



The Imperative of Restoring and Strengthening the Voting Rights Act

A 2024 Report of the American Civil Liberties Union

Submitted for the Record
U.S. Senate Committee on the Judiciary
The Right Side of History: Protecting Voting Rights in America
Hearing on March 12, 2024

Introduction

The American Civil Liberties Union (ACLU) is a nonpartisan, nationwide organization with millions of members and supporters dedicated to defending the principles of liberty and equality embodied in our Constitution and civil rights laws. For over 100 years, the ACLU has been our nation's guardian of civil liberties and civil rights, working in the courts, legislatures, and communities to defend and preserve the Constitution and laws of the United States. The ACLU's Voting Rights Project was established in 1965, the same year that the Voting Rights Act was enacted, and has filed more than 400 lawsuits to enforce our country's voting laws and Constitutional protections. The Voting Rights Project fights to ensure that all Americans have access to the ballot box and can participate in the political process on an equal basis. It has historically focused much of its work on combating efforts targeting the political rights of voters of color, who continue to face grave threats to their voting rights. In addition to our work in the courts, the ACLU's National Political and Advocacy Department leads the ACLU's efforts to protect and strengthen federal laws that promote an equitable and fully inclusive democracy.

More than a century ago, the Supreme Court famously described the right to vote as preservative of all others.¹ We are not truly free without self-government, which requires a vibrant participatory democracy where there is fair and equal representation for everyone. The right to vote is an essential act of self-determination—indispensable to the promise of “government of the people, by the people, and for the people.”²

Yet since our nation's founding, citizens in racial and ethnic minority groups have fought pernicious efforts to block them from political representation. After the Civil War and Reconstruction period—when newly emancipated Black men were, for a brief period, able to exercise their political rights and hold elected office—more than a hundred years of state-sanctioned voting discrimination followed, which fenced out Black Americans and other minority groups from participating in the political process.³ By the turn of the twentieth century, white officials intensified their official and systematic attempts to block people from voting based on their race or ethnicity as well as relying on violence and threats. The ideologies of racial hierarchy guiding these efforts remained popular concepts undergirding the structure of state constitutions and state laws that sought to preserve white supremacy.

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

² Lincoln, Abraham. “The Gettysburg Address.” 1863.

³ African Americans did not possess the right to vote before the Civil War. With the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, African Americans and others were granted the right to vote free from racial discrimination, U.S. CONST. amend XV, § 1; *see* U.S. CONST. amend. XIV, § 1, and both amendments gave Congress express power to enforce the amendments with appropriate legislation. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend XV, § 2. But after a brief period of federal enforcement action following the Civil War, Congress and the executive branch abandoned those efforts. For the next hundred years, Southern states undertook sweeping efforts to disenfranchise African Americans and other minority voters by continuing to enact procedural barriers and discriminatory prerequisites to voting, such as literary tests, and through state-sanctioned violence. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 69–93 (Basic Books 2000); *see also* Section I *infra* for more on the historical background leading up to the ratification of the Fourteenth and Fifteenth Amendments and adoption of the Voting Rights Act of 1965.

Many of these state constitutional provisions remain today and continue to lock in unequal representation and political conditions.⁴

Congress enacted the Voting Rights Act of 1965⁵ (“VRA” or “Act”) after trying and failing for almost a century to remedy the affliction of racial discrimination in the voting process and the failure to dismantle state-sanctioned disenfranchisement of Blacks in particular. The most powerful enforcement tool in the Voting Rights Act is the federal preclearance process, established by Section 5 of the VRA. It requires states and political subdivisions with the worst records of voting discrimination to federally “preclear” voting changes, either administratively with the Attorney General or through a declaratory judgment action in federal court. Section 4(b) of the Act established the criteria identifying jurisdictions that would be subject to preclearance (the “coverage formula”). Section 5 requires covered jurisdictions to demonstrate that a proposed voting change does not have a discriminatory purpose or effect before the change can be enforced.

Since 1965, Section 5 has had the greatest impact in dismantling voting discrimination of any congressional action, successfully blocking more than 1,000 instances of discriminatory election rules advanced by state and local officials that would have weakened minority voting power or blocked minority voters from casting a ballot altogether.⁶ Section 5 also served as a strong deterrent against countless discriminatory voting changes from going forward.⁷ Because of the need and its effectiveness, Congress reauthorized Section 5 four times, most recently in 2006.⁸ At the time, Congress concluded that although there was significant progress in reducing barriers to voting, there was continued evidence of systematic racial discrimination in the covered jurisdictions that justified reauthorization of Section 5’s protections.⁹

Despite the vast legislative record Congress compiled—which included 21 hearings spanning two years and more than 15,000 pages of record evidence¹⁰—on June 25, 2013, in the case *Shelby County v. Holder*, the Supreme Court held that the coverage formula in

⁴ See, e.g., *Evidence of Current and Ongoing Voting Discrimination: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (2019) (testimony of Derrick Johnson, President, NAACP, discussing historical context of provision in the Mississippi Constitution requiring majority vote requirement for both the state’s popular vote and state House districts for any statewide office and resulting exclusion of successful Black candidates for statewide office); JEFF MANZA AND CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 59–66 (Oxford Univ. Press 2008) (discussing racial origins of felon disenfranchisement rules and finding clear correlation between racial threats—the theory that dominant groups perceive subordinate groups as a threat when subordinate groups gain power to the detriment of the dominant group—and the adoption of state felon disenfranchisement rules).

⁵ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

⁶ See H. R. REP. NO. 109-478, at 22 (2006).

⁷ *Id.* at 24.

⁸ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

⁹ See H.R. REP. NO. 109-478, at 2, 21–53 (2006).

¹⁰ See *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

Section 4(b) of the VRA was unconstitutional,¹¹ rendering Section 5 preclearance inoperative. In a 5-4 decision, the Supreme Court held that while “voting discrimination still exists,” the coverage formula was unconstitutional on the basis that it had not been updated in 40 years and was untethered from current conditions of discrimination.¹² Therefore, the formula could no longer be used as a basis for identifying jurisdictions for preclearance. The majority opinion also expressed concerns with the coverage formula’s disparate treatment of states. Chief Justice John Roberts posited that these federalism concerns could be alleviated if the coverage formula is sufficiently tailored to the problem it targets; in that case, he maintained that it was not.¹³ So while the preclearance requirement itself remains constitutionally valid, Section 5 is generally deprived of force or effect without a valid coverage formula to identify the jurisdictions subject to preclearance.

With this decision, voters lost the most powerful mechanism to block racially discriminatory voting changes and the ability to learn of potentially discriminatory changes prior to their enforcement. Sure enough, after the *Shelby County* decision, states unleashed a torrent of voting restrictions. Since the 2013 decision, the ACLU, its affiliates, and scores of other voting rights groups, organizers, and litigators have battled an onslaught of discriminatory voting changes in the courts, legislatures, and local government bodies. Evidence uncovered in litigation and other advocacy shows that many of the voting changes have been aimed squarely at voters of color, preventing them from casting their ballots or to minimize their collective voting strength. The most conservative federal courts in the country have struck down several of these laws as racially discriminatory, but often only after years of these laws being in force, during which hundreds of elections took place. Moreover, nearly 100 restrictive voting laws have been enacted since *Shelby County*,¹⁴ and in 2023, at least 14 states enacted 17 restrictive voting measures.¹⁵

Importantly, in the *Shelby County* ruling, the Supreme Court invited Congress to update the Voting Rights Act and ensure that the statute is responsive to voting discrimination where it occurs in the country, stating: “We issue no holding on section 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”¹⁶ Thus, Section 5’s continued operation depends on Congress updating the Voting Rights Act in a manner that complies with the Court’s decision, and Congress continues to have strong constitutional grounding to do so. For decades, the Supreme Court has recognized that Congress acts at the apex of its constitutional power when legislating to exercise the enforcement power granted to it by the Fourteenth and Fifteenth Amendments to block racial discrimination in the voting process.¹⁷ Congress also has broad power under the

¹¹ *Shelby Cnty v. Holder*, 570 U.S. 529, 557 (2013).

¹² *Id.* at 551–52.

¹³ *See id.* at 553.

¹⁴ <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights>

¹⁵ <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>

¹⁶ *Id.* at 557.

¹⁷ *See generally City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Elections Clause of Article 1, Section 4, of the Constitution to regulate the conduct of federal elections.¹⁸

Attacks on the Voting Rights Act did not stop with *Shelby County*. In 2021, the U.S. Supreme Court further weakened the VRA in *Brnovich v. Democratic National Committee*¹⁹ by making it harder to bring successful claims for practices affecting the time, place, and manner of voting under Section 2, a nationwide ban on discriminatory voting practices. Section 2 faces continued attacks by jurisdictions and groups hostile to racial justice by resurfacing arguments long settled. For example, in a Section 2 case challenging Arkansas' state legislative districts, a federal judge became the first in the nation to depart from 60 years of precedent, including from the Supreme Court, and practice that private individuals and organizations (i.e., not just the Department of Justice) can bring lawsuits under Section 2 of the VRA.²⁰ Even more shocking was the Eighth Circuit Court of Appeals' panel's affirmance of this decision in a 2-1 ruling,²¹ and the full court's refusal to reconsider the dissent of three judges.²²

Congress must continue to exercise its constitutional authority and directive to restore and strengthen the VRA, because strong federal protections for the right to vote are urgently needed. As this report shows, voting practices denying or abridging the right to vote on account of race, ethnicity, and language minority status continue in a widespread and flagrant manner. The *Shelby County* decision, in halting the preclearance remedy, was itself highly consequential to creating the current conditions of voting discrimination minority voters are now contending with. As the late Justice Ruth Bader Ginsburg forecasted in the opinion's dissent, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."²³ Today we stand caught in the downpour: immediately after *Shelby County*, many states, particularly those formerly covered by preclearance, passed voter suppression and other discriminatory voting laws unlike anything seen in a generation.²⁴

These attacks have intensified due to recent overall increases in voter turnout. In part due to the public health and safety accommodations in response to the COVID-19 pandemic, which allowed more voters than ever before to cast a ballot by mail, voter turnout surged in

¹⁸ See U.S. CONST. art. I, § 4; see also *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *Foster v. Love*, 522 U.S. 67, 69 (1997).

¹⁹ 141 S. Ct. 2321 (2021).

²⁰ See *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 911 (E.D. Ark. 2022), *aff'd*, 86 F.4th 1204 (8th Cir. 2023).

²¹ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

²² *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967 (8th Cir. 2024) (en banc).

²³ *Shelby Cnty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J. dissenting).

²⁴ See Dale E. Ho, Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County, 127 YALE L.J. FORUM 799 (2018); Block the Vote: Voter Suppression in 2020, ACLU (Feb. 3, 2020), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/>; Voting Laws Roundup: May 2021, Brennan Center for Justice (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.work/researchreports/voting-laws-roundup-may-2021>.

the 2020 elections.²⁵ In particular, Asian-American and Latinx voter turnout rose dramatically to historic highs, while Black voter turnout rebounded from a dip in 2016. Minority voters played key roles in the outcomes of various elections, particularly the presidential race in Arizona, Georgia, and Pennsylvania, as well as two run-off elections for U.S. Senate in Georgia in January 2021.²⁶ Unfortunately, in the wake of this historic turnout – which spanned political parties and demographic groups – various states responded by making it harder to vote, passing omnibus bills that restrict access to the franchise in ways big and small. Many of these restrictions target or disproportionately impact the voters that the VRA was designed to protect.

And while the tactics officials use to discriminate have shifted in light of legal developments and political conditions, the strategies have remained the same, such as efforts to dilute minority voting strength, limit voting opportunities, and advance laws that, while neutral on their face, are intended to deny or abridge the rights of minority voters. Additionally, racially polarized voting – that is, when membership in a racial or ethnic group strongly predicts voting behavior – has actually intensified under current political conditions, increasing the returns for bad actors for perpetrating racial discrimination at the ballot box.²⁷

Without congressional action, official acts of voting discrimination will persist against minority voters. Additional, stronger tools are needed to block discriminatory voting changes *before* they impact voters, because once the right to vote in an election is lost it is virtually impossible to remedy. Racial discrimination also affects public confidence in free and fair elections among our citizenry at a time when our election system is viewed with particular scrutiny by the public. Decisive congressional action is needed to protect voters who continue to be targeted by cynical attempts to thwart their political voices and to ensure our electoral system is fair, inclusive, and constitutional.

This report is divided into four parts. First, we provide a brief overview of the conditions leading to the passage of the Voting Rights Act of 1965 and review the Act's provisions, as well as changes made in subsequent reauthorizations to update its protections. Second, we provide an analysis of current law governing Congress's power to enact remedial legislation to address voting discrimination after *Shelby County* and *Brnovich*. Third, we demonstrate the fact that discrimination in voting has continued unabated in recent years and is still

²⁵ See William H. Frey, *Turnout in 2020 Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows*, Brookings (May 5, 2021), <https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/>.

²⁶ See *id.*; Nate Cohn, *Why Warnock and Ossoff Won in Georgia*, N.Y. Times (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/upshot/warnock-ossoff-georgia-victories.html>.

²⁷ See Ed Kilgore, *Racially Polarized Voting Is Getting Extreme in the South*, N.Y. MAG: INTELLIGENCER (Dec. 6, 2016), <http://nymag.com/intelligencer/2016/12/racially-polarized-voting-is-getting-extreme-in-the-south.html>; Harry Enten, *It's Much Harder To Protect Southern Black Voters' Influence Than It Was 10 Years Ago*, FIFTYTHREEEIGHT (Dec. 5, 2016), <https://fivethirtyeight.com/features/its-much-harder-to-protect-southern-black-voters-influence-than-it-was-10-years-ago/>; LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 9-13 (March 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

happening today. Finally, we provide guidance on how a revitalized VRA can prevent voting discrimination before it takes effect and harms voters. Congress must make every effort to revitalize the VRA to address present-day voting discrimination and bring us closer to a stronger, more inclusive democracy.

I. HISTORICAL OVERVIEW

*Since the franchise was first guaranteed to Negroes, there has been a history in the South of efforts to render the guarantee meaningless. As devices have been struck down, others have been adopted in their place. An understanding of this history is relevant to an understanding of the progress of Negroes in the South under recent Federal laws and the obstacles which they face in achieving full and free participation in the electoral and political process.*²⁸

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

a. Reconstruction and post-Reconstruction

After the Civil War, the federal government attempted a series of actions to ameliorate unequal conditions between Black Americans, both those who had been enslaved and those who had not, and white Americans during the Reconstruction period. The government began that work by recasting our nation's concept of citizenship and the rights associated with it. The most important acts were the ratification of the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments.²⁹ The Thirteenth Amendment abolished slavery,³⁰ the Fourteenth Amendment established the guarantees of citizenship, due process, and equal protection against state encroachment,³¹ and the Fifteenth Amendment prohibited the denial or abridgment of the right to vote of citizens on the basis of race, color, or previous condition of servitude.³² The Fourteenth and Fifteenth Amendments endowed all citizens with the right to vote free from racial discrimination. Importantly, both expressly gave Congress the power to enforce their guarantees through

²⁸ U.S. COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A STUDY OF THE POLITICAL PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESS IN 10 SOUTHERN STATES SINCE THE PASSAGE OF THE VOTING RIGHTS ACT OF 1965 1 (May 1968), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf> [hereinafter USCCR 1968 REPORT].

²⁹ The Civil War Amendments were adopted notwithstanding extreme resistance and controversy surrounding their provisions. See KEYSSAR, *supra* note 3, at 77-83.

³⁰ U.S. CONST. amend XIII, § 1.

³¹ U.S. CONST. amend XIV, § 1.

³² U.S. CONST. amend XV, § 1.

legislation, placing the responsibility for enforcing their guarantees of equal treatment squarely on Congress' shoulders.³³

At the same time, Black Americans joined organized movements, conventions, and petition drives to demand suffrage and protest their exclusion from the franchise.³⁴ In 1867, the federal government began Reconstruction initiatives in earnest to rebuild the South and reorient power structures away from the traditional white Southern governments. Congress and the executive branch undertook a range of enterprising actions to implement the change in legal status of Black Americans and combat attacks on their political rights.

A centerpiece of federal action was the Reconstruction Act of 1867, which required former Confederate states to ratify the Fourteenth Amendment and amend their state constitutions to require Black male suffrage in order to be readmitted to the Union. This effectively required Southern governments to guarantee full civil and political rights for Black males.³⁵ This and other enforcement measures allowed hundreds of thousands of Black men to register to vote in the 10 states of the Old South.³⁶ The integration of Black Americans into political life had a radical effect on the composition of federal, state, and local government bodies.³⁷ The former Confederate states sent 16 African Americans to serve in Congress, including two U.S. Senators from Mississippi.³⁸ African Americans held positions in state legislatures and statewide offices across the South, including as secretaries of state and lieutenant governors in Mississippi and South Carolina.³⁹ At one point, over half of the representatives in South Carolina's lower legislative chamber were Black.⁴⁰ And, for the first time in American history, African Americans held positions of political power in their communities as school board officials and justices of the peace.⁴¹ This new representation had some of the anticipated impact on civic and political life as the region's first public school systems were established, bills were introduced to improve voting rights and governing institutions, and efforts were made to rebuild and diversify the shattered Southern economy.⁴²

³³ See Section II *infra*.

³⁴ See KEYSSAR, *supra* note 3, at 70.

³⁵ See Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428.

³⁶ See Enforcement Act of 1871, An Act to enforce the rights of citizens to vote in the several states of this union, ch. 99, 16 Stat. 433 (imposing criminal penalties for interfering with voting and authorizing federal courts to appoint supervisors of elections to protect the voting process from interference); Enforcement Act of 1870, An Act to enforce the Right of Citizens of the United States to vote in the Several States of the union and for other Purposes, ch. 114, 16 Stat. 140 (implementing the Fifteenth Amendment by prohibiting discrimination in voting or voting qualifications on the basis of race, color, or previous condition of servitude, imposing penalties for violations, and granting district courts power to enforce the law's provisions).

³⁷ See USCCR 1968 REPORT, *supra* note 28, at 1–3.

³⁸ *Id.* at 3.

³⁹ *Ibid.*

⁴⁰ *Id.* at 2.

⁴¹ See *id.* at 3.

⁴² See *id.* (highlighting advances in public education and government reform and in Georgia, Florida, and North Carolina with leadership by Black legislators).

Predictably, severe opposition throughout Reconstruction challenged the dramatic increase in political power of African Americans.⁴³ At the end of Reconstruction in 1877, dynamic shifts in political power largely resulting from political backlash to increased Black political power and a national economic downturn led the federal government to abandon its efforts to advance the promise of the Fourteenth and Fifteenth Amendments.⁴⁴ As a result, states were once again free to use legal and extralegal methods to reestablish a racially segregated system. Once readmitted to the Union, white supremacist leaders in Southern states rewrote their state constitutions and intensified efforts to establish a rigid system of racial separation and hierarchy between white and Black Americans.⁴⁵ In the absence of political representation, the infamous Black Codes and similar discriminatory laws flourished, resegregating Black Americans from civic life throughout the former Confederacy.⁴⁶ The political backlash wiped out most of the gains achieved during the Reconstruction period, foreshadowing a destructive trend in America's pursuit for an inclusive democracy.

As a key source of civic and political empowerment, the suffrage of Black people was a focal point of the backlash. Between 1890 and 1910, every state of the former Confederacy enacted laws that were race-neutral in language but intended to disenfranchise Black voters en masse.⁴⁷ Southern states established literacy tests and enacted “grandfather clauses”—exempting individuals whose grandfathers were eligible to vote—to allow illiterate whites to bypass literacy tests,⁴⁸ in effect preventing only the formerly enslaved and their descendants from voting.⁴⁹ Other disfranchising practices were just as widespread, including poll taxes, vouchers of “good character,” disqualification for “crimes of moral turpitude” (i.e., felony disenfranchisement laws), residency requirements, and

⁴³ Despite the progress during Reconstruction, African Americans' access to voting and political participation continued to be a target of intimidation, interference, and violent reprisals throughout the South. See ALLAN J. LICHTMAN, *THE EMBATTLED VOTE IN AMERICA* 84 (Harvard Univ. Press 2018). One horrific example documented by the House Committee on Elections recounted over 2,000 people that were killed or injured in Louisiana in the weeks prior to 1868 Presidential election in midnight raids, secret murders, and open riots. USCCR 1968 REPORT, *supra* note 28, at 4 (citing JOINT SELECT COMMITTEE ON THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, REPORT OF THE JOINT SELECT COMMITTEE APPOINTED TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, SO FAR AS REGARDS THE EXECUTION OF LAWS, AND THE SAFETY OF THE LIVES AND PROPERTY OF THE CITIZENS OF THE UNITED STATES AND TESTIMONY TAKEN, 42D CONG., 2D SESS., REP. NO. 41, pt. 1, at 21–22 (1872)). Intimidation and interference were also widespread when African Americans went to vote on Election Day when harassment and intimidation occurred near polling sites and election fraud committed by those intending to block African Americans' votes from counting. *Id.* at 4–7.

⁴⁴ See LICHTMAN, *supra* note 43, at 88–94.

⁴⁵ See *id.* at 94.

⁴⁶ See *id.* at 97. In addition to legislative acts targeting Black political rights, widespread acts of terror, such as white mob violence and lynchings, were rampant throughout the South and went unprosecuted. The Ku Klux Klan, a white supremacy terrorist organization formed after the Civil War and similar paramilitary organizations used violence as a tool to strategically intimidate Blacks and deny them an equal place in American society. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* 342 (Harper & Row 1988).

⁴⁷ See LICHTMAN, *supra* note 43, at 94.

⁴⁸ See USCCR 1968 REPORT, *supra* note 28, at 6, 8, 10; LICHTMAN, *supra* note 43, at 94.

⁴⁹ See USCCR 1968 REPORT, *supra* note 28, at 6 n.54; LICHTMAN, *supra* note 43, at 94.

property qualifications to register to vote.⁵⁰ Although some rules explicitly excluded Black people from political participation, such as rules instituting white primary elections,⁵¹ most of them were facially “color-blind,” but fashioned or administered in a way to eliminate the ability of Black citizens to vote or diminish their ability to vote on an equal basis.⁵²

These efforts caused the percentage of registered Black voters to drop swiftly. In Louisiana, for example, Black voter registration dropped from 130,334 in 1896 to 5,320 in 1900 and to 1,342 by 1904—a 96% decrease in Black registration.⁵³ In South Carolina, Black voter registration decreased from 92,081 in 1876 to 2,823 in 1898, and in Mississippi this number dropped from 52,705 in 1876 to 3,573 in 1898.⁵⁴ Black voter turnout in presidential elections in the 11 former Confederate states dropped from an average of 61% in 1880 to 2% in 1912.⁵⁵ By the 1950s, the voter registration rate of Black Americans in the South remained steadily low due to the extreme nature of anti-Black suppressive legal and extralegal tactics, such as in Alabama and Mississippi where the registration rates were 5.2% and 4.4%, respectively.⁵⁶

b. Congressional efforts to address voting discrimination prior to 1965

With the beginnings of the civil rights movement in the 1950s, Congress reengaged in efforts to advance protections for Black voting rights for the first time since Reconstruction. Congress’s first attempt was the Civil Rights Act of 1957, which established the U.S. Commission on Civil Rights to examine issues of racial discrimination in the voting process and recommend corrective measures.⁵⁷ The law also enacted a federal prohibition against voter intimidation, coercion, or interference, gave the Attorney General the power to sue to enjoin such acts, and established the Civil Rights Division at the Department of Justice.⁵⁸ Congress added to its effort with the Civil Rights Act of 1960, which gave federal courts authority to issue special orders declaring individuals qualified to vote if a pattern or practice of voting discrimination in a particular area was found, and required local officials to retain and provide registration and voting records to the Attorney General upon request

⁵⁰ LICHTMAN, *supra* note 43, at 94.

⁵¹ See USCCR 1968 REPORT, *supra* note 28, at 6–8 for brief summary on white primaries and *Smith v. Allwright*, 321 U.S. 649 (1944), which held white primaries unconstitutional.

⁵² See generally *Giles v. Harris*, 189 U.S. 475 (1903) (upholding tests and other requirements required by Alabama law to register to vote that were discriminatorily administered against Black citizens in practice on the basis that the practices were neutral on their face and applied to all citizens); U.S. COMMISSION ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 4–19 (May 1965), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf>.

⁵³ USCCR 1968 REPORT, *supra* note 28, at 8.

⁵⁴ John Lewis and Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 107 (1972) (citing BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 111 (J. Grant, ed. 1968)).

⁵⁵ LICHTMAN, *supra* note 43, at 96 (citing KENT REDDING AND DAVID R. JAMES, ESTIMATING LEVELS OF MODELING DETERMINANTS OF BLACK AND WHITE VOTER TURNOUT IN THE SOUTH, 1880 TO 1912, HISTORICAL METHODS 34 (2001)).

⁵⁶ See H.R. REP. NO. 89-439 (1965).

⁵⁷ Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101-105, 71 Stat. 637.

⁵⁸ *Id.* at §§ 111, 121, 131.

to help identify patterns of discrimination.⁵⁹ Finally, the Civil Rights Act of 1964, among its many new protections, prohibited jurisdictions from imposing different voting qualifications on individuals within the jurisdiction and also prohibited discrimination in the voter registration process.⁶⁰

However, these laws' ability to protect the right to vote suffered from a structural deficiency: despite strong federal protections, after-the-fact enforcement proved ineffective against the widespread practices and devices used across the South to prevent Black Americans from registering to vote, voting, or having their votes count. In 1963, the U.S. Commission on Civil Rights reported that the six years of enforcing the new federal voting rights laws were "ineffective" at solving the problems they were aimed at addressing, citing the inherent delays in the judicial process.⁶¹ U.S. Attorney General Nicholas Katzenbach cited the "tortuous, often-ineffective pace of litigation" in his testimony before Congress in 1965.⁶² In evaluating the adequacy of its efforts under the Civil Rights Acts of 1957, 1960, and 1964, Congress concluded that "[e]xperience has shown that the case-by-case litigation approach will not solve the voting discrimination problem . . . The inadequacy of existing laws is attributable to both the intransigence of local officials and dilatory tactics, two factors which have largely neutralized years of litigating effort by the Department of Justice."⁶³

c. The Voting Rights Act of 1965

It was in this context that Congress learned prophylactic measures were needed if federal legislation was to "banish the blight of racial discrimination in voting."⁶⁴ The Voting Rights Act is broadly viewed as one of the most successful pieces of federal civil rights legislation and culminated decades of struggle to claim fundamental rights and liberties for all citizens.

The tipping point for decisive federal action came when Alabama State Troopers viciously attacked a group of civil rights activists, led by the late Congressman John Lewis, as they marched from Selma to Montgomery, Alabama, in peaceful protest of continued systematic denial of Blacks' suffrage. "Bloody Sunday," as it came to be known, happened on March 7, 1965, in Selma, Alabama. Days later President Lyndon Johnson, in a special joint session before Congress, announced the introduction of a bill "designed to eliminate illegal barriers to the right to vote," "to strike down restrictions to voting rights in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote," "eliminate tedious, unnecessary lawsuits which delay the right to vote," and "ensure that properly

⁵⁹ Civil Rights Act of 1960, Pub. L. No. 86-449, §§ 301, 601, 74 Stat. 90.

⁶⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241.

⁶¹ U.S. COMMISSION ON CIVIL RIGHTS, 1963 REPORT 25 (Sept. 1963), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11963a.pdf>.

⁶² H.R. REP. NO. 89-439 (1965); *Hearing on the Proposed Voting Rights Act of 1965 Before the House Comm. on the Judiciary*, 98th Cong. (1965) (statement of Attorney General Nicholas deB. Katzenbach).

⁶³ S. REP. NO. 89-162 (1965).

⁶⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

registered individuals are not prohibited from voting.”⁶⁵ Two days later, on March 17, Congress introduced the Voting Rights Act of 1965, and after several months of deliberation on its provisions, President Johnson signed it into law on August 6.⁶⁶ Through the years, it has undergone several reauthorizations and amendments to update its protections and to respond to current conditions of discrimination.⁶⁷

As initially enacted, the law advanced several strategies to stamp out rampant efforts in the South and elsewhere to disenfranchise Black Americans and other people of color. First, it established a permanent, nationwide ban on discriminatory voting practices or procedures. Codified in Section 2 of the VRA, this provision prohibits states or local jurisdictions from adopting voting qualifications, prerequisites, standards, practices, or procedures that result in the denial or abridgement of the right to vote on account of race or color.⁶⁸ Section 2 is enforceable by both private plaintiffs and the Attorney General and extends to claims of racially discriminatory results, in addition to discriminatory purpose.⁶⁹ At the time the Voting Rights Act was proposed and debated, Section 2 was understood to closely match the guarantees of the 15th Amendment, that is, the right to vote without denial or abridgement on the basis of race.⁷⁰

The 1965 Act also permitted the Department of Justice to send federal examiners to certain jurisdictions to supervise the registration of voters and to certify election observers to help ensure compliance with federal laws.⁷¹ These provisions proved hugely effective at increasing the number of registered voters and for increasing voter turnout in the South and elsewhere. The 1965 Act also temporarily suspended voting tests and devices, such as

⁶⁵ Lyndon Baines Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965), H.Doc. 117, 89th Cong., 1st sess.

⁶⁶ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). Section 2 was later amended to include language minorities as a protected class. Voting Rights Act Amendments of 1975 § 206.

⁶⁷ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

⁶⁸ Voting Rights Act of 1965 § 2

⁶⁹ In 1982, after the Supreme Court decided *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which a plurality of the Court held that Congress intended for Section 2 to extend only to claims of discriminatory intent, Congress amended Section 2 to expressly provide for discriminatory results claims. See Voting Rights Act Amendments of 1982 § 3.

⁷⁰ *Voting Rights: Hearing on S. 1564 before the S. Comm. on the Judiciary*, 89th Cong. 208 (1965). The Supreme Court would later impute a requirement that in lawsuits under Section 2, plaintiffs would have to prove that such denial or abridgement was intentional, though Congress would amend the Act shortly afterward to undo this. See *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 65 (1980) (plurality); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

⁷¹ Voting Rights Act of 1965 §§ 6–9.

literacy tests, in covered jurisdictions⁷²—a prohibition that became nationwide in 1970⁷³ and permanent in 1975.⁷⁴ It also banned poll taxes⁷⁵ and imposed criminal and civil penalties for individuals seeking to deprive others of the right to vote.⁷⁶

In addition, the VRA introduced Section 5, its most potent remedial measure, which required federal preclearance of any proposed voting changes in covered jurisdictions before they took effect. Section 5 imposed a rigorous review process which put the onus on “covered” jurisdictions to show to either the U.S. Attorney General or the U.S. District Court for the District of Columbia that a proposed voting change would not have the purpose or effect of denying or abridging the right to vote on the basis of race or color (or, per the 1975 amendments, on the basis of language minority status).⁷⁷ Jurisdictions subject to preclearance were identified through a coverage formula contained in Section 4(b) of the VRA. That section captured jurisdictions (i) that maintained any test or device for voting as of November 1, 1964, and (ii) where less than 50% of voting age residents were registered to vote or voted in the November 1964 general election.⁷⁸ Applying this same criteria to subsequent presidential elections, subsequent amendments to the Act in 1970 and 1975 added jurisdictions that maintained a voting test or device and where less than 50% of voting age residents were registered to vote or voted in the November 1968 and November 1972 presidential elections.⁷⁹

In enacting the coverage formula, Congress ensured that certain jurisdictions it identified as having the worst records of voting discrimination were captured by the coverage formula.⁸⁰ Congress then established the criteria—low voter registration and turnout rates, plus the use of tests or devices—to capture those jurisdictions. In identifying the worst offenders, Congress undertook a comprehensive review, gathering what it deemed reliable evidence of voting discrimination.⁸¹

⁷² Voting Rights Act of 1965 § 4. The Act initially defined “tests or device” as any requirement that a person, as a prerequisite for voting or registration for voting, (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or knowledge of any particular subject, (3) possess good moral character, or (4) prove qualifications by the voucher of registered voters or members of any other class. *Id.* The Act was later amended to include as a voting test or device English-only elections where at least 5% of the voting age citizens in a jurisdiction are members of a single language minority. *See* Voting Rights Act Amendments of 1975 § 203.

⁷³ Voting Rights Act Amendments of 1970 § 6.

⁷⁴ Voting Rights Act Amendments of 1975 § 102.

⁷⁵ Voting Rights Act of 1965 § 10.

⁷⁶ *Id.* at §§ 11–12.

⁷⁷ *Id.* at § 5.

⁷⁸ *Id.* at § 4.

⁷⁹ Voting Rights Act Amendments of 1970 § 4; Voting Rights Act Amendments of 1975 § 202.

⁸⁰ *See South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966).

⁸¹ *Id.* at 309–15 (reviewing Congressional findings from H.R. REP. NO. 89-439, 8–16 (1965); S. REP. NO. 89-162, pt. 3, 3–16 (1965)). From the start, Congress acknowledged the formula did not perfectly capture some places with terrible records of voting discrimination, such as Texas and Arkansas, and also included some places for which, at the time, Congress lacked evidence of discrimination, such as

Congress gave special consideration to the Justice Department's unsuccessful efforts to effectively address discriminatory voting practices through litigation on a case-by-case basis, which, as explained above, had largely failed to open the voting and registration process to Black voters. Confronted with hostile and opportunistic state and local officials, the Justice Department would prove one discriminatory practice or procedure to be unlawful and enjoin it, only to see a new one substituted in its place. Litigation would then have to commence anew to challenge the new practice or procedure, in an endless and costly loop. Congress cited the impotency of its previous legislation aimed at protecting Black suffrage and the lack of effective litigation tools available to private plaintiffs and the Department of Justice:

What has been the effect of the 1957, 1960, and 1964 voting rights statutes? Although these laws were intended to supply strong and effective remedies, their enforcement has encountered serious obstacles in various regions of the country. Progress has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process. Judicial relief has had to be gaged not in terms of months—but in terms of years. With reference to the 71 voting rights cases filed to date by the Department of Justice under the 1957, 1960, and 1964 Civil Rights Acts, the Attorney General testified before a judiciary subcommittee that an incredible amount of time has had to be devoted to analyzing voting records—often as much as 6,000 man-hours—in addition to time spent on trial preparation and the almost inevitable appeal. The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often has caused no change in result, only in methods.⁸²

To protect against overbreadth of the coverage formula, Congress included a provision for the termination of preclearance coverage, also known as “bail out,” if a jurisdiction successfully files a declaratory judgment action in federal district court establishing the absence of voting discrimination for a period of years according to certain criteria.⁸³ Congress also included a provision to protect against under-inclusiveness by giving federal courts the ability to retain oversight—i.e., “bail in” to preclearance review—of a jurisdiction for a period of time if a Fourteenth or Fifteenth Amendment violation warranted it.⁸⁴

The preclearance process proved an immediate success, and it was dramatically more effective than previous legislation at mitigating, deterring, and blocking racially discriminatory voting practices. The results were measurable by significant increases in Black voter registration and turnout, particularly in the South. The U.S. Commission on

Alaska (even though Alaska, as Congress came to understand later, did in fact have a terrible record of voting discrimination against Alaska Native voters). To address this, Congress included the “bail in” and “bail out” mechanisms, discussed *infra*.

⁸² H.R. REP. NO. 89-439, at 9–11 (1965); *see also South Carolina v. Katzenbach*, 383 U.S. at 328.

⁸³ Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437 (1965). These criteria were amended from initial enactment through reauthorizations. As initially enacted, “bail out” required a jurisdiction to show that it had not used a test or device denying or abridging the right to vote on account of race or color for in the five years preceding the filing of a declaratory judgment action.

⁸⁴ *Id.* at § 3(c).

Civil Rights' May 1968 report examining Black voter participation concluded that "the Voting Rights Act has resulted in a great upsurge in voter registration, voting, and other forms of political participation by Negroes in the South."⁸⁵ In the Deep South, Black voter registration rates increased an average of 67% between 1964 and 1968, and there was a dramatic overall increase in the rates of nonwhite voter registration measured in individual states covered by preclearance.⁸⁶ The Commission also reported large increases in Black voter turnout and a doubling in the number of Black elected office holders.⁸⁷

Yet while great progress was made, state and local jurisdictions continued to innovate new ways to diminish the voting strength and political power of African Americans. The same U.S. Civil Rights Commission report concluded:

Nevertheless, many new barriers to full and equal political participation have arisen, including measures or practices diluting the votes of Negroes, preventing Negroes from becoming candidates, discriminating against Negro registrants and poll watchers, and discriminating against Negroes in the appointment of election officials. Intimidation and economic dependence in many areas in the South continue to prevent Negroes from exercising their franchise or running for office fully and freely.⁸⁸

The Commission discussed at length the problem of dilution tactics that swiftly replaced the voting barriers that had been successfully weakened by the 1965 Act. Instead of thwarting Black Americans' ability to register or physically cast a vote, these measures aimed to dilute the individual and collective weight of votes cast by Black voters relative to white voters. These methods and devices included reapportionment and redistricting of voting boundaries, changes to methods of elections (e.g., conversion to at-large elections), and annexations of predominantly Black jurisdictions with predominantly white jurisdictions.⁸⁹ For example, after the surge in Black voter registration in 1966, Mississippi enacted 12 new laws altering the state's election laws to diminish the weight of votes cast by Black voters. These included measures advancing at-large elections systems for county boards of education and boards of supervisors, as well as several reapportionment and redistricting statutes that diluted Black voting strength in Mississippi.⁹⁰ Alabama and local counties throughout the state pursued similar strategies in response to the substantial increase in Black voter participation.⁹¹

⁸⁵ USCCR 1968 REPORT, *supra* note 28, at iii.

⁸⁶ VALELLY, RICHARD. THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 4 (University of Chicago Press 2004). In the 10 states examined, the Commission reported that the nonwhite registration rate had increased: from 19.3% to 51.6% in Alabama; from 40.4% to 62.8% in Arkansas; from 51.2% to 63.6% in Florida; from 27.4% to 52.6% in Georgia; from 31.6% to 58.9% in Louisiana; from 6.7% to 59.8% in Mississippi; from 46.8% to 51.3% in North Carolina; from 37.3% to 51.2% in South Carolina; from 69.5% to 71.7% in Tennessee; up to 61.6% in Texas; and from 38.3% to 55.6% in Virginia. USCCR 1968 REPORT, *supra* note 28, at pp. 12–13, 223.

⁸⁷ See USCCR 1968 REPORT, *supra* note 28, at 14–15, 211–221.

⁸⁸ *Id.* at iii.

⁸⁹ *Id.* at 21–39.

⁹⁰ *Id.* at 21–23, 30–35.

⁹¹ *Id.* at 23–25, 26–30.

In each subsequent reauthorization of the VRA, Congress determined that as minority voter participation grew, jurisdictions increasingly turned to practices that diluted minority voting strength. The nature of Section 5 objections — determinations by the U.S. Attorney General that a covered jurisdiction’s proposed voting rule is discriminatory — and court decisions reflected this trend.⁹² Congress intended for Section 5 to keep up with the evolution of voting discrimination to prevent new schemes and practices that diminish minority voting power, recognizing “that protection of the franchise extends beyond mere prohibition of official actions designed to keep voters away from the polls, it also includes prohibition of state actions which so manipulate the elections process as to render votes meaningless.”⁹³ In view of this, Congress continued to strongly endorse Section 5 as the most appropriate remedy to protect against new devices adopted to discriminate and disempower voters of color.

d. Voting Rights Act amendments and reauthorizations: 1970-1982

Through periodic reauthorizations, Congress amended the Voting Rights Act several times to respond to newly identified and emerging voting discrimination practices, updating the Act’s protections in 1970, 1975, 1982, 1992, and 2006.⁹⁴ In 1970, Congress updated the original 1965 coverage formula—originally capturing Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and 28 counties in North Carolina⁹⁵—to add voter registration and turnout data and the use of tests or devices by jurisdictions in the 1968 presidential elections as an additional coverage metric.⁹⁶ The 1970 amendments added Bronx, Kings (Brooklyn), and New York (Manhattan) counties in New York, counties in Wyoming, California, Arizona, and Idaho, election districts in Alaska, and towns in Connecticut, New Hampshire, Maine, and Massachusetts to the list of covered jurisdictions.⁹⁷ The temporary suspension of tests or devices contained in the 1965 Act became nationwide in 1970 and permanent in 1975. The 1975 amendments also amended the coverage formula again to include in the list of covered jurisdictions those which had voter registration or turnout below 50% and used a test or device in the 1972 presidential elections.⁹⁸

The 1975 amendments also addressed discrimination directed at language minority voters for the first time. The Senate Judiciary Committee report explained:

⁹² See H.R. REP. NO. 109-478, at 2 (2006); S. REP. NO. 97-417, at 6 (1982); H.R. REP. NO. 94-196, at 10 (1975); S. REP. NO. 94-295, at 16 (1975); H.R. REP. NO. 91-397, at 3283 (1969).

⁹³ H.R. REP. NO. 97-227, at 17 (1982); *see also* H.R. REP. NO. 109-478, at 5 (2006).

⁹⁴ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

⁹⁵ H.R. REP. NO. 94-196, at 5 (1975). The 1965 coverage formula also captured four counties in Arizona, Honolulu County, Hawaii, and Elmore County, Idaho. *Ibid.*

⁹⁶ Voting Rights Act Amendments of 1970 § 4.

⁹⁷ S. REP. NO. 94-295, at 13 (1975).

⁹⁸ Voting Rights Act Amendments of 1975 § 202.

Title III is specifically directed to the problems of ‘language minority groups,’ that is, racial minorities whose dominant language is frequently other than English. [The Act] defines language minorities as persons who are ‘American Indian, Asian American, Alaskan Natives, or of Spanish heritage.’...The Committee singled out the ‘language minority’ groups for several reasons. First, as discussed above, illiteracy is all too often a product of racially discriminatory educational systems...Second, while the documentation of discrimination and non-responsiveness by the states was substantial with regard to the particular minority groups, the Subcommittee was presented with no evidence of difficulties for other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups.⁹⁹

During the House Judiciary Committee’s hearings, expert witness testimony relayed that language-minority groups were subjected to instances of discriminatory plans, annexations, and acts of physical and economic intimidation.¹⁰⁰ One member of Congress noted that “[t]he entire situation of these uncovered jurisdictions is tragically reminiscent of the earlier and, in some respects, current problems experienced by blacks in currently covered areas.”¹⁰¹ Congress pointed to the problem that “states and local jurisdictions have been disturbingly unresponsive to the problems of these minorities” and determined that “[b]ecause so many states and counties have not responded to the situation confronting language minority citizens, the Committee believes strongly that Congress is obligated to intervene.”¹⁰²

Congress addressed this discrimination in a few ways. Congress added as a test or device the use of English-only elections where at least 5% of voting age residents in a jurisdiction are from a single language minority group.¹⁰³ These amendments resulted in the addition of Alaska (which had previously successfully bailed out of coverage), Arizona, Texas, several counties in California, Colorado, Florida, South Dakota, New York (which had also successfully bailed out), and two Michigan townships.¹⁰⁴ The 1975 amendments also added a requirement, commonly known as Section 203, that certain states and political subdivisions conduct bilingual elections. The requirement applies to covered jurisdictions in which a single language minority is more than 5% of the eligible voters and extends to noncovered jurisdictions where a language minority is more than 5% of the eligible voters and the illiteracy rate within the language minority is higher than the national average.¹⁰⁵ In 1992, Congress extended the language minority provisions for an additional 15 years, concluding that “the type of discrimination previously encountered by these language minority populations still exists, and the need for [Section] 203 continues” and that

⁹⁹ S. REP. NO. 94-295, at 38.

¹⁰⁰ See LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 36-37 (Univ. of Ok. Press 2010).

¹⁰¹ *Id.* at 27.

¹⁰² S. REP. NO. 94-295, at 39.

¹⁰³ *Id.* at § 203.

¹⁰⁴ S. REP. NO. 97-417, at 117 (1982); see also U.S. DEP’T OF JUSTICE, JURISDICTIONS PREVIOUSLY COVERED BY SECTION 5, http://www.justice.gov/crt/about/vot/sec_5/covered.php.

¹⁰⁵ Voting Rights Act Amendments of 1975 § 203.

“without a federal mandate, much needed bilingual assistance in the voting process, meant to ensure the guarantees of the Fourteenth and Fifteenth Amendments, may disappear.”¹⁰⁶

e. The 2006 reauthorization

In 2006, the Section 5 preclearance provision and Section 4 coverage formula were again set to expire. Congress undertook an exhaustive two-year investigation to examine and document evidence of ongoing discrimination in the covered jurisdictions. Congress built an extensive record of continuing discrimination in the covered jurisdictions since the 1982 reauthorization, largely consisting of evidence of vote dilution but also practices that denied or burdened the ability of minority voters to cast a ballot. The House Report cited evidence of continued discrimination by covered jurisdictions consisting of:

- (i) over 700 objections interposed by the Justice Department between 1982 and 2006;
- (ii) hundreds of voting changes that were withdrawn after requests for more information by the Justice Department;
- (iii) successful Section 5 enforcement actions undertaken in covered jurisdictions since 1982 against election practices that would have diluted minority voting strength, such as annexations and at-large methods for electing officeholders;
- (iv) the number of requests for declaratory judgments denied by the D.C. District Court;
- (v) the continued filing of Section 2 cases that originated in covered jurisdictions, predominantly vote dilution cases;
- (vi) litigation initiated by the Justice Department since 1982 to enforce sections 4(e), 4(f)(4), and 203 to protect language minority access; and
- (vii) the tens of thousands of federal observers sent by the Justice Department to monitor elections between 1982 and 2006.¹⁰⁷

The House evidence also included a nationwide analysis of Section 2 cases showing that, of all the successful Section 2 litigation undertaken in the previous 25 years, more than half had occurred in the covered jurisdictions, notwithstanding the powerful protection of Section 5 and the fact that the covered jurisdictions contained less than 39% of the country’s total population.¹⁰⁸

Congress concluded that violations continued to be concentrated in these areas and warranted reauthorization of Section 5 preclearance and the 4(b) coverage formula, finding that “without the continuation of the Voting Rights Act of 1965 protections, racial and

¹⁰⁶ H.R. REP. NO. 102-665 (1992).

¹⁰⁷ H.R. REP. NO. 109-478, at 2 (2006); *see also* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2, 120 Stat. 577 (2006).

¹⁰⁸ H.R. REP. NO. 109-478, at 53.

language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”¹⁰⁹ The House Report concluded that the 2006 reauthorization represented “one of the most extensive legislative records in the Committee on the Judiciary’s history,”¹¹⁰ which included 21 hearings, testimony from 90 witnesses, and more than 15,000 pages of record evidence.¹¹¹ The ACLU submitted a report to Congress reviewing our voting rights litigation docket since the previous 1982 reauthorization.¹¹² The report—close to 900 pages and reviewing 293 cases in 31 states—concluded that purposeful discrimination was still widespread in places where it had historically existed against minority voters and that Section 5 continued to be a critical tool for blocking discriminatory voting practices.¹¹³ The report also concluded there was a continuing pattern of racially polarized voting in the covered jurisdictions and hostility to minority political participation was an ongoing problem. Additionally, with the Section 203 minority language assistance provision and federal observers provision due to expire, the ACLU presented evidence that both of these provisions were necessary to deter and remedy ongoing discrimination. Both provisions were reauthorized by Congress, passing the Senate with a vote of 98-0 and the House with a vote of 390-33.

II. CONGRESSIONAL AUTHORITY TO REMEDY RACIAL DISCRIMINATION IN VOTING AFTER *SHELBY COUNTY*

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

¹⁰⁹ Voting Rights Act Reauthorization and Amendments Act of 2006 § 2.

¹¹⁰ H.R. REP. NO. 109-478, at 5 (2006).

¹¹¹ Brief for Respondent-Intervenors at 4, *Shelby Cnty. v. Holder*, No. 12-96 (2013) (citing H.R. REP. NO. 109-478, at 5 (2006); S. REP. NO. 109-295, at 2 (2006)).

¹¹² MCDONALD, *supra* note 27.

¹¹³ Examples from ACLU litigation of discrimination against minority voters presented in the report included: restrictive photo ID laws; discriminatory annexations and deannexations; challenges by white voters or elected officials to majority-minority districts; pairing Black incumbents in redistricting plans; refusing to draw majority-minority districts; refusing to appoint Blacks to public office; maintaining a racially exclusive sole commissioner form of county government; refusing to designate satellite voter registration sites in the minority community; refusing to accept “bundled” mailing voter registration forms; refusing to allow registration at county offices; refusing to comply with Section 5 or Section 5 objections; transferring duties to an appointed administrator following the election of Black individuals to office; white opposition to restoring elections to a majority Black town; requiring candidates for office to have a high school diploma or its equivalent; prohibiting “for sale” and other yard signs in a predominantly white municipality; disqualifying Black elected officials from holding office or participating in decision making; relocating polling places distant from the Black community; refusing to hold elections following a Section 5 objection; maintaining an all-white self-perpetuating board of education; challenges to the constitutionality of the National Voter Registration Act; failure to provide bilingual ballots and assistance in voting; county governance by state legislative delegation; challenges to the constitutionality of the Voting Rights Act; packing minority voters to dilute their influence; and using discriminatory punch card voting systems. *Id.* at 16–19.

The framers of the Fifteenth Amendment drew on Chief Justice John Marshall’s precept to formulate the scope of Congress’s enforcement powers under the Civil War Amendments.¹¹⁵ Rooted in the Constitution’s Supremacy Clause, this maxim defines Congress’s expansive powers to enforce the Fifteenth Amendment’s guarantee that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹¹⁶

Congress continues to have sweeping power under the Fifteenth Amendment to identify and eradicate racial discrimination in voting. Regarding preclearance, an unbroken line of Supreme Court decisions going back a half century confirms that the Voting Rights Act’s prophylactic remedy is a valid exercise of congressional power. As explained below, Supreme Court jurisprudence continues to forcefully uphold Congress’s power to enforce the command of the Fifteenth Amendment to “banish the blight of racial discrimination in voting.”¹¹⁷

Additionally, although not addressed in *Shelby County*, Congress may act to protect minority voters through its expansive authority under the Elections Clause, which gives Congress supervisory power over federal elections. Though less prominent in previous congressional deliberations on the Voting Rights Act, the Supreme Court has consistently recognized Congress’s broad powers under the Clause. Congress should consider this power as additional, considerable authority to the extent policies address federal elections.

a. Supreme Court review of the Voting Rights Act prior to *Shelby County*

The Voting Rights Act’s heightened degree of federal oversight over local voting changes has been repeatedly challenged by jurisdictions seeking to free themselves from federal review—although they could also “bail out” of coverage by proving the absence of discriminatory practices for a period of years. In 1966, just one year after the VRA’s passage, the Supreme Court applied a rational basis standard of review to uphold Section 5 preclearance and the Section 4 coverage formula as constitutional exercises of Congress’s Fifteenth Amendment enforcement power in *South Carolina v. Katzenbach*.¹¹⁸ The Court expressed its use of the standard as follows:

The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved power of the States, *Congress may use any rational means to effectuate the constitutional prohibitions of racial discrimination in voting*...Section 1 of the Fifteenth Amendment declares that ‘(t)he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.’ This declaration has

¹¹⁴ 17 U.S. 316 (1819).

¹¹⁵ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 567 (2013).

¹¹⁶ U.S. CONST. amend XV.

¹¹⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

¹¹⁸ 383 U.S. at 301, 324 (1966).

always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice....The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.¹¹⁹

The Court continued:

[Section] 2 of the Fifteenth Amendment expressly declares that ‘Congress shall have the power to enforce this article by appropriate legislation.’ By adding this authorization, the Framers indicated that Congress was chiefly responsible for implementing the rights created in [Section] 1. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation...Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.¹²⁰

The Court’s analysis was highly deferential to Congress’s evaluation of the problem targeted by the VRA and its legislative judgment in enacting remedies to address them.¹²¹

Unsuccessful legal challenges followed each reauthorization in 1970,¹²² 1975,¹²³ 1982,¹²⁴ and 2006.¹²⁵ With respect to the 1975 amendments, the Supreme Court issued a major ruling on Congress’s Fifteenth Amendment enforcement powers in *City of Rome v. United States*. In that case, the City of Rome, Georgia, appealed the denial of preclearance of several

¹¹⁹ *Id.* at 325. (Emphasis added.)

¹²⁰ *Id.* at 326–26. The Court also mirrored the language of *McCulloch* when describing the power of Congress to legislate to enforce the Civil War Amendments: “Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.” *Id.* at 236 (quoting *Ex parte Virginia*, 100 U.S. 339, 345–346 (1879)).

¹²¹ Rational basis is a highly deferential standard of review and carries with it a strong presumption of validity of a legislative act. Judicial inquiry is typically limited to whether Congress has a rational basis for determining the problem and whether the means selected to address it are reasonable and appropriate. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964).

¹²² *Georgia v. United States*, 411 U.S. 526, 534–35 (1973) (reaffirming *Katzenbach*’s holding that the Act was a permissible exercise of congressional power under the enforcement clause of the Fifteenth Amendment).

¹²³ *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (rejecting the City of Rome, Georgia’s, contention that the Act exceeded Congress’s Fifteenth Amendment enforcement power and that the Act violated principles of federalism).

¹²⁴ *Lopez v. Monterey Cnty.*, 525 U.S. 266, 268, 283, 284–85 (1999) (rejecting California’s argument that preclearance unconstitutionally violated state sovereignty and affirming that Congress’s Fifteenth Amendment enforcement powers extend to protect against voting practices that are discriminatory in either purpose or effect).

¹²⁵ *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (finding the coverage formula under the Act unconstitutional); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009) (raising “serious constitutional questions” relating to the Act’s coverage formula and preclearance remedy).

annexations on multiple grounds, including by challenging the constitutionality of Section 5. The Court rejected the City of Rome’s argument that preclearance violated federalism principles. It concluded that “principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’ Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”¹²⁶ The Court reinforced *Katzenbach*’s holding that “the Fifteenth Amendment supersedes contrary exertions of state power” and again applied rational basis review to hold that “Congress has the authority to regulate state and local voting through the provisions of the Voting Rights Act.”¹²⁷

The *City of Rome* plaintiffs also argued that Section 5 could not constitutionally prohibit voting changes that had only a discriminatory effect and that the Fifteenth Amendment only prohibits laws enacted with a discriminatory purpose. The Court firmly rejected this argument, holding that Congress, in exercising its remedial powers under the Fifteenth Amendment, could prohibit voting changes that are discriminatory in effect to enforce the amendment’s proscriptions.¹²⁸

Up until the 2006 reauthorization, the Supreme Court acknowledged the preclearance process’s uncommon intrusion into state and local policymaking but consistently upheld the constitutionality of Section 5 and the coverage formula because “the Fifteenth Amendment permits the intrusion.”¹²⁹ Yet, even as the Court repeatedly upheld the Act’s constitutionality, the Court increasingly narrowed the VRA’s reach over a series of decisions,¹³⁰ ultimately expressing skepticism regarding the continued viability of the coverage formula.

b. Current burdens, current needs, and the equal sovereignty principle announced in *Northwest Austin* and *Shelby County*

The VRA’s 2006 reauthorization was initially challenged in *Northwest Austin Municipal Utility District No. 1 v. Holder*.¹³¹ In *Northwest Austin*, a small Texas utility district filed suit seeking relief under the Act’s “bailout” provision, which allows political subdivisions to be released from preclearance if certain conditions are met which prove the jurisdiction has

¹²⁶ *City of Rome*, 446 U.S. at 179–180.

¹²⁷ *Ibid.*

¹²⁸ *Id.* at 173–77. In making this holding—that Congress can prohibit voting practices that have only a discriminatory effect—the Court essentially extended its reasoning in *Katzenbach* upholding the Act’s ban on literacy tests in the covered jurisdictions as an appropriate exercise of congressional power, because the covered jurisdictions had imposed the tests to effectuate voting discrimination, even if applied and administered in a nondiscriminatory fashion. *Id.* at 176–77.

¹²⁹ *Lopez*, 525 U.S. at 284–85.

¹³⁰ See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 479–80 (2003) (determining that, in assessing whether a Section 5 violation has occurred, courts should consider factors beyond the traditional inquiry into minorities’ ability to elect candidates of their choice); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (holding that Section 5 does not extend to purposefully discriminatory voting changes that are not enacted with a specific retrogressive purpose); *City of Mobile v. Bolden*, 446 U.S. 55, 58 (finding that Congress intended Section 2 to only proscribe purposeful voting discrimination) (1980). Each of these decisions were legislatively overturned by Congress in subsequent reauthorizations.

¹³¹ 557 U.S. 193 (2009).

been discrimination-free for a period of years. The utility district argued in the alternative that if it was ineligible for bail out, Section 5 posed an unconstitutional intrusion into local sovereignty. A three-judge district court panel upheld the constitutionality of Section 5.¹³²

The utility district appealed to the Supreme Court, and, in a departure from previous cases reviewing the VRA, the Court surveyed favorable changes in voting patterns in covered jurisdictions since 1965 and remarked in dicta that, close to 50 years later, the “preclearance requirements and its coverage formula raise[d] serious constitutional questions.”¹³³ The Court cited federalism concerns to aver that “a departure from the fundamental principle of equal sovereignty [among states] requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets”¹³⁴ and warned that “the [Act] imposes current burdens and must be justified by current needs.”¹³⁵ The Court ultimately avoided the constitutional question by concluding that the utility district was eligible to bail out from coverage under Section 4(a) and made no holding regarding preclearance or the coverage formula.

Taking this strong signal from the Court regarding its view of the VRA’s constitutionality, a year after the *Northwest Austin* decision, Shelby County, Alabama, sued in the D.C. District Court to challenge the federal Justice Department’s objection to proposed voting changes within the county in *Shelby County v. Holder*. Unlike the plaintiff in *Northwest Austin*, however, Shelby County did not qualify for bailout. The county instead sought a declaratory judgment that Section 5 preclearance and the Section 4 coverage formula were facially unconstitutional and sought a permanent injunction against their enforcement. The district court ruled against the county and upheld the VRA after finding that the legislative record from the 2006 reauthorization offered ample justification for Congress to reauthorize Section 5 and continue the Section 4(b) coverage formula.¹³⁶

The D.C. Circuit Court of Appeals affirmed. It agreed with the district court’s assessment that the legislative record supported reauthorization, and that litigation under Section 2 remained, by itself, inadequate to protect the rights of minority voters within the covered jurisdictions. It also accorded deference to Congress’s judgment that preclearance was still necessary.¹³⁷ The D.C. Circuit focused its inquiry on “whether [the coverage formula], together with bail-in and bailout, continues to identify the jurisdictions with the worst problems.”¹³⁸ After weighing the combined effectiveness of Section 2 lawsuits across the country with the deterrent effect of Section 5, the court concluded that the coverage formula continued “to single out the jurisdictions in which discrimination is concentrated,” and therefore passed constitutional muster.¹³⁹

On review by the Supreme Court, Chief Justice John Roberts’ majority opinion directly took up the question of constitutionality but did not make a holding regarding Section 5.

¹³² *Nw. Austin Mun. Utility Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008).

¹³³ *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. at 204.

¹³⁴ *Id.* at 203.

¹³⁵ *Ibid.*

¹³⁶ *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011).

¹³⁷ *Shelby Cnty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012)

¹³⁸ *Id.* at 879.

¹³⁹ *Id.* at 883.

Instead, the Court ruled on the Section 4(b) coverage formula, finding it unconstitutional considering current conditions. In doing so, Chief Justice Roberts announced two principles guiding the majority's decision, directly referring to the dicta from *Northwest Austin* noted above: *first*, the Voting Rights Act imposes current burdens that must be justified by current needs, and *second*, a departure from the fundamental principle of "equal sovereignty" of the states requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets.¹⁴⁰

Chief Justice Roberts concluded that the statutory coverage formula did not meet these criteria because it was based on voter registration, turnout data, and practices from the 1960s and 1970s, while voter registration and turnout in the covered states had risen dramatically and the practices upon which the coverage formula were based had since been banned.¹⁴¹ The majority thus concluded that the coverage formula irrationally distinguished between the states "based on decades-old data and eradicated practices."¹⁴² With respect to the legislative record, the majority identified the "fundamental problem" that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."¹⁴³ It further claimed that it was "not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today."¹⁴⁴

The Court particularly scrutinized the disparate coverage formula as violating the principle of "equal sovereignty," repeatedly emphasizing that the disparate treatment of states must be sufficiently justified. The Court directed that, to serve the Fifteenth Amendment's purpose to ensure a better future, if "*Congress . . . is to divide the States—[it] must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions; it cannot rely simply on the past.*"¹⁴⁵

c. Reconciling *Shelby County* with existing Supreme Court precedent upholding the Voting Rights Act

Even after *Shelby County*, Congress acts at the zenith of its power when it enacts legislation to enforce the guarantees of the Fifteenth Amendment,¹⁴⁶ which "targets precisely and only racial discrimination in voting[.]"¹⁴⁷ In full, the Amendment reads:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

¹⁴⁰ *Shelby Cnty. v. Holder*, 570 U.S. 529, 542 (2013).

¹⁴¹ *Id.* at 551.

¹⁴² *Id.*

¹⁴³ *Id.* at 554.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 553.

¹⁴⁶ See *Hayden v. Pataki*, 449 F.3d 305, 359 (2d Cir. 2006).

¹⁴⁷ See *Shelby Cnty. v. Holder*, 383 U.S. at 567 (Ginsburg, J., dissenting).

Section 2. The Congress shall have power to enforce this article by appropriate legislation.¹⁴⁸

By affirmatively granting Congress authority to enforce its terms, the Fifteenth Amendment was “specifically designed as an expansion of federal power and an intrusion on state sovereignty.”¹⁴⁹ It made Congress “chiefly responsible for implementing the rights created by the amendment.”¹⁵⁰ The Voting Rights Act—particularly its preclearance system—reflects Congress’s definitive attempt to remedy voting discrimination in the face of “unremitting and ingenious defiance of the Constitution.”¹⁵¹ The Act’s prophylactic approach reflects Congress’s understanding of the continuing vulnerability of minority voting rights and that the sacred right to vote, once lost or abridged, is impossible to remedy. In adopting preclearance, Congress was also guided by the limits of previous legislation, including the Civil Rights Act of 1957 which authorized the U.S. Department of Justice to sue for injunctive relief on a case-by-case basis.¹⁵² As discussed above, this proved inadequate to protect minority voting rights, leading Congress to create the preclearance structure that proved much more effective.

The *Shelby County* majority did not overrule, or even call into question, the prior holdings of *Katzenbach*, *City of Rome*, and other decisions by the Court upholding the constitutionality of the Voting Rights Act; indeed, Chief Justice Roberts insisted that the majority opinion did not conflict with those cases.¹⁵³ Accordingly, these cases should be read in alignment to the extent possible.

First, because *Shelby County* did not make a holding on Section 5, the preclearance process itself remains constitutional.¹⁵⁴ As indicated, an unbroken line of Supreme Court decisions going back more than 50 years confirms that the preclearance component is a valid exercise of congressional authority under the Fifteenth Amendment.¹⁵⁵ Rather, the *Shelby County*

¹⁴⁸ U.S. CONST. amend XV, § 1.

¹⁴⁹ *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999).

¹⁵⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 325–26 (1966).

¹⁵¹ *City of Rome v. United States*, 446 U.S. 156, 173–74 (1980) (quoting *Katzenbach*, 383 U.S. at 309.).

¹⁵² See Part. IV, Pub. L. 85-315, 71 Stat. 634 (1957).

¹⁵³ See *Shelby Cnty.*, 383 U.S. at 535, 545–46 (invoking *Katzenbach* to reinforce that preclearance is a “stringent” and “potent” remedy and “an uncommon exercise of congressional power,” but could be justified by “exceptional conditions.”); see also *id.* at 539 (referring to the Court’s previous decisions upholding the constitutionality of the Act); *id.* at 544 (averring that *Katzenbach* rejected the notion that the equal sovereignty principle operated as a bar on differential treatment, but did not suggest that the principle was irrelevant to the constitutional inquiry).

¹⁵⁴ Congress should take note, however, that the majority opinion in dicta seemed to suggest that Section 5 pushed the limits of constitutional bounds. See *id.* at 544–45.

¹⁵⁵ See *Lopez v. Monterey Cnty.*, 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).

majority opinion concluded that the coverage formula that Congress adopted when it reauthorized Section 5 in 2006 irrationally relied on outdated data.¹⁵⁶

Second, the majority opinion in *Shelby County* did not disturb established precedent that Fifteenth Amendment enforcement legislation must meet a rational basis standard of review.¹⁵⁷ While the majority opinion's focus on current needs and burdens to justify the coverage formula noticeably departed from prior decisions that were highly deferential to Congress, such as *Katzenbach*, it repeatedly invoked "rationality" as the proper metric to gauge the constitutionality of the coverage formula.¹⁵⁸ It also cited *Katzenbach* to reach its conclusion that the 1965 coverage formula was rational in practice and theory,¹⁵⁹ while the reauthorization of the 2006 coverage formula was irrational.¹⁶⁰

Legislation ought to be found rational, and thus constitutional, so long as a new coverage formula differentiates among jurisdictions in a manner that is responsive to current conditions of discrimination and the remedies adopted by Congress are sufficiently related to address the discrimination. Finally, it bears brief discussion that legislative action to reinstate the coverage formula based on current needs should survive the test of "congruence and proportionality" associated with challenges to Congress's Fourteenth Amendment enforcement power.¹⁶¹ Prior to the release of the *Shelby County* decision, scholars and practitioners widely expected the Court to clarify whether the congruence and proportionality standard superseded the rationality analysis employed in Fifteenth Amendment cases such as *Katzenbach*¹⁶² because the Court often treated its jurisprudence of Congress's Fourteenth and Fifteenth Amendment enforcement powers as coextensive.¹⁶³ The Court did not appear to apply the congruence and proportionality standard in *Shelby*

¹⁵⁶ See *Shelby Cnty.*, 570 U.S. at 551 ("Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s.").

¹⁵⁷ See *id.* at 569 (Ginsburg noting in her dissent: "Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed 'rational means.'"). Notably, the majority did not respond to Justice Ginsburg's statement in dissent that the majority did not claim to alter precedent setting rational basis as the standard of review.

¹⁵⁸ See *Shelby Cnty.*, 570 U.S. at 552, 554, 556.

¹⁵⁹ *Id.* at 550 (citing *South Carolina v. Katzenbach*, 383 U.S. at 330).

¹⁶⁰ See, e.g., *id.* at 554, 556 (concluding that reliance on vote dilution evidence highlights the irrationality of a coverage formula based on voting tests and access to the ballot.).

¹⁶¹ See generally *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

¹⁶² Indeed, the Court highlighted the unresolved standard three years earlier in *Northwest Austin*. See *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 204 ("The parties do not agree on the standard to apply [T]hat question has been extensively briefed in this case, but we need not resolve it."). The Court then gave additional reason to believe that it would address the standard when it modified the question presented in *Shelby County* to include the question of whether Section 5 also violated the Fourteenth Amendment. See Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1498 (2014).

¹⁶³ See, e.g., *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendment as coextensive."); *City of Boerne*, 521 U.S. at 518 (citing "parallel power to enforce the provisions of the Fifteenth Amendment").

County, and—as some justices have recognized—it can be difficult to predict how the Court will apply its enforcement jurisprudence in the future.¹⁶⁴ Still, the Court’s cases suggest that a restored preclearance formula that accounts for current conditions of discrimination and its attendant burdens upon states would also be found valid under that test.¹⁶⁵

Yet, the rational basis standard continues to be the presumptive lodestar for the question of whether a coverage formula enacted by Congress identifying jurisdictions subject to

¹⁶⁴ See *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 44 (2012) (Scalia, J., dissenting) (“[T]he varying outcomes we have arrived at under the ‘congruence and proportionality’ test make no sense.”).

¹⁶⁵ Courts applying the “congruence and proportionality” test first outlined in *City of Boerne v. Flores*, commonly engage in a three-part inquiry to assess the appropriateness of the “fit” between the constitutional right that Congress endeavors to protect and the means it adopts to do so.

First, the court must identify with “precision the scope of the constitutional right” that Congress sought to remedy. *Bd. Of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. at 356. In the context of the Voting Rights Act’s preclearance framework, Section 5 protects two decidedly fundamental rights worthy of jealous protection: the right to vote and the right to be free from racial discrimination. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights[.]”); see also *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

Second, the *Boerne* test considers “whether Congress identified a history and pattern of constitutional [violations] by the States” concerning the relevant constitutional right. *Bd. Of Trustees of Univ. of Ala. V. Garrett*, 531 U.S. at 368. Updated to reflect “current needs” because of recent or continuing examples of racial discrimination in voting, Section 5 preclearance should comfortably clear this second factor. To start, the Supreme Court has recognized that Congress may more easily show a “pattern of constitutional violations,” *Nev. Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 722 (2003), when the legislation at issue targets state conduct “subject to a heightened standard of judicial scrutiny.” *Tennessee v. Lane*, 541 U.S. 509, 528–29 (2004). The right to be free from racial discrimination and the right to vote are quintessentially such rights. Separately, in *City of Boerne*, the Supreme Court expressly cited the legislative record supporting the Voting Rights Act preclearance in cases like *Katzenbach* and *City of Rome* as indicative of congruence and proportionality. See *City of Boerne*, 521 U.S. at 530–32. Only the requirement of more “current conditions” the Court announced in *Shelby County* could possibly have justified a different result in that case. But now, preclearance restoration proposals that are presently before Congress are based on recent voting rights violations, and thus would cure the problem of “currency,” as *Shelby County* articulated them.

