

²⁰ *Katzenbach*, 383 U.S. at 308.

²¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

²² See *Nw. Austin, Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 201 (2009) (the “historic accomplishments of the [VRA] are undeniable”).

The VRA was intentionally responsive to the scourge and proliferation of voter suppression that had long existed in many States. It afforded the Department of Justice new authority to prohibit suppressive laws *before* they went into effect. Previously, when the Department of Justice obtained favorable decisions striking down suppressive voting practices, States and localities often enacted new discriminatory schemes to restrict Black people from voting. In establishing the preclearance framework of the VRA, Congress, therefore, “had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the [Voting Rights Act] itself.”²³ Section 5 of the VRA was designed to remedy not only then-existing discriminatory voting schemes but also to address the “ingenious methods”²⁴ that might be devised and used in the future to suppress the full voting strength of African Americans.

The VRA took a significant step towards making the promise of the Civil Rights Amendments a reality and shaping our country into a true democracy for the first time in our history.²⁵ The VRA was successful at addressing Jim Crow subjugation in the electoral arena specifically because of the preclearance process’s prophylactic design. Section 5 preclearance was an efficient, effective, and *necessary* mechanism for detecting and redressing the many forms of voting discrimination *before* elections took place.

Throughout our history, passage and enforcement of the VRA has been a bipartisan enterprise, as Republicans and Democrats alike have recognized that voting rights for Black and brown Americans is fundamental to our aspirations to an equal, just, and racially and ethnically inclusive democracy.²⁶

The Supreme Court and the Voting Rights Act

In the 56 years since the passage of the Voting Rights Act, the Supreme Court has issued several opinions related to the Act. Not once has the Court questioned Congress’s Fifteenth Amendment power—indeed, its duty—to enact legislation “to

²³ “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures.” *South Carolina*, 383 U.S. at 309.

²⁴ U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20- Apr. 1, 1965.

²⁵ Nikole Hannah Jones, “Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true,” *New York Times Magazine* (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

²⁶ See e.g. To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965 (Aug. 4, 1965), <https://www.govtrack.us/congress/votes/89-1965/s178>; Pub. L. No. 91-285, 84 Stat. 314 (signed into law by President Richard Nixon on June 22, 1970); Pub. L. No. 94-73, 89 Stat. 402 (signed into law by President Gerald Ford on August 6, 1975); Pub. L. No. 97-205, 96 Stat. 134 (signed into law by President Ronald Reagan on June 29, 1982); Pub. L. No. 102-344, 106 Stat. 921 (signed into law by President George W. Bush on August 26, 1992).

banish the blight of racial discrimination in voting.”²⁷ In most of its decisions, the Court has sustained and even adopted Congress’s methodology for safeguarding the vote. At other crucial moments, however, the Court has undercut Congress’s vision, forcing our elected representatives to fulfill their constitutional role and clarify their intent. When the Court has properly interpreted and effectuated the Voting Rights Act’s intent, Congress has ratified and extended the Court’s holdings. When the Court has misconstrued the Act, Congress has responded swiftly to correct these misreadings. In the last eight years, the Court has issued two decisions undermining the purpose and efficacy of the Voting Rights Act, and it is well past time for Congress to respond.

Pre-Shelby History

In the landmark 1966 case of *South Carolina v. Katzenbach*, the Court upheld the major provisions of the VRA against charges that it was too heavy an intrusion on state prerogatives.²⁸ Beginning with *Katzenbach*, the Court has repeatedly upheld the Voting Rights Act as “a valid means for carrying out the commands of the Fifteenth Amendment”²⁹ that is squarely within Congress’s “full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”³⁰

In the 1980 case of *Mobile v. Bolden*, however, a plurality of the Supreme Court misperceived congressional intent and concluded that a Section 2 violation, like a violation of the Fifteenth Amendment, would require proof of discriminatory intent.³¹ Yet that very same day, the Court affirmed that Congress held the power not only to legislate against intentional discrimination in voting but also to prohibit “electoral changes that are discriminatory in effect” as “an appropriate method of promoting the Fifteenth Amendment’s purposes.”³² Congress wasted no time in acting to reassert its intent and authority, amending the Voting Rights Act in 1982 “to relieve plaintiffs of the burden of proving discriminatory intent” and prohibit States and

²⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

²⁸ *Id.*

²⁹ *Id.* at 337.

³⁰ *Id.* at 326. See also *Katzenbach v. Morgan*, 384 U.S. 641, 643 (1966) (upholding Section 4(e) of the Voting Rights Act); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557, 89 S. Ct. 817, 827, 22 L. Ed. 2d 1 (1969); *id.* at 567 (holding that the Voting Rights Act’s clearly constitutional scope and broad remedial purpose required that it be interpreted in a manner that provides “the broadest possible scope” in combating racial discrimination); *Perkins v. Matthews*, 400 U.S. 379, 387 (1971); *Chisom v. Roemer*, 501 U.S. 380, 403 (1991); *Lopez v. Monterey Cty.*, 525 U.S. 266, 284 (1999). The Court has also looked to Congress for guidance on how to interpret the VRA, enshrining the “Senate Factors” as the relevant points of analysis for a Section 2 vote dilution claim in 1986. *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986) (citing S. Rep. 97-417, at 28–29).

³¹ *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 60 (1980).

³² *City of Rome v. United States*, 446 U.S. 156, 177-78 (1980).

localities from running elections “in a manner which *results* in a denial or abridgement of the right . . . to vote.”³³

Shelby County v. Holder

In 2013, the Court struck at the heart of the Voting Rights Act through its decision in *Shelby County, Alabama v. Holder*.³⁴ The ruling undercut Section 5’s preclearance regime not by invalidating preclearance itself but rather by striking the formula Congress prescribed for determining which jurisdictions have a sufficient history of discrimination to require preclearance protection for their voters.³⁵

The practical result was an abrupt halt to the successes of the VRA’s preclearance provisions. As the late Justice Ruth Bader Ginsberg noted in her dissent to the *Shelby* decision: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”³⁶ The *Shelby* decision allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked.³⁷ At its pre-*Shelby* strength, Section 5 would have prevented many of the voter suppression schemes that we have encountered since 2013.

Through our report “Democracy Diminished: State and Local Threats to Voting post-*Shelby County, Alabama v. Holder*,” LDF tracks, monitors, and publishes a record of discriminatory voting changes in jurisdictions formerly protected by Section 5.³⁸ *Democracy Diminished* details the many tactics that state and local policymakers have implemented with alarming speed since the *Shelby* decision, including barriers to voter registration, cuts to early voting, purges of the voter rolls, strict photo identification requirements that target and disproportionately affect voters of color, and last-minute polling place closures and consolidations. Attached to my testimony as Appendix A is a topline summary of recent LDF litigation against voter suppression tactics in previously-covered jurisdictions.

³³ 52 U.S.C.A. § 10301(a) (emphasis added); *Chisom v. Roemer*, 501 U.S. 380, 392–93 (1991) (recounting the 1982 amendments’ legislative history and purpose).

³⁴ 570 U.S. 529 (2013).

³⁵ *Id.* at 557 (holding that the coverage formula in Section 4(b) “can no longer be used as a basis for subjecting jurisdictions to preclearance,” but “issu[ing] no holding on § 5 itself,” and noting that “Congress may draft another formula based on current conditions”).

³⁶ *Shelby County*, 570 U.S. at 590 (Ginsburg, J., dissenting).

³⁷ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

³⁸ NAACP Legal Defense Fund, *Democracy Diminished*, LDF’s Thurgood Marshall Institute, https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf

Brnovich v. DNC

While *Shelby* struck at the heart of the VRA, earlier this year, the Supreme Court undermined the strongest complement to preclearance by weakening the protections afforded by Section 2 of the VRA. In the *Shelby* decision, the Court went out of its way to explain that its decision “in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in [Section] 2.”³⁹ Indeed, the Court emphasized that “Section 2 is permanent, applies nationwide,” and broadly “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’”⁴⁰ Yet, this summer, six Supreme Court justices dealt a substantial blow to Section 2 and the democratic ideals it was designed to protect in *Brnovich v. DNC*.⁴¹ By weakening Section 2 of the Voting Rights Act based on its own views of how much discrimination is acceptable, a majority of the Supreme Court has once again diminished our democracy.

In *Brnovich*, the Court’s majority created five new factors—or “guideposts,” in Justice Alito’s terminology—to uphold a pair of Arizona laws that the *en banc* Ninth Circuit had found discriminatory in violation of Section 2.⁴² The decision disregards the plain text of Section 2, ignores settled precedent, and severely curtails the broad application of Section 2 that Congress intended, thus making it more difficult to ensure that every eligible citizen is able to freely exercise their right to vote.

Justice Kagan explained in her *Brnovich* dissent that “to read [Section 2] fairly . . . is to read it broadly”⁴³ and yet the majority opinion’s guideposts “all cut in one direction—toward limiting liability for race-based voting inequalities” and shielding discriminatory laws from Section 2 challenges.⁴⁴

One of the majority’s newly-created guideposts in *Brnovich* instructs courts to compare a challenged voting restriction to the burdens of voting *as they existed in 1982, when Section 2 was amended by Congress*. This “guidepost” contravenes the text and purpose of Section 2, which is to prohibit racial discrimination in voting, not to impose 1982 as a reference point for evaluating whether today’s laws are discriminatory. As Justice Kagan observed, “Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber.”⁴⁵ The majority’s guidepost has no basis in the text or purpose

³⁹ *Shelby County*, 570 U.S. at 557.

⁴⁰ *Id.* at 536–37 (quoting 52 U.S.C. § 10301(a)).

⁴¹ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

⁴² *Id.* at 2336–40 (opinion of the Court).

⁴³ *Id.* at 2361 (Kagan, J., dissenting).

⁴⁴ *Id.* at 2362 (Kagan, J., dissenting).

⁴⁵ *Id.* at 2363–64 (Kagan, J., dissenting).

of Section 2.⁴⁶ Consider, for example, a State that expands access to voting by mail after 1982, but does so in a way that favors white voters by making drop boxes more available in predominately white communities. Notwithstanding this new *Brnovich* guidepost, the State's approach would violate both the letter and spirit of Section 2.

Another "guidepost" the *Brnovich* decision created is to consider the size of the discriminatory burden established by a voting restriction in absolute terms. Applying this guidepost, the majority asserted that "[a] policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open."⁴⁷ This guidepost, too, is inconsistent with the spirit and letter of Section 2. If a voting restriction abridges the rights of 0.5 percent of white voters and 1.5 percent of Black voters, it can mean thousands of Black voters have their voting rights abridged because of a discriminatory restriction. Such an action cannot be dismissed because 98.5 percent of Black voters are able to vote. Congress has an interest and responsibility to rid the country of racial discrimination in voting, not only to reduce it. In her dissent, Justice Kagan explained that a voting law may violate Section 2 if it results in racially discriminatory outcomes, regardless of the size of the burden it imposes in absolute terms.

Yet another "guidepost" enumerated in the *Brnovich* decision suggests that States may erect roadblocks to voting that disproportionately harm historically disenfranchised racial groups and engage in voter suppression so long as that State has raised a theoretically legitimate—albeit unsubstantiated—interest, such as abstract concerns about potential for fraud. This guidepost threatens to return our nation to the time before the Voting Rights Act's enactment, when States adopted facially neutral voting laws under the pretense of "purity of the ballot" but with the intent of excluding Black voters from the political process.⁴⁸ This guidepost, too, finds no support in the VRA's text and lacked any basis in the factual record before the Court in *Brnovich*. Indeed, the majority decision repeatedly refers to a supposed risk

⁴⁶ Nicholas Stephanopoulos, *The Supreme Court showcased its 'textualist' double standard on voting rights*, Wash. Post (July 1, 2021), <https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/>; David Gans, *Selective originalism and selective textualism: How the Roberts court decimated the Voting Rights Act*, SCOTUSBlog (July 7, 2021), <https://www.scotusblog.com/2021/07/selective-originalism-and-selective-textualism-how-the-roberts-court-decimated-the-voting-rights-act/>.

⁴⁷ *Brnovich*, 141 S. Ct. at 2345 (opinion of the Court).

⁴⁸ For example, comparable language regarding the "purity of the ballot box" in the Texas Constitution has deep ties to calls by white legislators in the state to ensure the "purity of the Anglo-Saxon race" by, among other tactics, disenfranchising Black Texans with tactics such as white primaries. See Bruce A. Glasrud, *Child or Beast?: White Texas' Views of Blacks 1900-1910*, 15 E. Tex. Historical J. 38 (1977); Hannah Knowles, *A Texas Bill Drew Ire for Saying It Would Preserve 'Purity of the Ballot Box.' Here's the Phrase's History*, Wash. Post (May 9, 2021), <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black/>.

of voter fraud, even though Arizona could not point to any fraud to justify its challenged laws.⁴⁹ This guidepost, thus, rests on phantom fears about voter fraud, a phenomenon that is almost nonexistent.⁵⁰ By contrast, there are voluminous examples of persistent and proliferating racial discrimination in voting during the same time period.⁵¹ While the Fifteenth Amendment and the Voting Rights Act clearly demand the eradication of racial discrimination in voting as a national imperative,⁵² the *Brnovich* opinion sends a false message that voter fraud, not racial discrimination, is the real threat to our democracy.

In short, the *Brnovich* decision is antithetical to the core constitutional principles of equality and non-discrimination and is a major departure from nearly four decades of judicial interpretation of Section 2. While the full scope of its impact is not yet clear, the risks are obvious. VRA Section 2 cases are already arduous and expensive; forcing voters to meet standards skewed towards masking discrimination will cause many meritorious actions to fail in court and many more never to be brought, providing fresh oxygen to discriminatory practices Congress sought to eliminate when it enacted the Voting Rights Act. Just as Congress in 1982 overrode the Court's cramped interpretation of Section 2 in *City of Mobile v. Bolden*,⁵³ today

⁴⁹ Richard Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, Slate (July 8, 2021), <https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html?via=rss>.

⁵⁰ German Lopez, *The case against voter ID laws, in one chart*, Vox.com (Aug. 6, 2015), <https://www.vox.com/2015/8/6/9107927/voter-id-election-fraud>; See also, Quinn Scanlan, "We've never found systemic fraud, not enough to overturn the election": Georgia Secretary of State Raffensperger says," ABC News (Dec. 6, 2020), <https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956>; "Debunking the Voter Fraud Myth," Brennan Center for Justice (Jan. 31, 2017), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf; Jennifer Wu, et al., *Are Dead People Voting By Mail? Evidence from Washington State Administrative Records* (Oct. 27, 2020), https://stanforddpl.org/papers/wu_et_al_2020_dead_voting/wu_et_al_2020_dead_voting.pdf (analyzing 4.5 million voter records and identifying only 14 questionable ballots, or 0.0003 percent).

⁵¹ J. Morgan Kousser, *Facts of Voting Rights* 3 (cataloguing currently 4,173 "voting rights events" after 1982, including many after 200); H. R. Rep. No. 109-478, at 40-43 (2006) (reciting numerous Department of Justice objections to proposed voting laws under Section 5 in the relevant time period, as well as several voting laws that were withdrawn or amended voting changes were withdrawn or amended after the DOJ requested more information); U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* (Sept. 12, 2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf (identifying successful Section 2 litigation between the 2006 reauthorization and the *Shelby* decision in 2013); see generally Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643 (2006).

⁵² U.S. Const. amend. XV; 52 U.S.C. § 10301; *South Carolina*, 383 U.S. at 308 ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century").

⁵³ 446 U.S. 55 (1980).

Congress must override the *Brnovich* decision and restore the full power of one of our nation's most important and successful civil rights laws: the Voting Rights Act of 1965.

The Current State of Voting Rights in America

The Supreme Court's actions in *Shelby* and now *Brnovich*; a four-year gap in the Department of Justice's enforcement of voting laws;⁵⁴ a global pandemic with sharply unequal consequences by race; the drive by States to raise new barriers to the ballot in service of the former President's Big Lie about pervasive voter fraud; and new attempts to subvert fair election outcomes after Election Day have come together to create an urgent crisis for our democracy, and especially for voters of color.

Unfortunately, intentional discrimination against Black and brown voters and rules and procedures that raise greater barriers for voters of color are a fact of life in 2021. Since 2013 there have been at least 8 federal court decisions finding that states or localities intentionally discriminated against Black voters or other voters of color.⁵⁵ In just one striking example, a federal appeals court found that a strict voter identification provision in North Carolina "target[ed] African Americans with almost surgical precision" and noted that "...we can only conclude that the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent."⁵⁶

Voting Rights in the 2020 Election

2020 was an unprecedented year in many respects. With the COVID-19 pandemic, the country faced not only a public health crisis, but also a threat to the very foundation of our democracy: free and fair elections. The staggering rate of transmission, infection, and death related to COVID-19 placed many voters (and especially voters of color) in the unthinkable position of choosing to risk their health

⁵⁴ The former administration filed only one Section 2 case in roughly four years. See U.S. Dep't of Justice, *Justice Department Reaches Agreement with Chamberlain School District, South Dakota, under the Voting Rights Act* (May 28, 2020), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-chamberlain-school-district-south-dakota-under-voting>; *An Assessment of Minority Voting Rights Access in the United States*, U.S. Commission on Civil Rights (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

⁵⁵ See *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *Holmes v. Moore*, 840 S.E.2d 244 (N.C. App. 2020); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821-MHH, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019); *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 730 (S.D. Tex. 2017); *Perez v. Abbott*, 250 F.Supp.3d 123 (S.D. Tex. 2017); *Perez v. Abbott*, 253 F. Supp. 3d 864 (S.D. Tex. 2017); *Allen v. Evergreen*, No. 13-107, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014).

⁵⁶ *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

or lose their right as citizens to participate and vote. Voters were too often forced to make this life-risking choice because their government would not protect them.⁵⁷

In addition, the actions and lessons learned over the past year force us to reconsider the arc of voter suppression—and to face the reality that voter suppression and election subversion can continue after ballots have been cast. We now know that we must be vigilant about fighting voter suppression not only at the stages of registration and voting, but also throughout the counting and canvassing of ballots and the certification of results. Indeed, in the 2020 Election, efforts at voter suppression continued beyond Election Day in an unprecedented campaign to disrupt the counting and certification of ballots election and overturn the election's results.⁵⁸

Accounts from LDF's Voting Rights Defender and Prepared to Vote teams, detailed in the LDF Thurgood Marshall Institute's report *Democracy Defended*,⁵⁹ reveal the depth and breadth of the issues voters faced. In sum, the 2020 election did not, as numerous news reports suggested, "go smoothly."⁶⁰ Voters overcame a litany of barriers and obstacles with determination and resilience.

Obstacles began during the primary elections when many states refused to adjust election procedures to make voting safe and accessible in the face of a raging global pandemic.⁶¹ Racially-motivated voter intimidation sprang up during the early

⁵⁷ *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM Research Lab (last updated March 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>; *COVID-19 hospitalization and deaths by race/ethnicity*, Centers for Disease Control and Prevention (last updated September 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>.

⁵⁸ Simon Romero, Shaila Dewan & Giulia McDonnell Nieto del Rio, *In a Year of Protest Cries, Now It's 'Count Every Vote' and 'Stop the Steal!'*, New York Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/electionprotests-vote-count.html>; Bill Bostock, *Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, Business Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted*, Business Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T>; Maura Ewing et al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Washington Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>.

⁵⁹ NAACP Legal Defense and Educational Fund, Inc., Thurgood Marshall Institute, *Democracy Defended* (Sept. 2, 2021), https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1-3.pdf.

⁶⁰ Sherrilyn Ifill, *No, This Election Did Not Go 'Smoothly'*, Slate (Nov. 9, 2020), <https://slate.com/news-andpolitics/2020/11/2020-election-voting-did-not-go-smoothly.html>.

⁶¹ During the April 2020 primaries in Wisconsin, Black voters "waited for hours—keeping as much distance as reasonable from fellow voters waiting in line—to exercise the fundamental right that the

voting period in places such as Detroit, Michigan where bad actors targeted robocalls to Black neighborhoods claiming voters' information would be shared with law enforcement and creditors if they voted by mail.⁶² Pairing intimidation with misinformation, voters in nearby Flint, Michigan—another predominately Black city—received robocalls recommending they vote the day after the election.⁶³

Intimidation campaigns continued through Election Day with caravans designed to frighten voters⁶⁴ and heightened police presence at polling places in communities with fraught relationships with law enforcement.⁶⁵ Then there were extremists showing up to polling places armed, harkening back to a time when Black voters endured harrowing violence at the polls.⁶⁶ In Louisiana, for example, a man arrived at a polling site carrying a poster for President Trump and an assault rifle.⁶⁷

Supreme Court described 134 years ago as 'preservative of all rights'). See Sherrilyn Ifill, *Never Forget Wisconsin*, Slate (Apr. 8, 2020), <https://slate.com/news-and-politics/2020/04/never-forget-wisconsin.html>. Subsequently, throughout the spring and summer of 2020, LDF was involved in numerous lawsuits challenging the lack of safe and accessible voting options in response to the COVID-19 pandemic in Texas, Louisiana, Alabama and South Carolina. See, e.g., NAACP Legal Defense and Educ. Fund, Inc., *LDF Files Emergency Amicus Brief to Protect Texas Voters at Risk Amid COVID-19 Pandemic* (May 21, 2020), <https://www.naacpldf.org/press-release/ldf-files-emergency-amicus-brief-to-protect-texas-voters-at-risk-amid-covid-19-pandemic/>; *Power Coalition for Equity and Justice v. Edwards*, No. 3:20-cv-00283-BAJ-EWD (M.D. La., May. 7, 2020), https://www.naacpldf.org/wp-content/uploads/FILED-COMPLAINT_Power-Coalition-v.-Edwards-20-cv00283_20200507.pdf; NAACP Legal Defense and Educ. Fund, Inc., *LDF, SPLC, and ADAP File Federal Lawsuit Challenging Alabama's Lack of Safe and Accessible Voting During COVID-19 Pandemic* (May 1, 2020), <https://www.naacpldf.org/press-release/ldf-splc-and-adap-file-federal-lawsuit-challenging-alabamas-lack-of-safe-and-accessible-voting-during-covid-19-pandemic/>; *Thomas v. Andino*, No. 3:20-cv-01552-JMC, (D. S.C. May. 25, 2020) https://www.naacpldf.org/wp-content/uploads/order_-_south_carolina_pi_granted-1.pdf.

⁶² Sam Gringlas, *Far-Right Activists Charged Over Robocalls That Allegedly Targeted Minority Voters*, National Public Radio (Oct. 1, 2020) <https://www.npr.org/2020/10/01/919309649/far-right-activists-charged-over-robocalls-that-allegedly-targeted-minority-vote>.

⁶³ Kathleen Gray, *Michigan officials warn of robocalls meant to mislead residents in Flint.*, New York Times (Nov. 3, 2020), <https://www.nytimes.com/2020/11/03/us/politics/michigan-robocalls.html>.

⁶⁴ Pariesa Young, *US voters face intimidation ahead of presidential election by caravans, armed militias, rallies*, The Observers (Nov. 3, 2020), <https://observers.france24.com/en/20201103-american-voters-intimidation-threats-election>; *Democracy Defended* 2021 *supra* note 59 (reporting one instance, outside a polling location in Hattiesburg, Mississippi, in which an old state flag containing the Confederate emblem was flown, confronting voters with a symbol of white supremacy and racism as they sought to cast their ballots).

⁶⁵ Kira Lerner, *Police at Polling Places Could Intimidate Voters, Advocates Warn*, The Appeal (Jul. 2, 2020), <https://theappeal.org/police-polling-places-voter-intimidation-consent-decree/>.

⁶⁶ Time Sullivan & Adam Geller, *Increasingly normal: Guns seen outside vote-counting centers*, Associated Press (Nov. 7, 2020), <https://apnews.com/article/protests-vote-count-safety-concerns-653dc8f0787c9258524078548d518992>.

⁶⁷ Scottie Hunter, *Baker Police Dept. responds to reports of man armed with assault rifle near polling location*, WAFB 9 (Nov. 3, 2020), <https://www.wafb.com/2020/11/03/baker-police-respond-reports-man-armed-with-assault-rifle-near-polling-location/>.

The Herculean efforts of civil rights groups, grassroots activists and civic groups proved critical to ensuring access to the polls for millions of voters. This model is not sustainable—nor is it constitutionally permissible for Black voters and other voters to be subjected to heightened barriers simply to exercise one of our most fundamental rights. It is unworthy of our democracy. It violates the spirit and letter of the Fourteenth and Fifteenth Amendments, and the sacrifices of the Civil Rights Movement that resulted in our most cherished civil rights statutes.

Voter Suppression Beyond Election Day

In 2020, we saw the arc of voter suppression extend beyond Election Day in novel ways. People across the country participated in a campaign to disrupt the counting and certification of the presidential election and ultimately to overturn its results.⁶⁸ In Michigan, election officials dutifully counting votes were mobbed and harassed.⁶⁹ In Arizona, protestors attempted to infiltrate ballot counting headquarters and tamper with vote counting.⁷⁰ In Pennsylvania, the Federal Bureau of Investigation helped local police intercept and arrest two men carrying weapons who were suspected of involvement in a plot to interfere with ballot counting.⁷¹

The violent attack on the Capitol on January 6th was a brazen, virulent, and deadly manifestation of the concerted effort to undermine our democracy, to overthrow the government, and to negate the votes cast by our communities. Yet it was the natural conclusion of years of rhetoric inciting and condoning racism and

⁶⁸ Simon Romero, Shaila Dewan & Giulia McDonnell Nieto del Rio, *In a Year of Protest Cries, Now It's 'Count Every Vote' and 'Stop the Steal'*, New York Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/election-protests-vote-count.html>; *LDF Issues Statement Condemning Breach of U.S. Capitol, Attempted Coup by Supporters of President Trump*, NAACP LDF (Jan. 6, 2020), <https://www.naacpldf.org/press-release/ldf-issues-statement-condemning-breach-of-u-s-capitol-attempted-coup-by-supporters-of-president-trump/>.

⁶⁹ Bill Bostock, *Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, Business Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>.

⁷⁰ Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted*, Business Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T>.

⁷¹ Maura Ewing et. al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Washington Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphia-attack-plot-vote-count-election/>.

white supremacy,⁷² expanding the proliferation of conspiracy theories,⁷³ and flouting the rule of law. Many photographs from the January 6th insurrection were disturbing, but one in particular demonstrated the event's historical significance and the stakes for our Republic: the image of an insurgent inside the U.S. Capitol brandishing a Confederate flag.⁷⁴ Our nation was brought to the brink of disaster by coddling and nurturing the very forces that nearly destroyed this country more than a century ago—and which remain a threat to our democracy today.

Whether through the passage of voter suppression legislation in state houses across the country, the introduction of hundreds of more bills that can be taken up in next year's legislative sessions, intimidation at the ballot box, misinformation circulated on social media, or attempts to subvert an election through threats and violence, these attacks threaten the very integrity of our democracy. We shall be a democracy in name only if we continue to allow discriminatory voter suppression and discrimination to subvert the will of our nation's increasingly diverse electorate and "the democratic ideals of equality and majority rule, which have served this Nation so well in the past[.]"⁷⁵

Proliferation of Suppressive Voting Measures in the States

Today, we see a repeat of history—a steady drip of old poison in new bottles. Whereas in a bygone era discriminatory intent was dressed up in ideals such as securing a more informed and invested electorate, the new justification is fighting imaginary voter fraud, a phantom conjured only to attack. The goal remains the same: lock in place a power structure rooted in racial hierarchy.

Justice Ginsburg, in her *Shelby* dissent, compared efforts to combat voter suppression in the states to "battling the Hydra."⁷⁶ According to Greek mythology, for every head cut off the monstrous Hydra, two more would grow in its place.⁷⁷ Preclearance was designed to address the Hydra problem—to eliminate adaptive, and

⁷² James Rainey & Melissa Gomez, *Asked to condemn white supremacists, Trump tells Proud Boys hate group to 'stand by'*, LA Times (Sept. 29, 2020), <https://www.latimes.com/world-nation/story/2020-09-29/asked-to-condemn-white-supremacists-trump-tells-proud-boys-hate-group-to-stand-by>.

⁷³ Shirin Ghaffary, *The long-term consequences of Trump's conspiracy theory campaign*, Vox.com (Nov. 20, 2020), <https://www.vox.com/recode/21546119/trump-conspiracy-theories-election-2020-coronavirus-voting-vote-by-mail>.

⁷⁴ Javonte Anderson, *Capitol riot images showing Confederate flag a reminder of country's darkest past*, USA Today (updated Jan. 13, 2021), <https://www.usatoday.com/story/news/2021/01/07/capitol-riot-images-confederate-flag-terror/6588104002/>.

⁷⁵ *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

⁷⁶ *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting).

⁷⁷ *Hydra: Greek Mythology*, Britannica.com (last accessed May 24, 2021), <https://www.britannica.com/topic/Hydra-Greek-mythology>

unrelenting discriminatory voting practices. Yet, Hydra-like proliferation is exactly what we see unfolding in the states. In the wake of record turnout and voter engagement in Black communities during the 2020 election season,⁷⁸ state lawmakers have unleashed a wave of Jim Crow-style voting laws targeting voters of color by restricting access to the ballot for Black, Latino, Asian American and Pacific Islander, and Native American communities.

According to the Brennan Center, as of September 2021, state legislators have introduced more than 425 bills with restrictive provisions in 49 states, and at least 19 states have enacted 33 laws that restrict access to the ballot.⁷⁹ Critically, many of these laws are directly targeted at cutting off pathways to the ballot box that Black and brown voters used successfully in 2020. For example, after Black voters adjusted to the pandemic by voting absentee, S.B. 90 in Florida severely curtailed the use of unstaffed ballot return drop boxes and effectively eliminated community ballot collection.⁸⁰ And in Georgia and Texas, after strong early in-person turnout among Black voters, lawmakers initially moved to outlaw or limit Sunday voting in a direct attack on the “souls to the polls” turnout efforts undertaken by many Black churches.⁸¹ And the new omnibus voting law in Texas, S.B. 1, eliminates a number of accessible, common sense voting methods, including “drive-thru” voting and 24-

⁷⁸ Abby Budiman, *Key facts about Black eligible voters in 2020 battleground states*, Pew Charitable Trusts Research Center (Oct. 21, 2020), <https://www.pewresearch.org/fact-tank/2020/10/21/key-facts-about-black-eligible-voters-in-2020-battleground-states/>.

⁷⁹ *State Voting Bills Tracker 2021*, Brennan Center for Justice (last updated October 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

⁸⁰ See generally Compl. for Decl. and Inj. Relief, *Fla. State Conferences of Branches v. Lee*, No. 4:21-cv-00187-WS-MAF (N.D. Fla. May 6, 2021), ECF No. 1.

⁸¹ Ltr. from NAACP Legal Defense and Educ. Fund, Inc. to Texas Senate (May 29, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-Conference-Committee-Report-Opposition-Senate-20210529-1.pdf>; Ltr. from NAACP Legal Defense and Educ. Fund, Inc., et al., to Georgia House of Representatives, Special Committee on Election Integrity (Mar. 14, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-SPLC-Written-Testimony-on-SB202-3.18.21.pdf>. In both states, after advocacy from LDF and others, lawmakers eventually removed these blatantly discriminatory provisions from the omnibus voting bills under consideration—although in both states, the final forms of the enacted bills remained extremely harmful to voters of color. See NAACP Legal Defense and Educ. Fund, Inc., *LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law* (May 6, 2021), <https://www.naacpldf.org/press-release/ldf-files-lawsuit-against-the-state-of-florida-over-suppressive-voting-law/>; NAACP Legal Defense and Educ. Fund, Inc., *Civil Rights Groups Sue Georgia Over New Sweeping Voter Suppression Law* (March 30, 2021), <https://www.naacpldf.org/press-release/civil-rights-groups-sue-georgia-over-new-sweeping-voter-suppression-law/>.

hour early voting- both methods that proved invaluable for Black and Latino voters in Texas's largest cities in 2020.⁸²

A significant number of the most suppressive voting laws in the states are made possible by the Supreme Court's *Shelby* decision. That decision not only freed covered jurisdictions from their duty to report any changes in voting laws or rules to the federal government but signaled to jurisdictions throughout the country that the federal government would not screen for improper limits, restrictions, and barriers to voting participation.

Voting access left to the whims of state lawmakers has proven that the scourge of voter suppression reaches far beyond the states and jurisdictions previously covered by Section 5 of the VRA. The proliferation of state anti-voting laws across the country demonstrates the urgent need for Congress to bring the VRA's preclearance formula into the modern era, to reinstate federal oversight over discriminatory voting practices, and to strengthen and protect voting rights wherever suppression occurs. States have proven time and time again that they are incapable of monitoring themselves and that federal legislation is needed to protect voters.

The Limits of Case-by-Case Litigation

LDF's decades of experience, including the summary of cases highlighted in Appendix A, demonstrates that voting rights litigation can be slow and expensive. The parties often spend millions litigating these matters.⁸³ The cases also expend significant judicial resources.⁸⁴ Additionally, the average length of Section 2 cases is two to five years.⁸⁵ In the years during a case's pendency, thousands—and, in some cases, millions—of voters are effectively disenfranchised.

⁸² Compl. for Decl. and Injunctive Relief, *Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. Sept. 7, 2021), ECF No. 1; see also NAACP Legal Defense and Educ. Fund, Inc., Lawsuit Filed Challenging New Texas Law Targeting Voting Rights (Sept. 7, 2021), <https://www.naacpldf.org/press-release/lawsuit-filed-challenging-new-texas-law-targeting-voting-rights/>.

⁸³ *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP Legal Defense and Educ. Fund, Inc. (Feb. 19, 2021), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs-2.19.21.pdf>.

⁸⁴ Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed).

⁸⁵ Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) (“Two to five years is a rough average” for the length of Section 2 lawsuits).

For example, LDF challenged Texas' voter identification law,⁸⁶ which the state enacted after the *Shelby County* decision. It was widely described as the most restrictive voter identification law in the country.⁸⁷ A federal court found that the law "creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African Americans [i.e., they comprise a disproportionate share of the more than 600,000 registered voters and one million eligible voters who lack the requisite photo ID], and was imposed with an unconstitutional discriminatory purpose," and that it "constitutes an unconstitutional poll tax."⁸⁸ Although LDF was ultimately successful in that litigation, including in obtaining attorneys' fees,⁸⁹ in the three years after the trial and while the case made its way twice to the Fifth Circuit Court of Appeals and back to the trial court, Texas voters elected candidates to the following offices:

- In 2014: a U.S. Senator, all 36 members the State's delegation to Congress, governor, lieutenant governor, attorney general, comptrollers, commissioners, and four Justices of the Texas Supreme Court.
- In 2015: a special election for a member of the state senate.
- In 2016: the Presidential primary, 36 members of Congress, three Supreme Court justices, state boards of education, sixteen state senators, all 150 members of the state House, over 175 district judges, over 75 district attorneys.

These are all the officials elected in just one state during the pendency of a single case. This is not a model that can be sustained.