Third, the court determines whether the scope of the law is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (quoting *City of Boerne*, 521 U.S. at 532). To apply this factor the Supreme Court has commonly considered a remedial law’s “tailoring” to determine whether it properly remedies the discerned pattern of unconstitutional conduct without imposing undue cost to states’ sovereign constitutional authority—for example, by proscribing more conduct than is necessary to cure the offending conduct. On that score, Section 5 preclearance should be viewed favorably, as the need for a remedy to unconstitutional racial discrimination in voting cannot be gainsaid, and the mechanism Congress proposes should find support in an updated legislative record. Finally, any reviewing court, including the Supreme Court, would be compelled to acknowledge that *City of Boerne* cited Section 5 preclearance as a properly tailored, “congruent and proportional” remedy to violations of the Fifteenth Amendment.

preclearance—and any additional remedies—is within its Fifteenth Amendment enforcement powers. In prior cases upholding the coverage formula, and preclearance as a whole, the Supreme Court weighed whether Congress’s chosen means to “effectuate the constitutional prohibition of racial discrimination in voting” were rationally related to that goal.¹⁶⁶ The Court’s answer over decades consistently showed deference to Congress’s judgment that the preclearance formula was “rational in both practice and theory.”¹⁶⁷

Thus, *Shelby County* should not be read to bar what the Supreme Court invited Congress to do: “draft another formula based on current conditions.”¹⁶⁸ Congress should accept the Supreme Court’s invitation to craft an updated Voting Rights Act based upon its guidance that it should be responsive to current conditions of discrimination as well as carefully pursue a coverage formula that identifies jurisdictions for preclearance based on a record of where and when discrimination is most likely to occur.

d. Congressional power under the Elections Clause

Shelby County did not speak on another source of congressional authority for preclearance found outside of the Fourteenth and Fifteenth Amendments—the Elections Clause of Article I of the U.S. Constitution.¹⁶⁹ The Elections Clause provides that state legislatures “shall prescribe” the “Times, Places and Manner of holding Elections for Senators and Representatives,” while “the Congress may *at any time by Law make or alter such Regulations*.”¹⁷⁰ This is an expansive grant of federal authority, which the Supreme Court has held affords Congress “general supervisory power over the whole subject” of federal elections,¹⁷¹ to exercise “as and when [it] sees fit.”¹⁷² Congress, in turn, has directly relied on those powers to enact critical voting legislation like the National Voter Registration Act, which the Supreme Court has determined permissibly overlays a “superstructure of federal regulation atop state voter-registration systems.”¹⁷³

Congress was mindful of its broad authority under the Elections Clause when it passed the Voting Rights Act. In addition to the Fifteenth Amendment, the 1965 House Report states that the enacted bill was “also designed to enforce ... article 1, section 4” of the Constitution.¹⁷⁴ This is critical because as Justice Antonin Scalia wrote in 2013, federalism concerns ebb when Congress acts under the Elections Clause, as “States’ role in regulating congressional elections—while weighty and worthy of respect—has always existed subject

¹⁶⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966); *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (recognizing “Congress’ authority under § 2 of the Fifteenth Amendment [is] no less broad than its authority under the Necessary and Proper Clause.”).

¹⁶⁷ *Katzenbach*, 383 U.S. at 330.

¹⁶⁸ *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

¹⁶⁹ See U.S. Const. art. I, § 4.

¹⁷⁰ *Id.* (emphasis added)

¹⁷¹ *Ex Parte Siebold*, 100 U.S. 371, 388 (1879).

¹⁷² *Id.* at 384.

¹⁷³ *Arizona v. Inter Tribal Council of Ariz. (ITCA)*, 570 U.S. 1, 4 (2013).

¹⁷⁴ H.R. REP. NO. 89-439 (1965); see also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (“To enforce the fifteenth amendment to the Constitution of the United States *and for other purposes*.”).

to the express qualification that it ‘terminates according to federal law.’”¹⁷⁵ Simply put, “the Clause ... ‘invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt [their] choices.’”¹⁷⁶

The Election Clause’s grant of power to Congress to protect the integrity of federal elections has clearly featured less prominently in litigation and debates over the constitutionality of preclearance than the Civil War Amendments. But the Supreme Court has consistently recognized Congress’s broad “authority to provide a complete code for congressional elections.”¹⁷⁷ And the Court has also been clear that Congress can *combine* its Election Clause and Fifteenth Amendment powers to ensure that the “great organisms of [the federal] executive and legislative branches should be the free choice of the people” made without the “violence and internal corruption” of racial discrimination.¹⁷⁸ Congress may surely rely on its Elections Clause authority to “prevent the implementation of local laws and practices that impede the ability to register for and participate in federal elections,”¹⁷⁹ as it has done through the Voting Rights Act.

III. HOSTILITY TO MINORITY POLITICAL PARTICIPATION PERSISTS AT LEVELS THAT JUSTIFY A RESTORED AND STRENGTHENED VOTING RIGHTS ACT

Our fathers believed that if this noble view of the rights of man was to flourish, it must be rooted in democracy. The most basic right of all was the right to choose your own leaders. The history of this country, in large measure, is the history of the expansion of that right to all of our people.

President Lyndon B. Johnson’s Special Message to Congress, March 15, 1965

Voting discrimination in the United States has manifested according to historical sentiments, political shifts, and available practices based on legal developments. Chief Justice John Roberts was correct in some respects in observing that, after initial enactment of the Voting Rights Act in 1965, “[n]early 50 years later, things have changed[.]”¹⁸⁰ He correctly noted that voter registration and turnout have improved dramatically, largely due to the success of the Voting Rights Act. In enacting the Voting Rights Act of 1965, Congress chose to apply the preclearance remedy to jurisdictions that had long histories of voting discrimination and were therefore, in its judgement, most likely to continue to pursue voting policies that discriminated on the basis of race. Based on its review at the time, Congress wisely chose to identify these jurisdictions based on metrics closely associated

¹⁷⁵ *ITCA*, 570 U.S. at 14 (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)); see also *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001) (aside from Elections Clause, “No other constitutional provision gives the State authority over congressional elections, and no such authority could be reserved under the Tenth Amendment”).

¹⁷⁶ *ITCA*, 570 U.S. at 8–9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)).

¹⁷⁷ *Id.*

¹⁷⁸ *Ex parte Yarbrough* (“*The Ku Klux Cases*”), 110 U.S. 651, 666–67 (1884).

¹⁷⁹ Brief of Gabriel Chin et al. as *Amici Curiae* Supporting Respondents at 4, *Shelby Cnty. v. Holder*, No. 12-96 (2013).

¹⁸⁰ *Shelby Cnty. v. Holder*, 570 U.S. 529, 547 (2013).

with racial discrimination: the use of voting tests and devices, voter registration, and turnout rates. Congress was proven correct in making these determinations—the VRA was immediately successful and dramatically increased voter registration and turnout rates in the covered jurisdictions.¹⁸¹

Despite these gains, voting discrimination persisted through other means, justifying and necessitating the continued enforcement of Section 5 and other provisions of the Voting Rights Act through subsequent reauthorizations of the law. Evolving discriminatory tactics separate and apart from historical barriers erected to thwart registration and turnout—barriers such as poll taxes and literacy tests—necessitated reauthorization of preclearance in 1970, 1975, and 1982. The Supreme Court upheld all of these, even in the face of major improvements in Black voter registration and turnout. Indeed, Congress intended for the Voting Rights Act to keep up with new strategies devised to suppress minority voters.¹⁸² As famously noted by Justice David Souter in *Reno v. Bossier Parish*:

In fine, the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles.¹⁸³

a. Current indicia of discrimination

The election of Barrack Obama in 2008 was a transcendent moment in our nation’s history. Many believed the election signaled the turning of a corner in the fight against racism in America, but time quickly revealed a very different reality.¹⁸⁴ The surge in voter registration and turnout among people of color in 2008 was one of the most diverse electorates in American history—and it was swiftly met with legislative retaliation in the states.¹⁸⁵

When the Supreme Court nullified preclearance in *Shelby County v. Holder* in 2013, the Court released the worst offenders from federal oversight of their voting changes during a growing backlash against increased minority voter participation. These states, and other

¹⁸¹ See USCCR 1968 REPORT, *supra* note 28, at pp. 12–13, 223 (reporting in 1968 that nonwhite registration rate had increased dramatically as a result of the 1965 Act: from 19.3% to 51.6% in Alabama; 40.4% to 62.8% in Arkansas; 51.2% to 63.6% in Florida; 27.4% to 52.6% in Georgia; 31.6% to 58.9% in Louisiana; 6.7% to 59.8% in Mississippi; 46.8% to 51.3% in North Carolina; 37.3% to 51.2% in South Carolina; 69.5% to 71.7% in Tennessee; up to 61.6% in Texas; and from 38.3% to 55.6% in Virginia).

¹⁸² See H.R. REP. NO. 109-478, at 2 (2006); S. REP. NO. 97-417, at 6 (1982); H.R. REP. NO. 94-196, at 10 (1975); S. REP. NO. 94-295, at 16 (1975); H.R. REP. NO. 91-397, at 3283 (1969).

¹⁸³ *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part).

¹⁸⁴ See generally NAACP Legal Defense and Educational Fund, Inc., “POST-RACIAL” AMERICA? NOT YET: WHY THE FIGHT FOR VOTING RIGHTS CONTINUES AFTER THE ELECTION OF PRESIDENT BARACK OBAMA (2009), https://www.naacpldf.org/wp-content/uploads/Post-Racial-America-Not-Yet_Political_Participation.pdf.

¹⁸⁵ See generally ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 247–85 (Picador 2015).

states with less culpable records, took the *Shelby* decision as a signal that they were now free to enact voting restrictions with impunity, opening the flood gates to levels of voting discrimination unlike anything the country had seen in a generation. As noted above, states have enacted nearly 100 restrictive voting laws since *Shelby County*.¹⁸⁶ In effect, the majority opinion in *Shelby County* itself was highly consequential in creating the conditions of voting discrimination that minority voters are currently facing. A squall of voting restrictions by states and localities were advanced on a national scale, wreaking havoc on voters, including photo ID laws, restraints on voter registration, voter purges, cuts to early voting, restrictions on the casting and counting of absentee and provisional ballots, documentary proof of citizenship requirements, polling place closures and consolidations, and criminalization of acts associated with registration or voting.¹⁸⁷

The surge of minority political participation catalyzed a renewed race to stop voters from exercising the franchise, and these changes have purposefully targeted people of color to counteract their increased political power and engagement. The right to vote in many ways is now defined by a margins game: slicing off margins of the electorate—diluting the strength of their votes—to tip the balance of political power. This problem has proven to be particularly acute when there is a surge in minority electoral interest or participation.¹⁸⁸ As states expanded absentee balloting during the COVID-19 pandemic, voluntarily and in response to lawsuits brought by organizations, including the ACLU and its affiliates, to protect people’s right to vote, health, and safety.¹⁸⁹ This surge was particularly acute in communities of color, especially Asian-American and Latino communities, and the decisive role that voters of color played in key races has in turn led to a fever pitch of state legislation and efforts to restrict access to the ballot.¹⁹⁰

¹⁸⁶ <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-gutted-voting-rights>.

¹⁸⁷ Appendix A to this report documents these events at length to the extent the ACLU provided direct representation or participated as amicus.

¹⁸⁸ See, e.g., *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) (Justice Kennedy concluding, “In essence [Texas] took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation”); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 216 (4th Cir. 2016) (similarly concluding that North Carolina “took away minority voters’ opportunity because they were about to exercise it.”) (*quoting LULAC*); German Lopez, *North Dakota’s new voting restrictions seem aimed at Native Americans who vote Democrat* (Oct. 31, 2018) (describing how former Sen. Heidi Heitkamp 2012 electoral victory won with Native American support, and the North Dakota legislature responded by instituting a photo ID law intended to discriminate against Native American voters), <https://www.vox.com/policy-and-politics/2018/10/31/18047922/north-dakota-voter-id-suppression-heitkamp>.

¹⁸⁹ See Appendix A, which details the ACLU’s voting rights caseload, including its COVID-19 related cases.

¹⁹⁰ William H. Frey, *Turnout in 2020 Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows*, Brookings (May 5, 2021), <https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/>; Brennan Ctr. for Justice, *State Voting Bills Tracker 2021*, <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021> (collecting state voting bills proposed or enacted in 2021).

At the same time, Congress should heed the fact that current discrimination continues to encompass many of the same tactics devised decades ago that justified the initial passage and subsequent reauthorizations of the Voting Rights Act, and which persist in many parts of the country, particularly on the local level. Redistricting, apportionment, and modification of methods of elections continue to be advanced by state and local officials to dilute minority voting strength. Additionally, practices such as poll closures, challenges to voter or candidate eligibility, and schemes to keep minority voters off the registration rolls or prevent their absentee or provisional ballots from being counted continue. We document these practices at length in Appendix A attached to this report, summarizing the ACLU's litigation docket from 2006 to present.

Relatedly, Congress must also understand the continuing significance of racially polarized voting. Racially polarized voting refers to patterns where voting blocs within a jurisdiction fall along racial lines. The presence of racially polarized voting often results in the defeat of the electoral choices of a cohesive set of voters of color by the majority and indicates that race is an important factor in the electorate's political choices. For this reason, the Supreme Court and Congress have pointed to the persistence of racially polarized voting as probative of purposeful discrimination that justifies remedial legislation to protect minority voting rights.¹⁹¹ The Court has repeatedly acknowledged that the presence of racially polarized voting "bear[s] heavily on the issue of purposeful discrimination," because "[v]oting along racial lines allows those elected to ignore [minority] Black interests without fear of political consequences."¹⁹² In support of the 2006 Voting Rights Act reauthorization, Congress concluded:

The Committee finds it significant that the ability of racial and language minority citizens to elect their candidates of choice is affected by racially polarized voting . . . [It] is the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred candidates into the electoral process. Testimony presented indicated that "the degree of racially polarized voting in the South is increasing, not decreasing . . . [and is] in certain ways re-creating the segregated system of the Old South."¹⁹³

The ACLU's report submitted in support of the 2006 reauthorization also concluded that, "[o]ne of the most sobering facts to emerge from this report, as well as from the decisions in other cases, is the continuing presence of racially polarized voting. While much progress has been made in minority registration and office holding, the persistence of racial bloc voting shows that race remains dynamic in the political process, particularly in the covered

¹⁹¹ See *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."); see H.R. REP. NO. 109-478, at 34 (2006).

¹⁹² See *Rogers v. Lodge*, 458 U.S. 613, 623–24.

¹⁹³ See H.R. REP. NO. 109-478, at 34 (2006).

jurisdictions.”¹⁹⁴ Based on our review of our litigation docket, we continue to find the strong presence of racially polarized voting, which has increased in intensity in certain areas.¹⁹⁵

b. Voters lack effective tools to enforce their rights under the Constitution and federal law

In dicta in his opinion in *Shelby County*, Chief Justice John Roberts laid out a path for Congress to follow in enacting an updated Voting Rights Act to respond to current conditions of discrimination. Referring to the 1965 coverage formula as “rational in both practice and theory,” Roberts highlighted that the formula “looked to cause (discriminatory tests) and effect (low voter registration and turnout) and tailored the remedy (preclearance) to those jurisdictions exhibiting both.” Through our litigation and other advocacy, we have been able to identify the discriminatory policies largely responsible for causing recent violations of voters’ federally protected rights.

The continued onslaught of discriminatory voting laws and practices has resulted in an explosion of litigation to protect voters from state and local officials’ violations of federal law. Since *Shelby County*, the ACLU has opened more than 110 new voting rights matters, including cases filed and investigations, and we currently have more than 30 active matters.¹⁹⁶ Between the 2012 and 2016 presidential elections alone, the ACLU and its affiliates won 15 voting rights lawsuits, protecting more than 5.6 million voters in 12 states that collectively are represented by 161 members of the House of Representatives and wield 185 votes in the Electoral College.¹⁹⁷ In the 2020 presidential election year, the ACLU won 28 lawsuits in 21 states and Puerto Rico to safeguard the voting rights of millions of Americans as the COVID-19 pandemic spread across the country and states struggled – or refused – to adapt voting procedures to protect public health while still ensuring access to the ballot.

After *Shelby County* eviscerated Section 5’s preclearance protections, Section 2 of the Voting Rights Act is now the heart of federal protection for the right to vote. It applies nationwide to every state and local jurisdiction and has no expiration date. The ACLU’s recent Section 2 litigation experience reveals two things. First, our record of success in blocking discriminatory voting changes—with an overall success rate in Section 2 litigation of over 75%—reveals that state and local officials are continuing to engage in a widespread pattern of racial discrimination and are committing pervasive violations of federal law. Second, it shows that as important as it is, Section 2 alone is woefully insufficient since — unlike preclearance — it does not prevent discriminatory changes to voting laws *before* they taint elections. All too often, discriminatory laws that we challenged and courts subsequently struck down remained in place for months or even years while litigation

¹⁹⁴ MCDONALD, *supra* note 27.

¹⁹⁵ See, e.g., *Mo. State Conference of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006 (E.D. Mo. 2016); *Wright v. Sumter Cnty. Bd. of Elections and Registration*, 301 F.Supp.3d 1297 (M.D. Ga. 2018); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004); see also Kilgore, *Enten*, *supra* note 27.

¹⁹⁶ These numbers are based on a recent review of the ACLU’s internal case management system.

¹⁹⁷ See Dale Ho, *Let People Vote: Our Fight for Your Right to Vote in This Election*, ACLU (Nov. 3, 2016), <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/let-people-vote-our-fight-your-right-vote-election>.

proceeded—time in which elections were held and hundreds of government officials were elected under discriminatory conditions.

Yet even Section 2 is under attack. On July 1, 2021, the Supreme Court issued a decision in *Brnovich v. Democratic National Committee*, reversing a Ninth Circuit decision finding a Section 2 violation and upholding two voting restrictions in Arizona.¹⁹⁸ The decision adopted a new standard for Section 2 claims, one which is unduly cramped and at odds with the law’s intent of eradicating all voting practices that have racially discriminatory effects. While it preserves Section 2 as a vehicle for challenging the most egregious forms of racial discrimination, the Court narrowed the statute, raising the bar even higher to successfully challenge racially suppressive laws. The decision comes at a perilous time for voting rights, amid a wave of state voter suppression laws. As Justice Elena Kagan wrote in dissent, “Section 2 of the Act remains, as written, as expansive as ever — demanding that every citizen of this country possess a right at once grand and obvious: the right to an equal opportunity to vote.”¹⁹⁹ She continued that even though “[m]aybe some think that vote suppression is a relic of history—and so the need for a potent Section 2 has come and gone,” that provision remains a “crucial tool to achieve th[e] goal” of ensuring to everyone, regardless of race, has “an equal chance to participate in our democracy.”²⁰⁰

And while the ACLU continues to bring successful cases after *Shelby County* under what remains of the VRA, the nature and number of cases have changed due to the loss of Section 5 and the resulting blitz of discriminatory voting changes. Prior to *Shelby County*, the ACLU focused a large part of our docket on voting discrimination at the local level—where discrimination tended to be especially entrenched and challenging to identify and address. After *Shelby County*, the ACLU and our affiliates have had to pivot away from addressing local discrimination and instead devote substantial resources to challenging statewide action impacting millions of voters that was previously held at bay by Section 5. These cases are harder to bring and resolve, meaning that local officials – who have been emboldened by *Shelby County* just as state officials have been – act without scrutiny.

Adding to the difficulty, there is no longer a means to effectively monitor voting changes occurring at the local level since preclearance was rendered inoperative and jurisdictions are no longer required to report voting changes to the federal government. We continue to bring successful challenges against local jurisdictions under Section 2, but those cases have become far fewer without notice of voting changes and the prophylactic protection afforded by preclearance. For comparison, between 1982 and 2006, the ACLU brought 145 lawsuits in the State of Georgia alone; of these cases, approximately 125 of these were against local jurisdictions.²⁰¹ In the six years since *Shelby County* was decided—about one quarter of the comparative time period—we have been able to bring four cases in Georgia, only two of which were challenges to local voting practices.

Overall, the ACLU and our state affiliates have litigated fourteen Section 2 cases to judgment, settlement, or other resolution since *Shelby County*. Fourteen of the ACLU’s

¹⁹⁸ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

¹⁹⁹ *Id.* at 2351 (Kagan, J., dissenting).

²⁰⁰ *Id.* at 2373 (Kagan, J., dissenting).

²⁰¹ See MCDONALD, *supra* note 27, at 4.

eighteen Section 2 cases have produced favorable outcomes²⁰² for our clients, a success rate of 77.7%.²⁰³ The following table summarizes the ACLU’s Section 2 litigation since *Shelby County*:

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Re-solved	Days	Success?
<i>Bethea v. Deal</i>	No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016)	Failure to extend voter registration deadline after hurricane	10/17/16	10/19/16	2	N
<i>Frank v. Walker</i>	768 F.3d 744 (7th Cir. 2014)	Voter ID	12/13/11	3/23/15	1197 ²⁰⁴	N
<i>Florida Dem. Party v. Scott</i>	No. 4:16CV626-MW/CAS, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)	Failure to extend voter registration deadline after hurricane	10/9/16	10/12/16	3	Y
<i>Jackson v. Bd. of Trustees of Wolf Point</i>	No. CV-13-65-GF-BMM-RKS, 2014 WL 1794551 (D. Mont. Apr. 21, 2014), <i>R. & R. adopted as modified sub nom.</i> 2014 WL	School redistricting	8/7/13	4/14/14 ²⁰⁵	250	Y

²⁰² We rely on Professor Ellen Katz’s definition of a “successful” Section 2 case. See Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 653-54 n.35 (2006) (“Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success,” including decisions where a court “granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys’ fees after a prior unpublished determination of a Section 2 violation.”). Professor Katz’s study was cited by Congress during the 2006 Voting Rights Act reauthorization and in Justice Ginsberg’s dissent in *Shelby County*. See *Shelby County*, 133 S.Ct. at 2642 (Ginsberg, J., dissenting) (citing *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong., 1st Sess., pp. 964–1124 (2005)).

²⁰³ *Allen v. Milligan*, 599 U.S. 1, 29 (2023) (explaining that “§ 2 litigation in recent years has rarely been successful”).

²⁰⁴ Litigation on plaintiffs’ as-applied constitutional claims remained ongoing until January 2023, but the Seventh Circuit rejected our Section 2 claims in 2014, and the Supreme Court denied a petition for review of that decision in March 2015.

²⁰⁵ This date reflects the date the district court adopted a joint consent decree proposed by parties on both sides; later proceedings centered around attorney’s fees and costs.

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Re-solved	Days	Success?
	1791229 (D. Mont. May 6, 2014)					
<i>Rangel-Lopez v. Cox</i>	344 F. Supp. 3d 1285 (D. Kan. 2018)	County polling place closure	10/26/18	1/30/19	96	Y ²⁰⁶
<i>Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.</i>	894 F.3d 924 (8th Cir. 2018), <i>cert. denied</i> , 139 S. Ct. 826 (2019)	School Board At- Large Elections	12/18/14	1/7/19	1482	Y
<i>Montes v. City of Yakima</i>	No. 12-CV-3108-TOR, 2015 WL 11120964 (E.D. Wash. Feb. 17, 2015)	City At-Large Elections	8/22/12	2/17/15 ²⁰⁷	910	Y
<i>MOVE Texas Civic Fund v. Whitley</i>	No. 5:19-cv-00171 (W.D. Tex. Feb 22, 2019) ³⁷	Statewide voter purge	2/4/19	4/29/19 ²⁰⁸	85	Y
<i>NAACP v. East Ramapo</i>	462 F. Supp. 3d 368 (S.D.N.Y. 2020), <i>aff'd</i> 984 F.3d 213 (2d Cir. 2021)	School Board At-Large Elections	11/16/17	1/6/21	1147	Y
<i>N.C. NAACP v. McCrory</i>	831 F.3d 204 (4th Cir. 2016), <i>cert. denied</i> , 137 S. Ct. 1399 (2017)	Voter ID; Early Voting; Same-day registration; Out- of- Precinct Ballots; Pre-Registration	8/30/13	5/15/17	1355	Y

²⁰⁶ Although the court denied the plaintiffs' Motion for a Temporary Restraining Order, the plaintiffs voluntarily moved to dismiss the case after the defendants announced the opening of new polling locations. *See ACLU of Kansas Declares Victory; Files Voluntary Motion to Dismiss Dodge City Voting Access Suit*, ACLU of Kansas (Jan. 25, 2019), <https://www.aclukansas.org/en/press-releases/aclu-kansas-declares-victory-files-voluntary-motion-dismiss-dodge-city-voting-access>.

²⁰⁷ This is the date the court adopted a remedial plan, later proceedings focused on attorney's fees and costs.

²⁰⁸ Parties on both sides filed a joint motion to dismiss because of a reached settlement.

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Re-solved	Days	Success?
<i>Navajo Nation Human Rts. Comm'n v. San Juan Cnty.</i>	No. 2:16-cv-00154 (D. Utah 2016)	All-mail voting, elimination of polling places	2/26/16	2/21/18 ²⁰⁹	727	Y
<i>Ohio State Conf. of the NAACP v. Husted</i>	No. 2:14-CV-00404 (S.D. Ohio 2014)	Early Voting	5/1/14	4/17/15 ²¹⁰	352	Y
<i>People First Alabama v. Merrill</i>	491 F. Supp. 3d 1076 (N.D. Ala. 2020)	Absentee Ballot Excuse Requirement (COVID-19)	5/1/20	11/16/20	200	N ²¹¹
<i>Wright v. Sumter Cnty. Bd. of Elections & Registration</i>	301 F. Supp. 3d 1297 (M.D. Ga. 2018), <i>aff'd</i> 979 F.3d 1282 (11th Cir. 2020)	County Redistricting	3/7/14	10/27/20	2427	Y
<i>Baltimore Cnty. Branch of NAACP v. Baltimore Cnty.</i>	No. 21-CV-03232-LKG, 2022 WL 657562, at *1 (D. Md. Feb. 22, 2022)	County Redistricting	12/1/21	3/25/22	94	Y
<i>Alpha Phi Alpha Fraternity Inc. v. Raffensperger</i>	No. 1:21-CV-05337-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023)	State Legislative Redistricting	12/30/21	10/26/23 ²¹²	422	Y

²⁰⁹ This date reflects when the settlement from the parties was reached and announced. *See Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, ACLU of Utah (Feb. 21, 2018), <https://www.acluutah.org/newsroom/item/1418-settlement-announced-in-navajo-nation-human-rights-commission-v-san-juan-county>.

²¹⁰ This date reflects when the parties reached a settlement and moved to dismiss the case.

²¹¹ In this case, the trial court judge found a violation of Section 2 and entered an injunction barring the application of the excuse requirement to vote absentee; on appeal, the Eleventh Circuit granted a stay of the injunction without explaining its reasoning, *see Op.*, *People First Ala. v. Merrill*, 491 F. Supp. 3d 1076 (No. 20-13695-B), 2020 WL 6074333 (likely relying on *Purcell v. Gonzalez*, *see infra.*).

²¹² Defendants have appealed the decision but not sought a stay, meaning the new maps obtained through the injunction will be in place for the 2024 cycle regardless of the ultimate result of the appeal.

ACLU Section 2 Cases Litigated to Judgment/Settlement since <i>Shelby County</i>						
Case name	Citation	Practice Challenged	Date Filed	Date Re-solved	Days	Success?
<i>Robinson v. Ardoin</i>	605 F. Supp. 3d 759 (M.D. La.), <i>cert. granted before judgment</i> , 142 S. Ct. 2892 (2022), and <i>cert. dismissed as improvidently granted</i> , 143 S. Ct. 2654 (2023), and <i>vacated and remanded</i> , 86 F.4th 574 (5th Cir. 2023)	Congressional Redistricting	3/30/22	1/24/24 ²¹³	666	Y ²¹⁴
<i>Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment</i>	586 F. Supp. 3d 893 (E.D. Ark. 2022), <i>aff'd</i> , 86 F.4th 1204 (8th Cir. 2023)	State legislative Redistricting	12/29/21	1/30/24	763	N

The average length of time that the ACLU's Section 2 cases have taken to litigate is 676 days or almost two years. When emergency cases, such as those brought after natural disasters to extend an election-related deadline or those brought to accommodate voters in the COVID-19 pandemic, are excluded, this average jumps to 848 days or well over two years. But this does not include currently pending cases. The following table summarizes the ACLU's pending Section 2 litigation, including the number of days the case has been pending:

²¹³ Reflects the enactment of a new congressional plan with a second majority-BVAP district.

²¹⁴ The trial court in *Robinson* granted plaintiffs' request for a preliminary injunction on June 6, 2022, a decision that the Supreme Court stayed following the Fifth Circuit's denial of Louisiana's stay request. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). The Court held the case in abeyance until it ruled on *Allen v. Milligan* in June 2023, which led the Court to vacate the stay and return the case to the Fifth Circuit for review in its ordinary course. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023). The Fifth Circuit affirmed the district court's ruling on the merits but vacated the preliminary injunction because, according to the panel, the Legislature had time to pass a new lawful map before the 2024 elections. In January 2024, the Legislature passed a map containing two opportunity districts for Black voters. That map is now subject to ongoing litigation in *Robinson* and *Callais v. Landry*, No. 3:24-cv-00122-DCJ-CES-RRS (W.D. La. 2024).

Pending ACLU Section 2 Cases					
Case name	Citation	Practice Challenged	Date Filed	Days Pending	Interim Success?
<i>Sixth District of the AME Church v. Kemp</i>	Case No. 1:21-mi-55555- JPB (N.D. Ga.)	Restrictive absentee voting ballot acceptance laws	3/29/21	1,087	N ²¹⁵
<i>Milligan v. Allen</i>	Case No. 2:21-cv-01530-AMM (N.D. Ala.)	Alabama congressional redistricting map	11/16/21	857	Y (prelim. injunction)
<i>Stone v. Allen</i>	Case No. 2:21-cv-01531-AMM (N.D. Ala.)	Alabama State Senate redistricting map	11/16/21	856	N
<i>White v. Mississippi Board of Elections</i>	Case No. 4:22-cv-00062-SA-JMV (N.D. Miss.)	Mississippi Supreme Court districting	04/25/22	695	N
<i>Mississippi NAACP v. Mississippi Board of Elections</i>	Case No. 3:22-cv-00734- DPJ-HSO-LHS (S.D. Miss.)	Mississippi state legislative redistricting maps	12/02/22	474	N
<i>Nairne v. Ardoin</i>	Case No. 3:22-cv-00178- SDD-SDJ (M.D. La.)	Louisiana state legislative redistricting maps	03/14/22	737	Y (trial win, on appeal)
<i>Coca v. Dodge City, Kansas</i>	Case No. 6:22-cv-01274- EFM (D. Kan.)	At-large city council districts	12/15/22	461	N

A few points stand out from a review of our recent Section 2 litigation.

First, there is a strong public interest in blocking discriminatory voting changes before they take root and impact elections. When elections take place while voting rights litigation is pending and under conditions that are later found to be discriminatory, there is no way to adequately compensate the victims of voting discrimination after-the-fact. Voting rights are

²¹⁵ The Court ultimately granted preliminary injunctions under the First Amendment against the line-relief ban outside the 150-foot buffer zone and under the Materiality Provision of the Civil Rights Act against the provision against counting absentee ballots missing a birthdate, but only did so in 2023 for the 2024 elections.

different than other civil rights, because going through the legal process can only affect future elections. Unlike a case of employment or housing discrimination, where a person could be compensated monetarily or made whole by reinstatement of a job or apartment, elections cannot be re-run. Instead, voters can only seek relief for future elections, while those who won office under discriminatory regimes make policy and accrue the benefits of incumbency. Therefore, there is a strong public interest in ensuring the integrity of the voting process by insulating it from discrimination through prophylactic measures.

Making matters worse is that Section 2 cases—and voting discrimination cases generally—take substantial time to litigate, leaving discriminatory voting systems in place for months or even years before they are ultimately blocked or rescinded. The average length of time that the ACLU’s Section 2 cases have taken to litigate from filing to resolution is 676 days, or almost two years.²¹⁶ Even when we seek preliminary relief to protect voters while the case is pending, or otherwise litigate Section 2 cases on expedited schedules to mitigate the discriminatory impact on voters during elections, it still usually takes years to block discriminatory voting laws through Section 2 litigation. This reflects the fact that voting rights litigation, and Section 2 litigation in particular, is highly complex. Section 2 cases are among the most difficult cases tried in federal court. The Federal Judicial Center issued a study showing that voting rights cases impose almost four times the judicial workload of the average case, and that voting cases are the sixth most work-intensive type of the sixty-three types of cases that come before the federal district courts.²¹⁷

In the over a dozen ACLU Section 2 cases that resulted in favorable outcomes for our clients since the *Shelby County* decision, well more than a dozen elections were held between the time of filing and the ultimate resolution of that case. In the interim, hundreds of federal, state, and local government officials were elected under regimes that were later found by a court to be racially discriminatory or which were later abandoned by the jurisdiction.²¹⁸

²¹⁶ This number includes two rather unusual Section 2 cases filed in 2016 related to voter registration deadlines affected by Hurricane Matthew, which were completed in a matter of days (*FDP v. Scott* and *Bethea v. Deal*), as well as a COVID-19 related case which was also litigated on an abridged schedule (*People First Alabama v. Merrill*). If those three cases are excluded, the average length of the ACLU’s Section 2 cases is 848 days—well over two years from filing to resolution.

²¹⁷ *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization*, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 141 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project). This testimony was cited in the D.C. Circuit’s ruling in *Shelby County*. See *Shelby Cnty. v. Holder*, 679 F.3d 848, 872 (D.C. Cir. 2012), *rev’d on other grounds*, 570 U.S. 529 (2013). See also *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 96 (2006) (statement of Rob McDuff, Att’y, Jackson, Mississippi).

²¹⁸ This is a conservative estimate for a number of reasons. In calculating the number of elections held under a discriminatory regime (and the number of offices elected during those elections), we limited our calculation to federal and state elections, and excluded local elections (except where the elections practice challenged was a local practice). For example, for a challenge to a statewide law, we included the number of statewide elections that took place under the discriminatory regime, but excluded local elections from our calculation; we also excluded local government officials elected—either in a statewide election or in a local-only election.

For example, in 2011, the Justice Department blocked a redistricting plan for the Board of Education of Sumter County, Georgia, that would have reduced the number of African Americans on the board from six out of nine to two out of seven total members.²¹⁹ The proposed plan resulted in a 5-2 majority of white-preferred candidates on the Board of Education in a county where African Americans outnumbered white residents in total population (52% compared to 42.1%), voting age population (49.5% to 46.7%), and the number of registered voters (48.5% to 46.7%). Prior to this objection by the Department of Justice, the apportionment and method of election of members of the Sumter County Board of Education had for decades been the subject of multiple objections interposed by the Attorney General and litigation by private plaintiffs under Section 5.²²⁰ After *Shelby County*, the Board immediately implemented its plan to reduce the number of African Americans on the board. The ACLU promptly filed a Section 2 lawsuit in 2013 that was finally resolved *seven years later* in 2020, when a federal appeals court affirmed a lower court judgment finding that the plan violated the Voting Rights Act.²²¹ The trial court decision was rendered five years after the plan went into effect (and appeals were exhausted an additional two years later), meaning Black students and their parents were unlawfully deprived of equal representation on the school board during that time period.²²²

In 2014, the ACLU represented the Missouri State Conference of the NAACP, filing a lawsuit challenging the Ferguson-Florissant school district's at-large method of electing school board members under Section 2. In 2014, the student body of the district was approximately 80% African American, and African Americans constituted a slight minority of the district's voting age population. Due to racially polarized voting, there was not a single Black director on the seven-member school board as recently as 2014. In August 2016, the district court ruled in favor of the plaintiffs in a lengthy opinion finding that the at-large method of electing school board members was racially discriminatory. The school district appealed the decision to the Eighth Circuit, which unanimously affirmed the district court's decision.²²³ The school board then appealed to the U.S. Supreme Court, which denied cert in 2019, ending the case after four years of litigation—and the 2015, 2016, 2017, and 2018 elections were held during that time in which nine members of the school board were elected.

In August 2013, the ACLU and other organizations challenged a sweeping election law in North Carolina that enacted numerous restrictions on voting opportunities for Black voters. These restrictions included cuts to early voting, eliminating preregistration and same-day registration, and prohibiting out-of-precinct voting, which, collectively, about one million North Carolina voters had used in the 2012 presidential election. The legislature also enacted a highly restrictive photo ID requirement. In a unanimous opinion, the Fourth Circuit held that the law was enacted by the state legislature with the intent to

²¹⁹ *Field Hearing on Voting Rights and Election Administration in Georgia Before the Subcomm. on Elections of the H. Comm. on H. Administration*, 116th Cong. 1 (2019) (statement of Sean Young, Legal Director, ACLU of Georgia); see also *Wright v. Sumter Cnty. Bd. of Elections*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

²²⁰ *Edge v. Sumter Cnty. Sch. Dist.*, 775 F.2d 1509 (1985); 541 F. Supp. 55 (M.D. Ga. 1981).

²²¹ 979 F.3d 1282 (11th Cir. 2020).

²²² *Id.* at 1–2.

²²³ *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, No. 16-4511 (8th Cir. Jul. 3, 2018).

discriminate against the state’s Black voters.²²⁴ This case took 34 months to litigate—almost three years—from filing the complaint to a ruling by the Fourth Circuit. In the interim, the 2014 general election took place, with 188 federal and state officers elected—including a U.S. Senator, 13 congressional representatives, four state supreme court justices, and 170 seats for state legislature.²²⁵ In other words, almost 200 federal and state officials in North Carolina were elected under a discriminatory regime that the Fourth Circuit found “target[ed] African Americans with almost surgical precision.”²²⁶ While the law has since been struck down, there is no way to now compensate the Black voters of North Carolina—or our democracy itself—for that gross injustice.

The ACLU and others used all available tools to prevent this from happening, initially litigating this complex matter on an expedited timeline and seeking a preliminary injunction before the 2014 midterms, which the Fourth Circuit granted.²²⁷ Unfortunately, the Supreme Court stayed the Fourth Circuit’s ruling²²⁸—presumably due to concerns that the case was decided too close to the general election²²⁹—effectively leaving the discriminatory regime in place for the 2014 election. The Supreme Court later permitted the preliminary ruling from the Fourth Circuit to go into effect.²³⁰ Despite the plaintiffs ultimately prevailing on the final merits of the case²³¹ and using every legal tool available, with remarkable speed given the complexity of the case, there were no adequate legal avenues to prevent the discriminatory law from tainting the 2014 election.

Even more recently, in 2021, along with the ACLU of Alabama, Legal Defense Fund, and cooperating law firms, the ACLU challenged Alabama’s congressional redistricting plan as racially discriminatory under Section 2 and the Fourteenth Amendment.²³² Despite Alabama having stark racially polarized voting, continuing discrimination in the political system, and a Black voting-age population over 27% concentrated in compact areas, Black voters had an opportunity to elect a representative of their choosing in only one of Alabama’s seven districts. Alabama’s legislature accomplished this by “cracking,” or breaking up a region of the State called the Black Belt—an area of primarily majority Black counties that includes Montgomery and Selma—into four different congressional districts.

²²⁴ *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

²²⁵ See North Carolina State Board of Elections, 11/04/2014 General Election Results – Statewide, available at https://er.ncsbe.gov/?election_dt=11/04/2014&county_id=0&office=FED&contest=0.

²²⁶ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (“*NAACP v. McCrory*”).

²²⁷ *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

²²⁸ *North Carolina v. League of Women Voters of N.C.*, 135 S.Ct. 6 (Oct. 08, 2014).

²²⁹ See Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 449 (2016).

²³⁰ That is, despite temporarily staying that preliminary ruling, the Supreme Court declined to hear the case on appeal, leaving the preliminary injunction in place for subsequent local elections. See *North Carolina v. League of Women Voters of N. Carolina*, 135 S. Ct. 1735 (2015). This suggests that the Supreme Court’s stay of the preliminary injunction was issued due primarily to the proximity of the Fourth Circuit’s ruling to the 2014 general election. See Hasen, *supra* note 229.

²³¹ When the law was struck down after final judgment before the 2016 presidential election, see *NAACP v. McCrory*, 769 F.3d 224), the Supreme Court declined to hear an appeal of that decision as well. See *North Carolina v. N.C. State Conf. of NAACP*, 137 S. Ct. 1399 (2017).

²³² Compl., *Milligan v. Merrill*, No. 2:21-cv-01530-AMM, ECF No. 1 (N.D. Ala. Nov. 16, 2021).

In January 2022, a three-judge panel agreed that Alabama’s congressional plan unfairly diluted Black voters’ voting power.²³³ The court enjoined Alabama’s congressional map under Section 2 and gave the State an opportunity to redraw the map before the 2022 elections with a second district where Black Alabamians could have a fair chance at electing a candidate of their choice. Alabama did no such thing. It appealed and asked the Supreme Court to block the district court’s ruling. The Supreme Court did just that: it stayed the three-judge panel’s decision, with Justice Kavanaugh applying a new, enhanced version of *Purcell*²³⁴ and explaining that due to the proximity to the next election, the required changes to the congressional plan were not “feasible without significant cost, confusion, or hardship.”²³⁵ The Court also agreed to take up the case on the merits—a process of briefing, oral argument, and waiting that played out over the course of approximately 16 months. During this time, an entire election cycle elapsed under the maps the three-judge panel found highly likely to violate Section 2 of the VRA. It is likely no coincidence that the turnout gap between Black and white Alabama voters in the 2022 general election was the widest in over a decade—nine percentage points by one estimate²³⁶—and had Alabama’s lowest turnout in 36 years according to the Alabama Secretary of State’s own figures.²³⁷

In June 2023, the Supreme Court issued a landmark ruling that affirmed the district court’s decision and paved the way for a new, fairer congressional map for Black Alabamians.²³⁸ And indeed, Black voters will go to the polls this year to vote under a map that, for the first time in Alabama’s history, contains two districts in which they can elect candidates of their choice.

But this historic win for Black voters cannot erase the harm they suffered due to the *Purcell* principle’s application: 2022 congressional elections proceeded apace under the racially discriminatory map. Nor did the Court’s eventual decision affirming the injunction end the fight. After the Court’s ruling, Alabama chose defiance over compliance when given the chance to draw a new map. It did so by passing a new congressional map that it in the words of the district court “[did] not provide the remedy we said federal law requires.”²³⁹ The court was “disturbed by the evidence that the State . . . ultimately did not even nurture the ambition to provide the required remedy.”²⁴⁰ It remarked that it was “not aware of any other case in which a state legislature—faced with a federal court order . . . requiring a plan that provides an additional opportunity district—responded with a plan that the state

²³³ *Milligan v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022)

²³⁴ The *Purcell* principal is discussed in detail *infra*, 53.

²³⁵ *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring).

²³⁶ Kevin Morris & Coryn Grange, *10 Years After SCOTUS Gutted Voting Rights Act, Alabama Turnout Gap Is Worse*, Brennan Ctr. For Justice (June 22, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/10-years-after-scotus-gutted-voting-rights-act-alabama-turnout-gap-worse>.

²³⁷ John Sharp, *Alabama’s midterm election turnout worst in at least 36 years*, AL.com (Nov. 9, 2022), <https://www.al.com/election/2022/11/alabamas-midterm-election-turnout-worst-in-at-least-36-years.html>.

²³⁸ *Allen v. Milligan*, 599 U.S. 1 (2023).

²³⁹ *Milligan v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156 (N.D. Ala. Sept. 5, 2023).

²⁴⁰ *Id.* at *3-4.

concedes does not provide that district.”²⁴¹ And while this ended the fight for 2024, Alabama has persisted in defending its discriminatory map, with a trial set for February 2025.

The stay in *Milligan* also had downstream impacts in other redistricting cases. In Georgia, for example, the Supreme Court’s order came down on the first day of an evidentiary hearing to on the merits of Georgia’s state legislative and congressional maps. The district court concluded that the plaintiffs had shown the maps likely violated the VRA, but still denied preliminary relief on the basis of the *Milligan* stay.²⁴² While plaintiffs prevailed at trial this past October, congressional and state legislative elections in 2022 proceeded in the meantime under the discriminatory maps. Congressional and state legislative cases in Louisiana were similarly held hostage to the *Milligan* stay, denying the possibility of relief for 2022.²⁴³

Second, there are few tools available for the public to track and effectively respond to discriminatory voting changes that occur in their communities now that jurisdictions with long records of voting discrimination no longer have to notify the Attorney General of voting changes. As changes to voting practices are often more difficult to identify at the local level—where much voting discrimination continues to occur—the lack of effective methods to monitor voting changes has become a major problem.

Since Shelby County was decided, there have been approximately 150 Section 2 cases reported on Westlaw in which courts have determined liability, preliminary or otherwise, or in which the parties have settled. Of these roughly 150 Section 2 cases, the plaintiffs have been successful at least in part in 40 cases²⁴⁴ (the ACLU and/or its affiliates were counsel in 16 of these 40 successful Section 2 cases).²⁴⁵ And out of the 40 successful cases, 21 were successful challenges to local practices.

²⁴¹ *Id.*

²⁴² *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222 (N.D. Ga. 2022).

²⁴³ See *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022); *Nairne v. Ardoin*, No. CV 22-178-SDD-SDJ, 2022 WL 3756195, at *1 (M.D. La. Aug. 30, 2022).

²⁴⁴ While we have attempted to be systematic in this research, we do not purport to present a complete picture of all Section 2 litigation. Because this analysis is limited only to cases reported on Westlaw, it is inevitably under-inclusive in some respects. It does not, for example, include all of the ACLU cases discussed in the previous section—some of which have not been reported on Westlaw. Additionally, we include cases where the plaintiffs obtained the relief sought but the decision was later vacated as moot on appeal, where the plaintiffs obtained relief through an election cycle but later had the decision reversed, and where the plaintiffs obtained relief through settlement. This list does not include cases still pending on appeal, but does include cases such as *Milligan* where although the case is still pending, plaintiffs obtained relief for at least one election cycle that cannot be undone.

²⁴⁵ See *Fla. Democratic Party v. Scott*, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016); *Jackson v. Wolf Point*, 2014 WL 1794551 (D. Mont. April 24, 2014) (settled); *Mo. NAACP v. FFSD*, 894 F.3d 924 (8th Cir. 2018); *Montes v. City of Yakima*, 2015 WL 11120966 (E.D. Wash. June 19, 2015); *Navajo Nation Human Rights Comm’n v. San Juan Cnty.*, 281 F. Supp. 3d 1136 (D. Utah 2016); *NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Ohio NAACP v. Husted*, 768 F.3d 524 (2016) (vacated as moot, but ultimately settled); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297 (M.D. Ga. 2018).

<u>Successful Section 2 Cases Decided Since <i>Shelby County</i> That Are Reported on Westlaw</u>							
	<u>Case Name</u>	<u>Citation / Case Number</u>	<u>State</u>	<u>Year</u>	<u>Dilution or Denial</u>	<u>Practice Challenged</u>	<u>Def.</u>
1	Molina v. County of Orange	2013 WL 3009716 (S.D.N.Y. June 14, 2013)	NY	2013	Dilution	County Redistricting	County
2	Hubbard v. Lone Star College System	No. 4:13-cv-01635, ECF No. 14 (S.D. Tex. Oct. 11, 2013)	TX	2013	Dilution	At-Large Districts	University
3	Wandering Medicine v. McCulloch	906 F. Supp. 2d 1083 (D. Mont. 2012), vacated as moot 544 Fed. Appx. 699 (9th Cir. 2013).	MT	2013	Denial	Polling Places; Registration Deadline	State
4	Allen v. City of Evergreen	2014 WL 12607819 (S.D. Ala. Jan. 13, 2014)	AL	2014	Dilution	City Redistricting	City
5	Jackson v. Bd. of Trustees of Wolf Point	2014 WL 1794551 (D. Mont. Apr. 21, 2014)	MT	2014	Dilution	School Redistricting	City
6	Favors v. Cuomo	39 F. Supp. 3d 276 (E.D.N.Y. 2014)	NY	2014	Dilution	State Legislative Redistricting	State
7	OH NAACP v. Husted	768 F.3d 524 (6th Cir. 2014)	OH	2014	Denial	Early Voting	State
8	Benavidez v. Irving Indep. Sch. Dist.	2014 WL 4055366 (N.D. Tex. Aug. 15, 2014)	TX	2014	Dilution	At-Large Elections	School Board
9	Ga. NAACP v. Fayette County	118 F. Supp. 3d 1338 (N.D. Ga. 2015)	GA	2015	Dilution	At-Large Elections	County
10	Montes v. City of Yakima	2015 WL 11120966 (E.D. Wash. June 19, 2015)	WA	2015	Dilution	At-Large Elections	City
11	MI APRI v. Johnson	833 F.3d 656 (6th Cir. 2016)	MI	2016	Denial	Straight-Ticket Voting	State

<u>Successful Section 2 Cases Decided Since <i>Shelby County</i> That Are Reported on Westlaw</u>							
	<u>Case Name</u>	<u>Citation / Case Number</u>	<u>State</u>	<u>Year</u>	<u>Dilution or Denial</u>	<u>Practice Challenged</u>	<u>Def.</u>
12	Missouri NAACP v. FFSD	201 F.Supp.3d 1006 (E.D. Mo. 2016)	MO	2016	Dilution	At-Large Elections	School Board
13	NC NAACP v. McCrory	831 F.3d 204 (4th Cir. 2016)	NC	2016	Denial	Voter ID; Early Voting; Same Day Registration	State
14	Brakebill v. Jaeger	2016 WL 7118548 (D.N.D. Aug. 1, 2016), rev'd 932 F.3d 671 (8th Cir. 2019)	ND	2016	Denial	Voter ID	State
15	Sanchez v. Cegavske	214 F. Supp. 3d 961 (D. Nev. 2016)	NV	2016	Denial	Early Voting	State
16	Pope v. County of Albany	94 F. Supp. 3d 302 (N.D.N.Y. 2015)	NY	2016	Dilution	County Redistricting	County
17	Veasey v. Abbott	830 F.3d 216 (5th Cir. 2016)	TX	2016	Denial	Voter ID	State
18	Navajo Nation v. San Juan Cnty.	162 F. Supp. 3d 1162 (D. Utah, Feb. 19, 2016), aff'd 929 F.3d 1270 (10th Cir. 2019)	UT	2016	Dilution	Districting	County
19	Bear v. County of Jackson	2017 WL 52575 (D.S.D. Jan. 4, 2017)	SD	2017	Denial	Early Voting	County
20	Patino v. City of Pasadena	230 F. Supp. 3d 667 (S.D. Tex. 2017)	TX	2017	Dilution	County Redistricting	County
21	Huot v. City of Lowell	280 F. Supp. 3d 228 (D. Mass. 2017)	MA	2017	Dilution	At-Large Districts	City
22	Navajo Nation Human Rights	281 F. Supp. 3d 1136 (D. Utah 2017)	UT	2017	Denial	Vote by Mail	County

<u>Successful Section 2 Cases Decided Since <i>Shelby County</i> That Are Reported on Westlaw</u>							
	<u>Case Name</u>	<u>Citation / Case Number</u>	<u>State</u>	<u>Year</u>	<u>Dilution or Denial</u>	<u>Practice Challenged</u>	<u>Def.</u>
	Comm. v. San Juan County						
23	U.S. v. City of Eastpointe	378 F. Supp. 3d 589 (E.D. Mich. 2019)	MI	2017	Dilution	At-Large Districts	City
24	Georgia Coalition for the People's Agenda v. Kemp	347 F. Supp. 3d 1251 (N.D. Ga. 2018)	GA	2018	Denial	Voter Purges	State
25	Thomas v. Bryant	366 F. Supp. 3d 786 (S.D. Miss. Feb. 16, 2019), vacated as moot 961 F.3d 800 (5th Cir. 2020) (en banc)	MS	2018	Dilution	State districting	State
26	Ala. State Conf. of the NAACP v. City of Pleasant Grove	2019 WL 5172371 (N.D. Ala. Oct. 11, 2019)	AL	2019	Dilution	At-Large Elections	City
27	Flores v. Town of Islip	382 F. Supp. 3d 197 (E.D.N.Y. 2019)	NY	2019	Dilution	At-Large Districts	Town
28	Blackfeet Nation v. Stapleton	Case No. 4:20-cv-95 (D. Mont. Oct. 15, 2020)	MT	2020	Denial	Failure to open Satellite election office	State
29	Harding v. Edwards	484 F. Supp.3d 299 (M.D. La. 2020)	LA	2020	Denial	Early Voting	State
30	Molina v. County of Orange	2013 WL 3009716 (S.D.N.Y. 2013)	NY	2020	Dilution	Districting	County
31	NAACP v. East Ramapo Central School District	462 F. Supp. 3d 368 (S.D.N.Y., May 25, 2020), aff'd 984 F.3d 213 (2d Cir. 2021)	NY	2020	Dilution	Districting	School District

<u>Successful Section 2 Cases Decided Since <i>Shelby County</i> That Are Reported on Westlaw</u>							
	<u>Case Name</u>	<u>Citation / Case Number</u>	<u>State</u>	<u>Year</u>	<u>Dilution or Denial</u>	<u>Practice Challenged</u>	<u>Def.</u>
33	Spirit Lake Tribe v. Jaeger	2018 WL 5722665 (D.N.D. Nov. 1, 2018)	ND	2020	Denial	Voter ID	State
34	Baltimore Cnty. Branch of NAACP v. Baltimore Cnty.	No. 21-CV-03232-LKG, 2022 WL 657562, at *1 (D. Md. Feb. 22, 2022)	MD	2022	Dilution	Districting	County
35	Whitest v. Crisp Cnty. Sch. Dist.,	601 F. Supp. 3d 1338 (M.D. Ga. 2022), aff'd, No. 22-11826, 2023 WL 8627498 (11th Cir. Dec. 13, 2023)	GA	2022	Dilution	At-Large Elections	School District
36	Milligan v. Allen	Milligan v. Merrill, 582 F. Supp. 3d 924 (N.D. Ala. 2022), aff'd sub nom. Allen v. Milligan, 599 U.S. 1 (2023)	AL	2023	Dilution	Districting	Congressional
37	Soto Palmer v. Hobbs	No. 3:22-CV-05035-RSL, 2023 WL 5125390 (W.D. Wash. Aug. 10, 2023), cert. denied before judgment sub nom. Trevino v. Palmer, No. 23-484, 2024 WL 675259 (U.S. Feb. 20, 2024)	WA	2023	Dilution	Districting	State Legislature
38, 39	Alpha Phi Alpha Fraternity Inc. v. Raffensperger; Pendergrass v. Raffensperger	No. 1:21-CV-05337-SCJ, 2023 WL 7037537 (N.D. Ga. Oct. 26, 2023)	GA	2023	Dilution	Districting	State & Congressional

<u>Successful Section 2 Cases Decided Since <i>Shelby County</i> That Are Reported on Westlaw</u>							
	<u>Case Name</u>	<u>Citation / Case Number</u>	<u>State</u>	<u>Year</u>	<u>Dilution or Denial</u>	<u>Practice Challenged</u>	<u>Def.</u>
40	Robinson v. Ardoin; Galmon v. Ardoin	605 F. Supp. 3d 759 (M.D. La.), cert. granted before judgment, 142 S. Ct. 2892 (2022), and cert. dismissed as improvidently granted, 143 S. Ct. 2654 (2023), and vacated and remanded, 86 F.4th 574 (5th Cir. 2023)	LA	2023	Dilution	Districting	Congressional

For the ACLU and other voting rights advocates, half the battle is simply learning about new voting changes. This is particularly true at the local level, where there are often fewer resources available to assist community members to examine and respond to changes in voting laws. For example, in Irwin County, Georgia, the Board of Elections in 2017 attempted to close the single polling location that existed in the only Black neighborhood in the county, contrary to the recommendations of the non-partisan Association of County Commissioners of Georgia. While the Board alleged that it wanted to close this polling place to save costs, it also opted to keep open a polling place located at the Jefferson Davis Memorial Park in a neighborhood that was 99% white. After the ACLU of Georgia threatened litigation, the Board rejected this discriminatory proposal. The ACLU of Georgia only learned about these proposed closures in this rural Georgia county because one of its members happened to live in the area and alerted the affiliate.²⁴⁶

In 2018, in Randolph County, Georgia, which is in the southwest corner of the state and is 60% Black, the Board of Elections tried to close seven of the nine polling locations in the county. The ACLU of Georgia only found out because a resident happened to read a small notice in the legal section of a local weekly paper and reached out for help. Our affiliate had less than two weeks before the 2018 general election to undertake intensive advocacy, including the threat of litigation, to counter the efforts by the Board to close the voting sites. Only after significant resources were invested in legal, media, and organizing work did enough public scrutiny build to force the Board to vote to keep the polling locations open and end their discriminatory efforts. During the course of our advocacy, it was discovered that the Board had hired a consultant, handpicked by Secretary of State Brian Kemp who

²⁴⁶ *Field Hearing on Voting Rights and Election Administration in Georgia Before the Subcomm. on Elections of the H. Comm. on H. Administration*, 116th Cong. 1 (2019) (statement of Sean Young, Legal Director, ACLU of Georgia).

was running for Governor at the time, who recommended closing polling places in counties that were almost all disproportionately Black.²⁴⁷

These are just two recent examples from Georgia, which has 159 counties. The ACLU was only able to respond when alerted by residents who became aware of voting changes by happenstance. Additionally, more advocacy and resources were required to block discriminatory voting changes after the fact than those needed in a process where officials are required to affirmatively notify the public in a reasonable manner. Under preclearance, individuals, community organizations, and other impacted stakeholders could—and often did—weigh in with the Justice Department to share their views on the proposed change and its impact on voters. Without legal requirements for fair notice of voting changes, jurisdictions do not provide adequate public notice of changes in voting procedures until it is too late. This leaves the public unable to provide input on decisions affecting the voting process before implementation. Since the voting public no longer has a formal say on the propriety of voting changes through the preclearance process, voting changes are often advanced by local officials without consideration of public input or reaction. Unfortunately, since *Shelby County* over 200 polling places have closed in Georgia.

Finally, it bears mentioning that the loss of preclearance has effectively halted the Justice Department’s federal observer program, another resource no longer available to monitor the conduct of local elections for voting discrimination.²⁴⁸ The coverage formula invalidated by *Shelby County* also served as a basis for the Attorney General to identify jurisdictions to send federal observers.²⁴⁹ This outcome has substantially weakened the federal government’s ability to identify potential election issues and protect voters from discrimination.

IV. SOLUTIONS IN THE VOTING RIGHTS ADVANCEMENT ACT: BLOCKING DISCRIMINATORY VOTING CHANGES BEFORE THEY IMPACT VOTERS

Voting discrimination not only persists—after the *Shelby County* decision, but it has also become frenzied. Stronger protections for voting rights are needed to prevent voting discrimination. Our experience highlights the need for restored and enhanced voting rights protections, including new preclearance processes based on current conditions, a more protective standard for obtaining and sustaining preliminary relief in voting discrimination cases, and robust notice and transparency requirements necessary to block official acts of

²⁴⁷ *Ibid.*

²⁴⁸ As part of the House Judiciary Committee’s June 29 hearing on the need to enhance the protections of the Voting Rights Act, James Tucker, who serves as pro bono counsel to the Native American Rights Fund, submitted written testimony on the need for a federal observer program, which the ACLU supports. See Testimony of Dr. James Thomas Tucker, *The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the U.S. House Comm. on the Judiciary* (June 29, 2021), <https://docs.house.gov/meetings/JU/JU10/20210629/112839/HHRG-117-JU10-Wstate-TuckerJ-20210629.pdf>.

²⁴⁹ See U.S. DEP’T OF JUSTICE, FACT SHEET ON JUSTICE DEPARTMENT’S ENFORCEMENT EFFORTS FOLLOWING SHELBY COUNTY DECISION, <https://www.justice.gov/crt/file/876246/download>.

voting discrimination before they are implemented. Each of these measures aim to provide prophylactic protection for voters.

a. A robust preclearance regime that addresses current patterns of discrimination.

The rights of voters of color to have equal access to the ballot and have their vote counted equally cannot be adequately safeguarded without a restored and more robust preclearance regime. As detailed at length in the preceding sections of this report, preclearance had been incredibly effective in preemptively protecting the rights of all voters in jurisdictions that have long records of voting discrimination. This discrimination has not ended. In fact, it has only intensified in recent years, taking on new forms and patterns that target or disproportionately impact Black, Latino, Asian American, Native, disabled, and other marginalized voters. And there is no other remedy that Congress can provide that would have the powerful prophylactic and deterrent effect of a strong preclearance regime that stops racial discrimination in voting before it can impact elections to the irreparable detriment of voters. After-the-fact litigation, while important, is simply too protracted and costly and allows elections to continue under discriminatory rules and conditions.

One very clear and recent example of present-day discrimination is our case of *Allen v. Milligan*, mentioned in the previous section.²⁵⁰ The process between the three-judge trial court holding that the case was not particularly close and granting a preliminary injunction, the Supreme Court put the ruling on hold during appeal, and ultimately agreeing that the map discriminated against Black voters in violation of Section 2 of the VRA spanned 16 months. In the meantime, the 2022 congressional elections took place under the racially discriminatory map. Again, it is impossible to remedy the gross injustice Black Alabama voters faced in this case, having their voting strength illegally stifled despite every effort under what is left of the VRA. And even after the Supreme Court finally agreed that Alabama's map was racially discriminatory, the state drew a new map that defied the judiciary and continued to discriminate against Black Alabamians, with the three-judge court finding "that the circumstances surrounding the enactment of the 2023 Plan reflect 'a significant lack of responsiveness on the part of elected officials to the particularized needs' of Black voters in Alabama" and "clearly it illustrates the lack of political will to respond to the needs of Black voters in Alabama in the way that we ordered."²⁵¹

What's more, the fight in Alabama continues. While a new map is in place for 2024, Alabama persists in defending its discriminatory map for future elections. This is one example among many demonstrating that discrimination in voting is still very real, and that no other tool apart from a strong preclearance regime can adequately safeguard voters from discrimination.

Additionally, the John Lewis Voting Rights Advancement Act's inclusion of a practice-based preclearance mechanism is a vital supplement to geographic preclearance that covers jurisdictions with the worst records of voting discrimination. Practice-based preclearance is based on current evidence of discrimination that adheres to Chief Justice John Roberts's

²⁵⁰ *Allen v. Milligan*, 599 U.S. 1 (2023).

²⁵¹ *Milligan v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156 at *68, *70 (N.D. Ala. Sept. 5, 2023).

pillar of equal sovereignty, and triggers preclearance based on the record of the voting practice itself being discriminatory when used in combination with demographic triggers. The covered practices include practices that we have observed are used to discriminate against voters of color, including changes to methods of elections, jurisdiction boundaries, redistricting, documentation or qualifications to vote, the availability of multilingual voting materials, and polling place locations and resources.²⁵² As documented in this report, as well as our 2006 report to Congress for the last reauthorization of the Voting Rights Act,²⁵³ the ACLU's experience demonstrates that these types of voting changes are the most common practices adopted to discriminate, and practice-based preclearance would stop the most pernicious uses of them before they go into effect in jurisdictions with a significant minority population or growth in population.

b. A more protective preliminary injunction standard, and one mindful of the expansion of the “*Purcell* doctrine.”

Remedial legislation should also effectively address discriminatory changes arising in places that do not meet the threshold for being covered under preclearance. These voters must also have a legal mechanism available to help effectively block harmful voting changes before they are enforced without having to wait for years of protracted litigation to be resolved or have courts find a likelihood of success on the merits but then pause any relief because an election is several months away. The John Lewis Voting Rights Advancement Act provides another important safeguard against voting discrimination in jurisdictions that would not be covered by preclearance by revising the common law standard for obtaining and sustaining a preliminary injunction in federal voting rights litigation, facilitating the ability of plaintiffs to block potentially discriminatory voting laws before they can taint an election.

A flexible preliminary injunction standard that provides heightened protection for possible violations of federal voting rights laws underscores what makes the right to vote different from other civil rights. In theory, victims of discrimination in other areas, such as in employment or housing, can be compensated after the fact with money damages or equitable relief and possibly made whole. But once an election occurs under discriminatory conditions, disenfranchised voters have irrevocably lost their ability to participate in the democratic process, which cannot be—and would not be—compensated with monetary damages or any other type of possible relief for that election. Government officials are elected, the benefits of incumbency vested, and there is no way to undo or mitigate the discrimination that has occurred during an election. For these reasons, perhaps more so than in any other area, discrimination in voting *must* be prevented before it occurs. Our experience illustrates that stronger statutory protections are necessary for that prophylactic purpose.

Importantly, Congress has full authority to modify the standards for granting injunctive relief through legislation, and this authority extends to courts' issuance of preliminary injunctions. Preliminary injunctions are considered by courts as an “extraordinary remedy,”

²⁵² H.R. 4, 116th Cong. § 4A (2019).

²⁵³ See generally McDONALD, *supra* note 27.

because their issuance occurs before parties' rights have been fully adjudicated.²⁵⁴ Yet Congress, in its judgment, can determine that the public interest warrants special protection in certain situations and has the discretion to enact a more lenient standard. The Supreme Court has expressly recognized this authority in a series of decisions dating back 75 years and repeatedly concluded that Congress may revise or alter the standard for issuing injunctive relief. In fact, a review of relevant case law shows that courts have never called into question Congress's power to modify the standards for injunctive relief. Most often, the court's inquiry has focused on whether Congress had in fact intended to change the conditions under which a plaintiff may acquire injunctive relief. Here, we evaluate congressional authority to revise the standard for granting preliminary injunctive relief and conclude that enacting a more protective preliminary injunction standard is wholly in line with its authority.

Under the common law approach—reflected in Rule 65 of the Federal Rules of Civil Procedure—federal courts traditionally consider four factors when evaluating whether to grant preliminary injunctive relief: (i) the strength of the plaintiff's claim on the merits; (ii) whether it is likely the plaintiff would suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in the plaintiff's favor; and (iv) whether an injunction is in the public interest.²⁵⁵ There is some fluidity as to the precise manner by which these factors are applied by courts.²⁵⁶

Notwithstanding the common law method, Congress may legislate the standard by which a preliminary injunction may be granted or denied by a court. The Supreme Court has explicitly and repeatedly recognized Congress's authority to alter the traditional equitable considerations for granting injunctive relief, including the issuance of preliminary and final injunctions.²⁵⁷ The Court initially recognized this authority with respect to courts ordering final equitable relief, including permanent injunctions. The Court then extended its reasoning to conclude that Congress has the same general authority with respect to preliminary injunctions, since the analytical frameworks for each form of relief are nearly identical.²⁵⁸ The Supreme Court has also held that Congress can statutorily require that courts issue injunctions automatically when merits violations are found of particular laws, suggesting Congress's power to regulate courts' equity jurisdiction is broad.²⁵⁹

²⁵⁴ See generally Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *FEDERAL PRACTICE AND PROCEDURE* § 2948 (2d ed. 1995).

²⁵⁵ *Id.*; see also *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

²⁵⁶ Several circuits apply a “sliding scale” approach, where a plaintiff that demonstrates a strong likelihood of success on the merits may be held to a lower standard with respect to the other factors under consideration, and, conversely, a plaintiff who does not make a strong merits showing would be required to make a stronger showing of the other factors. Other circuits adhere to a complete evaluation of all four factors.

²⁵⁷ See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006).

²⁵⁸ See *Amoco Production Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987).

²⁵⁹ See *TVA v. Hill*, 437 U.S. 153 (1978) (holding that Congress required in the Endangered Species Act that a final injunction automatically issues once a merits violation is shown).

The Court has also expressed that congressional intent must be clear in its legislative command when revising courts' equity jurisdiction. In the case *Weinberger v. Romero-Barcelo*, the Court stated:

“Congress may intervene and guide or control the exercise of the courts’ discretion, but [the Court does] not lightly assume that Congress has intended to depart from established principles ‘Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.’”²⁶⁰

Congress has revised preliminary injunction standards as part of their remedial provisions in several areas of federal law. Each of these statutes also have been subject to judicial review acknowledging the legislatively modified standard. These statutes include the Petroleum Marketing Practices Act,²⁶¹ Endangered Species Act,²⁶² National Labor Relations Act,²⁶³ Federal Trade Commission Act,²⁶⁴ and the Securities Exchange Acts of 1933 and 1934.²⁶⁵

A more protective preliminary injunction standard is particularly important because in recent years, there has been a general reluctance by courts to issue preliminary injunctions requested by impacted voters, particularly when the voting change in question is being challenged in proximity to an election.²⁶⁶ This judicial reticence extends to the Supreme Court, which in a series of recent decisions has reversed or stayed preliminary injunctions that were granted by lower courts close to the date of an election.²⁶⁷ This judicial doctrine is sometimes referred to as the “*Purcell* principle” and refers to a judicial policy prominently acknowledged in *Purcell v. Gonzalez*, a 2006 per curiam Supreme Court opinion indicating that courts should not issue orders changing election rules in close proximity to an election.²⁶⁸

²⁶⁰ 456 U.S. 305, 313 (1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944)

²⁶¹ See 15 U.S.C. § 2805(b); *Mac’s Shell Serv., Inc. v. Shell Oil Prods. Co. LLC*, 559 U.S. 175 (2010).

²⁶² See 16 U.S.C. § 1536; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); see also *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782 (9th Cir. 2005); *Friends of the Earth v. United States Navy*, 841 F.2d 927 (9th Cir. 1988); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

²⁶³ See 29 U.S.C. §160 (j); *Chester ex rel. N.L.R.B. v. Grane Healthcare Co.*, 666 F.3d 87 (3d Cir. 2011).

²⁶⁴ See 15 U.S.C. 53(b); *FTC v. Inc. 21com Corp.*, 688 F. Supp. 2d 927 (N.D. Cal 2010).

²⁶⁵ See 15 U.S.C. § 77t(b); 15 U.S.C. § 78u(d); *SEC v. Bravata*, 763 F.Supp.2d 891 (E.D. Mich. 2011); *SEC v. Homestead Properties, L.P.*, 2009 WL 5173685 (C.D. Cal. 2009); *SEC v. Schooler*, 912 F. Supp. 2d 1341 (S.D. Cal. 2012).

²⁶⁶ See Hasen, *supra* note 229, at 449.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 428. In a 2006 per curiam opinion, the Supreme Court in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), vacated a Ninth Circuit injunction which had temporarily blocked use of Arizona’s strict new photo ID law. The Court in *Purcell* criticized the Ninth Circuit both for not explaining its reasoning and for issuing an order just before an election which could cause voter confusion and problems for

Aggressive application of the *Purcell* principle in the past decade has meant that voting laws ultimately found to be unlawful remain in place for years—even if courts agree that the laws are racially discriminatory—simply because the reviewing federal court would have had to block them in the period “close” to an election. But “close” to an election has become a moving target such that courts now often refrain from intervening in some cases several months before an election. As a result, many elections take place, and candidates assume office, under discriminatory or otherwise unlawful regimes as the window to challenge them narrows.²⁶⁹

Notably, the original *Purcell* decision itself is a narrow, fact-specific ruling, which included a simple warning that “[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls,” and that “[a]s an election draws closer, that risk will increase.”²⁷⁰ It bears little resemblance to the so-called “*Purcell* principle” that hovers like a dark cloud over voting rights today. The crux of the decision was procedural error and the relationship between trial and appellate courts. Nothing in *Purcell* purports to assert a hard-and-fast rule that courts should never intervene within several months of an election.

Yet, following this Supreme Court decision, courts now cite *Purcell*—a narrow decision that described commonsense factors that a court should consider when an election is imminent—as an inviolable bar on granting any relief in the period before an election.²⁷¹ In the years following this brief, unsigned decision that spawned the *Purcell* principle, courts have used this “principle” to hijack the case-specific analysis for obtaining preliminary relief. The instruction to consider possible voter confusion and administrative burdens that may ensue if a court intervenes close to an election now works as something close to a bright-line rule against entering relief for plaintiffs several months from Election Day—even where the sought relief would neither confuse voters nor impose administrative burdens.

At the same time, courts have applied the rule inconsistently, often with little explanation, making it harder for officials and voters alike to understand why courts have blocked relief for voters in a specific case. This fuels the perception that the principle is being used in one

those administering elections. In the 2014 election cases, for example, the Court consistently voted against changing the electoral status quo just before the election.

²⁶⁹ This concern is magnified in the wake of *Shelby County* and the loss of the preclearance regime that would have prevented many of these laws from being enacted—or even proposed in the first instance.

²⁷⁰ *Purcell*, 549 U.S. at 4–5. In 2006, plaintiffs—residents of Arizona, Indian tribes, and community organizations—moved for a preliminary injunction barring the state from implementing a voter identification requirement; the district court denied the request, but the Ninth Circuit Court of Appeals granted in a short, three-line order. See Order, *Gonzalez v. Arizona*, No. 06-16702, ECF No. 16 (9th Cir. Sept. 18, 2006). The defendants—the State of Arizona and county election officials—appealed to the Supreme Court, which dissolved the Court of Appeals’ injunction. Considering the election’s imminence, the need for clarity, and given the Ninth Circuit’s lack of explanation, the Supreme Court vacated the Ninth Circuit’s injunction and allowed the election to proceed under new voter ID rules. *Purcell*, 549 U.S. at 4–5.

²⁷¹ See Hasen, *supra* note 229, at 428.

direction only: to stymie voting rights advocates' efforts to protect voters from discriminatory laws and practices, and to block those *before* they can taint an election.

But the *Purcell* principle is likely inapposite where Congress has legislated a preliminary injunction standard because it is a judicially created doctrine based on policy considerations regarding the public interest, not a matter of constitutional interpretation.²⁷² It may therefore be overridden by Congress through legislation. Indeed, Congress is generally the more suitable body to evaluate and make determinations regarding what is in the public interest with respect to the enforcement of federal laws and availability of legal remedies for violations of those laws. To be sure, there is an exceptionally strong public interest in ensuring the conduct of free and fair elections.

c. Notice and transparency provisions

On a basic level, notice of proposed election changes and their impact is critical for community awareness of changes in voting procedures so voters can comply, cast an effective ballot, or provide feedback to officials as to how the change will impact voters' ability to exercise the franchise. Thus, election officials should provide reasonable notice of potential changes of voting changes before implementation. Before *Shelby County*, Section 5 not only prevented racially discriminatory changes from going into effect, but also functioned as a notice requirement with the Justice Department serving as a central hub for the Section 5 submissions.²⁷³ The public was able to receive notice of the proposed voting changes, review them, and provide the Justice Department with comments regarding their impact. Now, since Section 5 has been immobilized, a huge and often prohibitive part of the battle to protect voting rights is finding out where and when discrimination is occurring, particularly at the local.

The John Lewis Voting Rights Advancement Act includes notice and transparency requirements, separate from the federal preclearance process, to ensure that voters, especially minorities, are able to defend their right to vote against sudden, arbitrary, or discriminatory elections changes. Moreover, notice requirements pose an exceedingly low burden on jurisdictions and come with a high reward to the public and to voters. These notice and transparency requirements apply to all election changes related to federal elections, polling place resources during federal elections, and changes relating to federal, state, or local constituencies and political boundaries.

²⁷² See Appendix B, which demonstrates the issues and inconsistencies with how courts apply the *Purcell* principle that effectively stymie efforts by voting rights advocates to block discriminatory laws and practices *before* an election.

²⁷³ See Department of Justice, Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, <https://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-1965-amended> (last updated Aug. 6, 2015); Archive of Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, <https://www.justice.gov/crt/archive-notices-section-5-activity-under-voting-rights-act-1965-amended> (last updated Nov. 16, 2017).

Conclusion

The price of federal inaction to protect the voting rights of Americans is high, and history offers a myriad of examples demonstrating its cost to the nation. Congress must act now to cement the legacy of the Voting Rights Act and guard the rights of all Americans. Our history is a continuum of periods where galvanized voters exercise their political rights followed by largescale efforts by those with power to quash that political rise. Historical and current evidence show that the right to vote remains perilous for many Americans. Congress must realize their bounded duty to fulfill the promise of the Fourteenth and Fifteenth Amendments and restore and strengthen the Voting Rights Act for a new generation.

Appendix A

The cases summarized in this appendix are cases where the ACLU provided direct representation on behalf of plaintiffs or participated as amicus. We include cases that were active as of, or filed in, 2006 or later. The year listed next to each case represents the year the initial complaint was filed.

1. **Schwier v. Cox – Georgia 2000**

With some exceptions, the Privacy Act of 1974 makes it unlawful for “any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”²⁷⁴ The law protects individuals registering to vote from having to disclose their social security numbers unless the state required such disclosure before the Privacy Act was enacted. In 1999, after they moved to Walton County, Georgia, and tried to register to vote, Deborah and Theodore Schwier were told they had to disclose their social security numbers. When they declined to do so, the county rejected their voter registration applications. In October 2000, the ACLU filed suit on behalf of the Schwierts under the Privacy Act and the Civil Rights Act of 1964,²⁷⁵ which makes it illegal to deny anyone the right to register and vote for any act or omission immaterial to determining voting qualifications.²⁷⁶ The suit sought to require election officials to permit the Schwierts to register and vote without disclosing their social security numbers.²⁷⁷

The court preliminarily enjoined the county, allowing the Schwierts to vote if they tendered their social security numbers under seal. Their social security numbers would not be permanently entered into election records and would be destroyed if they ultimately prevailed in the suit.²⁷⁸ Much of the subsequent dispute turned on whether Georgia’s voter registration law qualified for the Privacy Act’s exception, i.e. whether Georgia required voters to disclose their social security numbers prior to January 1, 1975. The district court initially ruled for the state, holding that neither the Privacy Act nor the Civil Rights Act of 1964 gave the plaintiffs a private right of action.²⁷⁹ The plaintiffs appealed, and the United States intervened to defend the Privacy Act’s constitutionality. The court of appeals reversed and remanded, holding that both the Privacy Act and the Civil Rights Act afforded

²⁷⁴ P.L. 93-579, § 7(a)(1), 88 Stat. 1896.

²⁷⁵ See Docket Sheet, *Schwier v. Cox*, No. 1:00-cv-2820 (N.D. Ga. Oct. 26, 2000).

²⁷⁶ See Pub. L. No. 88-352, § 101, 78 Stat. 241.

²⁷⁷ LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 181-184 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

²⁷⁸ See *Schwier v. Cox*, 412 F.Supp.2d 1266, 1268 (N.D. Ga. 2005).

²⁷⁹ See *Schwier v. Cox*, 340 F.3d 1284, 1286 (11th Cir. 2003).

a private right of action.²⁸⁰ The court's opinion was significant because other courts had previously rejected private suits under both statutes.²⁸¹

On remand, the district court ruled for the plaintiffs. The court concluded that Georgia's voter registration system did not qualify for the Privacy Act's exception because the state statute's plain language as of December 31, 1974, asked registrants for their social security number "if known at the time of application" and did not uniformly require disclosure.²⁸² The court also held that the state violated the Civil Rights Act of 1964 because the disclosure of applicants' social security numbers was not "material" to whether they were qualified to vote under state law.²⁸³ On appeal, the court of appeals affirmed the district court's judgment.²⁸⁴

2. Thompson v. Glades County – Florida 2000

In 2000, the ACLU filed suit on behalf of Billie Thompson, the first African American to run for the Glades County school board and only the second African American to run for countywide office, against Glades County, Florida. The suit challenged the at-large method of election for the five-member county commission and board of education as diluting minority voting strength in violation of Section 2 and the Constitution.²⁸⁵ In 1998, when Thompson ran for the school board, the population of the county was 10,576, 10.5% of which was African American. Thompson received 42% of the vote in the Democratic primary against the incumbent but was defeated. The suit also alleged that the State of Florida had a racially discriminatory intent in enacting the at-large method of election systems, which had a racially discriminatory effect.

Glades County was sparsely populated and extremely economically depressed, with employment dependent mostly on citrus farming. African Americans did not fare well economically compared with whites: Black residents' per capita income was half that of whites, the unemployment rate of Blacks was double that of whites, and the poverty rate of Blacks was three times that of whites. There was also a history of official discrimination against African Americans in Glades County, including discrimination against African Americans attempting to exercise their rights to the franchise.²⁸⁶ A trial was held in October 2001, in which expert testimony presented the history of racial discrimination in Florida, and in Glades County in particular, and the discriminatory purpose behind the

²⁸⁰ *Ibid.*

²⁸¹ LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 184 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

²⁸² *Schwier v. Cox*, 412 F.Supp.2d 1266, 1274-75 (N.D. Ga. 2005).

²⁸³ *Id.* at 1276.

²⁸⁴ *Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006).

²⁸⁵ Plaintiffs' Complaint for Injunctive and Declaratory Relief, No. 2:00-cv-212 (M.D. Fla. May 12, 2000).

²⁸⁶ *See id.* at ¶ 15.

state's switch to at-large methods of elections and the extent of racially polarized and racial bloc voting.²⁸⁷

Three years after the trial, the court issued a condensed decision finding that, although white voters in Glades County tended to vote as a bloc to defeat candidates of choice of African Americans and acknowledged the long history of racial discrimination behind the at-large election system, the plaintiffs failed to establish a Section 2 or a constitutional violation.²⁸⁸ The court appeared to base its decision on an erroneous conclusion that there was no viable remedy, rejecting an illustrative five-member plan drawn by the plaintiffs with one district containing a 50.23% African American and 15.23% Hispanic voting age populations, with the evidence showing that African Americans and Hispanics voted cohesively. The plan had an overall deviation of 8.6%. The court determined that it was not permitted to impose a plan with an 8.6% deviation and that African Americans would be a minority in an equal population plan. It further found that a plan with a 50.23% African American voting age population was not viable because “to translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person.”²⁸⁹ The court therefore found that the proposed district was “in reality only an influence district,” placing an unprecedented burden on the Section 2 plaintiffs because it effectively required them to prove it was impossible for a minority candidate to be outvoted in a remedial plan.

The plaintiffs appealed the decision of the trial court on their Section 2 claim to the Eleventh Circuit. The appeal was argued in May 2005, and in July 2007, nearly 27 months later, the appellate court reversed.²⁹⁰ It held that the district court clearly erred in several of its Section 2 determinations and that plaintiffs had in fact established a viable remedy. Specifically, it held that the district court's ruling that a minority supported candidate could not win in the proposed district depended on an assumption, contrary to the record, that all whites would register, turn out to vote, and then vote for the same candidate against the candidate of choice of the African American voters. The record in fact showed that the average white crossover vote was 19%. The court of appeals remanded for reconsideration of the record under the correct view of the law.²⁹¹

The county filed a petition for rehearing en banc, which was granted.²⁹² The court directed the parties to brief additional issues, particularly about the record on crossover voting and whether the plaintiffs had raised the issue of using crossover votes to make their remedy effective. The ACLU brief laid out in detail that the issue of crossover voting had been raised as part of the remedy pre-trial, at trial, and in a motion for reconsideration. The ACLU also pointed out that this was an alternative argument since in the plaintiffs' view,

²⁸⁷ See *Thompson v. Glades Cty.*, No. 2:00-cv-212, 2004 WL 5616892,*15-16 (M.D. Fla. 2004)

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Thompson v. Glades Cty.*, 493 F.3d 1253 (11th Cir. 2007).

²⁹¹ *Id.*

²⁹² *Thompson v. Glades County*, 508 F.3d 975 (11th Cir. 2007).

the evidence showed that the remedy would be effective no matter how white voters cast their votes. Two weeks after the en banc argument, the court announced that “[t]he judges of the en banc court are equally divided on the proper disposition of this case.”

Consequently, the judgment of the district court that ruled against plaintiffs was affirmed by operation of law.²⁹³

In a similar case, *Bartlett v. Strickland*, the U.S. Supreme Court agreed to hear an issue that it sidestepped in four previous cases—whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is an absolute, bright line requirement for a vote dilution claim under Section 2 of the Voting Rights Act. Because the U.S. Supreme Court took up a similar case for review, the ACLU filed a petition for writ of certiorari. However, the Court subsequently held that no Section 2 violation could be established where a minority was less than 50% of the voting age population in a district,²⁹⁴ and the Court denied the petition for writ of certiorari in *Thompson v. Glades County*.²⁹⁵

3. Bone Shirt v. Hazeltine – South Dakota 2001

In December 2001, the ACLU filed suit on behalf of four Native American voters after the South Dakota legislature redrew the boundaries of the state’s 35 legislative districts; each district elected one member of the state senate and two members of the state house for a total of 105 elected members.²⁹⁶ Every house member was elected at-large in each district, except for one district that was subdivided into two single-member districts. Though the state was 8.25% Native American, Native Americans constituted a majority in only two of the 35 districts. Moreover, they were unnecessarily “packed” into one of the two majority-minority districts, District 27, constituting 90% of the total population of the district. The plaintiffs argued this supermajority of Native American voters was substantially higher than necessary to give Native American voters an equal opportunity to elect candidates of their choice.²⁹⁷ The adjoining district, District 26, was 30% Native American and they tended to vote as a bloc with Native American voters in District 27.²⁹⁸ The plaintiffs sued, arguing that the plan diluted Native American voting strength by packing Native Americans into one district while diluting their voting strength in the neighboring district in violation of Section 2 of the Voting Rights Act. The plaintiffs also argued that the state did not submit the plan for preclearance as required by Section 5 of the Voting Rights Act, since two counties in the state were covered jurisdictions impacted by the new plan.

In 2002, a three-judge court ordered the state to submit its 2001 redistricting plan to

²⁹³ *Thompson v. Glades County*, 532 F.3d 1179, 1180 (11th Cir. 2008).

²⁹⁴ *Bartlett v. Strickland*, 556 U.S. 1 (2009).

²⁹⁵ *Thompson v. Glades*, 532 F. 3d 1179 (11th Cir. 2008), cert. denied, 556 U.S. 1126 (2009).

²⁹⁶ Complaint at ¶¶ 23-24, *Bone Shirt v. Hazeltine*, No. 3:01-cv-03032 (D.S.D. Dec. 26, 2001).

²⁹⁷ *Id.* at ¶¶ 34-36.

²⁹⁸ *Id.* at ¶¶ 37, 40.

federal officials for preclearance.²⁹⁹ The state submitted its plan to the Department of Justice, which cleared it for implementation despite the packing of Native American voters. After substantial discovery and a trial, the district court considered the plaintiffs' Section 2 claim. In a lengthy 144-page opinion, the court ruled for the plaintiffs and made extensive findings of racially polarized voting in addition to past and continuing discrimination against South Dakota's Native American population.³⁰⁰ The court found "substantial evidence that South Dakota officially excluded Indians from voting and holding office."³⁰¹ For example, Native Americans encountered numerous difficulties in obtaining registration cards from county auditors, whose behavior "ranged from unhelpful to hostile."³⁰² The court also determined that local officials regularly accused Native Americans of voter fraud and that such accusations were unfounded, politically motivated, and intended to intimidate.³⁰³ The court acknowledged "Indian[s] in Districts 26 and 27 bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process."³⁰⁴ In sum, the court found that there was "a significant lack of responsiveness on the part of elected officials to Indian concerns."³⁰⁵ The court also concluded that the plaintiffs had demonstrated that there were several ways to draw an additional majority-Native American district and gave the state an opportunity to fashion a new plan. After the state declined to do so, the court adopted the plaintiffs' proposed plan that remedied the Native American vote dilution.³⁰⁶ On appeal, the Eighth Circuit affirmed the district court's decision.³⁰⁷

4. **Black v. McGuffage – Illinois 2001**

In January 2001, the ACLU brought a civil rights class action on behalf of individual African American voters challenging the non-uniform, arbitrary, and unequal voting systems used in Illinois under Section 2 of the Voting Rights Act and the Fourteenth Amendment.³⁰⁸ In Illinois, the average residual vote rate in the 2000 presidential election was approximately 3.85%. Chicago, which used punch card voting systems, had a residual vote rate of 7.06%, although in one precinct it was as high as 36.73%.³⁰⁹ Based on statistics demonstrating the racial disparity in residual vote rates based on the voting system used, the plaintiffs argued that because African American and Latino voters were more likely to vote with punch cards than other voters, minority voters were less likely to have their votes

²⁹⁹ *Bone Shirt v. Hazeltine*, 200 F. Supp. 2d 1150 (D.S.D. 2002).

³⁰⁰ *See generally Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004).

³⁰¹ *Id.* at 1019.

³⁰² *Id.* at 1025.

³⁰³ *Id.* at 1026.

³⁰⁴ *Id.* at 1038.

³⁰⁵ *Id.* at 1046.

³⁰⁶ *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035 (D.S.D. 2005).

³⁰⁷ *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

³⁰⁸ Complaint at ¶ 1, *Black v. McGuffage*, No. 1:01-cv-00208 (N.D. Ill. Jan. 11, 2001).

³⁰⁹ *Black v. McGuffage*, 209 F. Supp. 2d 889, 893 (N.D. Ill. 2002).

counted than non-minority voters.³¹⁰

The parties reached a settlement agreement after extensive litigation and lengthy court-ordered settlement discussions. Approved in December 2003, the agreement called for implementation of new and improved voting technology by March 2006 and at least partial reimbursement of the plaintiffs' costs.³¹¹ The agreement provided that the plaintiffs could reinstate the litigation if the defendants failed to implement the new technology by the specified deadline. The court retained jurisdiction until January 2007, at which point it released the parties from the agreement's terms.

5. Cottier v. City of Martin – South Dakota 2002

Martin, located in southwestern South Dakota, is a small city of slightly more than 1,000 people, nearly 45% of whom are Native American. It is the county seat of Bennett County, which was created out of the Pine Ridge Indian Reservation in 1909. At the time of the filing of the lawsuit, the county had a slight Indian population majority (52%). Like many border towns in the American West, Martin has seen more than its share of racial conflict.³¹² The city was governed by a city council consisting of a mayor, who was elected at-large, and six council members, who were elected from three two-member wards. In January 2002, following the decennial census, the Martin City Council adopted a new redistricting plan for the city council wards.³¹³

In 2002, the ACLU filed suit on behalf of two Native American voters, alleging that the redistricting plan adopted by the city had the purpose and effect of diluting Native American voting strength in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.³¹⁴ Despite being a significant part of the population, Native Americans had been unable to elect any candidates of their choice to the city council because the redistricting plan ensured white voters controlled all three city council wards.³¹⁵

After more than two years of discovery, the case went to trial in June 2004. The district court ruled against the plaintiffs, finding that the plaintiffs had not established the third

³¹⁰ See Complaint at ¶¶ 3, 26, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Jan. 11, 2001); see also Fourth Amended Complaint at ¶¶ 46-47, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Oct. 9, 2003).

³¹¹ Order Approving Settlement Agreement, Black v. McGuffage, No. 1:01-cv-00208 (N.D. Ill. Dec. 15, 2003).

³¹² See *Cottier v. City of Martin*, No. 5:02-cv-05021, at *1-3, slip op. (D.S.D. Mar. 22, 2005).

³¹³ Supplemental Complaint at ¶ 14, Wilcox v. City of Martin, 02-cv-5021 (D.S.D. Sept. 6, 2002).

³¹⁴ See *id.*

³¹⁵ See *id.* at ¶ 23, Wilcox v. City of Martin, 02-cv-5021 (D.S.D. Sept. 6, 2002); *Cottier v. City of Martin*, No. 5:02-cv-05021, at *2-3 (D.S.D. Mar. 22, 2005).

Gingles factor that whites voted as a bloc usually to defeat the candidates preferred by Native American voters in city elections.³¹⁶

The plaintiffs appealed, and in May 2006 the Eighth Circuit reversed the district court's ruling, concluding that the plaintiffs did in fact establish that the candidates of choice of Native American voters were usually defeated by whites voting as a bloc, thus meeting the third *Gingles* factor. It vacated the lower court's opinion and remanded for further consideration on the totality of circumstances analysis.³¹⁷

On remand, the district court held that the challenged system violated Section 2 of the Voting Rights Act. The court found there was a long, elaborate history of discrimination against Native Americans in South Dakota in matters relating to voting. Particularly in Martin, the court found Native Americans continued to suffer the effects of past discrimination, including lower standards of living and levels of income, education, home ownership, and automobile ownership. The court also found that Martin city officials had taken intentional steps to thwart Native American voters from exercising political influence and that the city was apportioned in a manner that unlawfully diluted their voting strength, causing a persistent and unacceptable level of racially polarized voting in Martin.³¹⁸

The decision ordered a "full and complete remedy" for the plaintiffs. After the city refused to propose a new election plan, the district court ordered Martin to implement a system of cumulative voting for the city council.³¹⁹ The first election under the cumulative voting plan was held, and three Indian-friendly candidates were elected. The city appealed the district court's ruling on the merits of the plaintiffs' claim, as well as its remedial order imposing cumulative voting.

In December 2008, a three-judge panel of the Eighth Circuit affirmed the district court's judgment in the plaintiffs' favor.³²⁰ The panel found that the district court's determination that vote dilution was supported by substantial evidence in the record and that the district court did not abuse its discretion when it imposed cumulative voting as the remedy. The Eighth Circuit subsequently vacated the panel's ruling, however, when it granted the city's petition for rehearing en banc. In a divided 7-4 opinion, the en banc court ruled in May 2010, that the original decision of the district court dismissing the complaint for failure to satisfy the third *Gingles* factor was proper.³²¹ The plaintiffs filed a petition for a writ of certiorari, but it was denied by the Supreme Court in November 2010.³²²

6. Quick Bear Quiver v. Nelson – South Dakota 2002

³¹⁶ *Cottier v. City of Martin*, No. 02–5021, 2005 WL 6949764 (D.S.D. May 5, 2005).

³¹⁷ *Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir. 2006).

³¹⁸ *See Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1185 (D.S.D. 2006).

³¹⁹ *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 938 (D.S.D. 2007).

³²⁰ *Cottier v. City of Martin*, 551 F.3d 733 (8th Cir. 2008).

³²¹ *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010).

³²² *Cottier v. City of Martin*, 562 U.S. 1044 (2010).

Prior to the 2013 decision in *Shelby County v. Holder* immobilizing Section 5 preclearance of the Voting Rights Act, Shannon and Todd counties in South Dakota were covered jurisdictions and required to submit voting changes for federal preclearance. When the counties became covered jurisdictions pursuant to the 1975 amendments to the Voting Rights Act, the South Dakota Attorney General at the time voiced his opposition to the counties' coverage under the law and his intention to ignore the preclearance mandate, a practice that continued for the next 25 years.³²³ Following over 600 unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd counties sued the state in August 2002 to force it to comply with Section 5.³²⁴ In December 2002, the parties entered an agreed-upon consent order that required the state to preclear its backlog of unsubmitted voting changes and gave the court continued jurisdiction over the matter to ensure compliance with Section 5.³²⁵ It also referred the matter to a magistrate to develop with the parties a comprehensive remedial plan "that will promptly bring the State into full compliance with its obligations under Section 5."³²⁶ As a result of the consent order, by April 2005, the state had submitted 714 statutes and 545 administrative rule changes to the Department of Justice for preclearance.³²⁷

In January 2005, separate plaintiffs filed a lawsuit in Charles Mix County alleging the county commission districts were malapportioned in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.³²⁸ Because of that lawsuit, the South Dakota legislature passed a bill establishing a process for emergency redistricting of county commissioner districts to resolve the malapportionment claim, and Charles Mix County officials submitted a redistricting request pursuant to the new rules.³²⁹ However, the state did not request preclearance of the new emergency redistricting law, so the plaintiffs in *Quick Bear Quiver* filed a motion for a temporary restraining order³³⁰ and preliminary and permanent injunctions³³¹ requesting the law be enjoined from enforcement absent preclearance, which were all granted.³³² In granting the preliminary injunction, the district court issued a strongly worded decision, saying that state officials, "for over 25 years ha[d] intended to violate and ha[d] violated the preclearance requirements of the

³²³ See *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027, 1029 (D.S.D. 2005).

³²⁴ Complaint at ¶ 1, *Quick Bear Quiver v. Hazeltine*, 5:02-cv-05069 (D.S.D. Aug. 5, 2002).

³²⁵ Consent Order at ¶¶ 3, 6, *Quick Bear Quiver v. Hazeltine*, No. 5:02-cv-05069 (D.S.D. Dec. 27, 2002).

³²⁶ *Id.* at ¶ 4.

³²⁷ *Quick Bear Quiver*, 387 F.Supp.2d at 1029.

³²⁸ *Ibid.*

³²⁹ *Id.* at 1030.

³³⁰ Plaintiffs' Motion for a Temporary Restraining Order, *Quick Bear Quiver v. Nelson*, No. 5:02-cv-05069 (D.S.D. March 11, 2005).

³³¹ Plaintiffs' Motion for a Preliminary and Permanent Injunction, *Quick Bear Quiver v. Nelson*, No. 5:02-cv-05069 (D.S.D. March 15, 2005).

³³² *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027 (D.S.D. 2005).

VRA,” and that the new bill “g[ave] the appearance of a rushed attempt to circumvent the VRA.”³³³ The court enjoined implementation of the new emergency redistricting bill until the state complied with Section 5.³³⁴ The state submitted the redistricting bill for preclearance and petitioned the Supreme Court for review. The Department of Justice granted preclearance, and the Supreme Court dismissed the case as moot at plaintiffs’ request.³³⁵

7. Levy v. Lexington County School District Three Board of Trustees – South Carolina 2003

This was a vote dilution lawsuit brought by the ACLU in 2003 on behalf of Black residents of Lexington School District 3, one of five school districts lying wholly or partially within Lexington County, South Carolina. Prior to the filing of the lawsuit, no Black person had ever been elected to the school board under the challenged system of at-large nonpartisan elections, despite the fact that Blacks constituted 28.5% of the population of the school district.³³⁶

Lexington County has a long history of racial discrimination: schools were racially segregated; town ordinances required segregation in places of public accommodation; there was racial discrimination in hiring; the Ku Klux Klan was active in the county; Blacks were excluded from juries; election campaigns were characterized by racial appeals; whites fled the Democratic Party because of its support of civil rights laws; and housing was constructed on a segregated basis.³³⁷ Horace King, a resident of Lexington County, was head of the South Carolina chapter of the Christian Knights of the Ku Klux Klan in the 1990s. To promote the organization’s white supremacist goals, he encouraged Klan members to burn Black churches. In 1998, a member of the local Ku Klux Klan pled guilty to shooting three black teenagers outside a rural nightclub in Pelion in Lexington County.³³⁸

A trial occurred in March 2006, and after a lengthy delay of three years, during which elections were held for the school board in 2006 and 2008, the district court issued a detailed order on February 19, 2009, in which it held that the challenged at-large system diluted minority voting strength in violation of Section 2 of the Voting Rights Act.³³⁹ Among its numerous findings were that South Carolina and Lexington County had a voluminous history of racial discrimination which had continuing effects: voting was racially polarized, few minorities had been elected to office, churches, businesses, communities, and clubs remained segregated, Blacks had a depressed socio-economic status, Black registration and

³³³ *Id.* at 1034.

³³⁴ *Id.* at 1034-35.

³³⁵ *Nelson v. Quick Bear Quiver*, 546 U.S. 1085 (2006).

³³⁶ *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338, at *1 (D.S.C. Feb. 19, 2009).

³³⁷ See *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338, at *2 (D.S.C. Feb. 19, 2009); Brief of Appellees at ¶¶ C-F, *Levy v. Lexington Cty.*, No. 09-1550 (4th Cir. June 23, 2009).

³³⁸ Brief of Appellees at ¶ E, *Levy v. Lexington Cty.*, No. 09-1550 (4th Cir. June 23, 2009).

³³⁹ *Levy v. Lexington Cty.*, No. C/A 3:03-3093-MBS, 2009 WL 440338 (D.S.C. Feb. 19, 2009).

turnout were depressed, elected officials were unresponsive to the needs of the Black community, and Black students had depressed levels of academic achievement. After the complaint was filed, the school board recruited a retired Black school teacher to run for office in an effort to defeat the lawsuit.³⁴⁰

The school district appealed, and one of its main arguments was that the trial court should have considered the two election cycles that took place after trial but before the court issued its opinion. Oral argument was heard by the Fourth Circuit on September 24, 2009, and on December 21, 2009, it vacated and remanded the case for further consideration of the 2006 and 2008 elections.³⁴¹

On remand, the district court conducted more hearings and heard testimony from the parties' expert witnesses concerning the 2006 and 2008 elections. The district court also engaged the services of a statistical expert to educate the district court regarding the methodologies used by the parties' experts. In April 2012, the district court concluded that the plaintiffs failed to satisfy their burden of establishing a cognizable violation of Section 2 of the Voting Rights Act and granted summary judgment in favor of the school district.³⁴²

8. Kirkie v. Buffalo County – South Dakota 2003

In 2003, the ACLU filed suit in federal court alongside the Crow Creek Sioux Tribe to challenge a method of election diluting the voting strength of indigenous voters in Buffalo County, South Dakota. The 2000 Census listed Buffalo County as the poorest county in the nation.³⁴³ The county was overwhelmingly Native American with 83% of voters belonging to the Crow Creek Sioux Tribe. The method for electing the county's three-member commission—in effect for decades—packed nearly all of the county's Native American population, 1,692 of the 2,032 residents, into one district.³⁴⁴ White residents made up only 17% of the population but controlled the remaining two districts and, thus, the county government. The inter-district deviation was 218%—20 times the legal limit under the one person-one vote equal protection principle (total deviations of greater than 10% are presumptively unconstitutional).³⁴⁵ The plan's unlawfulness was raised with the Buffalo County Commission prior to the lawsuit, but the commission did not act to cure its

³⁴⁰ *Id.* at *1-19.

³⁴¹ See *Levy v. Lexington Cty.*, 589 F.3d 708 (4th Cir. 2009).

³⁴² See *Levy v. Lexington Cty.*, No. CA 3:03-3093-MBS, 2012 WL 1229511, at *1 (D.S.C. Apr. 12, 2012), as amended (Apr. 18, 2012).

³⁴³ Press Release, ACLU, ACLU of the Dakotas Challenges Districting Scheme that Prevents Native Americans from Holding Office (Mar. 20, 2003), <https://www.aclu.org/press-releases/aclu-dakotas-challenges-districting-scheme-prevents-native-americans-holding-office>; see LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 769-770 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

³⁴⁴ Complaint at ¶ 20, *Kirkie v. Buffalo County*, No. 3:03-cv-0311 (D.S.D. Mar. 20, 2003), 2003 WL 24224114.

³⁴⁵ *Id.* at ¶¶ 24-25.

problems despite having the ability to do so during a reapportionment process. Instead, the commission determined that the existing districts “were as regular and compact in form as practicable and required no change.”³⁴⁶

The ACLU’s lawsuit alleged that the districting plan was malapportioned to discriminate against Native American voters.³⁴⁷ The plaintiffs sought to dissolve existing district lines, draw a new set of nondiscriminatory lines, and call for a special election to fill the county commission. The parties settled the case through a consent decree whereby the county admitted its plan was discriminatory and agreed to submit to judicial preclearance under Section 3(c) of the Voting Rights Act through January 2013.³⁴⁸ With the decree in place, the county’s Native American community was able to elect two candidates of choice.

9. Prye v. Blunt – Missouri 2004

The Missouri state constitution prohibits any person from voting who “by reason of mental incapacity” has a legally appointed guardian.³⁴⁹ Missouri’s Probate Code establishes the procedures by which an individual might be adjudicated as incapacitated and a guardian appointed. An “incapacitated person” is “one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur.”³⁵⁰ The ACLU, with the Bazelon Center for Mental Health Law and the Illinois-based Guardianship and Advocacy Commission, challenged that statute in 2004 on behalf of a plaintiff who required a guardian for certain transactions but was fully capable of understanding the voting process and voting on his own.³⁵¹

Born in 1952, Steven Prye was one of the first Black students to attend desegregated Central High School in Memphis, Tennessee, in the late 1960s. His commitment to ending discrimination intensified sharply while at Central after he witnessed some white teachers celebrating the April 4, 1968, assassination of Dr. Martin Luther King Jr. The Lorraine Motel, where Dr. King was shot, was just one mile away from the school. After graduating from Yale University, attending Harvard Law School, and receiving a Master of Laws in taxation from New York University (NYU), the plaintiff taught courses at NYU, Vermont Law School, and the University of Illinois School of Law. At age 49, he was diagnosed with

³⁴⁶ *See id.* ¶ 27.

³⁴⁷ *Id.* at ¶ 1.

³⁴⁸ *See* Consent Decree at ¶ 27, *Kirkie v. Buffalo County*, No. 3:03-cv-0311 (D.S.D. Jan. 27, 2004), 2003 WL 24224114.

³⁴⁹ MO. CONST. art. 8, § 2.

³⁵⁰ MO. REV. STAT. § 475.010(9).

³⁵¹ Complaint, *Prye v. Blunt*, No. 04-4248-CV-C-ODS (W.D. Mo. Oct. 8, 2004).

a serious mental illness. A guardian was appointed and in 2004 the plaintiff came to live in Missouri.³⁵²

Prye challenged the state law which prohibited him from voting, relying upon the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and the U.S. Constitution. The Missouri district court acknowledged the importance of voting as preservative of all other rights, but refused to enjoin the state's restriction on voting before the 2004 election. It rejected the plaintiff's equal protection claims and concluded that the ADA and the Rehabilitation Act did not protect his right to vote. After the election, the plaintiff, joined by the Missouri Office of Protection and Advocacy Services (MOPAS) and other individuals, including Bob Scaletty, and with the ACLU's assistance, filed an amended complaint, challenging Missouri's blanket denial of the right to vote to persons who have been adjudged incapacitated.³⁵³ Lead plaintiff Prye passed away in January 2006, but the case he initiated continued to be pursued by MOPAS and Scaletty.

Scaletty was diagnosed as suffering from schizophrenia and, due to his mental illness, placed under a full guardianship in 1999 in accordance with procedures established by Missouri law. The guardianship order, however, expressly provided that Scaletty retain the right to vote. Despite the guardianship order protecting his right to vote, Scaletty was subsequently denied the right to vote in 2004 by election officials who explained that state law does not allow individuals under a guardianship order to vote.³⁵⁴ However, in January 2005, having learned of their mistake (after Scaletty became a party in this case), the Kansas City Board of Election Commissioners sent Scaletty's guardian a voter identification card on his behalf and advised that Scaletty was eligible to vote in the next election.³⁵⁵

On July 7, 2006, the defendants' motion for summary judgment was granted.³⁵⁶ The plaintiffs argued that Missouri violates federal law by denying the right to vote to all persons under a full guardianship order due to a finding of incapacity because at least some incapacitated individuals are qualified to vote, notwithstanding a probate court's finding of incapacity. The court found that the Missouri law did not violate the ADA as the law in question affords individualized determination of a person's abilities and limitations, was designed to differentiate those who are qualified to vote from those who are not, and denied the right to vote to those who lack the mental capacity to exercise the right to vote.

³⁵² See First Amended Complaint for Declarative and Injunctive Relief at ¶¶ 24–28, No. 04-4248 (W.D. Mo. Dec. 6, 2004).

³⁵³ See *id.*

³⁵⁴ See *id.* ¶¶ 29-34.

³⁵⁵ See Answer to Kansas City Election Board at ¶¶ 2–3, 2005 WL 3683622 (W.D.Mo. 2005)

³⁵⁶ *Prye v. Carnahan*, No. 04-4248-CV-C-ODS, 2006 WL 1888639 (W.D. Mo. Jul. 7, 2006).

On appeal, the Eighth Circuit affirmed the district court's grant of summary judgment although on somewhat different grounds.³⁵⁷ Here the court found that MOPAS lacked associational standing because the specific claim asserted required participation by individual persons with specific claims. Additionally, the court found that Scaletty's claim for equitable relief was moot as the guardianship order preserved his right to vote, elections officials advised Scaletty that he would be allowed to vote in the next election, and there was no reasonable expectation that the 2004 error would be repeated. The court also found that the plaintiff's claim that Missouri categorically prohibits those under full guardianship to vote without an individualized inquiry failed to prove the prohibition was categorical.

10. New Jersey State Conference NAACP v. Harvey – New Jersey 2004

In January 2004, civil rights organizations and private plaintiffs, represented by the ACLU and Rutgers Law School Constitutional Litigation Clinic, filed suit in New Jersey state court challenging that New Jersey's law disfranchised individuals with convictions who were on probation or parole. Plaintiffs contended that the law disproportionately impacted Black and Latino Americans, who face substantially higher rates of prosecution, conviction, and incarceration³⁵⁸ as an extension of the racial discrimination endemic in the criminal justice system.³⁵⁹ African Americans made up approximately 13.6% of New Jersey's total population, but 63% of the prison population, over 60% of the parolee population, and 37% of those on probation.³⁶⁰ Latinos constituted 13.3% of New Jersey's total population, but 18% of the prison population, 20% of the parolee population, and 15% of those on probation.³⁶¹ Collectively, Blacks and Latinos made up 81% of the total prison population, more than 75% of the parolee population, and more than 52% of those on probation; they also comprised more than 62% of those denied the right to vote under New Jersey's disenfranchisement law.³⁶²

The lawsuit was the first in the nation that challenged a disenfranchisement law based on a state's constitution. The suit made two claims: first, that the state disenfranchisement law has a discriminatory impact on Black and Latino Americans and denies them the guarantee of equal protection under the New Jersey Constitution, and second, that the disproportionate impact of the state's disenfranchisement law dilutes the voting strength of Black and Latino communities and deprives them of the ability to elect candidates of their choice, also in violation of the equal protection guarantee of the New Jersey Constitution.³⁶³ The plaintiffs also contended that there is no public benefit or government interest served

³⁵⁷ *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d. 803 (8th Cir. 2007).

³⁵⁸ Complaint at ¶ 1, *N.J. State Conf. NAACP v. Harvey*, No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div. Jan. 4, 2004).

³⁵⁹ *See generally id.* at ¶¶ 27, 33-40.

³⁶⁰ *Id.* at ¶ 23.

³⁶¹ *Id.* at. ¶ 24.

³⁶² *Id.* at ¶¶ 25, 28.

³⁶³ *Id.* at ¶¶ 45-53.

by denying suffrage to individuals on probation or parole.³⁶⁴ The plaintiffs included the New Jersey State Conference of the NAACP, Latino Leadership Alliance of New Jersey, and several impacted minority voters who were otherwise eligible to vote.

The state trial court granted New Jersey's motion for summary judgment, ruling that the plaintiffs failed to state a claim upon which relief could be granted.³⁶⁵ In November 2005, the state appellate court affirmed the lower court's judgment.³⁶⁶ The court reasoned that the New Jersey Constitution specifically authorized its disenfranchisement law and that the plaintiffs did not claim that it was enacted with an invidious purpose. The Supreme Court of New Jersey denied certiorari in March 2006.³⁶⁷

Following the final decision, the ACLU and Rutgers Law School Constitutional Litigation Clinic filed a petition in September 2006 with the Inter-American Commission on Human Rights, an autonomous body of the Organization of American States. The petition requested it find that the denial of New Jersey citizens' right to vote while they are on probation or parole violates universal human rights principles.³⁶⁸ The United States responded on April 7, 2010 that the petition should be dismissed for failure to exhaust domestic remedies.³⁶⁹ The ACLU filed responses on May 20, 2010, and November 15, 2010, arguing that the petitioners had exhausted all available remedies and that further pursuit of such remedies would be futile.³⁷⁰ Unfortunately, the Commission, without notice, archived the case due to its inaction on the petition, and the case is no longer pending.

11. **Blackmoon v. Charles Mix County – South Dakota 2005**

In January 2005, the ACLU sued Charles Mix County, South Dakota, on behalf of four tribal members after years of attempting to persuade the county to correct its apportionment scheme. The complaint alleged that the three county commission districts were malapportioned in violation of Section 2 of the Voting Rights Act and drawn to discriminate against Native American voters in violation of the Fourteenth and Fifteenth

³⁶⁴ *Id.* at ¶ 2.

³⁶⁵ *N.J. State Conf. NAACP v. Harvey* No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div.).

³⁶⁶ *N.J. State Conf. NAACP v. Harvey*, 885 A.2d 445 (N.J. Super. App. Div. 2005).

³⁶⁷ *N.J. State Conf. NAACP v. Harvey*, 895 A.2d 450 (N.J. 2006).

³⁶⁸ *See* Petition Alleging Violations of the Human Rights of the State Conference of the NAACP et. al by the United States of America and State of New Jersey, submitted September 13, 2006, <https://www.aclu.org/legal-document/petition-behalf-men-and-women-state-new-jersey-prohibited-voting-pursuant-state?redirect=cpreirect/26731>.

³⁶⁹ Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Petition No. P-990-06: Michael Mackason et al. (Apr. 7, 2010) (on file with author).

³⁷⁰ Letter from Steven M. Watt et al., Senior Staff Attorney, ACLU Human Rights Program, to Dr. Santiago Canton, Exec. Sec., Inter-American Comm'n on Human Rights (Nov. 15, 201) (on file with author); Petitioners' Observations to the Response of the Government of the United States of America (May 20, 2010) (on file with author).

Amendments.³⁷¹ Initially in November 2001, the ACLU wrote to the county on behalf of the Yankton Sioux Tribe that the county's districts violated the one person-one vote principle of the Fourteenth Amendment and diluted Native American voting strength by splitting them into two districts. State law required the county to redraw districts in February 2002, but the county commission opted to leave its then-current districts in place. Each district had a majority white voting age population, despite the fact that Native Americans made up 30% of the county and that it was possible to draw a compact majority Native American district. The total population deviation among the districts was 19%—almost certainly unconstitutional.³⁷²

In an effort to avoid court-supervised redistricting, the county asked the state to pass legislation establishing a process for emergency redistricting, as state law otherwise generally prohibited the county from redistricting until 2012.³⁷³ The legislature complied and passed a bill, which the governor promptly signed, allowing a county to redistrict—with the permission of the governor and secretary of state—any time it became “aware” of facts that called into question whether its districts complied with federal or state law.³⁷⁴ However, South Dakota failed to preclear the new law with the Department of Justice.

Before the county could take advantage of the new law, four Native Americans in a separate lawsuit obtained a preliminary injunction stopping the state from implementing the new voting law for emergency redistricting, unless and until it was precleared under Section 5 of the Voting Rights Act.³⁷⁵ The preliminary injunction effectively put the law on hold temporarily.

Afterwards the district court in *Blackmoon* granted the plaintiffs’ motion for partial summary judgment on their malapportionment claim, finding a violation of the one person-one vote standard of the Equal Protection Clause of the Fourteenth Amendment.³⁷⁶ The county eventually adopted a remedial plan that cured both the malapportionment and vote dilution claims and secured federal supervision of its elections through 2024.³⁷⁷

Subsequently, residents of the county approved a referendum in an attempt to increase the size of its county commission from three to five positions. The county commissioners submitted its plan to the Justice Department for preclearance, which was rejected on the basis that the county had not met its burden to prove that the increase was not motivated by a discriminatory purpose.³⁷⁸ Consequently, the three-member plan with one majority

³⁷¹ Complaint at ¶¶ 3-4, 36-39, *Blackmoon v. Charles Mix Cty.*, 4:05-cv-04017 (D.S.D. Jan. 27, 2005).

³⁷² *See id.* at ¶ 39.

³⁷³ S.D. CODIFIED LAWS § 7-8-10.

³⁷⁴ *See* H.B. 1265, 80th Leg., 2005 Sess. (S.D. 2005).

³⁷⁵ *See Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005).

³⁷⁶ *Blackmoon v. Charles Mix County*, 4:05-cv-04017, 2005 WL 2738954 (D.S.D. 2005).

³⁷⁷ Consent Decree, *Blackmoon v. Charles Mix County*, 05-cv-04017 (D.S.D. Dec. 4, 2007).

³⁷⁸ Letter from Grace Chung Becker, Acting Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Sara Frankenstein Gunderson (Feb. 11, 2008), <https://www.justice.gov/crt/voting-determination-letter-14>.

Native American district remained in place. The first elections held under the new districts occurred in 2006 and resulted in the first Native American to serve on the commission. Monitoring of voting changes in the county remains ongoing.

12. Crawford v. Marion County Election Board – Indiana 2005

In May 2005, the Indiana Democratic Party and Marion County Democratic Central Committee filed a lawsuit challenging Indiana’s photo ID law, alleging violations of the First and Fourteenth Amendments, the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act.³⁷⁹ The challenged law required in-person Election Day voters to present federally or state-issued photo ID before being able to vote. The plaintiffs argued that the requirement selectively and arbitrarily burdened and disenfranchised qualified voters, that it was a poll tax on voters who did not possess such identification, and that the burdens fell disproportionately on the poor or others of limited means.³⁸⁰ The plaintiffs also argued that no evidence of fraudulent in-person voting supported the requirement.³⁸¹ The ACLU separately filed suit in state court on behalf of elected officials and civic organizations, which was removed to federal court and consolidated with the lawsuit brought by the Democratic Party.³⁸²

The district court dismissed the complaint³⁸³ and a divided panel of the court of appeals affirmed.³⁸⁴ While noting that “[n]o doubt most people who don’t have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates,” the panel’s majority concluded that the state law was not an undue burden on the right to vote. The majority decision relied in part on the unfounded conclusion that because the plaintiffs, who did not have the required photo ID, did not indicate in the court record that they intended to vote, the plaintiffs were “unaffected by the law” and thus there were “no plaintiffs whom the law will deter from voting.”³⁸⁵

Consequently, the panel’s majority affirmed the complaint’s dismissal on grounds that there were a minimal number of voters adversely affected by the law and that the state articulated a reasonable basis for the law, which was to prevent voter fraud. (Notably, Judge Posner, who authored the panel’s majority, later expressed that the case might have

³⁷⁹ Complaint for Declaratory and Injunctive Relief, *Indiana Democratic Party v. Rokita*, No. 1:05-cv-00634 (S.D. Ind. May 2, 2005).

³⁸⁰ *See id.* at ¶¶ 17-19.

³⁸¹ *See* Amended Complaint for Declaratory and Injunctive Relief at ¶ 22, *Indiana Democratic Party v. Rokita*, No. 1:05-cv-00634 (S.D. Ind. May 27, 2005).

³⁸² *See* Minute Entry, *Crawford v. Marion Cty. Election Bd.*, No. 1:05-cv-00804 (S.D. Ind. June 23, 2005).

³⁸³ *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

³⁸⁴ *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

³⁸⁵ *Id.* at 951-52.

been wrongly decided.³⁸⁶) However, the dissenting judge found that “[t]he Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”³⁸⁷ The dissent also acknowledged that the “law will make it significantly more difficult for some eligible voters . . . to vote,” including the “poor, elderly, minorities, disabled, or some combination thereof.”³⁸⁸ A divided court of appeals denied *en banc* review.³⁸⁹

The plaintiffs then filed a petition for writ of certiorari to the U.S. Supreme Court, which was granted.³⁹⁰ In an April 2008 opinion, the Court upheld the Indiana law by a 6-3 vote.³⁹¹ The Court applied the balancing test it outlined in *Anderson v. Celebrezze*, which directs courts to weigh the asserted injury to the right to vote against interests the state advances to justify its attendant burdens.³⁹² The Court determined that Indiana demonstrated a legitimate and important interest in preventing voter fraud and protecting public confidence in elections. The Court also ruled that obtaining a free photo ID card did not pose a substantial burden on voting since voters could vote by provisional ballot. The Court’s ruling, however, did leave open the door to additional as-applied challenges to photo ID laws if plaintiffs demonstrate that such requirements impose an excessive burden on their right to vote.

13. Common Cause v. Billups – Georgia 2005

In September 2005, the ACLU and the ACLU of Georgia, on behalf of voters and seven non-profit organizations filed suit challenging Georgia’s 2005 photo ID law that required voters to present certain forms of photo ID before being able to vote in-person. Political appointees at the Justice Department precleared the law over the objections of career attorneys that the state failed to meet its burden of proof to demonstrate the law did not have the effect of retrogressing minority voting strength.³⁹³ The plaintiffs argued in both facial and as-applied challenges that the law would impose an unnecessary and undue burden on the

³⁸⁶ See John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, NY TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>; see also Richard Posner, *I Did Not ‘Recant’ on Voter ID Laws*, THE NEW REPUBLIC (Oct. 27, 2013), <https://newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id>.

³⁸⁷ *Crawford*, 472 F.3d at 955 (Evans, J. dissenting).

³⁸⁸ *Ibid.*

³⁸⁹ See *Crawford v. Marion Cty. Election Bd.*, 484 F.3d 436 (7th Cir. 2007).

³⁹⁰ *Crawford v. Marion Cty. Election Bd.*, 551 U.S. 1192 (2007).

³⁹¹ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

³⁹² 460 U. S. 780, 789 (1983).

³⁹³ See Dan Eggen, *Criticism of Voting Law Was Overruled*, WASHINGTON POST (Nov. 17, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504_pf.html; see also Section 5 Recommendation Memorandum: Aug. 25, 2005, <https://www.brennancenter.org/sites/default/files/analysis/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf>.

fundamental right to vote of hundreds of thousands of registered Georgia voters and was an unconstitutional poll tax under the Twenty-Fourth Amendment and violated Section 2 of the Voting Rights Act, the Civil Rights Act of 1964, the Equal Protection Clause, and the Georgia Constitution.³⁹⁴ The plaintiffs also argued that the stated purpose of the photo ID law, to prevent voter fraud, was a pretext intended to conceal the true purpose of the law, which was to suppress voting by the poor, the elderly, and the infirm, and by Black, Latino, and other minority voters. The plaintiffs presented evidence of this fact, including the lack of voter fraud in the state.³⁹⁵

In October 2005, a federal court preliminarily enjoined the photo ID law. The court ruled that the plaintiffs established a likelihood of success on the merits of their claims that the law was in the nature of a poll tax and a violation of the Equal Protection Clause, and sufficiently demonstrated those impacted by the law would suffer irreparable harm without the injunction.³⁹⁶

The legislature amended the statute in 2006 to provide what it deemed a free Georgia photo voter ID card to any registered voter who needed one. The ACLU sued on behalf of a set of plaintiffs on similar grounds³⁹⁷ and requested a preliminary injunction.³⁹⁸ A court granted the injunction in the run-up to the July 2006 primary elections.³⁹⁹ In granting the injunction, the court concluded that the plaintiffs had established a likelihood of success again on the merits of their Equal Protection Clause claim and would suffer irreparable harm without the injunction.

However, despite its prior rulings, the district court eventually ruled that the plaintiffs lacked standing and decided the constitutional issues against the plaintiffs as well, denying a permanent injunction and dismissing the case.⁴⁰⁰ The court determined the burden on the plaintiffs was slight because they testified that they could get ID cards if necessary to vote, and the court therefore applied rational basis analysis to uphold the law. The court also held the state's interest in preventing voter fraud trumped any burden on voters, even though there was no evidence of voter fraud by impersonation in Georgia for more than a decade—the only type of fraud an ID requirement could address.

³⁹⁴ Complaint for Declaratory and Injunctive Relief, *Common Cause v. Billups*, No. 4:05-cv-201 (N.D. Ga. Sept. 19, 2005).

³⁹⁵ *Id.* at ¶¶ 47-51.

³⁹⁶ *Common Cause v. Billups*, 406 F. Supp. 2d 1326, 1362, 1367, 1375 (N.D. Ga. 2005).

³⁹⁷ Second Amended Complaint for Declaratory and Injunctive Relief, *Common Cause v. Billups*, No. 4:05-cv-00201 (N.D. Ga. Apr. 26, 2006).

³⁹⁸ Motion for a Preliminary Injunction, *Common Cause v. Billups*, No. 4:05-CV-201 (N.D. Ga. July 5, 2006).

³⁹⁹ *Common Cause v. Billups*, 439 F.Supp.2d 1294 (N.D. Ga. 2006).

⁴⁰⁰ *Common Cause v. Billups*, 504 F.Supp.2d 1333, 1383 (N.D. Ga. 2007).

The plaintiffs appealed, arguing that the law affected a large number of Georgia voters and had an adverse discriminatory impact on the state's African American residents.⁴⁰¹ The plaintiffs' evidence included a data match completed by the Secretary of State that sought to identify registered voters who did not have an ID issued by the Georgia Department of Driver Services (DDS). The match identified 289,426 registered voters without a DDS-issued ID.⁴⁰² And although African Americans made up 27.9% of all registered voters in Georgia, African Americans comprised 49% of registered voters without a DDS-issued ID.⁴⁰³ The plaintiffs also argued that the district court's decision was inconsistent with the standards the Supreme Court established for assessing the law's burden on voters and that the court should have applied strict scrutiny analysis because the law was discriminatory and created an undue burden on the right to vote.⁴⁰⁴

The Eleventh Circuit Court of Appeals found the data match unpersuasive, citing data errors and failure of the match to account for other acceptable forms of identification. While it concluded the plaintiffs had standing, the Eleventh Circuit affirmed the decision of the district court⁴⁰⁵ and determined that Georgia's interest in preventing election fraud provided sufficient justification for the 2006 law and outweighed the burden imposed by the Georgia statute. The Supreme Court subsequently denied the plaintiffs' petition for a writ of certiorari.⁴⁰⁶

14. Large v. Fremont County – Wyoming 2005

In 2005, the ACLU filed a lawsuit against Fremont County, Wyoming, on behalf of Native American voters who were members of the Eastern Shoshone and Northern Arapaho Tribes residing on the Wind River Indian Reservation. The plaintiffs alleged that the at-large elections for the Fremont County Board of Commissioners diluted Native American voting strength in violation of the Constitution and Section 2 of the Voting Rights Act.⁴⁰⁷ At the time, Native Americans accounted for approximately 20% of the population, but with all five county Board of Commission seats elected at-large with staggered terms, no Native American candidates of choice were able to be elected despite receiving substantial support from the community.⁴⁰⁸ The defendants filed an answer denying the allegations of the complaint and a motion for summary judgment on the ground that Section 2, as applied in Indian Country to a county that was not covered by the special preclearance provisions of Section 5 of the Voting Rights Act, was unconstitutional.⁴⁰⁹ The plaintiffs filed a brief

⁴⁰¹ Brief of Appellants, *Young v. Billups*, No. 07-14664 (11th Cir. May 28, 2008).

⁴⁰² *Id.* at 7-8.

⁴⁰³ *Id.* at 9.

⁴⁰⁴ *See id.* at 42-52.

⁴⁰⁵ *Common Cause v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

⁴⁰⁶ *NAACP v. Billups*, 556 U.S. 1282 (2009).

⁴⁰⁷ Complaint at ¶ 1, *Large v. Fremont Cty.*, 05-CV-0270 (D. Wyo. Oct. 20, 2005).

⁴⁰⁸ *Id.* at ¶ 9-10.

⁴⁰⁹ Defendants' Answer to Complaint, *Large v. Fremont Cty.*, No. 05-CV-0270 (D. Wyo. Nov. 30, 2005).

opposing the motion.⁴¹⁰ On December 14, 2006, the United States filed a notice of intervention to defend the constitutionality of Section 2 and subsequently filed a brief to that effect.⁴¹¹ On January 26, 2007, the district court denied the defendants' motion for summary judgment.⁴¹²

Following depositions and discovery, the case was tried over a two-week period in February 2007. The district court issued an opinion finding that the at-large method of elections for the Fremont County Commission diluted the voting strength of Native Americans in violation of Section 2.⁴¹³ The court made extensive findings regarding past and pervasive ongoing discrimination against Native Americans, particularly in the area of voting, racially polarized voting, the isolation of the Native American community, and the lack of responsiveness by the county Commission to the special needs of Native Americans.⁴¹⁴

The parties were directed to propose districting plans to replace the at-large system. The county proposed plans that created a majority Native American single-member district with the other four members of the commission elected from the remainder of the county at-large.⁴¹⁵ The plaintiffs' proposed plan consisted of five single-member districts.⁴¹⁶ In August 2010, the district court adopted the plaintiffs' plan and concluded the county's proposal was not an adequate remedy for the Section 2 violation because it treated Native American and white voters differently and state law did not authorize "hybrid" plans.⁴¹⁷

While the county did not appeal the finding of a Section 2 violation, it appealed the remedy adopted by the district court. In February 2012, the Tenth Circuit affirmed the lower court's decision, holding that the county's proposed plan was not entitled to legislative deference because it did not "adhere as closely as possible to the contours of the governing state law."⁴¹⁸ The Tenth Circuit also determined that "settled Supreme Court precedent . . . strongly favors single-member districts in court-ordered plans."⁴¹⁹ After the Tenth Circuit's decision was issued, the district court also ordered that the county pay the plaintiffs' costs and attorney's fees.⁴²⁰ The county did not appeal, and the case closed—filed in 2005 and resolved in 2013, the case took 8 years to litigate.

15. Farrakhan v. Gregoire – Washington 2006

⁴¹⁰ Plaintiffs' Reply in Opposition to Summary Judgment, *Large v. Fremont Cty.*, No. 05-CV-0270 (D. Wyo. Dec. 1, 2005).

⁴¹¹ United States' Notice of Intervention Pursuant to 28 U.S.C. 2403(a), *Large v. Fremont Cty.*, No. 05-CV-0270 (D. Wyo. Dec. 14, 2006).

⁴¹² *Large v. Fremont Cty.*, No. 05-CV-0270, 2007 WL 9709756, at *1 (D. Wyo. Jan. 26, 2007).

⁴¹³ *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176, 1231 (D. Wyo. 2010).

⁴¹⁴ *See generally id.*

⁴¹⁵ *See Large v. Fremont Cty.*, No. 05-CV-0270, 2010 WL 11508507, at *2 (D. Wyo. Aug. 10, 2010), *aff'd*, 670 F.3d 1133 (10th Cir. 2012).

⁴¹⁶ *Id.* at *6.

⁴¹⁷ *Id.* at *10-13.

⁴¹⁸ *Large v. Fremont Cty.*, 670 F.3d 1133, 1135 (10th Cir. 2012).

⁴¹⁹ *Id.* at 1135.

⁴²⁰ *Large v. Fremont Cty.*, No. 05-CV-0270, 2013 WL 12342417, at *1 (D. Wyo. Sept. 20, 2013).

ACLU participating as amicus

Farrakhan v. Gregoire was a long-running case in which minority plaintiffs argued that discrimination in the state's criminal justice system led to high rates of disfranchisement for minorities in violation of Section 2 of the Voting Rights Act.⁴²¹ The Washington state constitution provided for the automatic disfranchisement of all persons convicted of "infamous crimes," defined as those punishable by death or imprisonment. The case was originally filed by the NAACP Legal Defense and Educational Fund, Inc., and the University Legal Assistance law clinic at Gonzaga Law School on behalf of a group of Black, Latino, and Native American incarcerated individuals. The plaintiffs presented evidence showing that Black Americans sentenced for serious crimes were more likely to be given aggravated sentences by the state's superior courts than whites sentenced for serious crimes, including the Spokane Prosecuting Attorney's office that sought the death penalty against an eligible Black person 100% of the time compared to 21% of the time for a white person. The plaintiffs also highlighted that the populations of Black, Latino, and Native Americans in state and federal correctional facilities were disproportionately large given their overall proportion in the general population.⁴²² The plaintiffs argued that the racial disparities were the result of racial discrimination in the Washington state criminal justice system, causing higher rates of arrest, conviction, longer sentences, and fewer suspended sentences.⁴²³

In 2000, a federal court granted the defendants' motion for summary judgment.⁴²⁴ The Ninth Circuit affirmed in part and reversed in part, finding that the lower court had applied an incorrect Section 2 analysis and that the plaintiffs had a cognizable claim that the disproportionate disfranchising of racial minorities based on criminal convictions violated Section 2.⁴²⁵ On remand, the district court found there was racial bias in the enforcement of Washington's criminal laws and the data and analysis in plaintiffs' expert reports was "compelling evidence of racial discrimination and bias in the Washington criminal justice system."⁴²⁶ The court also found credible the testimony of expert witnesses that the disparate impact on racial minorities was not explained by causes other than the racial bias. Nonetheless, the district court granted the state's motion for summary judgment, ruling that the lack of evidence of other forms of discrimination within the

⁴²¹ *Farrakhan v. Gregoire*, No. 2:96-cv-00076, 2006 WL 1889273, at *9 (E.D. Wash. July 7, 2006).

⁴²² See Plaintiffs' Fourth Amended Complaint Adding New Causes of Action at ¶¶ 16-20, *Farrakhan v. Locke*, No. 2:96-CV-00076. (E.D. Wash. Oct. 26, 1999).

Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997) (reciting factual and procedural background).

⁴²³ *Id.* at ¶¶ 20-21.

⁴²⁴ Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, *Farrakhan v. Locke*, No. 2:96-cv-00076 (E.D. Wash. Dec. 1, 2000).

⁴²⁵ *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

⁴²⁶ *Farrakhan v. Gregoire*, No. CV-96-076, 2006 WL 1889273, at *4 (E.D. Wash. July 7, 2006).

electoral system weighed in favor of the state and that there had to be more of a causal link between the discrimination within the criminal justice system and vote disfranchisement.⁴²⁷

Plaintiffs appealed, and the ACLU of Washington submitted a motion to file an amicus brief supporting a reversal of the lower court's decision. The ACLU argued that the district court erred in its analysis of Section 2, arguing that since disfranchisement was automatic upon conviction, the racial bias in the criminal justice system worked with the state election law, so nothing more was required to establish a violation of Section 2.⁴²⁸ The court denied the motion to file an amicus brief without providing any reason, but it listed the brief as one of the documents before the court in its opinion issued in January 2010.⁴²⁹

Then, in a 2-1 decision the court granted summary judgment to the plaintiffs on their vote denial claim. It concluded that there was discrimination in Washington's criminal justice system based on race, and that such discrimination clearly hindered the ability of racial minorities to participate effectively in the political process. As a consequence, the state's felon disfranchisement law violated Section 2 of the Voting Rights Act.

However, on October 7, 2010, in an en banc decision, the Ninth Circuit reversed the panel's ruling, concluding that the plaintiffs failed to present evidence of intentional racial discrimination in the operation of Washington's criminal justice system and did not meet their burden of establishing a violation of Section 2 of the Voting Rights Act.⁴³⁰ The plaintiffs did not file a petition for certiorari to the Supreme Court.

16. Libertarian Party of New Mexico v. Herrera – New Mexico 2006

In an effort to remove barriers for new political parties, the ACLU sued New Mexico in July 2006 to invalidate a two-petition ballot access system imposed on minor parties.⁴³¹ The challenged law required new parties to collect signatures to petition for formal party status and then required nominees from those parties to gather signatures on a second petition for their names to appear on the ballot. No such requirement existed for Republican or Democrat nominees. The lawsuit charged that New Mexico's law was unduly burdensome and violated the First and Fourteenth Amendment rights of political association by forcing new parties to seek signatures from non-party members in order to appear on the ballot. They sought declaratory and injunctive relief generally prohibiting the defendants from enforcing the two-petition system and injunctive relief requiring the defendants to place Libertarian Party nominees on the ballot for the 2006 general election.⁴³²

In September 2006, a New Mexico federal district court rejected the challenge and granted

⁴²⁷ *See id.* at *9.

⁴²⁸ Amicus Curiae Brief of the American Civil Liberties Union of Washington in Support of Appellants' Position Seeking Reversal, *Farrakhan v. Locke*, No. 01-35032 (9th Cir. Apr. 20, 2001).

⁴²⁹ *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010).

⁴³⁰ *Farrakhan v. Gregoire*, 623 F.3d 990, 994 (9th Cir. 2010).

⁴³¹ Complaint, *Libertarian Party of N.M. v. Herrera*, 6:06-cv-00615 (D.N.M. July 11, 2006).

⁴³² *Id.* at ¶ 1.

summary judgment for the defendants.⁴³³ The court implicitly noted that the measure was in place to minimize large numbers of third party and independent candidates on New Mexico ballots. The court upheld the law on the basis of the Supreme Court's decision in *Illinois State Board of Elections v. Socialist Worker Party*, which supported a state's interest that "a candidate demonstrate some support before being placed on the ballot...[to] safeguard[] the integrity of elections by avoiding overloaded ballots with frivolous candidacies, which in turn diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome runoffs, and may ultimately discourage voter participation in the electoral process."⁴³⁴ The court also reasoned the burdens imposed by New Mexico's ballot access law were less burdensome than other laws previously upheld by the Supreme Court.⁴³⁵ The ACLU appealed, and the Tenth Circuit affirmed the lower court's ruling.⁴³⁶ The plaintiffs did not appeal the Tenth Circuit's decision.