For these reasons, the need for prophylactic legislation is both urgent and acute. Litigation is a blunt instrument. The genius of Section 5 preclearance review was that it allowed federal authorities to stop voting discrimination *before* it inevitably harmed voters in a variety of federal, state, or local elections.

The Urgent Need for Congressional Action

The Time is Now

⁸⁶ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

⁸⁷ *Veasey v. Abbott: A Challenge to Texas' Harsh Voter ID Law*, Campaign Legal Center (May 18, 2016), <https://campaignlegal.org/sites/default/files/Veasey%20v%20Abbott%205.18.16%20One%20Pager.pdf>.

⁸⁸ *Veasey v. Perry*, 71 F. Supp. 3d 627, 693 (S.D. Tex. 2014).

⁸⁹ See *Veasey v. Abbott*, No. 20-40428 (5th Cir. Sept. 3, 2021), available at <https://www.ca5.uscourts.gov/opinions/pub/20/20-40428-CV0.pdf> (upholding grant of \$6,790,333.31 in attorneys' fees).

Today, our nation is at a crucial juncture in the decades-long struggle to create and maintain equality of voting rights for all citizens. The proliferation of state anti-voting laws across the country⁹⁰ demonstrates the urgent need for Congress to restore the VRA to its full strength, reinstate federal oversight over discriminatory voting practices in States and localities where voting discrimination is concentrated, and protect voting rights wherever suppression occurs.

The celebrated turnout and registration rates among Black voters in November 2020 occurred despite a litany of obstacles, and only because of the Herculean efforts by civil-rights groups, organizers, and activists—and because of the sheer determination and resilience of Black voters.⁹¹ This model is not sustainable. Nor is it lawful. Black voters' ability to overcome unequal burdens does not diminish the fact that those burdens exist. Nor does our Constitution countenance two systems of voting in this country—one in which Black and other marginalized voters require an independent, non-governmental apparatus to exercise the fundamental right to vote while white voters do not. To be clear, even with these extraordinary efforts, participation rates for Black, Asian American, and Latino voters remained well below those of white voters in the 2020 election.⁹²

Moreover, in 2020, efforts at voter suppression continued beyond Election Day, and there are no reasons to suspect this trend will not endure and even accelerate in future elections. A number of States witnessed unprecedented attempts to discount ballots cast in areas with large numbers of Black voters.⁹³ The 2020 election—and

⁹⁰ Brennan Center for Justice, *supra* note 79; see also Theodore Johnson & Max Feldman, *The New Voter Suppression*, Brennan Center (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression>; *Democracy Diverted: Polling Place Closures and the Right to Vote*, The Leadership Conference Education Fund (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/DemocracyDiverted.pdf>; Wendy R. Weiser and Max Feldman, *The State of Voting 2014*, Brennan Center (June 17, 2014), <https://www.brennancenter.org/our-work/research-reports/state-voting-2014>; *Election 2016: Restrictive Voting Laws by the Numbers*, Brennan Center (Sep. 28, 2018), <https://www.brennancenter.org/our-work/research-reports/election-2016-restrictive-voting-laws-numbers>; Wendy R. Weiser and Max Feldman, *The State of Voting 2018*, Brennan Center for Justice, (June 5, 2018), <https://www.brennancenter.org/our-work/research-reports/state-voting-2018>.

⁹¹ Sherrilyn Ifill, *No, This Election Did Not Go "Smoothly,"* *Slate* (Nov. 9, 2020), <https://slate.com/news-and-politics/2020/11/2020-election-voting-did-not-go-smoothly.html>.

⁹² William H. Frey, *Turnout in 2020 election spiked among both Democratic and Republican voting groups, new census data shows*, Brookings Institute (May 5, 2021), <https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/>

⁹³ Jeff Amy, Darlene Superville, & Jonathan Lemire, *GA election officials reject Trump call to 'find' more votes*, Associated Press (Jan. 4, 2021), <https://apnews.com/article/trump-raffensperger-phone-call-georgia-d503c8b4e58f7cd648bf9a746131ec9>; Bill Bostock, *Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and*

the wave of racially targeted voter suppression measures enacted and proposed by States since then—highlight the need for federal legislation to prevent voter suppression at all stages of the electoral process: from registration, to all methods of voting, to the counting and canvassing of ballots.

The extensive record of discriminatory voting practices enacted since *Shelby County* demands that Congress fulfill its constitutional obligation to protect voters from new and “ingenious methods”⁹⁴ of voter discrimination by restoring the Voting Rights Act to its full strength.

Grassroots Movements Demand Action

The passage of the VRA in 1965 was spurred by the grassroots activism of thousands across the country, and especially in the South, who faced down billy clubs, police dogs and vitriol from white mobs to secure the unencumbered right to vote. It was the result of the tremendous sacrifice of those beaten on the Edmund Pettus Bridge, including the late Congressman John Lewis, the martyrdom of Medgar Evers, Jimmie Lee Jackson, Viola Gregg Liuzzo, Andrew Goodman, James Chaney, Michael Schwerner, and so many others,⁹⁵ which proved crucial to ensuring the federal government take seriously its duty to enforce the right to the franchise. In short, the right to vote that we enjoy today was forged by courageous people who demanded the protection and expansion of the franchise. Congress saw the tumult and desire for change across the nation and ultimately responded with the Voting Rights Act of 1965.

Today, we see again that same heroism of the average American to speak out, protest and demand change when faced with injustice in the calls for federal legislation to protect the right to vote. It is the obligation of this generation of lawmakers to respond to these calls and ensure that the hard-won gains of the past are not lost. People and institutions across the country have decried the onslaught of

Michigan, Business Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted*, Business Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11?r=US&IR=T>; Maura Ewing et al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Wash. Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>.

⁹⁴ U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25, 20- Apr. 1, 1965.

⁹⁵ Marty Roney, *Remembering the Martyrs of Bloody Sunday*, USA Today (Mar. 7, 2015), <https://www.usatoday.com/story/news/nation/2015/03/03/bloody-sunday-martyrs/24344043/>; Deborah Barfield Berry, *'Bloody Sunday' pilgrimage to move through Miss.*, USA Today (Feb. 10, 2014), <https://www.usatoday.com/story/news/nation/2014/02/10/civil-rights-pilgrimage/5376225/>.

voting restrictions, from grassroots organizers and activists,⁹⁶ to influential Black executives in corporate America,⁹⁷ corporations like Coca Cola and Delta Airlines,⁹⁸ sports associations like Major League Baseball,⁹⁹ film industry icons,¹⁰⁰ religious leaders,¹⁰¹ and more.

The people have called on Congress once again to use the power enshrined in the Constitution, and entrusted to this body, to ensure the franchise for all citizens and to build a 21st century democracy that is representative of, and responsive to, our growing, diverse nation. Congress must take action. It is the obligation of this body to continue to uphold the principles of democracy—and to continue the great tradition of perfecting our union by protecting the right to vote.

⁹⁶ Jane C. Timm, *Progressive groups unite to oppose Texas GOP's voting restrictions*, NBC News (Jun. 28, 2021), <https://www.nbcnews.com/politics/elections/progressive-groups-unite-oppose-texas-gop-s-voting-restrictions-n1272459>; *Georgia-Based Disability Rights Groups Join Fight Against Georgia's Anti-Voter Law S.B. 202*, The Arc (May 2, 2021), <https://thearc.org/georgia-disability-groups-join-fight-voter-law/>.

⁹⁷ Andrew Ross Sorkin & David Gelles, *Black Executives Call on Corporations to Fight Restrictive Voting Laws*, New York Times (March 31, 2021), <https://www.nytimes.com/2021/03/31/business/voting-rightsgeorgiacorporations.html>.

⁹⁸ David Gelles, "Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition," New York Times (March 31, 2021), <https://www.nytimes.com/2021/03/31/business/delta-coca-colageorgia-voting-law.html>; Andrew Ross Sorkin & David Gelles, *Hundreds of Companies Unite to Oppose Voting Limits, but Others Abstain*, New York Times (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/business/ceoscorporate-america-votingrights.html?smtyp=cur&smid=tw-nytimes>.

⁹⁹ Kevin Draper et. al., *M.L.B. Pulls All-Star Game From Georgia in Response to Voting Law*, N.Y. Times (Apr. 6, 2021), <https://www.nytimes.com/2021/04/02/us/politics/mlb-all-star-game-moved-atlanta-georgia.html>.

¹⁰⁰ Kimberly Chin, *Will Smith Movie Pulls Production Out of Georgia Over GOP Voting Law*, Wall Street Journal (Apr. 12, 2021), <https://www.wsj.com/articles/will-smith-movie-emancipation-pulls-production-out-of-georgiaovergop-voting-law-11618257076>.

¹⁰¹ Lakisha Lemons, *Faith leaders fight back against what they call voter suppression bills*, Spectrum News 1 (Apr. 14, 2021), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/04/14/faith-leaders-fight-backagainst-voter-suppression-laws>.

Restoring the VRA is a Necessary Exercise of Congress's Constitutional Authority

When Congress reauthorized the VRA in 2006, it legislated against the backdrop of an unbroken line of Supreme Court authority holding that the VRA's preclearance process was a constitutional means for the Congress to ensure the equal right to vote.¹⁰² Despite the devastating effect of the Court's *Shelby* decision, the Court did not hold that no measured and properly tailored preclearance provision is constitutional. The Court in *Shelby* held, rather, that the VRA's preclearance coverage formula was unconstitutional because it had not been updated since the 1970s, and therefore was not based on "current conditions."¹⁰³ But the Court's opinion left opportunity for Congress to establish a new preclearance framework responsive to current conditions. Indeed, the Supreme Court found preclearance a "stringent" and "potent" measure, available to Congress to deploy as an "extraordinary" tool to confront racial discrimination in elections and voting systems.¹⁰⁴ And, as noted above, Chief Justice Roberts expressly invited Congress to establish such a framework that is responsive to recent evidence of voting discrimination.¹⁰⁵

That a Constitutional Amendment, which is rare in American history, was devoted solely to the prohibition of racial discrimination in voting—and that the Amendment expressly delegated enforcement powers to Congress—underscores the extraordinary harm of the denial to vote based on race.¹⁰⁶ Further, the Supreme Court has long recognized that the Fifteenth Amendment's prohibition on "sophisticated as well as simple-minded modes of discrimination"¹⁰⁷ provides Congress the power to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."¹⁰⁸ A legislative remedy such as an updated preclearance mechanism would, therefore, be justified as an exercise of this extraordinary power.

Even one election in which the right to vote is restricted, threatened, diluted, denied, impeded, or violated, is one election too many. Violations of our electoral rights are not ordinary harms and must therefore be met with extraordinary remedies. An election conducted under conditions later found to be racially

¹⁰² See *Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹⁰³ *Shelby County, Ala. v. Holder*, 570 U.S. 529, 554 (2013).

¹⁰⁴ *Id.* at 545-46.

¹⁰⁵ *Id.* at 557.

¹⁰⁶ U.S. Const. amend. XV.

¹⁰⁷ *Gomillion v. Lightfoot*, 364 U.S. 339, 342, (1960) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

¹⁰⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

discriminatory has consequences that existing remedies cannot combat. The inability of the courts to retroactively correct these wrongs further disenfranchises and threatens to disengage voters who may understandably believe that their vote does not matter if discriminatory voting practices are left unchecked. Racially discriminatory practices in the electoral system have consequences that preclearance can prevent and correct. Preclearance was designed as a unique and powerful intervention to stop discrimination *before* elections take place.

It is not only imperative that Congress restore the VRA, but also that Congress *strengthen* the VRA to better address the ingenious methods that are, and will be, used to suppress the full voting strength of African Americans and other people of color.

Specific Changes Needed to Restore the Voting Rights Act to its Full Strength

The John Lewis Voting Rights Advancement Act (“JLVRAA”), introduced on October 5th by Senator Leahy after similar legislation passed the House of Representatives on August 24, 2021, contains provisions which have taken up the challenge to both restore the Voting Rights Act and strengthen and modernize it to meet present day conditions. Each of the elements of the legislation detailed below is both necessary and grounded in Congress’s authority under the Constitution.

Restoring Geographic-Based Preclearance

Our experience litigating against discriminatory practices at every stage of the voting process since *Shelby County* demonstrates the need for Congress to take up the Court’s invitation to restore the “heart”¹⁰⁹ of the VRA with a new preclearance mechanism grounded in current conditions. The approach to geographic coverage in the John Lewis Voting Rights Advancement Act introduced this week is specifically tailored to address the Court’s concerns as articulated in the *Shelby* decision (described above) by identifying those States and localities where recent conditions show a pattern of continued discrimination against voters of color.

The JLVRAA updates the VRA’s preclearance coverage formula by requiring jurisdictions to preclear voting changes with the DOJ or United States District Court for the District of Columbia for a ten-year period if they have a certain number of violations in the prior 25 years.¹¹⁰ This “rolling 25-year lookback” is a long enough period to establish patterns and automatically remains current by constantly using

¹⁰⁹ *South Carolina*, 383 U.S. at 315.

¹¹⁰ States are covered if there were at least 15 violations within their borders; or at least 10 including one violation by the state itself. Political subdivisions are covered if they have at least 3 violations.

the present day (rather than a fixed date) as the starting point for the lookback. Jurisdictions with no violations in the past 10 years are eligible for an updated “bail out” of preclearance coverage, keeping the formula tailored, up-to-date, and responsive to the *Shelby* Court’s concerns.

This geographic-coverage based approach is supported by Supreme Court precedent. As eight Justices explained in *Northwest Austin*, “[t]he doctrine of equality of States does not bar remedies for local evils which have subsequently appeared.”¹¹¹ A statute’s disparate geographic coverage will be upheld so long as it is “sufficiently related to the problem that it targets.”¹¹² The JLVRAA clearly satisfies this standard. By limiting geographic preclearance to those States and localities with recent patterns of discrimination in voting, the statute ensures that the preclearance remedy is implemented in places where the evil of voting discrimination is most prevalent.

Moreover, by focusing on evidence of voting discrimination within the past 25 years on a rolling basis—and pairing this with the ability of jurisdictions to “bail out” if they can demonstrate 10 years without new discriminatory voting measures—the JLVRAA properly considers “current conditions” within the meaning of *Shelby County*. Indeed, as explained below, this look-back window is clearly consistent with Supreme Court precedent about the time period Congress and courts may consider in evaluating the propriety of enforcement legislation under the Fourteenth and Fifteenth Amendments.

In 1999, the Supreme Court in *Lopez v. Monterey County* upheld the constitutionality of Section 5 at that time, and rejected a challenge brought by a jurisdiction that was covered based on conditions in the jurisdiction in 1968.¹¹³ *Lopez* thereby recognizes that evidence of voting discrimination from 30 years ago may justify preclearance, and that Congress, in 1982, acted properly in subjecting jurisdictions to preclearance for 25 additional years based on evidence of voting discrimination from 1968. Similarly, in *Tennessee v. Lane*, the Court upheld Title II of the Americans with Disabilities Act (“ADA”) as applied to court access by looking to evidence of discrimination dating back to 1972—32 years before the Court’s decision in *Lane*, and 18 years before Congress enacted the ADA in 1990.¹¹⁴ By contrast, in *City of Boerne v. Flores* (1997), the Court held that Congress had exceeded its enforcement authority under the Fourteenth Amendment in enacting part of the Religious Freedom Restoration Act of 1990 when “the history of persecution in this country detailed in [congressional] hearings mentions no episodes occurring in the

¹¹¹ *Northwest Austin*, 557 U.S. at 205.

¹¹² *Id.*

¹¹³ 525 U.S. 266, 282-285 (1999).

¹¹⁴ *Tennessee v. Lane*, 541 U.S. 509, 525 & nn. 12, 14 (2004).

past 40 years.”¹¹⁵ Similarly, in *Shelby County* itself, the Court held that Congress in 2006 failed to consider “current conditions”¹¹⁶ by implementing preclearance for 25 additional years based on a coverage formula tied to evidence of voting discrimination from 34 to 42 years earlier.

The JLVRAA, which considers evidence of voting discrimination over the last 25 years on a rolling basis for a 10-year preclearance period, is similar to the look-back windows that the Court recognized as probative of current conditions in *Lopez* and *Lane* and is not comparable to the longer look-back windows at issue in *City of Boerne* and *Shelby County*.

The 25-year look-back contained in the JLVRAA is also essential to determine whether States and political subdivisions are engaged in a pattern of voting discrimination that warrants preclearance. Voting discrimination is often concentrated during redistricting, and a 25-year look-back allows consideration of two redistricting cycles—including the post-redistricting litigation that may span several years before a court adjudication that a redistricting plan illegally discriminated against voters of color.

In addition, in its *Shelby County* Supreme Court brief, LDF identified numerous jurisdictions that had a pattern of attempting to circumvent and evade federal prohibitions on voting discrimination that was fully visible only if one looked back approximately 25 years because a more limited snapshot in time would shield the full pattern from view.¹¹⁷ Examples of such “serial violations of minority voting rights” included:

- The City of Calera in Shelby County, Alabama, which, in 2008, attempted to circumvent a consent decree from 1990 that prohibited discriminatory methods-of-election against Black voters;¹¹⁸
- The City of Alabaster in Shelby County, Alabama, which had attempted discriminatory annexations in 2000 after having been blocked by Section 5 from doing so in 1975 and 1977;¹¹⁹
- Dallas County, Alabama, which repeatedly attempted various measures to discriminate against Black voters through methods of election, voter purges, and discriminatory redistricting in the 1980s

¹¹⁵ 521 U.S. 507, 530 (1997).

¹¹⁶ *Shelby Cty.*, at 557.

¹¹⁷ Brief for Respondent-Intervenors Earl Cunningham, Harry Jones, Albert Jones, Ernest Montgomery, Anthony Vines and William Walker, at 19-35, *Shelby v. Holder*, 570 U.S. 529 (2013). <https://www.naacpldf.org/wp-content/uploads/12-96-bs-Earl-Cunningham-et-al.pdf>.

¹¹⁸ *Id.* at 19-20.

¹¹⁹ See *id.* at 20; see also *Voting Determination Letters for Alabama*, U.S. Dept. of Justice, available at <https://www.justice.gov/crt/voting-determination-letters-alabama>.

and early 1990s, after the notorious and violent discrimination that gave rise to the VRA in Selma—the county seat—in 1965;¹²⁰

- The State of Texas, which attempted to enact racially discriminatory redistricting plans after the 1980 census, 1990 census, 2000 census, and 2010 census;¹²¹
- The City of Seguin, Texas, which was forced to abandon discriminatory methods of election in response to three lawsuits between 1978 and 1993, but then proposed a new discriminatory districting plan and manipulated a candidate filing period to prevent any Latino candidate from competing after the 2000 census;¹²²
- The State of Louisiana, which sought to implement discriminatory redistricting plans for its State House after every census between 1970 and 2000;¹²³
- The City of Augusta, Georgia, which had a history of discriminatory voting-related measures from 1987 to 2012—the most recent involving the State of Georgia’s pretextual rationale for rescheduling an election to a date when low Black turnout was anticipated.¹²⁴

These examples highlight the importance of a 25-year look-back for geographic coverage in identifying those jurisdictions where voting discrimination is most prevalent, and therefore geographic preclearance most necessary.

In sum, the VRA’s geographic-based preclearance coverage is essential to restoring the Act’s effectiveness; the 25-year rolling lookback period combined with flexible bail-out procedures in the JLVRAA is targeted to cover jurisdictions with an established pattern of discrimination that is recent enough to be relevant to current conditions; and this coverage formula operates within a framework that has been repeatedly affirmed by Supreme Court precedent.

Known Practices Coverage / Practice-Based Preclearance

To complement the essential tool of geographic-based preclearance, the JLVRAA adds a form of preclearance based upon known discriminatory practices wherever they occur. History shows that voters of color become targets for discrimination when they reach a sufficient threshold of the population to shift local power. To protect voting populations growing into power, the JLVRAA highlights a

¹²⁰ Brief for Respondent-Intervenors, *supra* note 117 at 20-21.

¹²¹ *See id.* at 23-24.

¹²² *See id.* at 25.

¹²³ *See id.* at 28.

¹²⁴ *See id.* at 31-32; *see also Voting Determination Letters for Georgia*, U.S. Dept. of Justice, available at <https://www.justice.gov/crt/voting-determination-letters-georgia>.

set of voting practices known to have a discriminatory effect and requires preclearance of those practices in places where minority voting populations have reached certain thresholds (typically at least 20% of the population).¹²⁵

This Known Practices Coverage (“KPC”) preclearance framework would require preclearance for any voting policies or practices that pose a significant potential for violations of voting rights as demonstrated by broad historical experience. For example, the creation of at-large seats, annexations of suburban populations, changing or reduction of polling locations, shifting list maintenance practices, and redistricting completed by incumbents all raise concerns when they occur in a jurisdiction that has experienced recent, significant growth of a specific minority population. Importantly, in most instances, the KPC framework would require federal preclearance of voting practices that are known to correlate with racial or language-based discrimination only in jurisdictions that have a significant racial or language minority citizen voting-age population. KPC combines a demographic threshold with the prevalence of specific, known practices of voting rights discrimination.

Practice-based preclearance is a reasonable, flexible response to the “current conditions” of voting discrimination in the nation and is supported by a long line of Supreme Court precedent recognizing Congress’s authority to outlaw practices that are not *per se* unconstitutional but are known to perpetuate racial discrimination. In *South Carolina v. Katzenbach*,¹²⁶ for example, the Court upheld Congress’s decision to suspend the use of literacy tests in the VRA of 1965 even though such tests were not categorically unconstitutional.¹²⁷ The Court recognized that such tests had frequently been used to discriminate against Black voters, and it was therefore reasonable for Congress to suspend them entirely, as Congress “may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”¹²⁸ In 1975, Congress amended the VRA to make the suspension on literacy tests a permanent ban.

¹²⁵ Certain changes such as to ID requirements and multi-lingual election information require preclearance nationwide. For greater detail on the importance and efficacy of KPC, see Asian Americans Advancing Justice | AAJC, Mexican Amer. Legal Defense and Educ. Fund, and NALEO Educ. Fund, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes* (Nov. 2019), https://www.advancingjustice-aajc.org/sites/default/files/2019-11/Practice%20Based%20Preclearance%20Report%20Nov%202019%20FINAL%20-%20reduced_0.pdf.

¹²⁶ 383 U.S. 301 (1966).

¹²⁷ See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51-52 (1959).

¹²⁸ *Id.* at 324.

Similarly, in *City of Rome v. United States*,¹²⁹ the Court found it permissible for Congress to prohibit changes to voting processes that have racially discriminatory effects even absent proof of intentional discrimination that would itself violate the Fifteenth Amendment. The Court explained that “even if [Section 1 of the Fifteenth Amendment] prohibits only purposeful discrimination,” its prior decisions “foreclosed any argument that Congress may not, pursuant to [its enforcement authority under Section 2 of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect.” Since *City of Rome*, the Court has continued to reaffirm the proposition that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.”¹³⁰ Because it identifies practices known to be especially susceptible to discrimination in voting, practice-based preclearance represents an exercise of congressional authority supported by this well-established line of precedent.

Together, geographic preclearance and practice-based preclearance hold the promise of both addressing the discriminatory voting schemes we see proliferating today, and also preventing “ingenious methods” that might be devised to suppress votes in the future.¹³¹ The genius of preclearance, and the VRA, was creating a mechanism to prevent such mutations in voting discrimination and suppression—the Hydra described by Justice Ginsburg that we see proliferating in states today.

Restoring and Strengthening VRA Section 2

The next essential components of the JLVRAA work together to again make Section 2 of the Voting Rights Act the robust nationwide protection against voting discrimination that Congress intended.

First, the JLVRAA reasserts Congress’s intent and corrects the Supreme Court’s flawed interpretation of Section 2 in the *Brnovich* case. The legislation’s main approach is simply to codify the Supreme Court’s longstanding framework for interpreting Section 2. It establishes the so-called *Gingles* prongs as elements of proof and Senate Report factors as items for consideration in the “totality of the

¹²⁹ 446 U.S. 156 (1980).

¹³⁰ See *City of Boerne*, at 518; see also *Tennessee v. Lane*, 541 U.S. 509 (2004); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

¹³¹ U.S. Congress, House, Committee on the Judiciary Voting Rights, 89th Cong., 1st sess., 1965, Mar. 18-19, 23-25 (Apr. 1, 1965).

circumstances” analysis required to establish a Section 2 vote dilution claim. It then explicitly applies similar “totality of the circumstances” factors in the vote denial or abridgement context. In addition, the Act prohibits consideration of certain alleged justifications of unlawful practices that distract from a precise analysis of discriminatory impact.

Next, the JLVRAA takes one of the clearest and most successful concepts from Section 5 of the VRA and applies it in a broader context. To preclear a proposed voting change, a jurisdiction covered under Section 5 must show that it will not diminish the voting power of a protected voting population, a concept known as retrogression.¹³² This simple, intuitive, and easy-to-administrate concept—don’t make matters worse—enabled the Department of Justice to efficiently address thousands of preclearance applications each year.¹³³ The JLVRAA applies this straightforward concept nationwide, and provides a streamlined cause of action to voters when jurisdictions attempt to roll back the clock and erase hard-won progress. The Act provides that jurisdictions may not enact voting changes that have the purpose or effect of diminishing the ability of voters of color of participating or electing candidates of choice.

Protecting Voters as Election Day Approaches

The JLVRAA next addresses how the VRA and other voting rights protections are applied in close proximity to elections, restoring a path for critical pro-voter changes that are sometimes needed because circumstances change (as seen with the COVID pandemic) or harms are not clear earlier. In 2006, the Supreme Court articulated a principle that courts should be wary of ordering last-minute changes to election rules that could backfire by confusing voters.¹³⁴ Recently, courts have

¹³² 52 U.S.C. § 10304(a)-(b) (setting forth preclearance procedures to ensure that no “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” goes into effect if it “has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color [or language-minority status] to elect their preferred candidates of choice”); see, e.g., *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 299 (2015) (characterizing these requirements as “the prohibition on retrogression under § 5”).

¹³³ H.R. Rep. 109-478, 36, 2006 U.S.C.C.A.N. 618, 640 (recounting that “the Department of Justice received thousands of proposed voting changes annually from covered jurisdictions” since 1982, and that “more than 700” of those submissions were found “to be discriminatory against minority voters.”); see also *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 562 (2013) (Ginsburg, J., dissenting) (explaining that “the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history”).

¹³⁴ *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

misapplied this principle to reject changes that opened pathways for participation with no risk of confusion (such as extending ballot return deadlines).¹³⁵ Voters challenging election rules have ended up in a bind – it's too early to sue before the harm is clear and documented, but it's too late to sue if the election is around the corner. The JLVRAA simply makes clear that proximity to an election should not be a barrier to relief unless there is real, irreparable harm to voters caused by changing the rules.

The JLVRAA as an Integrated Whole

In addition to the central pillars of restoring and modernizing preclearance and Section 2 and protecting voters close to elections, the JLVRAA adds badly-needed and long-overdue protections for Native American voters; requires increased transparency for voting changes; authorizes more widespread use of federal observers; makes it easier for plaintiffs to receive preliminary relief; and expands the ways courts may order preclearance as a remedy.

Each of the provisions of the JLVRAA is critical on its own; but together the Act is greater than the sum of its parts. The Act as a whole takes critical steps toward restoring and modernizing the Voting Rights Act, embracing Congress's constitutional mandate by reasserting its original intent through a coherent structure that: a) affirmatively protects voters both in select jurisdictions with established, recent patterns of discrimination *and* in more far-flung places where an entrenched power structure is tempted to use practices with a known history of discriminatory impact to thwart the growing power of minority voting populations; b) restores and strengthens the VRA's nationwide protections so that Black and brown Americans can exercise the freedom to vote no matter where they live; c) clarifies that courts must be flexible and explicitly pro-voter in approaching changes necessary to vindicate voting rights in close proximity to elections; d) takes an important step towards meeting our nation's obligations to Native American voters; and e) provides both voters and the Department of Justice streamlined pathways to enforce these protections.

¹³⁵ See, e.g., *Merrill v. People First of Alabama*, 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting) (in a case litigated by LDF, explaining that the Court's majority was wrong to rely on *Purcell* in staying a district court's injunction granting relief to voting-rights plaintiffs, because the injunction "lift[ed] burdensome requirements rather than imposing them" and "d[id] not risk creating 'voter confusion and consequent incentive to remain away from the polls'").

Conclusion

During the House debate to reauthorize the VRA in 2006, the late Congressman John Lewis commented on the continued need for a preclearance framework: “Yes, we have made some progress. We have come a distance. We are no longer met with bullwhips, fire hoses, and violence when we attempt to register and vote. But the sad fact is, the sad truth is discrimination still exists, and that is why we still need the Voting Rights Act.”¹³⁶ Congressman Lewis’s observation remains equally true today.

We urge Congress to take up the Court’s invitation to legislate to enforce the promise of an equal right to vote for all, and to employ the full force of its constitutional authority to protect the American voters from the extraordinary harm of denying or diminishing their right to vote.

Congress has both the urgent obligation and the robust constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race today just as it did in 1965. The VRA’s preclearance process provided a quick, efficient, and non-litigious way of addressing America’s pervasive and persistent problem of voting discrimination, and most importantly to address it *before* the harm of disenfranchisement occurred. This Congress should not retreat from establishing a new preclearance framework that reflects the current conditions of the nation. In addition, Congress must update and strengthen the key pillars of the VRA’s pro-voter framework so its protections against discrimination are adequate to present-day conditions.

The VRA was drafted to rid the country of discrimination in voting—not to reduce discrimination to a level tolerable by some and now considered the norm across the country. The loss of the right to vote, or restrictions imposed on ballot access, even if ultimately vindicated, can never be fully remedied. The preclearance framework of the VRA was established expressly to address such harms; the rest of the John Lewis Voting Rights Advancement Act complements modernized preclearance to create a coherent whole that is greater than the sum of each of its essential parts. It is past time for Congress to fulfill its constitutional duty to the American people by once again taking up the charge of eradicating racial discrimination in voting and by renewing its commitment to protecting and strengthening the fundamental right to vote.

¹³⁶ 152 Cong. Rec. H5164 (daily ed. July 13, 2006) (statement of Rep. Lewis).

APPENDIX A

Summary of Representative LDF Voting Rights Litigation in Jurisdictions Formerly Covered by Voting Rights Act Preclearance

Alabama

Challenging Alabama’s Discriminatory Photo ID Law

In 2011, before the 2013 *Shelby* decision, the Alabama state legislature passed House Bill (HB) 19, a law which required voters to present a form of government-issued photo identification to vote.¹³⁷ The law also included a provision that would allow a potential voter without the required ID to vote *if* that person could be “positively identified” by two poll workers, a provision that harkened back to pre-1965 vouch-to-vote systems. Notably, although HB 19 passed the state legislature—alongside judicially recognized discriminatory redistricting plans¹³⁸—and was sent to the Governor’s desk in 2011, it was not implemented until after the Supreme Court’s 2013 *Shelby* decision—which ensured that Alabama was no longer required to submit this and other voting changes to the federal government for review under Section 5.

As reports show, various forms of photo ID laws across the country have a racially discriminatory and burdensome effect on Black, Latino and other voters of color.¹³⁹ HB 19 is no different. Evidence as of 2018 has shown that 118,000 already-registered voters lack the photo ID required by this law.¹⁴⁰ Black and Latino voters are two times more likely than white voters to lack the required ID and Black voters are over four times more likely than other voters to have their provisional ballots rejected because of a lack of acceptable ID.

On top of imposing this unnecessary and discriminatory extra requirement to vote, in 2015 Alabama closed 31 driver’s license-issuing offices predominately in majority Black counties for the entirety of 2016—a presidential election year.¹⁴¹ Driver’s licenses are the primary form of photo ID that most voters can and do use to vote. Alabama only reopened these offices in December 2016, after the election,

¹³⁷ *AL HB 19* (2011), <https://legiscan.com/AL/text/HB19/id/327641>.

¹³⁸ *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026 (MD Ala. 2017).

¹³⁹ *Citizens Without Proof*, Brennan Center for Justice at NYU School of Law (Nov. 2006) http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf.

¹⁴⁰ Appellant’s Br., *Greater Birmingham Ministries v. Merrill*, No. 18-10151, 2018 WL 1135793, at *3, 20-27 (11th Cir. Feb. 21, 2018).

¹⁴¹ Mike Cason, *State to Close 5 Parks, Cut Back Services at Driver License Offices*, Alabama.com (Sept. 2015) https://www.al.com/news/2015/09/state_announces_to_close_becau.html#incart_river_home.

because the U.S. Department of Transportation concluded that the closings were racially discriminatory in violation of the Civil Rights Act of 1964.¹⁴²

LDF filed a federal lawsuit in December of 2015, arguing that HB 19 had a discriminatory purpose and had discriminatory results in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and Section 2 of the VRA.¹⁴³ Representing Greater Birmingham Ministries, the Alabama NAACP and individual voters, we contended that voters of color without photo ID are more likely to lack transportation, and more likely to live below the poverty line than white voters without a required ID. This makes it extremely difficult—if not impossible—for many people to get to a location that issues photo IDs, even before accounting for other obstacles like taking time off work and being able to afford fees associated with obtaining an ID. We also challenged the “positively identify” provision of HB 19, which allows poll workers unfettered discretion to determine whether to allow a person without photo ID to cast a ballot. Indeed, there are reported instances of people who have voted at the same location for decades but could not be “positively identified” by election officials who had just moved to the area. Unfortunately, a federal judge granted summary judgment to the Alabama Secretary of State in January 2018, denying relief to the plaintiffs represented by LDF, and, following appeals, the Eleventh Circuit affirmed this outcome in April 2021.¹⁴⁴

Alabama Absentee Voting During COVID-19

On May 1, 2020, in response to the COVID-19 pandemic, LDF filed a federal lawsuit against Alabama Governor Kay Ivey, Secretary of State John Merrill, and others challenging Alabama’s unduly burdensome absentee voting provisions as violating the U.S. Constitution the Voting Rights Act, and the Americans with Disabilities Act.¹⁴⁵ Specifically, the suit challenged the requirement that an absentee ballot application be accompanied by a copy of a photo ID (the “Photo ID

¹⁴² Melanie Zanona, *Feds: Closing driver’s license offices in Ala. violates civil rights*, The Hill (Dec. 28, 2016) <https://thehill.com/policy/transportation/312055-feds-closing-driver-license-offices-in-alabama-violates-civil-rights>.

¹⁴³ *Greater Birmingham Ministries v. Alabama*, <https://www.naacpldf.org/wp-content/uploads/Greater-Birmingham-Ministries-v.-Alabama-Complaint.pdf>.

¹⁴⁴ See *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018), *aff’d sub nom. Greater Birmingham Ministries v. Sec’y of State for Alabama*, 966 F.3d 1202 (11th Cir. 2020), *opinion vacated and superseded sub nom. Greater Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021), and *aff’d sub nom. Greater Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021).

¹⁴⁵ LDF, SPLC, and ADAP File Federal Lawsuit Challenging Alabama’s Lack of Safe and Accessible Voting During COVID-19 Pandemic, NAACP Legal Defense and Educ. Fund, Inc. (May 1, 2020), <https://www.naacpldf.org/press-release/ldf-splc-and-adap-file-federal-lawsuit-challenging-alabamas-lack-of-safe-and-accessible-voting-during-covid-19-pandemic/>.

Requirement”); the requirement that an absentee ballot affidavit be notarized or signed by two witnesses (the “Witness Requirement”); and the Secretary of State’s policy prohibiting curbside voting (the “Curbside Voting Prohibition,” collectively, the “Challenged Provisions”).

In light of the COVID-19 pandemic, LDF alleged the aforementioned provisions would force thousands of Alabamians who were unable to meet the absentee voting requirements to make a choice between voting in person during the July primary runoff, August municipal elections, and November 2020 elections—and thereby risking their health—or forgoing their fundamental right to vote. In June 2020, the district court granted LDF’s request for a preliminary injunction in part, enabling Alabamians to utilize no-excuse absentee voting for the state’s July 14 primary runoff. The State of Alabama then extended the no-excuse policy for the November election. On September 8, 2020, a remote trial began with respect to the witness requirement, ID requirement, and *de facto* ban on curbside voting. On September 30, 2020, the District Court entered a 197-page favorable opinion and granted a permanent injunction against all three provisions challenged by LDF and co-counsel.¹⁴⁶ The injunction was in place for two weeks, during which time Alabama absentee voters were able to apply for absentee ballots without Photo ID or submit absentee ballots without two witness signatures or a notary stamp under the injunction. On October 13, 2020, the Eleventh Circuit stayed the injunction of the Photo ID and Witness Requirements but left in place the injunction of Secretary Merrill’s *de facto* Curbside Voting Ban.¹⁴⁷ On October 21, 2020, the Supreme Court of the United States, by a 5-3 vote, stayed the permanent injunction of the Curbside Voting Ban, over a dissent by Justice Sotomayor, joined by Justices Breyer and Kagan.¹⁴⁸

Discriminatory Local Electoral Systems in Alabama

Against the backdrop of statewide and local barriers to registration and voting, Black Alabamians also face electoral structures which minimize their power to elect their preferred candidates to local government.¹⁴⁹ Often times, these structures exist

¹⁴⁶ *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020).

¹⁴⁷ *People First of Alabama v. Sec’y of State for Alabama*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. Oct. 13, 2020).

¹⁴⁸ *Merrill v. People First of Alabama*, 141 S. Ct. 25 (2020).

¹⁴⁹ Across the nation, racial and ethnic minorities are underrepresented in city government, including offices elected at-large, with Black communities comprising approximately 12% of our country’s population, but only 4.3% of city councils and 2% of all mayors. Zoltan Hajnal, *Averting the Next Ferguson: One Simple Solution*, Political Violence at a Glance (Aug. 28, 2014), <http://politicalviolenceataglance.org/2014/08/28/averting-the-next-ferguson-one-simple-solution/>.

in the form of dilutive electoral methods and redistricting plans that crack Black and other voters of color among too many districts or pack them into too few districts.

Since *Shelby County*, LDF has warned officials in several local jurisdictions that the at-large aspects of their electoral systems may violate Section 2 of the VRA and potentially also the U.S. Constitution. This includes cases currently in litigation or other active advocacy in which we challenge at-large voting systems that have kept Black people from electing their representatives of choice to various offices in Jefferson County, the City of Pleasant Grove, Madison County, and Morgan County.¹⁵⁰ At-large elections can allow 51 percent of voters to control 100 percent of the seats on an elected body, which, in the presence of racially polarized voting and other structures, can dilute a racial minority group's voice in the electoral system. It is no surprise then that for decades congressional, state, and many local officials have been elected by districts. In Jefferson County, a federal court found that at-large school board districts were a product of intentional discrimination.¹⁵¹ After the City of Pleasant Grove changed its voting system in response to LDF's efforts, three Black city councilors were elected for the first time ever.¹⁵²

Florida

Challenging Legislative Attack on Voting Rights Restoration

On November 6, 2018, the people of Florida voted to approve a state constitutional amendment, Amendment 4, to restore voting rights to more than 1.4 million people with felony convictions upon the completion of their sentences. The passage of Amendment 4 reflected the understanding that restoring the voting rights of returning citizens strengthens public safety, reduces recidivism, and builds a healthy democracy for all.¹⁵³ Amendment 4 generated overwhelming bipartisan

¹⁵⁰ NAACP LDF, *LDF Files Complaint Against Pleasant Grove, Alabama Over Voting Rights Act Violations* (Dec. 13, 2018), <https://www.naacpldf.org/files/about-us/Pleasant%20Grove%20letter.pdf>; NAACP LDF, *LDF Sends Letter to Madison County Official Over Voting Rights Concerns* (Jan. 1, 2019), <https://www.naacpldf.org/wp-content/uploads/Ltr-to-Madison-Cty-Cmmn.pdf>; NAACP LDF, *LDF Sends Letter to Alabama County Commission Expressing At-large Voting Concerns* (Feb. 7, 2019), <https://www.naacpldf.org/news/ldf-sends-letter-alabama-county-commission-expressing-large-voting-concerns/>

¹⁵¹ *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821-MHH, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019).

¹⁵² Anna Beahm, "Pleasant Grove makes history; elects first black councilors," AL.com (August 26, 2020), <https://www.al.com/news/2020/08/pleasant-grove-makes-history-elects-first-blacks-to-council.html>

¹⁵³ Steven Lemongello, *Floridians will vote this fall on restoring voting rights to former felons*, Sun

support, with a supermajority of Florida voters—more than 64 percent¹⁵⁴—approving the measure, which reportedly resulted in the largest expansion of the electorate since Congress passed the Voting Rights Act in 1965. However, in 2019, the Florida Legislature enacted SB 7066, a law that, among other requirements, mandated that people with past felony convictions pay all legal financial obligations (“LFOs”) arising from a felony conviction before they are eligible to vote, including those LFOs converted to civil obligations—removing the criminal imprimatur—and even Florida cannot tell otherwise eligible voters what they owe or otherwise eligible voters cannot afford to pay the LFOs.

On June 28, 2019, LDF and other civil rights and good governance groups filed a lawsuit in the U.S. District Court for the Northern District of Florida challenging SB 7066.¹⁵⁵ We alleged that, by conditioning the right to vote on payment of LFOs, SB 7066 violates fundamental fairness and unconstitutionally burdens the right to vote under the Fourteenth Amendment, discriminates on the basis of wealth in violation of the Equal Protection Clause, violates the prohibition against poll taxes enshrined in the Twenty-Fourth Amendment, and imposes punitive sanctions in violation of the Ex Post Facto Clause. We further alleged that SB 7066 is unconstitutionally vague in violation of the Due Process Clause because Florida fails to provide returning citizens with sufficient information to determine whether LFOs continue to disqualify them from voting. Finally, we alleged that SB 7066 chills the voter registration activities of local organizations in violation of the First Amendment and that SB 7066 intentionally discriminates on the basis of race in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

On October 18, 2019, the district court granted a partial preliminary injunction because SB7066’s LFO requirements constitute wealth-based discrimination for those who cannot afford to pay and ordered that the individual Plaintiffs in the case must be permitted to vote because they have shown they cannot afford to pay their respective LFOs.¹⁵⁶ Following more than a week of trial, in May 2020, the district court made numerous findings, among them that SB7066 erects unconstitutional

Sentinel (Jan 23, 2018), <https://www.sun-sentinel.com/news/florida/fl-reg-felon-voters-amendment-20180123-story.html>; Steven Bousquet et al., *1.2. Million Floridians Have a Lot Riding on Passage of Amendment 4*, Miami Herald (Nov. 2, 2018), <https://www.miamiherald.com/news/politicsgovernment/state-politics/article221021940.html>.

¹⁵⁴ Tim Mak, *Over 1 Million Florida Felons Win Right To Vote With Amendment 4*, National Public Radio (Nov. 7, 2018), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4>.

¹⁵⁵ *Gruver, et al. v. Barton, et al.*, No. 1:19-cv-121 (N.D. Fla. 2019).

¹⁵⁶ P.R. Lockhart, *A controversial Florida law stops some former felons from voting. A judge just blocked part of it.*, Vox.com (Oct. 19, 2019), <https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-injunction-lawsuits-fines-fees>.

wealth-based hurdles to voting and certain LFOs function as unconstitutional poll taxes. The decision would have restored voting rights to hundreds of thousands of citizens had it been in force for the 2020 elections. However, the State appealed the decision to the Eleventh Circuit Court of Appeals *en banc* which reversed all of the findings of the district court, effectively denying the voting rights of hundreds of thousands of people with past felony convictions.

Ongoing Challenge to Florida’s Omnibus Voting Bill (S.B. 90)

On May 6, 2021, LDF filed a lawsuit on behalf of the Florida State Conference of the NAACP, Disability Rights Florida, and Common Cause against the Florida Secretary of State, challenging multiple provisions in SB 90, a bill signed into law by Governor DeSantis that same day. Challenged provisions include: (i) restrictions and new requirements for standing VBM applications; (ii) limitations on where, when, and how drop boxes can be used; and (iii) a vague and overbroad prohibition on conduct near polling places, including potentially criminalizing offering free food, water, and other relief to Florida voters waiting in long lines.¹⁵⁷ This litigation is in progress.

Georgia

At-Large Voting in Fayette County, Georgia

In August 2011, organizational and individual plaintiffs challenged the at-large electoral method for the five-member Fayette County School Board and County Commission, which had never elected a Black member in the County’s nearly 200-year history. Plaintiffs challenged that the electoral method had discriminatory results in violation of Section 2 of the VRA. After a district court granted summary judgment on Plaintiffs’ claim, the Eleventh Circuit reversed; thereafter, the Plaintiff settled with both bodies, leading to the use of four single member districts—with one being comprised of a majority of Black voters—and one at-large seat. Black voters subsequently elected candidates of choice for both seats, including the first Black County commissioner. In those elections, Fayette County had the highest turnout of any of Georgia’s 159 counties. However, in 2015 the County Commission tried to revert to an at-large voting system in a special election held to replace that Black Commissioner who had died unexpectedly. LDF won a preliminary injunction ruling, preventing the County from reverting to at-large voting and requiring the election to

¹⁵⁷ LDF, *Important Facts About LDF’s Lawsuit Challenging Florida’s New Voting Law*, <https://www.naacpldf.org/naacp-publications/ldf-blog/important-facts-about-ldfs-lawsuit-challenging-floridas-new-voting-law/>.

use single-member districts, which allowed Black voters to again elect their preferred candidate—the second Black County commissioner in the history of Fayette.¹⁵⁸

Ongoing Challenge to Georgia's Omnibus Voting Bill (S.B. 202)

Since the *Shelby* 2013 decision, the State of Georgia has enacted voting restrictions across five major categories studied by the U.S. Commission on Civil Rights: voter identification requirements, documentary proof of citizenship requirements, voter purges, cuts to early voting, and polling place closures or relocations.¹⁵⁹ These barriers have made voting materially more difficult for historically disenfranchised communities, including voters of color, voters with disabilities, older voters, student voters, and voters experiencing poverty.

Despite these barriers, Georgia voters and Black voters, specifically, turned out in record numbers for the 2020 November General Election and 2021 January Runoff Election.¹⁶⁰ This record participation occurred notwithstanding the global COVID-19 pandemic—a pandemic that has disproportionately harmed Black people. The integrity of the General Election and Runoff Election was repeatedly recognized, including with statements praising Georgia's election system by its Governor, Secretary of State, and other top election officials.¹⁶¹

Two days after the Runoff Election, and a day after the insurrection led by white supremacists, on January 7, 2021, the Georgia House Speaker David Ralston announced the creation of a Special Committee on Election Integrity ("EIC"). LDF, jointly with the Southern Poverty Law Center ("SPLC"), provided oral and written testimony throughout the session to oppose omnibus bills restricting access to the right to vote, explaining that these bills would disproportionately harm low-income

¹⁵⁸ *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F.Supp.3d 1338 (ND Ga. 2015).

¹⁵⁹ LDF, *Democracy Diminished*, *supra* n. 38 at 25-32.

¹⁶⁰ Brittany Gibson, *Record Turnout in Georgia, but Mostly Before Election Day*, The American Prospect (Jan. 5, 2021), <https://prospect.org/politics/record-turnout-in-georgia-but-mostly-before-election-day/>; Adam Edelman, *'It's Too Important Now': Record Turnout, Black Voters Fuel Democratic Hopes in Georgia*, NBC News (Nov. 1, 2020), <https://www.nbcnews.com/politics/2020-election/it-stoo-important-now-record-turnout-black-voters-fuel-n1245416>; *Overcoming the Unprecedented: Southern Voters' Battle Against Voter Suppression, Intimidation, and a Virus*, Southern Poverty Law Center (March 16, 2021), <https://www.splcenter.org/overcoming-unprecedented-southern-voters-battle-against-voter-suppression-intimidation-and-virus>.

¹⁶¹ Quinn Scanlan, *'We've never found systemic fraud, not enough to overturn the election': Georgia Secretary of State Raffensperger says*, ABC News (Dec. 6, 2020), <https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956>; Miles Parks, *Georgia Election Official: Don't Let Misinformation 'Suppress Your Own Vote'*, National Public Radio (Jan. 4, 2021), <https://www.npr.org/2021/01/04/953321408/georgia-election-official-dont-let-misinformation-suppress-your-own-vote>.

and racial minority voters.¹⁶² Yet, the Georgia General Assembly refused to conduct any racial-impact study of these bills.

On March 17, 2021, with little notice to EIC members, let alone members of the public, an EIC member introduced a substitute bill to Senate Bill 202 (“S.B. 202”), which expanded from three pages to over ninety pages, only hours before a full hearing. With limited opportunity for meaningful engagement and review, the EIC rushed S.B. 202 through additional hearings. A little over a week later, on March 25, 2021, the House and Senate passed S.B. 202, followed by the Governor signing it into law during a closed-door session and days before the end of legislative session. S.B. 202, one of the most restrictive voting laws of recent years, (1) severely restricts mobile voting; (2) imposes new identification requirements for requesting and casting an absentee ballot; (3) delays and compresses the time period for requesting absentee ballots; (4) imposes new restrictions on secure drop boxes; (5) implements out-of-precinct provision ballot disqualification; (6) drastically reduces early voting in runoff elections; and (7) criminalizes the provision of food and water to voters waiting in line to cast a ballot.¹⁶³

On March 30, 2021, LDF, along with allies, filed a lawsuit, later amended, in the Northern District of Georgia challenging S.B. 202 on behalf of several groups including the Sixth District of the African Methodist Episcopal Church, the Delta Sigma Theta Sorority, Inc, Georgia ADAPT, Georgia Advocacy Office, and Southern Christian Leadership Conference.¹⁶⁴ Plaintiffs raise the following federal constitutional and statutory voting claims: (1) intentional racial discrimination and discriminatory results under Section 2 of the VRA, (2) intentional racial discrimination under the Fourteenth and Fifteenth Amendments, (3) an unconstitutional burden on the right to vote under the First and Fourteenth Amendments; and (4) an unconstitutional burden on the right to freedom of speech and expression concerning the ban on line relief under the First Amendment. Plaintiffs are challenging S.B. 202 for discrimination on the basis of disability under Title II of the American Disabilities Act, discrimination on the basis of disability under Section 504 of the Rehabilitation Act of 1973, and a violation of the Civil Rights Act of 1964’s prohibition on immaterial requirements to voting. Defendants have

¹⁶² *LDF and SPLC Action Fund Submit Testimony Opposing Georgia’s S.B. 202*, NAACP LDF (March 18, 2021), <https://www.naacpldf.org/news/ldf-and-splc-action-fund-submit-testimony-opposing-georgias-s-b-202/>.

¹⁶³ *Civil Rights Groups Sue Georgia Over New Sweeping Voter Suppression Law*, NAACP LDF (March 30, 2021), <https://www.naacpldf.org/press-release/civil-rights-groups-sue-georgia-over-new-sweeping-voter-suppression-law/>.

¹⁶⁴ *Id.*

moved to dismiss the case, and those motions are pending before the district court, which also has stayed formal discovery.

Louisiana

Discriminatory Judicial Districting in Terrebonne Parish, Louisiana

Under Section 2 of the VRA and the U.S. Constitution, LDF challenged Louisiana's use of at-large voting to maintain a racially segregated state court (32nd JDC), which has jurisdiction over Terrebonne Parish.¹⁶⁵ A Black candidate has never been elected as a judge on this court in a contested election. A sitting white judge has been re-elected in 2008 under the at-large voting method, which a majority of white voters control the outcome of, after the Louisiana Supreme Court suspended him for appearing in black face, an afro wig, an orange prison jumpsuit, and handcuffs at a Halloween party in a public setting.

After more than eleven days of trial, the federal district court ruled that the at-large electoral scheme for the 32nd JDC "deprives Black voters of the equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act of 1965, and it has been maintained for that purpose, in violation of Section 2 and [the Fourteenth and Fifteenth Amendments to the] United States Constitution."¹⁶⁶

In early December 2018, the Court entered an order, determining that it would use a special master to help determine the appropriate remedy in this case. In April 2019, the special master issued his findings and recommendations to the Court about a remedial districting plan, and in July 2019, the Court adopted a plan recommended by the special master which would have required the implementation of five single member districts—one of which was comprised of a majority of Black voters—for this five-member court. Subsequently, the Court issued final judgment and an injunctive order. The next day, the Attorney General filed a notice of appeal. Oral argument before the Fifth Circuit Court of Appeals was held in January 2020. In June 2020, a three-judge panel of the Fifth Circuit reversed the district court's post-trial favorable decision—which found that plaintiffs clearly established vote dilution through experts who found some of the most stark racially-polarized voting anywhere in the country—and denied LDF's petition for rehearing *en banc*.

¹⁶⁵ *Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp.3d 395, 462 (MD La. 2017).

¹⁶⁶ *Fifth Circuit Rejects Louisiana's Attempt to Prematurely Appeal Voting Rights Decision*, NAACP Legal Defense and Educ. Fund, Inc. (Nov. 14, 2017), <https://www.naacpldf.org/press-release/fifth-circuit-rejects-louisianas-attempt-to-prematurely-appeal-voting-rights-decision/>

Texas

Discriminatory Voter ID Law

For years, LDF prosecuted a statewide lawsuit against the State of Texas involving the state's photo ID law, SB 14—the same law previously blocked by Section 5 in 2012.¹⁶⁷ SB 14 was widely described, including by an en banc panel of the Fifth Circuit, as the most restrictive voter ID law in the country as it permitted concealed hand-gun license owners to vote with that ID, a form disproportionately held by white Texans but prohibited the use of student IDs, even those issued by Texas' public colleges and universities, and employee or trial state or federal government-issued IDs in voting. After the State of Texas implemented SB 14 within hours of the *Shelby* decision,¹⁶⁸ LDF and other civil rights advocates challenged the law on behalf of individual voters and organizations, including Black college students, harmed by the strict photo ID law.¹⁶⁹

In 2014, after a nearly two-week trial, a federal district court struck down that photo ID law, holding that “SB 14 creates an unconstitutional burden on the right to vote, has an impermissible discriminatory effect against Hispanics and African Americans [i.e., they comprise a disproportionate share of the more than 600,000 registered voters and one million eligible voters who lack the requisite photo ID], and was imposed with an unconstitutional discriminatory purpose,” and that it “constitutes an unconstitutional poll tax.”¹⁷⁰ Following that decision, an en banc panel of the Fifth Circuit U.S. Court of Appeals affirmed in 2016 that SB 14 had a discriminatory impact on Black and Hispanic Texans in violation of Section 2's results test.¹⁷¹ On remand, the trial court found that Texas also had enacted the law for the purpose of discriminating against voters of color in violation of Section 2 and the Fourteenth and Fifteenth Amendments.¹⁷²

Although LDF was ultimately successful in that litigation, in the years before trial, through multiple appeals, and before a remedy for the Section 2 discriminatory results remedy was implemented for the 2016 elections, Texas elected numerous

¹⁶⁷ *Texas v. Holder*, 888 F.Supp.2d 113, 144-45 (D.D.C. 2012), *vacated and remanded*, ___ U.S. ___, 133 S. Ct. 2886 (2013).

¹⁶⁸ Ed Pilkington, *Texas rushes ahead with voter ID law after supreme court decision*, The Guardian (June 25, 2013), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-courtdecision>.

¹⁶⁹ *Veasey v. Perry*, 71 F. Supp. 3d 627, 693 (S.D. Tex. 2014).

¹⁷⁰ *Id.*

¹⁷¹ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

¹⁷² *Veasey v. Abbott*, 249 F. Supp. 3d 868 (S.D. Tex. 2017).

candidates to state and federal office under the discriminatory SB14 including: a U.S. senator, members of the Texas delegation to the U.S. House of Representatives, Governor, Lieutenant Governor, Attorney General, Controller, various statewide Commissioners, Justices of the Texas Supreme Court, state boards of education, state senators, members of the state House, state court trial judges, and over district attorneys. The remedy was in place for elections in 2016 and 2017 before Texas codified aspects of the remedy beginning in elections in 2018, which a three-judge court of the Fifth Circuit upheld as sufficient for a complete remedy to the Section 2 violation.

Discriminatory Early Voting Schedules in Waller County, Texas

In 2018, prior to Election Day, LDF received reports that students at Prairie View A&M University (“PVAMU”), a historically Black university located in Waller County, Texas, did not have adequate early voting sites or hours, particularly at an early voting site on PVAMU’s campus, and that county officials refused student requests to provide them. On October 22, 2018, LDF filed a federal lawsuit against officials in Waller County. County officials have long discriminated against Black voters at PVAMU and in the majority-Black City of Prairie View, dating back to at least the early 1970s.¹⁷³ During the 2018 election, the County provided fewer early voting opportunities to PVAMU students, as compared to other voters in Waller, despite students’ reliance on this means of voting. During the first week of early voting, no polling sites were available anywhere in the City of Prairie View or on campus; in the second week, while Prairie View, where PVAMU is located, provided five early voting days, two of those were off campus at a site inaccessible to many PVAMU students who lack transportation. By contrast, in the majority-white city of Waller, voters had two locations to vote during the first week and, overall, 11 days of early voting. During the second week of early voting, two voting sites were open in Prairie View, but for considerably fewer hours than voting sites in Waller and other areas with larger white populations. On Wednesday, October 24—the eve of the 2018 election—LDF filed a motion for a temporary restraining order (“TRO”) seeking an emergency change to Waller County’s early voting schedule that would include early voting on-campus during the first week of early voting.

Later that same day, county commissioners in Waller County modestly expanded early voting in Prairie View by providing 5 hours of voting at the Prairie View City Hall on Sunday, October 28, and by extending the hours of early voting on the PVAMU campus to 7:00am to 7:00pm on Monday, October 29, through

¹⁷³ *The Walk of Political Engagement*, Prairie View A&M University (Mar. 31, 2017), <https://www.pvamu.edu/1876/2017/03/31/the-walk-of-political-engagement-at-pvamu/>.

Wednesday, October 31.¹⁷⁴ Consequently, LDF withdrew its TRO request for emergency relief. However, LDF continued to litigate its claims under Section 2 of the Voting Rights Act and the 14th, 15th, and 26th Amendments to the U.S. Constitution on behalf of PVAMU students, who were still denied equal and adequate voting opportunities in the election under the modified plan. Moreover, since 2018, the county has removed the off-site early voting election site at PVAMU for elections that the county conducts, including for the consequential 2020 elections.

In July 2020, the district court denied the Defendants' motion for summary judgment, finding that genuine disputes of material fact existed under all of Plaintiffs' claims.¹⁷⁵ In the fall of 2020, LDF and our clients in Prairie View participated in a twelve-day trial for this lawsuit; post-trial briefing was completed in March of this year, and the parties are now awaiting the court's decision.

Ongoing Challenge to Texas's Omnibus Voting Bill (S.B. 1)

On September 7, 2021, LDF filed a lawsuit on behalf of the Houston Area Urban League, Houston Justice, Delta Sigma Theta Sorority, Inc., The Arc of Texas and a local election judge challenging S.B. 1, a new omnibus Texas law targeting means and methods of voting used by Black and Latino voters in the 2020 election cycle.¹⁷⁶ The lawsuit challenges multiple provisions of the omnibus voter suppression bill, including S.B. 1's elimination of drive thru voting and 24-hour voting, restriction on county flexibility in early voting hours, burdens on voting by mail, including the banning of vote-by-mail drop boxes and distribution of unsolicited vote by mail ballot applications, imposition of burdens on individuals who provide voters assistance to vote, including by subjecting them to criminal penalties, and the law's empowerment of partisan poll watchers to interfere with election administration and to intimidate and harass voters at the polls.

¹⁷⁴ *Waller County Modestly Expands Early Voting in Prairie View, LDF's Suit Still Pending* NAACP Legal Defense and Educ. Fund, Inc. (Oct. 25, 2018), <https://www.naacpldf.org/press-release/waller-county-modestly-expand-early-voting-prairie-view-ldfs-suit-still-pending-2/>.

¹⁷⁵ *Allen v. Waller Cty., Texas*, 472 F. Supp. 3d 351, 361 (S.D. Tex. 2020).

¹⁷⁶ Compl. for Decl. and Injunctive Relief, *Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. Sept. 7, 2021), ECF No. 1; *see also* NAACP Legal Defense and Educ. Fund, Inc., *Lawsuit Filed Challenging New Texas Law Targeting Voting Rights* (Sept. 7, 2021), <https://www.naacpldf.org/press-release/lawsuit-filed-challenging-new-texas-law-targeting-voting-rights/>.

Additional Representative Voting Rights Litigation

In addition to those cases where LDF is specifically involved, over the last few years, we also are aware of numerous states and localities across the country that have implemented laws and practices which impeded and/or discouraged individuals from exercising their right to vote. For example:

In North Dakota, we saw the state implement a law requiring voters to provide IDs with a residential street address, threatening to disenfranchise thousands of Native American people who live on rural reservations where residential addresses are uncommon.¹⁷⁷ Studies commissioned by Native American rights groups who sued to challenge the law revealed that roughly 35 percent of that population did not have an acceptable ID with a residential address.

In Dodge City, Kansas, voting was limited to one polling location, which was outside of town and inaccessible via public transportation. The nearest bus stop was more than a mile away and at times, freight trains in the area block traffic, slowing access to the polls. Dodge City's population is 60 percent Hispanic, and the voter turnout among Latinx voters is lower than the national average.¹⁷⁸

And, in Wisconsin, the state implemented a law requiring voters to present a current driver's license, passport, or state or military ID to cast a ballot. There were substantial legal challenges to the state's voter ID law; however, aspects of it were allowed to stand for the 2016 election. Post-election surveys and other evidence clearly demonstrate that the law discouraged and/or prevented many people for exercising their right to vote.¹⁷⁹

¹⁷⁷ Cheyenne Haslett, *North Dakota Native Americans fight to protect their right to vote after court ruling*, ABC News (Oct. 21, 2018), <https://abcnews.go.com/Politics/native-americans-north-dakota-fight-protect-voting-rights/story?id=58585206>

¹⁷⁸ Kansas City Star Editorial Board, *Voter suppression at its worst: This Kansas town aims to keep people away on Election Day*, The Kansas City Star (Oct. 24, 2018), <https://www.kansascity.com/opinion/editorials/article220341790.html>

¹⁷⁹ Ari Berman, *Rigged: How Voter Suppression Threw Wisconsin to Trump And Possibly Handed Him the Whole Election*, Mother Jones (Nov./Dec. 2017), <https://www.motherjones.com/politics/2017/10/voter-suppression-wisconsin-election-2016/>

**North Carolina Lieutenant Governor Mark Robinson**

Written Testimony
United States Senate
Committee on the Judiciary
October 6, 2021

Hearing: *"Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act."*

Chairman Durbin, Ranking Member Grassley, and the Members of the Committee:

Thank you for inviting me to provide this written testimony to the Committee regarding the important topic under consideration: how lawmakers can go about striking the balance of protecting the voting rights of all citizens while simultaneously providing those voters with elections that are secure, fair, and in which all citizens can have confidence.

I hail from Greensboro, home of the Woolworths Diner Sit-ins, an epicenter of the civil rights movement. I grew up poor as the 9th of 10 children in a home marred by alcoholism and abuse, but sustained by a mother's faith in God. I was raised by a woman who lived through Jim Crow, and witnessed first-hand the incredible sacrifices made to ensure that future generations of black Americans would have a meaningful voice in their government. My home state of North Carolina was one of the states covered by the Voting Rights Act in 1965, and in 2020 I became the highest-ranking black elected official in the history of the State. Clearly, North Carolina does not require the "assistance" of the Federal Government to ensure that black North Carolinians can make their voices heard.

Today we are here to discuss H.R. 4, which essentially seeks to overturn the Supreme Court's 2013 decision in *Shelby County v. Holder* that struck down the "preclearance" requirement contained in the 1965 Voting Rights Act which required states – *certain states* – to obtain permission from federal authorities before passing election-related laws. The reason for such a requirement was clear in 1965, and the solution was simple: the Voting Rights Act of 1965 (VRA) banned the Jim Crow-style racially discriminatory election laws designed to discourage or prevent minorities from voting which had been enacted by some state legislatures, and those states were consequently required to change their laws and end the practices which had resulted in low voter registration

and participation in minority communities. In order to ensure that these states remained compliant with the VRA, and did not attempt to avoid its requirements by simply passing new discriminatory laws, any proposed changes to election laws in those states had to be “pre-cleared” by the U.S. Department of Justice.

Although the VRA accomplished its goal of combatting Jim- Crow voter discrimination and intimidation, we must acknowledge the obvious: It is no longer 1965.

Gone are the literacy tests and poll taxes. Gone are the requirements that voters memorize portions of the Constitution or be required to prove their “good moral character.” There are no states passing laws designed to prevent minorities from exercising their right to vote.

In its *Shelby County* decision, the Supreme Court reiterated that the preclearance portion of the VRA “‘authorizes federal intrusion into sensitive areas of state and local policymaking,’ and represents an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’” (Internal citations omitted.) In the Jim Crow era, such a departure was justified because of the extraordinary circumstances of the times. However, times have changed.

When Congress reauthorized the VRA in 2006, the House of Representatives noted that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices.” Between 1965 and 2006, there was an approximately 1,000 percent increase in the number of African-American elected officials in the six states originally covered by the VRA.

Black Americans are registered to vote in record numbers and have achieved parity with white voters throughout the country. Black Americans can make their voices heard at the ballot box and elect candidates of their choice. The Voting Rights Act worked as intended – it eliminated Jim Crow laws and practices designed to suppress the voices and the votes of black Americans. It is 2021, and the extraordinary circumstances of the Jim Crow era and the civil rights movement no longer exist. Accordingly, the “extraordinary federal intrusion” into states’ administration of elections contemplated by H.R. 4 is not justified in 2021, any more than it was justified in 2013 when the Supreme Court struck it down as unconstitutional.

This legislation seeks to go even further than the VRA did, at a time when the evils the VRA addressed (and which bills like H.R. 4 pretend to address) no longer exist. Rather than celebrate that victory over evil and injustice, the proponents of this legislation instead seek to gaslight the American people into believing that the conditions of 1965 persist today, for their own partisan political purposes. This legislation is nothing more than an attempt to ensure that one party controls the machinery of our government in perpetuity, by mandating an unconstitutional federal takeover of elections in our country. Period.

In addition to expanding the coverage criteria determining which states would require preclearance, this legislation also applies preclearance to each, and every State in the Union should they attempt to make certain changes to their election laws. It provides for the ability of any

“aggrieved” citizen to file baseless lawsuits, opening the floodgates of litigation by liberal advocacy groups who find “voter suppression” lurking in every election-security measure. Under the VRA, enforcement was the role of the Attorney General. Under H.R. 4, Congress would subcontract the protection of citizens’ voting rights to the leftist identity groups and special interests favored by Democrats. It also dramatically expands the Attorney General’s authority to challenge in court any act by a state that the Attorney General deems a violation of the Fourteenth or Fifteenth Amendments, an unprecedented enlargement of the power wielded by the Federal Government.

This legislation is most emphatically revealed as a partisan political power-grab by the provision which seeks to effectively ban states from enforcing Voter ID measures duly enacted by the legislatures of those states, supported by an overwhelming majority of their citizens across party, racial, and other demographic lines, and, in some cases like my home State of North Carolina, enshrined by the people when they voted to make an amendment to their constitution adding it.

Voter ID is common sense for the common good, and for Democrats to imply that black Americans are too stupid, too lazy, or too “oppressed” to obtain a free photo identification is downright insulting. There is no widespread, systematic suppression of voters, whether black, brown, or any other color. This is not 1965. Jim Crow is dead, even if there are those who would prefer it was not. In 2021, the number of people who would prefer that we were still in the dark days of Jim Crow because they truly hold vile racist beliefs is far smaller than the number of those who simply seek to use its legacy to spread lies and fear in order to hold onto their power. They should be ashamed. The histrionics of some on the left claiming that we are still in Jim Crow is a slap in the face and a desecration of the graves of those who fought – and died – to end it. Stop erasing their accomplishments for your personal and political gain.

Our elections must be secure, for the benefit of all citizens. Americans have an easier time registering to vote and voting than at any other time in our nation’s history. More people participated in the general election in 2020 than ever before. We must always strive to protect the rights of all, especially those most vulnerable among us, but we must not lose sight of the important fact that, without confidence in the outcomes of secure elections, government “of the people, by the people, and for the people,” may very well “perish from the earth.”



Current Conditions of Voting Rights Discrimination

A Report Prepared by

**Voting Rights in New York State: Recent
Enforcement Actions, Continuing
Challenges, and the Need for a
Revitalized Voting Rights Act**

October 4, 2021

Prepared by Perry Grossman

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Voting Rights in New York State: Recent Enforcement Actions, Continuing Challenges, and the Need for a Revitalized Voting Rights Act

Perry Grossman¹

October 4, 2021

I. OVERVIEW

Enforcement of the Voting Rights Act of 1965 (VRA) began in New York within months of its enactment. In *United States v. Board of Elections of Monroe County, New York*, the court succinctly articulated a dynamic that remains true today: While the VRA may have been “[b]orn out of civil rights problems currently plaguing the south and the violence flowing from them,” the law “was not designed to remedy deprivations of the franchise in only one section of the country. Rather, it was devised to eliminate second-class citizenship wherever present.”² In the past 56 years, New York has been the site of dozens of successful actions brought under the VRA. In December 2018, the New York Times reported, “[d]espite its reputation for sterling progressivism, New York has some of the most restrictive election laws in the nation.”³ This report describes how New York’s

¹ Senior Staff Attorney at the New York Civil Liberties Union and Adjunct Professor at Fordham Law School. This report was prepared with generous and dedicated assistance in research and drafting from colleagues at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP—Alexander F. Atkins, Merinda Davis, Adam D. Friedland, Melinda Haag, Peter Jaffe, Tyler C. Lee, Nicole D. Martin, Eliza P. Strong, and Aidan Synnott. Special thanks to Jesse Barber, Senior Research Analyst at the New York Civil Liberties Union, for his assistance with the quantitative analyses in this report.