17. **Boustani v. Blackwell – Ohio 2006**

In 2006, the ACLU, the ACLU of Ohio, and other civil rights organizations filed suit in Ohio on behalf of two dozen organizations and a group of naturalized citizens challenging a law requiring naturalized citizens to produce a certificate of naturalization when voting in-person or within 10 days of casting a provisional ballot.⁴³⁷ The state did not request documentation from native-born citizens. Moreover, the naturalization certificate cost more than \$200 to obtain and took nearly a year to receive once requested. The suit challenged this requirement as a poll tax under the Twenty-Fourth Amendment and an undue burden on the fundamental right to vote for a specific group of voters in violation of the Fourteenth Amendment.⁴³⁸ Because the law also allowed poll workers to ask voters if they were naturalized and demand proof of citizenship, the suit separately challenged the law as encouraging racial profiling of U.S. citizens belonging to certain ethnic groups.⁴³⁹

The federal court enjoined the law and struck it down as unconstitutional under both the Fourteenth and Twenty-Fourth Amendments.⁴⁴⁰ The court agreed that the law imposed an undue burden on the right to vote, subjected naturalized citizens to disparate treatment, and constituted an unconstitutional poll tax.⁴⁴¹ Although the court halted the law's enforcement, the statute remained on the books, leaving the plaintiffs concerned that poll workers would continue to enforce additional requirements for naturalized citizens. The

⁴³³ *Libertarian Party of N.M. v. Vigil-Giron*, 6:06-cv-00615, 2006 WL 8443845 (D.N.M. 2006).

⁴³⁴ *Id.* (citing *Ill. State Bd. of Elections v. Socialist Worker Party*, 440 U.S. 173, 183-84 (1979)).

⁴³⁵ *Id.* at *7-9

⁴³⁶ *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303 (10th Cir. 2007).

⁴³⁷ Complaint for Declaratory and Injunctive Relief at ¶ 15, *Boustani v. Blackwell*, No. 1:06-cv-02065 (N.D. Ohio Aug. 29, 2006).

⁴³⁸ *Id.* at ¶¶ 36-38.

⁴³⁹ *Id.* at ¶¶ 39-42.

⁴⁴⁰ *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006).

⁴⁴¹ *Id.* at 825-27.

plaintiffs filed a motion for additional relief in 2012 asking the court to compel the state to educate poll workers on the law's abrogation and also to require that signs be placed at polling places to advise naturalized voters of their rights.⁴⁴² The court denied the order finding a lack of standing; no further action has been taken in the case.⁴⁴³

18. Ariz. v. Inter Tribal Council of Ariz.; Gonzalez v. Ariz. – Arizona 2006

In November 2004, Arizona voters approved Proposition 200, a ballot initiative that amended Arizona law by requiring individuals to provide proof of citizenship to register to vote and photo identification. Three lawsuits were filed and consolidated in federal court challenging the new requirements.⁴⁴⁴

The ACLU and additional co-counsel represented the Inter Tribal Council of Arizona, League of Women Voters of Arizona, League of United Latin American Citizens, and other individual and organizational plaintiffs asserting violations of the Fourteenth and Twenty-Fourth Amendments, the Civil Rights Act of 1964, Section 2 of the Voting Rights Act, and the National Voter Registration Act (NVRA). With respect to the proof of citizenship requirement, the plaintiffs argued that the identification requirements imposed an unnecessary and undue burden on the fundamental right vote for thousands of eligible Arizonans who were otherwise qualified to register to vote, but did not possess or were unable to access the documents specified as “satisfactory evidence” of citizenship.⁴⁴⁵ The plaintiffs also argued that the proof of citizenship requirement was preempted by the NVRA, at least with respect to voters who apply to register to vote using the federal voter registration form. The plaintiffs cited evidence that Native Americans living on reservations in Arizona, encompassing approximately 25 million acres, were more likely to be living below the poverty line and less likely to have residential home addresses, utility bills in their names, drivers' licenses, and other documents prescribed for proving citizenship under the new law.⁴⁴⁶ and the means to obtain the documents proving citizenship.⁴⁴⁷ The plaintiffs also argued the rules would especially burden the elderly, disabled, nursing home residents, and other individuals living in rural areas or without access to transportation.⁴⁴⁸ The proof of citizenship requirements also severely hampered the voter registration efforts of the plaintiffs.⁴⁴⁹

⁴⁴² Motion for Additional Relief, *Boustani v. Blackwell*, No. 1:06-cv-02065 (N.D. Ohio Sept. 25, 2012).

⁴⁴³ *Boustani v. Husted*, No. 1:06-cv-2065, 2012 WL 5414454, at *2 (N.D. Ohio 2012).

⁴⁴⁴ Consolidation Order, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. Jun. 1, 2006); Consolidation Order, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. Aug. 4, 2006) (consolidating Complaint, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. May 9, 2006); Complaint, *Inter Tribal Council of Ariz. v. Brewer*, No. 3:06-cv-1362 (D. Ariz. May 24, 2006); Complaint, *Navajo Nation v. Brewer*, No. 3:06-cv-1575 (D. Ariz. June 20, 2006)).

⁴⁴⁵ Complaint at ¶ 27, *Inter Tribal Council of Ariz. v. Brewer*, No. 3:06-cv-1362 (D. Ariz. May 24, 2006).

⁴⁴⁶ *Id.* at ¶ 29.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Id.* at ¶ 30.

⁴⁴⁹ *Id.* ¶ 31.

The plaintiffs sought a preliminary injunction to prohibit the implementation of the proof of citizenship and voter ID requirements for the 2006 midterm election.⁴⁵⁰ The district court denied the motion, but an injunction pending appeal was initially granted by the Ninth Circuit.⁴⁵¹ However, the Supreme Court vacated that order.⁴⁵² The Ninth Circuit subsequently affirmed the denial of injunctive relief by the district court.⁴⁵³

Discovery in the case proceeded and a trial was held in July 2008. The plaintiffs put forth evidence that between January 2005 and the Fall 2007, 31,550 voter registration applications were rejected for failure to provide proof of citizenship, of which 90% had listed the United States as their place of birth. Subsequently, only 11,000 of the total rejected applications were able to register. Plaintiffs also highlighted that although Arizona's population increased by 650,000 people (11%) between 2004 and 2007 in the first three years of Proposition 200, the number of registered voters declined by more than 11,000 voters. With respect to the photo ID requirement, the plaintiffs showed that while voters without acceptable ID were able to cast a conditional provisional ballot, they needed to produce an ID within 5 days for their vote to count, and between 63% and 77% of provisional ballots went uncounted, while many potential voters simply left without voting in the 2006 election after being asked to present ID.⁴⁵⁴ Additionally, the plaintiffs' evidence showed that many Native Americans over the age of 40 did not have birth certificates because they were not born in hospitals and could no longer be issued a delayed birth certificate because no living birth witnesses remained.⁴⁵⁵ On August 20, 2008, the district court entered judgment for defendants.⁴⁵⁶

The plaintiffs appealed to the Ninth Circuit, which issued a 2-1 opinion in October 2010 that held the NVRA preempted Proposition 200's proof of citizenship requirement for registration, making the law invalid. The Court of Appeals rejected the plaintiffs' additional arguments that the voter ID requirement violated the Voting Rights Act and the Fourteenth and Twenty-Fourth Amendments. The Ninth Circuit, sitting en banc, issued a subsequent ruling blocking the proof of citizenship requirement under the NVRA, but upheld the voter ID requirement.

On appeal to the Supreme Court, the Court affirmed that Arizona was prohibited from requiring individuals using the federal voter registration form to submit documentary proof of citizenship to register to vote, unless the procedure was approved by the U.S. Election

⁴⁵⁰ Plaintiffs' Motion for Preliminary Injunction, *Gonzalez v. Arizona*, No. 06-cv-1268 (D. Ariz. Aug. 9, 2006).

⁴⁵¹ Order on Motion for Preliminary Injunction, *Gonzalez v. Arizona*, No. 06-cv-1268 (D. Ariz. Aug. 9, 2006).

⁴⁵² *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

⁴⁵³ *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

⁴⁵⁴ *See Gonzalez v. Ariz.*, No. 06-cv-01362, 2008 WL 11395512 (D. Ariz. Aug. 20, 2008).

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

Assistance Commission.⁴⁵⁷ In an opinion authored by Justice Scalia, the Court held that the NVRA preempted Arizona’s documentary proof of citizenship requirement, and Arizona’s refusal to register voters using the federal form without documentary proof was in conflict with the NVRA and therefore unlawful. The Court held that the NVRA requires all states to “accept and use” the federal voter registration form and noted that “[n]o matter what procedural hurdles a State’s own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available.”⁴⁵⁸

19. Jenkins v. Ray – Georgia 2006

Following the 2000 census, the Georgia General Assembly redrew the state’s Board of Education districts and redistricted the five single-member districts for the Randolph County Board of Education.⁴⁵⁹ The state submitted the redistricting plan to the Justice Department, which granted preclearance in 2002.⁴⁶⁰ One of the new district lines ran through the middle of property belonging to District 5 Board Member and Chairman of the Board, Henry L. Cook, a Black incumbent, leaving his residence in District 4 and his farmland in District 5. District 5 was a majority Black district. Historically, District 4 was predominantly white. A state judge initially ruled that Cook was a District 5 elector, and Cook was reelected as the District 5 board member.⁴⁶¹ However, in a subsequent election local election officials decided that Cook resided in District 4, making him ineligible to run for his seat.⁴⁶²

Black voters in Randolph County sued, supported by the ACLU, alleging that the decision amounted to a new redistricting plan and should have been precleared under Section 5.⁴⁶³ A three-judge panel agreed and granted the plaintiffs summary judgment.⁴⁶⁴ The court relied on the assessment by the Department of Justice that its initial redistricting approval was contingent on Cook retaining District 5 eligibility⁴⁶⁵ and concluded that the change was a “standard, practice, or procedure with respect to voting” that required additional preclearance.⁴⁶⁶ Upon review, the Justice Department denied preclearance, concluding that there was sufficient evidence to prevent the county from meeting its burden of proving an absence of a discriminatory purpose.⁴⁶⁷ The case closed in 2007.

⁴⁵⁷ *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013).

⁴⁵⁸ *Id.* at 12.

⁴⁵⁹ Complaint at ¶ 7, *Jenkins v. Ray*, No. 4:06-cv-00043 (M.D. Ga. Apr. 17, 2006).

⁴⁶⁰ *Id.* at ¶ 8.

⁴⁶¹ *See id.* at ¶¶ 16-17.

⁴⁶² *See id.* at ¶ 17.

⁴⁶³ *Id.* at ¶ 22.

⁴⁶⁴ *Jenkins v. Ray*, No. 4:06-CV-43, 2006 WL 1582426 (M.D. Ga. 2006) (per curiam).

⁴⁶⁵ *Id.* at *3.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *See* Letter from Wan J. Kim, Assistant Attorney Gen., U.S. Dep’t of Justice, to Tommy Coleman, Esq. (Sept. 12, 2006), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2700.pdf>.

20. Strickland v. Clark – Mississippi 2006

The ACLU filed this case on behalf of plaintiffs in October 2006, challenging Mississippi's disenfranchisement rules in state court.⁴⁶⁸ Article 12, Section 241 of the Mississippi Constitution prohibits individuals convicted of 10 enumerated crimes—murder, rape, forgery, bribery, obtaining money or goods under false pretense, bigamy, embezzlement, perjury, theft, and arson—from voting in state and certain federal elections; the provision, however, allows individuals with a conviction of one of the 10 crimes to still vote in U.S. presidential elections.⁴⁶⁹ In 2004, the state Attorney General interpreted “theft” as including 11 additional crimes, and the decision was precleared by the Department of Justice in 2005.⁴⁷⁰ The Mississippi voter registration application form listed the 21 crimes that purportedly disqualify a person from registering to vote or voting in all state and federal elections—11 of which are not included in Article 12, Section 241. The form also did not include a provision that permitted individuals convicted of the enumerated crimes to vote in presidential elections.⁴⁷¹

The plaintiffs filed the lawsuit against the Secretary of State and state Attorney General arguing that the defendants denied individuals convicted of the enumerated crimes the right to vote in presidential elections and violated the right of individuals convicted of one of the state Attorney General's 11 additional theft crimes to vote in state and federal elections. The plaintiffs alleged violations of the Mississippi Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the National Voter Registration Act.⁴⁷² The plaintiffs sought declaratory and injunctive relief and moved to extend the voter registration deadline so that individuals convicted of one of the additional eleven crimes could vote in the November 2006 election. The plaintiffs also sought a temporary restraining order and preliminary injunction, which were denied. The state then filed a motion to dismiss the plaintiffs' claim, which was also denied.⁴⁷³ After discovery requests were propounded, additional plaintiffs filed a motion to join the suit in February 2008, but the state court did not rule on that motion,⁴⁷⁴ so they filed a separate suit in federal court.⁴⁷⁵

21. NAACP v. Carnahan – Missouri 2006

⁴⁶⁸ Complaint, *Strickland v. Clark*, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

⁴⁶⁹ MISS. CONST. art. 12, § 241; *see also* Complaint at ¶ 2, *Strickland v. Clark*, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

⁴⁷⁰ Complaint at ¶ 22-25, *Strickland v. Clark*, Case No. G2006-1753 S/2 (Chanc. Ct. Miss. 2006).

⁴⁷¹ *Id.* at ¶ 3-4.

⁴⁷² *Id.* at ¶ 6.

⁴⁷³ *See* Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at n.1, *Young v. Hosemann*, No. 3:08-cv-567 (S.D. Miss. Sept. 12, 2008).

⁴⁷⁴ *See id.* at 2.

⁴⁷⁵ Complaint for Injunctive and Declaratory Relief, *Young v. Hosemann*, No. 3:08-cv-567 (S.D. Miss. Sept. 19, 2008).

In September 2006, the NAACP and several other civic organizations and individual plaintiffs sued the Missouri Secretary of State and other state officials in a lawsuit seeking a declaratory judgment that the state's new photo ID requirement to vote was unconstitutional and to enjoin its enforcement.⁴⁷⁶ The plaintiffs argued that the photo ID law imposed an unauthorized, unnecessary, and undue burden on the fundamental right to vote in violation of the Fourteenth Amendment, an unconstitutional poll tax in violation of the Twenty-Fourth Amendment, was a violation of the Civil Rights Act of 1964, and a violation of Section 2 of the Voting Rights Act. Among the factual allegations presented were the various costs necessary to obtain an acceptable photo ID to vote, including the underlying documents to obtain an acceptable ID, and how the law would disproportionately burden Black and Latino voters, students, women, the disabled, the elderly, and the working poor.⁴⁷⁷ State officials themselves estimated that the law could disenfranchise 170,000 to 240,000 eligible voters.⁴⁷⁸

The plaintiffs filed a preliminary injunction motion in September 2006 to enjoin enforcement of the law.⁴⁷⁹ The plaintiffs' suit was voluntarily dismissed without prejudice in November 2006⁴⁸⁰ after the Missouri Supreme Court, in separate state litigation, struck down the law as violating several provisions of the Missouri Constitution.⁴⁸¹ The Missouri Supreme Court in an en banc decision affirmed the trial court's conclusions that the law placed a substantial burden on the fundamental right to vote and violated the state constitution's equal protection clause and guarantee of the right of qualified, registered citizens to vote.⁴⁸² The court also agreed that the photo ID law placed heavy burdens on specific populations and rejected the state's argument that the law was justified to protect against voter fraud because the facts did not support that in-person voter fraud was a problem in Missouri.⁴⁸³ With respect to the state's argument that it had a compelling interest in combating the perception of voter fraud, the court found that "[w]hile the State does have an interest in combating those perceptions [of voter fraud], where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement."⁴⁸⁴

22. Stewart v. Blackwell – Ohio 2006

⁴⁷⁶ Complaint for Declaratory and Injunctive Relief, NAACP v. Carnahan, No. 2:06-CV-04200-SOW (W.D. Mo. Sep. 6, 2006).

⁴⁷⁷ See *id.* ¶¶ 25-37.

⁴⁷⁸ See *id.* ¶ 24; see also *Weinschenk v. State*, 203 S.W.3d 201, 206 (Mo. 2006).

⁴⁷⁹ Plaintiff's Motion for a Preliminary Injunction, NAACP v. Carnahan, No. 2:06-cv-04200 (W.D. Mo. Sep. 22, 2006).

⁴⁸⁰ Order Lifting Stay, Dismissing Motion for Preliminary Injunction, and Dismissing Case without Prejudice, NAACP v. Carnahan, No. 2:06-CV-04200-SOW (W.D. Mo. Nov. 21, 2006).

⁴⁸¹ *Weinschenk*, 203 S.W.3d at 206. The ACLU and several other organizations filed an amicus brief in support of the plaintiffs in the state case. Brief for NAACP, Inc., et al. as *Amici Curiae*, *Weinschenk v. State*, 203 No. SC 88039 (Mo. 2006).

⁴⁸² *Weinschenk*, 203 S.W.3d at 204.

⁴⁸³ See *id.* at 209-210.

⁴⁸⁴ *Id.* at 218.

Voters in Ohio, represented by the ACLU and ACLU of Ohio, brought a class action lawsuit in 2002 challenging the state's use of punch card ballots and optical scan systems.⁴⁸⁵ Neither system used by Ohio provided notice to voters if there were possible errors in how they marked their ballots that could prevent their votes from being counted. The plaintiffs sued the Ohio Secretary of State, members of the Ohio Board of Examiners for the Approval of Electoral Marking Devices, members of various county boards of elections, and members of various county councils. At the time, Ohio relied predominantly on punch card voting systems; 69 of the state's 88 counties used punch cards. Those 69 counties included 72.5% of all registered voters in Ohio and 74% of the state's 11,756 voting precincts. Among the 19 counties that did not use punch cards, two used lever voting machines, six had electronic voting devices, and 11 used optical scanning equipment.⁴⁸⁶

The plaintiffs were two subclasses of voters. The first argued that non-notice punch card and optical scan systems violated the Fourteenth Amendment.⁴⁸⁷ The second consisted of African American voters from Hamilton, Summit, and Franklin counties who alleged their votes were disproportionately at risk of being rejected in violation of Section 2 of the Voting Rights Act.⁴⁸⁸ Using lay and expert testimony, the plaintiffs demonstrated racial disparities in counted votes due to flaws in non-notice technology. Election officials in Hamilton County also repeatedly expressed concern that punch card systems disfranchised African American voters in Cincinnati.

During the 2000 presidential election, punch card voting equipment resulted in greater intra-county racial differences in overvoting and undervoting than notice technology. The analysis by the plaintiffs' expert, Dr. Richard Engstrom, showed that in the 2000 presidential election in Hamilton County, the county seat of Cincinnati, Black voters' ballots were rejected for overvoting at nearly seven times the rate of non-Black voters.⁴⁸⁹ His Hamilton County analysis showed that Blacks undervoted at nearly twice the rate of non-Blacks, and adjusted for estimated and intentional undervotes, suffered unintentional undervotes seven and a half times more than non-Black voters. In Montgomery County, the county seat of Dayton, Black voters experienced residual voting around two and a half times as often as non-Black voters. Similarly, Black voters in Summit County, the county seat of Akron, experienced overvoting more than nine times the rate of non-Blacks. Summit County's Black voters also experienced total undervoting almost two and a half times more

⁴⁸⁵ Complaint for Declaratory and Injunctive Relief with Class Allegations, *Stewart v. Blackwell*, No. 5:02-CV-2028 (N.D. Ohio Oct. 11, 2002).

⁴⁸⁶ *Stewart v. Blackwell*, 356 F. Supp. 2d 791, 810 (N.D. Ohio 2004).

⁴⁸⁷ Complaint for Declaratory and Injunctive Relief with Class Allegations at 32, *Stewart v. Blackwell*, No. 5:02-CV-2028 (N.D. Ohio Oct. 11, 2002).

⁴⁸⁸ *Ibid.*

⁴⁸⁹ LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 805 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

frequently than non-Blacks and unintentional undervoting over three times more than other voters.⁴⁹⁰

The plaintiffs compared these results with Franklin County, which used direct record electronic (DRE) voting machines in order to determine if election machinery was the cause of the disparities and found there was no racial disparity in the number of overvotes in the county. DRE machines also appeared to reduce the rate of accidental under-voting. For non-Blacks, the rate became negligible, and for Black voters, it dropped below 1%, nearly eliminating the racial gap in accidental undervotes.

The plaintiffs' experts testified that racial disparities in the residual vote rates could not be separated from the evident and consistent socioeconomic disparities between Blacks and whites in each of the three counties. However, while error-prone punch card machines used in Hamilton, Summit, and Montgomery counties amplified racial disparities in the counties and caused a gap in residual ballot rates between white and Black voters, the voting technology used in Franklin County prevented a similar gap. In other words, unlike the three defendant counties, Franklin County's use of DRE machines overcame ambient racial disparities to ensure that Blacks and whites had an equal opportunity to participate in the political process.⁴⁹¹

On December 14, 2004, the district court ruled against the plaintiffs.⁴⁹² The court did not find a Section 2 violation, primarily because majority white counties in the state also had high residual vote rates. The plaintiffs appealed and argued that the court erred by applying a "rational basis" level of scrutiny. Sitting *en banc*, the court of appeals vacated the judgment for mootness, since the challenged machines were no longer in use.⁴⁹³

23. Citizen Equal Rights Alliance v. Johnson – Montana 2007

Citizens Equal Rights Alliance, Inc. and associated entities filed suit in federal court in May 2007, alleging that various forms of fraud were committed during the November 2006 general election on the Crow Indian Reservation in Big Horn County, Montana.⁴⁹⁴ The plaintiffs claimed that the tribal government's endorsement of certain tribal members running for Big Horn County offices in the 2006 election constituted "election fraud and/or voting rights abuses,"⁴⁹⁵ even though the right of an organization or group to endorse candidates for public office is protected by the First and Fourteenth Amendments of the

⁴⁹⁰ *See id.*

⁴⁹¹ *See Stewart*, 356 F. Supp. at 795-796.

⁴⁹² *Id.*

⁴⁹³ *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007).

⁴⁹⁴ Complaint for Declaratory and Injunctive Relief at ¶¶ 1, 14, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. May 24, 2007).

⁴⁹⁵ *See id.* at ¶ 14.

Constitution.⁴⁹⁶ The plaintiffs' other claims of fraud, including double voting and insecure ballot boxes, were similarly without merit. Despite failure to establish evidence of fraud, the plaintiffs argued that the alleged fraud diluted white voting strength in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act and sought removal of all precincts from the Crow Indian Reservation.

The ACLU filed a motion to intervene on behalf of Crow tribal members in July 2007.⁴⁹⁷ In November 2007, the district court granted motions to dismiss in favor of the county and state defendants.⁴⁹⁸ Among its findings, the court determined that the plaintiffs failed to state a federal claim and failed to prove that the defendants had acted with discriminatory intent or racial animus against the plaintiffs or white voters of the county. The complaint's dismissal mooted the ACLU's motion to intervene. However, the plaintiffs were allowed to file an amended complaint joining federal officials as additional defendants.⁴⁹⁹ Once again, the ACLU filed a motion to intervene on behalf of tribal members.⁵⁰⁰ But, in March 2008 the plaintiffs filed a voluntary notice of dismissal of their case.⁵⁰¹

24. Madison v. Washington – Washington 2007

In March 2006, King County Superior Court Judge Michael Spearman struck down a Washington state law that denied voting rights to thousands of formerly incarcerated persons solely because they owed court-imposed fines. The ACLU and ACLU of Washington represented three individuals who were unable to vote because they could not pay the court-imposed financial obligations. The challenged state law prohibited individuals from voting after they finished their prison terms until they completely satisfied a number of fines and fees. These legal financial obligations included docket and filing fees, court costs,

⁴⁹⁶ This was not the first time whites had accused Indians of voter fraud in Big Horn County. Carroll Graham, a non-Indian and a state senator from Big Horn County, charged that election fraud had been committed during the 1982 primary and requested an investigation by the State Commissioner of Political Practices. He complained, among other things, that Indian voters had been bribed with sandwiches and potato chips by the successful primary candidates or their supporters. Jack Lowe, an attorney with the commissioner's office, conducted a four-day investigation of the allegations and concluded that no fraud had occurred. According to Lowe, the practices complained of "would raise no eyebrows in some other parts of the state." Lowe concluded that "the most striking feature of Big Horn County politics is this: there is a very unfortunate racial polarization taking place. This election is seen by some as a sort of latter-day Indian uprising." A federal court, in a successful Indian vote dilution case, described the allegations of voter fraud on the Crow Reservation as "unfounded." *See Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986).

⁴⁹⁷ Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. July 16, 2007).

⁴⁹⁸ Order Granting Defendants' Motion to Dismiss, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Nov. 5, 2007).

⁴⁹⁹ Amended Complaint for Declaratory and Injunctive Relief, Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Nov. 19, 2007).

⁵⁰⁰ Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Feb. 19, 2008).

⁵⁰¹ Notice of Dismiss, Motion for Leave to Intervene, *Citizen Equal Rights Alliance v. Johnson*, No. 1:07-cv-00074 (D. Mont. Mar. 25, 2008).

restitution, and costs related to incarceration. Interest on these court-imposed assessments accrued at 12% a year.⁵⁰² According to Washington’s own statistics, more than 90% of people were indigent at the time of charging, so it was extremely difficult for many returning citizens to pay the financial assessments upon release. Additionally, at the time of litigation, disfranchisement affected about 3.7% of eligible voters in Washington—almost double the national average, and more than 250,000 people in Washington could not vote because of a prior felony conviction. The impact of the disenfranchisement law was widespread and disproportionately impacted people of color in Washington, where marked racial disparities in the state’s incarceration rate meant the state disfranchised almost 25% of all voting-age African American males.⁵⁰³

After a favorable lower court ruling granting summary judgment for the plaintiffs, the state appealed.⁵⁰⁴ In a 6-3 decision issued in July 2007, the Supreme Court of Washington reversed. The majority held that persons with felony convictions no longer had a fundamental right to vote and, as a result, applied a rational basis standard to review the law—the lowest level of judicial scrutiny. The court concluded that Washington had a rational basis for “limiting political participation of those unwilling to abide by laws and in requiring the completion of all sentence elements before the right to vote is restored.”⁵⁰⁵ The court did not address the plaintiffs’ argument that people’s financial inability—not their unwillingness—to pay financial obligations does not indicate whether or not they are law-abiding citizens. Three dissenting judges countered that the financial conditions violated the Equal Protection Clause, reasoning that drawing a financial line between some formerly incarcerated persons—thus allowing some to vote but not others—was impermissible.⁵⁰⁶ The case generated support for the legislature to repeal the conditioning of voting rights restoration on the ability to pay off all court-imposed fines and fees.⁵⁰⁷

25. Nick v. Bethel – Alaska 2007

In June 2007, the ACLU, ACLU of Alaska, and Native American Rights Fund represented Alaskan Natives in the Bethel Census Area of Alaska, where more than 10,000 Yup’ik speakers reside. They contended the state and the City of Bethel failed to provide language assistance in the Yup’ik language as required by the special minority language provisions of

⁵⁰² Complaint, *Daniel Madison v. State of Washington*, No. 04-2-33414-4 SEA (Sup. Ct. Wash. Oct. 21, 2004).

⁵⁰³ Press Release, ACLU, Washington Court Strikes Down Modern Form of Poll Tax (Mar. 28, 2006) <https://www.aclu.org/press-releases/washington-court-strikes-down-modern-form-poll-tax>.

⁵⁰⁴ *Madison v. State*, No. 04-2-33414-4SEA, 2006 WL 3713716 (Wash. Super. 2006).

⁵⁰⁵ *Madison v. State*, 163 P.3d 757, 771 (Wash. 2007).

⁵⁰⁶ *Id.* at 778-82 (Alexander, J., Chambers, J., Johnson, J., dissenting)

⁵⁰⁷ See WASH. REV. CODE § 29A.08.520(1); see also *Felons and Voting Rights*, WASHINGTON SECRETARY OF STATE, <https://www.sos.wa.gov/elections/voters/felons-and-voting-rights.aspx> (regarding fines, restitution, or other legal financial obligations, “You are not required to completely pay off your fines, restitution, or other legal financial obligations (LFOs) before you register to vote. However, your voting rights can be revoked if the sentencing court determines that you have failed to comply with the terms of your legal financial obligations”).

the Voting Rights Act, Section 4(f)(4) and Section 203.⁵⁰⁸ These complaints alleged the failure to provide written language assistance to voters by way of translations of election materials and the failure to provide oral language assistance by way of translators, interpreters, and adequately trained election officials. The plaintiffs also claimed that the defendants failed to comply with the preclearance provision of Section 5 of the Voting Rights Act and sought to allow Alaska Native limited-English proficient voters to receive assistance from the person of their choice as required by Section 208 of the Voting Rights Act.

The litigation presented a number of distinct challenges. Not only were the plaintiffs geographically isolated and remote, making travel difficult and time consuming, but it was difficult to communicate without the assistance of Yup'ik translators. For example, attorneys for the plaintiffs engaged in election monitoring during the general election on November 4, 2008, but to do so they had to fly on small planes to several isolated Native villages and utilize translators to interview, follow up, and obtain translated declarations from voters about their experiences at the polls.⁵⁰⁹

In July 2008, the plaintiffs obtained a preliminary injunction against the state defendants. The district court held that the plaintiffs had demonstrated a substantial likelihood of success on the merits of their claims and enjoined the state from further failure to provide adequate and effective language assistance. Specifically, the court ordered the state to undertake efforts to provide mandatory poll worker training in the requirements of the law, hire a language assistance coordinator fluent in Yup'ik, recruit bilingual poll workers or translators, provide written sample ballots in Yup'ik, provide preelection publicity in Yup'ik, ensure the accuracy of translations, provide a Yup'ik glossary of election terms, and submit pre and post-election reports to the court.⁵¹⁰

On July 31, 2009, the court accepted a consent decree and settlement agreement entered into by the plaintiffs and the City of Bethel.⁵¹¹ It provided for translators at the polls, mandatory training for all translators working in city elections, the provision of a Yup'ik-English election glossary, broadcasting of Yup'ik-language election announcements, advance publication of translator services prior to elections, and translation of initiatives and referenda into written Yup'ik.⁵¹² The city also agreed to seek Section 5 preclearance of the settlement agreement.

Following more litigation, the plaintiffs and the state defendants entered into a settlement agreement providing for minority language assistance to Yup'ik speakers including poll

⁵⁰⁸ See Complaint, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska Jun. 11, 2007); First Amended Complaint, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska May 22, 2008).

⁵⁰⁹ ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2010-DECEMBER 31, 2010 8, https://www.aclu.org/sites/default/files/field_document/VRP_Annual_Report_2010.pdf.

⁵¹⁰ *Nick v. Bethel*, No. 3:07-cv-00098, 2008 WL 11456134, at *6-7 (D. Alaska July 30, 2008).

⁵¹¹ Order from Chambers, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska July 31, 2009).

⁵¹² See Consent Decree and Settlement Agreement, *Nick v. Bethel*, No. 3:07-cv-00098 (D. Alaska July 9, 2009).

workers to serve as bilingual translators, Yup'ik sample ballots, a comprehensive Yup'ik-English glossary of election terms, radio election ads in Yup'ik, election video broadcasts in Yup'ik, outreach to Yup'ik speakers, the formation of a Yup'ik Translation Panel, translation of ballot measures, and compliance with Section 5 preclearance. The agreement also called for payment of the plaintiffs' lawyers fees and retention of enforcement jurisdiction by the district court until December 31, 2012. The agreement was formally approved by the district court on February 16, 2010.⁵¹³ Monitoring of elections and the implementation of the settlement agreements is ongoing.

26. Johnson v. Bredeesen – Tennessee 2008

For several years, Tennessee had one of the most cumbersome and confusing felon re-enfranchisement schemes in the nation. In 2006, the legislature amended the law to allow people convicted of “infamous crimes” to apply for a Certificate of Restoration. The law, however, requires that applicants pay all victim restitution and be current on any child support obligations.⁵¹⁴ Prior to the 2006 amendment the state did not require individuals with past convictions, who had otherwise completed all the terms of their sentence, to pay legal financial obligations before being eligible to seek restoration of their voting rights.⁵¹⁵

On February 25, 2008, the ACLU and ACLU of Tennessee filed a lawsuit challenging the requirement to pay legal financial obligations as a condition of rights restoration as unconstitutional under the Fourteenth and Twenty-Fourth Amendments and state laws.⁵¹⁶ The lawsuit also highlighted the fact that individuals who do not have a criminal conviction but owe outstanding child support do not risk losing their voting rights for failure to pay. Two of the three plaintiffs in the case, Terrence Johnson and Jim Harris, owed outstanding child support payments but had custody of their children.

The complaint also included a due process claim on behalf of a plaintiff who, prior to the lawsuit being filed, attempted to complete and submit a Certificate of Restoration application. The law requires a supervising authority, such as a probation officer or criminal court clerk, to complete a portion of the Certificate of Restoration. However, the state had not implemented a set of procedures that all counties have to follow when determining whether a person convicted of an “infamous crime” owes a legal financial obligation, and if so, whether that person has satisfied the requirement. Supervising authorities refused to sign the form for this plaintiff on the grounds that he owed victim

⁵¹³ Order Granting Parties' Joint Request for Approval of Settlement Agreement on §§ 203, 4(f)4 & 208 Claims, Rescission of Preliminary Injunction, and Dismissal of Case With Prejudice at 2, Nick v. Bethel, No. 3:07-cv-00098 (D. Alaska Feb. 16, 2010).

⁵¹⁴ See *Johnson v. Bredeesen*, 624 F.3d 742, 744–45 (6th Cir. 2010).

⁵¹⁵ *Id.* at 745.

⁵¹⁶ Complaint for Declaratory Relief, Injunctive Relief, and Nominal Monetary Damages, *Johnson v. Bredeesen*, No. 3:08-cv-00187 (M.D. Tenn. Feb. 25, 2008).

restitution. Yet, neither the county nor the state provided him with documentation confirming whether or not he owed any money.⁵¹⁷

Three of the defendants filed a motion to dismiss for failure to state a claim, which the court denied. The defendants then filed a motion for a judgment on the pleadings, arguing that even assuming all of the allegations in the complaint were true, the plaintiffs' claims still failed as a matter of law. After a hearing, the court granted the defendants' motion as to all of the claims except for the due process claim. The parties eventually settled one of the plaintiff's claims, and he was able to vote in the November 4, 2008, general election.

The plaintiffs appealed the dismissal of the remainder of their claims to the Sixth Circuit. In a 2-1 decision, a panel affirmed the dismissal of the plaintiffs' claims.⁵¹⁸ The majority ruled that Tennessee's re-enfranchisement scheme does not violate the Equal Protection Clause because the State has a rational basis for requiring payment of restitution and child support, even if the child support payment has nothing to do with the underlying conviction. The panel also held that conditioning the right to vote on payment of restitution and child support is not equivalent to imposing a poll tax and, therefore, the Twenty-Fourth Amendment is not implicated.⁵¹⁹ The majority also rejected the plaintiffs' claim under the Privileges and Immunities Clauses of the U.S. Constitution and Tennessee Constitution, reasoning that the provisions do apply to voting rights.⁵²⁰ In her dissent, Judge Moore concluded that the Supreme Court's decisions in *Harman v. Forssenius*,⁵²¹ *Griffin v. Illinois*,⁵²² and its progeny, required the court to conclude that the law violated both the Equal Protection Clause and the Twenty-Fourth Amendment.⁵²³ The plaintiffs filed a petition for rehearing en banc which the Sixth Circuit denied on December 17, 2010.⁵²⁴

27. Morales v. Handel; Morales v. Kemp – Georgia 2008

This action was filed by the ACLU, the Lawyers' Committee for Civil Rights Under Law, and the Mexican American Legal Defense and Educational Fund (MALDEF) to challenge a new system of voter verification involving citizenship checks being implemented by the state of Georgia weeks prior to the 2008 presidential election.⁵²⁵ Georgia's system attempted to match information of voter registration applicants with information contained in the state's Department of Driver Services database and the Social Security Administration database to verify eligibility, flagging individuals whose information did not

⁵¹⁷ See *id.* at ¶¶ 1–9.

⁵¹⁸ *Johnson*, 624 F.3d 742.

⁵¹⁹ *Id.* at 750-754.

⁵²⁰ *Id.* at 751-752.

⁵²¹ *Harman v. Forssenius*, 380 U.S. 528 (1965).

⁵²² *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵²³ *Id.* at 754-780.

⁵²⁴ *Johnson v. Haslam*, 624 F.3d 742 (6th Cir. 2010), cert. denied, 563 U.S. 1008 (2011).

⁵²⁵ Complaint for Declaratory and Injunctive Relief – Class Action, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Oct. 9, 2008).

match to local registrars for special scrutiny. Without providing procedures for evaluating citizenship, the Secretary of State directed county election officials to not permit individuals with flagged registration records to vote a regular ballot unless and until the county verified the individual's citizenship. Individuals designated as potential noncitizens would instead have to vote a "challenged" ballot.⁵²⁶

The complaint argued that the process was inaccurate and error-prone, resulting in the plaintiff being wrongly flagged as a noncitizen and deemed ineligible to vote, even though he had duly registered and had taken steps to prove his citizenship in response to the county's scrutiny of his citizenship status by providing a passport to the county clerk.⁵²⁷ The plaintiff sought declaratory relief and temporary and permanent injunctive relief on behalf of himself and the class of residents of Georgia who had submitted timely voter registration forms and were wrongly being flagged as noncitizens. The plaintiff argued that the flawed matching procedures were illegally implemented because the state failed to seek preclearance as required by Section 5 of the Voting Rights Act and was in violation of the National Voter Registration Act (NVRA), which prohibits systematic challenges to voter registration 90 days prior to an election subject to certain exceptions provided in the statute which did not apply in this case.⁵²⁸

Georgia argued that it was complying with the NVRA and that because it was attempting to comply with a federal law, the change did not reflect a policy choice made by state or local officials and did not have to be precleared.⁵²⁹ Specifically, Georgia argued that the verification procedures were adopted in a purported effort to comply with the Help America Vote Act (HAVA) and its directive to states to accurately maintain their statewide voter registration lists and verify certain voter information.⁵³⁰ HAVA provides a process for states to remove duplicate registrations and help ensure the accuracy of information submitted by the registrants by matching registrants' information against information contained in a state's drivers' license database and the Social Security Administration database.⁵³¹ Such information, however, does not include information on citizenship status, since voters already verify their citizenship during the registration process. Further, HAVA does not require states to use the matching process to verify *eligibility* to vote, which is what Georgia attempted to do and in a manner that wrongly flagged eligible voters as noncitizens.⁵³²

A three-judge court was empaneled and granted the plaintiff's motion for a preliminary injunction, finding that at least two aspects of the state's voter verification procedure

⁵²⁶ *Id.* at ¶¶ 34-35.

⁵²⁷ *Id.* at ¶¶ 58-59.

⁵²⁸ *See id.* at ¶¶ 64-69; Motion for Preliminary Injunction and Temporary Restraining Order and to Convene Three-Judge Court, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Oct. 9, 2008).

⁵²⁹ Response to Motion for Temporary Restraining Order and Preliminary Injunction at ¶ 3, *Morales v. Handel*, Case No. 1:08-cv-03172 (N.D. Ga. Oct. 10, 2008).

⁵³⁰ *See id.*

⁵³¹ Amended Complaint for Declaratory and Injunctive Relief at ¶¶ 18-20, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. March. 10, 2009).

⁵³² *Id.* at ¶ 21.

constituted changes in the state's voting process and required Section 5 preclearance prior to implementation.⁵³³ During the course of litigation, the state submitted the voting changes to the Department of Justice for preclearance. The organizations representing the plaintiff then filed a comment letter with Department of Justice in November 2008, asking it to either object to the submission or request additional information to evaluate its impact upon language and racial minorities. The Justice Department interposed an objection to the state's submission, finding that the verification procedures were inaccurate and discriminatory and determining that the procedure created disparate voting burdens for Latino, Asian American, and African American citizens than for white citizens.⁵³⁴

In September 2009, Georgia moved to dismiss arguing that the verification program was authorized under both state and federal law and that the plaintiff's complaint was moot given the state's newly enacted proof of citizenship law.⁵³⁵ The plaintiff moved for summary judgment seeking a final judgment permanently enjoining the Secretary from using the voter verification procedures unless the procedures were precleared.⁵³⁶ In June 2010, the three-judge panel issued an order finding that the appropriate remedy was to extend the existing preliminary injunction to the upcoming elections in Georgia.⁵³⁷ Subsequently, Georgia filed suit in the U.S. District Court for the District of Columbia seeking a declaratory judgment that the voter verification program did not violate Section 5, discussed *infra*.

28. State ex rel. Colvin v Brunner – Ohio 2008

ACLU participating as amicus for defendants

In 2006, Ohio began permitting voters to receive no-fault absentee ballots in person at the county boards of elections as a form of early voting. Many election officials promoted absentee voting as a way for voters to avoid the long lines and technical glitches that plagued elections in Ohio. In 2008, Ohio's registration deadline was October 6, but early and absentee voting began on September 30. This allowed a prospective voter to register to vote and receive an absentee ballot in person on the same day during a five-day window, in essence a variation of same day registration known as "Golden Week." When news broke that Democrats' Get Out the Vote efforts would take advantage of this directive, Republicans threatened to sue. They argued that a voter must be registered to vote for at least 30 days before receiving an absentee ballot.

⁵³³ *Morales v. Handel*, No. 1:08-cv-03172, 2008 WL 9401054, at*8 (N.D. Ga. Oct. 27, 2008).

⁵³⁴ Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to The Honorable Thurbert E. Baker, Attorney Gen. (May 29, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf.

⁵³⁵ *See* Defendant's Brief in Support of Motion to Dismiss or in the Alternative Motion for Summary Judgment, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Sept. 4, 2009).

⁵³⁶ Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Sept. 4, 2009).

⁵³⁷ Order, *Morales v. Handel*, No. 1:08-cv-03172 (N.D. Ga. Jun. 15, 2010).

Two registered voters filed for a writ of mandamus to require the Ohio Secretary of State to prohibit the “Golden Week” practice of allowing voters to register and vote on the same day.⁵³⁸ The ACLU, together with various national and local voting rights groups, filed an amicus brief urging the court to dismiss the voters’ claims. The brief argued that the plaintiffs’ interpretation of state law was erroneous and violated Section 202 of the Voting Rights Act, Section 1971 of the Civil Rights Act, the National Voter Registration Act, and the First and Fourteenth Amendments.⁵³⁹

On September 29, 2008, the Ohio Supreme Court ruled against the plaintiffs and held that any voter who would be registered for 30 days as of Election Day on November 4 would be able to request and receive an absentee ballot.⁵⁴⁰

29. State ex rel. Skaggs v. Brunner; NEOCH v. Brunner – Ohio 2008

ACLU as amicus for defendants

This litigation was originally filed in the Ohio Supreme Court on November 13, 2008, challenging then Ohio Secretary of State Jennifer Brunner’s determination that approximately one thousand provisional ballots cast by registered and qualified voters, which lacked a printed name or signature on the ballot envelope, nonetheless complied with state law and should be counted. The plaintiffs were two voters from Franklin County who filed suit to challenge this determination and requested a writ of mandamus and temporary restraining order against Brunner and the Franklin County Board of Elections to prohibit them from counting the ballots.⁵⁴¹ The issue originated as the result of the Franklin County Board of Elections’ decision to create its own provisional ballot envelope form for use in the 2008 general election, even though a provisional ballot envelope format was prescribed by the Secretary of State. Franklin County’s provisional envelope included a written instruction that a voter was required to print their own name on the form—had the board used the Secretary of State’s prescribed form, a poll worker would have filled out the form for the provisional voter and simply asked the voter to sign.⁵⁴² Ohio law also required poll workers to verify that a provisional voter had executed and signed the written affirmation.

Approximately 1,000 provisional ballots cast in Franklin County in the November 4, 2008, election were alleged to have been incomplete because they lacked a printed name or signature.⁵⁴³ Also at issue were the results of three extremely close congressional races in the Fifteenth Congressional District, Twentieth House District, and Nineteenth House

⁵³⁸ See Verified Petition for Writ of Mandamus, *State ex rel. Colvin v Brunner*, No. 08-1813 (Ohio Sept 12, 2008).

⁵³⁹ Brief of *Amici Curiae* 1Matters et al. in Opposition to Relators’ Petition, *Ohio ex Rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (Ohio Nov. 13, 2008).

⁵⁴⁰ *State ex rel. Colvin v Brunner*, 120 Ohio St.3d 110 (Ohio 2008).

⁵⁴¹ Complaint, *Ohio ex Rel. Skaggs v. Brunner*, No. 2:08-cv-1077 (Oh. Supreme Ct. Nov. 13, 2008).

⁵⁴² See Brief for ACLU Voting Rights Project and ACLU of Ohio as *Amici Curiae* in Opposition to Relators’ request for a writ, at 3, *Ohio ex rel. Skaggs v. Brunner*, No. 08-4585 (6th Cir. 2008).

⁵⁴³ *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d 506, 509 (2008).

District, which might have been determined by the 1,000 provisional ballots.⁵⁴⁴ All of the disputed ballots were cast by voters who were properly registered and eligible to vote in their precincts and included a name, either in print or signature form, and other information that allowed the voters who cast the ballots to be identified.⁵⁴⁵

The case was removed to federal court and considered with two other consolidated cases challenging Ohio's provisional ballot process for the 2008 election.⁵⁴⁶ On November 14, the plaintiffs moved to remand the case back to state court, arguing that no federal question was raised that gave the federal district court jurisdiction.⁵⁴⁷ The district court denied the motion on November 16, finding in part that the complaint contained Equal Protection Clause questions.⁵⁴⁸ On November 20, the district court granted summary judgment for the Secretary of State and permitted the provisional ballots to be counted. The district court determined that the deficiencies on the provisional ballot forms associated with the disputed ballots were the result of poll worker error in failing to verify completion of the form, as required under state law.⁵⁴⁹ The plaintiffs appealed, arguing that removal and consolidation was improper, as they had not pled any federal claims, and that the district court's erred in granting summary judgment to the Secretary of State.⁵⁵⁰

The ACLU filed an amicus brief arguing that the plaintiffs' interpretation of the law violated Section 1971 of the Civil Rights Act of 1964, which prohibits officials from denying the right of any individual to vote because of an error or omission on any document relating to any application, registration, or other act requisite to voting if immaterial to determining the voter's qualifications.⁵⁵¹ On November 25, the Sixth Circuit agreed with the plaintiffs' argument that federal jurisdiction was improper and remanded the case back to the Ohio Supreme Court.⁵⁵² The ACLU again filed an amicus brief in support of Secretary Brunner's determination that the ballots should be counted on the same theory under Section 1971 of the Civil Rights Act of 1964. However, the Ohio Supreme Court ruled that state law required the provisional ballot envelope be completely executed in order for the ballots to

⁵⁴⁴ See Complaint at ¶8, Ohio ex Rel. Skaggs v. Brunner, No. 2:08-cv-1077 (Oh. Supreme Ct. Nov. 13, 2008); *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d at 511-512.

⁵⁴⁵ See *State ex rel. Skaggs v. Brunner*, 120 Ohio St. 3d at 509.

⁵⁴⁶ See *Ohio Republican Party v. Brunner*, No. 2:08-cv-913 (S.D. Oh. 2008); *Northeast Ohio Coalition for Homeless v. Brunner*, No. C2-06-896 (S.D. Oh. 2008).

⁵⁴⁷ Motion for Remand of Case to the Ohio Supreme Court, Ohio ex rel. Skaggs v. Brunner, No. 2:08-cv-1077 (S.D. Oh. Nov. 14, 2008)

⁵⁴⁸ *Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819, 826 (S.D. Ohio 2008).

⁵⁴⁹ *State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 836-37 (S.D. Ohio 2008).

⁵⁵⁰ See Emergency Motion of Relators/Appellants, Ohio ex rel. Skaggs v. Brunner, No. 08-4585 (6th Cir. Nov. 20, 2008).

⁵⁵¹ Brief for ACLU Voting Rights Project and ACLU of Ohio as *Amici Curiae* in Opposition to Relators' request for a writ, at 4, Ohio ex Rel. Skaggs v. Brunner, No. 08-4585 (6th Cir. 2008).

⁵⁵² *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468 (6th Cir. 2008).

count.⁵⁵³ As a result, nearly 1,000 Ohio registered voters' ballots were discarded, potentially swinging the outcome of the three races.

30. Ohio Republican Party v. Brunner – Ohio 2008

ACLU participating as amicus for defendants

In September 2008, the Ohio Republican Party filed suit against the Ohio Secretary of State in federal court seeking a temporary restraining order and preliminary and permanent injunctions to block a directive issued by the Secretary allowing voters to register to vote and receive an absentee ballot on the same day during the five-day overlap between state's voter registration and absentee voting periods. Effectively, the overlap between the registration and absentee voting periods permitted voters to register and vote on the same day for those five days.⁵⁵⁴ The plaintiff wanted to prohibit this and alleged that the Secretary of State's directive violated various state and federal laws. The ACLU, ACLU of Ohio, and other civil rights organizations filed an amicus brief arguing that there was no federal question giving the district court jurisdiction over the case and that the court should abstain from second-guessing an interpretation of the state's election law by the chief state election official⁵⁵⁵ since there was a similar petition pending in the Ohio Supreme Court.⁵⁵⁶ The brief further argued that if the relief sought by the plaintiff was granted, it would violate federal voting laws rather than uphold protected voting rights.⁵⁵⁷ The district court abstained from ruling in light of the Ohio Supreme Court's decision on September 29, 2008, upholding the actions taken by the Ohio Secretary of State.⁵⁵⁸

On October 5, the plaintiffs filed a renewed motion for a temporary restraining order requesting the court to rule on its claim under the Help America Vote Act (HAVA), which the court had not done previously. The renewed motion alleged that the Secretary violated HAVA by failing to verify new registrations against the Ohio Bureau of Motor Vehicles and Social Security Administration databases.⁵⁵⁹ The Secretary argued that her office was in full compliance with the requirements of HAVA and, further, that HAVA does not mandate the use of database matching to verify voter eligibility or to be used to challenge or purge

⁵⁵³ *Ohio ex rel. Skaggs v. Brunner*, 900 N.E.2d 982 (Ohio 2008).

⁵⁵⁴ Verified Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction, *Ohio Republican Party v. Brunner*, 2:08-cv-00913 (S.D. Ohio Sept. 26, 2008).

⁵⁵⁵ Brief as *Amicus Curiae* of ACLU of Ohio et al. in Opposition to Plaintiffs' Application for Temporary Restraining Order, *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Sept. 29, 2008).

⁵⁵⁶ See Verified Petition for Writ of Mandamus, *State ex rel. Colvin v. Brunner*, No. 08-1813 (Ohio Sept. 12, 2008).

⁵⁵⁷ *Id.* at 8-18.

⁵⁵⁸ *Ohio Republican Party v. Brunner*, No. 2:08-CV-00913, 2008 WL 4445193 at *3 (S.D. Ohio 2008) (citing *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110 (S. Ct. Ohio 2008)).

⁵⁵⁹ See Renewed Motion for Temporary Restraining Order Following Interlocutory Appeal, *Republican Party of Ohio v. Brunner*, No. 2:08-cv-00913 (N.D. Ohio Oct. 5, 2008).

voters.⁵⁶⁰ The ACLU and others again filed an amicus brief in support of the Secretary, which explained that the point of HAVA database matching was to prevent duplicate registrations, not to purge voters or subject them to unwarranted challenges at the polls.⁵⁶¹ However, the district court granted the temporary restraining order and directed the Secretary to perform verification of new registrants' identity and match their information to Ohio's motor vehicles database and the Social Security Administration database.⁵⁶²

The Secretary of State appealed the order to the Sixth Circuit, and on October 14 the full Sixth Circuit, sitting en banc and in a divided decision, denied the motion to stay the temporary restraining order.⁵⁶³ The Secretary then appealed to the U.S. Supreme Court to overturn the en banc decision. The ACLU and others filed another amicus brief in the Supreme Court in support of the Secretary's request, advancing several arguments for why the temporary restraining order was wrongly issued.⁵⁶⁴ On October 17, the Supreme Court granted the stay and vacated the temporary restraining order. Without deciding the merits, the Court determined that the plaintiff was not likely to prevail on the question of whether a private party could raise a HAVA claim to justify the issuance of a temporary restraining order.⁵⁶⁵

On November 4, 2008, the plaintiffs amended their complaint to allege violations of provisional ballot rules and challenge directives issued by the Secretary of State to guarantee consistent treatment of provisional ballots throughout the state.⁵⁶⁶ This portion of the case was consolidated with *Northeast Ohio Coalition for the Homeless v. Brunner*.⁵⁶⁷ However, the plaintiffs subsequently dismissed their claims in late November.⁵⁶⁸

31. Project Vote v. Madison Cnty. Bd. of Elections – Ohio 2008

In September 2008, the ACLU and the ACLU of Ohio sued an Ohio county in federal court for denying absentee ballots to newly registered voters in violation of a directive issued by

⁵⁶⁰ See Memorandum in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order and Preliminary Injunction at ¶¶ 8-18, *Republican Party of Ohio v. Brunner*, No. 2:08-cv-00913 (N.D. Ohio Oct. 8, 2008).

⁵⁶¹ See Brief of *Amicus Curiae* ACLU of Ohio et al. in Opposition to Plaintiffs' Renewed Motion for Temporary Restraining Order, *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Oct. 7, 2008).

⁵⁶² *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957, 966 (S.D. Ohio 2008).

⁵⁶³ *Ohio Republican Party v. Brunner*, 544 F.3d 711 (6th Cir. 2008).

⁵⁶⁴ Brief of *Amicus Curiae* ACLU of Ohio et al. in Support of Appellant's Application for Stay of Temporary Restraining Order, *Brunner v. Ohio Republican Party et al.*, No. 08A332 (2008).

⁵⁶⁵ *Brunner v. Ohio Republican Party*, 55 U.S. 5, 6 (2008).

⁵⁶⁶ Amended and Supplemental Complaint for Preliminary and Permanent Injunction, *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Nov. 4, 2008).

⁵⁶⁷ Order Granting Motions to Consolidate, *Northeast Ohio Coalition for the Homeless v. Brunner*, No. C2-06-896 (S.D. Ohio Nov. 6, 2008).

⁵⁶⁸ Order Granting Motion to Voluntarily Dismiss, *Ohio Republican Party v. Brunner*, No. No. 08-4242/08-4243/08-4251 (6th Cir. Nov. 5, 2008).

the Ohio Secretary of State.⁵⁶⁹ Specifically, Directive 2008-63, required county boards of election to permit same-day registration and absentee voting during the five-day window where the voter registration and absentee voting periods overlapped (the same directive at issue in *State ex rel. Colvin v. Brunner* and *Ohio Republican Party v. Brunner*).⁵⁷⁰ Project Vote sought a temporary restraining order against the Madison County Board of Elections because the county indicated that it would not follow the directive. The complaint asserted violations of state law, the First and Fourteenth Amendments, the National Voter Registration Act, the Civil Rights Act of 1964, and the Voting Rights Act. The plaintiffs asked the court to enjoin Madison County to comply with state law and the Secretary of State's directive.⁵⁷¹

On September 29, 2008, the U.S. District Court in the Northern District of Ohio granted Project Vote's request for a temporary restraining order and directed the Madison County Board of Elections to permit prospective voters to register and request an absentee ballot simultaneously.⁵⁷² That same day, the Ohio Supreme Court affirmed a lower court ruling upholding Directive 2008-63.⁵⁷³ Ultimately, Project Vote filed a motion to dismiss without prejudice after the Ohio Supreme Court's decision and official election results showed that ballots cast by voters between September 30 to October 6 had been honored.⁵⁷⁴

32. State ex rel. Myles v. Brunner – Ohio 2008

The McCain presidential campaign sent absentee ballot request forms to roughly one million Ohio voters. The McCain request forms included a checkbox with a statement that read, "I am a qualified elector and would like to receive an Absentee Ballot for the November 4, 2008 General Election." The Ohio Secretary of State instructed boards of elections to reject any forms where the voter failed to check a box next to a statement that they are an eligible elector, even if voters signed the bottom of the form affirming that they were eligible. Voters who received the McCain mailers, did not check the box, and had their absentee ballot requests rejected, filed suit in the Ohio Supreme Court to compel boards of elections to not reject absentee ballot applications on that basis.⁵⁷⁵ The ACLU of Ohio along

⁵⁶⁹ Complaint for Declaratory and Injunctive Relief, *Project Vote v. Madison Cty. Bd. of Elections*, 08-cv-2266 (N.D. Ohio Sept. 24, 2008).

⁵⁷⁰ See Memorandum to Directive 2008-63 from Jennifer Brunner, Ohio Sec'y of State, to All Counties; BOE Contacts (Aug. 13, 2008); see also OHIO REV. CODE § 3509.02(A).

⁵⁷¹ See Complaint for Declaratory and Injunctive Relief at ¶ 45, *Project Vote v. Madison Cty. Bd. of Elections*, 1:08-cv-2266 (N.D. Ohio Sept. 24, 2008).

⁵⁷² *Project Vote v. Madison County*, No. 1:08-cv-2266, 2008 WL 4445176, at *12 (N.D. Ohio Sep. 29, 2008).

⁵⁷³ *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110 (Ohio 2008).

⁵⁷⁴ See Plaintiffs' Motion to Dismiss Without Prejudice, *Project Vote v. Madison Cty. Bd. of Elections*, 1:08-cv-2266 (N.D. Ohio Dec. 22, 2008).

⁵⁷⁵ *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328 (Ohio 2008).

with other organizations filed an amicus brief⁵⁷⁶ opposing the Secretary's position. The ACLU argued that Ohio law required the absentee ballot request to simply contain certain information, not in a specific form, and that rejecting an application for inconsequential errors or omissions violated Section 1971 of the Voting Rights Act prohibiting officials from denying any individual the right to vote because of immaterial errors or omissions.

The Ohio Supreme Court upheld the voters' complaint on state law grounds. It ordered the Secretary of State to direct boards of elections to refrain from rejecting absentee ballot applications if the voter left the box next to a qualified-electors statement unmarked and to issue absentee ballots to those applicants.⁵⁷⁷

33. ACLU of Ohio v. Brunner – Ohio 2008

In January 2008, the ACLU of Ohio and two voters filed a complaint against state and local election officials in Cuyahoga County in the Northern District of Ohio. The complaint challenged the county's use of non-uniform, unequal, and inaccurate voting technologies as violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Section 2 of the Voting Rights Act.⁵⁷⁸ The plaintiffs argued that the voting technology advanced by the county had a disproportionate and negative impact on the franchise of Black voters.⁵⁷⁹

The defendants in the lawsuit were in the process of changing the voting technology used in Cuyahoga County from less error-prone voting technology that provided voters notice of ballot errors, to a voting system that was more error-prone, did not provide such notice of potential ballot errors, and would result in those votes being thrown out.⁵⁸⁰ Before the 2008 primary election, Cuyahoga County used touchscreen voting machines with auditable paper trails. Because of various issues with the Cuyahoga County Board of Elections and the Secretary of State, the Secretary of State ordered the county to use central count optical scans for future elections.⁵⁸¹ Central count did not provide voters notice of overvotes, unintentional undervotes, or an opportunity to cast a corrected ballot.

Subsequently, the legislature abolished the use of central count optical scans after May 1, 2008.⁵⁸² Accordingly, in March 2008 the court issued an order stating that the "[d]efendants will prepare stipulations indicating that they have no intention of using non-notice voting technology based on their interpretation of Senate Bill 286 and funding concerns related to

⁵⁷⁶ Reply Brief of Amici The Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Relator's Petition for Writ of Mandamus, State ex rel. Myles v. Brunner, No. 2008-1842 (Ohio 2008) .

⁵⁷⁷ *State ex rel. Myles v. Brunner*, 120 Ohio St.3d 328 (Ohio 2008).

⁵⁷⁸ Complaint, ACLU of Ohio v. Brunner, No. 1:08-cv-00145 (N.D. Ohio. Jan. 17, 2018).

⁵⁷⁹ *Id.* at ¶ 3.

⁵⁸⁰ *See id.* at ¶¶ 21-54.

⁵⁸¹ *Id.* at ¶ 40.

⁵⁸² *See* S.B. 286, 127th Gen. Assem., 2007-2008 Sess.(Ohio 2008).

HAVA.”⁵⁸³ The state and county defendants stipulated that the November 2008 election would be conducted using notice technology, and plaintiffs moved to dismiss without prejudice.⁵⁸⁴ The court granted the motion in April 2008.⁵⁸⁵

34. Gillette v. Weimer – Virginia 2008

In 2008, the ACLU represented an individual plaintiff in a lawsuit against elections officials in Prince William County, Virginia, for refusing to allow him to vote because he did not have a photo ID.⁵⁸⁶ At the time, Virginia law permitted voters without ID to cast a ballot by signing an affidavit.⁵⁸⁷ The plaintiff was denied this process,⁵⁸⁸ and the complaint charged violations of state law, the Fourteenth Amendment, and Section 5 of the Voting Rights Act for failing to preclear a voting change before implementation since Virginia was a covered jurisdiction.⁵⁸⁹ The parties negotiated a consent decree in which defendants agreed to follow state law to permit voters who do not present an ID to cast a ballot if they sign an affidavit attesting to their identity and voter registration status and to post signage indicating the voters’ rights.⁵⁹⁰

35. Green Party of Michigan v. Land – Michigan 2008

The ACLU and ACLU of Michigan, on behalf of the Green Party of Michigan, Libertarian Party of Michigan, and others challenged the constitutionality of a state law that required the Michigan Secretary of State to provide voter lists containing party preference data information only to the chairpersons of the two major political parties.⁵⁹¹ The plaintiffs, three minor parties, a journalist, and a political consultant, argued that the statute violated their First Amendment right to access and report on information of public interest and the Fourteenth Amendment’s Equal Protection Clause.⁵⁹² The district court agreed, concluding in March 2008 that the statute was unconstitutional because it severely burdened the First Amendment rights of association of minor parties and denied them an equal opportunity to win votes by putting them at a distinct disadvantage. The court concluded that the law was

⁵⁸³ Minutes of Proceedings/Order, ACLU of Ohio v. Brunner, No. 1:08-cv-00145 (N.D. Ohio Mar. 13, 2008).

⁵⁸⁴ See Plaintiffs’ Motion to Dismiss Without Prejudice, ACLU of Ohio v. Brunner, 1:08-cv-00145 (N.D. Ohio Apr. 2, 2008).

⁵⁸⁵ Order Granting Plaintiffs’ Motion to Dismiss Without Prejudice, ACLU of Ohio v. Brunner, 1:08-cv-00145 (N.D. Ohio Apr. 4, 2008).

⁵⁸⁶ See Complaint, Gillette v. Weimer, No. 1:08-cv-00188 (E.D. Va. Feb. 28, 2008).

⁵⁸⁷ See *id.* at ¶¶ 10-11.

⁵⁸⁸ See *id.* at ¶¶ 14-18.

⁵⁸⁹ See *id.* at ¶ 1.

⁵⁹⁰ See Consent Decree, Gillette v. Weimer, No. 1:08-cv-00188 (E.D. Va. June 19, 2008).

⁵⁹¹ See Complaint for Declaratory and Injunctive Relief at ¶¶ 13-24, Green Party of Mich. v. Land, 2:08-cv-10149 (Mich. Jan. 11, 2008).

⁵⁹² See *id.* at ¶¶ 39-51.

not justified by any compelling state interest.⁵⁹³ The state chose not to appeal the decision.

36. **Van Hollen v. Government Accountability Board – Wisconsin 2008**

ACLU participating as amicus

The Attorney General of Wisconsin filed for a writ of mandamus to require the Wisconsin Government Accountability Board (GAB) to retroactively run a matching check on voter registrations received prior to when the state's computerized voter registration database went live on August 6, 2008. For registrations after this date, the GAB performed a process to verify information on registration records with information from the state driver's license database and the federal Social Security Administration database. The Wisconsin Attorney General claimed that the Help America Vote Act (HAVA) required voter registration data to positively match information in the Social Security Administration or state driver's license databases to determine eligibility before voters could receive a ballot on Election Day.⁵⁹⁴ The Attorney General argued that this process was necessary to prevent the dilution of the rights of qualified voters with those of ineligible voters by risking fraud in the voting process.⁵⁹⁵

The ACLU and several other civil rights and civic organizations filed an amicus brief in support of the defendants' motion to dismiss, arguing that the state Attorney General's interpretation of HAVA was flawed. First, while HAVA includes a limited database matching process to support list maintenance activities—which the GAB was following for registrations after August 2008—it does not require the retroactive process the Wisconsin Attorney General was attempting to force or that the matching process be used to determine voter eligibility.⁵⁹⁶ In fact, the GAB specifically declined to link its voter registration database matching process with voter eligibility because of flaws inherent in the matching process and allowed registrants whose information was unsuccessfully matched to still be placed on the registration rolls and to vote in the same manner as other voters. Second, HAVA actually imposes specific restrictions on the authority of states to remove individuals from voter registration rolls to prevent the removal of qualified, registered individuals.⁵⁹⁷

As in other cases where officials attempted to confirm voting eligibility through database matching, problems stemming from clerical errors, mismatching of different people with similar names, or inconsistent use of initials or nicknames resulted in false positives. A 2008 test comparison of Wisconsin's statewide voter registration system data with

⁵⁹³ See *Green Party of Mich. v. Land*, F. Supp. 2d 912, 917-18, 924 (E.D. Mich. 2008).

⁵⁹⁴ Petition for Writ of Mandamus, *Van Hollen v. Gov't Accountability Bd.*, No 2008-CV-004085 (Wis. Ct. App. Oct. 23, 2008).

⁵⁹⁵ See *id.* at ¶¶ 2-3.

⁵⁹⁶ See Brief as *Amici Curiae* of The Lawyers' Committee for Civil Rights Under Law et al. in Support of Defendant's Motion to Dismiss at 2, *Van Hollen v. Gov't Accountability Bd.*, No. 08-CV-004085 (Wis. Ct. App. Oct. 6, 2008).

⁵⁹⁷ *Ibid.*

Wisconsin Department of Transportation data showed that more than 20% of new voters were a mismatch, an implausible number;⁵⁹⁸ in fact, four of the six members of the Government Accountability Board themselves failed the initial data crosscheck.⁵⁹⁹ Division Administrator Nat Robinson noted that “[i]t’s clear the data quality issue must be addressed before this cross-checking function can be used to ensure reliable voter data.” In October 2008, the state court dismissed the Attorney General’s complaint, holding that neither HAVA nor state law required voter information to match Social Security data as a condition for voting.⁶⁰⁰

37. Kennedy v. Avondale Estates – Georgia 2008

The town of Avondale Estates, Georgia, had long been a predominantly white enclave before it became mostly non-white. One of the mechanisms used to exclude Black homeowners was a 1967 municipal ordinance that prohibited the display of yard signs that limited information on real estate available for purchase.⁶⁰¹ This technique was common in predominantly white neighborhoods that sought to stave off integration, but such ordinances were seldom enforced.⁶⁰²

Although unconstitutional,⁶⁰³ the ordinance remained unchallenged until 1998 when, two days before a primary election, Avondale Estates residents Tanya Greene and Sean Maher placed a campaign sign on their front lawn in support of a candidate for superior court judge. Like Ms. Greene, the candidate was an African American who had devoted much of his professional career to representing indigent persons facing the death penalty. The city clerk removed the sign on her lunch break the next day.⁶⁰⁴

Separately, Avondale Estates resident Laurie Hunt made a yard sign criticizing the city for not firing the city manager for making racist comments on the job. The city manager, who was also the police chief, was accused of saying “[t]he police officer’s uniform patch would

⁵⁹⁸ Press Release, WISCONSIN ELECTIONS COMMISSION, Accountability Board Members’ Voter Data Do Not Match Department of Transportation Records (Mar. 18, 2008), <https://elections.wi.gov/node/696>.

⁵⁹⁹ *See id.*

⁶⁰⁰ *Van Hollen v. Gov’t Accountability Bd.*, No. 08-CV-4085 (Wis. Ct. App. Oct. 23, 2008).

⁶⁰¹ *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

⁶⁰² LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 281 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

⁶⁰³ *See Linmark Assoc. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (ban on residential “for sale” signs unconstitutional); *Ladue v. Gilleo*, 512 U.S. 43 (1994) (total ban on political signs unconstitutional).

⁶⁰⁴ LAUGHLIN McDONALD AND DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT. VOTING RIGHTS LITIGATION, 1982-2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 282 (Mar. 2006), https://www.aclu.org/files/votingrights/2005_report.pdf.

look better if it had a nigger on the patch with a noose around his neck.”⁶⁰⁵ The city council fined the police chief \$5,000.00 but did not discharge him. When the city manager/police chief saw Ms. Hunt’s sign, he asked one of his officers to “just stop and ask the people to remove the sign.”⁶⁰⁶ Three squad cars visited Ms. Hunt and issued her a citation with a potential \$100 fine.

In 1998, several city residents represented by the ACLU filed suit against the city alleging that the ordinance was unconstitutional.⁶⁰⁷ In discovery, plaintiffs learned that no version of the sign ban was in place before the effective date of Section 5 of the Voting Rights Act and that the 1967 ordinance had never been submitted for preclearance under Section 5. Because regulations implementing Section 5 include “change[s] affecting the right or ability of persons to participate in political campaigns” as an example of covered changes⁶⁰⁸ and Georgia was a covered state, the plaintiffs amended the complaint to include a Section 5 violation.

After the lawsuit was filed, the city adopted a moratorium on enforcing the ordinance, and after plaintiffs filed for summary judgment, the ban was repealed insofar as it applied to political and “for sale” yard signs.⁶⁰⁹ For the general election in 2000, residents could display political signs—without fear of police interference—for the first time in three decades.

Though the main problem—the total ban on political yard signs—was resolved in the plaintiffs’ favor, the city amended its ordinance five times during the litigation, which created other issues regarding size, setback regulations, and unequal treatment based on content.⁶¹⁰ When the district court issued an order on the remaining issues, it concluded that Section 5 did not cover political signs.⁶¹¹ The plaintiffs filed a motion for reconsideration, which the court denied in February 2006.⁶¹²

38. New York State Board of Elections v. López Torres – New York 2008

ACLU participating as amicus

This case involved a constitutional challenge to the elaborate system that governs the election of judges to the New York State Supreme Court, which is the state’s principal trial

⁶⁰⁵ *Id.* (citing INVESTIGATIVE REPORT OF ALLEGATION OF RACIAL DISCRIMINATION, PREPARED FOR THE MAYOR AND THE BOARD OF COMMISSIONERS, CITY OF AVONDALE ESTATES, GEORGIA 3 (Aug. 15, 1998)).

⁶⁰⁶ *Id.* (citing Plaintiffs’ [First] Motion for Summary Judgment at 21, *Maier v. Avondale Estates*, No. 1:00-CV-1847 (N.D. Ga. Oct. 20, 2000)).

⁶⁰⁷ *Maier v. Avondale Estates*, No. 1:98-CV-2584 (N.D. Ga. Sep. 4, 1998); refiled and assigned No. 1:00-CV-1847 (N.D. Ga. Jul. 20, 2000).

⁶⁰⁸ 28 C.F.R. § 51.13(k).

⁶⁰⁹ *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184, 1188 (N.D. Ga. 2005).

⁶¹⁰ *Ibid.*

⁶¹¹ *Id.* at 1217-18.

⁶¹² Order, *Maier v. Avondale Estates*, 1:00-cv-1847 (N.D. Ga. Feb. 9, 2006).

court. The state requires major parties to nominate judicial candidates at conventions for each of the 12 judicial districts in the state, who then appear on the general election ballot. These judicial candidates are nominated by delegates who attend the conventions and must themselves stand for election from each judicial district. To successfully become a delegate, individuals need to petition their way onto a ballot and run in a primary election held several weeks before the conventions. Elected delegates from each party then meet at the judicial conventions to nominate the parties' candidates for judicial office.⁶¹³ The system, broadly prescribed by state law, effectively worked in a way where control of the delegate petition and election process—dominated by local leaders of the major parties—led to the control of judicial nominees.⁶¹⁴ In effect, the system functioned in a way that created very low burdens for judicial candidates supported by local party leaders—who could take advantage of party infrastructure and resources to elect favored delegates—and large burdens for judicial candidates that did not enjoy party support because of the extremely cumbersome process for recruiting delegates to vote for them.

Because of the virtual impossibility of becoming a judicial candidate without party support under this complex process, a set of judicial candidates and their supporters brought a constitutional challenge on First Amendment and Equal Protection Clause grounds. They argued that the system deprived voters of the right to choose their parties' judicial candidates and imposed insurmountable burdens on challenger candidates who seek a major party nomination without the support of local party leaders. After a lengthy analysis of the process, the district court agreed with the challengers and issued a preliminary injunction,⁶¹⁵ which the Second Circuit affirmed,⁶¹⁶ concluding that the plaintiffs were likely to succeed on the merits of their First Amendment claim because the system was set up so that party leaders, and not voters, effectively selected the justices of New York's Supreme Court.

The New York State Board of Elections, the New York County Democratic Committee, New York Republican State Committee, and other defendants petitioned the Supreme Court for certiorari review, which was granted.⁶¹⁷ The petitioners argued that the constitutional challenge to the state system impermissibly intruded into the associational rights of the parties' leadership to choose standard-bearer candidates. The ACLU and New York Civil Liberties Union filed an amicus brief in support of the lower court's decision, arguing that the challenged system not only deprived voters and candidates of the realistic opportunity to participate in the nominating process, but also imposed severe burdens on voters and candidates unnecessary to further a compelling interest.⁶¹⁸

⁶¹³ See *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 200 (2008).

⁶¹⁴ See *López Torres v. N.Y. State Bd. Of Elections*, 411 F. Supp. 2d 212, 217-223 (E.D.N.Y. 2006).

⁶¹⁵ *Id.* at 255-256.

⁶¹⁶ *López Torres v. N.Y. State Bd. Of Elections*, 462 F.3d 161 (2d Cir. 2008).

⁶¹⁷ *N.Y. State Bd. of Elections v. López Torres*, 549 U.S. 1204 (2007).

⁶¹⁸ Brief as *Amicus Curiae* of the American Civil Liberties Union and New York Civil Liberties Union in Support of Respondents, *N.Y. State Bd. of Elections v. López Torres*, No. 06-766 (July 13, 2007).

The Supreme Court disagreed. In a unanimous opinion, it reversed the lower court.⁶¹⁹ The Court determined First Amendment associational rights of political parties does not confer associational rights on individuals to be able to join or wield a certain degree of influence in the party. The court also determined parties might control their membership during a candidate-selection process in a manner that helps the party produce a nominee who, in their view, best represents its political platform.⁶²⁰

39. Riley v. Kennedy – Alabama 2008

In 1985, the U.S. Attorney General precleared a local law in Alabama providing for a special election to fill midterm vacancies on the Mobile County Commission.⁶²¹ This was an exception to the state law practice that provided for gubernatorial appointment for vacant county commission seats. After the Governor called a special election pursuant to the new local law to fill an opening on the commission, a lawsuit was filed seeking to enjoin the election on the basis that it conflicted with state law. Ultimately, the Alabama Supreme Court ruled that the local law violated the Alabama Constitution.

The Alabama Legislature subsequently passed a law in 2004 that the Justice Department precleared, which provided that the Governor would appoint individuals to vacancies in county commissions unless a local law authorized a special election. A lawsuit followed to compel a special election for a vacancy on the Mobile County Commission on the basis that the new Alabama state law revived the previous local special election law from 1985. The Alabama Supreme Court again intervened, holding that the new state law could only apply prospectively and could not revive the previous local law.⁶²² One of the plaintiffs from this case then sued in federal court alleging that Section 5 of the Voting Rights Act required Alabama to preclear the two decisions of the Alabama Supreme Court on the matter. The U.S. District Court for the Middle District of Alabama agreed and concluded that the 1985 local law was the most recent precleared practice put into place and the baseline from which to determine a “change” under Section 5.⁶²³

The state appealed and the Supreme Court granted review. On appeal, the state argued that a decision by a covered jurisdiction’s highest court invalidating a law should not count as a voting change subject to Section 5. The state also argued that a state law found to be unconstitutional by a state’s highest court cannot serve as the baseline for changes in voting or retrogression and that the decision by the three-judge court raised constitutional and workability concerns.⁶²⁴

The ACLU filed an amicus brief in support of the respondents in February 2008, arguing that the language and legislative history of Section 5, as well as its implementation, showed

⁶¹⁹ *N.Y. State Bd. of Elections v. López Torres*, 552 U.S. 196, 209 (2008).

⁶²⁰ *Id.* at 202-03.

⁶²¹ *See Riley v. Kennedy*, 553 U.S. 406 (2008).

⁶²² *Riley v. Kennedy*, 928 So.2d 1013 (Ala. 2005); *see Riley*, 553 U.S. at 406.

⁶²³ *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1336 (M.D. Ala. 2006).

⁶²⁴ *See generally* Brief for Appellant, *Riley v. Kennedy*, No. 07–77 (Jan. 14, 2008).

that changes in voting implemented in covered jurisdictions pursuant to state court orders should be subject to preclearance.⁶²⁵ Notably, the Attorney General interposed numerous objections to voting changes implemented as a result of court orders. Those objection letters were submitted as part of the legislative record supporting the 2006 Voting Rights Act reauthorization.⁶²⁶ Congress similarly approved the application of Section 5 to electoral changes implemented by state courts when it extended Section 5 in 1975 and recognized that litigation could lead to changes requiring preclearance when it extended Section 5 in 1982.⁶²⁷ Section 5 preclearance was meant to prevent retrogression in minority voting strength without regard for the legality of a practice under state law.

In a 7-2 decision, the Supreme Court held that the local 1985 voting change was never “in force or effect” within the meaning of Section 5. As such, the law did not mark a “change” from the baseline, and Alabama’s reinstatement of prior practice did not require preclearance.⁶²⁸ The Court did not decide any of the questions that could have weakened or limited Section 5’s scope.

40. Avitia v. Superior Court of Tulare County⁶²⁹ – California 2008

In 2008, the ACLU joined a lawsuit brought on behalf of Rosalinda Avitia and several other Latino voters residing in and around the city of Visalia in Tulare County, California. The plaintiffs challenged the at-large elections for the five-member Board of Directors of the Tulare Local Healthcare District.

Avitia was the ACLU’s first case involving claims under the California Voting Rights Act of 2001 (CVRA). CVRA provides a cause of action for vote dilution similar to Section 2 of the Voting Rights Act, but is broader and operates without some of the limitations imposed by judicial decisions over the last two decades. Specifically, plaintiffs bringing claims under CVRA need not demonstrate the feasibility of a district in which a minority group constitutes a majority of the electorate (the so-called *Gingles* district). Moreover, the totality of the circumstances, or Senate Report Factors, usually required in addition to evidence of racially polarized voting and the *Gingles* district were probative but not necessary to a claim of vote dilution under CVRA.

The plaintiffs in *Avitia* brought suit in 2007 to address the fact that there had only been one Latino on the Tulare Local Healthcare District’s Board of Directors since the body’s inception in 1946, despite the fact that as of 2000, Latinos comprised 47.3% of the population in the district. The plaintiffs’ expert witness, Dr. J. Morgan Kousser, did an

⁶²⁵ Brief *Amicus Curiae* of the American Civil Liberties Union and ACLU of Alabama in Support of Appellees, *Riley v. Kennedy*, No. 07–77 (Feb. 21, 2008).

⁶²⁶ *Id.* at 5.

⁶²⁷ *Ibid.*

⁶²⁸ *Riley v. Kennedy*, 553 U.S. 406, 422-23 (2008).

⁶²⁹ See ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2010-DECEMBER 31, 2010 13-14, https://www.aclu.org/sites/default/files/field_document/VRP_Annual_Report_2010.pdf; *Avitia v. The Superior Ct. of Tulare Cty.*, No. 07-cv-224773 (Cal. Sup. Ct. Tulare Cty. 2008).

analysis of voting patterns and concluded that voting was racially polarized in a number of Healthcare District elections and propositions since 1994.

In August of 2008, the plaintiffs moved unsuccessfully for a preliminary injunction to enjoin the district from conducting and certifying the results of the November 2008 election for two members of the Board of Directors. Despite the defendant's failure to submit any contradicting expert testimony or evidence regarding polarized voting in the district, the state superior court held that the plaintiffs did not establish a strong likelihood of success on the merits. The court essentially adopted some of the concerns with plaintiffs' statistical evidence proffered by the defendant, even though federal case law supported the plaintiffs' evidence and their interpretation of CVRA's requirements. The superior court also denied the defendant's motion for a judgment on the pleadings, two motions for summary judgment, various motions to compel discovery, and a motion to dismiss for failure to join indispensable parties.

Following lengthy negotiations, the parties agreed to a settlement providing that a proposal calling for the adoption of district or "zone" elections for the Board of Directors be put on the ballot no later than June 2012. If the proposal was approved, the new plan would be implemented in the November 2012 elections. Because the plaintiffs were confident the proposal would be adopted, they agreed that if it was defeated they would not refile their complaint. The state court approved the settlement agreement on February 16, 2010.

41. Baker v. Chapman – Alabama 2008

In July 2008, the ACLU and ACLU of Alabama filed this suit.⁶³⁰ Alabama's constitution provides for the disfranchisement of persons previously convicted of certain crimes.⁶³¹ The three disenfranchised plaintiffs had past convictions for offenses—forgery, escape, and receiving stolen property—that were not on the legislature's list of disfranchising crimes.⁶³² One of the plaintiffs attempted to register and vote but was told that she was ineligible due to her offense even though her crime—receiving stolen property—was on neither the legislature's nor the attorney general's list of crimes involving moral turpitude.⁶³³

The plaintiffs asserted that Alabama's disfranchisement scheme violated the state's separation of powers doctrine, which leaves the designation of disfranchising offenses to the legislature and not the state Attorney General, as well as state and federal equal protection, due process, and privileges and immunities doctrines. The plaintiffs also argued the state's requirement that individuals pay all restitution, fines, and legal costs before

⁶³⁰ Complaint, *Baker v. Chapman*, No. 03-CV-2008-900749.00 (Cir. Ct. Ala. 2008).

⁶³¹ ALA. CONST. art. VIII, § 177.

⁶³² Complaint at ¶ 2, *Baker v. Chapman*, No. 03-CV-2008-900749.00 (Cir. Ct. Ala. July 21, 2008) (citing Ala. Code § 15-22-36.1(g)).

⁶³³ *Id.* at ¶ 54.

having their the right to vote restored violated equal protection laws and was an impermissible wealth-based qualification for exercise of the franchise.⁶³⁴

The trial court dismissed the plaintiffs' suit in October 2008 for lack of standing on the grounds that two of the plaintiffs had not suffered any injury because they never attempted to vote and that the third plaintiff who was denied the right to register had not exhausted other state remedies.⁶³⁵ The plaintiffs appealed the dismissal to the Alabama Supreme Court,⁶³⁶ and the court affirmed the trial court's order in a per curiam opinion in June 2010, without offering any factual or legal basis for its decision.⁶³⁷

42. S.C. Green Party v. S.C. State Election Commission – South Carolina 2008

In August 2008, the ACLU filed a lawsuit in federal court on behalf of the South Carolina Green Party and Eugene Platt challenging the state's "sore loser" statute.⁶³⁸ South Carolina's electoral scheme permits "fusion voting," an electoral practice that allows a candidate to seek the nomination of more than one party, and in turn, allows more than one party to nominate the same candidate. Separately, South Carolina's "sore loser" statute prohibits a candidate from having their name placed on the general election ballot as a candidate of a certified political party if the candidate lost the party's primary.⁶³⁹ Platt was chosen by both the Green Party and Working Family Party as their candidate for a state legislative house seat but lost the nomination for the same office in the Democratic primary. As a result, the election commission prohibited Platt from appearing on the general election ballot. The plaintiffs argued that the application of the state's rules violated the First and Fourteenth Amendments and sought declaratory and injunctive relief prohibiting the election commission from applying the sore loser statute to disqualify candidates from appearing on the general election ballot for one party because of a loss in another party's primary or convention. The plaintiffs also sought preliminary and permanent injunctions requiring the defendants to place Platt on the ballot for the November 2008 General Election.⁶⁴⁰

The district court held oral arguments in September 2008, and denied the plaintiffs' motion for preliminary injunction prohibiting defendants from disqualifying Platt from the general election ballot as the Green Party's nominee for the state house seat.⁶⁴¹ The plaintiffs and

⁶³⁴ See *id.* at ¶¶ 78-102.

⁶³⁵ See Order, *Baker v. Chapman*, No. 03-CV-2008-900749.00 (Cir. Cit. Ala. Oct. 8, 2008).

⁶³⁶ See Appellant Brief, *Baker v. Chapman*, 3-CV-2008-900749.00 (Ala. Jan. 30, 2009).

⁶³⁷ See *Baker v. Chapman*, 83 So.3d 588 (Ala. 2010).

⁶³⁸ Complaint at ¶ 1, *S.C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. Aug. 7, 2008).

⁶³⁹ S.C. CODE ANN. § 7-11-10.

⁶⁴⁰ Complaint, *S.C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. Aug. 7, 2008); Plaintiffs' Motion for a Preliminary Injunction, *S.C. Green Party v. S.C. Election Comm'n*, No. 08-cv-2790 (D.S.C. Aug. 7, 2008).

⁶⁴¹ Minute Entry, *S. C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. Sept. 18, 2008).

defendants then both filed summary judgment motions. The defendants argued that Platt was disqualified from appearing on the ballot as the Green Party candidate for the seat in question based on the state's sore loser statute, the party loyalty pledge statute, and the filing deadline statute.⁶⁴² The plaintiffs challenged the constitutionality of each statute as applied to Platt.⁶⁴³ The court granted the defendants' summary judgment motion, finding that the application of the sore loser statute in connection with fusion voting did not elevate the plaintiffs' burdens to a level requiring strict scrutiny. The court maintained that Platt and the Green Party had notice of the sore loser statute when he decided to seek multiple nominations and similarly assumed the associated risks.⁶⁴⁴ The court also found that significant state interests were served by South Carolina's sore loser statute as applied to fusion candidates, including maintaining party stability and avoiding voter confusion. The court did not address the party-loyalty pledge statute or the filing deadline statute.

The plaintiffs appealed to the Fourth Circuit, raising three questions, including whether the state, consistent with the First and Fourteenth Amendments, could exclude a candidate who won two party nominations but subsequently lost a third, thereby leaving the two nominating parties without a candidate on the general-election ballot.⁶⁴⁵ The Fourth Circuit rejected the plaintiffs' arguments, concluding that the burden the sore loser statute placed on the Green Party's association rights was not severe, stating, "[t]he Green Party retained the right to select Platt, or any other candidate, at its state convention. It was Platt's own decision to seek the Democratic Party's nomination, not interference by members of the Democratic Party in the Green Party's nomination process, that affected the Green Party's ability to retain Platt on the general election ballot as its preferred nominee."⁶⁴⁶ As a result, the court applied a low standard of scrutiny to determine that South Carolina's sore loser statute advanced state regulatory interests, including the state's interest in minimizing excessive factionalism and party splintering, reducing the possibility of voter confusion, and ensuring orderly, fair, and efficient procedures for the election of public officials.⁶⁴⁷

43. United States Students Association v. Land – Michigan 2008

In September 2008, the ACLU, on behalf of the United States Student Association Foundation, Michigan State Conference of NAACP Branches, and ACLU of Michigan, brought suit seeking injunctive relief against the Michigan Secretary of State and other Michigan election officials in a challenge to the election officials' unlawful processes used to

⁶⁴² Memorandum in Support of Motion for Summary Judgment, *S. C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. May 22, 2009); *see also* S.C. CODE ANN. §§ 7-11-10, 7-11-210, 7-11-15.

⁶⁴³ Plaintiffs' Motion for Summary Judgment, *S. C. Green Party v. S.C. State Election Comm'n*, No. 08-cv-2790 (D.S.C. May 22, 2009).

⁶⁴⁴ *S.C. Green Party v. S.C. State Election Comm.*, 647 F.Supp.2d 602 (D.S.C. 2008).

⁶⁴⁵ Appellants' Brief at 2-3, *S.C. Green Party v. S.C. State Election Comm'n*, No. 09-1915 (4th Cir. Sept. 28, 2009).

⁶⁴⁶ *S.C. Green Party v. S.C. State Election Comm.*, 612 F. 3d 752, 757 (4th Cir. 2010).

⁶⁴⁷ *Id.* at 759.

reject, cancel, or remove the names of voters from the voter registration rolls. Michigan used a process whereby it would use voter identification cards returned as undeliverable as a basis for rejecting a person's registration and would also cancel a registrant's application if the registrant obtained an out-of-state driver's license.⁶⁴⁸ The plaintiffs argued these processes violated provisions of the National Voter Registration Act that govern the voter notification and removal process relating to states' voter registration rolls, as well as the Civil Rights Act of 1964 and the First and Fourteenth Amendments. The plaintiffs sought a preliminary injunction to protect the ability of eligible voters wrongfully affected by these policies to cast ballots in the November 2008 election. The district court granted the preliminary injunction with regard to the removal of voters whose registration cards were returned, but denied the motion with regard to the driver's license issue.⁶⁴⁹

With regards to the driver's license issue, the district court emphasized that the plaintiffs' likelihood of proving their allegations of standing to challenge this practice was "questionable." The district court also noted that, unlike the undeliverable identification cards, the driver's license practice provided some out-of-state driver's license applicants with the opportunity to reaffirm their Michigan residence and remain on the voting rolls and denied the preliminary injunction for this issue.⁶⁵⁰ By contrast, the court found that the plaintiffs made a strong showing of a likelihood of success on the merits of the undeliverable registration cards issue and enjoined the state from canceling or rejecting a voter's registration based upon the return of the original identification card as undeliverable. Michigan state officials appealed the injunction and sought an emergency motion to stay the injunction, but the Sixth Circuit denied the motion for a stay concluding that "the preliminary injunction is necessary to protect the individual voters of Michigan affected by the undeliverable-voter-ID-card practice."⁶⁵¹ Shortly after the Sixth Circuit decision, the case settled in exchange for the defendants' agreement not to reject or cancel individual voter registrations solely because the original identification card was returned as undeliverable or because the individual surrendered their Michigan driver's license and obtained a driver's license in another state without specific written confirmation that the individual changed their residence for voting purposes.⁶⁵²

44. Young v Hosemann – Mississippi 2008

Represented by the ACLU, two individuals with felony convictions filed a civil rights action in September 2008 under federal and state laws in federal district court in Mississippi.⁶⁵³

⁶⁴⁸ Complaint, *U.S. Student Ass'n Found. v. Land*, 2:08-cv-14019 (E.D. Mich. Sept. 18, 2008); First Amended Complaint, *U.S. Student Ass'n Found. v. Land*, 2:08-cv-14019 (E.D. Mich. Oct. 7, 2008).

⁶⁴⁹ *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. 2008).

⁶⁵⁰ *Id.* at 946.

⁶⁵¹ *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008).

⁶⁵² Settlement Agreement and Stipulation of Dismissal with Prejudice, *U.S. Student Ass'n Found. v. Land*, Case No. 2:08-CV-14019 (E.D. Mich. Jun. 24, 2010).

⁶⁵³ Complaint for Injunctive and Declaratory Relief, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Sept. 12, 2008).

The plaintiffs alleged that Article 12, Section 241 of the Mississippi Constitution explicitly allows individuals to vote for U.S. President and Vice President, notwithstanding a criminal conviction, if they are citizens of the United States, at least 18 years old, meet residency requirements, and have not been adjudicated “non compos mentis.”⁶⁵⁴ Both plaintiffs alleged that they met all of the qualifications for an elector in the State of Mississippi and that the defendants’ disfranchisement of them violated Section 241 of the Mississippi Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the National Voter Registration Act. The plaintiffs asked the court for declaratory and injunctive relief and simultaneously filed a motion for a preliminary injunction.

On September 25, 2008, the district court denied the motion for a preliminary injunction from the bench and issued an order stating that “the Defendants’ interpretation of Section 241 of the Mississippi Constitution is correct, thus Plaintiffs are not likely to succeed on the merits of their claims.”⁶⁵⁵ On appeal, the Fifth Circuit denied the plaintiffs’ motion for emergency injunctive relief pending appeal.

On March 9, 2009, the district court granted the defendants’ motion to dismiss the complaint for failure to state a claim, reaffirming its prior conclusion that the “plaintiffs were entitled to no relief because the court does not find the plaintiff’s interpretation [of Section 241] to be a fair or reasonable construction, and because the court concludes that defendants have correctly construed this provision.”⁶⁵⁶

The plaintiffs appealed to the Fifth Circuit. On February 25, 2010, in a published opinion, the court of appeals affirmed the district court’s decision, finding that “the text of § 241 is perfectly clear and perfectly contrary to the construction urged by the appellants.”⁶⁵⁷

45. Kelly v. McCulloch; Kelly v. Johnson – Montana 2008

On April 8, 2008, the ACLU and the ACLU of Montana, filed a lawsuit in federal court challenging Montana’s ballot access system for independent and previously unqualified parties.⁶⁵⁸ The complaint charged that the state’s ballot access law violates the rights guaranteed by the First and Fourteenth Amendments. It was filed on behalf of U.S. Senate candidate Steve Kelly and voter Clarice Dreyer. Kelly ran as an independent candidate for U.S. Representative in 1994 and was the last independent candidate for statewide office to appear on the ballot.

⁶⁵⁴ MISS. CODE ANN. § 23-15-11; MISS. CONST. art. 12, § 241; Complaint for Injunctive and Declaratory Relief at ¶¶ 11-21, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Sep. 12, 2008).

⁶⁵⁵ Order Denying Motion for Preliminary Injunction, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Sep. 25, 2008).

⁶⁵⁶ Order Granting Motion to Dismiss, *Young v. Hosemann*, No. 3:08-cv-00567 (S.D. Miss. Mar. 9, 2009).

⁶⁵⁷ *Young v. Hoseman*, 598 F.3d 184, 191 (5th Cir. 2010).

⁶⁵⁸ Verified Complaint, *Kelly v. Johnson*, 2:08-cv-00025 (D. Mont. Apr. 8, 2008).

Under Montana law, independent and minor party candidates can appear on the general election ballot only if they submit the signatures of 5% of the total votes cast for the successful candidate for the same office in the last general election. A 2007 state law also added a filing fee and moved the petition deadline from June to March—more than 200 days before the election. Major party candidates, by contrast, do not have to submit any signatures in order to appear on the primary ballot and they appear on the general election ballot automatically when they win a primary election.⁶⁵⁹

The district court denied the plaintiffs’ motion for a preliminary injunction seeking to have Kelly put on the 2008 general election ballot. The parties filed cross motions for summary judgment in the summer of 2009. On February 3, 2010, the district dismissed the complaint on the grounds that neither of the plaintiffs had standing.⁶⁶⁰ The plaintiffs appealed.

The Ninth Circuit heard oral argument on November 5, 2010, and on December 10, 2010, reversed and remanded concluding that both plaintiffs had standing as a matter of law as registered voters.⁶⁶¹ Upon remand, the district court ruled that the deadline for independent and minority party candidates to file for office and submit signatures was unconstitutionally early.⁶⁶² The district court cited in its opinion the U.S. Supreme Court ruling in *Anderson v. Celebrezze* that “... protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena... Competition in ideas and governmental policies is at the core of our electoral process and First Amendment freedoms.”⁶⁶³ The district court also found that the 5% signature requirement and the 1% filing fee did not impose a severe burden and that Montana had an important state interest that justified the burden imposed by the signature and fee requirements.⁶⁶⁴

46. Northwest Austin Municipal Utility District Number One v. Gonzales – Texas 2008

This case was a challenge to the constitutionality of the 2006 reauthorization of Section 5 of the Voting Rights Act. Northwest Austin Municipal Utility District Number One (NAMUDNO), a subjurisdiction of Texas, a state covered by Section 5, sought a declaratory judgment to bailout of coverage from Section 5 pursuant to Section 4(a) of the Act, which permits jurisdictions to exempt themselves from coverage upon a showing of being discrimination-free for a period of years.⁶⁶⁵ Additionally, NAMUDNO sought a declaratory judgment that Section 5 was unconstitutional.⁶⁶⁶ Texas became a covered jurisdiction as a

⁶⁵⁹ *Kelly v. McCulloch*, No. CV-08-25, 2010 WL 11583553, at *1 (D. Mont. Feb. 3, 2010).

⁶⁶⁰ *Id.* at *3.

⁶⁶¹ *See Kelly v. McCulloch*, 405 F. Appx. 218, 219 (9th Cir. 2010).

⁶⁶² *Kelly v. McCulloch*, No. CV-08-25, 2012 WL 1945423, at *8 (D. Mont. May 25, 2012).

⁶⁶³ *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

⁶⁶⁴ *Kelly v. McCulloch*, No. CV-08-25, 2012 WL 1945423, at *3,4 (D. Mont. May 25, 2012).

⁶⁶⁵ *See* 52 U.S.C § 10303(a).

⁶⁶⁶ Complaint, *Northwest Austin Mun. Utility Dis. No. One v. Gonzales*, No. 1:06-cv-01384 (D.D.C. Aug. 4, 2006).

result of the 1975 amendments to the Voting Rights Act, which added as a test or device for purposes of the Section 4(b) coverage formula the use of English-only elections in jurisdictions where at least 5% of voting age citizens constitute a single language minority.⁶⁶⁷

The ACLU, ACLU of Texas, and ACLU of the District of Columbia represented a minority resident of NAMUDNO and was granted leave to intervene. The plaintiff argued that NAMUDNO lacked standing to bail out and also that the extension of Section 5 was constitutional.⁶⁶⁸ Several other civil rights organizations also intervened to defend the constitutionality of Section 5.

Following discovery, all parties filed motions for summary judgment. In a lengthy decision entered on September 4, 2008, the three-judge court granted the motions of the Attorney General and the various defendant-intervenors, ruling that NAMUDNO did not qualify as political subdivision under the Voting Rights Act and therefore could not bailout from coverage under Section 4(a).⁶⁶⁹ The court also held, after an extensive analysis of the legislative record, that the extension of Section 5 was constitutional under the Fourteenth and Fifteenth Amendments.⁶⁷⁰ The court based its opinion on the extensive congressional record of Section 5 objections, continued racial bloc voting, patterns of discrimination by the covered jurisdictions, and litigation under Section 2 of the Voting Rights Act. The court also noted that the extension passed unanimously in the Senate and by an overwhelming majority in the House of Representatives, indicating that the judgment of Congress for the continued need of Section 5 was due deference by the courts.⁶⁷¹

NAMUDNO filed a jurisdictional statement in the Supreme Court, which noted probable jurisdiction on January 9, 2009.⁶⁷² The Court heard oral arguments in April 2009 and issued its much-anticipated ruling in June 2009. In an 8-1 opinion written by Chief Justice John Roberts, the Court declined to decide the issue of the constitutionality of Section 5. Instead, the Court ruled that the utility district was in fact eligible to bailout from Section 5 coverage and as a consequence the Court would “avoid the unnecessary resolution of constitutional questions” involving Section 5.⁶⁷³

Foreshadowing the 2013 *Shelby* decision, the majority opinion stated in dicta that “the Act imposes current burdens and must be justified by current needs,” “the Act’s preclearance requirements and its coverage formula raise serious constitutional questions,” questioned

⁶⁶⁷ See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400 (1975).

⁶⁶⁸ See Motion for Leave to Intervene as Defendants, *Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, No. 1:06-cv-01384 (D.D.C. Nov. 3, 2006).

⁶⁶⁹ See *Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, 573 F.Supp.2d 221, 231-235 (D. D.C. 2008).

⁶⁷⁰ See *id.* at 266.

⁶⁷¹ See *ibid.*

⁶⁷² Probable Jurisdiction Noted, *Northwest Austin Mun. Utility Dist. No. One v. Gonzales*, 557 U.S. 193 (Jan. 9, 2009).

⁶⁷³ *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009).

whether the “statute’s disparate geographic coverage is sufficiently related to the problem that it targets,” and that “[t]he Act also differentiates between States, despite our historic tradition that all States enjoy ‘equal sovereignty.’”⁶⁷⁴ Yet the opinion also underscored the vital role the Act played in American politics, stating that “[t]he historic accomplishments of the Voting Rights Act are undeniable,” and the improvements in minority political participation “are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success.”⁶⁷⁵

Following remand, the utility district, the United States, and the intervenors filed a proposed consent decree allowing the utility district to bailout from Section 5 coverage. The consent decree was approved by the three-judge court in November 2009, and the claim challenging the constitutionality of Section 5 was dismissed without prejudice.⁶⁷⁶

47. Green Party of Arkansas v. Daniels – Arkansas 2009

On August 27, 2009, the ACLU and ACLU of Arkansas filed suit in federal court on behalf of the Green Party of Arkansas and two of its members in an action to preserve the Green Party’s place on the state ballot in the 2010 election. Candidates of state-certified political parties are granted automatic access to the ballot in Arkansas. Under Arkansas state law, once a political party achieves certification it must earn at least 3% of the total votes cast for the office of governor or nominees for presidential electors at the first general election after the party becomes certified in order to retain its status as a state-certified political party.⁶⁷⁷ The Green Party successfully petitioned to become a certified political party in 2006 and 2008 by filing petitions comprised of 10,000 Arkansas voters. However, following certification in 2006 the Green Party received only 1.65% of the vote for governor and in 2008 the Green Party’s candidate for president (Cynthia McKinney) earned only 0.3% of the votes cast (although the Green Party’s candidates for U.S. Senate and U.S. House of Representative each received more than 15% of the votes cast in their respective races). In each case, following the 2006 and 2008 elections, the Secretary of State subsequently decertified the Green Party.⁶⁷⁸

The plaintiffs argued that based upon the 2008 U.S. House and Senate election results, it was apparent that the Green Party had substantial support among Arkansas voters and that decertification of the party because of a poor showing for the party’s presidential candidate, who did not campaign in Arkansas, violated the political and associational rights of the Green Party and its members.

⁶⁷⁴ *Id.* at 203-04.

⁶⁷⁵ *Id.* at 202.

⁶⁷⁶ Consent Judgement and Decree, Northwest Austin Mun. Utility Dist. No. One v. Holder, No. 1:06-cv-1384 (D.D.C. Nov. 3, 2009).

⁶⁷⁷ Ark. Code Ann. § 7-1-101(21)(C)

⁶⁷⁸ *Green Party of Arkansas v. Daniels*, 733 F. Supp. 2d 1055 (E.D. Ark. 2010).

The district court granted the defendant's motion for summary judgment.⁶⁷⁹ It acknowledged that the ballot access statute undoubtedly burdens constitutionally protected rights, but held that Arkansas had a vital interest in organizing and regulating elections and the burden imposed upon plaintiffs' rights was not severe. Because of the importance of the constitutional rights at issue and the burdens placed upon them by state law, the plaintiffs appealed the district court's decision.

On appeal, the court of appeals affirmed the district court's grant of summary judgment and found that the ballot access statute did not impose a severe burden on the Green Party's associational rights, and as such, was not subject to strict scrutiny.⁶⁸⁰ The court also found that the burden the statute imposed on the Green Party's associational rights were significantly outweighed by Arkansas's important regulatory interests in preventing ballot overcrowding, frivolous candidacies, and voter confusion.

48. Moore v. Franklin County Board of Elections and Registration – Georgia 2009

After finding that a ballot was cast by a voter who did not reside in the city of Franklin Springs, the Superior Court of Franklin County, Georgia, set aside the results of a mayoral election decided by a single-vote margin.⁶⁸¹ The court ordered a special election for December 29, 2009—just 19 days after its ruling, which was not submitted for Section 5 preclearance. Franklin Springs is home to Emmanuel College, and many student-voters were away for the year-end holidays, making them unable or unlikely to participate in the special mayoral election.

The winner of the disputed election, an employee of Emmanuel College, appealed the Superior Court's decision to hold a special election and requested a stay from the Georgia Supreme Court. The ACLU and Lawyers Committee for Civil Rights Under Law filed an amicus brief supporting the request, which argued that the lower court failed to comply with Section 5 and that setting the election during the holiday season would unfairly and unnecessarily burden student voters. Amici relied upon the Twenty-Sixth Amendment and numerous court decisions invalidating disparate treatment of students seeking to register and vote. The Georgia Supreme Court, however, denied the request for a stay. The election went ahead on December 29, and the challenger was elected by five votes.⁶⁸²

49. Bartlett v. Strickland – North Carolina 2009

In this suit, several county commissioners in North Carolina alleged that state officials' redistricting plan, which attempted to preserve minority voting power in a 39% African

⁶⁷⁹ *Id.*

⁶⁸⁰ *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011).

⁶⁸¹ See ACLU Voting Rights Project, ANNUAL REPORT: JANUARY 1, 2009-DECEMBER 31, 2009 20-21, https://www.aclu.org/sites/default/files/field_document/vrp_annualreport_2009.pdf (reviewing *Moore v. Franklin County Board of Elections and Registration*, No. 09-FV-1038-J (Ga. Sup. Ct. 2009)).

⁶⁸² *Id.*

American North Carolina House of Representatives district, violated the North Carolina Constitution because the district did not encompass whole counties and instead included portions of four different counties. In that district, Black voters had recently joined with white “crossover” voters to elect candidates of choice in contrast to North Carolina’s long history of denying Black Americans equal opportunity in state elections.⁶⁸³ In response to the complaint, the state officials argued that Section 2 of the Voting Rights Act of 1965 prohibiting minority vote dilution required the redistricting plan because the Black population in the district was sufficiently large and geographically compact to constitute a majority under the terms of the Voting Rights Act. The North Carolina Superior Court entered summary judgment for the state officials.⁶⁸⁴

On appeal, the North Carolina Supreme Court held that because the minority group did not comprise a numerical majority of citizens of voting age (at least 50% of the population in the applicable district), the redistricting plan did not meet the conditions of the Voting Rights Act. Instead, the plan had to comply with North Carolina’s Constitution, which prohibits counties from being divided for purposes of state legislative districts. Thus, the court reversed the lower court’s decision and declared the plan unlawful.⁶⁸⁵

The U.S. Supreme Court granted certiorari and agreed to hear the question of whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is a strict requirement for a vote dilution claim under Section 2 of the Voting Rights Act. The ACLU submitted an amicus brief along with other civil rights groups, arguing that the state court’s position was inconsistent with the history, purpose, and prior interpretation of the Voting Rights Act.⁶⁸⁶ The Supreme Court ultimately held that no Section 2 violation could be established where a minority was less than 50% of the voting age population in a district.⁶⁸⁷ Crossover districts like the one at issue in this case, the Court ruled, did not meet the *Gingles* requirement that a minority is sufficiently large and geographically compact enough to constitute majority in a single-member district for purposes of a Section 2 claim under Voting Rights Act’s vote dilution provision.

50. Coronado v. Napolitano — Arizona 2009

The ACLU and ACLU of Arizona filed a lawsuit challenging two aspects of Arizona’s felon disfranchisement rules: (1) the denial of voting rights to formerly incarcerated individuals with past felony convictions based on their inability to pay the court fines, fees, and restitution associated with their sentences, and (2) the disfranchisement of people convicted of non-common law felonies.⁶⁸⁸ Under Arizona law, every person convicted of a felony is

⁶⁸³ Brief of NAACP, Cindy Moore, Milford Farrior, Mary Jordan, and the ACLU as *Amici Curie* in Support of Petitioners at 5-7, *Bartlett v. Strickland*, No. 07-689 (2009).

⁶⁸⁴ *See Pender County v. Bartlett*, No. 04 CVS 06966, slip op. at 2 (N.C. Super. Ct. Jan. 9, 2006).

⁶⁸⁵ *Pender Cty. v. Bartlett*, 649 S.E.2d 364 (N.C. 2007).

⁶⁸⁶ Brief of NAACP, Cindy Moore, Milford Farrior, Mary Jordan, and the ACLU as *Amici Curie* in Support of Petitioners at 5-7, *Bartlett v. Strickland*, No. 07-689 (2009).

⁶⁸⁷ *Bartlett v. Strickland*, 556 U.S. 1, 14-15 (2009).

⁶⁸⁸ Complaint, *Coronado v. Napolitano*, No. 2:07-cv-01089 (D. Ariz. June 1, 2007).

stripped of their civil rights, including the right to vote, serve on a jury, and run for public office.⁶⁸⁹ Individuals who have only one criminal conviction are eligible for automatic restoration of their voting rights once they receive a Certificate of Absolute Discharge from the state and pay all of their legal financial obligations.⁶⁹⁰ Those convicted of two or more felonies must seek discretionary approval from a judge before the state can restore their civil rights, a process that is arbitrary and intimidating.⁶⁹¹

Three of the plaintiffs had only one criminal conviction but remained ineligible for automatic rights restoration because they owed outstanding legal debts to the state. The plaintiffs argued that conditioning the right to vote on the payment of fines or fees is in the nature of a poll tax and violates the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution, the Voting Rights Act, and state laws.⁶⁹² The lawsuit also argued that the scope of crimes covered by Arizona's felon disenfranchisement rules were inconsistent with the intent of the Fourteenth Amendment and that Congress only intended to permit states to disenfranchise individuals convicted of serious common law felonies such as murder and treason. Thus, there is no constitutional provision or exception that would permit states to automatically deny basic voting rights for drug-related crimes or other acts that were never felonies at common law.

In January 2008, the district court dismissed the complaint for failure to state a claim, determining that because fines and fees are terms of an individual's sentence, Arizona was permitted to disenfranchise individuals on that basis and that Section 2 of the Fourteenth Amendment provided an affirmative sanction for states to disenfranchise persons convicted of rebellion or other crimes.⁶⁹³

Plaintiffs filed an amended complaint in April 2008 to include specific allegations regarding the racial disparities resulting from the disenfranchisement law and the negative, disproportionate impact of the state's fines and fees requirement on indigent people.⁶⁹⁴ The defendants moved to dismiss the amended complaint, and the court granted that motion in November 2008.⁶⁹⁵ The court essentially reiterated its reasoning in dismissing the original complaint, ruling that the plaintiffs did not have a fundamental right to vote because of their previous convictions, the legislative history behind passage of the Fourteenth Amendment did not support the plaintiffs' interpretation of Section 2, and the fines and

⁶⁸⁹ See ARIZ.CONST., art. VII, §2; Ariz. Rev. Stat. Ann. § 13-904; see also *Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at *1 (D. Ariz. Jan. 22, 2008).

⁶⁹⁰ Ariz. Rev. Stat. Ann. § 13-907.

⁶⁹¹ Ariz. Rev. Code § 13-908; *Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at *1 (D. Ariz. Jun. 1, 2007).

⁶⁹² See Complaint at ¶¶ 58-83, *Coronado v. Napolitano*, No. 2:07-cv-01089 (D. Ariz. June 1, 2007).

⁶⁹³ *Coronado v. Napolitano*, No. CV 07-1089, 2008 WL 191987 (D. Ariz. Jan. 22, 2008).

⁶⁹⁴ See Amended Complaint for Declaratory Relief, Injunctive Relief, and Nominal Monetary Damages at ¶¶ 45-46, 63, CV 07-1089 (D. Ariz. Apr. 30, 2008).

⁶⁹⁵ *Coronado v. Napolitano*, No. CV 07-1089, 2008 WL 4838707, at *6 (D. Ariz. Nov. 6, 2008), aff'd sub nom. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010).

fees requirement did not result in discrimination on the basis of wealth even though it might have a disparate impact on indigent people.⁶⁹⁶ The court also determined that the plaintiffs were not entitled to any discovery regarding the factual allegations in the complaint, so dismissal at such an early stage in the litigation was warranted.⁶⁹⁷

The plaintiffs appealed the court's decision to the Ninth Circuit, and the case was consolidated with *Harvey v. Brewer*, which focused solely on the disfranchisement of people convicted of non-common law felonies.⁶⁹⁸ The Ninth Circuit heard oral argument in October 2009, and issued its opinion affirming the lower court's decision in May 2010. As to the plaintiffs' non-common law felony claim, the court ruled that a plain reading of the phrase "other crime" in Section 2 of the Fourteenth Amendment, as well as the phrase's past and contemporary usage, supported the court's conclusion that the term applies to all crimes, not just common law felonies.⁶⁹⁹ The court also rejected the plaintiffs' challenge to Arizona's fines and fees requirement, reasoning that "[j]ust as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights."⁷⁰⁰ The *Harvey* plaintiffs filed a motion for rehearing en banc which the court denied on July 16, 2010. The plaintiffs decided not to file a petition for certiorari to the Supreme Court.

51. Gray v. South Carolina State Election Commission – South Carolina 2009

In August 2009, the ACLU filed this action on behalf of individual South Carolina citizens and the United Citizens Party against the South Carolina State Election Commission under Section 5 of the Voting Rights Act. The suit argued that a voting change related to the state's reinterpretation of the its filing deadline statute required preclearance and claimed violations of the First and Fourteenth Amendments.⁷⁰¹ The plaintiffs requested declaratory and injunctive relief prohibiting the defendants from enforcing the reinterpreted filing deadline against them.⁷⁰² Between 1998 and April 16, 2008, the Election Commission interpreted the law to allow candidates to run as candidates for one or more political parties in the general election as long as they filed a "Statement of Intent of Candidacy" for one political party during the filing period. On April 16, 2008, the Election Commission voted to require candidates seeking party nominations to file a Statement of Intent during

⁶⁹⁶ *See generally id.*

⁶⁹⁷ *Id.* at *3.

⁶⁹⁸ 605 F.3d 1067 (9th Cir. 2010).

⁶⁹⁹ *See id.* at 1073-1079.

⁷⁰⁰ *Id.* at 1079.

⁷⁰¹ Complaint at ¶ 1, *Gray v. S.C. State Election Comm'n*, No. 3:09-cv-02126 (D.S.C. Aug. 12, 2009).

⁷⁰² *Ibid.*

the filing period for each political party in which the candidate planned to run in the general election.⁷⁰³

The plaintiffs filed a motion for preliminary injunction to enjoin the South Carolina State Election Commission from implementing the change absent compliance with Section 5.⁷⁰⁴ The parties agreed to dispense with a hearing on the preliminary injunction and proceed directly to a hearing on the merits based on stipulated facts and oral arguments in November 2009.⁷⁰⁵ This proceeding failed to resolve the issue and the district court requested additional targeted discovery, which was completed in February 2010. In March 2010, the district court found in favor of the plaintiffs and granted a permanent injunction. The court held that the subsequent policy constituted a change that required preclearance because it required multiple Statements of Intent where a single filing sufficed before; and the implementation of the subsequent policy resulted in an election practice that differed from the baseline practice established by the most recent preclearance that was in force and effect.⁷⁰⁶

52. Janis v. Nelson – South Dakota 2009

In February 2009 the ACLU, the ACLU of South Dakota, and local counsel filed suit on behalf of Native Americans who resided on the Pine Ridge Reservation in Shannon County, which was one of two counties in South Dakota covered by Section 5 of the Voting Rights Act.⁷⁰⁷ The plaintiffs were denied the right to vote because of past felony convictions, despite the fact that their sentences did not include incarceration and state law expressly provides that persons convicted of felonies would only be denied the right to vote while incarcerated in the state penitentiary. The plaintiffs argued that the removal of their names from the voter registration rolls constituted a change in voting that was not precleared as required by Section 5 and was unlawful under state and federal law, including the Fourteenth Amendment, the Help America Vote Act (HAVA), the National Voter Registration Act (NVRA), and Section 2 of the Voting Rights Act.⁷⁰⁸

After the state placed the names of the voters back on the voter registration rolls, the state attempted to dismiss the action as moot, which the court denied.⁷⁰⁹ Thereafter the state filed a motion to dismiss all counts of the plaintiffs' amended complaint, or alternatively, for

⁷⁰³ *Id* at ¶ 17.

⁷⁰⁴ Plaintiffs' Motion for a Preliminary Injunction, *Gray v. S.C. State Election Comm'n*, No. 3:09-cv-02126 (D.S.C. Aug. 14, 2009).

⁷⁰⁵ *Gray v. S.C. State Election Comm'n*, No. 3:09-cv-02126, 2010 WL 753767, at *1 (D.S.C. Mar. 1, 2010).

⁷⁰⁶ *Id.* at *3.

⁷⁰⁷ Complaint for Declaratory and Injunctive Relief and Compensatory and Nominal Damages, *Janis v. Nelson*, No. 5:09-cv-05019 (D.S.D. Feb. 18, 2009)

⁷⁰⁸ First Amended Complaint for Declaratory Relief, Injunctive Relief, and Monetary Damages, *Janis v. Nelson*, No. 5:09-cv-05019 (D.S.D. Oct. 7, 2009).

⁷⁰⁹ *Janis v. Nelson*, No. 5:09-cv-05019, 2009 WL 4505935 (D.S.D. Nov. 24, 2009).

a judgment on the pleadings.⁷¹⁰ The state made several arguments, including that the plaintiffs never claimed they actually tried to vote, even though the plaintiffs explained they feared prosecution if they attempted to do so, and that any alleged wrongdoing laid with local election officials and not state officials.⁷¹¹ The state also argued that Section 5 was unconstitutional and outdated as applied to Shannon County, as the county was experiencing high voter registration and turnout rates above the national average.⁷¹² The court rejected these arguments, and in a second decision entered the same day, the court denied requests by state and county officials that they not be required to comply with discovery requests made by the plaintiffs.⁷¹³

Ultimately the parties reached a settlement, whereby the plaintiffs and the state agreed upon the impact of felony convictions on individuals' right to vote, including retention of the right to vote for people convicted of felonies who are sentenced only to probation, fines, fees, or restitution. The defendants also agreed to advance various amendments to state laws and conduct affirmative outreach and public education regarding the right to vote for individuals with felony convictions.⁷¹⁴ Based on the settlement, the parties stipulated to dismissal of the litigation with prejudice, which was granted by the court.⁷¹⁵

53. League of Women Voters of Indiana v. Rokita – Indiana 2009

Three months after the decision of the Supreme Court in *Crawford v. Marion County Election Board*,⁷¹⁶ which rejected a federal challenge brought by the ACLU and others to Indiana's photo ID law, in July 2008 the League of Women Voters of Indiana filed suit in state court seeking a declaration that the photo ID law violated the Indiana State Constitution. The plaintiff argued that the law imposed a substantive new qualification on the right to vote that was unauthorized by the Indiana Constitution. The state filed a motion to dismiss in September 2008, and, after oral arguments in the trial court, the motion was granted based on the court's determination that the photo ID law was a procedural regulation that did not constitute a voter qualification and was not arbitrary or unreasonable.⁷¹⁷

The Indiana Court of Appeals reversed and struck down the law under the Equal Privileges and Immunities Clause of the state constitution, reasoning that the law effectively added a qualification beyond those constitutionally permitted and was not merely a procedural

⁷¹⁰ State Defendants' Amended Motion to Dismiss, or in the Alternative, Motion for Judgment on the Pleadings, *Janis v. Nelson*, No. 5:09-cv-05019 (D.S.D. Nov. 4, 2009).

⁷¹¹ *See generally id.*

⁷¹² *See Janis v. Nelson*, No. 09-cv-5019, 2009 WL 5216902, at *7 (D.S.D. Dec. 30, 2009).

⁷¹³ *Janis v. Nelson*, No. 09-cv-5019, 2009 WL 5216898 (D.S.D. Dec. 30, 2009).

⁷¹⁴ Settlement Agreement and Release in Full of All Claims, *Janis v. Nelson*, No. 09-cv-5019 (D.S.D. May 25, 2015).

⁷¹⁵ Judgment of Dismissal, *Janis v. Nelson*, No. 09-cv-5019 (D.S.D. May 26, 2010).

⁷¹⁶ *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

⁷¹⁷ *See League of Women Voters of Ind. v. Rokita*, 915 N.E.2d 151 (Ind. Ct. App., 2009).

regulation.⁷¹⁸ The court further held that exempting absentee voters and voters living in a state-licensed care facility from the ID requirement was an unconstitutional disparate treatment of voters and violated the requirement of uniform application of state election laws.⁷¹⁹

In November 2009, the ACLU, together with the Southern Coalition for Social Justice, filed an amicus brief, which argued that the decision of the court of appeals was correctly decided in conformity with decisions from other states interpreting their state constitutions' Equal Privileges and Immunities Clauses.⁷²⁰ The ACLU argued that the Indiana Supreme Court should follow other state courts reviewing analogous or similar state constitutional provisions, where they invalidated similar voting restrictions by using a more expansive approach to finding constitutional violations (i.e. more frequent heightened scrutiny when reviewing certain classifications) than was available under federal equal protection law.⁷²¹

In June 2010, the Indiana Supreme Court reversed the court of appeals and upheld the photo ID law. The plaintiff argued, as it did in the lower court, that the distinctions made by the photo ID law—first, between in-person and absentee voters, and second, between senior citizen voters living in state care facilities serving as voting locations and senior citizens living outside of such facilities—were each impermissible. The court rejected these arguments and found that the first distinction was justified pursuant to the legislature's general power to set identification requirements and that applying the same ID requirement to absentee voters was an impractical method for identification purposes when compared to in-person identification at a voting location. The court determined the second distinction was also permissible due to the relatively minimal number of similarly situated voters exempted from the photo ID requirement, and thus was an “insubstantial disparity.”⁷²² Within this framework, the court determined that the law met the requirement of uniform application as a “specific legislative regulation associated with additional accommodations extended by the legislature” and did not have different requirements for in-person, as opposed to absentee, voters. The court analogized this to the “accommodations” that allow for early and absentee voting.⁷²³ The court left open the possibility of a successful “as-applied” claim of constitutional invalidity, mentioning potential individual claims, such as hardship of obtaining an ID in the first instance due to fees or other requirements for obtaining the ID.⁷²⁴

54. Swann v. Handel; Swann v Kemp – Georgia 2009

⁷¹⁸ *Id.* at 165.

⁷¹⁹ *Id.* at 168-69.

⁷²⁰ See Brief of ACLU and Southern Coalition for Social Justice as *Amici Curiae* Supporting Appellants at 3-7, *League of Women Voters of Ind. v. Rokita*, No. 49S02-1001-CV-50 (Ind. June 30, 2010).

⁷²¹ See *id.* at 7-10.

⁷²² *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 770-772 (Ind. 2010).

⁷²³ *Id.* at 768.

⁷²⁴ *Id.* at 773.

The ACLU filed this lawsuit on behalf of disenfranchised Georgia voters in September 2009, challenging the constitutionality of Section 21-2-381(a)(1)(D) of the Georgia Code, which prohibits election officials from mailing absentee ballots to a place other than the permanent mailing address, temporary out-of-county, or out-of-municipality address of a voter unless they will be out of the county on Election Day. Election officials in the state interpreted this provision as prohibiting the mailing of absentee ballots to people incarcerated in the same county they reside in who otherwise remain eligible to vote.⁷²⁵ However, eligible individuals incarcerated outside of their county of residence would be able to receive their absentee ballot. The plaintiffs incarcerated within their county of residence asserted that the law violated their right to equal protection under the Fourteenth Amendment and the right to due process based on the defendants' failure to inform them that they would not be able to receive an absentee ballot in jail.⁷²⁶

Both the plaintiffs and defendants filed motions for summary judgment. In October 2010, the district court denied the plaintiffs' and granted the defendants' motion.⁷²⁷ The court decided that the plaintiffs' equal protection claim failed because they were not treated differently than similarly situated individuals. The court also reasoned that because the plaintiff's absentee ballot application listed his registered address on his county ballot application, the defendants did not commit any acts that deprived him of his right to vote.⁷²⁸ Likewise, the court found that the plaintiff's due process claim failed because the board did not deny his application and therefore did not fail to inform him that his application was denied.⁷²⁹

The plaintiffs appealed to the Eleventh Circuit in October 2010 seeking the court's determination on whether the plaintiff was required to list the jail's address on his absentee ballot application in order to challenge the constitutionality of the law in question as it applied to him.⁷³⁰ In response, the defendants argued that plaintiff lacked standing to raise his equal protection claim on the grounds that because he never listed the jail as his mailing address on the absentee ballot application, his injury was not traceable to the defendants. The Eleventh Circuit agreed with the defendants and determined that the plaintiff would not have received a ballot at the jail regardless of the application of the statute because he did not provide the jail address on his application.⁷³¹ The Court vacated the district court's decision and instructed the district court to dismiss the action for lack of subject matter jurisdiction, which it did in April 2012.⁷³²

55. Tempel v. Platt – South Carolina 2009

⁷²⁵ *Id.* at ¶¶ 30-31.

⁷²⁶ *Id.* at ¶¶ 39-47.

⁷²⁷ *Swann et al. v. Handel*, Case No. 1:09-CV-2674, 2010 WL 4117448 at *1 (N.D. Ga. Oct. 18, 2010).

⁷²⁸ *Id.* at *3.

⁷²⁹ *Id.* at *4.

⁷³⁰ Brief of Appellant, *Swann v. Kemp*, No. 10-14901 (11th Cir. Dec. 6, 2010).

⁷³¹ *Swann v. Kemp*, 668 F.3d 1285 (11th Cir. 2012).

⁷³² Order, *Swann v. Kemp*, No. 1:09-CV-2674 (N.D. Ga. Apr. 24, 2012).

George E. Tempel, Chairman of the Charleston County Democratic Party, brought an action in South Carolina state court in August 2008 to enjoin Eugene Platt from being a candidate for the South Carolina state house in the November 2008 general election.⁷³³ A South Carolina candidate oath law—also known as a “sore loser” law—requires every candidate for office to sign an oath to abide by the results of a party’s primary. If the candidate loses the party’s primary, the law bars the candidate from petitioning or campaigning as a write-in candidate on the general election ballot for any office for which the party has a nominee. South Carolina was also one of four states that permitted fusion voting, allowing a candidate to run in more than one party’s primary. Thus, the state’s candidate oath law operates with the fusion voting system to bar a candidate who loses a party’s primary from having their name placed on the general election ballot by another political party that nominates them. While Platt won the nominations of the Green Party and Working Family Party for the state legislative house seat, he subsequently lost the nomination for the same office in the Democratic primary. At the urging of the Democratic Party, the South Carolina State Election Commission disqualified Platt from appearing on the general election ballot as the Green Party’s nominee. Platt and the Green Party separately challenged this ruling in federal court.⁷³⁴ Platt argued that the case was not ripe for decision in view of this separately pending federal action.

The circuit court granted the injunction pursuant to S.C. Code Ann. § 7-11-210 (2000), which authorizes a party chairman to obtain injunctive relief if a defeated party primary candidate pursues appearing on a general election ballot in a race where the party has a nominee.⁷³⁵ Represented by the ACLU, Platt appealed to the South Carolina Supreme Court, which affirmed the circuit court’s injunction in January 2010.⁷³⁶

56. English v. Chester County – Pennsylvania 2010

In January 2010, the ACLU, ACLU of Pennsylvania, and Public Interest Law Center of Philadelphia filed a lawsuit in federal court in Pennsylvania on behalf of Black residents and Lincoln University students against Chester County. The plaintiffs argued that that the county’s Board of Elections and Department of Voter Services had deprived Black Americans in Lower Oxford East Township of their right to vote by assigning them to inconvenient and inadequate polling facilities.⁷³⁷ Residents of the township, most of whom were Black and comprised almost 70% of the township’s precinct, had historically voted at a polling place located on the campus of Lincoln University, a Historically Black College and University, where most of the precinct’s voters reside. In 1992, after a Lincoln University professor won a seat on the local school board in a hotly contested election, the county

⁷³³ *Tempel v. Platt*, No. 08-CP-10-4978 (S.C. Ct. of Common Pleas 2009).

⁷³⁴ *See* Complaint, S.C. Green Party et al. v. S.C. State Election Comm., No. 3:08-cv-2790 (D.S.C. Aug. 7, 2008).

⁷³⁵ *See Tempel v. Platt*, Case No. No. 2010–MO–002, 2010 WL 10097777, at *1 (S.C. Jan. 19, 2010).

⁷³⁶ *Id.* at *1-*2.

⁷³⁷ *See* ACLU OF PENNSYLVANIA, ENGLISH, ET AL. V. CHESTER COUNTY, <https://www.aclupa.org/our-work/legal/legaldocket/englishetalvchestercounty>.

moved the polling place to a building several miles away that was significantly smaller and had fewer voting machines.⁷³⁸ The polling place remained at that location despite continued requests to return it to Lincoln University.⁷³⁹

In recognition of the high numbers of newly registered voters in the 2008 primary, precinct residents anticipated a large turnout of Black voters and petitioned the board of elections to return the polling place to the Lincoln University campus prior to the 2008 general election.⁷⁴⁰ The board of elections refused.⁷⁴¹ Predictably, the polling location's numerous problems plagued the precinct's voters on Election Day. Lines began before polls opened, and delays began as soon as the polls open. The voter registration rolls at the precinct did not contain an up-to-date list of registered voters because the board had failed to provide it. The delays, combined with the inadequacy of the facility to accommodate the number of voters who had turned out, most of whom were Black, waited up to seven hours in the pouring rain to cast their votes—far longer than voters elsewhere in Chester County. A poll watcher caused further delays by challenging the identities of young Black voters throughout the day.⁷⁴² Despite multiple attempts to resolve the issues with the board of elections, the board refused to take any action. The result was low voter turnout and a racially disparate impact in the precinct with the highest percentage of Black voters in the county.⁷⁴³

The suit alleged that the polling location was in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.⁷⁴⁴ It asked the court to order Chester County to return the Lower Oxford East polling place to the Lincoln University campus, authorize federal elections monitors, and award damages to residents who faced extreme difficulties or were prevented from voting in the 2008 general election.⁷⁴⁵ In April 2010, the parties settled the case based upon an agreement with the board of elections that it would return the polling place to the Lincoln University campus.⁷⁴⁶

57. Georgia v. Holder – Georgia 2010

In June 2010, the state of Georgia sued the U.S. Attorney General when its voter registration verification process did not obtain preclearance under the Voting Rights Act.⁷⁴⁷

⁷³⁸ Complaint at ¶ 2, *English v. Chester Cty.*, No. 2:10-cv-00244 (E.D. Pa. Jan. 10, 2010).

⁷³⁹ *Id.*

⁷⁴⁰ *Id.* at ¶ 29.

⁷⁴¹ *Id.* at ¶ 34.

⁷⁴² *See id.* at ¶¶ 35-45.

⁷⁴³ *See id.* at ¶ 46.

⁷⁴⁴ *See id.* at ¶¶ 102-119.

⁷⁴⁵ *See id.* at 20.

⁷⁴⁶ Settlement Agreement and Mutual Release at ¶ 1, *English v. Chester Cnty.*, No. 2:10-cv-00244 (E.D. Pa. Aug. 9, 2010).

⁷⁴⁷ Expedited Complaint for Declaratory Judgment, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. June 22, 2010).

Georgia adopted a system attempting to match the information of voter registration applicants with information contained in the state's Department of Driver Services and Social Security Administration database for verification and flag individuals whose information did not match to local registrars for further inquiry. The state did not initially obtain preclearance under Section 5, even though the new system was clearly a voting change that required preclearance. The state used the Help America Vote Act's (HAVA) voter registration list maintenance process to justify its new system, even though HAVA does not require a matching process to verify voter eligibility and in fact contains specific prohibitions against the process Georgia was trying to implement. During the preclearance process, the Attorney General twice rejected Georgia's verification process, finding the matching program was "seriously flawed," that "thousands of citizens who are in fact eligible to vote under Georgia law have been flagged," that the "impact of these errors falls disproportionately on minority voters," and that "applicants who are Hispanic, Asian or African American are more likely than white applicants, to statistically significant degrees, to be flagged for additional scrutiny."⁷⁴⁸

Nonetheless, Georgia sought a declaratory judgment that its verification process did not violate Section 5 of the Voting Rights Act or, alternatively, a ruling that the preclearance requirement was unconstitutional.⁷⁴⁹ The ACLU and the Lawyers' Committee for Civil Rights intervened on behalf of the Georgia State Conference of the NAACP, the Georgia Association of Black Elected Officials, and the Georgia Coalition for the Peoples' Agenda.⁷⁵⁰ A month after intervention, Georgia filed an amended complaint, and within hours the Attorney General abruptly informed the court that it would preclear the system, even though it was substantially similar to the one the Justice Department had objected to a year earlier. The parties filed a joint motion to dismiss on August 20, 2010. The intervenors argued that the unusual process and decision to immediately preclear a system that was previously determined as "seriously flawed" resulted in the denial to the intervenors of access to materials submitted during the preclearance process, and that Georgia nonetheless did not meet its Section 5 burden.⁷⁵¹ The intervenors requested that the Court require Georgia and the Department of Justice to explain the events that led to the administrative preclearance.⁷⁵² The court declined to do so and dismissed the action.⁷⁵³

⁷⁴⁸ Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to The Honorable Thurbert E. Baker, Attorney Gen. (May 29, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090529.pdf.

⁷⁴⁹ Expedited Complaint for Declaratory Judgment, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. June 22, 2010).

⁷⁵⁰ Motion for Leave to Intervene as Defendants, *Georgia v. Holder*, 1:10-cv-01062 (D.D.C. June 6, 2010).

⁷⁵¹ *See* Notice by Defendant-Intervenors, *Georgia v. Holder*, 1:10-cv-01062 (D.D.C. Aug. 21, 2010); Response to Plaintiff's and Defendant's Joint Motion to Dismiss by Defendant-Intervenors Brooks, et al., *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. Sept. 7, 2010).

⁷⁵² Response to Plaintiff's and Defendant's Joint Motion to Dismiss by Defendant-Intervenors Brooks, et al. at 12-13, *Georgia v. Holder*, No. 1:10-cv-01062 (D.D.C. Sept. 7, 2010).

⁷⁵³ *Georgia v. Holder*, 748 F. Supp. 2d 16, 19 (2010).

58. Spirit Lake Tribe v. Benson Cty. – North Dakota 2010

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court that closing the precincts on the Reservation would make it difficult or impossible for many residents to vote in violation of the federal and state constitutions and Section 2 of the Voting Rights Act.⁷⁵⁴ The ACLU filed an amicus brief in support of the Tribe's Section 2 claim and its motion for a preliminary injunction.

Following an expedited hearing, the district issued a preliminary injunction on October 21, 2010, requiring the county to maintain the two polling places on the reservation. It concluded that closing the precincts would have a disparate impact on Native American voters who lacked access to transportation or to voting by mail.⁷⁵⁵ After the preliminary injunction was granted, the parties entered into a consent decree and settlement in October 2011 requiring the county to maintain the two polling places on the reservation for future general elections, subject to certain conditions.⁷⁵⁶

59. Brown v. Secretary of State of Florida – Florida 2010

This suit was filed by two members of Congress, Mario Diaz-Balart and Corrine Brown, challenging Article III, Section 20 of the Florida Constitution, which was adopted by more than 60% of the state's voters at the November 2010 election. The challenged provision provides standards for congressional redistricting, including that a plan may not favor or disfavor an incumbent or political party or deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. The plaintiffs contended that the state law violates Article I, Section 4, Clause 1 of the U.S. Constitution and the Elections Clause, which gives state legislatures power to prescribe the times, places, and manner of holding elections for members of Congress.⁷⁵⁷

The ACLU and ACLU of Florida represented defendant-intervenors who sought to defend the constitutionality of the state law. The ACLU of Florida played a major role in promoting the adoption of the challenged redistricting standards, and the defendant-intervenors contended that the federal constitution does not prohibit the adoption of redistricting standards by a state's electorate. The motion seeking leave to intervene was filed on December 16, 2010. On January 24, 2011, the Florida House of Representatives filed to join the lawsuit to challenge the adopted provisions.⁷⁵⁸

⁷⁵⁴ Complaint, *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095 (D.N.D. Oct. 8, 2010).

⁷⁵⁵ *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at *1 (D.N.D. Oct. 21, 2010)

⁷⁵⁶ Consent Judgment and Decree and Stipulation of the Parties, *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095 (D.N.D. Oct. 6, 2011).

⁷⁵⁷ *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1272-1273 (11th Cir. 2012).

⁷⁵⁸ *Id.* at 1274.

On September 9, 2011, the district court rejected the lawsuit and granted summary judgment to the defendants.⁷⁵⁹ The plaintiffs appealed to the Eleventh Circuit, which upheld the district court's decision on January 31, 2012.⁷⁶⁰ The appellate court noted in its decision that the Supreme Court had provided clear and unambiguous guidance, explaining that the term "Legislature" in the Elections Clause refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state.⁷⁶¹

60. Nix v. Holder; Laroque v. Holder – North Carolina 2010

In 2010, residents of Kinston, North Carolina, filed suit seeking a declaratory judgment that Section 5 of the Voting Rights Act was unconstitutional because it exceeded Congress's enumerated powers and violated equal protection principles.⁷⁶² Kinston was a covered jurisdiction under Section 5 and required to obtain preclearance of voting changes before enforcement. The suit was filed after the Department of Justice denied preclearance to a proposed voting change in Kinston that would have replaced the city's partisan electoral system with a non-partisan system with a plurality vote requirement. The Department found the change would likely have a retrogressive effect on the ability of Kinston's Black voters to elect candidates of choice.⁷⁶³ The Justice Department conducted a statistical analysis of the impact of the change, which demonstrated that the removal of partisan cues in city elections would eliminate the single factor that permitted Black candidates to be elected because Kinston voters based their choice more on the race of a candidate rather than partisan affiliation.⁷⁶⁴ The analysis showed that without the party appeal or the ability to vote straight ticket, the limited support from white crossover voters for a Black candidate would diminish in a manner that prevented Black candidates from being elected.⁷⁶⁵ The City of Kinston did not join the lawsuit, nor did it seek judicial preclearance of the Section 5 objection.

The ACLU and Southern Coalition for Social Justice intervened on behalf of the North Carolina State Conference of the NAACP and residents of Kinston arguing that Section 5 was a constitutional exercise of congressional authority, the plaintiffs lacked standing, and the district court did not have jurisdiction over the plaintiffs' claims.⁷⁶⁶ In December 2010, the district court issued an opinion granting motions to dismiss filed by the Justice Department and the defendant-intervenors.⁷⁶⁷ The court concluded the plaintiffs lacked

⁷⁵⁹ *Diaz-Balart v. Browning*, No. 10-23968-CIV, 2011 WL 13175016 (S.D. Fla. Sept. 9, 2011).