² 248 F. Supp. 316, 317 (W.D.N.Y. 1965).

³ Vivian Wang, *Why Deep Blue New York is ‘Voter Suppression Land,’* N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/nyregion/early-voting-reform-laws-ny.html>.

minority voters have required and still require the VRA's full panoply of protections to exercise the franchise.

The dissonance between New York's progressive reputation and regressive voting rights record has made it a frequent target of 'whataboutism' by states seeking to justify renewed voter suppression efforts, or a discriminatory status quo.⁴ Officials in Georgia, Texas, Ohio, and North Carolina have each recently pointed to New York to justify restrictive new voting measures.⁵ To a significant extent, these criticisms are inaccurate, particularly in light of New York's recent measures to modernize its elections laws and practices.⁶ However, these states' comparisons to New York are much more an indictment

⁴ See, e.g., Sean Morales-Doyle and Chisun Lee, *New York's Worst-in-the-Country Voting System*, THE ATLANTIC (Sept. 13, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/new-yorks-worst-in-the-country-voting-system/570223/> ("So long as New York's voting system is such a mess, states like Ohio, North Carolina, and Wisconsin will use it as a reference point to justify their own flawed systems. In fact, they already have.").

⁵ See Jane C. Timm, *Republicans, defending voting restrictions, point finger at blue states with laws they say are worse*, NBC (Apr. 8, 2021), <https://www.nbcnews.com/politics/elections/republicans-defending-voting-restrictions-point-finger-blue-states-laws-they-n1263205> (quoting Texas Lt. Gov. Dan Patrick, "So if, somehow, we're accused of being racist because we want to suppress the vote of the people of color, I guess New York, New Jersey and Delaware are even more racist"); Amy Sherman, *Ask Politifact: Are New York's Voter Laws More Restrictive Than Georgia's?*, POLITIFACT (Apr. 8, 2021), <https://www.politifact.com/article/2021/apr/08/ask-politifact-are-new-yorks-voter-laws-more-restr/> (quoting Georgia Gov. Brian Kemp, "It is easier to vote in Georgia than it is in New York"); Jeffrey Toobin, *The Problem with Voting Rights in New York*, THE NEW YORKER (Oct. 11, 2016), <https://www.newyorker.com/news/daily-comment/the-problem-with-voting-rights-in-new-york> ("Indeed, New York's voting procedures have become a talking point for Republican-led states in defending their own regression on voting rights. In discussing their limitations on voting rights, North Carolina and Ohio have pointed to the New York rules.")

⁶ See, e.g., Brigid Bergin, *New York Poised to Expand Voting Rights As Other States Suppress Them*, GOTHAMIST (May 21, 2021), <https://gothamist.com/news/new-york-poised-expand-voting-rights-other-states-suppress-them> ("On the same day the New York Assembly took action on [voting rights expansion] legislation, Governor Doug Ducey of Arizona signed a bill that reduced the number of voters permanently eligible for early voting in the state. Analysis by the Brennan Center from March of this year found that 361 bills that would limit voting rights had been introduced in 47 states."); Sean Morales-Doyle, *The Box Score on Voting Rights*, Brennan Ctr. for Justice (Apr. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/box-score-voting-rights> ("The critical difference is that Georgia and New York are headed in opposite directions. Since 2019, New York's legislature has swiftly moved to expand democracy . . . Georgia, on the other hand, is responding to record turnout by making it harder to vote, rolling back the very policies that put it ahead of New York in the first place."); Sherman *supra* note 5, (noting that New York has the longest election day voting hours in the nation and no voter identification requirement for

of New York than an acquittal of their own efforts to suppress and dilute minority voting strength.

This report focuses on New Yorkers' recent and ongoing struggles with racial vote dilution and suppression, but the state's current problems have roots in a history of discrimination in voting that can be traced back over two centuries.

The New York State Constitution of 1777 limited the right to vote to any "freeman."⁷ As New York began a process of gradual emancipation and the free Black population grew, the state imposed onerous requirements for Black people to vote.⁸ An 1811 law, an "Act to Prevent Frauds and Perjuries at Elections," required Blacks "to obtain a document certifying their freed status from a 'supreme court justice, mayor, recorder, or . . . court of common pleas,' pay a fee and present the documentation at the polls" before voting.⁹ These measures effectively suppressed Black voter registration.¹⁰

In 1821, the New York State Constitution included a requirement that denied the franchise to any "man of colour" unless he owned real property valued at over \$250.00 "over and above all debts and incumbrances charged thereon" and had actually paid taxes

absentee ballot applications or the vast majority of in-person voting, as well as more recent efforts to modernize elections and lower barriers to the ballot).

⁷ Erika Wood, et al., JIM CROW IN NEW YORK, Brennan Ctr. for Justice 5 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_JIMCROWNY_2010.pdf citing N.Y. CONST. art. VII (1777).

⁸ See *id.* at 5.

⁹ *Id.*

¹⁰ *Id.*

on that property.¹¹ For Black men,¹² the right to vote was illusory; “[a]lthough free black men were technically allowed to vote, virtually none owned real property at the time and thus Black people effectively were disenfranchised under the state constitution.”¹³ In 1869, a referendum on eliminating the property requirement failed, and the requirement persisted for several years after the 1870 ratification of the 15th Amendment.¹⁴ The property requirement was ultimately replaced by a state constitutional amendment requiring the disenfranchisement of any person convicted of an “infamous crime,”¹⁵ a discriminatory provision of the New York State Constitution that remains in effect today.¹⁶ According to the state Division of Criminal Justice Services, in 2018, Black people represented only 15 percent of the state’s total population, but 48 percent of all people sentenced to prison.¹⁷

¹¹ N.Y. CONST. art. II, § 2 (1821) (repealed 1874); see Wood, *supra* note 7 at 6–8.

¹² The New York State Constitution did not protect women’s suffrage until 1917. N.Y. CONST. amend. 1 (Nov. 6, 1917) https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

¹³ Wood, *supra* note 7 at 5. The New York State Legislature actually attempted to rescind the state’s ratification of the 15th Amendment to the United States Constitution; however, Congress did not recognize the attempted rescission. *Id.*

¹⁴ *Id.* at 12. The New York State Legislature actually attempted to rescind the state’s ratification of the 15th Amendment to the United States Constitution; however, Congress did not recognize the attempted rescission. *Id.*

¹⁵ *Id.* at 12–13.

¹⁶ N.Y. CONST. art. II, § 3 (“The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.”). In 2021, New York passed a bill that restored the right to vote to people convicted of felonies automatically upon release from incarceration. See S.830B, 2021–2022 Leg. Sess. (N.Y. 2021) (enacted). Until that time, people who had been released from prison, but were on parole remained ineligible to register to vote, absent discretionary relief such as a pardon. *Id.* at §§ 2, 13.

¹⁷ N.Y. DEP’T OF CRIM. JUST. SERV.’S, NYS ARRESTS AND PRISON SENTENCES BY RACE/ETHNICITY at 1 (Aug. 27, 2019), <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2018%20Population%20Arrests%20Prison%20by%20Race.pdf>.

During the 20th century, New York implemented laws that suppressed minority voting strength. In 1921, the New York State Constitution was amended to require that new voters be able to read and write in English.¹⁸ The practice persisted until the Supreme Court's 1966 decision in *Katzenbach v. Morgan*,¹⁹ which held the protections for Puerto Rican voters provided by Section § 4(e) of the VRA to be a proper exercise of Congressional power under §5 of the Fourteenth Amendment, and New York's literacy test to be unenforceable to the extent it conflicted with VRA § 4(e). Indeed, "Section 4(e) was aimed specifically at remedying the discriminatory election practices that prevented Puerto Ricans in New York City from voting because of their inability to pass an English literacy requirement as a prerequisite for voter registration."²⁰ When the VRA was passed in 1965, only 30 percent of Puerto Rican New Yorkers—a community disproportionately disenfranchised by the literacy tests—were registered to vote.²¹ As a result of this discrimination, three counties within New York State—Bronx, Kings, and New York Counties—were covered by the preclearance regime beginning in the 1970s and continuing

¹⁸ N.Y. CONST. amend. 3 (Nov. 8, 1921), https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf.

¹⁹ 384 U.S. 641 (1966).

²⁰ Juan Cartagena, *Voting Rights in New York City, 1982-2006*, 17 S. CAL. L. & SOC. JUST. 501, 518 (2008) citing *Katzenbach*, 384 U.S. at 652.

²¹ See Daniel Brook, *New York Should Hate the Voting Rights Act*, *SLATE* (Feb. 21, 2013), <https://slate.com/news-and-politics/2013/02/voting-rights-supreme-court-case-why-is-new-york-defending-the-voting-rights-act.html> ("... the people most disenfranchised by the test were not actually immigrants, who were rare after Congress passed the National Origins Act and Asian Exclusion Act in 1924, but internal migrants from Puerto Rico. Born on U.S. soil, Puerto Ricans had voting rights through birthright citizenship. But having been educated in the Spanish-language public schools on the island, they couldn't pass New York's English-language test and subsequently lost their ability to vote when they moved to the city seeking better jobs.")

until the coverage formula was invalidated in *Shelby County* 2013.²² As discussed below, preclearance under Section 5 of the VRA was key to blocking or deterring a numerous potentially retrogressive changes in New York.²³

Voting Rights Act enforcement in New York is not a matter of ancient history. Within the past 25 years, New York has been the site of at least fourteen documented violations of federal voting rights laws.²⁴ Under the coverage formula set forth in the John R. Lewis Voting Rights Advancement Act of 2021, H.R.4,²⁵ at present, New York would be only one violation shy of statewide coverage under preclearance. Two counties—Suffolk and Westchester—have been the site of at least three violations each during the past 25 years, making them likely subject to coverage under H.R.4’s preclearance formula.²⁶ Albany, Orange, and Bronx Counties are each one violation away from

²² U.S. Dep’t Just., Jurisdictions Previously Covered by Section 5 (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

²³ See Section IV *infra*.

²⁴ *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing on H.R. 4 Before the H. Subcomm. on the Const., C.R. and C.L., H. Comm. on the Judiciary*, 117th Cong. H4437 (Aug. 16, 2021) (Testimony of Peyton McCrary, Professorial Lecturer in Law, George Washington University Law School) (hereinafter, McCrary Testimony). <https://www.congress.gov/117/crec/2021/08/24/167/150/CREC-2021-08-24-pt1-PgH4417.pdf> (listing 12 violations in New York State on pp. 21-22). Prof. McCrary did not include two recent violations occurring in school districts from his list of violations in New York State: (1) *Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 374 (S.D.N.Y. 2020) (*East Ramapo*), *aff’d sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); and (2) Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003).

²⁵ John R. Lewis Voting Rights Advancement Act of 2021, H.R.4, 117th Cong. (2021), <https://www.congress.gov/bills/117/congress/house-bill/4/related-bills>.

²⁶ Violations in Suffolk County: *Flores v. Islip*, Case No. 18-cv-03549 (GRB) (E.D.N.Y. Oct. 14, 2020) ECF Nos. 223–224; *United States v. Suffolk County, et al.*, Case No. 2:04-cv-02698 (E.D.N.Y. Sept. 27, 2004), ECF No. 10; Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003). Violations in Westchester County: *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); *United States v. Westchester County, N.Y.*, Case No. 7:05-cv-00650-CM (S.D.N.Y. Jan. 3, 2008), ECF No. 31; *New Rochelle Voter Defense v. City of New Rochelle*, 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

coverage.²⁷ New York’s voting rights advocates are not surprised at the number of violations, but remain disappointed by how few have been prosecuted, particularly among the state’s thousands of local government entities—counties, cities, towns, villages, school districts, and special purpose districts. Many of these political subdivisions run their own elections without oversight by the state or county boards of elections.²⁸

There are more barriers to minority political participation in New York than are apparent in the state’s Voting Rights Act docket. Available data show significant and persistent disparities in voter turnout rates by race in New York. In the November 2020 election in New York, an estimated 54.9 percent of the citizen voting age population (CVAP) who identify as Hispanic or Latino and 62.7 percent of Black CVAP cast a ballot in November 2020, rates significantly lower than the white non-Hispanic voter turnout rate, 69.0 percent.²⁹ The disparity is even greater between Asian and non-Hispanic white voters. Only 51.9 percent of the Asian CVAP cast a vote in November 2020. Data from the Census Bureau show that racial disparities in turnout in New York have been significant and

²⁷ See McCrary Testimony, *supra* note 24 at 21-22.

²⁸ See NEW YORK STATE BOARD OF ELECTIONS, REPORT CONCERNING RECOMMENDATIONS AND GUIDANCE FOR THE ADMINISTRATION OF ELECTIONS BY VILLAGES, SCHOOL DISTRICTS, FIRE DISTRICTS, LIBRARY DISTRICTS, AND OTHER MUNICIPAL CORPORATIONS REQUIRED TO HOLD ELECTIONS UNDER NEW YORK STATE at 6, (Feb. 4, 2015), <https://www.elections.ny.gov/NYSBOE/news/Chapter273Report020415.pdf> (hereinafter, ADMINISTRATION OF ELECTIONS BY MUNICIPAL CORPORATIONS) (“While the federal, state and local elections are run by the county board of elections, villages for example, have the option of having the county board run their elections, on any day of the year that they choose. With very few exceptions, school district elections are run by the school districts themselves.”).

²⁹ U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2020, TABLE 4B: REPORTED VOTING AND REGISTRATION BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES: NOVEMBER 2020 (Apr. 2021), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.

persistent over time, with Black voter turnout during the November 2012 election a notable exception.³⁰

2020 New York Voter Turnout Rate by Race	
<i>Race/Ethnicity</i>	<i>Percent of CVAP who cast a vote</i>
White non-Hispanic alone	69.0%
Black alone	62.7%
Hispanic (of any race)	54.9%
Asian alone	51.9%
Total	64.7%

Those disparities are even more pronounced in local government elections, which have largely escaped the legislature's recent election reform agenda. As explained in greater detail below, the structure and conditions of school district elections are paradigmatic of the voter suppression and vote dilution that occurs in local elections in New York State. Based on an original analysis of recent school board elections in twenty-five large, diverse school districts in Nassau, Westchester, Suffolk, Rockland, and Oneida Counties conducted by the New York Civil Liberties Union, an estimated 6.3 percent of CVAP voted in school district elections.³¹ The analysis of voter records for the years 2016-2019 shows the racial disparity in school district election turnout rates is large. In all 25 school districts, the turnout rate of voters of color lags behind the white turnout rate. In all

³⁰ See generally U.S. CENSUS BUREAU, VOTING AND REGISTRATION, DATA TABLES <https://www.census.gov/topics/public-sector/voting/data/tables.All.html> (providing data tables by state, including tables on reported voting and registration, by race, Hispanic origin, sex, and age for federal general elections dating back to 1994).

³¹ The 25 school districts included are large, have reasonably diverse electorates, and maintained electronic voting records, a requirement for the analysis. See Appendix A, *infra*. Overall voter turnout rates were calculated using the average turnout rate in election years 2016-2019 and the American Community Survey 5-year estimate of citizens of voting-age residing in each school district. Although voter race is not reported on registration records in New York, a peer-reviewed methodology titled Bayesian Improved Surname Geocoding ("BISG") can be applied to estimate the race of voting population based on their surnames and addresses. See Kosuke Imai & Kabir Khanna, *Improving Ecological Inference by Predicting Individual Ethnicity from Voter Registration Records*, 24 POLITICAL ANALYSIS 263 (Mar. 17, 2016), <https://imai.fas.harvard.edu/research/files/race.pdf>.

but five districts, the white turnout rate is more than double the turnout rate for voters of color.³² The following table presents the analysis of data aggregated from all 25 school districts and the results of the analysis of turnout rates for each of the individual 25 districts is available at Appendix A.

Analysis of Turnout Rates in 25 School District Elections by Race (2016-2019)	
<i>Race/Ethnicity</i>	<i>Percent of citizens who cast a vote</i>
White	8.0%
Black	3.6%
Hispanic	3.4%
Asian	2.6%
Total	6.3%

New York's low and racially disparate turnout rates are a function of a complex concatenation of the lingering effects of longstanding discrimination; election laws that suppress and dilute minority voting strength, particularly in local contests; and notoriously poor election administration. The persistence of these conditions in New York's decentralized election scheme makes rooting out this discrimination a daunting challenge. The 57 county boards of elections and the Board of Elections in the City of New York conduct federal and state elections; however, New York contains hundreds of villages, and thousands of special purpose districts (*e.g.*, school, water, fire, sewer, districts etc.) that may be conducting elections.³³ There is no centralized repository of voting and elections data for these local government entities, no oversight of their elections by state authorities,

³² See Appendix A, *infra*.

³³ See New York State Board of Elections, ADMINISTRATION OF ELECTIONS BY MUNICIPAL CORPORATIONS, *supra* note 28 at 5-6, ("New York State is a large and complex web of jurisdictions - 62 counties, 62 cities, 932 towns, 343 villages, and 7,658 'other' districts which may be conducting elections (such as school, fire, water, sewer, park, lighting and library)").

and little media or other public scrutiny applied to their political processes. The difficulty of even investigating vote suppression and vote dilution in these thousands of local elections is a high barrier to diagnosing and prosecuting potential infringements on the right to vote for those important offices.

Another reason that so many potential cases go unprosecuted is that virtually every affirmative case is time-consuming, complex, and expensive. As the Supreme Court observed over fifty years ago, and remains true today, “[v]oting suits are unusually onerous to prepare” and “[l]itigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials”³⁴ Over the last half-century, VRA lawsuits have only become more complex and resource-intensive, often requiring multiple expert witnesses whose substantial fees must be paid out of pocket.³⁵ Meanwhile, incumbents are able to spend taxpayer dollars to defend the discriminatory systems that keep them in office. In one recent successful vote dilution case against a suburban school district, the plaintiffs were awarded nearly \$5 million in attorneys’ fees, nearly \$200,000 in expert witness fees, and over \$400,000 in costs after three years of litigation and many thousands of hours of plaintiffs’ attorneys’ time.³⁶ The school district and its incumbent

³⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

³⁵ *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 69 (Nov. 9, 2005), <https://www.congress.gov/109/chrg/CHRG-109hrg24504/CHRG-109hrg24504.pdf> (testimony of Laughlin McDonald, Director, ACLU Voting Rights Project). McDonald testified that, in a typical vote dilution case a plaintiff “need[s] probably three experts: a demographer, to draw plans; a statistician, to analyze voting patterns; and a political scientist or historian, to talk about what . . . the present-day impact of race is in a jurisdiction.”)

³⁶ *Judgment, Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, Case No. 7:17-cv-08943-CS-JCM (S.D.N.Y. Mar. 30, 2021), at ECF No. 694; Report and Recommendation at 14-15, Case No. 7:17-cv-08943-CS-JCM, (S.D.N.Y. Dec. 29, 2020), at ECF No. 671.

board members also spent well over \$7 million in taxpayer funds to defend the suit.³⁷ The immense commitment required to try these complex cases, where no statutory damages are available and fee and cost recovery are highly uncertain, deters the commencement of meritorious cases.

The stakes may not seem worth the massive resources required to prosecute voting rights cases against school districts, town and village councils, and special purpose districts; however, these entities “have primary agency over matters of daily importance including education, transportation, property taxes, police, fire, and sanitation.”³⁸ Moreover, “[t]hese local offices are important not only because of the critical substantive services they provide to their constituents, but because school boards and city councils also function as a farm system for candidates for higher office,” and “[i]f minority groups are less able to elect candidates to local offices, they are also likely to be less able to develop candidates who compete in elections for state and federal offices.”³⁹

The VRA has been a necessary tool for remedying the entrenched inequities in New York’s political processes, but judicial decisions have eroded the most effective civil rights law in our nation’s history at time when it is still urgently needed.⁴⁰ New York’s example illustrates both the historic success of the VRA and the necessity of revitalizing and

³⁷ See Transcript of Proceedings at 10, *Nat’l Ass’n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, Case No. 7:17-cv-08943-CS-JCM, (S.D.N.Y. Mar. 8, 2021) at ECF No. 686.

³⁸ Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 598 (2017).

³⁹ *Id.* at 598–99.

⁴⁰ See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021); *Shelby County v. Holder*, 570 U.S. 529 (2013).

strengthening its protections to continue fulfilling the charge of achieving a democratic process free from the taint of racial discrimination.

II. ENFORCING SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK SINCE 1996

In the last 25 years, over a half-dozen Section 2 cases have led to changes in election systems across New York State. Unfortunately, the burdens of diagnosing and prosecuting Section 2 cases present a significant challenge to rooting out the full depth and breadth of voting rights violations in New York efficiently.

A. Recent Cases

1. *National Association for the Advancement of Colored People, Spring Valley Branch v. East Ramapo Central School District*

East Ramapo is a “highly segregated” school district in Rockland County.⁴¹ Black and Latino children constitute over 90% of the district’s public school student population.⁴² White children residing in the district overwhelmingly attend private schools and account for 98% of the students enrolled in the private schools in the district.⁴³ Although Black and Latino citizens account for approximately one-third of the district’s eligible voter population,⁴⁴ no candidate of choice of Black or Latino voters had won a contested election in the decade before the lawsuit was filed in November 2017.⁴⁵ During that time, East Ramapo’s Board of Education exhibited a significant lack of responsiveness to the needs

⁴¹ *East Ramapo*, 462 F. Supp. 3d at 374.

⁴² *East Ramapo*, 462 F. Supp. 3d at 375.

⁴³ *Id.*

⁴⁴ *Id.* at 374 n.5.

⁴⁵ *See id.* at 381.

of the district's Black and Latino communities.⁴⁶ Public school buildings fell into disrepair and the Board "eliminated hundreds of public school teaching, staff, and administrative positions and eliminated classes and programs."⁴⁷ At the same time, the Board closed two public schools over the opposition of Black and Latino residents and tried to sell one of them to the private schools at a "sweetheart price" but the sale was annulled by the Commissioner of Education.⁴⁸ Graduation rates and test scores declined.⁴⁹ The Board refused state funding that was offered to help restore public school programs because the funding would have required public school parents and teachers to have some input into how the money would be spent.⁵⁰ When parents and students of color tried to bring their complaints to Board meetings, instead of listening, the Board took steps to delay and prevent public comments at their meetings.⁵¹ Despite all of this, the District's at-large method of electing Board members and racially-polarized voting enabled the white majority to control the outcome of elections for every seat on the East Ramapo Board. Every year, the preferred candidates of white voters won election without making any attempt to appeal to Black or Latino voters.

In November 2017, the Spring Valley National Association for Advancement of Colored People ("NAACP") and seven Black and Latino voters sued the School District,

⁴⁶ *Id.* at 413–16.

⁴⁷ *Id.* at 414.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 415.

⁵¹ *Id.* at 413.

alleging that the District's at-large election structure unlawfully diluted the votes of Black and Latino residents in violation of Section 2 of the Voting Rights Act.⁵² The case went to a bench trial in early 2020.

The Court found that plaintiffs had “convincingly proven their case of vote dilution.”⁵³ Beyond finding that District elections were characterized by high levels of racially-polarized voting where the preferred candidates of white voters invariably defeated the preferred candidates of minority voters, the court found that School District elections involved a variety of discrimination-enhancing practices, including “at-large, staggered, off-cycle elections with numbered posts,” as well fewer and different polling places than in state and federal elections and a lack of adequate language assistance to Spanish and Creole-speaking voters.⁵⁴ The court found that the School District's dominant candidate slating process was not equally open to minority voters and candidates in that “[i]nfluential members of the white, private school community in the District participate in a slating process by which they select, endorse, promote, and secure the election of their preferred candidates, and minorities have no input into this process.”⁵⁵

Although the court noted some minority candidates had been elected to the Board, the court found that “the mere fact that . . . a few [minorities] were elected[] does not carry a lot of weight in light of the evidence that victories were arranged for appearance's sake

⁵² Complaint, *East Ramapo*, No. 17-CV-8943 (CS), ECF No. 1.

⁵³ *East Ramapo*, 462 F. Supp. 3d at 417.

⁵⁴ *Id.* at 401–02.

⁵⁵ *Id.* at 402.

and/or occurred in unusual circumstances”⁵⁶ The court cited “ample evidence” in finding that the Board was unresponsive to the needs of the Black and Latino community.⁵⁷ Finally, the court found that “some Board members had tenuous, if not illegitimate, reasons for wanting to maintain the *status quo*,” noting that “there is evidence that the dominant Board members and the white slating organization have a desire to adhere to the current system despite its discriminatory effect and went to extraordinary lengths to preserve that system to maintain political power.”⁵⁸ Among other things, the court noted that “in the course of this proceeding, Board members outright lied or disingenuously claimed lack of memory; the Board President and others failed to provide the Board’s members of color with complete or accurate information about this lawsuit, including settlement possibilities that could have saved enormous amounts of money; and one leader of the white slating organization went so far as to go into contempt of court.”⁵⁹ The court further noted that “the slating organization appears to have been so desperate to maintain the at-large system that it engineered [a Black candidate’s] 2019 victory for purposes of appearances after Defendant’s counsel suggested it would be ‘good for the case’ to have an additional minority candidate.”⁶⁰

⁵⁶ *Id.* at 412.

⁵⁷ *Id.* at 413.

⁵⁸ *Id.* at 416–17

⁵⁹ *Id.* at 416 (internal citations omitted).

⁶⁰ *Id.* at 417. The Second Circuit was particularly concerned by the District’s counsel’s conduct. “Considering Section 2 case law directs courts to look past such disingenuous ploys, it is bad legal advice. More disturbing, however, is that the advice appears to be directed at aiding the District in flouting the well-established and clear intent of the Voting Rights Act. Such deceptive posturing has no place in the legal profession.” *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 242 n.15 (2d Cir. 2021).

The court (a) enjoined the school district from holding any further elections under its at-large system; (b) required the district to propose a district-based remedial plan that fully complies with the VRA; (c) ordered defendants to pay plaintiffs' fees, costs, and expenses; and (d) retained jurisdiction to ensure compliance. The court concluded: "For too long, black and Latino voters in the District have been frustrated in that most fundamental and precious endeavor. They, like their white neighbors, are entitled to have their voices heard."⁶¹ The Second Circuit Court of Appeals affirmed the decision in January 2021.⁶² The first election under the remedial plan was held on February 2, 2021.

The case was time-consuming and expensive, lasting nearly four years from the filing of the complaint in November 2017 to the District's satisfaction of judgment in September 2021. The case was prolonged by tactics that attempted to shield incumbent Board members from disclosing material facts in discovery. For example, three Board members delayed the case for over a year by repeatedly asserting frivolous claims of legislative immunity from discovery to avoid being deposed, including in an interlocutory appeal that was dismissed by the Second Circuit.⁶³ Meanwhile, elections for the Board were held in 2018 and 2019 under a system ultimately held to violate the rights of the District's Black and Latino voters while the litigation was pending. In total, attorneys for the Plaintiffs spent over 20,000 total hours litigating the case.⁶⁴

⁶¹ *East Ramapo*, 462 F. Supp. 3d at 418.

⁶² *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

⁶³ See *Nat'l Ass'n for the Advancement of Colored People v. E. Ramapo Cent. Sch. Dist.*, 776 F. App'x 44 (2d Cir. 2019).

⁶⁴ See *Nat'l Ass'n for Advancement of Colored People v. E. Ramapo Cent. Sch. Dist.*, No. 17CIV8943CSJCM, 2020 WL 7706783, at *7–8 (S.D.N.Y. Dec. 29, 2020). Compare Katzenbach, 383

The Board's efforts to prolong the litigation came at the expense of the District's taxpayers, including the Black and Latino voters fighting for a voice in the District. Based on a review of invoices obtained through a public records request, the District paid its attorneys at least \$7.2 million to defend the at-large election system.⁶⁵ The District was also required to pay over \$5.4 million in attorneys' fees and costs to Plaintiffs.⁶⁶

2. *Flores v. Town of Islip*

The Town of Islip, located in Suffolk County in central Long Island, is the third most populous town in the State, with over 330,000 residents, of which approximately one-third are Latino.⁶⁷ The town has long been represented by a five-member Town Board elected at-large, but no Latino candidate has ever held town-wide office.⁶⁸ Between 2005 and 2019, Latino candidates of choice were consistently defeated by candidates preferred by the white voting majority. As a result, Islip's Latino population suffered from a lack of local representation, exemplified by Town officials' roles in the illegal dumping of thousands of tons of toxic construction debris at a public park in the center of Islip's Latino community.⁶⁹

U.S. at 314 (noting in 1966 that voting suits were "unusually onerous," when they sometimes required "as many as 6,000 man-hours spent combing through registration records in preparation for trial.")

⁶⁵ Transcript of Proceedings at 10, *East Ramapo*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021) (No. 17-CV-8943 (CS)), ECF No. 686.

⁶⁶ Satisfaction of Judgment, *id.*, ECF No. 713.

⁶⁷ *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 208 (E.D.N.Y. 2019).

⁶⁸ *See id.* at 243.

⁶⁹ Sarah Armaghan and Andrew Smith, *2 former Islip Town Employees sentenced in illegal dumping case*, NEWSDAY (Oct 21, 2016), <https://www.newsday.com/long-island/crime/2-former-islip-town-employees-sentenced-in-illegal-dumping-case-1.12489109>.

In June 2018, two Latino advocacy organizations and four individual Latino voters in Islip filed suit against the Town of Islip, the Islip Town Board, and the Suffolk County Board of Elections, alleging that the Town's at-large election structure unlawfully diluted Latino voting strength in violation of Section 2 of the Voting Rights Act. The case went to a bench trial in September 2020, and the Town agreed to a settlement five days into trial.⁷⁰ As set forth in the Joint Settlement Agreement and Consent Order, the court found that Plaintiffs had satisfied the *Gingles* preconditions, and Plaintiffs presented significant evidence that the totality of the circumstances weighed in favor of liability, such as (1) the history of literacy tests in New York and recent local failures to comply with the VRA's language-based requirements; (2) that Islip's elections are staggered and held off-cycle in an unusually large at-large district; (3) Latinos lack of access to the dominant local Republican Party's slating process; (4) that Islip's Latinos have lower socioeconomic status and political participation than whites; (5) racial appeals in political campaigns, such as associating Latinos with crime; and (6) that no Latino had ever been elected to Town-wide office in Islip. The court found that "the evidence offered during trial demonstrates that there is a factual basis for the assertion that the 'totality of the circumstances' . . . warrants relief under the Voting Rights Act."⁷¹

The Town ultimately entered into a Joint Settlement Agreement and Consent Judgment, which required (a) the Town to permanently transition from at-large to district-

⁷⁰ *Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 WL 6060982, at *1 (E.D.N.Y. Oct. 14, 2020).

⁷¹ See, e.g., *Complaint, Flores v. Town of Islip*, No. 18-CV-3549 (GRB)(ST), 2020 WL 6060982 (E.D.N.Y. Oct. 14, 2020), ECF No. 1; Expert Report of Dr. Thomas J. Sugrue, *id.*, ECF No. 164-2; Transcript of Record at 480–535, *id.*

based elections, starting with the 2021 election cycle, in which Latinos make up a majority of the citizens of voting age in at least one district; (b) the Town to pay a portion of Plaintiffs' fees, costs, and expenses; and (c) the Court to retain jurisdiction to enforce the provisions of the settlement.⁷² Defendants stipulated that the Town's "at-large system for Islip Town Council elections violates Section 2 of the Voting Rights Act."⁷³ The Court joined in this finding "because, under that system, members of the Hispanic or Latino minority group in Islip have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."⁷⁴

Even with the settlement, the case incurred considerable taxpayer expense. The Town of Islip spent over \$3 million defending its at-large election system before the case had even gone to trial.⁷⁵

3. *Pope v. County of Albany*

Albany County is comprised of 18 cities, town and villages, including the City of Albany, and is governed by a County Executive and a 39-member County Legislature.⁷⁶ As explained in more detail below, in the redistricting cycles occurring after the 1990 Census and the 2000 Census, Black voters filed Section 2 suits arising out of the Albany

⁷² See Joint Settlement Agreement and Consent Order, *Flores*, 2020 WL 6060982 (No. 18-CV-3549 (GRB)(ST)), ECF No. 224.

⁷³ *Id.* at 3.

⁷⁴ See *id.*

⁷⁵ Sophia Chang, *Islip spends nearly \$3M so far to fight voting rights case*, *NEWSDAY* (Dec. 16, 2019), <https://www.newsday.com/long-island/suffolk/islip-voting-rights-lawsuit-legal-fees-1.39577727>.

⁷⁶ *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 281 F. Supp. 2d 436, 439 (N.D.N.Y. 2003).

County legislature's failure to draw an adequate number of majority-minority districts.⁷⁷ The suits resulted in consent decrees both times.⁷⁸ The same problem occurred after the 2010 Census. In June 2011, individual black and Latino voters challenged the plan for redistricting of the Albany County Legislature in the Northern District of New York. Plaintiffs alleged that the Voting Rights Act required the creation of an additional majority-minority district following population shifts reflected in the 2010 Census.

In January 2014, the court granted plaintiffs summary judgment on the first *Gingles* precondition.⁷⁹ After an 11-day bench trial in late 2014 and early 2015, the court found that the challenged redistricting plan violated Section 2. The Court found that the preferred candidates of Black voters were usually defeated by the preferred candidates of a cohesive white voting bloc.⁸⁰ African-Americans in Albany County also lagged significantly behind non-Hispanic whites on all socio-economic measures and continued to experience the effects of discrimination in housing and healthcare.⁸¹ The court further found that these socioeconomic disparities existed alongside low Black voter turnout and reduced opportunities for Black political participation, including "voter apathy emanat[ing] from a perception that minority voters are not a meaningful part of the political process."⁸² The court found that minorities had rarely been elected to office in the County outside of

⁷⁷ See *id.* at 440. The lawsuits stemming from the 1990 Census and 2000 Census are covered in more detail in Section III.A.5.

⁷⁸ *Pope v. Cty. of Albany*, 94 F. Supp. 3d 302, 311–12 (N.D.N.Y. 2015).

⁷⁹ *Id.* at 319.

⁸⁰ *Id.* at 340–41.

⁸¹ *Id.* at 344.

⁸² *Id.* at 344–45.

majority-minority districts, and that only one minority candidate had ever been elected to county-wide office.⁸³ The court also found that the County's failure to create an additional majority-minority district in response to demographic shifts and the rationale underlying the challenged map was tenuous, noting that the County ignored draft maps showing that creating an additional majority-minority district was possible.⁸⁴ The Court ultimately ordered the County to draw a remedial redistricting plan and awarded attorneys' fees to Plaintiffs.⁸⁵

4. *United States v. Village of Port Chester*

Between 1990 and 2000, the Latino population of the Village of Port Chester in Westchester County increased by over 70%, making Latinos a plurality of village residents and over one-fifth of the Village's citizen voting age population.⁸⁶ Notwithstanding the significant demographic shift, no Latino had ever been elected to any of the six positions on Port Chester's Board of Trustees.⁸⁷

In December 2006, the U.S. Department of Justice sued Port Chester in the Southern District of New York, alleging that the Village's at-large election structure unlawfully diluted the vote of Black and Latino residents in violation of Section 2 of the

⁸³ *Id.* at 345-47.