⁷⁶⁰ *Brown*, 668 F.3d 1271.

⁷⁶¹ *Id.* at 1277.

⁷⁶² Complaint, *Laroque v. Holder*, No. 1:10-cv-0561 (D.D.C. April 7, 2010).

⁷⁶³ See Letter from Acting Assistant Attorney General Loretta King, Civil Rights Division, Department of Justice to James P. Cauley III, Esq. (Aug. 17, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_090817.pdf.

⁷⁶⁴ *Id.*

⁷⁶⁵ *Id.*

⁷⁶⁶ Motion to Intervene as Defendants, *Laroque v. Holder*, No. 1:10-cv-0561 (D.D.C. July 7, 2010).

⁷⁶⁷ Order on Motion to Dismiss, *Laroque v. Holder*, No. 1:10-cv-0561 (D.D.C. Dec. 20, 2010).

standing, and there was no cause of action for private persons to challenge the constitutionality of Section 5 as applied to the Attorney General's objection to a proposed electoral change.⁷⁶⁸ The plaintiffs appealed to the D.C. Circuit Court of Appeals, and the court of appeals reversed and remanded in July 2011.⁷⁶⁹ It held that the plaintiff, a candidate for public office in Kinston, had standing and a cause of action to seek declaratory and injunctive relief against the Attorney General on the ground that Section 5 was unconstitutional. On remand, the district court reached the merits of the plaintiffs' claims in December 2011,⁷⁷⁰ rejecting that Section 5 exceeds Congress's enforcement powers and holding that Section 5 was "justified by the evidence of persistent, intentional discrimination that Congress amassed."⁷⁷¹ It also rejected their claim that Section 5 violates equal protection principles.

The plaintiffs again appealed to the D.C. Circuit Court of Appeals. While the appeal was pending, the Justice Department reversed its position regarding Kinston's proposed voting change in light of new evidence it received in a separate preclearance proceeding.⁷⁷² After reviewing that additional evidence, the Attorney General withdrew his objection to the proposed change. Accordingly, in May 2012 the D.C. Circuit determined that the plaintiffs' claims were moot and dismissed the case for lack of jurisdiction.⁷⁷³ The plaintiffs filed a petition for certiorari, which was denied on November 13, 2012.⁷⁷⁴

61. Shelby County v. Holder – Alabama 2010

Prior to the Supreme Court's 2013 decision in *Shelby County v. Holder* nullifying the preclearance coverage formula, the Supreme Court most recently weighed in on Section 5's constitutionality in 2009 in *Northwest Austin Municipal Utility District No. 1 v. Holder*. In that case, Chief Justice John Roberts expressed skepticism regarding the continuing constitutionality of portions of the Voting Rights Act, opining in dicta that the law "imposes current burdens and must be justified by current needs" and that "[t]he Act also differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty."⁷⁷⁵ Animated by the decision, Shelby County, Alabama, filed suit the following year in district court in a facial challenge seeking a declaratory judgment that both Section 5 preclearance and the Section 4(b) coverage formula were unconstitutional

⁷⁶⁸ *Id.*

⁷⁶⁹ *Laroque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011).

⁷⁷⁰ *Laroque v. Holder*, 831 F.Supp.2d 183 (D.C. Cir. 2011).

⁷⁷¹ *Id.* at 228.

⁷⁷² See Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Div., to Robert T. Sonnenberg, Esq. (Apr. 30, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120430.pdf.

⁷⁷³ *Laroque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012).

⁷⁷⁴ *Laroque v. Holder*, 679 F.3d 905 (D.C. Cir. 2012), cert. denied sub nom. *Nix v. Holder*, 133 S. Ct. 610 (2012).

⁷⁷⁵ *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, 203 (2009).

and a permanent injunction against their enforcement.⁷⁷⁶ The D.C. district court upheld the constitutionality of Section 5 and the coverage formula, granting summary judgment for the Attorney General.⁷⁷⁷ The U.S. Court of Appeals for the District of Columbia affirmed, holding that Congress did not exceed its powers by reauthorizing Section 5 and that the coverage formula was still relevant to the issue of voting discrimination.⁷⁷⁸ On June 25, 2013, the Supreme Court held that the coverage formula was unconstitutional. In a 5-4 decision, the Supreme Court found that while “voting discrimination still exists,” Section 4(b) of the Voting Rights Act was unconstitutional on the basis that the coverage formula had not been updated recently and no longer reflected current conditions of discrimination.⁷⁷⁹ Therefore, the formula could no longer be used as a basis for subjecting jurisdictions to preclearance.

62. Frank v. Walker – Wisconsin 2011

In December 2011, the ACLU, ACLU of Wisconsin, and National Law Center for Homelessness and Poverty brought suit on behalf of individual plaintiffs challenging Wisconsin’s strict photo ID law in federal court, seeking declaratory and injunctive relief.⁷⁸⁰ The Wisconsin law requires voters to present identification that is one of a limited list of acceptable photo identification in order to vote. Similar to the impact of photo ID laws in other states, Black and Latino voters in Wisconsin disproportionately lack the required photo ID and the documents necessary to obtain a free state ID card to vote, and as a result are more likely to be disproportionately disenfranchised.⁷⁸¹ Prior to enactment of the photo ID law, voters were generally required to provide proof of residency with a range of acceptable documents, such as utility bills, bank statements, or pay stubs, and not required to provide proof of identity to vote.⁷⁸² Over two dozen individual plaintiffs brought class claims under the Fourteenth and Twenty-Fourth Amendments and Section 2 of the Voting Rights Act.

After a two-week trial—in which the parties presented 43 fact witnesses, six expert witnesses, and thousands of pages of documentary evidence—in April 2014, the trial court struck down the photo ID law and permanently enjoined its enforcement, concluding that the law violated Section 2 of the Voting Rights Act.⁷⁸³ The court also held that the law violated the Fourteenth Amendment by imposing a substantial burden on the right to vote that was not outweighed by the state’s asserted justification.⁷⁸⁴ In making these determinations, the court found that there was no evidence of voter impersonation fraud

⁷⁷⁶ Complaint, *Shelby Cty. v. Holder*, No. 1:10-cv-00651 (D.D.C. Apr. 27, 2010).

⁷⁷⁷ *Shelby Cty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011).

⁷⁷⁸ *Shelby Cty. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012).

⁷⁷⁹ *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

⁷⁸⁰ First Amended Complaint, *Frank v. Walker*, No. 2:11-cv-01128 (E.D. Wis. Dec. 13, 2011).

⁷⁸¹ *Id.* at ¶¶ 95-96.

⁷⁸² *Id.* at ¶ 38.

⁷⁸³ *Frank v. Walker*, 17 F.Supp.3d 837, 879 (E.D. Wis. 2014).

⁷⁸⁴ *Id.* at 863-64.

and the state had failed to put forward evidence to suggest that its photo ID law effectively prevented other types of fraud. The court also found the photo ID law did not enhance public confidence in voting.⁷⁸⁵ With respect to the burden on voters and its discriminatory impact, the court concluded that “approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, lack a qualifying ID,” and noted that, “to put this number in context, in 2010 the race for governor in Wisconsin was decided by 124,638 votes, and the race for United States Senator was decided by 105,041 votes. Thus the number of registered voters who lack a qualifying ID is large enough to change the outcome of Wisconsin elections.”⁷⁸⁶ The court also found that while many registered voters would be able to obtain qualifying IDs, many others could not.⁷⁸⁷ Finally, the court found it “inescapable” that the photo ID law would disproportionately burden and disenfranchise Black and Latino voters in the state and that the photo ID law’s “disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance, [and that it] therefore produces a discriminatory result.”⁷⁸⁸

Wisconsin appealed the decision to the Seventh Circuit, which in a panel decision reversed the district court’s holdings that the law violated Section 2 of the Voting Rights Act and imposes a substantial burden on the right to vote. With respect to the constitutional claim, the court relied on the Supreme Court’s 2008 decision in *Crawford v. Marion County Election Board*, which upheld Indiana’s photo ID law against a facial challenge, reasoning that the facts of the Wisconsin photo ID case did not justify a different outcome than *Crawford*.⁷⁸⁹ With respect to the Section 2 claim, the Seventh Circuit reversed the district court’s holding. The panel concluded, after recognizing the lower court’s finding of a disparate impact on Black and Latino voters, that the district court failed to find that “substantial numbers of persons eligible to vote have tried to get a photo ID but [had] been unable to do so” or that minority voters have less opportunity to obtain a qualifying photo ID.⁷⁹⁰ Judge Richard Posner called a vote for rehearing en banc *sua sponte*, but an equally divided court denied the request. The dissenting judges found this case to be “importantly dissimilar” from *Crawford*—a case which Judge Posner himself authored on behalf of the Seventh Circuit in 2008—and that the evidentiary record before the court was vastly different than in *Crawford*.⁷⁹¹

The ACLU requested review of the Seventh Circuit’s decision by the U.S. Supreme Court, arguing that the Seventh Circuit misinterpreted and misapplied the *Crawford* decision. The ACLU argued that the case was distinguishable from *Crawford* due to the vast evidentiary record demonstrating that Wisconsin voters faced substantial or even insurmountable

⁷⁸⁵ *Id.* at 847-53.

⁷⁸⁶ *Id.* at 854.

⁷⁸⁷ *Id.* at 862.

⁷⁸⁸ *Id.* at 876-78.

⁷⁸⁹ *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

⁷⁹⁰ *Frank v. Walker*, 768 F.3d 744, 745-47 (7th Cir. 2014).

⁷⁹¹ *Frank v. Walker*, 773 F.3d 783 (7th Cir. 2014) (Posner, J., dissenting).

burdens to obtain a qualifying ID. The request also differentiated the two cases in that Wisconsin's professed interest to prevent voter impersonation fraud was illusory and pretextual in light of the fact that Wisconsin was unable to show a single case of voter impersonation fraud in the state.⁷⁹² The petition also argued that the Seventh Circuit's panel decision gravely misinterpreted Section 2 and wrongly rejected the factual findings of racially discriminatory denial and abridgement of the right to vote resulting from Wisconsin's photo ID law.⁷⁹³ The Supreme Court declined to reconsider the Seventh Circuit's ruling upholding the law, and the law became effective in 2015.⁷⁹⁴

The plaintiffs then undertook a second stage of litigation, advancing remaining constitutional claims that the district court did not resolve in its initial decision, namely, that the Wisconsin law was unconstitutional as applied to those voters who were unable to acquire a qualifying ID. After initially rejecting the plaintiffs' claim⁷⁹⁵ and being reversed on appeal,⁷⁹⁶ the district court granted a preliminary injunction in July 2016, instructing that voters who lack photo ID must be able to cast a regular ballot in the November 2016 elections after completing an affidavit. The district court's decision was based on its finding that the plaintiffs had shown some likelihood of success on the merits of their Fourteenth Amendment claim that the photo ID law substantially burdened the right to vote among eligible voters who, even after putting forth a reasonable effort, would be unable to obtain a qualifying ID, and that Wisconsin lacked a viable interest in enforcement of the law with respect to these voters.⁷⁹⁷

Wisconsin filed an emergency appeal of this decision with the Seventh Circuit, and on August 10, 2016, the Seventh Circuit stayed the district court's order.⁷⁹⁸ On August 26, 2016, the full Seventh Circuit declined to reconsider this decision, holding that the urgency needed to justify an en banc review of the panel decision was not shown because of the state's representation that voters would automatically be able to receive a credential for voting if they requested one in person at a driver's license facility.⁷⁹⁹ Because of the Seventh Circuit's order, Wisconsin's photo ID law was in effect without the affidavit alternative for those without ID during the 2016 elections. After the Seventh Circuit issued the emergency stay on the district court's order, the case proceeded to the Seventh Circuit on appeal. Oral argument was held in February 2017.

⁷⁹² Petition for Writ of Certiorari, *Frank v. Walker*, No. 14-803 (Jan. 7, 2015).

⁷⁹³ *Id.* at 28-30.

⁷⁹⁴ Note that the Supreme Court had previously vacated the Seventh Circuit's stay of the district court's permanent injunction. *Frank v. Walker*, 135 S. Ct. 7 (2014).

⁷⁹⁵ *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2016).

⁷⁹⁶ *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016).

⁷⁹⁷ *Frank v. Walker*, 196 F. Supp. 3d 893, 904, 914-15 (E.D. Wis. 2016).

⁷⁹⁸ *Frank v. Walker*, Nos. 16-3003, 16-3052, 2016 WL 4224616 (7th Cir. Aug. 10, 2016).

⁷⁹⁹ *Frank v. Walker*, 835 F.3d 649 (7th Cir. 2016) (per curiam).

In June 2020, the Seventh Circuit reversed the injunction requiring Wisconsin to create an affidavit option.⁸⁰⁰ On remand, plaintiffs moved for preliminary injunction while the defendants moved for summary judgment. In September 2020, the district court denied the defendant's motion for summary judgment, while granting some preliminary relief requested by the plaintiffs.⁸⁰¹ The court ordered the state to send expedited temporary IDs beginning two weeks before the election and that the state must engage in more public education regarding the temporary receipt process.⁸⁰²

The case proceeded in discovery and was set for trial in early 2022, but the Court put trial on hold so the parties could engage in mediation with a federal magistrate judge. Given the substantial progress made in the implementation of the ID petition process, Plaintiffs dismissed the case without prejudice in January 2023.⁸⁰³

63. Citizens In Charge v. Gale – Nebraska 2011

On behalf of Citizens in Charge and other individual plaintiffs, the ACLU and ACLU of Nebraska challenged⁸⁰⁴ three provisions of Nebraska law as violating political speech and associational rights protected by the First and Fourteenth Amendments.⁸⁰⁵ The first law set out a signature distribution requirement for would be independent candidates, requiring them to obtain at least 50 signatures from at least one-third of Nebraska's counties on a candidacy petition before they may appear on the ballot. The second requires petition circulators to be "electors"⁸⁰⁶ of the State of Nebraska, a requirement that has been invalidated by federal courts in other circuits. The third requires all petitions to contain language in large, red type stating whether the circulator is paid or is a volunteer. Intervenor filed a subsequent complaint challenging the requirement that petition circulators be "electors" and that all petitions contain language in large, red type stating whether the circulator is paid or a volunteer.⁸⁰⁷ Intervenor then filed a motion for preliminary injunction requesting that the court find the petitioner residency requirement violates the First Amendment. The district court denied the injunction, agreeing with the defendants that the Eighth Circuit's decision in *Initiative & Referendum Institute v.*

⁸⁰⁰ *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

⁸⁰¹ *One Wisconsin Inst., Inc. v. Thomsen*, 490 F. Supp. 3d 1338 (W.D. Wis. 2020).

⁸⁰² *Id.*

⁸⁰³ Stipulation & Order Regarding Dismissal, *Weddle v. Evers*, No. 3:15-cv-00324-jdp, ECF No. 493 (W.D. Wisc. Jan. 13, 2023).

⁸⁰⁴ *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916, 918-923 (D. Neb. 2011).

⁸⁰⁵ Complaint, *Citizens In Charge v. Gale*, No. 4:09CV3255 (D. Neb. Dec. 16, 2009).

⁸⁰⁶ According to NEB. REV. STAT. § 32-110, "Elector" shall mean a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age and will attain the age of eighteen years on or before the first Tuesday after the first Monday in November of the then current calendar year.

⁸⁰⁷ See Motion to Intervene as Plaintiffs, *Citizens In Charge v. Gale*, No. 4:09-cv-03255 (D. Neb. May 27, 2010).

*Jaeger*⁸⁰⁸ was the controlling precedent despite other circuit courts disagreeing with the *Jaeger* analysis upholding similar residency requirements.⁸⁰⁹

On August 30, 2011, the district court issued its ruling that found the ban of election petition circulation by non-residents violated the First Amendment but upheld the requirement that petitions contain language in large, red type stating whether the circulator is paid or a volunteer.⁸¹⁰ The court agreed with plaintiffs that the circulation of petitions is core political speech and there are increased costs associated with using untrained solicitors.⁸¹¹ Noting the majority of circuit courts that previously reviewed similar restrictions also applied strict scrutiny and made similar determinations, the district court found that the ban on nonresident petition circulators⁸¹² In contrast to the *Jaeger* case, the court had not found evidence in the record of the alleged burden associated with the ban, while the plaintiffs and intervenors in *Citizens in Charge* offered evidence of the increased cost, the limited available pool of circulators and firms in Nebraska if only in-state-petitioners could be utilized, and the lack of fraud⁸¹³

In contrast, the district court found that requiring the disclosure in large red type did not impose a severe burden on First Amendment rights.⁸¹⁴ The court found that the disclosure was neither a pejorative label nor compelled speech but simply a way to inform the electorate of the status of the petitioner as paid or volunteer. The court also found no violation of the Equal Protection Clause as the plaintiff offered no evidence that they were a protected class.

64. Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections – New Jersey 2011

The ACLU of New Jersey, Rutgers School of Law-Newark Constitutional Litigation Clinic, and New Jersey Appleseed Public Interest Law Center filed a lawsuit on April 19, 2011, against the Middlesex County Board of Elections on behalf of Rutgers students, Middlesex County residents, the Latino Leadership Alliance of New Jersey, and New Jersey Citizen Action challenging the failure of New Jersey to offer Election Day registration of voters as an unnecessary obstacle to exercise of the right to vote in violation of the state constitution.⁸¹⁵ New Jersey law requires 30 days of residence to qualify as an eligible voter. In order to verify voters' identities, the state also required voters to submit their registration applications at least 21 days before an election. However, new electronic

⁸⁰⁸ *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001).

⁸⁰⁹ *Citizens in Charge v. Gale*, No. 4:09-cv-03255, 2010 WL 2682772 (D. Neb. July 1, 2010).

⁸¹⁰ *Citizens in Charge v. Gale*, 810 F. Supp 2d 916 (D. Neb. 2011).

⁸¹¹ *Id.* at 923.

⁸¹² *Id.* at 925.

⁸¹³ *Id.* at 926.

⁸¹⁴ *Id.* at 928

⁸¹⁵ Complaint for Declaratory and Injunctive Relief, *Rutgers Univ. Student Assembly. v. Middlesex Cty. Bd. Of Elections*, 102 A.3d 408 (N.J. Sup. Ct. Ch. Div. Apr. 19, 2011).

databases that New Jersey implemented in accordance with the Help America Vote Act allowed rapid verification of eligibility, obviating the rationale for the three-week cutoff.⁸¹⁶

The plaintiffs asserted that the defendant's failure to allow them to register on Election Day and have their votes counted "imposes severe burdens on the fundamental right to vote as guaranteed by the New Jersey Constitution art. 2, Sec. 1, Para. 3, and as implemented by N.J.S.A. 10:6-2(c) of the New Jersey Civil Rights Act."⁸¹⁷ The plaintiffs' motion for summary judgement was denied and the defendant's cross motion for summary judgment was granted by the trial court on December 11, 2013, in an order with limited findings of facts and conclusions of law. The court determined that the advance registration requirement imposed only a minimal burden on the right to vote, and, as a result, there was no need for the state to establish a compelling interest.

The lower court's order was reversed and remanded for further proceedings due to the failure to make sufficient findings of fact and conclusions of law particularly with regard to whether the state had demonstrated that the registration requirement advanced the stated purpose.⁸¹⁸ The appellate court noted that the defendants were asserting a legitimate interest in preventing voter registration fraud as a basis for requiring advance registration, but, per the decision, "...plaintiffs submitted reams of evidence, including certifications, reports and deposition transcripts, in support of their contention that New Jersey's SVRS has eliminated voter fraud as valid concern, and explaining why it was no longer necessary to have an advance registration requirement to ensure the integrity of the electoral process."⁸¹⁹

On remand for additional findings, the lower court concluded that the registration requirement did not warrant strict scrutiny review, and the state's important interests outweighed the minimal burden on voting rights and again granted the defendant's motion for summary judgement on April 14, 2015. The decision was affirmed on appeal.⁸²⁰ The Supreme Court of New Jersey denied the plaintiff's petition for certification and ordered that the notice of appeal be dismissed on January 17, 2017.⁸²¹

65. Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n –Arizona 2012

In 2000, Arizona voters adopted an initiative, Proposition 106, which amended Arizona's Constitution to remove redistricting authority from the Arizona Legislature and vest it in

⁸¹⁶ *Id.* at ¶¶ 72-75.

⁸¹⁷ *Id.* at ¶ 72.

⁸¹⁸ *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 102 A.3d 408 (Supr. Ct N.J. App. Div. 2014).

⁸¹⁹ *Id.* at 415.

⁸²⁰ *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 141 A.3d 335 (Supr. Ct N.J. App. Div. 2016).

⁸²¹ *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 158 A.3d 567 (N.J. 2017).

an independent commission, the Arizona Independent Redistricting Commission (AIRC). The Arizona Legislature challenged the map for congressional districts adopted by the AIRC in January 2012, seeking a declaration that Proposition 106 violated the Elections Clause of the U.S. Constitution and the adopted congressional maps were unconstitutional and void and an injunction prohibiting the AIRC from adopting or enforcing any maps.⁸²² The legislature argued that the Elections Clause—which provides, in part, that “the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof”⁸²³—required that only state legislative bodies conduct congressional redistricting and precluded delegating the task to an independent commission.⁸²⁴ AIRC responded that “Legislature” should not be read solely to mean elected representatives but rather all legislative authority conferred by the state’s constitution, including ballot measures adopted by the people themselves. A three-judge district court rejected the legislature’s complaint on the merits,⁸²⁵ and the Arizona Legislature appealed the decision to the Supreme Court.

The ACLU submitted an amicus brief with other organizations in support of the AIRC, urging the Court to uphold the district court finding that the Elections Clause does not preclude redistricting by an independent commission created by the people of Arizona.⁸²⁶ The brief argued that partisan gerrymandering subverts the federal electoral system envisioned by the Constitution by undermining the concept of majority rule, reducing the competitiveness of elections, and contributing to the political polarization that risks gridlock.⁸²⁷ The brief also argued that citizen-driven structural reforms are a constitutionally permissible form of direct democracy, especially in light of courts’ inability to date to address extreme partisan gerrymandering.⁸²⁸

The Supreme Court affirmed the district court’s judgement, holding in a 5-4 decision that the Elections Clause permits Arizona to use a commission to adopt congressional districts and that “lawmaking power in Arizona includes the initiative process.”⁸²⁹ The Court noted that dictionaries printed at the time of the drafting of the Constitution defined the word “legislature” as “the power that makes laws,” and in Arizona, the power to make laws rests not only with the official body of elected representatives but with the voters themselves, who have power under the Arizona State Constitution to pass laws and constitutional amendments through initiatives.⁸³⁰ The Court noted that such an interpretation of the

⁸²² See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047, 1049 (D. Ariz. 2014).

⁸²³ U.S. Const., Art. I, § 4, cl. 1.

⁸²⁴ See *Ariz. State Legislature*, 997 F. Supp at 1051.

⁸²⁵ *Ibid.*

⁸²⁶ Brief of Campaign Legal Center et al. as *Amici Curiae* Supporting Appellees, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13–1314 (2015).

⁸²⁷ *Id.* at 5.

⁸²⁸ *Ibid.*

⁸²⁹ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2659 (2015).

⁸³⁰ *Id.* at 2671.

Elections Clause is “in line with the fundamental premise that all political power flows from the people.”⁸³¹

66. ACLU of Iowa v. Schultz – Iowa 2012

In July 2012, the Iowa Secretary of State adopted and immediately made effective through emergency rulemaking two administrative rules impacting voters’ ability to stay on the voter registration rolls. The first rule created a procedure where any person, including individuals unconnected with the state, would be allowed to file an unsworn, unverified complaint challenging a voter’s eligibility to vote.⁸³² The second rule allowed the Secretary to initiate challenge and removal proceedings against registered Iowa voters on the grounds of alleged non-U.S. citizenship based on the Secretary’s comparison information from the state’s voter registration rolls with unspecified state and federal “lists of foreign nationals” and using unspecified criteria.⁸³³ The scheme was similar to voter purges in other states like Florida and Colorado, where thousands of eligible voters had been wrongfully disenfranchised.⁸³⁴

The ACLU and League of United Latin American Citizens (LULAC) filed a motion in state court to enjoin the emergency rules on the grounds that the use of emergency rulemaking power was improper under the Iowa Code and that the Secretary exceeded his statutory authority. The plaintiffs argued the rules were vague and posed a substantial risk of depriving qualified voters of their fundamental right to vote.⁸³⁵ Because the administrative rules were adopted in close proximity to the November 2012 Presidential election, the ACLU sought expedited review by the court. The state filed a motion to dismiss for lack of standing. The trial court denied the defendants’ motion to dismiss,⁸³⁶ and granted the ACLU’s motion for temporary injunctive relief.⁸³⁷ Despite the temporary injunction against the emergency rules, the Secretary proceeded with developing permanent rules through Iowa’s standard rulemaking process, which took effect in March 2013.⁸³⁸

⁸³¹ *Id.* at 2677.

⁸³² First Amended Complaint for Judicial Review of Agency Action under Iowa Code §17A at ¶ 13, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Aug. 8, 2012).

⁸³³ *Id.* at ¶ 14.

⁸³⁴ Press Release, ACLU, Victory for Voting Rights: State Drops Voter Purge Appeal (Mar. 13, 2005), <https://www.aclu.org/press-releases/victory-voting-rights-state-drops-voter-purge-appeal>.

⁸³⁵ First Amended Complaint for Judicial Review of Agency Action under Iowa Code §17A at ¶¶ 21-23, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Aug. 8, 2012).

⁸³⁶ Ruling and Order on Respondent’s Motion to Dismiss, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Sep. 11, 2012).

⁸³⁷ Order on Petitioners’ Motion for Temporary Injunction, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Sep. 13, 2012).

⁸³⁸ Second Amended Petition for Judicial Review of Agency Action under Iowa Code §17A at ¶ 28, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Mar. 29, 2013).

The ACLU and LULAC then sought to permanently enjoin both the emergency and permanent rules.⁸³⁹ The district court in Polk County granted the ACLU's motion, ruling that the Secretary exceeded his statutory authority under the Iowa Code but did not address the ACLU's constitutional claim that the rules violated qualified Iowa voters of the fundamental right to vote.⁸⁴⁰ The Secretary appealed to the Iowa Supreme Court⁸⁴¹ but ultimately dropped the appeal prior to a ruling in March 2015, effectively keeping in place the lower court's permanent injunction against the rules.⁸⁴²

67. Guare v. New Hampshire – New Hampshire 2012

In 2012, individual plaintiffs represented by the ACLU of New Hampshire filed suit in state court challenging a newly enacted law that added an affidavit requirement to the state's voter registration form for registrants to sign, attesting that they are subject to the state's residency laws. By agreeing to become permanent residents of the state, voter registrants would have to meet the state's residency requirements, and thereby would be required to obtain a New Hampshire driver's license and to register their vehicles in New Hampshire—both at significant cost—in order to vote.⁸⁴³ The new voter registration requirement was not only unnecessary and onerous, it directly conflicted with New Hampshire law governing eligibility to vote. Specifically, New Hampshire law permits all inhabitants with a voting *domicile* to vote; a voting domicile under state law is defined as “that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence.”⁸⁴⁴ By contrast, state law defines a resident as someone who is domiciled and, additionally, demonstrates intent to designate their place of abode as their principal place of physical presence for the indefinite future to the exclusion of all others.⁸⁴⁵ The new law targeted students and other mobile domiciliaries who were qualified to vote in the state, but did not wish to accept the legal financial obligations associated with becoming permanent residents of the state.⁸⁴⁶ Notably, state law explicitly permitted students attending school in New Hampshire to choose New Hampshire as their voting domicile.⁸⁴⁷ The amended voter registration form thus contained language that directly conflicted with applicable state law and conveyed inaccurate information.

⁸³⁹ *Id.*

⁸⁴⁰ Order re Reconsideration of Review on the Merits, ACLU of Iowa v. Schultz, No. CV 9311 (Dist. Ct. Polk Cty. Mar. 5, 2014).

⁸⁴¹ Motion to Dismiss and Motion for Reconsideration, ACLU of Iowa v. Schultz, No. 14-0585 (Iowa Oct. 20, 2014).

⁸⁴² Appellant's Voluntary Dismissal of Appeal, ACLU of Iowa v. Schultz, No. 14-0585 (Iowa Mar. 13, 2015).

⁸⁴³ Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶ 9, Guare v. New Hampshire, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

⁸⁴⁴ N.H. REV. STAT. § 654:1.

⁸⁴⁵ N.H. REV. STAT. § 21:6.

⁸⁴⁶ Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶ 1, Guare v. New Hampshire, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

⁸⁴⁷ N.H. REV. STAT. § 654:1.

The ACLU of New Hampshire challenged the new voter registration requirement on the ground that it violated various provisions of New Hampshire's state law and constitution and the Fourteenth and Twenty-Fourth Amendments of the U.S. Constitution.⁸⁴⁸ In September 2012, the Strafford County Superior Court preliminarily enjoined the new voter registration language from being included in the registration form, holding that the language "does not pass constitutional muster, and hinders educational efforts related to the election pertaining to qualifications for registering to vote."⁸⁴⁹ The court added that the language advanced a "confusing expression of the law to be considered by ... those prospective voters in the position of the four student petitioners, that is, non-resident persons who otherwise qualify to vote and would not like to register and/or proceed to exercise their voting rights without feeling they are subjecting themselves ... to residency law obligations."⁸⁵⁰

In March 2014, the ACLU of New Hampshire filed a motion for summary judgment asking the Superior Court to issue a final, permanent declaratory judgment that the law violated the New Hampshire Constitution.⁸⁵¹ In July 2014, the Strafford County Superior Court issued a decision striking down the law, finding that it did indeed violate the New Hampshire Constitution.⁸⁵² In its decision, the court called the added language "a confusing and unreasonable description of the law" that imposed a chilling effect on the right to vote of those domiciled in New Hampshire. The state appealed this decision to the New Hampshire Supreme Court, which affirmed the trial court ruling in May 2015.⁸⁵³ The Court concluded: "Because the challenged language is confusing and inaccurate, and because, as the trial court found, it could cause an otherwise qualified voter not to register to vote in New Hampshire, we hold that, as a matter of law, the burden it imposes upon the fundamental right to vote is unreasonable."⁸⁵⁴

68. Montes v. City of Yakima – Washington 2012

In 2012, the ACLU and ACLU of Washington filed suit against the City of Yakima on behalf of Latino voters, arguing that the city's at-large voting system deprived Latino voters of the right to elect a representative of their choice to the city council.⁸⁵⁵ The Yakima City Council was comprised of seven members, who were all elected using an at-large process for both residency district and citywide council member seats. No Latino had ever been elected

⁸⁴⁸ Second Amended Petition for Preliminary Injunction, Declaratory Judgement, and Final Injunctive Relief at ¶¶ 97-135, *Guare v. New Hampshire*, No. 2014-558 (N.H. Sup. Ct. May 15, 2015).

⁸⁴⁹ *Rivers v. New Hampshire*, No. 219-2012-CV-00458, slip op. at 7 (N.H. Sup. Ct. Sep. 24, 2012).

⁸⁵⁰ *Id.* at 5.

⁸⁵¹ Motion for Summary Judgment, *Guare v. New Hampshire*, No. 219-2012-CV-00458 (N.H. Sup. Ct. Mar. 14, 2014).

⁸⁵² *Guare v. New Hampshire*, No. 219-2012-CV-00458 (N.H. Sup. Ct. Jul. 24, 2014).

⁸⁵³ *Guare v. New Hampshire*, No. 14-0585 (N.H. Sup. Ct. May 15, 2015).

⁸⁵⁴ *Id.* at 7.

⁸⁵⁵ Complaint, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. Aug. 22, 2012).

to the city council since the at-large system had been put in place 37 years prior, even though Latino voters accounted for 33.4% of the city's voting-age population.⁸⁵⁶ The complaint argued that racially polarized bloc voting prevented Latino-preferred candidates from being elected and cited a history of private and official discrimination against the city's Latino population in employment, education, health services, housing, and in voting and political participation.⁸⁵⁷

After the close of discovery, both parties filed cross-motions for summary judgment.⁸⁵⁸ The Department of Justice filed a Statement of Interest in the case, opposing the city's summary judgment motion.⁸⁵⁹ The district court determined that the plaintiffs met the *Gingles* preconditions for Section 2 claims and granted their summary judgment motion. The court found that (1) the Latino population was sufficiently large and geographically compact to allow it to form a majority of voters in a single-member district; (2) the Latino population constituted a politically cohesive minority group and voted as a bloc; (3) the non-Latino majority voted sufficiently as a bloc to enable it to usually defeat the Latino minority's preferred candidate; and (4) the totality of circumstances demonstrated that Yakima City Council elections were not equally open to participation by Latino voters.⁸⁶⁰ The court found that there was no genuine issue of material fact that the city's voting system was not equally open to participation by members of the Latino community, in violation of Section 2 of the Voting Rights Act, as well as no issue of fact that the plaintiffs' proposed districting plans were acceptable under existing law.⁸⁶¹ In its Section 2 analysis, the court also discussed a history of voting-related discrimination in Yakima County, including several prior violations of the Voting Rights Act such as literacy tests and failure to provide Spanish-language voting materials as recently as ten years prior.⁸⁶² Considering all of the circumstances, the court determined that the non-Latino majority "routinely suffocate[d] the voting preferences of the Latino majority"⁸⁶³ in violation of Section 2 and required the parties to meet and confer on a proposed injunction and proposed remedial districting plan.⁸⁶⁴

The parties were unable to agree on a joint remedial districting plan, so each side submitted its own plan. A third plan was also submitted by FairVote, a voting-related

⁸⁵⁶ *Id.* at ¶¶ 8, 10, 14, 17-27.

⁸⁵⁷ *Id.* at ¶¶ 10, 14, 19.

⁸⁵⁸ Plaintiffs' Motion for Summary Judgment, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. July 1, 2014); Defendants' Motion for Summary Judgment, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. July 1, 2014).

⁸⁵⁹ Statement of Interest of the United States of America, *Montes v. City of Yakima*, No. 12-CV-3108 (E.D. Wa. Aug. 18, 2014).

⁸⁶⁰ *See Montes v. City of Yakima*, 40 F.Supp.3d 1377, 1390-1400 (E.D. Wa. 2014).

⁸⁶¹ *Id.* at 1386.

⁸⁶² *Id.* at 1409-1410.

⁸⁶³ *Id.* at 1407.

⁸⁶⁴ *Id.* at 1415.

nonprofit.⁸⁶⁵ The defendants' plan and FairVote's plan were each hybrid plans with some single-member districts and some at-large seats, while the plaintiffs' plan included seven single-member districts.⁸⁶⁶ The district court rejected the hybrid plans, finding that they would not remedy the Section 2 violations and were potentially unlawful under state law.⁸⁶⁷ Instead, the court adopted the plaintiffs' proposed plan and issued a final injunction requiring its implementation.⁸⁶⁸ The court also ordered the defendants to pay the plaintiffs' costs and attorney's fees.⁸⁶⁹

Both the defendants and FairVote appealed, arguing that the single-member districts violated the Equal Protection Clause.⁸⁷⁰ However, the appeal was stayed pending the Supreme Court's decision in *Evenwel v. Abbott*, which eventually held that the Equal Protection Clause does not forbid the use of total population, as opposed to voting-age population or registered-voter population, as the basis for equalizing the size of voting districts. After the *Evenwel* decision, the parties agreed to a joint dismissal of the appeal, leaving the lower court's judgment as final.⁸⁷¹

69. Veasey v. Abbott; Veasey v. Perry – Texas 2013

ACLU and ACLU of Texas as amicus in support of plaintiff-appellants

Senate Bill 14 (SB 14) was introduced in the Texas legislature in May 2011 and submitted to the Justice Department for preclearance review in July 2011. Considered the strictest photo ID law in the nation, it required Texas voters to present one of seven limited forms of photo ID to cast a ballot. Prior to the law's introduction, Texas voters were permitted to present a variety of documents for proof of identification to vote. SB 14 narrowed the kinds of identification documents Texas voters could use to vote, despite no evidence of in-person voter fraud in Texas.⁸⁷² During the legislature's consideration of SB 14, there was significant evidence presented regarding the discriminatory impact of the photo ID law on the state's Black and Hispanic voters, particularly those who lived in poverty. At the time SB 14 was being considered, Texas had the highest rate of poverty in the nation with more

⁸⁶⁵ *Montes v. City of Yakima*, No. 12-CV-3108, 2015 WL 11120964, at *3-4 (E.D. Wa. Feb. 17, 2015).

⁸⁶⁶ *Id.* at *2-*5.

⁸⁶⁷ *Id.* at *7, 9.

⁸⁶⁸ *Id.* at *11-*12.

⁸⁶⁹ *Montes v. City of Yakima*, No. 12-CV-3108, 2015 WL 11120966, at *1 (E.D. Wa. June 19, 2015).

⁸⁷⁰ Notice of Appeal, *Montes v. Yakima*, No. 12-CV-3108 (E.D. Wa. July 17, 2015).

⁸⁷¹ Order, *Montes v. City of Yakima*, Nos. 15-35309, 15-35593 (9th Cir. Apr. 12, 2016).

⁸⁷² This narrow class of approved identification included: A Texas driver's license; a personal identification card issued by the Texas Department of Public Safety and featuring the voter's photograph; an election identification certificate (a new form of state photo identification document created by SB 14); a U.S. military identification card featuring the voter's photograph; a U.S. citizenship certificate featuring the voter's photograph; a U.S. passport; or a concealed handgun permit issued by the Texas Department of Public Safety. Notably, the law did not permit federal or state government employee photo ID cards, state-issued student photo ID cards, or tribal photo ID cards.

than four million people living below the poverty line; three-quarters of which were minorities. State legislators and representatives from civil rights organizations who opposed the bill cited the particular burdens faced by these voters as being the least likely to possess photo ID and the most burdened by the bill's strict photo ID requirement.

Several amendments to SB 14 were proposed to mitigate the discriminatory effect of the bill on minority voters; all were rejected during the legislative process. These mitigating amendments included measures such as allowing state university IDs, providing travel reimbursements for impoverished individuals to obtain a photo ID, and requiring the Secretary of State to conduct a racial impact analysis on whether the photo ID law created disproportionate burdens on minority voters.

Proponents of the bill repeatedly identified voter fraud as the justification for a strict photo ID requirement but provided no evidence showing in-person voter fraud was a problem in Texas. In fact, the legislative record of the bill did not contain a single officially documented case of in-person voter fraud in the state.⁸⁷³ The lack of evidence of fraud led opposing legislators and stakeholders to voice concern that the bill was not intended to curb voter fraud but to block disfavored voters from voting.⁸⁷⁴

When Texas initially sought preclearance review from the Justice Department in July 2011, civil rights groups opposed preclearance and submitted comments to the department objecting to the law.⁸⁷⁵ In response to the Attorney General's request for more information, Texas submitted a computer-generated list of nearly 800,000 registered voters it had been unable to match with corresponding entries in its Department of Public Safety (DPS) driver's license and state ID database. This "no-match" list consisted of approximately 300,000 voters, almost 40% of whom were Hispanic.⁸⁷⁶ Experts also estimated that more than 600,000 registered Texas voters—and many more unregistered but eligible voters—did not have an ID approved under the law.⁸⁷⁷ The Attorney General concluded that Texas' own data showed that "Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack" a DPS-issued driver's license or ID card.⁸⁷⁸ Further, none of methods that Texas stipulated would help voters attain SB 14 compliant ID alleviated the impact of SB 14 on Hispanic voters. To obtain the supposedly free ID some voters were required to pay \$22 for a copy of a birth certificate and all had to travel to driver's license

⁸⁷³ Letter from Tex. State Conf. of the NAACP et al. to T. Christian Herren, Chief, Voting Section, Civil Rights Div., Dep't of Justice, (Sep. 14, 2011).

⁸⁷⁴ See *id.* (citing R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS: FINAL REPORT 40-42 (2009), <http://www.pewcenteronthestates.org/uploadedFiles/Final%20report20090218.pdf>).

⁸⁷⁵ *Id.*

⁸⁷⁶ *Texas v. Holder*, 888 F.Supp.2d 117, 140 (D.D.C. 2012).

⁸⁷⁷ This figure represented approximately 4.5% of all registered voters in Texas at the time. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014).

⁸⁷⁸ Letter from Assistant Attorney Gen. Thomas E. Perez, Civil Rights Div., Dep't of Justice to Keith Ingram, Esq. (Mar. 12, 2012), <https://www.justice.gov/crt/voting-determination-letter-34>.

offices, which 81 counties in Texas lacked.⁸⁷⁹ Accordingly, in March 2012 the Department of Justice denied preclearance for SB 14.

Texas then filed for a declaratory judgment in the U.S. District Court for the District of Columbia, seeking to preclear the law and including a claim that Section 5 of the Voting Rights Act was unconstitutional.⁸⁸⁰ The ACLU intervened, representing individuals and organizations opposed to the voter ID requirement. The court ruled against Texas and blocked implementation of the voter ID law, finding not only that Texas failed to demonstrate that SB 14 would not “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise... [but] in fact, record evidence demonstrates that, if implemented, SB 14 will likely have a retrogressive effect.” Since both the Justice Department and D.C. district court found the photo ID law would have a retrogressive effect, both entities withheld judgment on whether SB 14 was enacted with a discriminatory purpose.

After the Supreme Court’s decision in *Shelby County v Holder* immobilized federal preclearance, however, Texas swiftly implemented the voter ID law. Civil rights groups challenged SB 14 claiming violations of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. After extensive discovery and a nine-day bench trial, a district court sided again with the challengers of SB 14 on every claim in *Veasey v. Abbott*.⁸⁸¹ On the question of discriminatory effect on minority voters, the court considered it an “understatement” to “call SB 14’s disproportionate impact on minorities statistically significant.”⁸⁸² The court found that African Americans and Hispanics made up a disproportionate portion of the poor in Texas as compared to whites, which was directly linked to “socioeconomic effects caused by decades of racial discrimination” and that the poor were over eight times less likely to own an ID that satisfied SB 14’s definition of a qualifying ID.⁸⁸³ As a result, the court concluded that “SB 14 specifically burdens” minorities, who were less able than whites to bear the costs associated with obtaining the ID that SB 14 required.⁸⁸⁴

Significantly, the court found that Texas enacted the photo ID law to intentionally discriminate against minority voters.⁸⁸⁵ Both “by its interaction with the vestiges of past and current racial discrimination,” the court found SB 14 was discriminatorily crafted to harm the ability of minority groups to exercise the right to vote.⁸⁸⁶ However, because the district court entered a final order striking down Texas’s voter identification laws just nine

⁸⁷⁹ See *Texas v. Holder*, 888 F.Supp.2d at 140.

⁸⁸⁰ *Id.*

⁸⁸¹ *Veasey*, 71 F. Supp. 3d 627.

⁸⁸² *Id.* at 695 (finding that, among registered voters, African Americans were 305% more likely and Hispanics were 195% more likely to lack eligible ID than were whites).

⁸⁸³ *Id.* at 664.

⁸⁸⁴ *Id.* at 672.

⁸⁸⁵ *Id.* at 695.

⁸⁸⁶ *Id.* at 698.

days before early voting began in the 2014 election, the Fifth Circuit stayed the court's order. Elections were held with SB 14 in place while litigation continued.

Texas then appealed the district court decision to the Fifth Circuit. The ACLU filed an amicus brief in support of the appellees, which principally focused on a Seventh Circuit decision that upheld Wisconsin's photo ID law, a case upon which Texas relied heavily to defend its photo ID law and where the ACLU represented a set of plaintiffs. The ACLU brief argued that the Seventh Circuit decision applied a flawed legal analysis in the Wisconsin case and was wrongly decided, and urged the Fifth Circuit to reject its analysis.⁸⁸⁷ The Fifth Circuit panel affirmed the district court's holding that the law had a discriminatory effect in violation of the Voting Rights Act, vacated the holding that the law constituted a poll tax, and remanded for further findings on the discriminatory purpose claim.⁸⁸⁸ Texas then sought *en banc* review, which was granted. In the *en banc* proceeding, the ACLU filed another amicus brief supporting affirmance, focusing again on the flawed factual and legal analysis of the Seventh Circuit decision.⁸⁸⁹

When the full Fifth Circuit reached the merits of SB 14 two years after the stay was granted, they affirmed the lower court holding that Texas' photo ID law discriminated against African American and Hispanic voters. The Fifth Circuit supported the district court's finding of "a stark, racial disparity between those who possess or have access to [acceptable photo ID], and those who do not."⁸⁹⁰ The court also recognized that SB 14's legislative proponents made little attempt to lessen the discriminatory burden on minority voters, finding "[t]he record shows that drafters and proponents of SB 14 were aware of the likely disproportionate effect of the law on minorities, and that they nonetheless passed the bill without adopting a number of proposed ameliorative measures that might have lessened this impact."⁸⁹¹ Further, the *en banc* panel agreed that the stated reason for the necessity of photo ID could be a lie, stating "[t]here is evidence that could support a finding that the Legislature's race-neutral reason of ballot integrity offered by the State is pretextual."⁸⁹² The Fifth Circuit remanded the case back to the district court to reevaluate its finding of discriminatory purpose. A cert petition to the Supreme Court was denied, effectively letting the Fifth Circuit decision, largely upholding the district court decision.⁸⁹³ On remand and pursuant to the Fifth Circuit's instructions, the district court entered an interim remedy to help cure the discriminatory effect of SB 14. The court's remedy allowed voters without one of the limited forms of SB 14 ID to vote a regular ballot after signing a

⁸⁸⁷ Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellees, *Veasey v. Abbott*, No. 14-41127 (5th Cir. Mar. 10, 2015).

⁸⁸⁸ *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

⁸⁸⁹ Brief of *Amici Curiae* the American Civil Liberties Union and the American Civil Liberties Union of Texas in Support of Appellees, *Veasey v. Abbott*, No. 14-41127 (5th Cir. May 16, 2016).

⁸⁹⁰ *Veasey v. Abbott*, 830 F.3d 216, 264 (5th Cir. 2016) (*en banc*).

⁸⁹¹ *Id.* at 236.

⁸⁹² *Id.* at 237.

⁸⁹³ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 612 (2017).

declaration indicating their obstacle to obtaining the ID.⁸⁹⁴ This was intended as a “stop-gap” measure to lessen the discriminatory effects of the law on the impending Presidential election while the district court proceeded on remand to examine the discriminatory intent claim. After additional briefing and oral argument, the district court reweighed the evidence according to Fifth Circuit guidance and once again found that SB14 had a discriminatory purpose.⁸⁹⁵ During the period that the case was on remand, however, the Texas legislature passed a new law that codified the court’s remedy with respect to the plaintiffs’ discriminatory effect claim. The district court then permanently enjoined the new law pursuant to the plaintiffs’ discriminatory intent claim;⁸⁹⁶ a divided panel of the Fifth Circuit overturned the injunction on appeal as premature and an abuse of the district court’s discretion.⁸⁹⁷ In September 2018, nearly seven years after Texas passed its initial photo ID law, the Texas district court dismissed the case for the reasons cited in the Fifth Circuit’s opinion.⁸⁹⁸ As a result, the Texas photo ID law is partially in place, but only insofar as it was modified to address the Fifth Circuit’s finding that the original version of the law violated Section 2’s prohibition on voting practices with discriminatory results.

70. Benisek v. Lamone – Maryland 2013

ACLU and ACLU of Maryland as amicus in support of plaintiff-appellants

In November 2013, a set of plaintiffs filed a complaint in the U.S. District Court for the District of Maryland challenging the congressional redistricting plan enacted by the Maryland General Assembly following the 2010 Census, alleging the plan constituted violations of Article 1, Section 2 of the U.S. Constitution and the First and Fourteenth Amendments.⁸⁹⁹ At issue were the remedial maps for Maryland’s Fourth, Sixth, Seventh, and Eighth congressional districts, each of which contained non-contiguous and demographically distinct segments that resulted in election outcomes that skewed Democratic.

The case was initially dismissed in 2014 as nonjusticiable and for failure to state a claim by a district court judge without convening a three-judge panel.⁹⁰⁰ The dismissal was affirmed by the Fourth Circuit,⁹⁰¹ and the plaintiffs appealed to the Supreme Court which granted review.⁹⁰² In December 2015, the Supreme Court unanimously rejected the decisions of the

⁸⁹⁴ *See Veasey v. Abbott*, 265 F.Supp. 3d 684, 687 (S.D. Tex. 2017).

⁸⁹⁵ *Veasey v. Abbott*, 249 F.Supp.3d 868, 871 (S.D. Tex. 2017).

⁸⁹⁶ *Veasey*, 265 F.Supp.3d at 700.

⁸⁹⁷ *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

⁸⁹⁸ Final Judgment, *Veasey v. Abbott*, No. 2:13-cv-00193, (S.D. Tex. Sep. 17, 2018).

⁸⁹⁹ *See generally* Complaint, *Benisek v. Lamone*, No. 1:13-cv-03233 (D. Md. Nov. 5, 2013); Amended Complaint, *Benisek v. Lamone*, No. 1:13-cv-03233 (D. Md. Dec. 2, 2013); Second Amended Complaint, *Shapiro v. McManus*, Case No. 13-cv-3233 (D. Md. Mar. 3, 2016).

⁹⁰⁰ *Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D. Md. 2014).

⁹⁰¹ *Benisek v. Mack*, 584 Fed. Appx. 140 (4th Cir. 2014) (per curiam).

⁹⁰² *Shapiro v. Mack*, 135 S. Ct. 2805 (2015).

lower courts to dismiss the case without convening a three-judge panel, which the Court determined was required by federal law.⁹⁰³

On remand, a three-judge panel denied the defendants' motion to dismiss, holding that the plaintiffs presented a justiciable claim,⁹⁰⁴ and in 2017 the plaintiffs filed a motion for a preliminary injunction blocking the use of the maps and, alternatively, summary judgment. The district court denied the plaintiffs' request for a preliminary injunction, held the summary judgement motion in abeyance, and entered an order staying any further proceedings pending a decision by the Supreme Court in *Gill v Whitford*, another highly anticipated partisan gerrymandering case.⁹⁰⁵ The plaintiffs filed an appeal to the Supreme Court seeking to overturn the lower court's denial of a preliminary injunction.⁹⁰⁶ The ACLU submitted an amicus brief supporting the appellants, principally arguing for a standard of review for partisan gerrymandering cases that requires a showing of legislative intent to secure a partisan advantage and that the resulting map has the effect of entrenching the favored party against changes in voter preferences. The brief also argued that the assessment of partisan gerrymandering should focus on the plan as a whole, rather than on a single district.⁹⁰⁷ In June 2018, the Supreme Court affirmed the decision not to preliminarily enjoin the map in a per curiam opinion, finding that it was not abuse of discretion.⁹⁰⁸ The Court issued its decision in *Whitford* the same day.⁹⁰⁹

The district court subsequently took up and granted the plaintiffs' motion for summary judgment, granted the plaintiffs' request to permanently block further use of the 2011 plan, and ordered new maps be drawn.⁹¹⁰ The defendants appealed the decision to the U.S. Supreme Court, and the plaintiffs consented to a discretionary stay of the order pending appeal.⁹¹¹ In January 2019, the Supreme Court announced that *Benisek* would be heard along with *Common Cause v. Rucho*, discussed *supra*. As discussed above, the ACLU, the New York Civil Liberties Union, ACLU of North Carolina, and ACLU of Maryland filed an amicus brief arguing that partisan gerrymandering claims are justiciable and that the *Benisek* plaintiffs—along with plaintiffs in *Rucho*—had proven unconstitutional gerrymanders.⁹¹² In June 2019, as it did with *Rucho*, the Supreme Court held that partisan

⁹⁰³ *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015).

⁹⁰⁴ *Shapiro v. McManus*, 203 F. Supp. 3d 579, 586 (D. Md. 2016).

⁹⁰⁵ *Benisek v. Lamone*, 266 F. Supp. 3d 799, 816 (D. Md. 2017).

⁹⁰⁶ Plaintiffs' Notice of Appeal, *Benisek v. Lamone*, No. 13-cv-3233 (D. Md. Aug. 25, 2017).

⁹⁰⁷ Brief of the ACLU, ACLU of Maryland, and NYCLU as *Amici Curiae* in Support of Appellants, No. 17-333 (Jan. 29, 2018).

⁹⁰⁸ *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam).

⁹⁰⁹ *Gill v. Whitford*, 138 S. Ct. 1916 (2018). The Court in *Whitford* principally addressed the issue of standing and remanded the case back to the lower court on that issue.

⁹¹⁰ *Benisek v. Lamone*, 348 F.Supp. 493, 525 (D. Md. 2018).

⁹¹¹ Order Granting In Part Consent Motion to Stay, *Benisek v. Lamone*, No. 17-333 (Nov. 16, 2018).

⁹¹² Brief of ACLU, NYCLU, ACLU of North Carolina, and ACLU OF Maryland as *Amicus Curiae* in Support of Affirming District Court Judgments, *Rucho v. Common Cause*, No. 18-422; 18-72 (Mar. 8, 2019).

gerrymandering claims are nonjusticiable, vacated the lower court’s decision in *Benisek*, and remanded the case with instructions to dismiss for lack of jurisdiction.⁹¹³

71. League of Women Voters of N.C. v. North Carolina – North Carolina 2013

After *Shelby County v. Holder* was decided and freed North Carolina from federal preclearance, North Carolina’s legislature announced its aim of passing an omnibus election reform bill aimed at curbing voter registration and voting opportunities.⁹¹⁴ In crafting the bill, the legislature asked for data from state agencies regarding the use of various voting practices specifically broken down into categories based on race. After obtaining the racial data, the General Assembly passed legislation curtailing voting and registration in five different ways—all of which disproportionately burdened African Americans.⁹¹⁵

The ACLU, ACLU of North Carolina Legal Foundation, and Southern Coalition for Social Justice filed a lawsuit challenging the law in August 2013. The suit targeted numerous provisions of the North Carolina law that decreased opportunities for North Carolina’s African American residents to vote, including reducing the early voting period, eliminating same-day registration, and prohibiting “out-of-precinct” voting—all of which were disproportionately used by African Americans in the 2008 and 2012 general elections.⁹¹⁶ The bill also imposed a strict new photo ID requirement that disproportionately burdened African American voters.⁹¹⁷ The plaintiffs charged that these changes would reduce or eliminate voting opportunities relied on by hundreds of thousands of North Carolinians in recent elections and would result in longer lines throughout the remaining early voting period and on Election Day, further burdening the right to vote.⁹¹⁸

For example, North Carolina voters utilized early voting opportunities to an overwhelming extent: in the November 2012 elections, more than 2.5 million ballots were cast during early voting—more than half of all of the ballots cast in the election—and in the November 2008 elections, approximately 2.4 million ballots were cast during early voting.⁹¹⁹ At least 70.49% of African American voters cast their ballots during early voting in the 2012 general election, as compared with 51.87% of white voters who cast their ballot during that period.⁹²⁰ In 2008, at least 70.92% of African American voters cast their ballots during early voting, compared to 50.95% of white voters.⁹²¹ Data also showed that African American

⁹¹³ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁹¹⁴ 2013 N.C. SESS. LAWS 381.

⁹¹⁵ *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

⁹¹⁶ Complaint at ¶¶ 1, 33, 41, 48, 50, 56, 79, *League of Women Voters of N.C. v. N.C.*, No. 1:13-cv-00660 (M.D. N.C. Aug. 12, 2013).

⁹¹⁷ *Id.* at ¶ 66.

⁹¹⁸ *Id.* ¶ 76.

⁹¹⁹ *Id.* at ¶ 27.

⁹²⁰ *Id.* at ¶ 34.

⁹²¹ *Id.* at ¶ 36.

voters used Sunday voting and same-day registration to vote at highly disparate rates compared to white voters.⁹²² The plaintiffs claimed violations of the Equal Protection Clause of the Constitution and Section 2 of the Voting Rights due to the undeniable burden and outsized impact the changes would have on North Carolina's African American voters and requested declaratory, preliminary, and permanent injunctive relief to block the law from going into effect.

The district court consolidated the challenges to the law and conducted a bench trial in July 2015, with additional days of trial in 2016 on North Carolina's photo ID provisions. The extensive trial record included numerous expert and fact witnesses demonstrating the racial impact and racial animus driving the voting changes. However, in a lengthy opinion in April 2016, the district court rejected the plaintiffs' allegations that the challenged provisions were enacted with discriminatory intent and rejected the plaintiffs' claims under both the Voting Rights Act and the U.S. Constitution.⁹²³

The Fourth Circuit reversed and ruled decidedly in favor of the challengers to strike down the various provisions of the law. In July 2016, the court held that the challenged provisions of the 2013 law were enacted with racially discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act.⁹²⁴ With respect to the racial animus driving the law, the Fourth Circuit observed:

“[A]lthough the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist. Thus the asserted justifications cannot and do not conceal the State's true motivation.”⁹²⁵

This motivation, the court concluded, was that “the State took away [minority voters'] opportunity because [they] were about to exercise it.”⁹²⁶ With respect to the actions of the General Assembly:

“[I]n sum, relying on this racial data...[the legislature] enacted legislation restricting all—and only—practices disproportionately used by African Americans. When juxtaposed against the unpersuasive non-racial explanations the State proffered for the specific choices it made . . . we cannot ignore the choices the General Assembly made with this data in hand.”⁹²⁷

⁹²² *Id.* at ¶¶ 39, 48.

⁹²³ *N.C. State Conf. of NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016).

⁹²⁴ *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

⁹²⁵ *Id.* at 214.

⁹²⁶ *Id.* at 215.

⁹²⁷ *Id.* at 230.

Citing the legislature’s use of racial data in crafting the voting changes, the court found the legislature made these choices intentionally with respect to cutting same-day registration, early voting, preregistration, and out-of-precinct voting.⁹²⁸ With respect to the photo ID requirement, the court said that the use of the racial data the legislature used to craft the law “showed that African Americans disproportionately lacked the most common kind of photo ID, those issued by the Department of Motor Vehicles (DMV).” The court stated:

“[The] pre-*Shelby County* version of SL 2013–381 provided that all government-issued IDs, even many that had been expired, would satisfy the requirement as an alternative to DMV-issued photo IDs. After *Shelby County*, with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess.”⁹²⁹

Faced with the factual record, the Fourth Circuit concluded that “the North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent.”⁹³⁰ The re-erection of racial barriers constituted “purposeful racial discrimination” and “the record evidence is clear that this is exactly what was done” in North Carolina.⁹³¹ That purposeful discrimination was coupled with significant—and predictable—impact, also detailed at length in the Fourth Circuit’s opinion.⁹³² For example, with respect to photo ID, the court found that African Americans “disproportionately lacked the photo ID required by [the law]...[which] establishes sufficient disproportionate impact [to meet legal standards]. The record evidence provides abundant support for that holding.”⁹³³ Tactics such as removing public assistance IDs, among others, from a list of accepted IDs while continuing to allow all forms of ID that whites were most likely to have created disproportionate voting barriers. These barriers, coupled with widespread socioeconomic disparities between African Americans and whites in North Carolina, resulted in a regime that injured African Americans voters in a systematic fashion.

The Fourth Circuit enjoined the challenged provisions and granted the plaintiffs declaratory relief, holding the law unconstitutional and in violation of the Voting Rights Act. In December 2016, North Carolina sought Supreme Court review, which the Court denied in May 2017, effectively letting the decision and findings of the Fourth Circuit stand.⁹³⁴ Sadly, the unjust impact of law had already impacted numerous elections in North Carolina.

⁹²⁸ *Id.* at 216-218.

⁹²⁹ *Id.* at 216.

⁹³⁰ *Id.* at 215.

⁹³¹ *Id.* at 226.

⁹³² *Id.* at 230-32.

⁹³³ *Id.* at 231.

⁹³⁴ *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

72. Belenky v. Kobach – Kansas 2013

In November 2013, the ACLU and ACLU of Kansas filed a lawsuit in state court challenging Kansas' two-tiered voter registration system. Under the scheme, adopted without legal authority by Kansas Secretary of State Kris Kobach, voters who registered using the federal voter registration form (Federal Form) were only permitted to vote for federal offices and not for state or local elections unless they provided a birth certificate or passport as documentation of citizenship.⁹³⁵ In effect, the Kansas Secretary of State subjected voters to an unprecedented and unlawful voter registration system that divided them into separate and unequal categories of voters with different rights and privileges based on nothing more than the method of registration.⁹³⁶ The dual registration system permitted some voters to cast ballots for President and other federal offices, but prohibited them from voting for governor, state legislators, secretary of state, and other state and local offices.⁹³⁷ The plaintiffs argued that the adoption and enforcement of the dual registration system deprived qualified voters of the right to vote in state and local elections in violation of the Kansas Constitution's guarantee of equal protection. The petition also alleged that the program violated the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, which held that the National Voter Registration Act preempted state documentary proof of citizenship requirements for individuals using the Federal Form to register.⁹³⁸

In June 2014, the plaintiffs filed a motion for a preliminary injunction and expedited hearing on the matter.⁹³⁹ In July 2014, the court declined to grant injunctive relief, finding that uncertainty about the status of the law would further discombobulate the election.⁹⁴⁰ Throughout 2015 and 2016, the court rejected a string of attempts by the defendants to dispose of the case, strongly criticizing the dual registration system as being "wholly without a basis of legislative authority" and in violation of state and federal law.⁹⁴¹ The court issued a final order in January 2016 granting summary judgment for the plaintiffs and holding that the Secretary of State overstepped his legal authority by creating a system that prevents Federal Form registrants from voting in state and local elections.⁹⁴² The court

⁹³⁵ Petition for Declaratory and Injunctive Relief, *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., Nov. 21, 2013).

⁹³⁶ *Id.* at 1-2.

⁹³⁷ *Id.* at 2.

⁹³⁸ *Ibid.*

⁹³⁹ Plaintiffs' Motion for a Preliminary Injunction and for an Expedited Hearing, *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., June 27, 2014).

⁹⁴⁰ *See* Memorandum Opinion and Order at 6, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct., Aug. 21, 2015).

⁹⁴¹ *Id.* at 27.

⁹⁴² Memorandum Opinion and Order at 26, *Belenky v. Kobach*, No. 2013C1331 (Shawnee Cty. Dist. Ct., Jan. 15, 2016).

permanently barred any further implementation of the dual-voter scheme, restoring the voting rights of over 17,000 Kansans.⁹⁴³

Defendants appealed in July 2016, and in October 2016, the appeals court granted a stay in the appeal pending a final decision in *League of Women Voters v. Newby*.⁹⁴⁴ In January 2021, the case was dismissed in response to the denial of certiorari by the Supreme Court in *Fish v. Schwab*,⁹⁴⁵ which had held that Kansas's documentary proof of citizenship requirement for voter registration was unconstitutional.

73. Wright v. Sumter County Board of Elections – Georgia 2014

An individual plaintiff, represented by the ACLU, filed suit in 2014 challenging changes to the method of electing members and apportionment of the Board of Education of Sumter County, Georgia.⁹⁴⁶ The Sumter County Board of Education packed Black voters into two of the existing five districts and added two more at-large seats. This resulted in a 5-2 majority of white-preferred candidates on the Board of Education in a county where African Americans outnumbered white residents in total population (52% compared to 42.1%), voting-age population (49.5% to 46.7%), and in the number of registered voters (48.5% to 46.7%).⁹⁴⁷ Prior to this lawsuit, the apportionment and method of election of members of the Sumter County Board of Education had for decades been the subject of multiple objections interposed by the Attorney General under Section 5 of the Voting Rights Act⁹⁴⁸ and litigation by private plaintiffs.⁹⁴⁹ Sumter County also has a bitter history of racial discrimination, including in the voting context.⁹⁵⁰

In *Wright*, the plaintiff alleged that the Board's addition of two at-large seats and apportionment of districts diluted African American voting strength in violation of Section 2 of the Voting Rights Act. The district court initially granted summary judgment to the county, but the Eleventh Circuit reversed the decision of the district court and remanded

⁹⁴³ *Id.*

⁹⁴⁴ Order, *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cnty. Dist. Ct. Oct. 16, 2016).

⁹⁴⁵ 141 S. Ct. 965 (2020).

⁹⁴⁶ Injunction to Stop March 18, 2014 and May 20, 2014 Sumter County School Elections, *Wright v. Sumter Cty. Bd. of Elections and Registration*, No. 1:14-cv-00042-WLS (M.D. Ga. Mar. 7, 2014).

⁹⁴⁷ *Wright v. Sumter Cty. Bd. of Elections and Registration*, 301 F.Supp.3d 1297, 1302 (M.D. Ga. 2018).

⁹⁴⁸ See Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (Sept. 6, 1983), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1990.pdf>; Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (Dec. 17, 1982), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1960.pdf>; Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Henry L. Crisp, Esq. (July 13, 1973), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1250.pdf>.

⁹⁴⁹ See, e.g., *Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (11th Cir. 1985); *Edge v. Sumter Cty. Sch. Dist.*, 541 F. Supp. 55 (M.D. Ga. 1981).

⁹⁵⁰ For a discussion of this history see Plaintiffs' Brief in Support of his Motion for Summary Judgment, 1:14-cv-00042 (M.D. Ga. Apr. 7, 2017).

the case for further consideration.⁹⁵¹ The district court held a four-day bench trial in December 2017. At trial, the plaintiff relied on a racial bloc voting analysis of county elections performed by his expert.

The district court, after going through a detailed Section 2 analysis, ruled in favor of the plaintiff in March 2018.⁹⁵² The court found, based on the totality of the circumstances, “that African Americans in Sumter County have less opportunity to elect candidates of their choice than do white citizens,” resulting in unlawful dilution of African American voting strength in violation of Section 2.⁹⁵³ It further found that the plaintiff had presented an illustrative plan that was “likely to give African Americans a more proportional representation on the Board of Education than does the current plan.”⁹⁵⁴ As recommended by the parties, the court directed the Sumter County Board of Elections to confer with the county’s legislative delegation to give elected officials the first opportunity to remedy the unlawful election plan. After the Georgia General Assembly declined the court’s invitation to devise a remedy, the district court enjoined Sumter County from holding school board elections in 2018 using the unlawful plan.⁹⁵⁵ After further efforts to devise a remedy did not bear fruit, the November 2018 general election went forward without any school board races on the ballot in Sumter County.

Meanwhile, the county appealed the injunctions to the Eleventh Circuit. In April 2019, after briefing was complete, the plaintiff filed a motion for a limited remand to allow the district court to devise a remedy in time for the 2020 school board elections.⁹⁵⁶ The Eleventh Circuit granted the motion in May 2019 and returned the case to the district court.⁹⁵⁷

In September 2019, the district court appointed a special master to draw recommended remedial plans, followed by response and replies from parties on both sides.⁹⁵⁸ In January 2020, the district court adopted one of the proposed plans with single-member districts that would give the African American community an opportunity to elect Black-preferred candidate, and also moved the election date for the School Board to November to ensure

⁹⁵¹ *Wright v. Sumter Cty. Bd. of Elections and Registration*, 657 Fed.Appx. 871, 873 (11th Cir. 2016) (per curiam).

⁹⁵² *Wright*, 301 F. Supp. 3d at 1297.

⁹⁵³ *Id.* at 1323.

⁹⁵⁴ *Id.* at 1326.

⁹⁵⁵ *Wright v. Sumter Cty. Bd. of Elections and Registration*, 361 F.Supp.3d 1296, 1305-06 (M.D. Ga. 2018).

⁹⁵⁶ Plaintiff-Appellee’s Motion for a Limited Remand, No. 18-11510; 18-13510 (11th Cir. Apr. 26, 2019).

⁹⁵⁷ Order, *Wright v. Sumter Cty. Bd. of Elections and Registration*, No. 18-11510; 18-13510 (11th Cir. May 16, 2019).