⁸⁴ *Id.* at 347-49.

⁸⁵ *Id.* at 351-52.

⁸⁶ *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 419-20 (S.D.N.Y. 2010).

⁸⁷ *Id.* at 446.

Voting Rights Act.⁸⁸ In March 2007, the court preliminarily enjoined the upcoming election cycle, and the case went to a bench trial in summer 2007.⁸⁹

Following trial, the court found that the totality of the circumstances “clearly indicate[d] that Defendant’s method of electing the members of its Board of Trustees violates Section 2 of the Voting Rights Act.”⁹⁰ Plaintiffs had proved that Latinos were sufficiently numerous and compact to form a majority in a single-member district for the village board of trustees, that Latinos were politically cohesive and that their candidates of choice for the Village board were always defeated by a cohesive white voting bloc.⁹¹ The court also found that the Senate Factors weighed in favor of Plaintiffs.

Specifically, the court found that Village elections included electoral practices that enhance opportunities for discrimination such as “off-cycle and staggered Trustee elections contribute to the Hispanic community’s difficulty in electing its candidates of choice.”⁹² The court also found that Latinos lacked access to the candidate slating process, noting that “[w]hile the candidate selection process of Port Chester’s two major political parties formally allows for candidates to have open access to the ballot through the party caucus system, the reality of local politics in this community is that virtually binding decisions are made at closed meetings of the parties’ respective nominating committees, which allow

⁸⁸ *Id.* at 416.

⁸⁹ *Id.* at 416–17.

⁹⁰ *Id.* at 443.

⁹¹ *Id.* at 439–43.

⁹² *Id.* at 444.

limited access to outsiders or upstart candidates.”⁹³ The evidence showed Latinos at a marked disadvantaged compared to non-Hispanic whites with respect to socioeconomic status and levels of political participation.⁹⁴ The court also found that “the most recent election for Mayor of Port Chester was marred by a racial appeal,” indeed, a “blatant racial message . . . [that] emerged in the midst of ongoing proceedings in th[e] case.”⁹⁵ Finally, the court noted that “no member of the Hispanic community in Port Chester has ever been elected to the Board of Trustees,” and that, with the exception of a single school board candidate elected after the issuance of a preliminary injunction in the case, “no other Hispanics have been elected to public office in the Village.”⁹⁶ As a remedy, the Court ultimately approved a cumulative voting scheme.⁹⁷ After implementing the remedial order, the Village elected its first ever Latino trustee.⁹⁸

5. *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*

Following the 1990 Census, in which Blacks and Hispanics accounted for approximately 10% of Albany County’s total population, the Albany County Legislature enacted a redistricting plan that included only one majority-minority district and several

⁹³ *Id.* at 444.

⁹⁴ *Id.* at 445.

⁹⁵ *Id.* at 446.

⁹⁶ *Id.*

⁹⁷ *See id.* at 447–53,

⁹⁸ Kirk Semple, *First Latino Board Member Is Elected in Port Chester*, N.Y. TIMES (June 16, 2010), <https://www.nytimes.com/2010/06/17/nyregion/17chester.html>.

other districts where minorities were a near majority.⁹⁹ A lawsuit alleging that the redistricting plan violated Section 2 led to the entry of a consent decree vacating the districting plan and mandating the creation of a new plan that included three majority-minority districts.¹⁰⁰ In 2003, following the 2000 Census, the Albany County Legislature enacted a redistricting plan that retained only three majority-minority districts despite the County's Black population increasing by 2.5% and its Hispanic population nearly doubling, in part by only including Blacks in the definition of minority voters.¹⁰¹ Minority voters once again brought suit against the County's latest redistricting, alleging that the Voting Rights Act now required four majority-minority districts and seeking an injunction compelling such a plan.¹⁰²

The Northern District of New York ultimately granted a preliminary injunction against the County's districting plan after finding that plaintiffs had presented sufficient evidence to satisfy the *Gingles* preconditions and "evidence which demonstrated unequal access to the political process for minorities in Albany County."¹⁰³ Specifically, the court noted evidence that "strongly support[ed]" the conclusion that voting in Albany County was polarized along racial lines, that minorities in the County continued to bear the effects of past discrimination, and that no minorities had been elected to County-wide office.¹⁰⁴

⁹⁹ *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cty. of Albany*, 281 F. Supp. 2d 436, 439–40 (N.D.N.Y. 2003).

¹⁰⁰ *See id.*; *Pope v. Cty. of Albany*, 94 F. Supp. 3d 302, 311–12 (N.D.N.Y. 2015).

¹⁰¹ *See Arbor Hill*, 281 F. Supp. 2d at 440.

¹⁰² *Id.* at 440–41.

¹⁰³ *Id.* at 444.

¹⁰⁴ *See id.* at 444–56.

The court enjoined the County from conducting the 2003 election until it adopted a new redistricting plan that created a fourth majority-minority district.¹⁰⁵ The County ultimately entered into another consent decree that included in its definition of minority both Black and Hispanic voters and established four majority-minority districts.¹⁰⁶

6. *New Rochelle Voter Def. Fund v. City of New Rochelle*

Prior to 1993, the City of New Rochelle in Westchester County had elected the members of its City Council at-large and only one Black candidate had ever been elected to the Council in the 1960s and 1970s.¹⁰⁷ In 1991, residents brought suit under the Voting Rights Act, and the City ultimately enacted the relief they were seeking—the establishment of six single-member districts.¹⁰⁸ Following the 2000 Census, however, the City adopted a reapportionment plan in which a majority-minority district was converted into a plurality-minority district. In 2003, minority residents once again brought suit, alleging that the City of New Rochelle had intentionally minimized the number of majority-minority voting districts in the City in violation of Section 2.¹⁰⁹

The Southern District of New York agreed, holding that the City had deliberately diluted Black voting strength. The court “infer[red] that the Defendants intended the probable consequences of their actions,” noting that the City’s redrafting of the district in

¹⁰⁵ *Id.* at 457.

¹⁰⁶ *See Pope v. City of Albany*, 94 F. Supp. 3d 302, 312 (N.D.N.Y. 2015).

¹⁰⁷ *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 155 (S.D.N.Y. 2003).

¹⁰⁸ *Id.* at 155–56. Plaintiffs were ultimately awarded attorney fees because the court found that the litigation had motivated the change in election structure. *See Davis v. City of New Rochelle, N.Y.*, 156 F.R.D. 549, 552 (S.D.N.Y. 1994).

¹⁰⁹ *Id.* at 153–54.

question was “done with the awareness of the effect of their work,” because a major, predominately Black housing project and two other Black neighborhoods were transferred in whole or part out of the district.¹¹⁰ Finding the *Gingles* factors satisfied, the court also found that the relevant Senate Factors “generally point[ed] in favor of Plaintiffs’ claims,” noting that the “regrettable history of discrimination in employment, housing and education in the Westchester County area is too well known to require extended comment.”¹¹¹ The court ultimately ordered the City to reconfigure the district in question in order to return it to majority-minority status.¹¹²

7. *Goosby v. Town Board of the Town of Hempstead*

The Town of Hempstead, New York is the most populous town in the United States.¹¹³ In August 1988, Black plaintiffs brought suit against the Town Board and its incumbent board members, alleging that the Town’s at-large election structure unlawfully diluted the vote of Black residents in violation of Section 2 of the Voting Rights Act.¹¹⁴ At that time, all but ten out of 900 towns in the State used at-large elections.¹¹⁵ Between 1907 and 1993, every elected member of the Town Board was a white Republican, although the Town’s Black population had more than tripled as a percentage of the Town’s

¹¹⁰ *Id.* at 157.

¹¹¹ *Id.* at 158–60.

¹¹² *Id.* at 163–64.

¹¹³ *Goosby v. Town Bd. of the Town of Hempstead, N.Y.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997), *aff’d*, *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999).

¹¹⁴ *Id.* at 328–29.

¹¹⁵ *Id.* at 331.

residents from 3.4% in 1960 to 12.1% in 1990.¹¹⁶ The Town Board “exercises substantial authority, both formally and informally, in a wide variety of areas of importance to its residents,” including “controlling Town finances, acquiring and selling real property, maintaining Town property (including its various parks), filling vacancies in Town offices, removing fire and health hazards, awarding and executing Town contracts, cleaning and repairing Town streets and roads, maintaining adequate lighting on Town roads, collecting garbage in certain areas of the Town, and promulgating zoning laws and hearing applications for rezoning areas of the Town.”¹¹⁷ The town budget at the time of the lawsuit was \$290 million and the Town had approximately 2,500 employees.¹¹⁸

In early 1997, the Eastern District of New York determined that Hempstead’s at-large election system violated Section 2 and ordered the implementation of single-member districts.¹¹⁹ The court found that “[r]acially polarized voting in the Town [was] significant and persistent” and that Town Board elections were characterized by electoral mechanisms that enhance discrimination, including the fact that the Town, with “three-quarters of a million residents” was “one of the largest undivided districts in the country,” making “[c]ampaigning [] far more difficult than it would be under a single-member districting system.”¹²⁰ The court found that the dominant candidate slating organization for the Town Board—the Nassau County Republican Party, and more specifically, the party chairman at

¹¹⁶ *Id.* at 331–32.

¹¹⁷ *Id.* at 332.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 329.

¹²⁰ *Id.* at 339, 351.

the time, whose endorsement was a necessity for election—was not “truly open” to Blacks.¹²¹ The court noted that during the pendency of the litigation a Black Republican was appointed to fill a vacant seat and subsequently re-elected; however, based on, *inter alia*, “the testimony of the Town’s prominent Black Republicans regarding their efforts to penetrate the appointment and slating process for Town Board seats,” the court found that the appointment was effort to evade liability under Section 2 “by manipulating the election of a ‘safe’ minority candidate,” a risk acknowledged by the Senate Judiciary Committee in its report on the 1982 amendments to the Voting Rights Act.¹²²

Elections for the Town Board had been characterized by racial appeals, including campaign literature from one Board member that the court found was “perceived, reasonably, as a promise to stem the tide of blacks across the Queens border into Elmont and North Valley Stream” and that the Town Board “used its unofficial influence over the police department to further this goal.”¹²³ The Court further found that the Town Board that had “remained largely unresponsive to the particularized needs of the black communities,” including “[m]ost significantly, . . . indifference and callousness on the part of the Town Board with respect to the issue that probably matters most to blacks: racial intolerance and bigotry in Town government itself.”¹²⁴

The court ordered the adoption of a single-member district plan, after first rejecting the Town’s proposal of a hybrid plan with both single-member and at-large districts as a

¹²¹ *Id.* at 340–41.

¹²² *Id.* at 341, 344 (citing S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 29, n. 115).

¹²³ *Id.* at 343 (emphasis omitted).

¹²⁴ *See id.* at 346, 352.

violation of the Equal Protection Clause.¹²⁵ The Second Circuit affirmed both the liability and remedial orders.¹²⁶ The total time elapsed from the date the complaint was filed in 1988 to the resolution of the appeal was over a decade.

B. Challenges of Investigating and Prosecuting the Full Extent of Potential Section 2 Violations in New York State.

The scale and multiple levels of New York's election system make meaningful investigation and prosecution of Section 2 violations a daunting task. New York contains 62 counties, 62 cities, 932 towns, hundreds of villages, and thousands of special purpose (e.g., school, water, fire, sewer, etc.) districts that may be conducting elections.¹²⁷ These thousands of political subdivisions provide primary services that New Yorkers rely upon daily, including public education, sanitation, policing, fire services, water, parks, and libraries. Unfortunately, cases like *East Ramapo* and *Islip* are not unique. They are merely the most noticeable examples of a common problem of minority vote dilution and voter suppression in local elections. Elections in these local levels of government frequently feature practices that suppress turnout overall, but have a significantly disparate impact on minority turnout, as well as conditions that typically contribute to minority vote dilution.

¹²⁵ See *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F. Supp. 751 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999).

¹²⁶ *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999).

¹²⁷ Official sources appear to differ significantly in their count of local government entities, particularly villages and special purpose districts. Compare N.Y. Department of State, Division of Local Government Services, "What Do Local Governments Do," <https://video.dos.ny.gov/lg/localgovs.html> (stating that there are 551 villages in New York State) with New York State Board of Elections, ADMINISTRATION OF ELECTIONS BY MUNICIPAL CORPORATIONS, *supra* note 28, at 5 (listing 343 villages and 7,658 "other" districts); see also *Number of Local Governments by State*, GOVERNING, <http://www.governing.com/govdata/number-of-governments-by-state.html> (last visited December 5, 2019) (listing New York as having 3,450 "total governmental units," including 1,587 "general purpose governments" and 1,863 "special purpose districts") (citing U.S. Census Bureau, 2017 Census of Governments).

- The vast majority of local governments in the state elect their councils using at-large election systems.¹²⁸ Although at-large elections are not illegal *per se*, courts and commentators have long-recognized their susceptibility to racial vote dilution, particularly in the presence of racially-polarized voting.¹²⁹
- Village, school district, and special purpose district elections each take place on unique election days—not concurrent with any federal, state, or other local elections.¹³⁰ For example, state law requires that the vast majority of school district elections take place on the third Tuesday in May.¹³¹ State law sets village elections for March or June.¹³² Fire district elections are held in December.¹³³ “There is little question that the difference between holding an election “off-cycle” in March as opposed to holding it in November alongside

¹²⁸ Gerald Benjamin, *At-Large Elections in N.Y.S. Cities, Towns, Villages, and School Districts and the Challenge of Growing Population Diversity*, 5 ALB. GOV'T L. REV. 733, 734 (2012) (“At-large elections of board members are the norm in New York’s towns, villages, and school districts, and are used in about a quarter of the state’s cities as well. Additional cities elect some, but not all, of their councils on an at-large basis. And in some counties, the use of multi-member districts to choose some county legislators is, in effect, the analog of an at-large election process.”)

¹²⁹ See *Hendrix v. McKinney*, 460 F. Supp. 626, 629 (M.D. Ala. 1978) (“The effect of an at-large election system in combination with the minority status of blacks and the social pattern of racially polarized voting is a dilution of black voting strength.”); see, e.g., Benjamin, *supra* note 128, 5 ALB. GOV'T L. REV. at 734 (“The use of at-large elections is suspect under the Federal Voting Rights Act as a procedure highly likely to result in denying members of protected minority groups an effective choice at the polls.”)

¹³⁰ See New York State Board of Elections, *Administration of Elections by Municipal Corporations* at 5–6, (“New York State is a large and complex web of jurisdictions - 62 counties, 62 cities, 932 towns, 343 villages, and 7,658 ‘other’ districts which may be conducting elections (such as school, fire, water, sewer, park, lighting and library). Elections across these jurisdictions are conducted throughout the year, with a majority of the village elections in March, school district elections in May, and some village elections in June. Traditional state and local primary elections are conducted in September and the general election is conducted in November. Fire district elections round out the annual election cycle, as they are conducted in December.”)

¹³¹ N.Y. Education Law § 2002(1).

¹³² N.Y. Election Law § 15-104; .

¹³³ N.Y. Town Law § 175 (1).

major state and national elections can have a significant impact on voter behavior.”¹³⁴

- Polling location plans for local government elections that are not run by the boards of elections often feature too few and/or inconvenient poll sites.¹³⁵ Moreover, New York’s recent adoption of early voting has not applied to school districts, village, and special purpose district elections where elections are run by the jurisdictions themselves and not by the boards of elections.
- Local governments fail to provide adequate language assistance, even when required to do so under federal law.¹³⁶ The failure to provide adequate language assistance is especially harmful to Latino and Asian communities in New York, which are far more likely than non-Hispanic whites to report limited English proficiency.¹³⁷
- New Yorkers of color, particularly Black and Latino New Yorkers, are at persistent and widespread socioeconomic disadvantage compared to non-Hispanic whites. For example, according to the 2015–2019 American

¹³⁴ *Vill. of Port Chester*, 704 F. Supp. 2d at 444 (citing *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 178 (1985) (noting that in the jurisdiction at issue, “an election in March is likely to draw significantly fewer voters than an election held simultaneously with a general election in November”)).

¹³⁵ See, e.g., *East Ramapo*, 462 F. Supp. 3d at 401 (“State and federal elections have twenty-four polling places, but the District uses only thirteen for the same geographic area, which increases confusion and enhances discrimination.”).

¹³⁶ See, e.g., John Hildebrand, *Most Long Island School Districts Will Have Bilingual Ballots*, *Newsday*, March 24, 2019, <https://www.newsday.com/long-island/education/school-districts-voting-english-spanish-ballots-1.28832270> (“Bilingual ballots have been used for years in federal, state and county elections. Until now, most school districts have used only English forms on the assumption that federal rules covering other jurisdictions did not apply to them.”); see Section III *infra*.

¹³⁷ See U.S. Census Bureau, 2015–2019 American Community Survey 5-Year Estimates, B16005. Nativity by Language Spoken at Home By Ability to Speak English for the Population 5 Years and Over.

Community Survey, on a statewide basis, Blacks, Latinos, and Asians all lag behind non-Hispanic whites on a variety of measures including family and per capita income, poverty rates, and homeownership rates.¹³⁸ Blacks and Latinos also trail non-Hispanic whites on educational attainment.¹³⁹

- Racially polarized voting persists in the New York state electorate, particularly outside of New York City.¹⁴⁰

Although Section 2 of the Voting Rights Act expressly disclaims an entitlement to proportional descriptive representation, the extent to which minority candidates are elected is probative of whether vote dilution or suppressing may be occurring.¹⁴¹ Candidates of color have had some success in majority-minority political subdivisions and legislative districts, but are still generally underrepresented among elected officials in the state. Since 1777, no person of color has ever been elected governor of New York. No one of Latino or Asian heritage has ever been elected to any statewide office. Only one person of color has been elected to each of the statewide offices of Lieutenant Governor, Attorney General,

¹³⁸ See U.S. Census Bureau, 2015–2019 American Community Survey 5-Year Estimates, Tables B17010, Poverty Status in the Past 12 Months of Families by Family Type by Presence of Related Children Under 18 Years; B17020, Poverty Status in the Past 12 Months by Age; B19113, Median Family Income in the Past 12 Months (in 2019 Inflation-Adjusted Dollars); B19301, Per Capita Income in the Past 12 Months (in 2019 Inflation-Adjusted Dollars); B20017, Median Earnings in the Past 12 Months (in 2019 Inflation-Adjusted Dollars) by Sex by Work Experience in the Past 12 Months for the Population 16 Years and Over with Earnings in the Past 12 Months; B22005, Receipt of Food Stamps/SNAP in the Past 12 Months by Race of Householder; B25003, Tenure – Universe: Occupied Housing Units.

¹³⁹ See U.S. Census Bureau, 2015–2019 American Community Survey 5-Year Estimates, C15022, Sex by Educational Attainment for the Population 25 Years and Over.

¹⁴⁰ For example, an ecological inference analysis of the November 2020 general presidential election conducted by the New York Civil Liberties Union shows that in three of the four large suburban counties outside of New York City, more than 55% of white voters preferred Donald Trump, while in all four counties Black voter support for Joe Biden was at or above 90%, Latino voter support for Biden was at or above 70%, and Asian voter support for Biden was at or above 66%. See Appendix B.

¹⁴¹ See 52 U.S.C. § 10301(b).

or Comptroller. To date, outside of Bronx and Kings counties, which are both majority-minority counties, only one person of color has ever been elected to the position of district attorney in the remaining 59 counties of New York State.¹⁴² To date, only one person of color has ever been elected mayor of the City of New York.¹⁴³

One example of this underrepresentation is the well-established lack of diversity among New York's elected judiciary. Although nearly 45% of the State's population was non-white as of 2020, more than three-quarters of its judges were white.¹⁴⁴ The racial disparity between the general population and the bench is especially egregious for Latinos and Asians. In 2020, Latinos made up nearly 18% of the general population, but only 7% of judges, while Asians made up 8.5% of the population, but less than 3% of judges.¹⁴⁵ Research also shows underrepresentation of minorities, particularly Latinos, on municipal councils and school boards, in jurisdictions that use at-large elections.¹⁴⁶

Unfortunately, as noted above, the time consuming and resource-intensive process of investigating and prosecuting even a single Section 2 case is significant barrier to

¹⁴² Dave Lucas, *Albany County DA David Soares, Challenger Matt Toporowski Debate Before June 23 Primary*, WAMC NORTHEAST PUBLIC RADIO, June 5, 2020, <https://www.wamc.org/capital-region-news/2020-06-05/albany-county-da-david-soares-challenger-matt-toporowski-debate-before-june-23-primary>. In 2021, Alvin Bragg, a Black man, won the Democratic Party nomination for District Attorney of New York County. Michael R. Sisak, *Alvin Bragg's Opponent Concedes in Primary for Manhattan DA*, NBC4 NEW YORK, July 2, 2021, <https://www.nbcnewyork.com/news/local/alvin-braggs-opponent-concedes-in-primary-for-manhattan-da/3137640/> ("Alvin Bragg is one step closer to becoming the first Black district attorney for Manhattan after his opponent concedes")

¹⁴³ In 2021, Eric Adams, a Black man, won the Democratic Party nomination for Mayor of the City of New York. Elizabeth Kim, *"We've Been There": Why A Second Black Mayoralty Is Inspiring A Mix Of Hope And Skepticism*, GOTHAMIST, Aug. 4, 2021, <https://gothamist.com/news/eric-adams-second-black-mayor-nyc-hope-and-skepticism>.

¹⁴⁴ Report from the Special Advisor on Equal Justice in the New York State Courts (Oct. 1, 2020) at 33, available at <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>.

¹⁴⁵ *Id.* at 35.

¹⁴⁶ See Benjamin, *supra* note 128, 5 ALB. GOV'T L. REV. at 734.

scaling-up enforcement. Modern voter suppression and vote dilution have become more subtle but no less effective denying communities of color an equal opportunity to participate in the political process and elect candidates of choice than the first-generation vote denial scheme.¹⁴⁷ The greater subtlety requires increasingly sophisticated methods of analysis applied by costly experts to diagnose and prove Section 2 violations.¹⁴⁸ As such, the House Judiciary Committee unsurprisingly found fifteen years ago that “case-by-case enforcement alone is not enough to combat the efforts of certain States and jurisdictions to discriminate against minority citizens,” and that “Section 2 would be ineffective to protect the rights of minority voters.”¹⁴⁹ The time-consuming and costly nature of building Section 2 cases has, at times, made the law an inadequate vehicle for prosecuting minority voter suppression arising out of more ephemeral practices that can have a profound effect on turnout. For example, the locations of polling places are set shortly before election day and can change from year to year,¹⁵⁰ often leaving too little time to gather the data and conduct the expert analysis required to diagnose, let alone prosecute, a case of racial voter suppression.

Section 2 cases regularly require minority voters and their lawyers to risk six- and seven-figure expenditures for expert witness fees and deposition costs for claims that

¹⁴⁷ See H.R. Rep. No. 109-478 (2006), at 6.

¹⁴⁸ Federal courts have also found voting cases have consumed an increasing number of judicial resources over time and are comparable to antitrust cases as among the most time-consuming and resource-intensive cases. See Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 593 (2017) (citing Federal Judicial Center studies from 2005 and 2016).

¹⁴⁹ H.R. Rep. No. 109-478 (2006), at 57.

¹⁵⁰ See, e.g., N.Y. Elec. L. § 8-600(4)(c) (designation of early voting site and hours may occur up to 45 days before a primary or special election).

promise no damage awards.¹⁵¹ The recent New York cases in Islip and East Ramapo each demonstrate the exorbitant expense demanded by Section 2 litigation. Compounding the injury, it has remained true as the Supreme Court recognized over fifty years ago that voting rights defendants engage in dilatory tactics to prolong their time in office and evade liability,¹⁵² such as noted above in *East Ramapo*.¹⁵³

Finally, a lack of experienced voting rights attorneys in New York makes enforcement all the more challenging. There are very few lawyers in the state who represent the non-partisan interests of voters. The vast majority election lawyers in New York work as retained counsel for candidates or political parties. Of the small group of public interest voting rights lawyers based in New York, most are employed by national civil rights organizations—such as the NAACP Legal Defense and Education Fund, the American Civil Liberties Union, the Brennan Center for Justice, LatinoJustice PRLDEF, and the Asian American Legal Defense and Education Fund—and divide their practices among multiple states with few resources left to investigate and prosecute cases in New York. Attorneys in private practice are reluctant to take voting rights cases because individual voters and non-profit, non-partisan associations can rarely afford to retain counsel; there are no monetary damages available for voting rights claims; and statutory fee recovery, when available at all, is often uncertain. Voters—especially for low-income

¹⁵¹ See *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 7 (2005).

¹⁵² See *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (“Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings.”); see also *Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 4–5 (2005).

¹⁵³ See Section II.B.1 *supra*.

voters of color and disabled voters whose voting rights are most often infringed upon—often simply cannot afford the time and effort required to prosecute a case in light of work, family, or other obligations.¹⁵⁴

III. ENFORCING THE LANGUAGE MINORITY PROTECTIONS OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK

There is a long history of discrimination against language minority groups in voting in New York State.¹⁵⁵ Juan Cartagena, one of the state’s most prominent voting rights lawyers, observed that in New York the “the color of one’s skin, the foreignness of one’s ancestry and the difficulty with which one brokered the English language all worked to deny the franchise to [the state’s] citizens.”¹⁵⁶ New York’s exceptional language diversity is one of the state’s greatest strengths, but also presents a challenge for ensuring inclusive and equitable election administration.¹⁵⁷

The Voting Rights Act of 1965 introduced protections for Puerto Rican voters in Section 4(e), which provided that comprehension of English cannot be a condition to the participation in elections for citizens who were “educated in American-flag schools in which the predominant language was other than English.”¹⁵⁸ The relative success of New York City programs developed in response to litigation to enforce Section 4(e) compliance

¹⁵⁴ See *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. (2006), at 1620.

¹⁵⁵ See, e.g., Cartagena, *supra* note 20 at 507–16, 518–25, 537–39; see also *United States v. Cty. Bd. of Elections of Monroe Cty.*, 248 F. Supp. 316, 317 (W.D.N.Y. 1965).

¹⁵⁶ Cartagena, *supra* note 20 at 502.

¹⁵⁷ In New York City in particular, 59.3% of the population speak a language other than English at home. U.S. Census Bureau, *Language Spoken At Home: 2019 ACS 1-Year Estimates*, available at: <https://data.census.gov/cedsci/table?q=Language%20&tid=ACST1Y2019.S1601&hidePreview=false>.

¹⁵⁸ 52 U.S.C. § 10303(e).

in reaching close to 913,000 Puerto Ricans as well as many other Spanish-language speakers provided a model for implementing the broader language access requirements of Section 203.¹⁵⁹

Section 203 of the Voting Rights Act applies to four language groups: Alaska Natives, American Indians, Asian Americans, and persons of “Spanish heritage,”¹⁶⁰ “as well as the distinct languages and dialects within each of those groups.”¹⁶¹ A jurisdiction is covered under Section 203 if the Director of the Census determines two criteria are met, using “American Community Survey data in 5-year increments, or comparable census data.”¹⁶² Currently 7 of New York’s 62 counties are separately covered by Section 203 of the Voting Rights Act.¹⁶³ Seven counties are covered for Spanish: Bronx, Kings, Nassau, New York, Queens, Suffolk, and Westchester.¹⁶⁴ Three counties are covered for Chinese (including Taiwanese): Kings, New York, and Queens.¹⁶⁵ Additionally, Queens is covered

¹⁵⁹ See H.R. REP. NO. 94-196, at 24–25 (1975) (Noting that “[t]he provision of bilingual materials is certainly not a radical step. . . . Courts in New York have ordered complete bilingual election assistance, from dissemination of registration information through bilingual media to use of bilingual election inspectors.”); see also Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201, 209–10 (2005); *United States v. Cty. Bd. of Elections of Monroe Cty.*, 248 F. Supp. at 317 and *Torres v. Sachs*, 381 F Supp. 309, 312 (S.D.N.Y. 1974).

¹⁶⁰ 52 U.S.C. §§ 10503(c)(3), 10503(e).

¹⁶¹ James Thomas Tucker, *The Census Bureau’s 2011 Determinations of Coverage under Section 203 of the Voting Rights Act Mandating Bilingual Voting Assistance*, 19 ASIAN AM. L. J. 171 (2012) (citing 121 Cong. Rec. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); S. Rep. No. 94-295 at 24 n.14, reprinted in 1975 U.S.C.C.A.N. 790-91 n.14 (quoting Letter from Meyer Zitter, Chief, Population Division, Bureau of the Census, to House Judiciary Committee, Apr. 29, 1975)).

¹⁶² 52 U.S.C. § 10503(b)(2)(A).

¹⁶³ See 81 Fed. Reg. 85732, 87533 (Dec. 5, 2016).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

for Korean and Asian Indian.¹⁶⁶ The next coverage determinations are expected to be made in December, 2021, as required by Section 203(b)(2) of the Voting Rights Act.¹⁶⁷ Other than the addition of Asian Indian to Queens' coverage in 2011, there has not been any change to the covered jurisdictions or language covered within such jurisdictions in the past three coverage determinations.¹⁶⁸

Nonetheless, civil rights groups have had to go to court to ensure compliance with the law and have repeatedly prompted election administrators to resolve litigation through settlement agreements.¹⁶⁹ In addition to the Section 203 and Section 4(e) violations discussed in this Section, before the preclearance scheme Section 5 of the Voting Rights Act was left effectively inoperable by the *Shelby County* decision, proposed election procedures were blocked on several occasions due to failures to give proper ballot access to Chinese-American and Latino citizens.¹⁷⁰

Citizens in need of language assistance often experience intersecting barriers to participation in democracy and elections—for example, they are frequently the targets of discriminatory remarks made by poll workers in covered jurisdictions, misapplied photo

¹⁶⁶ *Id.*

¹⁶⁷ Compare generally *id.* (current coverage determinations issued on December 5, 2016) with 52 U.S.C. § 10503(b)(2)(A) (requiring the coverage determinations to be updated every five years).

¹⁶⁸ Compare 76 Fed. Reg. 63602, 63605 (Dec. 13, 2011) with 67 Fed. Reg. 48871, 48875.

¹⁶⁹ See, e.g., Brief of Amici Curiae National Asian Pacific American Bar Association, Asian American Legal Defense and Education Fund et al. Supporting Respondents, *Department of Commerce v. State of New York*, 2019 WL 1500055 (U.S.), 2 & n.68 (2019) (citing Complaint, *All. of South Asian Am. Labor v. The Bd. of Elections in the City of New York*, No. 1:13-cv-03732 (E.D.N.Y. July 2, 2013), ECF No. 1; Complaint, *Chinatown Voter Education All. v. Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006, ECF No. 1)).

¹⁷⁰ *Id.* at 507–10.

identification requirements, and errors that threaten their ability to cast valid ballots.¹⁷¹ The recent VRA violations reflected in court actions, DOJ objections, and federal observer accounts are described below, but they only begin to describe the ways in which New York fails its language minority voters. As part of their national election monitoring efforts, the Asian American Legal Defense and Education Fund (AALDEF), has repeatedly and recently documented in New York “racist and poorly trained poll workers,” such as demands for proof of citizenship from Asian American voters, including a poll worker in Chinatown who asked a Chinese American voter “Are you an American?” and demanded that the voter show identification before voting.”¹⁷² AALDEF also documented elections officials’ failure to provide adequate notice of the availability of provisional ballots interpreters,¹⁷³ as well as poll worker interference with interpreters assisting voters,¹⁷⁴ and numerous instances where voters were forced to vote by affidavit ballots due to failures to properly include their names in the poll books.”¹⁷⁵ Language-minority voters in New York

¹⁷¹ See Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW, 269, 295 (2008); see generally *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2d. Session, 12–21 (Mar. 8, 2005) (testimony of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund) (hereinafter Fung Testimony);

¹⁷² Asian American Legal Defense and Education Fund, *ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2012 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN CA, FL, GA, IL, LA, MA, MD, MI, NJ, NV, NY, PA, TX, VA AND DC* at 22-23, 25-26 (2012) (hereinafter, 2012 AALDEF Report), available at [aaldef.org/uploads/pdf/Access%20to%20Democracy%20Report%202012.pdf](https://www.aaldef.org/uploads/pdf/Access%20to%20Democracy%20Report%202012.pdf); see also generally Asian American Legal Defense and Education Fund, *ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2014 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN CA, FL, GA, IL, LA, MA, MD, MI, NJ, NV, NY, PA, TX, VA AND DC* at 22-23, 25-26 (2014), <https://www.aaldef.org/uploads/pdf/2014AccessToDemocracyReport.pdf>

¹⁷³ See 2012 AALDEF Report *supra* note 172, at 4.

¹⁷⁴ *Id.* at 22.

¹⁷⁵ *Id.* at 23.

need stronger guarantees against discrimination and greater enforcement resources to ensure that their rights are adequately protected.

Failures to provide legally adequate assistance to language-minority voters in New York are not confined to New York City. In recent years, the U.S. Department of Justice has taken action to enforce the VRA's language assistance protections against several political subdivisions, all outside of New York City.

A. *United States v. Orange County Board of Elections*

On April 18, 2012, Orange County Board of Election ("OCBOE") was sued by the United States pursuant to Section 4(e) of the Voting Rights Act, which protects the voting rights of citizens "educated in American-flag schools in which the predominant language was other than English" by prohibiting jurisdictions from "conditioning the right to vote of such persons on [their] ability to read, write, understand, or interpret any matter in the English language."¹⁷⁶ The complaint referred to 2000 Census data showing that the total number of people in Orange County who were born in Puerto Rico was 5,671, or 5.6% of the total Orange County population, and which constituted 29.6% of the total Puerto Rican population of the United States according to the 2000 Census figures.¹⁷⁷ By 2010, the Puerto Rican population of Orange County increased to 29,210 people.¹⁷⁸

The complaint sets out multiple violations of the Voting Rights Act, including allegations that during the 2009, 2010, and 2011 Federal, state, and local elections the

¹⁷⁶ 52 U.S.C. § 10303(e).

¹⁷⁷ Complaint at 11–12, *United States v. Orange County Board of Elections*, 12 Civ. 3071 (S.D.N.Y. 2012), available at: <https://www.justice.gov/archive/usao/nys/pressreleases/April12/occ/usorangecountycomplaint.pdf>.

¹⁷⁸ *Id.* at ¶ 15.

defendants failed to translate election materials into Spanish. This included various ballots, election notices, and election-related information on the OCBOE website.¹⁷⁹ The complaint further alleges that, during those same elections, the defendants failed to “recruit, appoint, train and maintain an adequate number of bilingual poll workers to provide Spanish-language assistance at the polls.”¹⁸⁰ According to the complaint, Defendants also denied multiple requests from Orange County residents to make Spanish-language assistance available at polling places.¹⁸¹

The parties entered into a stipulation which required OCBOE to designate bilingual election program coordinators, undertake a comprehensive program of translating ballots and election materials in Spanish; to ensure that information concerning elections and related services are adequately distributed to the County’s Puerto Rican community through media broadcast and publication, as well as OCBOE’s web site; to provide prominent signage in Spanish at polling places about the availability of Spanish-language assistance; to hire and train bilingual election inspectors and poll workers; and to use Spanish-surname analysis of the County voter registration list to estimate the number of Spanish-speaking voters and to staff those polling places according with bilingual personnel.¹⁸² The consent decree also authorized the appointment of federal election observers “to protect the voting guarantees of the Fourteenth and Fifteenth Amendments

¹⁷⁹ *Id.* at ¶ 16.

¹⁸⁰ *Id.* at ¶ 17.

¹⁸¹ *Id.* at ¶ 19–20.

¹⁸² Stipulation, *United States v. Orange County Board of Elections*, 12 Civ. 3071 (S.D.N.Y. 2012), available at: https://www.justice.gov/sites/default/files/crt/legacy/2015/03/10/orange_stip15_ny.pdf.

of the citizens of Orange County”¹⁸³ The stipulation applied to all Federal, State, and local elections administered by the OCBOE, for the period from March 6, 2015 through January 31, 2017.

B. *United States v. Westchester County, N.Y.*

On January 18, 2014, the United States filed an action against Westchester County, Westchester County Board of Elections (“WCBOE”), and the Commissioners of the Board of Elections alleging violations of Section 203 of the Voting Rights Act. Westchester County has been a covered jurisdiction for Spanish speaking language minorities under Section 203 of the Voting Rights Act since 1992, some 22 years before the suit was filed.

The complaint filed alleged several violations of Section 203, including failure to “recruit, appoint, train and maintain an adequate pool of bilingual poll officials capable of providing effective language assistance” to Spanish speaking citizens with limited English proficiency and failure to translate election-related materials into Spanish. Such information included election date announcements, voter registration information, election notices of various election types, candidate lists, and election-related information on County websites, in particular, the WCBOE website.¹⁸⁴

The parties entered into a consent decree, pursuant to which defendants agreed to comply with Section 203 of the Voting Rights Act and provide Spanish language materials, notices, forms, instructions, or assistance to voters, in “all elections and stages of the electoral process” conducted and administered by Westchester County. The consent decree

¹⁸³ *Id.* at 6-7.

¹⁸⁴ Complaint at 11–12, *United States v. Westchester County, N.Y.*, No. 05 CIV. 0650 (S.D.N.Y. 2005), available at: <https://www.justice.gov/crt/jurisdiction-and-venue>.

also provided for provisional ballots and other protections for voters attempting to vote at a polling place other than their assigned polling place.¹⁸⁵

The consent decree also itemized several other requirements defendants were required to comply with, including the translation of election-related materials into Spanish, and processes for managing such translation at local and polling-place level distribution, including Spanish ballots.¹⁸⁶ The dissemination of Spanish-language information in newspapers and other media was also required.¹⁸⁷ The consent decree outlined requirements for coordinators to oversee and manage the bilingual program, including ensuring adequate in-person Spanish language assistance at any place where “election-related transactions” were conducted by Westchester County, and that such personnel were adequately trained.¹⁸⁸ Finally, the consent decree authorized Federal observers to monitor compliance.¹⁸⁹

C. *United States v. Suffolk County*

On June 29, 2004, the United States entered into a consent decree with Suffolk County, Suffolk County Board of Elections (“SCBOE”), and the Commissioners of the SCBOE following the filing of a complaint alleging violations of Section 203 of the Voting

¹⁸⁵ Consent Decree at 1–2, *United States v. Westchester County, N.Y.*, No. 05 CIV. 0650 (S.D.N.Y. 2005), available at: https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/westchester_cd.pdf.

¹⁸⁶ *Id.* at ¶¶ 4–6.

¹⁸⁷ *Id.* at ¶ 7.

¹⁸⁸ *Id.* at ¶¶ 9–15 and 19–28.

¹⁸⁹ *Id.* at ¶¶ 29; 33–26 and 28–40.

Rights Act.¹⁹⁰ As with Westchester County, Suffolk County has been subject to the requirements of Section 203 with respect to Spanish since 1992.

The consent decree required defendants to provide in Spanish all election-related materials, including any notices, announcements, ballots, registration materials and other voting information (including appearing on voting machines), and imposed standards for the accuracy and completeness, and prominent placement of Spanish-language materials at polling places.¹⁹¹ The consent decree required coordinators to oversee the bilingual program, and required meetings between the Commissioners of the SCBOE and/or such coordinators and representatives of the “Hispanic community and other concerned groups” at least one month prior to primary and general elections conducted by the SCBOE to solicit community views.¹⁹² The consent decree also mandated minimum staffing levels and training requirements for bilingual poll workers.¹⁹³

In addition, the consent decree required that the SCBOE provide to the United States Attorney’s Office at least ten days prior to each federal, state or county election held in Suffolk County while the consent decree was effective, a report that included individualized polling place information, including the names each poll worker or interpreter designated to work at each polling place and which of those poll workers or

¹⁹⁰ Consent Decree, *United States v. Suffolk County, N.Y.*, No. CV 04-2698 (E.D.N.Y. June 29, 2004).

¹⁹¹ *Id.* at ¶ 1–2, 4 and 6.

¹⁹² *Id.* at ¶¶ 4–5.

¹⁹³ *Id.* at ¶¶ 7–11.

interpreters were bilingual in English and Spanish.¹⁹⁴ Federal observers were also permitted to monitor elections.¹⁹⁵

D. *United States v. Brentwood Union Free School District*

On June 2, 2003, a settlement agreement was filed with the Eastern District of New York after a complaint was filed against the Brentwood Union Free School District in Suffolk County, New York.¹⁹⁶ The complaint alleged violations of Section 203 with respect to provision of election materials and information in Spanish, including failures to translate materials into Spanish, and failures to provide adequate numbers of Spanish-speaking bilingual poll workers at polling places with significant numbers of Spanish-speaking voters.¹⁹⁷ The settlement agreement mandated that the school board appoint a Spanish Language Assistance Coordinator, to ensure that Spanish-speaking citizens receive Spanish language election materials and information regarding voting and election processes, provide adequate numbers of bilingual poll workers, investigate incidents of hostile treatment of Spanish-speaking voters by poll workers and remove any such poll workers from their positions.¹⁹⁸

¹⁹⁴ *Id.* at ¶ 16.

¹⁹⁵ *Id.* at ¶¶ 17 and 19.

¹⁹⁶ Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-2775 (E.D.N.Y. June 4, 2003).

¹⁹⁷ Press Release, Dept. of Justice, Justice Department Announces Resolution of Voting Law Violations in New York (Jun. 4, 2003), https://www.justice.gov/archive/opa/pr/2003/June/03_crt_335.htm (summarizing the consent decree).

¹⁹⁸ *Id.*

E. Assignment of Federal Observers

In addition to the specific cases discussed above, Federal election observers have been assigned to counties within New York State under Section 8 of the Voting Rights Act on numerous occasions to document potential violations of Section 203 and Section 5 (or to prevent or deter such violations).¹⁹⁹ Decisions by the Department of Justice to assign Federal observers to monitor particular elections are not taken lightly, and reflects “evidence of potential voting rights act violations which arise most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions”²⁰⁰ Between November 1985 and November 2004, 881 observers or monitors were assigned to New York State, with 353 sent to New York County, 286 sent to Kings County, 175 sent to Bronx County, 55 sent to Suffolk County and 12 sent to Queens/Suffolk Counties.²⁰¹ Since 2004, DOJ press releases note that observers or monitors have been sent to Bronx County (2012), Erie County (2018), Kings County (2008 and 2016), New York County (2008 and 2012), Orange County (2012 and 2016), Queens County (2012 and 2016) and Westchester County (2008 and 2013).²⁰² Limited information

¹⁹⁹ Cartagena, *supra* note 20, at 516–17.

²⁰⁰ *Id.* at 516.

²⁰¹ *Id.* at 517.

²⁰² Press Release, Dept. of Justice, Department of Justice to Monitor Polls in 23 States Across Nation on Election Day (Oct. 30, 2008), <https://www.justice.gov/archive/opa/pr/2008/October/08-crt-973.html>; Press Release, Dept. of Justice, Justice Department to Monitor Elections in New York (Sept. 12, 2012), <https://www.justice.gov/opa/pr/justice-department-monitor-elections-new-york-0>; Press Release, Dept. of Justice, Justice Department to Monitor Polls in 23 States on Election Day (Nov. 2, 2012), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-23-states-election-day>; Press Release, Dept. of Justice, Justice Department to Monitor Polls in 28 States on Election Day (Nov. 7, 2016), <https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day>; Press Release, Dept. of Justice, Justice Department to Monitor Compliance with Federal Voting Rights Laws on Election Day (Nov. 5, 2018) <https://www.justice.gov/opa/pr/justice-department-monitor-compliance-federal-voting-rights-laws-election-day> and Justice Department to Monitor Elections in South Carolina and Port Chester,

is available on the findings of the observers; however, available information shows ten occasions where observers were assigned in response to concerns over Section 203 compliance for Chinese language voters, seven occasions for both Chinese and Spanish language voters, and two occasions relating to concerns about the treatment of Korean and Spanish language voters.²⁰³

F. Department of Justice Information Requests to Nassau and Suffolk County School Districts Reveals Pervasive Failure to Provide Required Language Assistance Under Section 203.

Although the boards of elections in New York counties covered by Section 203 are generally aware of their language obligations (even if they often fail to comply with those obligations), the local government entities that run their own elections are not necessarily aware that (a) their county is covered under Section 203 and (b) as a result, they are also obligated to provide language assistance. Under 28 C.F.R. 55.9, when “a political subdivision (e.g., a county) is determined to be subject to . . . section 203(c), all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements as the political subdivision.” The result is that numerous political subdivisions within New York counties covered under Section 203 have been and/or continue to be engaged in violations of the Voting Rights Act.

For example, in March, 2019, for the first time, most of the 124 school districts in Nassau and Suffolk Counties planned to implement measures to comply with Section 203

New York, Dept of Justice, Mar. 18, 2013, available at: <https://www.justice.gov/opa/pr/justice-department-monitor-elections-south-carolina-and-port-chester-new-york>.

²⁰³ Cartagena, *supra* note 20, at 517.

of the Voting Rights Act.²⁰⁴ These plans were announced in response to letters sent by the U.S. Attorney's Office for the Eastern District of New York requesting information relating to such school district's compliance with Section 203 of the Voting Rights Act sent in June 2018.²⁰⁵ The letters requested several types of documents relating to the most recently held election, along with information regarding practices for providing assistance at polling places and other election-related meetings and events.²⁰⁶

In announcing their plans to comply with the Section 203, legal counsel for a majority of the relevant school districts noted that the school districts were responding to "demographic shifts and legal pressures."²⁰⁷ Media reporting noted that the school districts had been using only English ballots on the "assumption that federal rules covering other jurisdictions did not apply to them."²⁰⁸ Although the importance of language assistance for voters in Nassau and Suffolk counties has increased as the Latino population on Long Island has increased, Suffolk county has been designated as a covered jurisdiction for Spanish since 1992. To date, no comprehensive investigation has been conducted into whether other local government entities that run their own elections within counties under federal obligations to provide language are in compliance with their own language assistance obligations.

²⁰⁴ *Most Long Island School Districts Will Have Bilingual Ballots*, NEWSDAY (Mar. 24, 2019), <https://www.newsday.com/long-island/education/school-districts-voting-english-spanish-ballots-1.28832270>

²⁰⁵ *See, e.g.*, Letter from U.S. Attorney (E.D.N.Y.) to "Superintendent" (Jun. 28, 2018), available at <https://www.bsk.com/uploads/US-Dept-of-Justice-Letter.pdf>.

²⁰⁶ *Id.*

²⁰⁷ *Most Long Island School Districts Will have Bilingual Ballots*, *supra* note 204.

²⁰⁸ *Id.*

For another example, the New York Attorney General's office has conducted outreach to determine whether jurisdictions which have not been covered under Section 203, but are likely required to provide language assistance under other provisions of the Voting Rights Act come into compliance with those obligations. In 2012, the Rockland County Board of Elections ("Rockland BOE") entered into a Memorandum of Agreement with the New York Attorney General's office to ensure that Puerto Rican voters received the language assistance to which they are entitled under Section 4(e).²⁰⁹ The Agreement committed the Rockland BOE to providing "not only. . . a bilingual ballot, but that all election-related materials, including voter registration details and deadlines, polling place notices, sample ballots, absentee ballot applications and materials, affidavit ballots, and other information disseminated in English are also made available in Spanish."²¹⁰ The agreement was effective for five years and required the Rockland BOE to make regular reports to the Civil Rights Bureau of the New York Attorney General's office concerning compliance with the agreement.²¹¹

G. New York City Board of Elections Interferes with City's Efforts to Provide Assistance to Language Minority Voters.

In 2019, the Board of Elections in the City of New York (BOENYC)—legally, a state agency—attempted to stop a program funded and run by the City of New York to provide translators for speakers of languages not covered by Section 203. The City's

²⁰⁹ Memorandum of Agreement Concerning Minority Language Access, *In the Matter of Rockland County Board of Elections* (N.Y. Att'y Gen. Sept. 25, 2012), available at https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/voting-rights/Rockland%20County%20Final%20MOA%20signed%20by%20all%20parties.pdf.

²¹⁰ *Id.*

²¹¹ *Id.* at 4.

Democracy NYC initiative and the Mayor’s Office of Immigrant Affairs jointly developed a plan to provide interpreters for the top 15 languages spoken by limited English proficient New Yorkers based on data from the U.S. Census Bureau.²¹² In addition to the languages covered by the Voting Rights Act, the City’s expanded language assistance program included Albanian, Arabic, French, Haitian, Creole, Italian, Greek, Polish, Russian, Tagalog, Urdu, and Yiddish—each spoken by thousands of New Yorkers.²¹³ The City provided BOENYC with information concerning how the languages were chosen, at which poll sites interpreters for particular languages would be offered, how interpreters would be trained and supervised, and how they would provide their services.²¹⁴ The City requested permission for the interpreters to be able to wait inside the polling places. BOENYC refused. The City ultimately decided to station the interpreters beyond the area within 100 feet of the entrance to the polling place where electioneering is prohibited, even though the non-partisan interpreters were not engaged in electioneering.

BOENYC sued the City officials responsible for the interpreter program and attempted to invalidate it in its entirety.²¹⁵ BOENYC argued that the non-partisan

²¹² See, e.g., Press Release, City of New York, City Enters Litigation Against Board of Elections to Make Voting Easier for Limited English Proficient New Yorkers (Feb. 25, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/109-19/city-enters-litigation-against-board-elections-make-voting-easier-limited-english>; see also, *Board of Elections in the City of New York v. Mostofi*, 65 Misc. 3d 876 (Cnty. Ct. N.Y. 2019).

²¹³ *Mostofi*, 65 Misc. 3d at 878–79; see New York City Civic Engagement Commission, “Language Access Plan,” available at [https://www1.nyc.gov/site/civicingement/about/language-access-plan.page](https://www1.nyc.gov/site/civicingagement/about/language-access-plan.page) (providing the methodology for calculating where such language assistance will be provided.)

²¹⁴ *Mostofi*, 65 Misc. 3d at 879.

²¹⁵ *Id.* at 879–81.

interpreter program violated a state constitutional provision related to partisan administration of elections and was pre-empted by the Voting Rights Act.²¹⁶

Assemblywoman Rodneyse Bichotte, the first Haitian-American elected to the New York State legislature, criticized BOENYC's attempt to stop the City for providing expanded language access: "Instead of choosing inclusion, the Board has continued to allow language barriers to hinder democracy. The truth is that voting can feel like an impossible feat for people whose first language is not currently represented by the Board of Elections."²¹⁷ Assemblymember Steven Crymbowitz noted that the BOENYC's actions to block the interpreter program were another example of its "long and disturbing pattern of disenfranchising limited English proficiency New Yorkers."²¹⁸ State Senator Zellnor Myrie, Chair of the Elections Committee, said BOENYC's actions were "a direct attack on our immigrants, our communities of color, and our democracy itself."²¹⁹

A state court rejected BOENYC's challenge to the interpreter programing, holding that BOENYC had "fail[ed] to explain how the elimination of the Interpreter Program would not, in effect, disenfranchise voters."²²⁰ As the Brennan Center for Justice observed, "the agency's efforts prioritized party political interests over the will of city voters, who in

²¹⁶ *Id.* at 880.

²¹⁷ Press Release, City of New York, City Enters Litigation Against Board of Elections to Make Voting Easier for Limited English Proficient New Yorkers (Feb. 25, 2019), <https://www1.nyc.gov/office-of-the-mayor/news/109-19/city-enters-litigation-against-board-elections-make-voting-easier-limited-english>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Mostofi*, 65 Misc. 3d at 885 (2019).

2018 had approved a ballot question establishing a commission whose duties included expanding language assistance at poll sites.”²²¹

IV. ENFORCING THE PRECLEARANCE PROVISIONS OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 IN NEW YORK

Section 5 of the Voting Rights Act of 1965, which required certain states and political subdivisions to receive “pre-clearance” for any proposed changes to election policies or procedures was crucial to the success of the Voting Rights Act in New York and nationwide.²²² At the time of the Court’s 2013 ruling in *Shelby County*, which left the federal preclearance scheme effectively inoperable, three New York counties were covered “political subdivisions” under Section 4(b)’s coverage formula: Kings, Bronx, and New York (collectively, the “Covered Counties”).²²³

Between 1982 and 2005, New York City submitted over four thousand changes to voting policies and procedures for preclearance to the Department of Justice.²²⁴ Those submissions resulted in 14 objection letters and drew 121 “more information requests” (MIR) from the Department of Justice.²²⁵ An MIR is “contained in a formal letter from a

²²¹ JOANNA ZDANYS ET AL., HOW TO FIX THE NEW YORK CITY BOARD OF ELECTIONS SOLUTIONS TO THE STRUCTURAL FLAWS THAT CAUSE THE AGENCY’S EXCEPTIONAL DYSFUNCTION, *The Brennan Center for Justice* (Sept. 9, 2021), at 10, available at https://www.brennancenter.org/sites/default/files/2021-09/2021_08_NYC_BOE_Reform_Final.pdf.

²²² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439.

²²³ U.S. Dep’t Just., Jurisdictions Previously Covered by Section 5 (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

²²⁴ Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in *Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power*, 16, Tbl. 3.3 (Ana Henderson ed., 2007), available at http://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf; Brief for The City of New York, The Council of the City of New York, et al. as Amici Curiae Supporting Respondents, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (No. 12-96), 2013 U.S. S. Ct. Briefs LEXIS 929.

²²⁵ Fraga & Ocampo, *supra* note 224, at 16, Tbl. 3.3.

senior official within the DOJ and sent to the submitting jurisdiction requesting that it provide additional information about a proposed change in voting procedure or practice.”²²⁶ The 121 MIRs sent to New York also resulted in 75 further follow-up requests for more information.²²⁷ An analysis of MIRs issued by DOJ over a 23-year period found that MIRs had a significant deterrent effect on potentially retrogressive changes, especially in more recent years.²²⁸ That deterrent effect was especially strong in New York, which withdrew 51 changes in response to MIRs.²²⁹

The DOJ’s 14 objection letters were issued in response to a wide range of changes to the electoral process ranging from plans to redistrict to ensure incumbent re-election at the cost of minority representation in the State Assembly²³⁰ and refusal to provide translated ballots to Chinese-speaking voters.²³¹ Two of those objection letters were issued within the previous 25 years.

In 1996, the DOJ rejected a proposal to replace one of Bronx County’s elected, nine-person Community School Boards with five trustees appointed by the Chancellor’s office for the New York City Public School System, who would govern until the next

²²⁶ *Id.*, at 49-50 (citing Department of Justice, 28 C.F.R. §51.37, Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended).

²²⁷ *Id.* at 16, Tbl. 3.3.

²²⁸ *Id.* at 65 (noting that between 1999 to 2005, “MIRs deterred 605% more changes than did formal objections).

²²⁹ *Id.* at 16, Tbl. 3.3.

²³⁰ See U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 82-2462 (Jun. 22, 1982).

²³¹ See U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 93-4733 (May 13, 1994).

scheduled election.²³² The DOJ rejected the proposal because the board failed to “jointly seek and select” a superintendent with the Chancellor’s office.²³³ The electorate that had elected the nine board members—comprised of seven Hispanic and two Black members—was collectively 90% Hispanic and Black.²³⁴ In its rejection, the DOJ noted that the proposal effectively substituted the overwhelmingly minority electorate that had elected the board members with the will of the electorate that had elected the Chancellor, resulting in minority voters in the district having “considerably less influence over the selection of [the] board members through the choices of the appointing authority than they have under the direct-election system currently in place.”²³⁵

In 1999, New York State proposed altering the election procedures for community school boards in the Covered Counties.²³⁶ The proposal would have replaced a “single transferable vote method of election (STV) with a form of limited voting whereby voters may cast one vote for each of up to four candidates (LV 4), and the nine candidates receiving the greatest number of votes shall be elected.”²³⁷ The City proposed the changes to increase voter participation in school board elections. Citing a number of court cases finding that voting in New York City is racially polarized, the DOJ found that the information provided in support of the proposal indicated that this polarization is so

²³² See U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 96-3759 (November 15, 1996).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ U.S. Dep’t of Just., Div. of Civ. Rts., Voting Determination Letter Submission No. 98-3193 (February 4, 1999).

²³⁷ *Id.*

extreme “that the ability of minority voters to elect their candidates of choice [under the proposed plan] will be considerably reduced under the submitted change in voting method.”²³⁸

V. ELECTION ADMINISTRATION

At its best, election administration ensures that every eligible person is able to register to vote and to cast a meaningful ballot. At its worst, election administration generates unnecessary burdens on the right to vote, burdens that invariably fall harder on groups of voters who have been historically marginalized from the democratic process, including voters of color. New York’s election administration has consistently ranked among the worst in the United States.²³⁹

New York only began a process of meaningful reform to its state election laws and practices in 2019. In 2019, New York finally became the thirty-ninth state to offer in-person early voting, part of an effort “to improve New York’s notoriously low voter turnout.”²⁴⁰ However, as noted below, election administrators in some counties have resisted efforts to comply with state law directives to provide “adequate and equitable access” to early voting by making sites disproportionately inconvenient for voters of

²³⁸ *Id.*

²³⁹ New York has an average rank of 49 out of 51 on the Elections Performance Index (“EPI”), a nationwide comparison of election administration policy and performance across the states from one election cycle to the next. See “New York,” ELECTIONS PERFORMANCE INDEX, MASSACHUSETTS INSTITUTE OF TECHNOLOGY ELECTION DATA & SCIENCE LAB (last visited Oct. 1, 2021), <https://elections.mit.edu/#/data/map?view=state-profile&state=NY&year=2018>.

²⁴⁰ Michael Gormley, *What You Need to Know About Early Voting on Long Island*, NEWSDAY, Oct. 23, 2020, <https://www.newsday.com/news/region-state/early-voting-election-long-island-1.50044455>.

color and low-income voters,²⁴¹ failing to respond to hours-long lines at polling sites,²⁴² or failing to furnish voters with information and assistance in the Spanish language.²⁴³

Numerous cases have been filed in recent years in federal and state courts concerning failures of election administration in New York State. These cases have identified issues such as purging of voter rolls without adequate notice or process, abnormally long wait times at early voting sites, and inaccessibility, insufficient numbers, and inequitable geographic distribution of polling sites. These cases highlight systemic inefficiencies and other shortcomings in election administration by county and city boards of elections that have the effect of burdening or entirely disenfranchising New York voters, particularly voters of color.²⁴⁴

Common Cause/New York v. Board of Elections in the City of New York involved a challenge to the New York City Board of Elections' removal of voters from the registration rolls ahead of the presidential primary in the spring of 2016, including more than 117,000 voters in Brooklyn,²⁴⁵ which by some reports disproportionately impacted

²⁴¹ *People by James v. Rensselaer County Board of Elections*, No. EF2021-268959 (N.Y. Sup. Ct. May 7, 2021).

²⁴² See *Spring Valley Branch of the NAACP v. Rockland County Board of Elections*, No. 035092/2020 (N.Y. Sup. Ct. Oct. 29, 2020).

²⁴³ See *United States v. Suffolk County, N.Y.*, No. CV 04-2698 (E.D.N.Y. June 29, 2004).

²⁴⁴ Voters with disabilities also have had to repeatedly go to court to enforce their rights of accessibility to cast a ballot against the boards of elections. See, e.g., *Hernandez v. N. Y. State Bd. of Elections*, 2020 WL 4883889 (S.D.N.Y. Aug. 19, 2020); *Disabled In Action v. Bd. of Elections in the City of New York*, 752 F.3d 189 (2d Cir. 2014).

²⁴⁵ No. 1:16-cv-06122 (E.D.N.Y. Nov 03, 2016).

Latino voters.²⁴⁶ Plaintiffs, an election administration reform group and affected voters, contended the Board violated the National Voter Registration Act (“NVRA”),²⁴⁷ which prohibits election officials from removing registered voters from the voter rolls in federal elections without taking steps to verify that the voter has not moved, responded to a notice, or not voted in the two preceding election cycles. After an emergency hearing, the United States District Court for the Eastern District of New York issued an order requiring city poll workers to provide affidavit ballots to any individual who believed they had been registered to vote but whose name did not appear on the registration rolls. In January 2017, the court granted motions by both the U.S. Department of Justice and the New York Attorney General to intervene in the action. On December 14, 2017, the court issued an order approving a proposed Consent Decree mandating certain reforms, which restored the rights of improperly purged voters and established a comprehensive plan to fix how the Board manages its voter rolls and prohibit wrongful voter purges in future elections.²⁴⁸

In *Spring Valley Branch of the NAACP v. Rockland County Board of Elections*, the Spring Valley and Nyack Branches of the NAACP and several Rockland County voters filed a lawsuit against the Rockland County Board of Elections to address long lines and inadequate accommodations for voters with disabilities during early voting.²⁴⁹ The

²⁴⁶ See “Common Cause New York et al. v. Board of Elections in the City of New York, et al.,” LATINO JUSTICE PRLDEF (E.D.N.Y. Nov 03, 2016), <https://www.latinojjustice.org/en/cases/common-cause-new-york-et-al-v-board-elections-city-new-york-et-al>.

²⁴⁷ 52 U.S.C. § 20507.

²⁴⁸ See “City Board of Elections Admits It Broke the Law, Accepts Reforms,” WNYC (Oct. 24, 2017), <https://www.wnyc.org/story/city-board-elections-admits-it-broke-law-accepts-reforms/>; see also “Judge Orders NYC Board of Elections to Protect Purged Voters’ Rights,” WNYC (Nov. 5, 2016), <https://www.wnyc.org/story/judge-orders-nyc-board-elections-protect-rights-purged-voters/>.

²⁴⁹ No. 035092/2020 (N.Y. Sup. Ct. Oct. 29, 2020).

plaintiffs contended that, during the first weekend of early voting, lines in Rockland were particularly long, and voters intending to vote at Rockland County sites were deterred or prevented from voting due to the lengthy wait times and an absence of accommodations. The petition alleged that the issues with early voting had adversely impacted aged and disabled voters, who were less able to wait in long lines to vote. The suit sought the immediate extension of poll site hours for the remainder of early voting and the addition of signage offering accommodations for voters who require them. The lawsuit resulted in a stipulated judgment, with the state court ordering an extension of poll site hours for the remainder of early voting and posting of accessible notices for additional accommodations for disabled voters at all four Rockland County locations.²⁵⁰

In another action brought by voting rights advocacy group Common Cause/New York against the New York City Board of Elections, its co-executive directors, and its commissioners, *Common Cause/New York v. Brehm*, the plaintiffs alleged New York's procedures for placing voters on inactive status, removing inactive voters from official poll books, refusing to maintain inactive voter lists at polling locations, and requiring inactive voters to vote by affidavit ballot violated the Equal Protection Clause of the Fourteenth Amendment and the NVRA.²⁵¹ The challenged practices disproportionately affected

²⁵⁰ See "Spring Valley NAACP v. Rockland County Board Of Elections," NYCLU PRESS RELEASE (Oct. 29, 2020), <https://www.nyclu.org/en/cases/spring-valley-naacp-v-rockland-county-board-elections>; see also "Rockland Early Voting Hours Extended, Accommodations Added, Following Lawsuit," THE JOURNAL-NEWS (Oct. 30, 2020), <https://www.lohud.com/story/news/local/rockland/2020/10/30/rockland-elections-board-sued-over-early-voting-lines-accommodations/6083265002/>.

²⁵¹ 432 F. Supp. 3d 285 (S.D.N.Y. 2020).

voters of color and low-income voters in New York City.²⁵² After a four-day bench trial, the court ruled that the practices of removing the names of inactive voters from poll books and refusing to provide inactive lists at polling locations violated the Equal Protection Clause.²⁵³

The New York Attorney General's Office filed a state court lawsuit against the Rensselaer County Board of Elections and its commissioners alleging that when the Board and its commissioners selected early voting sites, they ignored statutory criteria designed to ensure "adequate and equitable access" to early voting, particularly for the County's voters of color, disabled voters, and low-income voters.²⁵⁴ Despite the availability of potential early voting sites in Troy—the most densely populated area of the county—the Board and its commissioners repeatedly refused to select an early voting site that was easily accessible to Troy residents, where the majority of the county's Black, Hispanic, and lower-income communities reside. The trial court ruled that the Board's decision not to place a site in a centrally located area within Troy was arbitrary and capricious, and annulled it. The Board appealed, triggering an automatic stay of the judgment for the June 2021 primary election. The Troy Branch of the NAACP and several voters of color residing in Troy moved to intervene on the side of the Attorney General. The appellate court granted the motion to intervene and affirmed the trial court ruling, ordering the

²⁵² Brigid Bergin, "'Inactive' NY Voters Shouldn't Be Removed From Voting List: Lawsuit," GOTHAMIST (Oct. 15, 2019), <https://gothamist.com/news/inactive-ny-voters-shouldnt-be-removed-from-voting-list-lawsuit>.

²⁵³ 432 F. Supp. 3d at 319. The court also granted a declaratory judgment that the board of elections had "violated Section 8 of the [National Voter Registration Act] by denying eligible voters the right to vote based on a purported change in residence without following the procedures" required by the NVRA. *Id.*

²⁵⁴ *People by James v. Schofield*, No. EF2021-268959 (N.Y. Sup. Ct. May 27, 2021).

Rensselaer County Board of Elections to designate legally compliant early voting sites in Troy by September 3, 2021.²⁵⁵

Sometimes instances of election administration with discriminatory intent or effect have proved too ephemeral for judicial enforcement. For example, after the State of New York passed legislation permitting undocumented immigrants to receive driver's licenses, several elected officials in Rensselaer County, including the County Executive, Chair of the County Legislature, and the County Clerk, as well the Republican Elections Commissioner for the County, issued a press release stating that the Rensselaer County Board of Elections would begin sending all voter registration applications received from the Department of Motor Vehicles to Immigration and Customs Enforcement ("ICE") to check if anyone who registered to vote in the county was in the United States illegally.²⁵⁶ Although the patently discriminatory policy was never enacted due to the refusal of one of the Rensselaer County Board of Elections commissioners to ratify it, these official statements had the unmistakable intent and likely effect of intimidating voters of color, particularly Latino voters and voters in households with mixed immigration status.

²⁵⁵ See *People by James v. Schofield*, No. 533467, Dkt. No. 54, – N.Y.S.3d –, 2021 WL 3774203 (N.Y. App. Div. Aug. 26, 2021) (granting motion to intervene brought by Troy Branch of the NAACP and Black and disabled voters, and otherwise affirming on the merits); see also "Attorney General James Sues Rensselaer County Board of Elections for Denying Communities of Color Access to Early Voting Sites," NEW YORK STATE ATTORNEY GENERAL'S OFFICE PRESS RELEASE (May 27, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-sues-reusselaer-county-board-elections-denying-communities>; "Attorney General James Wins Lawsuit Forcing Rensselaer County to Increase Access to Early Voting Sites in Communities of Color," NEW YORK STATE ATTORNEY GENERAL'S OFFICE PRESS RELEASE (June 7, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-wins-lawsuit-forcing-reusselaer-county-increase-access>.

²⁵⁶ See "Rensselaer County Board of Elections to Give ICE Voter Registration Information," TIMES UNION (July 18, 2019), <https://www.timesunion.com/news/article/Rensselaer-County-Board-of-Elections-to-give-ICE-14106220.php>.

VI. CONCLUSION

New York has a long way to go to overcome the deep-seated and continuing effects of its history of discrimination and to build an inclusive and equitable democracy in the nation's most diverse polity. The state has recently begun to enact and implement overdue reforms. Those modernizations do not obviate the need for strong federal protections for racial and language-minority voting rights in New York or for robust federal enforcement of those protections. Significant racial disparities in voter turnout persist in elections at all levels. Even more pronounced racial disparities persist in local government elections, which constitute the vast majority of all elections in the state. Those disparities follow from the widespread use of laws and practices whose effect in suppressing minority voting strength and generating conditions ripe for minority dilution is well-established. The Voting Rights Act has provided important tools for beginning the process of finding and rooting out discrimination from all levels of New York's election system. More efficient and effective causes of action against vote suppression and vote dilution are critical to continue that process and scale up enforcement efforts to more meaningful levels. Provisions for preclearance and federal election observers also have been and continue to be necessary in New York to prevent backsliding and to preserve the gains won through affirmative litigation, especially with the latest round of redistricting underway. The federal authorities that have repeatedly brought successful enforcement actions should receive greater resources and a mandate to continue bringing New York jurisdictions into compliance by opening more investigations and prosecuting more cases.

Longstanding discrimination takes an even longer commitment to ensure its undoing. The tools required to dismantle discriminatory structures have to be stronger

and more sophisticated than those used to build them. As Juan Cartagena wrote 15 years ago, and is still true today: “It is hard to imagine what an election in this part of the country would be like without the protections of the Voting Rights Act. But it is easier to imagine a future where its tools would be put to full use to eradicate what is left of a history of exclusion.”²⁵⁷

²⁵⁷ Cartagena, *supra* note 20, at 539.

APPENDIX A

Results of Bayesian Improved Surname Geocoding ("BISG") Analysis of Recent School District Elections in 25 Diverse and Large School Districts in Suffolk, Nassau, Westchester, Rockland, and Oneida Counties.