⁹⁵⁸ Order, *Wright v. Sumter Cty. Bd. of Elections and Registration*, No. 1:14-CV-42 (M.D. Ga. Sept. 23, 2019), Doc. No. 267.

increased voter participation.⁹⁵⁹ Although the defendants appealed the decision, the Eleventh Circuit affirmed the district court's remedy in October 2020.⁹⁶⁰

74. NAACP V. Husted – Ohio 2014

In May 2014, the ACLU and ACLU of Ohio, on behalf of the Ohio State Conference of the NAACP, League of Women Voters of Ohio, A. Philip Randolph Institute, Bethel African Methodist Episcopal Church, and other African-American churches, filed suit against the Ohio Secretary of State, filed suit challenging a state law that eliminated the first week of early voting in Ohio and a directive from the Secretary of State even more egregiously slashed the early voting period by eliminating all Sundays, the Monday before Election Day and all evening voting hours for the upcoming 2014 General Election. The complaint alleged violation of the Equal Protection Clause of the Fourteenth Amendment by burdening the fundamental right to vote and Section 2 of the Voting Rights Act of 1965 by disproportionately burdening African American voters' ability to participate effectively in the political process.⁹⁶¹ Just 16 months earlier, a federal court granted a preliminary injunction, affirmed by the Sixth Circuit, halting the elimination of the last three days of early voting in 2012.⁹⁶²

During the 2012 Presidential election, more than 157,000 people voted during the time periods cut by SB 283 and Directive 2014-06. A disproportionately high percentage of those were low-income voters, many of whom were African American. African Americans also disproportionately voted on Sundays through “Souls to the Polls” programs common among the Black church community.⁹⁶³ The lawsuit challenged these two restrictions on at least three theories: the restrictions: (1) placed an unconstitutional burden upon the right to vote of certain classes of voters (especially lower-income voters), (2) abridged the voting rights of citizens based on their race in violation of Section 2 of the Voting Rights Act, and (3) violated the equal protection clause by reflecting an intent to suppress voting specifically by African Americans.⁹⁶⁴

In September 2014, the Sixth Circuit affirmed the district court's ruling that cuts to early voting in Ohio must be restored in time for the 2014 federal midterm elections,⁹⁶⁵ but the Supreme Court stayed the lower court rulings without explanation, restoring the early

⁹⁵⁹ *Wright v. Sumter Cty. Bd. of Elections & Registration*, No. 1:14-CV-42 (WLS), 2020 WL 499615 (M.D. Ga. Jan. 29, 2020), *aff'd*, 979 F.3d 1282 (11th Cir. 2020).

⁹⁶⁰ *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020).

⁹⁶¹ Complaint, *Ohio State Conference of the NAACP v. Husted*, No. 2:14-cv-00404 (S.D. Ohio May 1, 2014).

⁹⁶² *Id.* at ¶ 1 (citing *Obama for Am. V. Husted*, 888 F. Supp. 2d 897 (S.D. Ohio 2012); *aff'd*, 697 F.3d 423 (6th Cir. 2012)).

⁹⁶³ *Id.*; Press Release, ACLU, ACLU Files Federal Lawsuit Challenging Ohio's Latest Attempts To Slash Early Voting Opportunities (May 1, 2014), <https://www.aclu.org/press-releases/aclu-files-federal-lawsuit-challenging-ohios-latest-attempts-slash-early-voting>.

⁹⁶⁴ *Id.*; ACLU OF OHIO, Case Summary for NAACP, ET AL. V. HUSTED, ET AL. <https://www.acluohio.org/archives/cases/naacp-et-al-v-husted-et-al>.

⁹⁶⁵ *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014).

voting restrictions in a 5-4 decision.⁹⁶⁶ In April 2015, parties came to a settlement agreement restoring early voting opportunities, including an additional Sunday of voting for the upcoming presidential general election; a week of expanded weekday evening hours from 8 a.m. to 7 p.m. for the presidential primary election and general elections. The agreement took effect after the May 2015 primary and continued through 2018.⁹⁶⁷

75. Howard v. Augusta-Richmond County – Georgia 2014

The ACLU filed suit against Augusta-Richmond County on behalf of individual African American residents seeking to enjoin a state law that required the county to move its local election date from the November 2014 general election date to the May 2014 primary election date, which historically had a statistically low turnout by voters of color.⁹⁶⁸ The county had initially requested preclearance from the Attorney General to move the date of the local election, as it was required to do under Section 5 of the Voting Rights Act. The Justice Department objected, citing statistics that minorities were less likely to vote earlier in the year.⁹⁶⁹ In its objection letter, the Justice Department noted that although the law—which provided that all nonpartisan elections for members of consolidated governments be held in conjunction with the primary in even-numbered years—was proposed as statewide legislation and did not name any specific jurisdictions, it only impacted the Augusta-Richmond mayoral and commissioner elections. The six other consolidated governments in Georgia either did not have any nonpartisan elected offices or already elected their nonpartisan officers on that date.⁹⁷⁰ The objection letter also found that although statistically voter turnout was substantially lower in July than November for both Black and white voters, the drop in the participation rate for Black voters was significantly greater than that for white voters and that the differential had been particularly dramatic in recent elections.⁹⁷¹ The letter also indicated that the Justice Department’s analysis of the evidence could not preclude a determination that the change was adopted for a discriminatory purpose, noting:

“Voting is racially polarized in Augusta-Richmond. Census figures show that the black population has gradually increased over the years, such that black persons now comprise a majority of both the total and voting age populations in the consolidated jurisdiction. As a result of these changing demographics, electoral outcomes are particularly dependent on voter turnout.”⁹⁷²

⁹⁶⁶ *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42 (2014) (mem.).

⁹⁶⁷ Settlement Agreement, *NAACP v. Husted*, No. 2:14-cv-00404 (S.D. Ohio Apr. 17, 2015).

⁹⁶⁸ Complaint, *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097 (S.D. Ga. May 13, 2014).

⁹⁶⁹ *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 12810317, at *1; *see also* Objection Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Division, Department of Justice to Deputy Attorney General Dennis R. Dunn, (Dec. 21, 2012).

⁹⁷⁰ *See* Objection Letter from Assistant Attorney General Thomas E. Perez, Civil Rights Div., Dep’t of Justice to Deputy Attorney Gen. Dennis R. Dunn (Dec. 21, 2012).

⁹⁷¹ *Id.*

⁹⁷² *Id.*

After the Supreme Court struck down the Voting Rights Act's Section 4(b) coverage formula as unconstitutional in *Shelby County v. Holder* and rendered Section 5 unenforceable, the Georgia legislature passed a law moving election dates earlier and permitted local governments to move the dates of their elections earlier as well. Augusta-Richmond County took advantage of this new law, prompting the ACLU's suit. The ACLU suit argued that the *Shelby County* decision did not apply retroactively and that the Section 5 objection lodged by Department of Justice was still legally valid; therefore, the state action attempting to move the local elections remained unenforceable.⁹⁷³

The district court rejected the plaintiffs' motion for a preliminary injunction and granted the defendants' motion to dismiss.⁹⁷⁴ The court also granted the defendants' motion for attorneys' fees, holding that the ACLU's lawsuit was "frivolous, unreasonable, or without foundation," because the result was foreclosed in light of the Supreme Court's prior ruling in *Shelby County*.⁹⁷⁵ The plaintiffs appealed, arguing that they had presented evidence that *Shelby County* was not controlling and that the Justice Department's prior objection on Georgia's election dates still held precedential value. The Eleventh Circuit reversed the district court on the issue of attorneys' fees, finding that the lower court abused its discretion because there was no binding precedent at the time the complaint was filed establishing that *Shelby County* applied retroactively.⁹⁷⁶ The Eleventh Circuit noted that Georgia's own attorneys had given contradictory statements on the effect of *Shelby County* on the Section 5 objection when questioned by state legislators, establishing that the plaintiffs' argument was far from "settled law" when it was filed.⁹⁷⁷ The court held no attorneys' fees was appropriate under the circumstances, bringing the case to an end.

76. Griffin v. Schultz; Griffin v. Pate – Iowa 2014

In November 2014, on behalf of Kelli Jo Griffin, an Iowa woman seeking to regain her right to vote, the ACLU and ACLU of Iowa Foundation filed suit in state court against state officials seeking declaratory, injunctive, and mandamus relief to effectuate that right.⁹⁷⁸ The Iowa Constitution permanently disenfranchises individuals convicted of "infamous crimes," unless the governor restores the rights of citizenship to Iowa electors made ineligible.⁹⁷⁹ From 2005 to 2011, by executive order, Iowa automatically restored voting rights to individuals convicted of felonies upon completion of their sentence, a process that reduced the number of disenfranchised Iowans by 81% and restored the right to vote to an

⁹⁷³ Complaint, *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097 (S.D. Ga. Apr. 18, 2014).

⁹⁷⁴ *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 12810317, at *1 (S.D. Ga. May 13, 2014).

⁹⁷⁵ *Howard v. Augusta-Richmond Cty.*, No. 1:14-cv-00097, 2014 WL 5827144, at *3 (S.D. Ga. Nov. 10, 2014).

⁹⁷⁶ *Howard v. Augusta-Richmond Cty.*, 615 Fed. App'x 651 (11th Cir. 2015) (per curiam).

⁹⁷⁷ *Id.* at 652.

⁹⁷⁸ Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief, *Griffin v. Schultz*, No. EQCE077368 (Iowa Dist. Ct. Nov. 7, 2014).

⁹⁷⁹ *Id.* at ¶ 2 (citing IOWA CONST. art. IV, § 16; *State ex rel. Dean v. Haubrich*, 83 N.W.2d 451 (Iowa 1957)).

estimated 100,000 individuals.⁹⁸⁰ In 2011, the newly-installed governor issued an executive order that rescinded the previous executive order and required citizens with felony convictions to complete an application process of individualized review in order to petition the state for restoration of their voting rights. This move changed longstanding policy in Iowa regarding rights restoration and resulted in only 40 individuals whose rights were restored out of an estimated 14,350 individuals who had discharged a felony offense.⁹⁸¹

The plaintiff had been previously convicted of non-violent drug crimes, successfully discharged her sentence of probation, and believed she was eligible to vote.⁹⁸² Her defense attorney representing her for her drug conviction advised her that her citizenship rights would be automatically restored by the governor's office, and she was not informed she was ineligible to vote. In November 2013, she registered to vote and cast a provisional ballot in a city election in Montrose, Iowa, which was not counted.⁹⁸³

After being acquitted of the perjury charge in March 2014, Griffin sued to invalidate the state's rules disenfranchising individuals with certain felony convictions. The suit claimed that the forfeiture of voting rights by those with criminal convictions violated the Iowa Constitution as applied to her case because her non-violent drug conviction did not qualify as an "infamous crime" under the state constitution. She argued that Iowa's process for disenfranchising voters convicted of felonies violated the Iowa Constitution's guarantee of the right of suffrage and Due Process Clause because it prohibited all Iowans with felony convictions from voting and not just those who had been convicted of "infamous crimes."⁹⁸⁴

The trial court granted summary judgment against Griffin on both claims,⁹⁸⁵ and she appealed the decision to the Iowa Supreme Court.⁹⁸⁶ The sole issue before the court was whether the felony crime of delivery of a controlled substance is an "infamous crime" for purposes of the Iowa Constitution. After a lengthy analysis of the concept of "infamy" at common law and as defined by other states, the Iowa Supreme Court concluded in a divided 4-3 opinion that "an infamous crime has evolved to be defined as a felony."⁹⁸⁷ Accordingly, the court affirmed the trial court's ruling and dismissed Griffin's claims in their entirety.

77. Evenwel v. Abbott – Texas 2014

ACLU and ACLU of Texas as amicus

⁹⁸⁰ *Ibid.*

⁹⁸¹ *Id.* ¶¶ 2, 28-29.

⁹⁸² *Id.* ¶ 1.

⁹⁸³ *Ibid.*

⁹⁸⁴ *Id.* at ¶¶ 30-53.

⁹⁸⁵ *Griffin v. Pate*, No. EQCE077368 (Polk Cty. Dist. Ct. Sept. 25, 2015).

⁹⁸⁶ *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016).

⁹⁸⁷ *Id.* at 205.

The Equal Protection Clause generally requires states to equalize the population of their electoral districts; this constitutional precept is known as the “one person, one vote” principle, and was originally articulated in the seminal case *Reynolds v. Sims*.⁹⁸⁸ Since the framing of the U.S. Constitution, states have broadly used total population as the metric for apportioning state legislative districts with equal numbers of persons, and the U.S. Constitution requires use of total population for apportioning congressional seats for the House of Representatives to ensure universal and equal representation in the federal government. Despite the long-established precedent of using total population as a basis for apportionment, individual plaintiffs Sue Evenwel and Edward Pfenninger filed a complaint in Texas district court in 2013 alleging that the state senate districts adopted by the Texas Legislature violated the Equal Protection Clause.⁹⁸⁹ The plaintiffs argued that the challenged districts were drawn based on the total overall population rather than the total population of eligible voters.⁹⁹⁰ The plaintiffs argued that drawing districts of equal population based on the state’s total population rather than based on the number of eligible voters diluted the weight of their votes when compared to districts with a lower proportion of eligible voters, in violation of the one person, one vote command under the Equal Protection Clause.⁹⁹¹ The plaintiffs sought declaratory relief that the Texas senatorial districts were unconstitutional and an injunction to prevent the use of the maps in subsequent elections.⁹⁹²

The district court granted Texas’ motion to dismiss, finding that the plaintiffs “failed to plead facts that state an Equal Protection Clause violation under the recognized means for showing unconstitutionality under that clause.”⁹⁹³ The district court held that the plaintiffs failed to establish that the apportionment base used by Texas, *i.e.*, total population, was forbidden by the Constitution and also failed to show that Texas’ senate map did not achieve substantial population equality using total population as the base.⁹⁹⁴ In so ruling, the district court rejected the plaintiffs’ theory that to satisfy the Fourteenth Amendment, Texas was required to use total eligible voters as its apportionment base.⁹⁹⁵

The plaintiffs’ appealed this ruling to the Supreme Court.⁹⁹⁶ The ACLU and ACLU of Texas argued in an amicus brief that the use of total population as the metric for state

⁹⁸⁸ 377 U.S. 533 (1964).

⁹⁸⁹ Complaint for Declaratory and Injunctive Relief, *Evenwel v. Perry*, No. 1:14-cv-00355 (W.D. Tex. Apr. 21, 2014).

⁹⁹⁰ *Id.*

⁹⁹¹ See Brief of *Amicus Curiae* Lawyers’ Committee for Civil Rights Under Law at pp. 5-11, *Evenwel v. Abbott*, No. 14–940 (2016).

⁹⁹² Complaint for Declaratory and Injunctive Relief, *Evenwel v. Perry*, No. 1:14-cv-00355 (W.D. Tex. Apr. 21, 2014).

⁹⁹³ Order on Motion to Dismiss, *Evenwel v. Perry*, No. 1:14-cv-00355, 2014 WL 5780507, at *4 (W.D. Tex. Nov. 5, 2014).

⁹⁹⁴ *Id.* at *3.

⁹⁹⁵ *Ibid.*

⁹⁹⁶ *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016).

redistricting is consistent with the Framers’ understanding of a republican form of government, and that the Framers intended that universal and equal representation through total apportionment would ensure equality of representation for all individuals, not just voters.⁹⁹⁷ In April 2016, the Supreme Court affirmed the dismissal of the plaintiffs’ claims, holding that “based on constitutional history, this Court’s decisions, and longstanding practice, that a State may draw its legislative districts based on total population.”⁹⁹⁸ In reaching its decision, the Court relied on the fact that all states used census total population numbers to draw districts and that only seven states adjusted these census-derived figures in any meaningful way. Of note, in affirming the district court, the Supreme Court expressly declined to resolve whether, as Texas argued, states *might* “draw districts to equalize voter-eligible population rather than total population.”⁹⁹⁹ Additionally, Justice Thomas in his concurrence noted:

The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The majority should recognize the futility of choosing only one of these options. The Constitution leaves the choice to the people alone—not to this Court.¹⁰⁰⁰

This makes it possible that the question of whether states can apportion state electoral districts based on a metric other than total population will again be litigated in federal court and may appear before the Supreme Court.

78. Davidson v. City of Cranston – Rhode Island 2014

Individual plaintiffs and the ACLU of Rhode Island filed suit in federal court in 2014 challenging the redistricting plan adopted by the City of Cranston, Rhode Island, for election of members of the Cranston City Council and the school committee.¹⁰⁰¹ The plaintiffs alleged that the redistricting plan violates the one person-one vote principle of the Fourteenth Amendment’s Equal Protection Clause by counting the population of Rhode Island’s only state prison as residents of the ward, even though most of the inmates remain residents of their pre-incarceration communities for virtually all other legal purposes, including voting.¹⁰⁰² 3,433 incarcerated individuals were districted into the electoral ward, accounting for approximately 25% of the district’s population despite not having a choice as to where they served their prison sentences and not being able to visit, patronize, or

⁹⁹⁷ Brief of the American Civil Liberties Union and the ACLU of Texas as *Amici Curiae* in Support of Appellees at 9-13, *Evenwel v. Abbott*, No. 14–940. (2016).

⁹⁹⁸ *Id.* at 1133 (Thomas, J., concurring).

⁹⁹⁹ *Id.*

¹⁰⁰⁰ *Id.*

¹⁰⁰¹ Complaint for Declaratory and Injunctive Relief, *Davidson v. City of Cranston*, No. 1:14-cv-00091 (*D.R.I. Feb. 19, 2014*).

¹⁰⁰² *Id.* at ¶ 1.

participate in public or private establishments in the city or ward.¹⁰⁰³ The plaintiffs alleged that this prison-based gerrymandering results in an unequal system of representation where the prisoner population is used to artificially inflate the population of the ward containing the prison, increasing the district's political power and diluting the voting strength of persons residing in other districts.¹⁰⁰⁴ The plaintiffs sought declaratory relief and an injunction barring the city from conducting elections under the redistricting plan.

The district court granted the plaintiffs' motion for summary judgment in May 2016, finding that the redistricting plan violated the one person-one vote principle.¹⁰⁰⁵ The court reasoned that the inmates "share none of the characteristics" of other constituents in the ward and have no rights or stake in the local civic life or political process. In particular, they do not share in the representation of the ward in the city council, but are nonetheless counted for representation purposes.¹⁰⁰⁶ In the court's view, this differentiated the situation from other cases in which non-voting populations are typically included in the population count for purposes of apportionment. The court granted the requested injunction and ordered the city to propose a districting plan that complied with the one person-one vote principle.¹⁰⁰⁷

The city appealed the decision to the First Circuit, which reversed, finding that the city's inclusion of the prison population in the surrounding ward was constitutionally permissible.¹⁰⁰⁸ The court reasoned that where total population is used for apportionment, a plaintiff must make a showing of invidious discrimination to support an equal protection claim, which was not shown in this case.¹⁰⁰⁹ The court also reasoned that it was required to give deference to the decision of the local election officials on apportionment¹⁰¹⁰ and that the Supreme Court had generally approved the use of total population data from the Census for apportionment, which the city had done.¹⁰¹¹

79. Missouri NAACP v. Ferguson-Florissant School District – Missouri 2014

On December 18, 2014, the Missouri State Conference of the NAACP and individual plaintiffs, represented by the ACLU and ACLU of Missouri, sued the Ferguson-Florissant School District challenging the district's at-large method for electing school board members,

¹⁰⁰³ *Id.* at ¶¶ 17-18.

¹⁰⁰⁴ Complaint for Declaratory and Injunctive Relief at ¶ 1, *Davidson v. City of Cranston*, No. 1:14-cv-00091 (D.R.I. Feb. 19, 2014); see also Sean Young, 'Home' Is Not Where You Are Involuntarily Confined, ACLU (Oct. 15, 2015), <https://www.aclu.org/blog/voting-rights/gerrymandering/home-not-where-you-are-involuntarily-confined>.

¹⁰⁰⁵ *Davidson v. City of Cranston*, 188 F.Supp.3d 146 (D.R.I. 2014).

¹⁰⁰⁶ *Id.* at 150.

¹⁰⁰⁷ *Id.* at 152.

¹⁰⁰⁸ *Davidson v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016).

¹⁰⁰⁹ *Id.* at 142-43.

¹⁰¹⁰ *Id.* at 143-44.

¹⁰¹¹ *Ibid.*

arguing it denied the district's Black residents an equal opportunity to participate in the political process and elect representatives of their choice in violation of Section 2 of the Voting Rights Act.¹⁰¹² The Ferguson-Florissant School District extends through numerous municipalities pursuant to a 1975 desegregation order intended to remedy the effects of discrimination against the area's African American students.¹⁰¹³ The area's segregated school system was the result of municipal borders that were initially drawn along racial lines and reinforced through racial housing covenants to avoid increasing African American voting strength in certain areas.¹⁰¹⁴ The desegregation order that created the school district required that two seats on the then 6-member school board be replaced by designees of the boards of two annexed African American districts.¹⁰¹⁵ Yet, since the implementation of the three-district desegregation plan in 1976, the demographics of Ferguson-Florissant changed dramatically and what had become a racially integrated school district once again became segregated.¹⁰¹⁶

At the time of filing, the Ferguson-Florissant School District's total voting age population was 51,010; whites constituted a slight majority of the voting age population at 49.69% and Blacks constituted 47.37%, yet Black students made up a majority of the district's student body, accounting for 77.1% of total enrollment in the school district.¹⁰¹⁷ And while only 13% of the student body in the school district was white, 6 out of the 7 school board members were white.¹⁰¹⁸ The plaintiffs sued the district arguing that there was inadequate representation of African Americans on the board, and the votes of the district's Black citizens were being diluted by the at-large voting system in violation of Section 2 of the Voting Rights Act. The plaintiffs argued that the school district's African American population was sufficiently numerous and geographically compact enough to allow for the creation of multiple, properly apportioned single-member districts in which African Americans would constitute a majority of the voting age population and that there was a clear pattern of voting cohesion among African American voters who tended to prefer the same candidate, but their preferred candidates were consistently defeated by the at-large system.¹⁰¹⁹ After a six-day bench trial in January 2016, the district court in August 2016 in a lengthy opinion evaluating the Section 2 claim held that the plaintiffs had established a Section 2 violation, finding that Black voters had less opportunity than other members of the electorate to participate in the political process and to elect representatives of their

¹⁰¹² Complaint, *Mo. NAACP v. Ferguson-Florissant Sch. Dist.*, No. 4:14-cv-02077 (E.D. Mo. Dec. 18, 2014).

¹⁰¹³ *Id.* at ¶ 2.

¹⁰¹⁴ *Id.* at ¶ 8.

¹⁰¹⁵ *Id.* ¶ 14 (citing *United States v. Missouri*, 515 F.2d 1365, 1373 (8th Cir. 1975)).

¹⁰¹⁶ *Id.* at ¶ 10.

¹⁰¹⁷ *Id.* at ¶ 11.

¹⁰¹⁸ *Id.* at ¶¶ 15-17.

¹⁰¹⁹ *Id.* at ¶¶ 22-24.

choice.¹⁰²⁰ The court also adopted the plaintiffs’ proposed remedial plan and rejected the defendant school district’s proposal.¹⁰²¹

The school district appealed the decision to the Eighth Circuit, which unanimously affirmed the district court’s decision.¹⁰²² The appellate court concluded that the district court properly found a Section 2 violation after engaging in the appropriate legal analysis and after thorough review of the facts and applicable legal standard.¹⁰²³ The court found “no clear error in the district court’s exhaustive factual findings” or the conclusion that “[g]iven the extent to which African Americans in [the Ferguson-Florissant School District] continue to experience the effects of discrimination, their ability to participate in the political process is impacted.”¹⁰²⁴ The school district petitioned for certiorari to the U.S. Supreme Court, which declined review.¹⁰²⁵

80. Greater Birmingham Ministries v. John Merrill – Alabama 2015

ACLU and ACLU of Alabama as amicus in support of plaintiff-appellants

In December 2015, plaintiffs represented by the NAACP Legal Defense and Educational Fund, Inc., challenged Alabama’s restrictive photo ID law.¹⁰²⁶ In 2011, Alabama passed a law that required voters to “provide valid photo identification to an appropriate election official prior to voting.”¹⁰²⁷ The law requires in-person and absentee voters to present one of seven limited forms of photo ID in order to vote,¹⁰²⁸ which Alabama’s own data shows Black voters in the state are less likely to possess.¹⁰²⁹ The only exception to the prescribed forms of photo ID is a provision that permits a voter to cast a ballot without presenting an ID if two election officials at the voter’s polling location “positively identify” the voter.¹⁰³⁰

Despite the purported justification of protecting against voter fraud, proponents of the bill could only point to one documented case of voter impersonation fraud in the 12 years prior

¹⁰²⁰ *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006 (E.D. Mo. 2016).

¹⁰²¹ *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F.Supp.3d 949 (E.D. Mo. 2016).

¹⁰²² *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F. 3d 924 (8th Cir. 2018).

¹⁰²³ *Id.* at 941.

¹⁰²⁴ *Id.* at 940.

¹⁰²⁵ *Ferguson-Florissant Sch. Dist. v. Mo. State Conf. of NAACP*, 139 S. Ct. 826 (2019).

¹⁰²⁶ Complaint, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015); *see also* First Amended Complaint, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

¹⁰²⁷ ALA. CODE § 17-9-30(a).

¹⁰²⁸ *Id.*

¹⁰²⁹ *See* Brief for Plaintiffs-Appellants at 27, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018); *see also* First Amended Complaint at ¶¶ 100-103, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

¹⁰³⁰ ALA. CODE § 17-9-30(f).

to the law’s passage.¹⁰³¹ The dubious proposition that the photo ID law is intended to curb voter fraud was further undermined when it was revealed that supporters and sponsors of the bill in the Alabama statehouse had made racist and racially charged comments in the run up to the law’s passage. The plaintiffs argued that these statements and the legislative history in Alabama provided evidence of the law’s discriminatory intent.¹⁰³² In one instance, the photo ID bill’s chief sponsor, a state senator who had tried for over a decade to pass a photo ID law, told Alabama newspapers that a photo ID law would undermine Alabama’s “black power structure” and that lacking an ID law “benefits black elected leaders.”¹⁰³³ The trial testimony in another case relating to an Alabama ballot initiative revealed that another sponsor of the bill, the chair of the Alabama Senate Rules Committee, referred to Black voters as “aborigines.”¹⁰³⁴ In another instance, the bill’s cosponsors were recorded devising a plan related to a planned ballot measure to depress turnout among Black voters, whom they slurred as “illiterates,” who would ride “H.U.D.-financed buses” to the polls in the 2010 midterm election.¹⁰³⁵ The same state legislature that passed the photo ID law also passed an intentionally racially discriminatory voter registration ID requirement and redistricting plan held unconstitutional by a three-judge panel.¹⁰³⁶

At the time the photo ID law was enacted, Alabama had been subject to the preclearance requirements of Section 5 but never sought preclearance for the law. Instead, the state chose to delay implementation until the outcome of *Shelby County v. Holder*, Alabama’s challenge to the constitutionality of the Voting Rights Act.¹⁰³⁷ The day after *Shelby County* was decided, immobilizing Section 5 of the Act, Alabama—in lock step with other formerly covered jurisdictions—announced it would implement its photo ID law.¹⁰³⁸

The plaintiffs challenged the photo ID law as violating Section 2 of the Voting Rights Act of 1965 on the basis that it was “enacted and/or operate...with the purpose or effect of abridging or denying the right to vote on account of race” and the Fourteen and Fifteenth Amendments to the U.S. Constitution because the defendants “intentionally enacted or

¹⁰³¹ First Amended Complaint at ¶ 70, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. May 3, 2016).

¹⁰³² *See* Brief for Plaintiffs-Appellants at 38-42, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018).

¹⁰³³ *See* Brief for Plaintiffs-Appellants at 38-39, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Feb. 21, 2018); *see also* Scott Douglas, *The Alabama Senate Race May Have Already Been Decided*, NY TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/opinion/roy-moore-alabama-senate-voter-suppression.html>; *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1259 (N.D. Ala. 2018).

¹⁰³⁴ *See United States v. McGregor*, 824 F.Supp.2d 1339, 1345 (M.D. Ala. 2011).

¹⁰³⁵ Brendan Kirby, *Jury at bingo trial hears Sen. Scott Beason’s infamous ‘aborigines’ comment, Ronnie Gilley jailhouse call*, AL.COM (Feb. 17, 2012), https://www.al.com/live/2012/02/jury_at_bingo_trial_hears_sen.html.

¹⁰³⁶ Complaint at ¶ 58, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015); *see also Greater Birmingham Ministries*, 284 F. Supp. 3d at 1259.

¹⁰³⁷ Complaint at ¶¶ 72-73, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015).

¹⁰³⁸ *See id.* at ¶¶ 74-75.

operate the law to deny or abridge the right to vote on account of race or color.”¹⁰³⁹ Over 118,000 registered voters did not have the necessary documentation to vote under the photo ID law, a number that skewed disproportionately Black and Latino.¹⁰⁴⁰ It was also later shown that thousands of voters had their provisional ballots rejected due to the restrictive photo ID law,¹⁰⁴¹ and African Americans voters were nearly five times more likely to have their ballots rejected than white voters. Thousands more people likely did not appear at the polls to vote because they lacked the required photo ID.¹⁰⁴²

After cross summary judgment motions were filed, the Alabama district court granted summary judgment for the defendants in January 2018. The court ruled that because it found the photo ID law did not “prevent anyone from voting” or otherwise impose a “substantial burden” on African Americans, it was not unconstitutional.¹⁰⁴³ Despite significant evidence that the law was motivated by an intent to discriminate, the district court dismissed the plaintiff’s suit because it considered the law’s requirements as mere inconveniences. Based on its determination that the law’s burden on voters was slight, the district court refused to consider the plaintiffs’ evidence that the law targeted minority communities.

The plaintiffs filed a notice of appeal with the Eleventh Circuit in January 2018. The ACLU, ACLU of Alabama, Lawyers’ Committee for Civil Rights Under Law, and Campaign Legal Center, filed an amicus in support of the appellants.¹⁰⁴⁴ In July 2020, the Eleventh Circuit upheld the granting of summary judgment for the defendants, finding that providing a photo ID is a “minimal burden on Alabama’s voters.”¹⁰⁴⁵

81. Democratic National Committee v. Hobbs – Arizona 2016

ACLU and ACLU of Arizona participating as amicus

The Democratic National Committee and Arizona Democratic Party filed suit in 2016 challenging under the First, Fourteenth and Fifteenth Amendments, and Section 2 of the Voting Rights Act, two Arizona election practices: (1) Arizona’s requirement that in-person voters cast their ballots only in their assigned precinct, which Arizona enforces by not

¹⁰³⁹ Second Amended Complaint, *Greater Birmingham Ministries v. Merrill*, No. 2:15-cv-02193 (N.D. Ala. Dec. 6, 2016).

¹⁰⁴⁰ Complaint, *Greater Birmingham Ministries v. Merrill*, No 2:15-cv-02193 (N.D. Ala. Dec. 2, 2015).

¹⁰⁴¹ Appellant’s Brief at 27, *Greater Birmingham Ministries v. Merrill*, No. 18-10151 (11th Cir. Feb. 21, 2018).

¹⁰⁴² *Ibid.*

¹⁰⁴³ *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1277 (N.D. Ala. 2018).

¹⁰⁴⁴ See Brief of ACLU et al. as *Amicus Curiae* in Support of Appellants, *Greater Birmingham Ministries v. Merrill*, No. 18-10151 (11th Cir. Mar. 1, 2018).

¹⁰⁴⁵ *Greater Birmingham Ministries v. Sec’y of State for Alabama*, 966 F.3d 1202 (11th Cir. 2020), opinion vacated and superseded sub nom. *Greater Birmingham Ministries v. Sec’y of State for State of Alabama*, 992 F.3d 1299 (11th Cir. 2021) (superseding opinion reaches the same holding and follows a similar discussion).

counting ballots cast out of precinct even for races in which the voter is qualified to vote, and (2) House Bill 2023, which makes it a felony for third parties to collect early ballots from voters unless the collector falls into one of several exceptions.¹⁰⁴⁶

After a lengthy bench trial, the district court dismissed the lawsuit on May 10, 2018, finding that the plaintiffs had not carried their burden of showing “that the challenged election practices severely and unjustifiably burden voting and associational rights, disparately impact minority voters such that they have less opportunity than their non-minority counterparts to meaningfully participate in the political process, or that Arizona was motivated by a desire to suppress minority turnout when it placed limits on who may collect early mail ballots.”¹⁰⁴⁷ The plaintiffs’ evidence included analyses by three experts, and testimony from numerous lay witnesses, including voters, election officials, and community advocates who collected ballots. A divided panel of the Ninth Circuit affirmed on September 12, 2018.¹⁰⁴⁸ The panel majority upheld the district judge’s findings that Arizona’s requirements “imposed only a minimal burden on voters and were adequately designed to serve Arizona’s important regulatory interests.”¹⁰⁴⁹ The dissenting judge stated that the in-precinct requirement “has a disproportionate effect on racial and ethnic minority groups,” and the ballot collection provision “serves no purpose aside from making voting more difficult.”¹⁰⁵⁰ Plaintiffs sought a rehearing en banc, which was granted on January 2, 2019. En banc oral argument took place on March 27, 2019.

The ACLU filed an amicus brief in support of rehearing en banc on September 24, 2018, and an amicus brief on rehearing, on January 23, 2019. The ACLU principally addressed the correct legal standard for vote denial claims under Section 2 of the Voting Rights Act. The brief argued that the district court erred by treating the case as one concerning vote dilution, instead of using distinct principles from the Section 2 vote denial analysis, which led the court to require an arbitrary numerical threshold for showing a discriminatory burden on voters. It further argued that the district court committed “a plain legal error” by failing to conduct a totality-of-the-circumstances analysis of how race-based discrimination and disparities relate to the burdensome nature of the voting restriction at issue, as called for by the text of the statute.¹⁰⁵¹

En banc, the Ninth Circuit reversed the judgment of the district court, finding that the out of precinct policy in Arizona violates the results test of Section 2 of the Voting Rights Act and that H.B. 2023 not only violates Section 2, but also violates the Fifteenth

¹⁰⁴⁶ Complaint, *Democratic Nat’l Comm v. Hobbs*, No. CV-16-01065-PHX-DLR (D. Ariz. 2016).

¹⁰⁴⁷ *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 882-83 (D. Ariz. 2018).

¹⁰⁴⁸ *Democratic Nat’l Comm. v. Reagan*, 904 F.3d 686 (9th Cir. 2018).

¹⁰⁴⁹ *Id.* at 697.

¹⁰⁵⁰ *Id.* at 732.

¹⁰⁵¹ Brief of ACLU as Amicus Curiae, *Democratic Nat’l Comm. v. Hobbs*, No. 8-15845 (9th Cir. Sept. 25, 2018).

Amendment.¹⁰⁵² On appeal to the Supreme Court, the ACLU filed another amicus brief urging the Court to adopt the manageable test already adopted by the majority of federal courts of appeals to consider the issue, which involves a fact-based, localized, totality-of-the-circumstances analysis.¹⁰⁵³ In July 2021, the Supreme Court reversed the en banc panel, holding that both policies neither violated the Voting Rights Act nor were enacted with a discriminatory purpose.¹⁰⁵⁴ Justice Alito’s majority opinion stated that having to find the proper polling place is a normal burden of voting and that the state attempted to accommodate voters while having a strong interest in precinct-based voting and small number of total number of out-of-precinct ballots. Regarding Arizona’s ballot collection ban, the opinion held that there is no significant burden on voters as there are many ways to return a ballot and that the prevention of fraud is a legitimate state interest, while plaintiffs did not show the extent of disparate impact. Justice Kagan dissented, writing:

Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too “radical”—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters. I could say—and will in the following pages—that this is not how the Court is supposed to interpret and apply statutes.¹⁰⁵⁵

She concluded that as in *Shelby County* decision, the Court once again rewrote and limited the bounds of the Voting Rights Act, which is intended to provide broad protection of the equal opportunity to vote and “designed to bring about ‘the end of discrimination in voting.’”¹⁰⁵⁶

82. Husted v. A. Philip Randolph Institute – Ohio 2016

In *Husted v. A. Philip Randolph Institute*, the Supreme Court, in a 5-4 decision, upheld Ohio’s voter purge practice, which the plaintiffs argued violated the National Voter Registration Act (NVRA).¹⁰⁵⁷ The case involved a challenge to Ohio’s practice of removing voters from its registration rolls due to a voter’s past failure to vote. Under the process, Ohio identified registrants for potential removal from the voter rolls if they did not vote in

¹⁰⁵² *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir.), *cert. granted sub nom. Arizona Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221, 207 L. Ed. 2d 1165 (2020), and *cert. granted sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222, 207 L. Ed. 2d 1165 (2020), and *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021).

¹⁰⁵³ Brief of Amicus Curiae the ACLU and the ACLU of Arizona in Support of Respondents, *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021).

¹⁰⁵⁴ *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021).

¹⁰⁵⁵ *Id.* at *2-*3 (Kagan, J., dissenting) (citations omitted).

¹⁰⁵⁶ *Id.*

¹⁰⁵⁷ *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).

one election; the state removed those voters if they did not vote in the following four-year period or respond to a notice by the state. This process wrongfully presumed that registrants' failure to vote meant these voters had moved and often removed them from the rolls without their knowledge. In 2015, Ohio conducted a massive voter purge based on this practice and removed tens of thousands of eligible voters who had not moved or otherwise become ineligible to vote since they last participated in November 2008 and were left unable to vote in the 2015 elections.¹⁰⁵⁸ These voters showed up to vote but could not because they had unwittingly been removed from the rolls.¹⁰⁵⁹ The "failure to vote" process disproportionately impacted voters of color and low income individuals, including the homeless.¹⁰⁶⁰

The ACLU, ACLU of Ohio, and Demōs, representing A. Phillip Randolph Institute and Northeast Ohio Coalition for the Homeless, challenged Ohio's voter purge practice, arguing that it violated Section 8 of the NVRA, which regulates states' list maintenance practices.¹⁰⁶¹ During the course of litigation, the ACLU put forward evidence that Ohio removed tens of thousands of voters under this practice, leaving many people to arrive at the polls to vote only to learn that they were no longer registered. The plaintiffs sought an injunction to stop the Ohio Secretary of State from removing more people from Ohio's voter registration rolls and require the Secretary either reinstate eligible voters who were improperly removed or count their provisional ballots.

The district court found in favor of Ohio¹⁰⁶² but was reversed on appeal by the Sixth Circuit.¹⁰⁶³ On review, in a 5-4 decision, the Supreme Court found that Ohio's procedure was not prohibited by the NVRA, reasoning that while the plain language of the statute forbids the removal of a voter where failure to vote is the sole reason for removal, Ohio's procedure did not do so because it required removal of voters based on a failure to vote for two years, plus a failure to return a notice card and failure to vote for four additional years. Justice Sotomayor dissented separately, arguing:

Congress enacted the NVRA against the backdrop of substantial efforts by States to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. It is unsurprising in light of the history of such purge programs that numerous *amici* report that the Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters. As one example, amici point to an investigation that revealed that in

¹⁰⁵⁸ Plaintiffs' First Amended Complaint at ¶ 6, *Ohio A. Philip Randolph Institute v. Husted*, No. 2:16-CV-303 (S.D. Ohio Apr. 6, 2016).

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ *Id.* at ¶ 48.

¹⁰⁶¹ 52 U.S.C. § 20507.

¹⁰⁶² *Ohio A. Phillip Randolph Institute v. Husted*, No. 2:16-CV-303, 2016 WL 3542450 (S.D. Ohio June 29, 2016).

¹⁰⁶³ *Ohio A. Phillip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016).

Hamilton County, ‘African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity’ since 2012, as ‘compared to only 4% of voters in a suburban, majority-white neighborhood.’...*Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process.”¹⁰⁶⁴

She concluded that the Court’s decision “entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.”¹⁰⁶⁵

Despite this narrow loss, the parties entered a settlement regarding the inadequacy of Ohio’s notification to voters flagged for removal.¹⁰⁶⁶ For the term of the settlement, Ohio is required to permit qualified voters who were removed without proper notice to cast a ballot and have it counted, and the Ohio Secretary of State is required to send eligible voters who are not registered a mailing informing them of that fact and of the registration deadline. The settlement further directs boards of elections to use motor vehicle records to prevent people queued for removal in 2019 from being removed if their motor vehicle records indicate they still reside at the address where they are registered.

83. Howell v. McAuliffe – Virginia 2016

ACLU and ACLU of Virginia participating as amicus

On April 22, 2016, Virginia Governor Terry McAuliffe issued an executive order that granted restoration of civil rights to an estimated 206,000 Virginians who had completed terms of incarceration and been released from supervised probation or parole.¹⁰⁶⁷ The governor issued the Executive Order pursuant to a section of Virginia’s state constitution that provides, “No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.”¹⁰⁶⁸ The governor issued similar orders periodically thereafter to restore the rights of Virginians with felony convictions who had since completed their sentences of incarceration and supervised release.¹⁰⁶⁹ On May 23, 2016, six voters in their individual

¹⁰⁶⁴ *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018) (Sotomayor, J., dissenting).

¹⁰⁶⁵ *Id.*

¹⁰⁶⁶ Settlement Agreement, *Ohio A. Philip Randolph Institute v. LaRose*, No. 2:16-cv-303 (S.D. Ohio May 17, 2016).

¹⁰⁶⁷ Va. Exec. Order No. 13 (Apr. 22, 2016); *see also Howell v. McAuliffe*, 292 Va. 320, 327-28 (Va. 2016).

¹⁰⁶⁸ VA. CONST. art. II, § 1.

¹⁰⁶⁹ *Howell*, 292 Va. at 328.

capacities filed a lawsuit against the Governor, challenging his legal authority to issue and implement the Executive Order. They argued that the orders had injured them because they “diluted Petitioners’ votes, created an illegitimate electorate, and threatened the legitimacy of the November elections.”¹⁰⁷⁰ The plaintiffs asked the Supreme Court of Virginia to issue a writ of mandamus ordering the cancelation of all voter registrations accepted pursuant to the executive orders and a writ of prohibition proscribing further action by state officials in restoring voting rights “en masse.”

In June 2016, the ACLU and ACLU of Virginia filed an amicus brief supporting the Governor’s authority under the Virginia Constitution to issue the executive order. The brief also argued that the executive order was consistent with the goals of rehabilitation and reintegration of ex-offenders and of remedying racial inequality resulting from the racial impact of Virginia’s felony disenfranchisement law.¹⁰⁷¹ The brief was accompanied by affidavits from three individuals who had their rights restored as a result of the Governor’s order and who documented the human impact of both disenfranchisement and rights restoration.¹⁰⁷²

In July 2016, the Supreme Court of Virginia concluded that the governor violated the section of the Virginia Constitution disqualifying individuals convicted of felonies from voting unless their rights are restored, and that he exceeded the authority granted to him by the state constitution by issuing a blanket, group pardon and restoration of voting rights without providing individualized review of each person.¹⁰⁷³ The court ordered the Secretary of the Commonwealth, the State Board of Elections, and the Department of Elections to take appropriate measures to reverse the executive orders and cancel the voter registrations of individuals who had regained their voting rights as a result of the Governor’s actions.¹⁰⁷⁴ At least 13,000 individuals had their voter registrations cancelled as a result.¹⁰⁷⁵

The Governor subsequently pledged to quickly restore the voting rights of affected Virginians by conducting individual reviews and restoration orders to eligible persons to comport with the court’s decision.¹⁰⁷⁶ In August 2016, the petitioners filed a motion asking

¹⁰⁷⁰ Verified Petition for Writs of Mandamus and Prohibition and Memorandum in Support of Verified Petition at 15, *Howell v. McAuliffe*, No. 160784 (Va. May 23, 2016).

¹⁰⁷¹ *See* Brief of ACLU and ACLU of Virginia as Amici Curiae in Support of Respondents, *Howell v. McAuliffe*, No. 160784 (Va. 2016).

¹⁰⁷² *Id.*

¹⁰⁷³ *Howell*, 292 Va. at 342-53.

¹⁰⁷⁴ *Id.* at 351-53.

¹⁰⁷⁵ *Id.* at 327-28.

¹⁰⁷⁶ Laura Vozzella, *Virginia's McAuliffe to Announce Restoration of Voting Rights to 13,000 Felons*, WASH. POST (Aug. 21, 2016), https://www.washingtonpost.com/local/virginia-politics/virginias-mcauliffe-to-announce-restoration-of-voting-rights-to-13000-felons/2016/08/20/590b43ee-6652-11e6-96c0-37533479f3f5_story.html.

the court to order the Governor to prove that he was obeying the court's decision.¹⁰⁷⁷ The motion alleged that Governor McAuliffe was circumventing the court's orders because there was no substantive difference between the previous Executive Orders and subsequent individualized reviews and restoration orders.¹⁰⁷⁸ The Governor and other officials filed a lengthy response outlining the measures taken to comply with the court's decision.¹⁰⁷⁹ The court denied the petitioner's motion in September 2016.¹⁰⁸⁰ Since then, Governor McAuliffe and his successor, Governor Northam, have restored the voting rights to former offenders upon completion of sentence on an individual, person-by-person basis.

84. Florida Democratic Party v. Scott – Florida 2016

On October 6, 2016, about one week before Florida's voter registration deadline, Florida Governor Rick Scott declared a state of emergency due to Hurricane Mathew, a massive, life-threatening hurricane, which caused the mandatory evacuation of 1.5 million people in the state and already killed several hundred people in the Caribbean in the days prior.¹⁰⁸¹ The hurricane resulted in the closure of state's election offices in 43 counties during the critical days before the end of the voter registration period.¹⁰⁸² Yet on the same day he declared the state of emergency, Governor Scott also refused to extend the voter registration deadline for the 2016 Presidential election, which in Florida was October 11, 2016,¹⁰⁸³ despite the fact that other states impacted by the hurricane had done so.¹⁰⁸⁴ At the time, Florida did not offer online voter registration or same-day registration, instead requiring registrants to complete a paper form and deliver it in person or by mail to a local elections office or voter registration organization for submission.¹⁰⁸⁵ For comparison, during the six days prior to the voter registration deadline in October 2012, roughly 116,000 Floridians had registered to vote.¹⁰⁸⁶

On October 9, 2016, the Florida Democratic Party filed suit in federal court to compel the state to extend the voter registration deadline.¹⁰⁸⁷ On October 10, 2016, the district court

¹⁰⁷⁷ Petitioners' Motion to Show Cause, *Howell v. McAuliffe*, No. 160784 (Va. Aug. 31, 2016).

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ Response to Petitioners' Motion to Show Cause, *Howell v. McAuliffe*, No. 160784 (Va. Sept. 12, 2016).

¹⁰⁸⁰ Order Denying Motion to Show Cause, *Howell v. McAuliffe*, No. 160784 (Va. Sept. 15, 2016).

¹⁰⁸¹ Complaint-in-Intervention at ¶ 2, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

¹⁰⁸² *Id.*

¹⁰⁸³ Complaint for Emergency Injunctive and Declaratory Relief at ¶¶ 21-22, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

¹⁰⁸⁴ *Fla. Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1257-58 (N.D. Fla. 2016).

¹⁰⁸⁵ Complaint for Emergency Injunctive and Declaratory Relief at ¶ 17, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

¹⁰⁸⁶ Complaint-in-Intervention at ¶ 8, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

¹⁰⁸⁷ Complaint for Emergency Injunctive and Declaratory Relief, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 9, 2016).

granted the plaintiffs' request for a temporary restraining order that directed state officials to extend the voter registration deadline by one day, finding that the plaintiffs were likely to prevail on the merits of their Fourteenth Amendment claim.¹⁰⁸⁸ On October 11 the ACLU intervened on behalf of two voting rights organizations, New Florida Majority and Mi Familia Vota, which were actively involved in voter registration activities in the state. The motion to intervene argued that minorities and young people would be particularly burdened and impacted by the state's refusal to extend the registration deadline, since these groups registered at higher rates in the final days of the voter registration period.¹⁰⁸⁹ The plaintiffs argued that the state's enforcement of the original deadline placed an undue burden on the right to vote in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act.¹⁰⁹⁰ On October 12, 2016, the district court agreed with the plaintiffs and entered a preliminary injunction that ordered state officials to extend the deadline for six additional days.¹⁰⁹¹ The state did not appeal, and more than 110,000 voters registered during the extension period.

85. Bethea v. Deal – Georgia 2016

In 2016, individual and organizational plaintiffs, the Georgia State Conference of the NAACP and WickForce, filed a complaint for injunctive and declaratory relief and an emergency temporary restraining order against the Georgia Secretary of State. The complaint alleged violations of the Fourteenth Amendment, Section 2 of the Voting Rights Act, and Section 8 of the National Voter Registration Act of 1993 due to the state's failure to extend the voter registration deadline for the 2016 November Presidential election.¹⁰⁹² In October 2016, Hurricane Matthew bore down on the East Coast during the last days of the voter registration period. With six days left in the registration period, the Governor of Georgia issued a mandatory evacuation order impacting five hundred thousand people in parts of six counties across the state and a voluntary evacuation order for residents in low lying areas encompassing 30 Georgia counties.¹⁰⁹³ In all, one million Georgians were subject to mandatory or voluntary evacuation.¹⁰⁹⁴

Yet despite the massive disruption due to Hurricane Matthew during the busiest time of voter registration, state officials inexplicably refused to extend the registration deadline¹⁰⁹⁵ even though it was well-known to state and local election officials that voter registration would have been particularly high during this period. During the final days of the

¹⁰⁸⁸ *Fla. Democratic Party*, 215 F. Supp. 3d 1250.

¹⁰⁸⁹ Complaint-in-Intervention at ¶¶ 9-10, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 11, 2016).

¹⁰⁹⁰ *Id.* at ¶¶ 20-27.

¹⁰⁹¹ Order Granting Preliminary Injunction, *Fla. Democratic Party v. Scott*, No. 4:16-CV-00626 (N.D. Fla. Oct. 12, 2016).

¹⁰⁹² Amended Complaint for Injunctive and Declaratory Relief, *Bethea v. Deal*, No. 2:16-cv-00140 (S.D. Ga. Oct. 18, 2016).

¹⁰⁹³ *Id.* at ¶ 3.

¹⁰⁹⁴ *Id.* at ¶ 18.

¹⁰⁹⁵ *Ibid.*

registration period for the 2012 Presidential election over 77,000 people registered to vote in the state.¹⁰⁹⁶ Due to closures, power outages, and other factors exacerbated by Hurricane Matthew, many voters were unable to register by the October 11, 2016, deadline.¹⁰⁹⁷ The failure to extend voter registration impacted racial and ethnic minorities disproportionately during the last few days of the registration period.¹⁰⁹⁸ The complaint cited statistics showing that in the run-up to the October 2012 election, approximately 29.5% of registered voters in Georgia were Black, and of the people who registered to vote during the final days of the registration period, approximately 49.7% were Black.¹⁰⁹⁹ Compounding the issue, online voter registration opportunities were not available to many residents in evacuation areas due to power outages.¹¹⁰⁰

The district court issued an order denying the plaintiffs' request for a temporary restraining order in October 2016. The court found that the plaintiffs failed to show that their injury outweighed the potential damage a restraining order would have to the state's interest in running an efficient election because the "requested extension would require local officials to both conduct early voting [beginning on October 17] and continue to register voters through October 25, 2016."¹¹⁰¹ The matter was voluntarily dismissed without prejudice on motion of the plaintiffs in November 2016.¹¹⁰²

86. Mullins v. Cole – West Virginia 2016

This class action suit for declaratory and injunctive relief was filed on October 20, 2016, in West Virginia state court against the clerk of Cabell County, West Virginia, for refusal to process registration forms submitted through the state's online registration system. The complaint alleged violations of the Equal Protection Clause and Due Process Clause of the Constitution and provisions of the West Virginia Constitution.¹¹⁰³ West Virginia had established an online voter registration system but the clerk of Cabell County refused to process online applications based on her representation in a letter to registrants that the "website does not provide the information that is required, by law, to be provided to this office in order to process a voter applications."

The court granted the plaintiffs' motion for a temporary restraining order after a hearing on October 25, 2016, and the plaintiffs' request for a preliminary injunction on November 21, 2016. The preliminary injunction was converted to a permanent injunction on January 24, 2017. The final order was not appealed by the defendant.

¹⁰⁹⁶ *Id.* at ¶ 4.

¹⁰⁹⁷ *Id.* at ¶ 5.

¹⁰⁹⁸ *Id.* at ¶ 15.

¹⁰⁹⁹ *Ibid.*

¹¹⁰⁰ *Id.* at ¶ 38.

¹¹⁰¹ *Bethea v. Deal*, 2:16-cv-00140, 2016 WL 6123241 at *3 (S.D. Ga. Oct. 19, 2016).

¹¹⁰² *Order, Bethea v. Deal*, No. 2:16-cv-00140 (S.D. Ga. Nov. 11, 2016).

¹¹⁰³ Class Action Complaint, *Mullins v. Cole*, No. 3:16-cv-9918 (S.D. W. Va. Oct. 20, 2016).

In the order granting the plaintiff's request for a preliminary injunction the court found the Clerk of Cabell County's assertion that the West Virginia registration website did not provide the necessary information to process voter registration patently untrue¹¹⁰⁴. Further, the court found that the failure of the Clerk to include information in the letter to online registrants as to how to complete a paper or alternate registration led to a "high likelihood that online applicants in Cabell County will be confused about whether they can vote or not if they return a paper application after the October 18 deadline."¹¹⁰⁵ The Cabell County Clerk's actions resulted in "disparate treatment and disenfranchisement of thousands of Cabell County residents."¹¹⁰⁶

87. Eason v. N.Y. State Bd. of Elections – New York 2016

This case was filed on behalf of the National Federation of the Blind, the Center for the Independence of the Disabled, and individual plaintiffs who are blind. States are required by law to meet accessibility and confidentiality standards when providing services such as online voter registration; the complaint alleged that New York is failing to comply with that requirement. Specifically, the plaintiffs alleged that New York's online voter registration system violated these standards because the DMV web pages and downloadable forms could not be read out loud by the screen-reader software used by blind and low-vision people to hear and navigate computer screen content.¹¹⁰⁷ The software also could not read the fillable form's section on party affiliation on the Board of Elections' website; blind and low-vision voters were forced to disclose this private information when they printed out the form to get someone else to help them sign it, denying them the same degree of privacy and independence afforded to other voters.¹¹⁰⁸

The lawsuit alleged violations of the Americans with Disabilities Act and Rehabilitation Act. It sought immediate adjustments to ensure the websites were legally compliant, creation of Board of Elections policies that ensured accessibility and provided a clear path of accountability, and the development of policies and procedures to ensure the sites remained accessible.¹¹⁰⁹

The parties reached a settlement on February 15, 2019. Under the settlement agreement, the State Board of Elections and DMV agreed to make their websites accessible to screen-access software within two years.¹¹¹⁰ They also agreed to work with an accessibility

¹¹⁰⁴ *Mullins v. Cole*, 218 F.Supp.3d 488, 494 (S.D. W. Va. 2016).

¹¹⁰⁵ *Id.* at 495.

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ Complaint for Declaratory and Injunctive Relief, *Eason v. N.Y. State Bd. Of Elections*, No. 1:16-cv-04292 (S.D.N.Y. June 9, 2016).

¹¹⁰⁸ *Id.*

¹¹⁰⁹ *Id.*

¹¹¹⁰ See Settlement Agreement and Stipulated Order of Dismissal at 4-5, *Eason v. N.Y. State Bd. Of Elections*, No. 1:16-cv-04292 (S.D.N.Y. Feb. 15, 2019).

consultant and put in place practices and procedures to ensure that the websites stay accessible in the long term.¹¹¹¹

88. Chelsea Collaborative v. Galvin – Massachusetts 2016

This case was filed on November 1, 2016, in Massachusetts state court to challenge the state's requirement that eligible Massachusetts voters register 20 days before an election. The complaint alleged that under the state's voter registration cutoff law thousands of eligible people are barred from voting in each election and that this arbitrary deadline interferes with the fundamental right to vote and unnecessarily disenfranchises voters.¹¹¹² The ACLU and ACLU of Massachusetts represented a set of individual and organizational plaintiffs that engaged in voter registration and get-out-the-vote activities. The lawsuit argued the law violated the Massachusetts Declaration of Rights and Massachusetts Constitution and requested the court to issue an order permitting the three individual plaintiffs to vote in the November 2016 election.¹¹¹³ The plaintiffs argued that under the Massachusetts Constitution, a state statute impinging on the fundamental right to vote can only be upheld if it promotes a compelling state interest that could not be achieved by a less restrictive means¹¹¹⁴ and that the arbitrary 20-day voter registration cutoff period was not the least restrictive way to advance a compelling state interest, particularly in light of the significant constitutional injury done unto potential voters of being disenfranchised and the rapidity with which election clerks were able to process voter registration forms.¹¹¹⁵ The plaintiffs also moved for a preliminary injunction to permit them to vote in the November 2016 presidential election,¹¹¹⁶ which the court granted.¹¹¹⁷ After a four-day trial, the court issued a ruling in July 2017, agreeing that the 20-day voter registration cutoff law was unconstitutional and disenfranchises thousands of potential voters throughout the Commonwealth.¹¹¹⁸

Secretary of the Commonwealth William Galvin appealed the decision to the Massachusetts Supreme Judicial Court. The court vacated the lower court decision, holding that the 20-day blackout period for voter registration prior to an election did not violate the Massachusetts Constitution.¹¹¹⁹ In reaching its decision, the court determined that strict scrutiny was inapplicable because the voter registration blackout period did not pose a

¹¹¹¹ *Id.* at 7.

¹¹¹² Class Action Complaint for Declaratory and Injunctive Relief, *Chelsea Collaborative v. Galvin*, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 1, 2016).

¹¹¹³ *Id.* at ¶ 9.

¹¹¹⁴ *Id.* at ¶ 25.

¹¹¹⁵ *Id.* at ¶¶ 45-53.

¹¹¹⁶ Emergency Motion for Preliminary Injunction, *Chelsea Collaborative v. Galvin*, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 1, 2016).

¹¹¹⁷ Order on Motion for Preliminary Injunction at 10-11, *Chelsea Collaborative v. Galvin*, No. 16-cv-3354 (Mass. Sup. Ct. Nov. 7, 2016).

¹¹¹⁸ See *Chelsea Collaborative v. Galvin*, No. 16-cv-3354, 2017 WL 4125039 (Mass. Super. Ct. July, 25, 2017).

¹¹¹⁹ *Chelsea Collaborative, Inc. v. Sec'y of the Commonwealth*, 100 N.E.3d 326 (Mass. 2018).

substantial enough interference with the right to vote to justify application of that standard.¹¹²⁰ In its decision, however, the court acknowledged that given current realities the basis for the 20-day voter registration deadline might need to be reconsidered. The court also concluded that “having chosen to impose a deadline for voter registration prior to an election, the Legislature has a continuing duty to ensure that the deadline is no further from election day than what the Legislature reasonably believes is consistent with the Commonwealth’s interest in conducting a fair and orderly election.”¹¹²¹ The ruling noted that a commission that lawmakers established in 1993 to study the voter registration deadline never met and that a task force formed under a 2014 elections law also did not meet or produce a report by its August 1, 2017, deadline.¹¹²² “Although the Legislature appeared to have a reasoned basis for requiring voters to register twenty days in advance of an election in 1993, the mechanisms put in place for a periodic review of that requirement seem to have failed. Thus, we have a concern that, given the passage of time, the reasoned basis for the 20-day blackout period may need to be reconsidered.”¹¹²³

89. Navajo Nation Human Rights Comm’n v. San Juan Cty. – Utah 2016

Representing the Navajo Nation Human Rights Commission and individual Navajo voters, the ACLU, ACLU of Utah, and Lawyers’ Committee for Civil Rights Under Law filed suit in 2016 against San Juan County. The lawsuit alleged that the county’s decision to switch to a mail-only voting system and to designate the only in-person voting location in the predominantly white part of the county adversely impacted Navajo voters—who constituted 49% of the voting age population of the county—in violation of federal law.¹¹²⁴

The predominantly mail-only system was highly problematic for Navajo voters for several reasons. First, it did not comply with San Juan County’s obligations under Section 203 of the Voting Rights Act to provide adequate language assistance to limited English proficient Navajo voters. Navajo is an unwritten language, and the closure of all but one voting location and the switch to a mail-only ballot system interfered with the county’s ability to provide adequate oral assistance, and thus, the ability of Navajo voters to vote.¹¹²⁵ Second, the postal service was unreliable with limited delivery service to rural parts of the county where many Navajo lived, making it difficult for many Navajo voters to receive and return their ballots under a mail-only system.¹¹²⁶

The only way to vote in-person was at the county clerk’s office in the county seat of Monticello, which required Navajo residents to travel more than twice as long as white residents in order to vote in person. On average, the trip for a Navajo voter took over two

¹¹²⁰ *Id.* at 333-335.

¹¹²¹ *Id.* at 328.

¹¹²² *Id.* at 338-340.

¹¹²³ *Id.* at 340.

¹¹²⁴ Complaint at ¶ 1, *Navajo Nation Human Rights Comm’n v. San Juan Cty.*, No. 2:16-cv-00154 (D. Utah Feb. 25, 2016).

¹¹²⁵ *Id.* at ¶ 4.

¹¹²⁶ *Id.* at ¶ 6.

hours round trip, while the trip for white voters took, on average, under an hour.¹¹²⁷ For residents living in the southwest parts of the county, which were majority Navajo, the round trip to the Monticello polling location took even longer, sometimes taking between nine and ten hours.¹¹²⁸ The significantly greater average distance required for Navajo residents to reach the county seat of Monticello, in the context of socioeconomic factors, such as disparate rates of poverty and access to reliable public and private transportation, and the history of racial discrimination and hostility toward Navajo people, placed a severe and disproportionate burden on Navajo residents' ability to vote.¹¹²⁹ The plaintiffs alleged that the predominantly mail-only system discriminated against Navajo voters in violation of Sections 2 and 203 of the Voting Rights Act and imposed a disproportionate and severe burden on Navajo voters' fundamental right to vote in violation of the Fourteenth Amendment.¹¹³⁰

In September 2017, a federal district court granted the plaintiffs' motion to dismiss the defendants' counterclaims, which alleged violations of federal civil rights statutes and Utah tort law, and allowed the lawsuit to proceed to a trial on the merits.¹¹³¹ In February 2018, the parties reached a positive settlement agreement regarding both claims.¹¹³² The county agreed to implement various measures aimed at providing meaningful and effective language assistance and to create equal opportunities for Navajo voters for the 2018 elections. These changes included providing in-person voting and language assistance at several locations inside the Navajo reservation during the 28 days before an election; maintaining three polling locations with language assistance on the Navajo reservation for Election Day voting; and ensuring quality interpretation of election information and materials into the Navajo language.¹¹³³ A motion to dismiss was signed, stipulating that the court would keep jurisdiction over the case.¹¹³⁴

90. League of Women Voters of the U.S. v. Newby – Washington, D.C. 2016

This case followed up the seminal 2013 case *Arizona v. Inter Tribal Council of Arizona (ITCA)*, in which the Supreme Court ruled that Arizona was prohibited from requiring documentary proof of citizenship for individuals using the federal voter registration form (Federal Form), unless the proof of citizenship requirement was approved by the U.S. Election Assistance Commission (EAC).¹¹³⁵ In *ITCA*, the Court held that the National Voter Registration Act (NVRA) preempted Arizona's documentary proof of citizenship

¹¹²⁷ *Id.* at ¶ 31.

¹¹²⁸ *Id.* at ¶ 32.

¹¹²⁹ *Id.* at ¶ 7

¹¹³⁰ *Id.* at ¶¶ 1, 8.

¹¹³¹ *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1149 (D. Utah 2017).

¹¹³² Order re: Stipulated Settlement and Motion to Dismiss, *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, No. 2:16-cv-00154 (D. Utah Feb. 22, 2018).

¹¹³³ *See generally id.*

¹¹³⁴ *Id.*

¹¹³⁵ 570 U.S. 1 (2013).

requirement and the state’s refusal to register voters using the Federal Form without documentary proof conflicted with the NVRA. In an opinion authored by Justice Scalia, the Supreme Court held that the NVRA requires all states to “accept and use” the Federal Form and noted that “[n]o matter what procedural hurdles a State’s own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available.”¹¹³⁶

Congress enacted the NVRA principally to “increase the number of eligible citizens who register to vote in elections for Federal office” and to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.¹¹³⁷ In enacting the NVRA, Congress debated and voted on the question of whether to permit states to require documentary proof of citizenship in connection with the Federal Form, and expressly rejected such a proposal.¹¹³⁸ The final conference committee report concluded that a documentary proof of citizenship requirement was not consistent with the purpose of the NVRA and risked being interpreted by states as permitting registration requirements that could “seriously interfere with” the mail registration program under the law.¹¹³⁹

Despite the NVRA’s legislative history, since 2006 Arizona had requested multiple times that the EAC amend the Federal Form to require documentary proof of citizenship; the EAC had repeatedly denied those requests. As contemplated by Congress, the EAC determined that documentary proof of citizenship unjustifiably increased the burden on qualified voters to register to vote because—as has been demonstrated repeatedly in litigation addressing documentary proof of identity requirements—many U.S. citizens either do not possess or cannot reasonably retrieve or afford documentation demonstrating citizenship, such as U.S. passports and birth certifications.¹¹⁴⁰ Moreover, Arizona was unable to show that there was a widespread problem with noncitizens registering to vote or voting, and the Federal Form already required that voters attest under penalty of perjury that they are U.S. citizens.

After the Supreme Court’s decision in *ITCA*, Arizona, Kansas, and Georgia submitted new requests to the EAC to require documentary proof of citizenship. The EAC rejected these requests in a formal decision finding that documentary proof of citizenship requirements were inconsistent with the purposes of the NVRA and were not shown to be necessary by any evidence provided by the states.¹¹⁴¹ Arizona and Kansas then filed a lawsuit in the U.S.

¹¹³⁶ *Id.* at 9.

¹¹³⁷ 52 U.S.C. § 20501(b)(1); *see also ITCA*, 570 U.S. at 13.

¹¹³⁸ *See* S. REP. NO. 103-6 (1993); 139 CONG. REC. 5098 (1993); H.R. REP. NO. 103-66, at 23 (1993); 139 CONG. REC. 9231-32 (1993).

¹¹³⁹ H.R. REP. NO. 103-66, at 23-24 (1993).

¹¹⁴⁰ ALICE P. MILLER, U.S. ELECTION ASSISTANCE COMMISSION, MEMORANDUM OF DECISION CONCERNING STATE REQUESTS TO INCLUDE ADDITIONAL PROOF-OF-CITIZENSHIP INSTRUCTIONS ON THE NATIONAL MAIL VOTER REGISTRATION FORM (Jan. 17, 2014).

¹¹⁴¹ *See* Complaint for Declaratory and Injunctive Relief at ¶ 3, *League of Women Voters of the U.S. v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 12, 2016).

District Court for the District of Kansas under the Administrative Procedures Act (APA) seeking a writ of mandamus to compel the EAC to modify their state instructions for the Federal Form to require documentary proof of citizenship.¹¹⁴² After an initial lower court ruling in favor of Arizona and Kansas, the Tenth Circuit reversed the judgment and rejected Kansas and Arizona's APA challenge.¹¹⁴³ The Supreme Court did not grant Kansas' and Arizona's cert petition, effectively letting the Tenth Circuit decision stand.¹¹⁴⁴

In 2016, the new EAC Executive Director, Brian Newby—acting unlawfully and contrary to longstanding Commission policy—sent letters to the Secretaries of State of Alabama, Georgia, and Kansas stating, without explanation, that he would allow them to require documentary proof of citizenship.¹¹⁴⁵ Newby was a former local election official in Kansas and was appointed to his local position by then Kansas Secretary of State Kris Kobach.¹¹⁴⁶ Newby had also publicly supported Kansas' efforts to achieve a documentary proof of citizenship requirement.¹¹⁴⁷ The ACLU, along with the Lawyers' Committee for Civil Rights Under Law, the Brennan Center for Justice, and Project Vote, representing private plaintiffs, filed suit against the EAC, arguing that Newby's action was a violation of EAC policy and federal law.¹¹⁴⁸

The plaintiffs' motion for a preliminary stay of Newby's action was initially denied by the district court¹¹⁴⁹ but was granted on appeal by the D.C. Circuit Court of Appeals, effectively blocking the new registration requirements from coming into effect until the suit was resolved.¹¹⁵⁰ The case returned to the district court, where the judge remanded to the EAC to determine whether Newby had the authority to allow the three states to require documentary proof of citizenship on the Federal Form.¹¹⁵¹ In 2017, the EAC announced a split along partisan lines over whether Newby acted within his authority.¹¹⁵² As a result, the circuit court's preliminary injunction against the burdensome registration requirements remained in place pending final judgment in the district court.

Back in the district court, the parties filed cross-motions for summary judgment. After a substantial delay, the court grant the plaintiffs' motion for summary judgment, holding

¹¹⁴² Complaint, *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095 (D. Kan. Aug. 21, 2013).

¹¹⁴³ See *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).

¹¹⁴⁴ *Kobach v. U.S. Election Assistance Comm'n*, 135 S. Ct. 2891 (2015).

¹¹⁴⁵ Complaint for Declaratory and Injunctive Relief at ¶ 1, *League of Women Voters of the U.S. v. Newby*, No. 1:16-cv-00236 (D.D.C. Feb. 12, 2016)

¹¹⁴⁶ See *id.* at ¶ 4.

¹¹⁴⁷ *Ibid.*

¹¹⁴⁸ *Id.* at ¶¶ 1-2.

¹¹⁴⁹ *League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80 (D.D.C. 2016).

¹¹⁵⁰ *League of Women Voters of United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016).

¹¹⁵¹ *League of Women Voters of United States v. Newby*, 238 F. Supp. 3d 6 (D.D.C. 2017).