School District Name	Citizen Voting-Age Population (CVAP) from 2015-2019 5-year ACS					Voter Turnout Estimates (4-year average) from BISG Analysis of Voting Documents				
	Total	White (%)	Black (%)	Latino (%)	Asian (%)	Total	White (%)	Black (%)	Latino (%)	Asian (%)
Bay Shore Union Free School District	24593	54%	19%	24%	3%	1598	83%	6%	8%	1%
Brentwood Union Free School District	50932	24%	19%	54%	2%	1590	32%	14%	50%	2%
East Meadow Union Free School District	38797	70%	5%	12%	12%	2725	86%	1%	7%	5%
Elmont Union Free School District	38399	24%	45%	17%	11%	1310	38%	37%	14%	8%
Farmingdale Union Free School District	31918	80%	6%	8%	6%	2030	92%	1%	5%	2%
Floral Park-Bellerose Union Free School District	14769	77%	1%	10%	11%	1272	91%	1%	5%	2%
Franklin Square Union Free School District	19170	79%	1%	12%	6%	1011	90%	0%	6%	2%
Freeport Union Free	25396	35%	30%	32%	1%	1070	47%	29%	20%	1%

	<i>Citizen Voting-Age Population (CVAP) from 2015-2019 5-year ACS</i>					<i>Voter Turnout Estimates (4-year average) from BISG Analysis of Voting Documents</i>				
School District Name	Total	White (%)	Black (%)	Latino (%)	Asian (%)	Total	White (%)	Black (%)	Latino (%)	Asian (%)
School District										
Garden City Union Free School District	16497	88%	2%	5%	4%	1416	94%	0%	2%	2%
Hicksville Union Free School District	28934	62%	4%	11%	20%	1521	79%	1%	8%	10%
Longwood Central School District	51059	72%	12%	13%	2%	2506	85%	7%	6%	1%
Massapequa Union Free School District	36606	94%	0%	5%	1%	4367	96%	0%	2%	1%
Middle Country Central School District	45489	79%	4%	11%	5%	2096	89%	2%	6%	2%
Mineola Union Free School District	17090	72%	3%	14%	8%	942	89%	0%	6%	3%
Mount Vernon School District	46397	19%	68%	12%	2%	2073	30%	59%	6%	1%
North Bellmore Union Free School District	20174	84%	2%	9%	4%	1668	92%	1%	4%	2%
Patchogue- Medford Union Free	37752	78%	6%	14%	1%	2268	89%	1%	8%	0%

	<i>Citizen Voting-Age Population (CVAP) from 2015-2019 5-year ACS</i>					<i>Voter Turnout Estimates (4-year average) from BLSG Analysis of Voting Documents</i>				
School District Name	Total	White (%)	Black (%)	Latino (%)	Asian (%)	Total	White (%)	Black (%)	Latino (%)	Asian (%)
School District										
Port Chester-Rye Union Free School District	17290	50%	6%	42%	3%	1848	70%	2%	26%	1%
Rockville Centre Union Free School District	16206	81%	7%	10%	2%	2368	94%	1%	3%	1%
Sachem Central School District	62851	81%	3%	10%	4%	4576	92%	1%	5%	2%
Three Village Central School District	32451	74%	4%	7%	13%	2521	92%	1%	2%	4%
Uniondale Union Free School District	27766	24%	51%	21%	2%	1383	32%	48%	16%	1%
Utica City School District	41049	67%	15%	10%	5%	2645	88%	6%	3%	1%
Westbury Union Free School District	15857	24%	41%	28%	5%	1569	28%	44%	23%	2%
William Floyd (Mastic Beach) Union Free School District	35655	77%	5%	14%	1%	1714	84%	3%	9%	1%

APPENDIX B

Results of Racially Polarized Voting (RPV) Analysis of 2020 Presidential General Election in Five New York Counties: Estimated Racial Vote Share Cast in Favor of Joe Biden, Donald Trump, or Other Candidates.

Nassau County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	42.74%	97.59%	80.26%	74.57%	71.58%
Trump	56.23%	1.91%	18.01%	23.53%	14.02%
Other	1.03%	0.50%	1.73%	1.89%	14.40%

Suffolk County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	42.80%	95.96%	75.44%	68.19%	55.43%
Trump	56.45%	2.96%	22.87%	23.69%	16.24%
Other	0.75%	1.08%	1.69%	8.12%	28.33%

Westchester County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	61.48%	97.50%	74.92%	66.56%	80.41%
Trump	37.89%	1.85%	24.10%	25.54%	10.79%
Other	0.63%	0.65%	0.98%	7.89%	8.79%

Rockland County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	41.82%	89.56%	71.55%	66.55%	46.39%
Trump	57.72%	9.10%	26.22%	29.05%	37.31%
Other	0.46%	1.35%	2.24%	4.40%	16.30%

Oneida County 2020 Presidential General Election RPV

Candidate	White	Black	Latino	Asian	Other
Biden	38.16%	89.19%	86.73%	84.81%	59.39%
Trump	60.04%	7.86%	9.65%	9.32%	19.24%
Other	1.80%	2.95%	3.63%	5.88%	21.38%



State by State Guide to Voting Laws

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Overview of State Voting Laws

State	Early Voting Days	Absentee Voting	Same Day Registration	Automatic Voter Registration	In-Person Voter ID	Absentee Voter ID	Ballot Trafficking
AL	39*	Excuse required	No	No	Photo ID	Photo ID & witness/notary signature	Ban
AK	13-15	No excuse	Yes, for Pres and VP	Yes	Photo or non-photo ID	Witness signature	Limited
AZ	18	No excuse	No	No	Photo or non-photo ID	Signature match	Limited
AR	13	Excuse required	No	No	Photo ID	Photo ID required and signature match	Limited
CA	21	No excuse	Yes	Yes	No	Signature match	Open
CO	12-15	All-mail voting	Yes	Yes	Photo or non-photo ID	Signature match	Limited
CT	0	Excuse required	Yes	Yes	Photo or non-photo ID	No	Limited
DE	0	Excuse required	No	No	Photo or non-photo ID	No	Unspecified
FL	8	No excuse	No	No	ID	Signature match	Limited
GA	17	No excuse	No	Yes	Photo ID	ID required	Family & Friends
HI	10	All-mail voting	Yes	Yes	No	Signature match	Unspecified
ID	10	No excuse	Yes	No	Photo ID	Signature match	County discretion
IL	30	No excuse	Yes	Yes	No	Signature match	Open
IN	22*	Excuse required	No	No	Photo ID	Signature match	Limited
IA	14*	No excuse	Yes	Yes	Photo or non-photo ID	Signature match	Limited
KS	14	No excuse	No	No	Photo ID	No	Limited
KY	3	Excuse required	No	No	Photo ID	Signature match	Limited
LA	7	Excuse required	No	No	Photo ID	Witness signature	Limited
ME	29	No excuse	Yes	Yes	No	Signature match	Limited
MD	8	No excuse	Yes	Yes	No	No	Open
MA	10	Excuse required	No	Yes	No	Signature match	Limited
MI	29*	No excuse	Yes	Yes	Photo ID	Signature match	Limited
MN	33	No excuse	Yes	No	No	Witness signature/Signature match	Limited
MS	31*	Excuse required	No	No	Photo ID	Witness signature/Signature match	Unspecified
MO	30*	Excuse required	No	No	Photo or non-photo ID	Notary signature	Limited
MT	21*	No excuse	No	No	Photo or non-photo ID	Signature match	Family & Friends
NE	21	No excuse	No	No	No	None	Limited
NV	12	All-mail voting	Yes	Yes	No	Signature match	Limited
NH	0**	Excuse required	Yes	No	Photo ID or affidavit	None	Limited

NJ	9	No excuse	No	Yes	No	Signature match	Limited
NM	23	No excuse	Yes	Yes	No	None	Limited
NY	9	Excuse required	No	Yes	No	Signature match	Unspecified
NC	13	No excuse	Yes	No	No	Witness or notary signature	Limited
ND	11	No excuse	No	No	Photo or Non-Photo ID	Signature match	Limited
OH	21	No excuse	No	No	Photo or Non-Photo ID	Signature match	Limited
OK	3	No excuse	No	No	Photo or Non-Photo ID	Notary Signature	Ban
OR	4	All-mail voting	No	Yes	No	Signature match	Open
PA	32*	No excuse	No	No	No	None	Ban
RI	14	Excuse required**	No	Yes	Photo or non-photo ID	Witness/notary signature, & signature match	Unspecified
SC	0	Excuse required	No	No	Photo ID	Witness	Limited
SD	32*	No excuse	No	No	Photo ID	Signature match	Limited
TN	14	Excuse required	No	No	Photo ID	Signature match	Ban
TX	10	Excuse required	No	No	Photo ID	Signature match	Family & Friends
UT	9	All-Mail	Yes	No	Photo or Non-Photo ID	Signature match	Unspecified
VT	37	All-Mail	Yes	Yes	No	None	Unspecified
VA	32	No excuse	No	Yes	Photo or Non-Photo ID	Witness signature	Limited
WA	12	All-Mail	Yes	Yes	Photo or Non-Photo ID	Signature match	Unspecified
WV	10	Excuse required	No	Yes	Photo or Non-Photo ID	Signature match	Limited
WI	9	No excuse	Yes	No	Photo ID	Witness signature	Unspecified
WY	31	No excuse	Yes	No	Photo or Non-Photo ID	None	Unspecified

Notes, Terminology, and Sources:

*Denotes Absentee In-Person Voting

**New Hampshire offers voters the opportunity to return their absentee ballots in person once received

**Rhode Island allows voters to list "no specific reason necessary" as an excuse when applying for an absentee ballot

Ballot Trafficking terms: "Ban" = ballot trafficking is prohibited, "Family & Friends" = only family and/or friends can return ballots on behalf of a voter, "Limited" =

restrictions on how many ballots one person can return or other restrictions, "Open" = no restrictions, "Unspecified" = state laws do not specify who can return an

absentee ballot

Sources: [NCSL State Election Resources](#) and additional supplemental sources

Election Turnout by Year

State	Turnout	2020	2018	2016	2014	2012	2010	2008
United States	Total	66.8%	53.4%	61.4%	41.9%	61.8%	45.5%	63.6%
	White Non-Hispanic	70.9%	57.5%	65.3%	45.8%	64.1%	48.6%	66.1%
	African American	62.6%	51.1%	59.4%	39.7%	66.2%	43.5%	64.7%
	Asian	59.7%	40.6%	49.0%	27.1%	47.3%	30.8%	47.6%
	Hispanic	53.7%	40.4%	47.6%	27.0%	48.0%	31.2%	49.9%
ALABAMA	Total	60.5%	50.7%	57.4%	42.5%	61.9%	44.1%	62.4%
	White Non-Hispanic	63.0%	52.6%	57.0%	42.3%	62.0%	44.0%	62.5%
	African American	54.8%	49.5%	60.8%	45.5%	63.1%	46.4%	62.5%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	29.1%	N/A	N/A	N/A	22.1%	N/A
ALASKA	Total	63.8%	52.8%	61.3%	50.7%	58.4%	50.7%	65.0%
	White Non-Hispanic	71.0%	60.3%	68.7%	57.8%	63.9%	56.5%	71.2%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
ARIZONA	Total	71.9%	58.9%	60.4%	40.6%	55.9%	48.8%	59.9%
	White Non-Hispanic	77.0%	65.3%	68.3%	46.4%	62.4%	52.4%	67.0%
	African American	69.1%	47.0%	50.9%	33.1%	46.0%	41.0%	52.4%
	Asian	67.9%	56.1%	51.6%	20.3%	27.1%	61.4%	59.9%
	Hispanic	60.8%	48.8%	47.4%	31.8%	40.4%	38.3%	36.6%
ARKANSAS	Total	54.0%	42.6%	58.7%	38.8%	53.3%	40.7%	53.8%
	White Non-Hispanic	57.0%	44.0%	60.2%	39.6%	55.7%	42.6%	55.9%
	African American	44.7%	41.6%	58.8%	38.2%	49.4%	32.5%	44.1%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	34.6%	20.8%	N/A	N/A	N/A	20.5%	N/A
CALIFORNIA	Total	65.1%	51.9%	57.9%	36.6%	57.5%	47.1%	63.4%
	White Non-Hispanic	74.6%	61.4%	67.1%	46.6%	64.3%	56.0%	68.5%
	African American	64.0%	50.6%	48.4%	29.9%	61.1%	42.6%	65.2%
	Asian	59.9%	40.7%	51.9%	26.8%	48.6%	34.3%	52.4%
	Hispanic	54.6%	43.3%	47.2%	24.9%	48.5%	35.4%	57.0%
COLORADO	Total	67.6%	58.1%	69.5%	59.3%	70.4%	52.6%	68.4%
	White Non-Hispanic	71.9%	62.6%	73.0%	63.7%	75.2%	57.0%	71.5%
	African American	53.1%	30.3%	74.1%	42.3%	55.6%	46.6%	58.9%
	Asian	43.2%	71.5%	33.4%	N/A	31.6%	30.7%	N/A
	Hispanic	51.1%	43.9%	55.6%	40.9%	52.1%	31.7%	51.4%
CONNECTICUT	Total	66.6%	54.0%	63.9%	46.7%	62.7%	49.3%	67.2%
	White Non-Hispanic	71.0%	57.7%	67.8%	50.1%	65.8%	52.2%	71.6%
	African American	65.2%	48.2%	53.5%	33.5%	62.2%	44.6%	54.1%
	Asian	56.6%	37.7%	N/A	N/A	29.0%	45.3%	N/A
	Hispanic	56.4%	41.1%	47.2%	30.8%	47.0%	28.3%	46.8%
DELAWARE	Total	67.7%	51.8%	62.3%	45.2%	67.3%	51.0%	67.3%
	White Non-Hispanic	68.4%	52.7%	66.3%	48.3%	69.9%	52.5%	69.8%
	African American	64.7%	56.2%	56.5%	43.0%	63.7%	49.6%	65.0%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FLORIDA	Total	62.1%	52.6%	59.5%	44.8%	60.8%	43.9%	63.8%
	White Non-Hispanic	66.8%	57.0%	63.8%	47.5%	61.9%	45.7%	65.2%
	African American	58.7%	47.2%	50.5%	44.0%	57.6%	41.5%	58.5%
	Asian	55.6%	40.5%	40.4%	43.0%	43.0%	24.7%	53.1%
	Hispanic	52.7%	44.3%	54.1%	36.0%	62.2%	41.1%	61.7%
GEORGIA	Total	66.1%	55.9%	60.2%	43.2%	61.9%	43.6%	64.2%
	White Non-Hispanic	70.3%	56.1%	63.8%	44.8%	62.0%	43.7%	64.1%
	African American	64.0%	59.6%	59.7%	43.0%	65.0%	46.8%	67.9%
	Asian	53.3%	43.8%	31.3%	25.7%	41.9%	14.6%	34.1%
	Hispanic	44.2%	38.2%	47.9%	29.8%	47.8%	23.9%	54.5%

State	Turnout	2020	2018	2016	2014	2012	2010	2008
HAWAII	Total	64.3%	44.0%	47.3%	41.8%	51.6%	43.1%	51.8%
	White Non-Hispanic	72.7%	50.4%	61.3%	45.1%	68.2%	47.5%	63.4%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	61.4%	44.6%	43.6%	45.8%	49.7%	48.8%	55.4%
	Hispanic	N/A	30.9%	N/A	N/A	N/A	35.7%	N/A
IDAHO	Total	64.9%	47.9%	62.1%	41.8%	63.9%	47.5%	61.4%
	White Non-Hispanic	67.5%	50.9%	65.1%	45.8%	66.4%	50.3%	64.5%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	46.3%	23.8%	42.9%	17.6%	N/A	14.7%	35.3%
ILLINOIS	Total	68.4%	53.0%	63.8%	41.7%	61.5%	45.5%	62.6%
	White Non-Hispanic	72.9%	57.1%	67.8%	45.8%	62.2%	46.4%	65.2%
	African American	63.8%	56.8%	58.7%	40.2%	71.8%	52.0%	62.2%
	Asian	69.3%	33.1%	51.3%	18.5%	55.4%	33.3%	36.7%
	Hispanic	46.8%	33.3%	49.2%	24.4%	38.3%	32.2%	46.8%
INDIANA	Total	61.0%	49.3%	58.3%	35.1%	59.3%	39.4%	60.5%
	White Non-Hispanic	62.0%	50.9%	59.4%	36.2%	59.3%	39.8%	61.1%
	African American	60.2%	47.2%	51.6%	37.3%	68.4%	43.5%	60.9%
	Asian	59.9%	27.6%	N/A	N/A	N/A	N/A	N/A
	Hispanic	44.0%	36.5%	46.0%	19.4%	41.1%	18.7%	35.3%
IOWA	Total	70.5%	59.6%	63.4%	52.9%	69.4%	52.3%	70.2%
	White Non-Hispanic	73.0%	60.8%	64.8%	54.5%	70.7%	53.5%	71.1%
	African American	46.2%	54.1%	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	44.2%	46.7%	N/A	N/A	N/A	25.7%	N/A
KANSAS	Total	65.7%	56.9%	61.3%	48.3%	63.3%	47.2%	63.3%
	White Non-Hispanic	70.7%	59.1%	65.3%	50.1%	67.0%	49.4%	65.5%
	African American	61.0%	46.5%	44.5%	43.3%	52.4%	32.3%	54.0%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	45.5%	41.4%	48.9%	35.3%	30.2%	30.0%	51.3%
KENTUCKY	Total	68.5%	53.8%	57.0%	47.5%	59.3%	46.8%	63.1%
	White Non-Hispanic	69.6%	54.1%	56.7%	47.8%	59.7%	48.3%	63.2%
	African American	62.5%	56.4%	69.1%	44.7%	56.9%	38.8%	65.5%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	3.2%	N/A
LOUISIANA	Total	61.9%	49.8%	61.6%	50.2%	66.3%	50.0%	70.3%
	White Non-Hispanic	64.7%	51.7%	62.5%	51.2%	65.2%	51.4%	72.4%
	African American	57.9%	49.5%	61.3%	51.6%	69.5%	48.9%	66.2%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	55.1%	31.1%	67.9%	31.3%	N/A	23.9%	N/A
MAINE	Total	71.3%	65.6%	72.7%	61.5%	68.6%	59.4%	71.2%
	White Non-Hispanic	71.8%	67.0%	73.3%	61.8%	69.1%	60.0%	72.0%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
MARYLAND	Total	73.6%	54.2%	65.8%	48.9%	65.1%	46.8%	68.3%
	White Non-Hispanic	72.3%	58.4%	67.1%	52.4%	65.6%	49.0%	67.1%
	African American	75.3%	48.7%	66.6%	48.1%	67.5%	46.6%	74.2%
	Asian	64.1%	43.4%	54.9%	30.0%	50.4%	26.7%	46.2%
	Hispanic	74.4%	48.3%	59.1%	30.8%	58.7%	33.2%	62.9%
MASSACHUSETTS	Total	66.3%	55.5%	66.7%	46.9%	70.8%	52.2%	67.1%
	White Non-Hispanic	72.4%	58.7%	70.3%	52.2%	73.2%	57.0%	70.2%
	African American	36.4%	47.0%	65.8%	25.7%	65.6%	39.3%	61.9%
	Asian	44.9%	43.1%	50.8%	17.4%	44.5%	32.6%	35.4%
	Hispanic	50.7%	42.7%	44.6%	17.0%	62.7%	14.0%	39.9%

State	Turnout	2020	2018	2016	2014	2012	2010	2008
MICHIGAN	Total	66.9%	59.5%	64.3%	47.1%	66.8%	47.3%	67.8%
	White Non-Hispanic	68.2%	61.1%	66.5%	49.1%	67.9%	48.6%	68.0%
	African American	63.8%	55.5%	61.0%	45.4%	63.3%	41.8%	71.1%
	Asian	45.1%	54.1%	54.2%	28.8%	51.6%	28.9%	58.7%
	Hispanic	54.7%	40.1%	36.0%	27.8%	70.3%	39.7%	47.8%
MINNESOTA	Total	77.9%	63.0%	68.7%	52.0%	73.2%	54.9%	75.0%
	White Non-Hispanic	79.9%	64.8%	71.0%	54.7%	74.5%	56.8%	76.5%
	African American	66.1%	54.7%	66.3%	21.7%	62.1%	44.5%	69.0%
	Asian	64.0%	43.3%	51.6%	37.1%	78.1%	24.5%	57.1%
	Hispanic	62.7%	N/A	36.6%	33.5%	45.2%	33.2%	N/A
MISSISSIPPI	Total	70.3%	54.2%	67.7%	42.3%	74.5%	47.1%	69.7%
	White Non-Hispanic	69.8%	51.7%	67.7%	40.3%	71.8%	47.7%	68.4%
	African American	72.8%	59.8%	69.1%	46.5%	82.4%	48.7%	72.9%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
MISSOURI	Total	66.8%	55.0%	64.8%	38.7%	63.9%	45.7%	65.8%
	White Non-Hispanic	67.9%	56.7%	65.8%	39.4%	64.2%	46.2%	65.3%
	African American	69.2%	47.9%	66.2%	37.0%	67.3%	47.6%	73.9%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	53.3%	43.3%	N/A	N/A	60.7%	37.2%	N/A
MONTANA	Total	73.5%	63.8%	65.9%	50.1%	65.7%	51.9%	65.4%
	White Non-Hispanic	74.6%	65.3%	67.3%	52.4%	67.2%	53.5%	66.2%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
NEBRASKA	Total	65.2%	50.8%	66.8%	44.3%	61.6%	41.3%	67.3%
	White Non-Hispanic	66.6%	54.7%	70.3%	46.6%	63.6%	43.4%	69.2%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	32.8%	N/A	N/A	N/A	21.6%	N/A
NEVADA	Total	61.5%	48.7%	60.5%	37.3%	57.9%	42.4%	59.9%
	White Non-Hispanic	69.7%	56.6%	63.2%	44.1%	60.3%	47.7%	62.5%
	African American	58.5%	36.8%	65.1%	31.9%	61.8%	34.4%	77.1%
	Asian	68.9%	27.8%	44.4%	19.6%	58.8%	25.9%	29.8%
	Hispanic	46.4%	37.7%	56.6%	27.6%	52.0%	27.9%	52.1%
NEW HAMPSHIRE	Total	74.0%	56.2%	69.0%	50.2%	69.4%	46.9%	71.2%
	White Non-Hispanic	76.4%	57.0%	69.7%	50.2%	70.0%	47.6%	72.3%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
NEW JERSEY	Total	78.3%	54.0%	61.5%	36.4%	61.9%	41.7%	64.1%
	White Non-Hispanic	81.1%	57.9%	66.9%	39.0%	63.4%	43.6%	67.1%
	African American	71.3%	51.5%	57.6%	35.4%	68.5%	46.9%	61.8%
	Asian	77.9%	38.9%	52.9%	19.4%	48.1%	29.9%	58.2%
	Hispanic	72.1%	51.2%	43.2%	34.1%	51.1%	28.1%	50.9%
NEW MEXICO	Total	62.6%	48.1%	54.8%	45.6%	61.6%	42.5%	62.6%
	White Non-Hispanic	73.1%	61.3%	69.2%	56.5%	70.5%	52.1%	71.5%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	53.8%	40.5%	48.2%	35.6%	56.2%	35.5%	53.7%
NEW YORK	Total	64.7%	49.5%	57.2%	34.4%	58.7%	43.6%	58.8%
	White Non-Hispanic	69.0%	52.9%	61.1%	36.7%	59.4%	47.5%	62.3%
	African American	62.7%	51.3%	58.2%	34.5%	69.2%	42.6%	54.9%
	Asian	51.9%	32.4%	34.5%	19.3%	39.2%	15.7%	33.4%
	Hispanic	54.9%	40.9%	50.6%	28.1%	53.9%	32.2%	55.1%

State	Turnout	2020	2018	2016	2014	2012	2010	2008
NORTH CAROLINA	Total	64.7%	52.4%	67.5%	46.2%	68.9%	45.4%	67.5%
	White Non-Hispanic	66.6%	54.4%	69.5%	47.2%	66.3%	47.0%	68.3%
	African American	63.4%	51.8%	69.1%	48.1%	80.2%	41.0%	68.3%
	Asian	70.9%	45.5%	58.5%	25.9%	N/A	32.4%	53.3%
	Hispanic	48.8%	38.6%	53.1%	26.0%	56.0%	43.8%	65.4%
NORTH DAKOTA	Total	67.1%	61.9%	64.2%	51.0%	63.9%	55.7%	67.5%
	White Non-Hispanic	71.5%	64.3%	67.9%	53.2%	66.0%	56.2%	67.6%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
OHIO	Total	70.1%	52.5%	63.6%	39.7%	63.1%	45.2%	65.5%
	White Non-Hispanic	71.9%	53.9%	64.4%	40.2%	61.9%	45.9%	65.4%
	African American	65.1%	51.4%	65.2%	40.7%	71.7%	43.4%	70.3%
	Asian	57.5%	50.1%	46.8%	38.1%	N/A	38.5%	46.9%
	Hispanic	58.7%	32.6%	57.8%	23.1%	56.9%	29.3%	52.4%
OKLAHOMA	Total	58.3%	49.4%	56.6%	34.2%	52.4%	40.4%	58.7%
	White Non-Hispanic	65.0%	53.0%	60.5%	36.1%	55.9%	43.3%	60.9%
	African American	49.5%	33.0%	57.3%	29.6%	54.6%	37.0%	64.5%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	30.3%	33.7%	33.4%	18.0%	28.7%	16.3%	35.6%
OREGON	Total	74.1%	61.1%	66.3%	55.5%	67.6%	56.3%	67.6%
	White Non-Hispanic	77.7%	65.9%	68.8%	59.5%	70.2%	58.2%	69.8%
	African American	51.2%	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	60.6%	26.2%	N/A	24.4%	N/A	48.7%	N/A
	Hispanic	51.9%	34.8%	54.9%	33.6%	50.0%	32.9%	38.6%
PENNSYLVANIA	Total	70.2%	54.6%	62.6%	40.0%	61.6%	43.9%	62.4%
	White Non-Hispanic	71.7%	56.6%	63.3%	41.2%	62.5%	44.8%	63.0%
	African American	70.8%	54.7%	63.2%	37.1%	65.2%	45.6%	63.9%
	Asian	49.1%	37.9%	60.3%	27.9%	47.6%	26.5%	30.2%
	Hispanic	54.3%	29.1%	51.7%	22.1%	45.1%	24.5%	50.5%
RHODE ISLAND	Total	66.3%	51.6%	60.6%	43.3%	62.5%	46.7%	67.4%
	White Non-Hispanic	66.8%	54.5%	61.7%	46.6%	63.3%	50.3%	68.9%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	37.8%	N/A	N/A	N/A	19.5%	N/A
SOUTH CAROLINA	Total	63.4%	48.7%	62.1%	42.4%	64.7%	50.9%	65.6%
	White Non-Hispanic	69.0%	48.6%	61.5%	43.2%	63.5%	51.0%	63.5%
	African American	53.9%	52.1%	65.2%	44.4%	69.3%	53.7%	72.6%
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	38.3%	17.6%	N/A	13.0%	N/A	8.9%	N/A
SOUTH DAKOTA	Total	58.5%	51.9%	59.1%	44.1%	61.0%	54.9%	67.8%
	White Non-Hispanic	60.3%	54.3%	61.9%	47.0%	64.3%	56.2%	70.3%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
TENNESSEE	Total	66.4%	49.6%	54.0%	36.6%	55.7%	37.7%	55.5%
	White Non-Hispanic	67.3%	51.7%	56.8%	38.6%	54.8%	38.4%	55.8%
	African American	69.4%	45.9%	50.3%	31.2%	61.1%	36.4%	59.3%
	Asian	N/A	30.2%	N/A	N/A	N/A	14.2%	23.4%
	Hispanic	41.4%	28.7%	21.7%	12.7%	62.3%	26.3%	N/A
TEXAS	Total	63.9%	48.4%	55.4%	34.6%	53.8%	36.4%	56.1%
	White Non-Hispanic	72.0%	57.7%	62.9%	41.8%	60.9%	43.8%	64.7%
	African American	60.8%	48.3%	57.2%	35.3%	63.1%	38.7%	64.9%
	Asian	58.7%	39.1%	47.3%	18.0%	42.4%	22.2%	33.7%
	Hispanic	53.1%	34.3%	40.5%	22.4%	38.8%	23.1%	37.8%

State	Turnout	2020	2018	2016	2014	2012	2010	2008
UTAH	Total	63.6%	57.6%	62.7%	36.5%	57.0%	38.6%	53.1%
	White Non-Hispanic	65.7%	61.2%	64.4%	38.6%	61.0%	40.5%	55.6%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	49.6%	43.6%	58.1%	18.1%	32.1%	18.9%	23.3%
VERMONT	Total	68.4%	54.9%	62.5%	42.5%	63.3%	55.0%	64.7%
	White Non-Hispanic	69.9%	55.3%	63.1%	43.3%	63.2%	55.4%	64.7%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
VIRGINIA	Total	71.5%	57.5%	68.2%	41.7%	66.9%	40.7%	68.7%
	White Non-Hispanic	77.3%	60.8%	69.6%	45.6%	67.5%	44.9%	69.4%
	African American	63.9%	56.4%	64.9%	34.2%	67.2%	35.6%	68.3%
	Asian	61.8%	46.0%	69.9%	31.6%	53.0%	22.7%	61.4%
	Hispanic	51.3%	34.6%	64.2%	25.4%	66.8%	18.9%	56.5%
WASHINGTON	Total	71.5%	61.9%	66.3%	50.0%	65.6%	58.1%	66.8%
	White Non-Hispanic	77.0%	65.5%	71.7%	55.5%	68.0%	62.6%	70.6%
	African American	61.9%	44.2%	42.6%	33.7%	48.3%	35.3%	46.4%
	Asian	62.8%	62.8%	69.0%	41.2%	66.0%	38.7%	50.5%
	Hispanic	53.7%	43.7%	47.2%	25.1%	46.6%	29.8%	52.7%
WEST VIRGINIA	Total	56.1%	44.1%	50.8%	33.6%	47.8%	41.0%	53.4%
	White Non-Hispanic	56.1%	45.2%	50.7%	34.6%	48.1%	41.3%	53.6%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A
WISCONSIN	Total	73.6%	64.6%	70.5%	55.4%	73.6%	54.3%	71.2%
	White Non-Hispanic	77.2%	66.9%	74.0%	58.8%	75.0%	55.3%	72.3%
	African American	43.5%	46.0%	46.8%	40.9%	78.5%	46.3%	73.1%
	Asian	N/A	66.0%	N/A	70.2%	N/A	N/A	N/A
	Hispanic	58.4%	59.4%	42.8%	31.7%	43.9%	39.4%	44.4%
WYOMING	Total	65.5%	52.1%	64.8%	40.3%	58.9%	47.2%	64.3%
	White Non-Hispanic	66.8%	54.9%	66.8%	41.4%	62.3%	48.9%	65.4%
	African American	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Asian	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Hispanic	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Notes, Terminology, and Sources:

N/A= Survey Sample Size Too Small For An Accurate Estimate

Source: U.S. Census Bureau Voting and Registration Data Tables

ALABAMA**Easy to Vote**

- [Early Voting](#): In-person absentee voting starts 55 days prior to election, ends day prior to the election
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Photo ID and witness/notary signature required
- [Ballot Trafficking](#): Ban
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 60.5%
- [African American](#): 54.8%
- [Hispanic](#): TBD
- [Asian](#): TBD

ALASKA

Easy to Vote

- Early Voting: Starts 15 days prior to election, ends day of election (Some locations offer early voting only Monday-Friday, others offer on the weekends: <https://www.elections.alaska.gov/Core/avolocationsg.php>, 6 Alaska Admin. Code § 25.500)
- Absentee Voting: No excuse
- Same Day Registration: Yes, but only for offices of president and vice-president
- Automatic Voter Registration: Yes

Hard to Cheat

- In-Person Voter ID: Photo or non-photo ID
- Absentee Voter ID: Witness signature
- Ballot Trafficking: Limited
- Secured Drop Boxes: None

2020 Turnout

- Overall: 63.8%
- African American: TBD
- Hispanic: TBD
- Asian: TBD

ARIZONA

Easy to Vote

- [Early Voting](#): Starts 27 days prior to election, ends 5pm Friday before election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or two forms of non-photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Not secured

2020 Turnout

- [Overall](#): 71.9%
- [African American](#): 69.1%
- [Hispanic](#): 60.8%
- [Asian](#): 67.9%

ARKANSAS

Easy to Vote

- [Early Voting](#): Starts 15 days prior to election, ends Monday before election
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Photo ID required; signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 54.0%
- [African American](#): 44.7%
- [Hispanic](#): 34.6%
- [Asian](#): TBD

CALIFORNIA

Easy to Vote

- [Early Voting](#): Starts 29 days prior to election, ends day before election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Open
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 65.1%
- [African American](#): 64.0%
- [Hispanic](#): 54.6%
- [Asian](#): 59.9%

COLORADO

Easy to Vote

- [Early Voting](#): In-person early voting begins 15 days before an election, and ends the day of the election.
- [Absentee Voting](#): All-mail voting
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo or non-photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 67.6%
- [African American](#): 53.1%
- [Hispanic](#): 51.1%
- [Asian](#): 43.2%

CONNECTICUT

Easy to Vote

- [Early Voting](#): No early voting
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo ID, non-photo ID, or signed affidavit
- [Absentee Voter ID](#): No
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 66.6%
- [African American](#): 65.2%
- [Hispanic](#): 56.4%
- [Asian](#): 56.6%

DELAWARE

Easy to Vote

- [Early Voting](#): No early voting (until 2022)
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo, non-photo ID, or signed affidavit
- [Absentee Voter ID](#): No
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 67.7%
- [African American](#): 64.7%
- [Hispanic](#): TBD
- [Asian](#): TBD

FLORIDA

Easy to Vote

- [Early Voting](#): Early voting is required for any election for Federal or state office, and must begin 10 days before an election and ends 3 days before an election. Local election officials may, however, extend this window to allow early voting as early as 15 days before an election and as late as 2 days before an election.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): ID required
- [Absentee Voter ID](#): Signature match (absentee voters must provide their Florida driver license number, Florida ID card number, or social security number when they request a mail ballot)
- [Ballot Trafficking](#): Limited (a person may deliver no more than two ballots per election in addition to his own or a ballot belonging to an immediate family member)
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 62.1%
- [African American](#): 58.7%
- [Hispanic](#): 52.7%
- [Asian](#): 55.6%

GEORGIA

Easy to Vote

- [Early Voting](#): Begins on the fourth Monday prior to election, ends Friday prior to the election (and weekend voting is mandatory on the second and third Saturdays during the early voting period)
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): ID required
- [Ballot Trafficking](#): Limited (an individual may return a ballot for a family member or individual residing in the same household)
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 66.1%
- [African American](#): 64.0%
- [Hispanic](#): 44.2%
- [Asian](#): 53.3%

HAWAII**Easy to Vote**

- [Early Voting](#): Early voting begins 10 business days before the election, and concludes on election day. Voting is conducted Monday-Saturday during the early voting period.
- [Absentee Voting](#): All-mail voting
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Not required
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): Not Secured

2020 Turnout

- [Overall](#): 64.3%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): 61.4%

IDAHO

Easy to Vote

- [Early Voting](#): In the discretion of each county, if offered it may begin on or before the third Monday prior to election, ends Friday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): In the discretion of each county (not provided for in statute)

2020 Turnout

- [Overall](#): 64.9%
- [African American](#): TBD
- [Hispanic](#): 46.3%
- [Asian](#): TBD

ILLINOIS

Easy to Vote

- [Early Voting](#): Begins forty days prior to election, ends the day prior to the election. Hours of temporary early voting locations are determined by election officials, but permanent early voting locations must remain open for prescribed hours on weekdays beginning 15 days before an election and weekends beginning 8 days before an election.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Open
- [Secured Drop Boxes](#): Not Secured

2020 Turnout

- [Overall](#): 68.4%
- [African American](#): 63.8%
- [Hispanic](#): 46.8%
- [Asian](#): 69.3%

INDIANA

Easy to Vote

- [Early Voting](#): Begins 28 days prior to election, ends the day prior to the election
- [Absentee Voting](#): Excuse required for absentee mail voting; no excuse in-person early voting
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited (members of a household or an individual designated as attorney in fact for the voter may return a ballot)
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 61.0%
- [African American](#): 60.2%
- [Hispanic](#): 44.0%
- [Asian](#): 59.9%

IOWA

Easy to Vote

- [Early Voting](#): In-person absentee voting begins 20 days prior to election, ends the day prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes (Election Day Registration)
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo or non-photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited (household or immediate family members)
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 70.5%
- [African American](#): 46.2%
- [Hispanic](#): 44.2%
- [Asian](#): TBD

KANSAS

Easy to Vote

- [Early Voting](#): In the discretion of the counties, may begin up to 20 days prior to election, ends the day prior to election. Hours are subject to local county elections officers.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match (signature verification and ID required for application)
- [Ballot Trafficking](#): Limited (collectors must sign a sworn designation and are limited to 10 ballots)
- [Secured Drop Boxes](#): None (not specified in statute, though several counties use drop boxes)

2020 Turnout

- [Overall](#): 65.7%
- [African American](#): 61.0%
- [Hispanic](#): 45.5%
- [Asian](#): TBD

KENTUCKY

Easy to Vote

- [Early Voting](#): Thursday prior to election, ends Saturday prior to election
- [Absentee Voting](#): Excuse required (outside of early voting period)
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 68.5%
- [African American](#): 62.5%
- [Hispanic](#): TBD
- [Asian](#): TBD

LOUISIANA

Easy to Vote

- [Early Voting](#): Begins 14 days prior to election, ends 7 days prior to election. Voting hours are 8:30-6:00 pm Monday-Saturday.
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Witness signature
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 61.9%
- [African American](#): 57.9%
- [Hispanic](#): 55.1%
- [Asian](#): TBD

MAINE**Easy to Vote**

- [Early Voting](#): Available as soon as absentee ballots are ready (30-45 days before election), ends three business days before election unless the voter has an acceptable excuse
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 71.3%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

MARYLAND

Easy to Vote

- [Early Voting](#): Voting is conducted beginning the second Thursday before an election, and ends the Thursday before the election (Begins October 27th during 2022 elections, ends November 3rd). Voting hours in a presidential election year are 8 am – 8 pm each early voting day. In all other elections, 10 am – 8 pm each early voting day.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): No
- [Ballot Trafficking](#): Open
- [Secured Drop Boxes](#): Unsecured

2020 Turnout

- [Overall](#): 73.6%
- [African American](#): 75.3%
- [Hispanic](#): 74.4%
- [Asian](#): 64.1%

MASSACHUSETTS

Easy to Vote

- [Early Voting](#): Begins 11 business days prior to election, ends 2 business days prior to election. Voting hours are regular business hours, but a city may, in its discretion, provide for additional early voting hours beyond the hours required by this subsection, including weekend hours.
- [Absentee Voting](#): Excuse required (early voting, no excuse voting, is allowed in some elections)
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No, unless you are voting for the first time in Massachusetts in a federal election, you are an inactive voter, you are casting a provisional or challenged ballot; or the poll work has a reasonable suspicion that leads them to request ID.
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Family member
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 66.3%
- [African American](#): 36.4%
- [Hispanic](#): 50.7%
- [Asian](#): 44.9%

MICHIGAN

Easy to Vote

- [Early Voting](#): In-person absentee voting begins 40 days prior to election, ends day before election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited (members residing in the same household)
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 66.9%
- [African American](#): 63.8%
- [Hispanic](#): 54.7%
- [Asian](#): 45.1%

MINNESOTA

Easy to Vote

- [Early Voting](#): Begins 46 days prior to election, ends day before election. The county auditor's office and the clerk's office in each city must be open for acceptance of absentee ballot applications and casting of absentee ballots from 10:00 am to 3:00 pm on Saturday and until 5:00 pm on the day immediately preceding a primary, special, or general election unless that day falls on a Saturday or Sunday.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes (Election Day)
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): Signature Match and witness signature
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 77.9%
- [African American](#): 66.1%
- [Hispanic](#): 62.7%
- [Asian](#): 64.0%

MISSISSIPPI**Easy to Vote**

- [Early Voting](#): In-person absentee voting begins 45 days before election, ends at noon the Saturday before the election (MS Code § 23-15-715 (2015))
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Witness signature/Signature match
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 70.3%
- [African American](#): 72.8%
- [Hispanic](#): TBD
- [Asian](#): TBD

MISSOURI

Easy to Vote

- [Early Voting](#): Missouri does not offer in-person absentee voting, but voters may vote by mail with an excuse.(MO § 115.277). Absentee ballots are made available not later than the sixth Tuesday prior to each election.
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or non-photo ID
- [Absentee Voter ID](#): Notary signature
- [Ballot Trafficking](#): Limited (close relatives only)
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 66.8%
- [African American](#): 69.2%
- [Hispanic](#): 53.3%
- [Asian](#): TBD

MONTANA

Easy to Vote

- [Early Voting](#): In-person absentee voting starts 30 days prior to election, ends day prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or non-photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Family & Friends
- [Secured Drop Boxes](#): None. Voters can drop off ballots at their county election's office. In 2020, drop boxes were made available.

2020 Turnout

- [Overall](#): 73.5%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

NEBRASKA

Easy to Vote

- [Early Voting](#): Starts 30 days prior to election, ends election day.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): No, but envelope must contain oath signed by voter
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Unsecured

2020 Turnout

- [Overall](#): 65.2%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

NEVADA

Easy to Vote

- [Early Voting](#): All-mail voting with early voting options. In-person early voting begins the third Saturday preceding a primary or general election and extends through the Friday before election day.
- [Absentee Voting](#): All-mail voting, no excuse required
- [Same Day Registration](#): Yes (Election Day)
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): None
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited (family members)
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 61.5%
- [African American](#): 58.5%
- [Hispanic](#): 46.4%
- [Asian](#): 68.9%

NEW HAMPSHIRE

Easy to Vote

- [Early Voting](#): No in-person early voting option
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): Yes (Election Day)
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID or execute a challenged voter affidavit (RSA 659:13)
- [Absentee Voter ID](#): No, voter must execute affidavit on envelope
- [Ballot Trafficking](#): Limited (family members may return ballots and must provide photo ID)
- [Secured Drop Boxes](#): None (allowed in 2020 under temporary change in law).

2020 Turnout

- [Overall](#): 74.0%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

NEW JERSEY

Easy to Vote

- [Early Voting](#): New Jersey enacted an in-person early voting law in 2021. In-person early voting begins on the 4th calendar day before a non-presidential primary election, on the 6th calendar day before a presidential primary election, and on the 10th calendar day before a general election. In all elections, it ends on the second calendar day before the election.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 78.3%
- [African American](#): 71.3%
- [Hispanic](#): 72.1%
- [Asian](#): 77.9%

NEW MEXICO

Easy to Vote

- [Early Voting](#): Begins 28 days prior to election, ends Saturday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): No, just required to sign ballot application and provide personal info
- [Ballot Trafficking](#): Limited (immediate family members or caregivers)
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 62.6%
- [African American](#): TBD
- [Hispanic](#): 53.8%
- [Asian](#): TBD

NEW YORK

Easy to Vote

- [Early Voting](#): Starts 10 days prior to election, ends the second day prior to the election
- [Absentee Voting](#): Excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): No
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 64.7%
- [African American](#): 62.7%
- [Hispanic](#): 54.9%
- [Asian](#): 51.9%

NORTH CAROLINA

Easy to Vote

- [Early Voting](#): Starts on the third Thursday prior to election, ends 3pm on the last Saturday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes (only during the early voting period)
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): No (voter ID law was struck down)
- [Absentee Voter ID](#): Ballot must be signed by two witnesses or a notary public.
- [Ballot Trafficking](#): Limited (close family members or a legal guardian)
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 64.7%
- [African American](#): 63.4%
- [Hispanic](#): 48.8%
- [Asian](#): 70.9%

NORTH DAKOTA

Easy to Vote

- [Early Voting](#): Optional per county, but if offered must start 15 days prior to election, and end day prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): None (although some counties utilized them in 2020).

2020 Turnout

- [Overall](#): 67.1%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

OHIO

Easy to Vote

- [Early Voting](#): Starts 28 days prior to election, ends 2pm Monday prior to the election. Weekend voting is available during the weekend prior to the election. A uniform statewide early voting schedule is set by the Secretary of State.
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited (family members)
- [Secured Drop Boxes](#): Not secured

2020 Turnout

- [Overall](#): 70.1%
- [African American](#): 65.1%
- [Hispanic](#): 58.7%
- [Asian](#): 57.5%

OKLAHOMA

Easy to Vote

- [Early Voting](#): Starts the Thursday prior to election, ends 2pm the Saturday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Notary signature required
- [Ballot Trafficking](#): Ban
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 58.3%
- [African American](#): 49.5%
- [Hispanic](#): 30.3%
- [Asian](#): *TBD*

OREGON

Easy to Vote

- [Early Voting](#): All-mail voting with in-person early voting options
- [Absentee Voting](#): All-mail voting
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): None
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Open
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 74.1%
- [African American](#): 51.2%
- [Hispanic](#): 51.9%
- [Asian](#): 60.6%

PENNSYLVANIA

Easy to Vote

- [Early Voting](#): In-person absentee voting begins 50 days prior to election, ends first Tuesday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): No (voter ID law struck down by state supreme court)
- [Absentee Voter ID](#): No
- [Ballot Trafficking](#): Ban except for voters with disabilities who designate an agent in writing
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 70.2%
- [African American](#): 70.8%
- [Hispanic](#): 54.3%
- [Asian](#): 49.1%

RHODE ISLAND**Easy to Vote**

- [Early Voting](#): Starts 20 days prior to election, ends day prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo or non-photo ID
- [Absentee Voter ID](#): 2 Witness signatures or a notary signature required and signature match
- [Ballot Trafficking](#): Does not specify
- [Secured Drop Boxes](#): Unsecured

2020 Turnout

- [Overall](#): 66.3%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

SOUTH CAROLINA

Easy to Vote

- [Early Voting](#): None (early voting was temporarily offered in 2020 due to COVID-19)
- [Absentee Voting](#): Excuse required
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Witness signature
- [Ballot Trafficking](#): Limited, voter can designate agent in writing
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 63.4%
- [African American](#): 53.9%
- [Hispanic](#): 38.3%
- [Asian](#): TBD

SOUTH DAKOTA

Easy to Vote

- [Early Voting](#): In-person absentee voting begins 46 days prior to election, ends 5pm the day prior to the election (S.D.C.L. § 12-19-1.2)
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Unsecured

2020 Turnout

- [Overall](#): 58.5%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

TENNESSEE

Easy to Vote

- [Early Voting](#): Starts 20 days prior to election, ends 5 days prior to the election
- [Absentee Voting](#): Excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Ban
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 66.4%
- [African American](#): 69.4%
- [Hispanic](#): 41.4%
- [Asian](#): TBD

TEXAS

Easy to Vote

- [Early Voting](#): Starts 17 days prior to election, ends 4 days prior to the election
- [Absentee Voting](#): Excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo
- [Absentee Voter ID](#): ID required
- [Ballot Trafficking](#): Friends and Family
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 63.9%
- [African American](#): 60.8%
- [Hispanic](#): 53.1%
- [Asian](#): 58.7%

UTAH

Easy to Vote

- [Early Voting](#): All-mail voting with early voting options
- [Absentee Voting](#): All-Mail
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): Unsecured based on photos of drop boxes and location maps.

2020 Turnout

- [Overall](#): 63.6%
- [African American](#): TBD
- [Hispanic](#): 49.6%
- [Asian](#): TBD

VERMONT

Easy to Vote

- [Early Voting](#): All-mail voting with 45 days of early voting options
- [Absentee Voting](#): All-Mail
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): None
- [Absentee Voter ID](#): None
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): Secured, every town has a drop box at the clerk's office

2020 Turnout

- [Overall](#): 68.4% %
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

VIRGINIA**Easy to Vote**

- [Early Voting](#): Starts 45 days prior to election, ends at 5pm Saturday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): No (Virginia will begin same-day registration in October 2022)
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Witness
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): Secured by video surveillance

2020 Turnout

- [Overall](#): 71.5%
- [African American](#): 63.9%
- [Hispanic](#): 51.3%
- [Asian](#): 61.8%

WASHINGTON

Easy to Vote

- [Early Voting](#): All-mail voting with early voting options
- [Absentee Voting](#): All-Mail
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): Unsecured

2020 Turnout

- [Overall](#): 71.5%
- [African American](#): 61.9%
- [Hispanic](#): 53.7%
- [Asian](#): 62.8%

WEST VIRGINIA

Easy to Vote

- [Early Voting](#): Starts 13 days prior to election, ends 3 days prior to the election
- [Absentee Voting](#): Excuse
- [Same Day Registration](#): No
- [Automatic Voter Registration](#): Yes

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): Signature match
- [Ballot Trafficking](#): Limited
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 56.1%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD

WISCONSIN

Easy to Vote

- [Early Voting](#): Starts 14 days prior to election, ends Sunday prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo ID
- [Absentee Voter ID](#): Witness
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): Secured

2020 Turnout

- [Overall](#): 73.6%
- [African American](#): 43.5%
- [Hispanic](#): 58.4%
- [Asian](#): TBD

WYOMING

Easy to Vote

- [Early Voting](#): Starts 45 days prior to election, ends day prior to the election
- [Absentee Voting](#): No excuse
- [Same Day Registration](#): Yes
- [Automatic Voter Registration](#): No

Hard to Cheat

- [In-Person Voter ID](#): Photo or Non-Photo ID
- [Absentee Voter ID](#): None
- [Ballot Trafficking](#): Unspecified
- [Secured Drop Boxes](#): None

2020 Turnout

- [Overall](#): 65.5%
- [African American](#): TBD
- [Hispanic](#): TBD
- [Asian](#): TBD



October 6, 2021

U.S. Senate Judiciary Committee
 c/o Chair Dick Durbin
 224 Dirksen Senate Office Building
 Washington, DC 20510

Dear U.S. Senate Judiciary Members,

American democracy can no longer be taken for granted. Last 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 currently underway. That is why we are urging you to do everything possible to push for swift passage and enactment of the John Lewis Voting Rights Advancement 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 — disproportionately 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 choosing 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.

U.S. Senate Judiciary Committee
 October 6, 2021
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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, disproportionately 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.

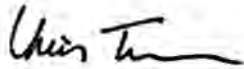
Nevertheless, at this moment, Texas is diversifying and those who are in power remain steadfast in their conviction to manipulate the voting rules to ensure they remain in power by limiting access to the ballot by minority Texans.

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 Committee
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We stand ready to work shoulder to shoulder with you to ensure that voting rights are protected. Our Democracy depends on it.

Sincerely,



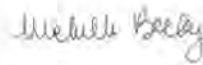
Rep. Chris Turner
Chair, Texas House Democratic Caucus



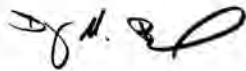
Rep. Alma Allen



Rep. Rafael Anchía



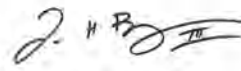
Rep. Michelle Beckley



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

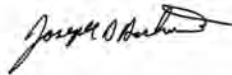


Rep. Philip Cortez

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Rep. Jasmine Crockett



Rep. Joe Deshotel



Rep. Alex Dominguez



Rep. Harold Dutton



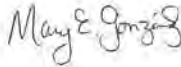
Rep. Art Fierro



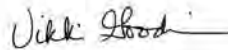
Rep. Barbara Gervin-Hawkins



Rep. Jessica González



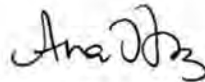
Rep. Mary González



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 Committee
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Rep. Jarvis Johnson



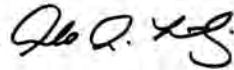
Rep. Oscar Longoria



Rep. Ray Lopez



Rep. Eddie Lucio, III



Rep. Armando Martinez



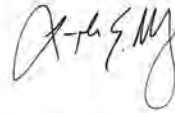
Rep. Trey Martinez Fischer



Rep. Terry Meza



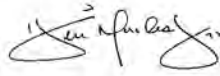
Rep. Ina Minjarez



Rep. Joe Moody



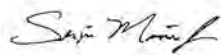
Rep. Christina Morales



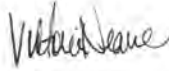
Rep. Eddie Morales



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

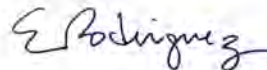
U.S. Senate Judiciary Committee
October 6, 2021
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Rep. Richard Peña Raymond



Rep. Ron Reynolds



Rep. Eddie Rodriguez



Rep. Ramon Romero, Jr.



Rep. Toni Rose



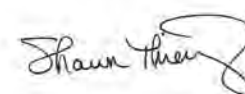
Rep. Jon Rosenthal



Rep. Carl Sherman, Sr.



Rep. James Talarico



Rep. Shawn Thierry



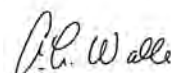
Rep. Senfronia Thompson



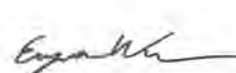
Rep. John Turner



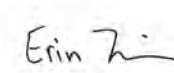
Rep. Hubert Vo



Rep. Armando Walle



Rep. Gene Wu



Rep. Erin Ziener

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UNITED STATES SENATE COMMITTEE
ON THE JUDICIARY

S.4263

John Lewis Voting Rights Advancement Act

Testimony of Mark F. (Thor) Hearne, II

October 6, 2021

INTRODUCTION

Chairman Durbin and Ranking member Grassley and members of this Committee, I appreciate the opportunity to provide this Committee my testimony on Senate Bill 4263. How our nation conducts elections is the bedrock of our constitutional republic. Without every eligible voter having the ability to cast a vote and all citizens having confidence in the fair and honest conduct and outcome of our elections, “We the People” will cease to govern our nation.

MY EXPERIENCE AND PERSPECTIVE

I have been involved in election litigation and legislation for three decades. I was legal counsel to President Bush in 2000 including lead counsel in *Bush-Cheney 2000 v. Evelyn Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000). I was President Bush’s national election counsel in 2004. I served as legal advisor to Secretary of State James Baker and President Carter on the Commission on Federal Election Reform in 2005 (the Carter-Baker Commission). Virginia’s Democrat Attorney General Mark Herring appointed me to defend Virginia’s election reform legislation against a constitutional challenge. And the Commonwealth’s election

reforms including its voter identification requirement were upheld in both the trial court and in the Fourth Circuit Court of Appeals. See *Lee v. Virginia State Board of Elections*, 188 F. Supp.3d 577 (E.D. Va. 2016), *affirmed* 843 F.3d 592 (4th Cir. 2016). I represented the leadership of the United States House and Senate as their counsel in the amicus brief in *Crawford v. Marion County Election Board* and I was also counsel for both Democrat and Republican election officials in another amicus brief in *Crawford*. In its decision upholding Indiana’s voter identification law, the Supreme Court heavily relied on the work and recommendations of the Carter-Baker Commission. See *Crawford v. Marion County Election Board*, 553 U.S. 181, 193 (2008) (in the Help America Vote Act and the National Voter Registration Act, Congress indicated its belief “that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology[, which] conclusion is also supported by a report issued shortly after the enactment of [Indiana’s voter ID law] by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases.”). I was also the lead counsel

represented voters including minority voters in the federal redistricting litigation concerning St. Louis County, Missouri, in *Corbett v. Sullivan*, 202 F. Supp.2d 972 (E.D. Mo. 2002). In that *Corbett* we were successful in having the St. Louis County Council reapportioned in a manner that allowed minorities opportunity to elect members of the minority community to the County Council. I worked closely with the local NAACP to achieve a just reapportionment of St. Louis County government. Counsel for the NAACP told the court, “[Mr. Hearne carried] the burden of a substantial amount of the NAACP’s case.... [Mr. Hearne] provided great help to counsel for the NAACP during this fast-paced redistricting litigation. [And Mr. Hearne took] the leading role in this action and in incorporating the NAACP’s objectives.”

I mention this background, and note especially the bipartisan nature of my experience, because I firmly believe that, while political campaigns and elections are quintessentially a partisan endeavor, the manner in which elections are conducted and the laws governing the conduct of elections should rise above partisan interests. Our identity as Americans should transcend our partisan affiliations as a Democrat or Republican. As President Obama said in his speech to the Democratic

National Convention in 2004, “there is not a liberal America and a conservative America — there is the United States of America. There is not a black America and a white America and Latino America and Asian America — there’s the United States of America.”

As Americans, we share a common interest in assuring our elections are fair, honest, and accessible to every eligible voter. We also share a common interest in assuring that the outcome reflects the will of the voters and was not engineered by disenfranchising some voters or by partisan manipulation of the election process.

Confidence in the outcome of an election is especially important when the election is close such as it was in 2000 and the *Bush v. Gore* litigation. It is untenable that a significant portion of the electorate would believe an election was rigged or tainted by fraud or incompetence. It is also unacceptable for any citizen to be denied the right to vote based upon the color of their skin or language.

Elections must be conducted according to clearly written laws that are faithfully followed and administered by election officials with transparency and without partisan bias. Every eligible citizen,

irrespective of their race, color or heritage, must have equal opportunity to cast a ballot, and every American must be confident that every lawfully cast ballot is accurately counted. It is always easy to convince the winning candidate that he or she won. But the test of a fair and honest election is when the losing candidate and his or her supporters accept the outcome as the will of the voters. The legitimacy of the rule of law depends upon the electorate's confidence in the conduct of our elections.

THE VOTING RIGHTS ACT

In the aftermath of the Civil War our nation faced a daunting task of reconstructing a single nation that integrated the newly emancipated former slaves and African Americans into the political life of our nation. President Lincoln abolished slavery with the Emancipation Proclamation in 1863. In 1865, 1868 and 1870 the states adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to our Constitution. These amendments did much to address the repugnant legacy of slavery. These amendments prohibited states from disenfranchising voters "on account of race, color, or previous condition of servitude." These amendments provided all citizens with "equal protection under the laws." And these

amendments abolished slavery “within the United States, or any place subject to their jurisdiction.”

These Reconstruction Amendments to our Constitution enabled the first black members to be elected to United States Congress and to serve in other government offices and produced a dramatic increase in black citizens registering to vote and casting ballots. These amendments were successful in beginning to remedy the evil of slavery and insidious racism. But, more needed to be done.

The Civil Rights Movement arose in response to the Jim Crow laws and voting “tests or devices,” such as literacy tests and poll taxes, certain southern states adopted as a scheme to deny or abridge the right of some American citizens to vote on account of their race or color.

The Voting Rights Act of 1965 was adopted to address these invidious measures and to address entrenched racial discrimination in voting. The moral authority of the Voting Rights Act was due in part to the bipartisan nature of the law introduced by Senators Dirksen and Mansfield as the two co-sponsors. Senator Dirksen was of course the Republican minority leader and Senator Mansfield was the Democratic

majority leader. Sixty-four other Senators cosponsored the bill, including forty-six Democrats and twenty Republicans. The Voting Rights Act passed the Senate with a seventy-seven to nineteen vote, with Democrats voting forty-seven to sixteen in favor and Republicans voting thirty to two in favor of the Voting Rights Act.

3. The Voting Rights Act passed the House in August 1965 with a vote of three-hundred thirty-three to eighty-five with Democrats voting two hundred twenty-one in favor and sixty-one against and Republicans voting one hundred twelve in favor with twenty-four in opposition.

My point in recalling this history is to note that the Voting Rights Act was passed with broad bipartisan support. This bipartisan consensus is what gave the Voting Rights Act its moral authority.

As originally written, the Voting Rights Act included extraordinary and exceptional measures, including Section 5 and Section 4, which the Supreme Court found to be “strong medicine” and an exceptional departure from the constitutional principles of federalism in which the states enjoy equal sovereignty. This unusual departure from constitutional principles of state sovereignty and the extraordinary

provisions of the preclearance sections of the Voting Rights Act were justified by the unique and exceptional circumstances of the day and the reprehensible legacy of the Jim Crow era. See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966), *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193, 203-204 (2009), and *Shelby County v. Holder*, 570 U.S. 529, 534 (2013).

But, as Chief Justice Roberts observed, the conditions in our nation in 2013 were no longer what they were in 1966. Voter registration and voting by black citizens have increased greatly, and registration and voting by black citizens in many jurisdictions now exceeds the percentage of white registration and voting. The number of African American and other minorities holding political office had greatly increased. In light of these changed conditions the Supreme Court struck down the Section 5 preclearance provisions as unconstitutional. The Court found that the original conditions that had justified subjecting certain states and jurisdictions to the extraordinary requirement of preclearance were no longer present.

The Supreme Court only struck down the preclearance formula in Sections 5 and 4. The Voting Rights Act, including Section 2 and Section

3, continue as the law of the land protecting the right of all citizens to vote and allowing the Justice Department and individuals to sue to enforce their right to vote

We all agree that an individual's right to vote and to have their vote accurately counted is a foundational constitutional principle. The current debate does not involve this foundational principle. Rather the current discussion concerns proposals to revise the Section 5 preclearance provisions declared unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013). As noted, the Supreme Court held the Section 5 preclearance provisions unconstitutional because the invidious discrimination and the extraordinary circumstances (such as literacy tests and poll taxes) that justified the 1965 preclearance formula were no longer present or justified in 2013. Black and minority communities were no longer underrepresented or not voting in parity with white voters. Indeed, in the recent Georgia Senate election and presidential election, the increase in participation by black and minority voters increased at a higher rate than white voters. To take Georgia and South Carolina as an example, both states are now represented by an African American

Senator – Republican Senator Tim Scott of South Carolina and Democrat Senator Raphael Warnock of Georgia.

In short, the premise for which Congress adopted this extraordinary legislation was no longer present. Importantly, the Supreme Court did not strike down the protections of Section 2 which prohibit discrimination. Rather, *Shelby County* addressed only the preclearance provisions the Court found to be premised upon a factual predicate that no longer existed.

Following the Court's decision in *Shelby County*, some now propose a new preclearance scheme. These proposals would recast the federal Justice Department as a national election board or super-state legislature rewriting or vetoing most state and local election laws and prevent states from adopting necessary election reforms unless the federal officials in the Department of Justice first approved these laws. The proposed preclearance scheme is flawed for three primary reasons.

First, preclearance is an extreme remedy that was only upheld due to the extraordinary circumstances from the Jim Crow era. Those circumstances no longer define American elections. There are no literacy

tests, poll taxes, or similar devices that prevent any eligible voter from casting a ballot. And, as noted, voter registration and voting by minorities has increased dramatically since the 1960s.

Those who support a reinvigorated federal preclearance procedure overlook how the preclearance process has in fact worked. Preclearance empowers partisan bureaucrats in the Voting Section of the Civil Rights Division of the Justice Department to veto or rewrite state election laws. Chief Justice Roberts observed, “the preclearance process at the Department of Justice is famously opaque and usually the States and municipalities have to go through or had to go through several layers of back and forth, ... its sort of a bargaining process.” *Wesley Harris v. Arizona Independent Redistricting Comm’n*, 578 U.S. ___, 136 S.Ct. 1301 (2016), oral argument transcript, p. 7. In 2013 the Department of Justice Inspector General found the officials in the Voting Section of the Civil Rights Division hired its lawyers from essentially five left-leaning advocacy groups.¹ The point is this, the preclearance process, in practice,

¹ See U.S. Department of Justice, Office of the Inspector General, Oversight Review Division, A Review of the Operations of the Voting Section of the Civil Rights Division, March 2013, p. 203, available at: <http://org.justice.gov/reports/2013/s1303.pdf>.

has proven to be an arbitrary, standardless (and now determined to be unconstitutional) intrusion into State's constitutional authority to conduct elections. And, not only that, but the preclearance process has been exploited for partisan and ideological ends that have nothing to do with the goal of protecting every citizen's right to vote irrespective of their race, color of their skin or their language. In short, preclearance devolved into a process that was arbitrary, partisan, and standardless.

Furthermore, when it comes to preclearance approval of districts drawn in the state and congressional reapportionment process, preclearance results in the racial slicing and dicing that divides or nation, not unites our nation. President Obama disparaged the racial division of our elections in his 2004 Democratic National Convention speech, saying, "The pundits like to slice-and-dice our country into Red States and Blue States; Red States for Republicans, Blue States for Democrats."

President Biden, when a candidate, infamously said to the African American Breakfast Club co-host Charlamagne, "If you have a problem figuring out if you are for me or Trump, you ain't black." This assumption that individuals can or should vote for a candidate based upon the color of their skin is the opposite of Dr. King's famous aspiration that "I have

a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”

Second a draconian preclearance provision prevents meaningful election reform. Voters having the confidence that they will be allowed to cast a ballot and that all ballots will be equally and accurately counted increases participation. To gain this public confidence in our elections and to protect the integrity of the election process, the States need to adopt meaningful and necessary election reforms.

The Carter-Baker Commission was a highwater mark in bipartisan election reform and presented a number of bipartisan recommendations, including voter identification, elimination of ballot harvesting, and the maintenance of current and accurate voter rolls among other reforms. These recommendations will increase voter confidence in our elections and increase voter participation. Several of the Carter-Baker recommendations merit particular attention. I note these because these election reforms would be hindered or prevented (delayed at the least) should they be subject to preclearance review by the Voting Rights Section of the Justice Department’s Civil Rights Division.

Voter Identification: The Carter Baker Commission

recommended that,

To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), and photograph and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to all non-drivers free of charge.

Requiring an individual to identify themselves with photo identification before casting a ballot is a commonsense measure to protect the integrity of elections. Of course, the state must provide the photo identification without cost. The constitutionality of requiring photo identification before an individual may cast a ballot has been reviewed by and approved as constitutional by the Supreme Court. See *Crawford*, 553 U.S. at 202. See also *Lee*, 843 F.3d at 607, in which Virginia's voter identification law was upheld against constitutional challenge. In *Lee*, the unanimous Fourth Circuit panel held, "just as Congress in HAVA found it beneficial to the voting process and the public perception of the voting process to require photo IDs, and just as the Carter-Baker

Commission found similarly, Virginia found it beneficial to require photo identification in all elections.” *Id.* Virginia’s and Indiana’s voter identification laws are a model for a constitutional voter identification law that protects the integrity of the election and does not impose an impermissible burden upon any voter. Indeed, in the *Lee v. Virginia* litigation, those challenging Virginia’s law could not identify a *single person* in the entire Commonwealth who was denied the right to cast a ballot due to Virginia’s voter identification law. As the Carter-Baker Commission noted, and as the voter identification laws that have been upheld provide, the required identification must be available to any person who does not possess the required identification without cost.

Voter identification laws are supported by more than eighty percent of Americans, more than seventy percent of Democrats, and more than seventy percent of African Americans.² Prominent Democrats support reasonable voter identification laws, including former president Jimmy Carter, Civil Rights leader Andrew Young from Atlanta, former

² Monmouth University Poll, “*Public Supports Both Early Voting and Requiring Photo ID to Vote* (June 21, 2021), available at: https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_062121.pdf.

Congressman Lee Hamilton, who was a member of the Carter-Baker Commission, and others, including political journalist Juan Williams.

The requirement that individuals identify themselves before casting a ballot increases confidence in the integrity of the election and prevents lawful voters from being disenfranchised by having their ballot canceled by an illegally cast ballot.

Prohibitions against ballot harvesting: The Carter-Baker Commission found that,

Absentee ballot and voter registration fraud: Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud. Absentee balloting is vulnerable to abuse in several ways: Blank ballots may be mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting “third-party” organizations, candidates, and political party activists from handling absentee ballots. States also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.

On the basis of this finding, the Carter-Baker Commission recommended that “State and local jurisdictions should prohibit a person

from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.” The Carter-Baker Commission continued, recommending that “All states should consider passing legislation that attempts to minimize the fraud that has resulted from ‘payment by the piece’ to anyone in exchange for their efforts in voter registration, absentee ballot or signature collection.”

Current accurate voter registration lists: An accurate and current voter registration roll is essential to an honest election and making sure that every eligible voter may cast a ballot and that no voter’s ballot is cancelled by an unlawfully cast ballot. The Carter-Baker Commission recommended, “All states should have procedures for maintaining accurate lists such as electronic matching of death records, drivers’ licenses, local tax rolls and felon records.” The Commission continued, “States need to effectively maintain and update their voter registration lists. ... When an eligible voter moves from one state to another, the state

to which the voter is moving should be required to notify the state which the voter is leaving to eliminate that voter from its registration list.”

Transparency in the conduct of elections: Justice Brandeis introduced the phrase “sunlight is said to be the best of disinfectant.” See Louis Brandeis, *Other Peoples’ Money*, 1933, p. 62. The Carter-Baker Commission similarly observed that sunlight in the conduct of elections was critical to assure confidence in the results of the election. “All legitimate domestic and international election observers should be granted unrestricted access to the election process.” Observers or challengers should be provided a meaningful opportunity to observe the conduct of elections and the processing of ballots.

CONCLUSION

Senate Bill 4263 is the antithesis of the Carter Baker Commission’s bipartisan recommendations for election reform. Contrary to the Carter Baker Commission recommendations, Senate Bill 4263 will undermine public confidence in our elections. I encourage this Committee to set aside partisan interests and passions and instead pursue bipartisan election reform as recommended by the Carter Baker Commission.

Bipartisan election reform will restore the confidence of every American in the integrity of our elections.

Thank you for the opportunity to appear and to participate in this important discussion of how we conduct our elections. Because the right to vote is so important to every American citizen of every race, color or heritage legislation guaranteeing this fundamental right should rise above partisan interests and, just like the Voting Rights Act, be a broadly bipartisan consensus of measures that protect all American's right to vote, respects the constitutional role of the states in conducting elections and accommodates meaningful and necessary election reforms such as those recommended by the Carter Baker Commission that will increase public confidence in our elections.