¹¹⁵² U.S. ELECTION ASSISTANCE COMMISSION, INTERPRETATION MEMO OF 2015 POLICY (June 1, 2017).

that “Newby failed to apply the appropriate statutory standard in approving the States’ requests and therefore violated the APA.”¹¹⁵³

91. Brown v. Kobach – Kansas 2016

In 2016, the ACLU filed a lawsuit in state court again challenging a dual voter registration system adopted by Kansas Secretary of State Kris Kobach, this time through a temporary regulation purportedly to formalize and provide a legal basis for the system. The suit charged that the dual registration system violated the Kansas Constitution and state law by preventing qualified Kansas voters from voting in state and local elections due solely to their method of registration using the federal voter registration form (Federal Form).¹¹⁵⁴ Among other things, the dual-registration system permitted voters who registered either by using the Federal Form or at the Kansas Division of Vehicles while applying for a driver’s license to vote only for federal offices, not state or local offices, unless they provided a birth certificate, passport or other documentation of citizenship.¹¹⁵⁵ Kobach enacted the temporary regulation on the eve of the 2016 primary elections, putting this system in place despite a state court having already declared it unauthorized and prohibiting its implementation in *Belenky v. Kobach*.¹¹⁵⁶

A Kansas state judge granted a temporary restraining order, reiterating the previous holding that the system was unauthorized and prohibited, and required Kobach to count all the votes—local, state, and federal—of all registered voters in the primary elections.¹¹⁵⁷ Later that year, the court granted a permanent injunction, officially ending Kansas’ dual-registration scheme.¹¹⁵⁸ An appeal of this case was stayed pending the outcome in two related federal cases, *Fish v. Schwab* and *League of Women Voters v. Newby*. In March 2021, the court dismissed the case in response to the Supreme Court’s denial of cert in *Fish v. Schwab*, discussed below, which held that Kansas’s documentary proof of citizenship requirement for voter registration unconstitutional.

92. Fish v. Schwab – Kansas 2016

In February 2016, the ACLU and ACLU of Kansas, on behalf of the League of Women Voters of Kansas and individual Kansans, filed yet another lawsuit challenging Kansas’ enforcement of a documentary proof of citizenship requirement.¹¹⁵⁹ Prior to this latest

¹¹⁵³ *League of Women Voters of United States v. Harrington*, 560 F. Supp. 3d 177, 181 (D.D.C. 2021).

¹¹⁵⁴ Petition Pursuant to K.S.A. Chapter 60 for Declaratory and Injunctive Relief at ¶ 2-3, *Brown v. Kobach*, No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016).

¹¹⁵⁵ *See id.* at ¶¶ 35-36.

¹¹⁵⁶ *See id.* at ¶¶ 27-30, 32-34.

¹¹⁵⁷ Order Granting Temporary Injunction at 7, *Brown v. Kobach*, No. 2016CV550 (Shawnee Cty. Dist. Ct. July 29, 2016) (as memorized in order issued Aug. 11, 2016).

¹¹⁵⁸ Memorandum Decision and Order, *Brown v. Kobach*, No. 2016CV550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016).

¹¹⁵⁹ *See* Complaint for Declaratory and Injunctive Relief, *Fish v. Kobach*, No. 2:16-cv-02105 (D. Kan. Feb. 18, 2016).

lawsuit, the ACLU had twice secured court decisions in separate actions that blocked Kansas Secretary of State Kris Kobach from requiring documentary proof of citizenship from individuals trying to register to vote and dissolved a scheme to create a two-tiered voter registration process in Kansas.¹¹⁶⁰ At issue this time was a 2013 Kansas law that required documentary proof of citizenship from voter registration applicants applying to register to vote at the Kansas Division of Motor Vehicles.

The National Voter Registration Act (NVRA) requires states to provide people with an opportunity to register to vote when they apply for or renew their driver's licenses at a motor vehicle agency and requires applicants to attest under penalty of perjury that they are U.S. citizens.¹¹⁶¹ In enacting the NVRA, Congress specifically rejected allowing states to require documentary proof of citizenship, determining it was "not necessary or consistent with the purposes of this Act" and "could effectively eliminate, or seriously interfere with," the administration or voter registration programs.¹¹⁶² Despite the clear prohibitions of the NVRA regarding documentary proof of citizenship, which had already been extensively litigated in separate lawsuits, Kansans were required to present additional paperwork demonstrating citizenship in order to register to vote at a motor vehicle agency. In some cases they were not informed of the requirement at all, only finding out later that they had been suspended from registering to vote or purged from the voter rolls.¹¹⁶³ In many cases, because of bureaucratic bungling, individuals who had in fact provided documentary proof of citizenship when registering to vote at a motor vehicle agency were still not duly registered.¹¹⁶⁴ At the time the complaint was filed, Kansas' enforcement of its proof of citizenship law had blocked over 35,000 individuals from registering to vote.¹¹⁶⁵

The plaintiffs alleged that the Kansas documentary proof of citizenship law violated the NVRA, which was enacted to make it easier for Americans to register to vote and maintain their registrations. Plaintiffs sought a declaratory judgment that the law was invalid and an order requiring the state to register the thousands of Kansans who had attempted to register to vote at a motor vehicles office but were denied due to their supposed failure to comply with the documentation requirements.¹¹⁶⁶

¹¹⁶⁰ See *Brown v. Kobach*, No. 2016-CV-550 (Shawnee Cty. Dist. Ct. Nov. 4, 2016) (mem. op.); *Belenky v. Kobach*, No. 2013-CV-1331 (Shawnee Cty. Dist. Ct., Aug. 21, 2015). Both lawsuits successfully prevented Kansas from implementing a dual voter registration system, which was intended to prevent qualified Kansas voters from voting in state and local elections if they did not provide documentary proof of citizenship when they registered to vote using the federal voter registration form.

¹¹⁶¹ 52 U.S.C. § 20504.

¹¹⁶² H.R. CONF. REP. NO. 103-66, at 23 (1993).

¹¹⁶³ Complaint for Declaratory and Injunctive Relief at ¶ 1-8, *Fish v. Kobach*, No. 2:16-cv-02105 (D. Kan. Feb. 18, 2016).

¹¹⁶⁴ *Id.* at ¶¶ 46-47.

¹¹⁶⁵ *Id.* at ¶ 6.

¹¹⁶⁶ See *id.* at ¶¶ 67-83.

In June 2018, a federal judge ruled decisively in favor of the plaintiffs and struck down the law after finding it violated the NVRA and the Equal Protection Clause of the U.S. Constitution.¹¹⁶⁷ The court found that “the law has acted as a deterrent to registration and voting for substantially more eligible Kansans than it has prevented ineligible voters from registering to vote” and that the proof of citizenship requirement had “caused confusion” and “eroded confidence in the electoral system.”¹¹⁶⁸ The judge also held Kansas Secretary of State Kris Kobach in contempt of court for failing to implement her preliminary orders in the case and flouting the court’s rules and the rules of civil procedure.¹¹⁶⁹ The court ordered Kobach to pay the ACLU \$26,200 in attorney’s fees and attend CLE classes on civil procedure and evidence.¹¹⁷⁰

Kansas accepted the contempt ruling but appealed the court’s merits ruling to the Tenth Circuit. In March 2019, the Tenth Circuit heard oral arguments for the case. A number of other cases involving similar laws or other actions by Kansas’s election officials were stayed pending the Tenth Circuit’s decision in this case. In April 2020, the Tenth Circuit affirmed the lower court’s ruling and the injunction, finding that the NVRA preempts the documentary proof of citizenship requirement and that the requirement unconstitutionally burdens the right to vote.¹¹⁷¹ Defendants petitioned for review by the Supreme Court, but in December 2020, the Supreme Court denied certiorari, leaving in place the findings of the lower courts.¹¹⁷²

93. Common Cause v Rucho – North Carolina 2016

ACLU and ACLU affiliates participating as amicus

Common Cause filed suit challenging North Carolina’s remedial 2016 redistricting map, which was adopted by the state legislature after the previous map was struck down by a federal court as an unconstitutional racial gerrymander.¹¹⁷³ The challenge was based on allegations that the map was a partisan gerrymander violating the Equal Protection Clause of the Fourteenth Amendment because it diluted the electoral strength of individuals who voted against Republican candidates; the First Amendment, by burdening and retaliating against individuals who voted against Republican candidates on the basis of their political beliefs and association; Article I, Section 2 of the U.S. Constitution, which provides that members of the House of Representatives will be chosen by the people of the several states, by usurping the right of the voters to select their preferred candidates for Congress; and Article 1, Section 4 of the U.S. Constitution because the legislature exceeded its power

¹¹⁶⁷ *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1054 (D. Kan. 2018).

¹¹⁶⁸ *See id.* at 1119.

¹¹⁶⁹ *See Fish v. Kobach*, 294 F. Supp. 3d 1154 (D. Kan. 2018).

¹¹⁷⁰ *Fish*, 309 F. Supp. 3d at 1119.

¹¹⁷¹ *Fish v. Schwab*, 957 F.3d 1105 (10th Cir.), cert. denied, 141 S. Ct. 965, 208 L. Ed. 2d 499 (2020).

¹¹⁷² *Schwab v. Fish*, 141 S. Ct. 965, 208 L. Ed. 2d 499 (2020).

¹¹⁷³ *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016).

granted therein.¹¹⁷⁴ A three-judge panel consolidated the case with a similar challenge, *League of Women Voters v. Rucho*,¹¹⁷⁵ and denied a motion to dismiss filed by the defendants.¹¹⁷⁶

In January 2018, the court in a lengthy opinion found for the plaintiffs on all of their claims, held that the map was an unconstitutional partisan gerrymander, enjoined use of the map, and directed the legislature to adopt yet another remedial map.¹¹⁷⁷ The court denied the defendants' motion to stay its ruling pending a Supreme Court decision in *Gill v. Whitford*, a separate partisan gerrymandering challenge to Wisconsin's state assembly maps.¹¹⁷⁸ Thereafter, the defendants filed an emergency application for a stay with the Supreme Court, which was granted in January 2018.¹¹⁷⁹ Subsequent to the Supreme Court's decision in *Whitford*, the case was remanded for further consideration.¹¹⁸⁰ In August of 2018, a three-judge panel issued a decision again finding the map unconstitutional on all counts asserted by the plaintiffs.¹¹⁸¹ The panel subsequently granted defendants' motion to stay pending Supreme Court review.¹¹⁸²

The Supreme Court agreed to hear the appeal. The ACLU, the New York Civil Liberties Union, ACLU of North Carolina, and ACLU of Maryland jointly filed an amicus brief arguing that partisan gerrymandering claims are justiciable and that the plaintiffs in the two cases under review had established unconstitutional gerrymanders.¹¹⁸³ The amicus brief argued that partisan gerrymandering violated the First Amendment when districts are drawn with the purpose and effect of entrenching partisan advantage because the First Amendment commands neutrality regarding the regulation of speech and other forms of political expression. The ACLU amici also stressed that courts in various cases had used workable evidentiary tools to determine whether an improper partisan gerrymander had taken place.

Despite the series of holdings of five separate federal district courts finding partisan gerrymandering unconstitutional on First Amendment and other grounds, on June 27,

¹¹⁷⁴ Complaint for Declaratory Judgment and Injunctive Relief at ¶¶ 25-54, *Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C. Aug. 5, 2016).

¹¹⁷⁵ Order on Joint Motion to Consolidate for Discovery and Trial, *Common Cause v. Rucho*, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Feb. 7, 2017).

¹¹⁷⁶ Order Denying Defendants' Motions to Dismiss, *Common Cause v. Rucho*, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Mar. 3, 2017).

¹¹⁷⁷ See *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 690-92 (M.D.N.C. 2018).

¹¹⁷⁸ *Common Cause v. Rucho*, 284 F. Supp. 3d 780 (M.D.N.C. 2018).

¹¹⁷⁹ *Rucho v. Common Cause*, 138 S. Ct. 923 (2018).

¹¹⁸⁰ *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018).

¹¹⁸¹ *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018).

¹¹⁸² Order Granting Defendants' Motion to Stay, *Common Cause v. Rucho*, No. 1:16-CV-1026; 1:16-CV-1164 (M.D.N.C. Sept. 12, 2018).

¹¹⁸³ Brief of ACLU, NYCLU, ACLU of North Carolina, and ACLU of Maryland as *Amicus Curiae* in Support of Affirming District Court Judgments, *Rucho v. Common Cause*, No. 18-422; 18-72 (Mar. 8, 2019).

2019, the Supreme Court held that partisan gerrymandering claims are nonjusticiable, vacated the lower court’s decision in *Rucho*, and remanded the case for dismissal.¹¹⁸⁴

94. Jarrod Stringer v. Whitley – Texas 2016

ACLU and ACLU of Texas participating as amicus

Private plaintiffs filed suit in 2016 alleging that Texas violates the “motor voter” provisions of the National Voter Registration Act of 1993 (“NVRA”) and the Equal Protection Clause of the Fourteenth Amendment by failing to provide for simultaneous voter registration with online driver’s license renewals and by failing to provide for simultaneous voter registration with online change-of-address forms.¹¹⁸⁵

The district court granted summary judgment to the plaintiffs on May 10, 2018.¹¹⁸⁶ The district court ruled that Texas was legally obligated under the NVRA to permit a simultaneous voter registration application with every transaction, and that it violated the NVRA by failing to do so.¹¹⁸⁷ It also ruled that Texas violated the Equal Protection Clause of the Fourteenth Amendment.¹¹⁸⁸ The plaintiffs obtained declaratory and injunctive relief.

Texas appealed to the Fifth Circuit on May 23, 2018, and the ACLU filed an amicus brief in support of the plaintiffs on September 21, 2018. The brief provided background on the requirements of the NVRA, identified how other states meet their NVRA obligations and provide voter registration services during online driver’s license transactions, and explained specific steps Texas could take to enhance its voter registration, change-of-address, and renewal procedures in order to comply with the NVRA.¹¹⁸⁹ Oral argument was held on February 5, 2019.

In November 2019, the Fifth Circuit reversed the judgment of the district court, finding that the plaintiffs did not have standing in this case.¹¹⁹⁰ The district court then dismissed the suit brought in 2016.¹¹⁹¹ Following the Fifth Circuit’s ruling, however, the plaintiffs filed a new complaint arguing that the lack of simultaneous voter registration had continued to impact plaintiffs and other voters.¹¹⁹² In January 2020, the district court granted part of a motion for preliminary injunction, ordering change of address forms for updating driver’s licenses to also serve as a notification to update voter registration.¹¹⁹³ In August 2020, the court granted the rest of the preliminary injunction, ordering each online

¹¹⁸⁴ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019).

¹¹⁸⁵ *Stringer v. Whitley*, No. 5:16-cv-00257 (W.D. Tex. Mar. 14, 2016).

¹¹⁸⁶ *Stringer v. Pablos*, 320 F. Supp. 3d 862 (W.D. Tex. 2018).

¹¹⁸⁷ *Id.* at 888-97.

¹¹⁸⁸ *Id.* at 897-900.

¹¹⁸⁹ Brief of ACLU et al. as Amicus Curiae, *Stringer v. Pablos*, No. 18-50428 (5th Cir. Sept. 10, 2018).

¹¹⁹⁰ *Stringer v. Whitley*, 942 F.3d 715 (5th Cir. 2019).

¹¹⁹¹ Order of Dismissal, *Stringer v. Cascos*, No. 5:16-cv-00257 (W.D. Tex. Jan. 21, 2020).

¹¹⁹² Complaint, *Stringer v. Hughs*, No. 5:20-cv-00046 (W.D. Tex. Jan. 14, 2020).

¹¹⁹³ *Stringer v. Pablos*, No. SA-16-CV-257-OG, 2020 WL 532937 (W.D. Tex. Jan. 30, 2020).

license renewal or change of address application a simultaneous application for voter registration.¹¹⁹⁴ The parties are currently engaging in settlement negotiations.

95. ACLU v. Trump – Washington D.C. 2017

The ACLU filed a lawsuit in federal court against President Donald Trump, Vice President Mike Pence, and the Pence-Kobach Commission, alleging that Trump's newly created Presidential Advisory Commission on Election Integrity violated federal law by holding its meetings behind closed doors and failing to allow documents to be available for public inspection in violation of the Federal Advisory Committee Act.¹¹⁹⁵ Kansas Secretary of State Kris Kobach was appointed Vice Chair of the committee. Because of Kobach's involvement in a number of lawsuits surrounding unlawful voter suppression tactics, many civil rights organizations were apprehensive that the commission would be used to justify nationwide voter suppression measures.¹¹⁹⁶ The lawsuit sought declaratory, injunctive, and mandamus relief, requiring the commission to hold open meetings and make all records and minutes open for public inspection.¹¹⁹⁷

The district court denied the request for a preliminary injunction in July 2017.¹¹⁹⁸ The ACLU filed an amended complaint in January 2018¹¹⁹⁹ after commission documents were released in a related case in the same court filed by a member of the commission itself.¹²⁰⁰ On the same day as the ACLU's filing, Trump issued an executive order terminating the commission.¹²⁰¹ The defendants moved to dismiss for mootness, but the parties agreed to a stay while the a similar case, *Dunlap v. Presidential Advisory Commission on Election Integrity*, is being decided. As the Commission no longer exists, the ACLU moved to dismiss without prejudice in July 2020, which the court granted.¹²⁰²

96. Missouri NAACP v. State of Missouri – Missouri 2017

¹¹⁹⁴ *Stringer v. Hughs*, No. SA-16-CV-257-OG, 2020 WL 6875182 (W.D. Tex. Aug. 28, 2020).

¹¹⁹⁵ Complaint for Declaratory and Mandamus Relief, *ACLU v. Trump*, No. 1:17-cv-01351 (D.D.C. July 10, 2017).

¹¹⁹⁶ See, e.g., Press Release, Civil and Human Rights Coalition Blasts Presidential Commission on Election 'Integrity,' (May 11, 2017), <https://civilrights.org/2017/05/11/civil-and-human-rights-coalition-blasts-presidential-commission-on-election-integrity/>.

¹¹⁹⁷ See generally Complaint for Declaratory and Mandamus Relief, *American Civil Liberties Union v. Trump*, No. 1:17-cv-01351 (D.D.C. July 10, 2017), <https://www.aclu.org/legal-document/american-civil-liberties-union-v-donald-trump-complaint>.

¹¹⁹⁸ *American Civil Liberties Union v. Trump*, 266 F.Supp.3d 133 (D.D.C. 2017).

¹¹⁹⁹ Amended Complaint for Declaratory, Injunctive, and Mandamus Relief, *American Civil Liberties Union v. Trump*, No. 1:17-cv-01351 (D.D.C. Jan. 3, 2018).

¹²⁰⁰ See *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 286 F.Supp.3d 96 (D.D.C. 2017).

¹²⁰¹ Exec. Order No. 13820, 83 Fed. Reg. 969 (Jan. 3, 2018).

¹²⁰² Plaintiffs' Notice of Voluntary Dismissal, *ACLU v. Trump*, No. 1:17-cv-01351 (D.D.C. Jul 20, 2020); Order, *ACLU v. Trump*, No. 1:17-cv-01351 (D.D.C. Jul 22, 2020) (dismissing case without prejudice).

On June 8, 2017, the Missouri NAACP and the League of Women Voters of Missouri, represented by the ACLU and Advancement Project, filed a petition for injunctive and declaratory relief with respect to the requirements of Missouri's new voter ID law, arguing that the law fails to provide mandated funding to properly implement the law.¹²⁰³ Specifically, the petition alleged that there was insufficient appropriation of state funds to cover all costs associated with implementing the law, including all costs for related public education, free voter IDs and birth certificates, and training of poll workers. The plaintiffs argued that the law could not be enforced because Section 115.427.6(3) provides that, "If there is not a sufficient appropriation of state funds, then the personal identification requirements of subsection 1 of this section shall not be enforced."¹²⁰⁴ According to the petition, the Secretary of State and Department of Revenue's combined reasonably necessary implementation costs would total nearly \$6 million, which is more than 350% of the actual appropriation.¹²⁰⁵

The Circuit Court of Cole County, Missouri, granted the state's motions for judgment on the pleadings and dismissed the case without prejudice on January 2, 2018.¹²⁰⁶ The Missouri NAACP and the League of Women Voters timely appealed to the Missouri Court of Appeals. The court found on October 30, 2018, that the appellants' claims against the state were not precluded by sovereign immunity or on the ground that appellants' suit was not ripe for adjudication.¹²⁰⁷ The court determined that the trial court's judgment on the pleadings and dismissal for failure to state a claim was reversible error: "The petition alleged that the insufficiency of the appropriation was demonstrated by the disparity between the cost estimates to implement the statute in Fiscal Year 2018 which were submitted to the legislature and the legislature's actual appropriation for Fiscal Year 2018, and was demonstrated in part by the allegedly inadequate manner in which the Secretary of State sought to discharge his advance-notice obligations. The allegations in Appellants' petition adequately pleaded a claim alleging insufficient appropriation."¹²⁰⁸

Trial in the case was held in August 2019, and post-trial briefing was completed in October 2019. A decision is pending.

97. Whitest v. Crisp County Georgia Bd. of Education – Georgia 2017

The ACLU brought suit against Crisp County, Georgia, challenging the at-large method of electing members of the county's Board of Education under Section 2 of the Voting Rights Act. Crisp County has six members of the Board of Education who each serve six-year staggered terms in non-partisan elections. The suit seeks to prove that this method

¹²⁰³ See Petition for Injunctive and Declaratory Relief at ¶¶ 3-6, 34-39, *Mo. NAACP v. Missouri*, No. WD81484 (Mo. Cole Cty. Cir. Ct. 2017).

¹²⁰⁴ *Id.* at ¶ 39.

¹²⁰⁵ *Id.* at ¶ 35.

¹²⁰⁶ *State Conf. of NAACP v. Missouri*, 563 SW 3d 138, 145-146 (Mo. Ct. of App. 2018).

¹²⁰⁷ *Id.* at 147-48.

¹²⁰⁸ *Id.* at 151.

prevents Black community members, who make up 43% of Crisp County, from electing even one representative of their choice.¹²⁰⁹ The plaintiffs have requested that the court enjoin any elections under the existing at-large method and redistrict in a way that complies with Section 2 of the Voting Rights Act, allowing areas of the county that are heavily populated with black citizens to elect their own representative.¹²¹⁰

The case was stayed for several years while the parties underwent unsuccessful mediation efforts to discuss a proposed settlement involving single-member districts. In August 2020, the stay was lifted, and the case is now in discovery.

98. NAACP v. East Ramapo Central Sch. Dist. – New York 2017

The NAACP, represented by NYCLU, filed a lawsuit challenging the at-large method of electing members of the East Ramapo Central School District, alleging that the method allowed the white majority in the community to control the entire board and effectively disenfranchise the minority members of the community.¹²¹¹ The suit further alleged that the at-large voting method filled the school board with white representatives who voted to redirect state funds into predominantly-white private schools, leaving predominantly-minority public schools underfunded (over 99% of private-school students in East Ramapo are white, while 96% of public-school students in East Ramapo are students of color).¹²¹² The only board member elected with Black and Latino voter support was initially forbidden from serving, until the legislature stepped in and passed a law restoring her full term.¹²¹³

East Ramapo has been under state oversight since 2015 when a state report found that the district favored the needs of private school students over public school students and that the district had eliminated nearly 450 public school positions between 2009 and 2014, including 200 teachers as well as all social workers. Additionally, the state-appointed monitor found that public school programs for kindergarten, arts, athletics, and music were cut, while private school programs were increased.¹²¹⁴

The case was filed in the Southern District of New York, with several Black and Latino parents of public-school students serving as plaintiffs. The court denied the school board's motion to dismiss in mid-2018. In May 2020, following a bench trial spanning seventeen days, the district court found that the district's at-large method of elections resulted in minority vote dilution in violation of the Voting Rights Act.¹²¹⁵ The court found that the

¹²⁰⁹ Complaint at 4, *Whitest v. Crisp Cty. Bd. of Ed.*, No. 1:17-cv-00109-LJA (M.D. Ga. June 14, 2017).

¹²¹⁰ *Id.* at 7.

¹²¹¹ Complaint, *NAACP v. East Ramapo Central Sch. Dist.*, No. 7:17-cv-08943-CS-JCM (S.D.N.Y. Nov. 16, 2017).

¹²¹² Complaint at 3.

¹²¹³ Complaint at 13.

¹²¹⁴ Complaint at 14.

¹²¹⁵ *NAACP v. E. Ramapo Sch. Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

election system gave Black and Latino residents less opportunity to elect representatives of their choice, and enjoined the district from using this at-large system moving forward, ordering a plan to be drawn with nine single-member districts.¹²¹⁶ The school district appealed to the Second Circuit, which affirmed the district court’s decision in January 2021.¹²¹⁷ The Second Circuit held that the totality of circumstances supported a finding of a violation of Section 2 of the Voting Rights Act.

99. Saucedo v. Gardner – New Hampshire 2017

Individual plaintiffs, represented by the ACLU, filed a lawsuit in 2017 challenging New Hampshire’s signature match requirement for absentee ballots that required local election officials to compare the signature of every voter’s absentee ballot application with the signature on an affidavit sent with the ballot.¹²¹⁸ An election official was required to reject the ballot without notice to the voter if—using no objective criteria—the signature did not appear to them to conform to what they envisioned was a matching signature.¹²¹⁹ In doing so, election officials had rejected the ballots of several hundred absentee voters in recent elections.¹²²⁰ The plaintiffs argued that this procedure violated voters’ rights under the Fourteenth Amendment and Americans with Disabilities Act.

The plaintiffs’ summary judgment submission included testimony concerning New Hampshire’s processing of absentee ballots and statistics from the 2016 general election regarding the rejection of absentee ballots.¹²²¹ It also included the expert report of a forensic document examiner who specialized in handwriting and signature identification. The expert opined that a person’s signature may vary for a variety of reasons, that variations were more prevalent in persons who are elderly, disabled, or who speak English as a second language, and that extensive training and several exemplars are required for proper signature analysis.¹²²² He further predicted that New Hampshire election officials would likely make erroneous determinations due to lack of training and multiple exemplars.¹²²³

The district court granted the motion for summary judgment on the plaintiff’s facial challenge on Fourteenth Amendment procedural due process grounds.¹²²⁴ The court reasoned that the signature match requirement “fails to guarantee basic fairness” under the Fourteenth Amendment for several reasons: it vested moderators “with sole, unreviewable discretion to reject ballots due to a signature mismatch”; the “absence of

¹²¹⁶ *Id.* at 417-18.

¹²¹⁷ *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021).

¹²¹⁸ *See* Complaint for Declaratory and Injunctive Relief at ¶ 15, *Saucedo v. Gardner*, No. 1:17-cv-00183 (D.N.H. May 10, 2017).

¹²¹⁹ *Ibid.*

¹²²⁰ *Id.* at ¶ 16.

¹²²¹ Plaintiffs’ Memorandum of Law in Support of their Motion for Summary Judgment as to All Claims at ¶ 50, No. 1:17-cv-00183 (Mar. 19, 2018).

¹²²² *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 205-206 (D.N.H. Aug. 14, 2018).

¹²²³ *Id.* at 212.

¹²²⁴ *Id.* at 202.

training and functional standards on handwriting analysis”; and “the lack of any review process or compliance measures.”¹²²⁵ Since the court granted relief based on the plaintiffs’ procedural due process claim, it declined to address their remaining claims. Based on its liability finding, the court permanently enjoined enforcement of the New Hampshire statute.¹²²⁶ New Hampshire did not appeal.

100. Peter La Follette v. Alex Padilla – California 2017

An individual plaintiff and the ACLU of North California filed suit in state court in 2017 challenging California’s signature-match requirement for mailed ballots. This provision of California law required local election officials to reject vote-by-mail ballots if they believed the signature on a ballot envelope did not match the signature on file for the voter. Officials did so without notice to the voter or any opportunity to cure the perceived mismatch. The plaintiffs argued that this requirement violated voters’ rights to due process and equal protection under the Fourteenth Amendment and the California Constitution.¹²²⁷

In the 2016 general election, over half of California’s 14.6 million voters voted by mail. An estimated 45,000 absentee voters’ ballots were rejected due to a signature mismatch, without giving voters adequate notice or an opportunity to cure.¹²²⁸ In support of their motion for a writ of mandate prohibiting the California Secretary of State and county registrars from rejecting ballots due to signature mismatches, the plaintiffs submitted several declarations addressing factual issues. They also submitted declarations from a forensic document expert in handwriting and signature identification and a political sociologist who conducted a study of vote-by-mail use by California voters.¹²²⁹

The California Superior Court granted the plaintiffs’ motion for a writ of mandate in March 2018.¹²³⁰ The court held that California’s requirement facially violated the due process clauses of the federal and state constitutions because it “fails to provide for notice that a voter is being disenfranchised and/or an opportunity for the voter to be heard,” which are “fundamental rights.”¹²³¹ The court relied on experts who “cite several reasons why a person’s signature may differ on two occasions”¹²³² and cited several federal court rulings that invalidated similar signature match laws.¹²³³ The court effectively granted injunctive relief by ordering that “no ballot may be rejected based on a mismatched signature without

¹²²⁵ *Id.* at 222.

¹²²⁶ *Id.*

¹²²⁷ Verified Petition for Writ of Mandate and Memorandum of Points & Authorities at ¶ 65-75, *La Follette v. Padilla*, No. CPF-17-515931 (Sup. Ct. Cal. Aug. 23, 2017).

¹²²⁸ *Id.* at ¶ 41.

¹²²⁹ *See generally id.*

¹²³⁰ Order Granting Plaintiffs’ Motion for Writ of Mandate, *La Follette v. Padilla*, No. CPF-17-515931 (Sup. Ct. Cal. Mar. 5, 2018).

¹²³¹ *Id.* at 6.

¹²³² *Id.* at 2.

¹²³³ *Id.* at 4-5.

providing the voter with notice and an opportunity to cure before the election results are certified.”¹²³⁴

California appealed to the California Court of Appeal in April 2018. In December 2018, the court of appeals dismissed the appeal as moot because California passed new legislation in September 2018 that provides voters with an opportunity to correct or verify a mismatched signature before the certification of election results, which implemented the remedy sought by the plaintiffs in this case.

101. Common Cause Indiana v. Lawson – Indiana 2017

The ACLU, ACLU of Indiana, and Demōs filed a lawsuit in federal court on behalf of Common Cause Indiana challenging a state law that permitted election officials to immediately purge the registrations of Indiana voters based on an interstate matching program known as the “Interstate Voter Registration Crosscheck Program” (Crosscheck). Indiana would remove voters flagged by the faulty matching system without notifying voters or any grace period to cure.¹²³⁵

The ACLU argued that Crosscheck was inaccurate and unreliable, utilizing a matching protocol that—according to a study by a team of researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft—incorrectly flagged people as potential double voters more than 99% of the time.¹²³⁶ The same study found that Crosscheck’s standard procedure, as applied by Indiana, would wrongfully eliminate the registrations of more than 300 legitimate voters for every potential double vote prevented.¹²³⁷ Crosscheck also had racially discriminatory outcomes according to numerous studies evaluating the program and its methodology. The flawed system flagged voter registration records with the same first and last name appearing in more than one state, which disproportionately targeted voters of color, who are much more likely to have similar first and last names according to U.S. census data, for removal.¹²³⁸ An analysis also showed that Crosscheck flagged one in six Latinos, one in seven Asian Americans, and one in nine African Americans as potential double registrants.¹²³⁹

The suit charged that Indiana’s purge procedures violated the National Voter Registration Act (NVRA), which requires states to follow a minimum notice process and waiting period before a state may remove a voter from the rolls and that voter registration list

¹²³⁴ *Id.* at 6.

¹²³⁵ Complaint for Declaratory and Injunctive Relief, *Common Cause Indiana v. Lawson*, No. 1:17-cv-03936 (S.D. Ind. Oct. 27, 2017).

¹²³⁶ *Id.* at ¶ 43 (citing SHARAD GOEL ET AL., ONE PERSON, ONE VOTE: ESTIMATING THE PREVALENCE OF DOUBLE VOTING IN U.S. PRESIDENTIAL ELECTIONS, 2-3, 25-26 (Harv. Univ., Working Paper, Jan. 13, 2017), <https://scholar.harvard.edu/files/morse/files/1p1v.pdf>).

¹²³⁷ See SHARAD GOEL ET AL., ONE PERSON, ONE VOTE: ESTIMATING THE PREVALENCE OF DOUBLE VOTING IN U.S. PRESIDENTIAL ELECTIONS 1 (Harv. Univ., Working Paper, Jan. 13, 2017).

¹²³⁸ Complaint for Declaratory and Injunctive Relief at ¶ 47, *Common Cause Indiana v. Lawson*, No. 1:17-cv-03936 (S.D. Ind. Oct. 27, 2017).

¹²³⁹ *Id.*

maintenance programs be reasonable, uniform, and nondiscriminatory. Crosscheck was championed and administered by then Kansas Secretary of State Kris Kobach, who has a long history of initiating and implementing numerous voter suppression tactics. A federal court granted the ACLU's request for a preliminary injunction in 2018, blocking implementation of the new law.¹²⁴⁰

Indiana appealed the preliminary injunction to the Seventh Circuit. In August 2019, a unanimous panel of the Seventh Circuit affirmed the district court's preliminary injunction. The Seventh Circuit concluded that the organizational plaintiffs had standing to challenge Indiana's list maintenance program.¹²⁴¹ Regarding the plaintiffs' likelihood of success on the merits, the Seventh Circuit concluded that Indiana's policy of "remov[ing] [voters] from the rolls based on Crosscheck without direct notification of any kind" appeared "inconsistent with the NVRA" "on its face."¹²⁴² The court explained that removal from voter lists based on "an inference from information provided by Crosscheck" could not likely be construed as a "request for removal . . . from the registrant" as the NVRA demands.¹²⁴³ Separately, the court concluded that Indiana's argument that a notification from Crosscheck qualified as "confirmation in writing" that a voter moved was also likely to fail, as it "defie[d] the structural logic of the [NVRA] by allowing a state to bypass [its] notice procedure."¹²⁴⁴

On remand, the district court stayed litigation until May 1, 2020 to allow the parties an opportunity to resolve the case. In this period, the state passed a new law SEA 334, which amended SEA 442, and state defendants moved to dismiss the cases on the basis they were mooted out by the new law. However, on August 20, 2020, the district court denied this motion, and granted summary judgment in plaintiffs' favor, finding the new law suffered from the same defects as the old one, because it allowed cancellation of voter registrations without direct contact from the voter.¹²⁴⁵ The state then appealed the ruling to the Seventh Circuit, which held oral argument on April 22, 2021.¹²⁴⁶ A decision is pending.

102. League of United Latin American Citizens v. Reagan – Arizona 2017

In November 2017, the League of United Latin American Citizens and the Arizona Students' Association, represented by Campaign Legal Center, filed a lawsuit for declaratory and injunctive relief against the Arizona Secretary of State challenging the state's dual registration system. Arizona administered a voter registration system whereby

¹²⁴⁰ *Common Cause Indiana v. Lawson*, 327 F.Supp.3d 1139 (S.D. Ind. 2018). A separate lawsuit challenging Crosscheck was filed by the Indiana State Conference of NAACP and League of Women Voters of Indiana in federal court and a preliminary injunction was granted in that case as well. *Indiana State Conf. of NAACP v. Lawson*, 326 F.Supp.3d 646 (S.D. Ind. 2018). The cases were consolidated on appeal by the Seventh Circuit.

¹²⁴¹ *Common Cause Indiana v. Lawson*, 937 F.3d 944, 956 (7th Cir. 2019).

¹²⁴² *Id.* at 959.

¹²⁴³ *Id.* at 960.

¹²⁴⁴ *Id.* at 962.

¹²⁴⁵ *Indiana Conf. of the NAACP v. Lawson*, 481 F.Supp.3d 826 (S.D. Ind. 2020).

¹²⁴⁶ *League of Women Voters of IN v. Sullivan*, No. 20-2815 (7th Cir. 2020).

registrants who completed either the state voter registration form or the federal voter registration form (Federal Form)—prescribed by the National Voter Registration Act (NVRA)—without providing documentary proof of citizenship would not be duly registered for both federal and state elections.¹²⁴⁷ If a voter completed the Federal Form without documentary proof of citizenship, the voter was only registered to vote in federal elections but not state elections.¹²⁴⁸ If a voter completed the state form without documentary proof of citizenship, the voter was not registered in state or federal elections.¹²⁴⁹ Additionally, Arizona was failing to register voters who already had provided documentary proof of citizenship to the state through its Motor Vehicle Division (MVD), which the state could have used to confirm citizenship of registrants given the fact that Arizona already had a process of verifying registrant information against the MVD database.¹²⁵⁰ Arizona adopted the dual registration practices presumably to get around the Supreme Court’s decision in *Arizona v. Inter Tribal Council of Arizona*, which held that the NVRA preempted Arizona’s documentary proof of citizenship requirement for individuals using the Federal Form to register.¹²⁵¹

The plaintiffs argued that Arizona’s dual registration policies unduly burdened the right to vote in violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment. The litigation was ultimately settled through a court-ordered consent decree in June 2018. The consent decree requires that the state provide instructions to county recorders so that voters using the state form would be registered to vote in federal elections, regardless of added documentary proof of citizenship requirements imposed for registration in state elections.¹²⁵² The consent decree further requires county recorders to advise registrants of the state’s documentary proof of citizenship requirement, provide the necessary information in order to be registered as “full ballot” voters, and provide public education and information on pertinent websites.¹²⁵³

Notwithstanding the settlement, the matter continued to create problems for Arizona voters. Prior to the close of voter registration in 2018, Luis Cisneros, a naturalized citizen and Arizona resident, went to update his voter registration after moving only to be told that his registration was rejected because he was incorrectly identified as a noncitizen.¹²⁵⁴ Working to correct this error, Mr. Cisneros brought his passport to prove his citizenship but was told by the Pima County Recorder’s Office that, contrary to the terms of the consent decree, while he would be registered to vote, his ballot would not count for the 2018 election

¹²⁴⁷ Complaint for Declaratory and Injunctive Relief at ¶ 1, *LULAC v. Reagan*, No. 2:17-cv-04102 (D. Ariz. Nov. 7, 2017).

¹²⁴⁸ *Id.* at ¶ 3.

¹²⁴⁹ *Ibid.*

¹²⁵⁰ *See id.* at ¶¶ 40-58.

¹²⁵¹ 570 U.S. at 1 (2013).

¹²⁵² Consent Decree, *LULAC v. Reagan*, No. 2:17-CV-04102 (D. Ariz. June 4, 2018).

¹²⁵³ *Id.*

¹²⁵⁴ Motion to Compel Compliance with Consent Decree at 4-5, *LULAC v. Reagan*, No. 2:17-CV-04102 (D. Ariz. Nov. 9, 2018).

since it was after the voter registration deadline.¹²⁵⁵ The ACLU and the ACLU of Arizona represented Mr. Cisneros and sought to have the Pima County Recorder restore his voter registration and have his ballot counted in the 2018 election. The Pima County Recorder refused twice, so the ACLU filed a motion to compel compliance with the consent decree in the district court, which had continuing jurisdiction over the matter.¹²⁵⁶ The Pima County Recorder finally updated Mr. Cisneros's voter registration and sent his ballot to be counted after the filing of the motion. The court held an expedited hearing on both motions. Because Mr. Cisneros's registration was restored and ballot was counted, the district court dismissed his motion as moot, and an order denying the plaintiffs' motion to compel was entered in November 2018.¹²⁵⁷

103. League of Women Voters of N.Y. v. N.Y. State Bd. of Elections – New York 2018

Plaintiffs Nicholas Dinnerstein and the League of Women Voters, an organization whose mission is to increase voter registration and participation, brought this lawsuit challenging New York's 25-day voter registration cutoff for arbitrarily disenfranchising tens of thousands of eligible voters in violation of the state constitution. The complaint argued that, "[a]s a direct result of the Voter Registration Cutoff, many thousands of constitutionally eligible voters in every election cycle are denied their fundamental right to vote."¹²⁵⁸ The complaint further charged that the voter registration cut-off, which was established nearly 30 years ago, is no longer necessary given the development of a computerized statewide voter registration database, and needlessly disenfranchises thousands of voters. Thus, "[a]dministrative rationales that may have supported the Voter Registration Cutoff at that time are no longer valid and are fundamentally undermined by the dramatic advancements in technology that have since been made."¹²⁵⁹

The complaint asserted that the disenfranchisement violates the state constitution's guarantee of the fundamental right to vote as well as equal protection. The complaint alleged that "[e]very constitutionally eligible voter who is denied the right to vote in even one election cycle suffers a severe and irreparable harm" and that "[t]his severe deprivation cannot be reconciled with the Constitution's prohibition against disenfranchisement and guarantee of the right to vote to every eligible citizen."¹²⁶⁰ With respect to equal protection, the complaint explains that "[t]he Voter Registration Cutoff makes voting more difficult for some eligible voters than others, as it unnecessarily imposes a more burdensome 25-day registration cutoff that applies only to some voters—including the individual Plaintiff in

¹²⁵⁵ *Id.* at 5.

¹²⁵⁶ *Ibid.*

¹²⁵⁷ *LULAC v. Reagan*, No. 2:17-CV-04102, 2018 WL 5983009, at *4 (D. Ariz. 2018).

¹²⁵⁸ Complaint for Declaratory and Injunctive Relief at ¶ 5, *League of Women Voters of N.Y. v. N.Y. State Bd. Of Elections*, No. 160342 (N.Y. Sup. Ct. Nov. 6, 2018).

¹²⁵⁹ *Id.* at ¶ 6.

¹²⁶⁰ *Id.* at ¶ 30.

this case—while other classes of voters are permitted to register up to ten days before a general election and still vote.”¹²⁶¹

The defendants filed a motion to dismiss the case on January 28, 2019, alleging that the plaintiffs lacked standing to bring the action.¹²⁶² On October 4, 2019, the trial court denied the motion to dismiss.¹²⁶³ On July 28, 2020, plaintiffs moved for a preliminary injunction which would prevent the city and state boards of election from enforcing the Voter Registration Cutoff for the November 2020 elections.¹²⁶⁴ On September 25, 2020, the court denied the motion, and the First Department upheld the denial on December 1, 2020.¹²⁶⁵

104. Gill v. Whitford – Wisconsin 2018

ACLU and ACLU of Wisconsin participating as amicus

Private plaintiffs filed suit in 2015 challenging Wisconsin’s plan for state legislative district boundaries as an unconstitutional partisan gerrymander, claiming the redistricting plan intentionally and systematically diluted Democratic voters’ strength in elections for state legislative seats. The plaintiffs claimed the map violated the Equal Protection Clause under the Fourteenth Amendment and rights of free association and speech under the First Amendment.¹²⁶⁶

The U.S. District Court for the Western District of Wisconsin, in a lengthy opinion, held for the plaintiffs, finding that the plan was intended to burden the representational rights of Democratic voters and ensure the Republican Party maintained durable control of the legislature.¹²⁶⁷ Relying on social science metrics, which measure the intensity of partisan gerrymandering based on the number of “wasted” votes, the court held that the plan was intended to have and resulted in a discriminatory impact on Democrats to obtain state legislative seats.¹²⁶⁸ Among the extensive evidence relied upon by the court was its finding that, despite Republicans winning a minority of the statewide legislative assembly votes in 2012, Republicans won 60 of the 99 assembly seats.¹²⁶⁹ The court also rejected the defendants’ explanation that the disparate representation in election outcomes was

¹²⁶¹ *Id.* at ¶ 51.

¹²⁶² *League of Women Voters of New York State v. New York State Bd. of Elections*, No. 160342/2018, 2020 WL 5745625 (N.Y. Sup. Ct. Sep. 25, 2020).

¹²⁶³ *League of Women Voters of N.Y. v. N.Y. State Bd. of Elecs.*, 189 A.D.3d 409, 132 N.Y.S.3d 771 (2020).

¹²⁶⁴ Plaintiffs’ Memorandum of Law in Support of a Motion for Preliminary Injunction, *League of Women Voters of N.Y. v. N.Y. State Bd. Of Elections*, No. 160342 (N.Y. Sup. Ct. July 28, 2018).

¹²⁶⁵ *League of Women Voters of N.Y. v. N.Y. State Bd. of Elecs.*, 189 A.D.3d 409 (N.Y. App. Div. 2020).

¹²⁶⁶ *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018).

¹²⁶⁷ *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

¹²⁶⁸ *See id.* at 890-96, 898-910.

¹²⁶⁹ *See id.* at 899.

attributable to political geography, finding that no inherent geographic advantage could explain the degree of partisanship in Wisconsin’s maps.¹²⁷⁰

In 2017, the defendants requested review by the U.S. Supreme Court. In its amicus brief, the ACLU argued that the Wisconsin legislature committed constitutional violations when it “locked up” the political process for the purpose of disabling competition among partisan viewpoints and that the legislative monopoly attained by the Wisconsin legislature violated the First Amendment and the Equal Protection Clause by putting its thumb on the scale of electoral competition.¹²⁷¹ The Court ultimately bypassed the merits of the case, vacated the judgment, and remanded back to the district court on the issue of standing.¹²⁷²

On remand, the district court granted in part the Wisconsin State Assembly’s motion to stay the case, allowing discovery to proceed, but postponing the trial and decision on the merits until the Supreme Court issued a decision on two other partisan gerrymandering cases from North Carolina and Maryland.¹²⁷³ Ultimately, the Supreme Court ruled that partisan gerrymandering claims were nonjusticiable in the North Carolina and Maryland cases.¹²⁷⁴ As a result, the Wisconsin case was dismissed for lack of jurisdiction in 2019.¹²⁷⁵

105. Georgia Muslim Voter Project v. Kemp – Georgia 2018

On behalf of the Georgia Muslim Voter Project and Asian Americans Advancing Justice-Atlanta, the ACLU and ACLU of Georgia filed a lawsuit against Georgia Secretary of State Brian Kemp and all Georgia county registrars demanding due process for Georgia voters whose absentee ballots or applications were rejected due to an alleged mismatch of signatures. Under Georgia law, county elections officials were required to reject all absentee ballots—as well as absentee ballot applications—of voters whose signature “[did] not appear to be valid” because the signature allegedly did not match the signature on the voter file, without giving prior notice to the voter or an opportunity to review, contest, or appeal that determination.¹²⁷⁶ The plaintiffs argued that signatures of the same person could greatly vary for a variety of reasons, including age, physical and mental condition, disability, medication, stress, accidents, and even inherent differences in a person’s neuromuscular coordination and stance.¹²⁷⁷ Moreover, signature variants were more prevalent in the elderly, disabled, or limited English proficient speakers.¹²⁷⁸ Georgia law

¹²⁷⁰ See *id.* at 921.

¹²⁷¹ Brief of the American Civil Liberties Union, the New York Civil Liberties Union, and the ACLU of Wisconsin Foundation as *Amici Curiae*, in Support of Appellees, *Gill v. Whitford*, No. 1601161 (Sept. 6, 2017).

¹²⁷² *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

¹²⁷³ *Whitford v. Gill*, No. 15-cv-421; 18-cv-763, 2019 WL 294800, at *2 (slip copy) (W.D. Wis. Jan. 23, 2019).

¹²⁷⁴ See *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019).

¹²⁷⁵ *Whitford v. Vos*, No. 19-2066, 2019 WL 4571109, at *1 (7th Cir. Jul. 11, 2019).

¹²⁷⁶ Complaint at ¶ 1, *Ga. Muslim Voter Project v. Kemp*, No. 1:18-cv-04789 (N.D. Ga. Oct. 16, 2018).

¹²⁷⁷ *Id.* at ¶ 4.

¹²⁷⁸ *Ibid.*

effectively put elections officials, which having no such qualifications, in the position of acting as handwriting experts.

The plaintiffs argued that the ballot rejection process violated the procedural due process guarantees of the Fourteenth Amendment and unconstitutionally burdened the fundamental right to vote in violation of the Fourteenth Amendment.¹²⁷⁹ The plaintiffs sought a temporary restraining order and preliminary and permanent injunctions requiring election officials to provide absentee voters notice and an opportunity to confirm their identity or otherwise resolve the alleged discrepancy prior to a ballot being rejected, as well as the opportunity to appeal the election officials' decision to reject a ballot due to an alleged signature discrepancy. Notably, Georgia already provided these due process safeguards for other types of balloting issues, including situations where a voter lacks an acceptable photo ID.¹²⁸⁰

In October 2018, the district court granted a temporary restraining order requiring Georgia to offer notice, an opportunity to cure, and an appeals process to voters with perceived signature mismatches.¹²⁸¹ In reviewing the case, the court cited evidence showing that the ballot rejections were applied disproportionately among racial groups. Nearly three times as many Black voters' ballots were rejected than white voters despite the fact that white voters outnumbered black voters two-to-one, and 25% of the rejected ballots came from Asian and Pacific Islander voters despite comprising only 15% of the mail ballot voters.¹²⁸² The district court rejected the state's argument that absentee voting, as a privilege rather than a right, did not require the same due process protections as Election Day voting. The court also found that there would be no unreasonable burden involved in extending substantially similar due process safeguards already in place for other balloting issues and that such safeguards would strengthen, rather than weaken (as the state had argued), the integrity of Georgia elections.¹²⁸³

The state appealed to the Eleventh Circuit and filed an emergency motion for a stay of the injunction pending appeal, which was denied.¹²⁸⁴ The Eleventh Circuit dismissed the state's argument that extending the safeguards to signature rejections would be burdensome and cause irreparable harm. The court noted that the chair of the board of registrars of one of Georgia's most populous counties had testified that compliance with the order was "pretty straightforward," "easily doable," and would "not really add any burdens to what we are already doing . . . even with a week left until Election Day."¹²⁸⁵ Shortly after the Eleventh Circuit handed down its decision, the Georgia legislature passed a set changes to its elections laws, which included a revision to the state's absentee ballot laws that largely

¹²⁷⁹ *Id.* at ¶¶ 46-65.

¹²⁸⁰ *Id.* at ¶ 7.

¹²⁸¹ *See Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018).

¹²⁸² *Id.* at 1331.

¹²⁸³ *Id.* at 1340.

¹²⁸⁴ *Martin v. Kemp*, 1:18-cv-04789, 2018 WL 7822108, at *1 (11th Cir. Nov. 2, 2018).

¹²⁸⁵ *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1268 (11th Cir. 2019) (Pryor, J. concurring).

mirrored the due process safeguards ordered by the district court for absentee ballots and applications with perceived signature mismatches.¹²⁸⁶ These laws were in direct response to this suit and other successful lawsuits addressing voter suppression in Georgia. In light of the passage of these new laws, the parties jointly agreed to a voluntary dismissal of the case in April 2019.¹²⁸⁷

106. New Florida Majority, et al. v. Detzner – Florida 2018

This case involved an action for injunctive and declaratory relief brought by the ACLU, ACLU of Florida, and Lawyers' Committee for Civil Rights Under Law, on behalf of New Florida Majority Education Fund, Common Cause, and Mi Familia Vota Education Fund. Plaintiffs sought a statewide week-long extension of the voter registration deadline as the result of Hurricane Michael and problems with the state's online voter registration system in the final days of the registration period. On October 7, 2018, two days before the voter registration deadline, Florida Governor Rick Scott declared a state of emergency in 35 of Florida's 67 counties based on the threat posed by Tropical Storm Michael and issued mandatory and voluntary evacuation orders throughout the state.¹²⁸⁸ At the time, over 5.6 million people, including nearly 3.7 million registered voters, lived in these 35 counties, accounting for over 28% of registered voters in the state.¹²⁸⁹ These announcements caused residents of affected areas to evacuate, causing a major disruption for the last two days of the voter registration period.

Compounding the problem for Florida voters, the state had recently adopted an online voter registration system, but users had been experiencing a number of difficulties with the system in the weeks prior to the voter registration deadline; the ACLU and other organizations warned government officials about these problems repeatedly, but the state did not take steps to resolve the issue.¹²⁹⁰ The inability of Florida residents to use the online system placed an additional burden on Floridians residing in affected counties that otherwise would have been able to register in person. These disruptions had an outsized impact on the ability of voters to register, especially since the final days of the registration period tend to involve the most activity.¹²⁹¹ The plaintiffs argued that, under the circumstances, the state's refusal to extend the registration deadline amounted to a denial of critical voter registration opportunities, and that, absent relief, tens of thousands of Floridians would likely be prevented from participating in the November 2018 general

¹²⁸⁶ See H.R. 316, Section 27, 155th Gen. Assem., Reg. Sess. (Ga. 2019); see also Press Release, ACLU of Georgia, ACLU of Georgia Lawsuit Results in Changes to State Law (Apr. 4, 2019), <https://www.aclu.org/press-releases/aclu-georgia-lawsuit-results-changes-state-law>.

¹²⁸⁷ Joint Stipulation of Dismissal, Ga. Muslim Voter Project v. Kemp, No. 1:18-cv-04789 (N.D. Ga. Apr. 15, 2019).

¹²⁸⁸ Complaint for Emergency Injunctive and Declaratory Relief at ¶ 17, New Fla. Majority Educ. Fund v. Detzner, No. 4:18-cv-00466 (N.D. Fla. Oct. 10, 2018).

¹²⁸⁹ *Ibid.*

¹²⁹⁰ *Id.* at ¶¶ 22-23.

¹²⁹¹ *Id.* at ¶ 24.

election.¹²⁹² Florida officials did not present any rationale for why it refused to extend the voter registration deadline as other states had done due to the hurricane, including North Carolina and South Carolina. Moreover, in 2016 a federal court ordered Florida to extend its voter registration deadline by a week due to disruptions caused by Hurricane Matthew, which resulted in an additional 80,000 Floridians being able to register;¹²⁹³ this case sought similar accommodations in 2018 due to Hurricane Michael.

Florida Secretary of State Ken Detzner issued a directive expressly refused to extend the October 9, 2018, registration deadline despite authorizing Supervisors of Elections, whose offices were closed on the voter registration deadline due to Hurricane Michael, to accept paper registration forms on the day that their offices reopened.¹²⁹⁴ The plaintiffs sued Detzner asserting that the failure to extend the deadline placed an undue burden on Floridians' right to vote and violated the Equal Protection Clause of the Fourteenth Amendment by failing to uniformly establish an extended voter registration deadline throughout the state. The plaintiffs sought an injunction against enforcement of the October 9 registration deadline and a one-week extension of the deadline throughout the state, including registrations through the online voter registration system.

Shortly after filing, this action was consolidated with *Florida Democratic Party v. Detzner*, a case asserting a similar challenge to Florida's failure to extend the voter registration deadline.¹²⁹⁵ Prior to consolidation, the district court in that case denied the Florida Democratic Party's request for a temporary restraining order against enforcement of the voter registration deadline, finding that there was no justification for a statewide extension of the deadline since Secretary Detzner's directive operated as a mandatory extension of the deadline in counties affected by Hurricane Michael. Following consolidation, the court applied the same reasoning to deny the plaintiffs' request for a preliminary injunction in *New Florida Majority*.¹²⁹⁶ In December 2018, a joint motion to dismiss was filed,¹²⁹⁷ and the court granted the voluntary dismissal with prejudice.¹²⁹⁸

107. Ohio A. Phillip Randolph Institute v. Ryan Smith¹²⁹⁹— Ohio 2018

This case involved a constitutional challenge to Ohio's congressional redistricting plan as an unconstitutional partisan gerrymander in violation of the Fourteenth Amendment, the First Amendment, and Article I of the U.S. Constitution. In May 2018, Ohio A. Phillip Randolph Institute, the League of Women Voters of Ohio, along with other civil and

¹²⁹² *Id.* at ¶ 4.

¹²⁹³ *See id.* at ¶ 20 (summarizing *Fla. Dem. Party v. Scott*, Case No. 4:16-cv-626, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016)).

¹²⁹⁴ *Id.* at ¶ 29.

¹²⁹⁵ *Fla Dem. Party v. Scott*, No. 4:18-cv-463 (N.D. Fla. Oct. 10, 2018).

¹²⁹⁶ *See New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (N.D. Fla. Oct. 16, 2018).

¹²⁹⁷ Joint Motion to Dismiss with Prejudice, *New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (Dec. 11, 2018).

¹²⁹⁸ Order of Dismissal, *New Fla. Majority v. Detzner*, No. 4:18-cv-00466 (Dec. 13, 2018).

¹²⁹⁹ Larry Householder was subsequently substituted for Ryan Smith as a party.

political organizations and numerous Ohio citizens filed suit against the leaders of the Ohio General Assembly and the Secretary of State.¹³⁰⁰ The plaintiffs argued that following the 2010 Census, Ohio Republicans, with the support and assistance of the national Republican Party, used advance computer mapping software to create an unlawful congressional map entrenching a 12-4 Republican to Democratic seat ratio. This ratio was notable because Republicans generally captured between 51% to 59% of the total statewide congressional vote for the decade.¹³⁰¹ For example, in 2012, even though Republicans received 51% of the congressional vote, the challenged map had consistently given Republicans 75% of the congressional seats.¹³⁰²

The plaintiffs raised four primary challenges to the constitutionality of Ohio's electoral map: (1) it violated the First Amendment by purposefully disfavoring individuals based on their political views and violating association rights; (2) it substantially burdened the right vote in violation of the Fourteenth Amendment; (3) it violated the Equal Protection Clause of the Fourteenth Amendment by diluting the plaintiffs' votes based on their political affiliation and did so intentionally; and (4) it exceeded Ohio's powers under Article I of the Constitution.¹³⁰³

In August 2018, the three-judge panel assigned to the case denied the defendants' motion to dismiss.¹³⁰⁴ The defendants argued that the plaintiffs' claims were nonjusticiable, lacked standing, and was barred by laches.¹³⁰⁵ As to justiciability, the court found that all three metrics proposed by the plaintiffs to evaluate the constitutionality of Ohio's map ("efficiency-gap," "mean-median difference," and "partisan bias") were potentially viable at the pleading stage of the litigation, rendering the case justiciable.¹³⁰⁶ The court also found that the individual plaintiffs suffered a constitutional injury for purposes of standing under the First Amendment because the challenged maps specifically disfavored the Democratic Party, thereby creating a tangible associational burden, and diluted their votes to such a degree that it made a practical difference in their ability to achieve electoral success.¹³⁰⁷ Similarly, the court found standing for the plaintiffs' Fourteenth Amendment claims because, as residents (or organizational representatives of residents) of particular "cracked" or "packed" districts, the dilution of the plaintiffs' votes constituted an injury-in fact.¹³⁰⁸ The

¹³⁰⁰ Complaint, *Ohio A. Philip Randolph Inst. v. Kasich*, No. 1:18-cv-357 (S.D. Ohio Feb. 4, 2019).

¹³⁰¹ Second Amended Complaint at ¶ 2-3, *Ohio A. Phillip Randolph Inst. v. Smith*, 1:18-cv-00357 (S.D. Ohio July 11, 2018).

¹³⁰² *Id.* at ¶¶ 2, 86.

¹³⁰³ *Id.* ¶¶ 136-169.

¹³⁰⁴ *Ohio A. Phillip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988, 993 (S.D. Ohio 2018).

¹³⁰⁵ *Id.* at 994.

¹³⁰⁶ *Id.* at 996.

¹³⁰⁷ *Id.* at 997-98. In addition to finding that the plaintiffs had established standing under two separate tests, the court found that the organizational plaintiffs had alleged injuries-in-fact on their own behalf and of their members.

¹³⁰⁸ *Id.* at 999.

court summarily dismissed the defendants' laches argument because the plaintiffs only sought prospective declaratory and injunctive relief, which laches did not bar.¹³⁰⁹

Following the court's ruling on the pleadings, the defendants filed a motion for summary judgment in January 2019.¹³¹⁰ The motion for summary judgment reheated the justiciability and standing arguments already evaluated by the court.¹³¹¹ Relying on the same reasoning as before, the three-judge panel denied the defendants' motion in a lengthy opinion, and the case proceeded to trial.¹³¹²

Following an eight-day bench trial, the court issued another lengthy opinion holding Ohio's "partisan gerrymandering unconstitutional."¹³¹³ The court explained that because the Ohio map created "districts that [were] so skewed toward one party that the electoral outcome [was] predetermined," the map violated the First Amendment, the Fourteenth Amendment, and Ohio's Article I powers to regulate elections.¹³¹⁴ The defendants appealed the ruling. The Supreme Court stayed the ruling of the district court¹³¹⁵ before ruling in *Rucho v. Common Cause*, which found partisan gerrymandering claims nonjusticiable.¹³¹⁶ In light of *Rucho*, the Supreme Court vacated the lower court's judgment and remanded the case.¹³¹⁷ Plaintiffs filed a motion to dismiss the case due to *Rucho*, and the case was dismissed in October 2019.¹³¹⁸

108. League of Women Voters of Arizona, et al. v. Reagan – Arizona 2018

In August 2018, the ACLU, the ACLU of Arizona, Demōs, and the Lawyers' Committee for Civil Rights Under Law, on behalf of the League of Women Voters of Arizona, Mi Familia Vota, and Promise Arizona, filed a lawsuit for declaratory and injunctive relief to remedy Arizona's violations of Section 5 of the National Voter Registration Act (NVRA).¹³¹⁹ Section 5 requires that when an individual notifies a state motor vehicles agency of a change of address, the agency must automatically update the individual's voter registration information, unless the voter affirmatively indicates that their change of address is not for voter registration purposes.¹³²⁰ Contrary to this requirement, the Arizona Secretary of State

¹³⁰⁹ *Id.* at 1001-02.

¹³¹⁰ Defendants' Motion for Summary Judgment, Ohio A. Philip Randolph Inst. v. Kasich, No. 1:18-cv-357 (S.D. Ohio Jan. 8, 2019).

¹³¹¹ See Memorandum in Law in Support of Defendants' Motion for Summary Judgment, Ohio A. Philip Randolph Inst. v. Kasich, No. 1:18-cv-357 (S.D. Ohio Jan. 8, 2019).

¹³¹² *Ohio A. Phillip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 703 (S.D. Ohio 2019).

¹³¹³ *Ohio A. Phillip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 994 (S.D. Ohio 2019).

¹³¹⁴ *Id.*

¹³¹⁵ *Chabot v. Ohio A. Philip Randolph Institute*, 139 S. Ct. 2635 (2019).

¹³¹⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2490 (2019).

¹³¹⁷ *Householder v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 101, 205 L. Ed. 2d 1 (2019).

¹³¹⁸ Order, Ohio A. Philip Randolph Institute v. Householder, No. 1:18-cv-00357 (S.D. Ohio Oct. 29, 2019).

¹³¹⁹ Complaint, League of Women Voters of Ariz. v. Reagan, No. 18-cv-02620 (D. Ariz. Aug. 18, 2018).

¹³²⁰ 52 U.S.C. § 20504.

was failing to automatically update the addresses of individuals who changed their addresses through the Arizona Department of Transportation.¹³²¹ Because of this failure to comply with federal law, Arizona had been consistently at the top of the list of states issuing and rejecting provisional ballots.¹³²² To put this in perspective, almost 70% of Arizonans changed their residential address between 2000 and 2010, making Arizona the state with the second highest rate of residents with address changes.¹³²³ The U.S. Census Bureau estimated that in 2016, more than 800,000 people in Arizona moved within the same county and more than 126,000 moved to a different county.¹³²⁴ The plaintiffs also presented information showing that one of the most frequent reasons provisional ballots in Arizona are rejected is because they are cast out-of-precinct. In the 2008 general election, 14,885 out-of-precinct ballots were not counted, constituting 0.6% of total ballots cast.¹³²⁵ In the 2012 general election, 10,979 ballots were cast out-of-precinct and not counted, constituting 0.5% of all ballots cast.¹³²⁶ Arizona's process also affected its early vote by mail system because if a voter moves within the state and the state does not automatically update their registration address in accordance with the NVRA, then the voter would not receive their early voting ballot.¹³²⁷ In 2016, 75% of Arizona voters utilized vote by mail. Accordingly, the plaintiffs sought an injunction to compel compliance with Section 5 of the NVRA and to count out-of-precinct ballots cast in the 2018 elections for races for which voters were eligible.

Following a hearing for a preliminary injunction, the district court rejected the plaintiffs' request.¹³²⁸ While the court indicated there may be a substantive NVRA violation, the court found that the plaintiffs had little chance to prevail on the merits due to the defendants' lack of authority to unilaterally alter voter registration procedures and compel Arizona election officials to count out-of-precinct ballots.¹³²⁹ The court also concluded that the plaintiffs were unable to show irreparable harm, citing a lack of evidence indicating that individuals who updated their address with the Arizona Department of Transportation had their ballots invalidated.¹³³⁰ In January 2020, the parties entered into a settlement

¹³²¹ See Complaint at ¶ 32, *League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620 (D. Ariz. Aug. 18, 2018).

¹³²² *Ibid.*

¹³²³ *Id.* at ¶ 29.

¹³²⁴ *Id.* This matters because under Arizona law if a voter moves between counties he or she is unable to vote at either their new or old polling place if their address is not up to date. See A.R.S. §§ 16-122, 16-135, 16-584. If a voter moves within the same county and attempts to vote at their old polling location, the voter would still be disenfranchised because Arizona law does not permit any part of an out-of-precinct ballot to count, even for races for which the voter is otherwise eligible, such as statewide or federal offices. *Id.*

¹³²⁵ *Id.* at ¶ 32.

¹³²⁶ *Ibid.*

¹³²⁷ *Id.* at ¶ 33.

¹³²⁸ *League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620, 2018 WL 4467891, at *10 (D. Ariz. Sept. 18, 2018).

¹³²⁹ *Id.* at *6.

¹³³⁰ *Id.* at *7.

agreement wherein Arizona agreed to comply with the NVRA's requirements, including automatically updating voter registration addresses as part of any driver's license address change (unless a voter opts out of such an update).¹³³¹

109. Rangel-Lopez v. Cox – Kansas 2018

On October 26, 2018, just days before the 2018 general election, the ACLU and ACLU of Kansas, on behalf of the League of United Latin American Citizens and an individual plaintiff, filed a lawsuit challenging the unilateral decision of the county clerk of Ford County, Kansas, to move the only voting site in its county seat of Dodge City to a location outside of the city.¹³³² Ford County is a majority-minority county in Kansas, largely due to the demographics of Dodge City. At the time of the filing, Hispanic residents made up approximately 53% of the county's population, five times the percentage of Hispanic residents in Kansas.¹³³³ Prior to the polling location change, Dodge City's Civic Center had been the only polling location in the city since 1998 and used as recently as August 2018 for the primary election.¹³³⁴ The county clerk's decision to move the city's only polling site also came after a year of efforts by voters and civic organizations requesting the clerk to add additional polling locations to better serve the area's Hispanic voters. The new location was over a mile from the nearest bus stop and did not have sidewalks for the majority of the route between the bus stop and new polling location.¹³³⁵ A significant number of people in Dodge City were dependent on public transit because of income, age, and disability.¹³³⁶ In 2016, Dodge City Public Transportation estimated that approximately 36% of the county had a potential need for public transportation, and 40% of households in Ford County did not own a car or shared a single vehicle among multiple family members.¹³³⁷ Additionally, the county's poverty rate was higher than the rest of Kansas, and its Hispanic residents were twice as likely than their white neighbors to be poor.¹³³⁸ Given the socioeconomic burdens faced by the city's Hispanic voters, the plaintiffs argued that they would be disproportionately burdened by the polling location change.

The plaintiffs alleged that the county clerk's actions violated the First and Fourteenth Amendments and Section 2 of the Voting Rights Act and sought a temporary restraining order to require the clerk to open an additional polling place in Dodge City for the upcoming election and a permanent injunction requiring her to open locations accessible by public transportation.¹³³⁹ The judge denied the plaintiffs' request for a temporary restraining order

¹³³¹ Joint Motion and Stipulation for Dismissal Pursuant to Settlement Agreement, *League of Women Voters of Arizona v. Reagan*, No. 2:18-CV-02620 (D. Ariz. Jan. 6, 200), Dkt. 67.

¹³³² Complaint at ¶ 1, *LULAC v. Cox*, No. 2:18-cv-02572 (D. Kan. Oct. 26, 2018).

¹³³³ *Id.* at ¶ 8.

¹³³⁴ *Id.* at ¶ 6.

¹³³⁵ *Id.* at ¶ 11.

¹³³⁶ *Id.* at ¶ 9.

¹³³⁷ *Ibid.*

¹³³⁸ *Id.* at ¶ 8.

¹³³⁹ *Id.* at ¶ (a) - (d)

on November 1, 2018, after a hearing on the matter, determining a late voting change to revert the polling site back to its original location was not in the public interest because it “likely would create more voter confusion than it would cure.”¹³⁴⁰ The court did not come to a determination on whether the plaintiffs would have succeeded on the merits because of the limited record before it, but expressed concern with the facts that had been presented in support of the temporary restraining order.¹³⁴¹

After national attention on the issue and increasing pressure, the county clerk announced that she would open two additional polling locations in the city, and the plaintiffs filed a motion to voluntarily dismiss the action without prejudice, which was granted on January 29, 2019.¹³⁴² The county expended approximately \$90,000 on legal fees as a result of the lawsuit.

110. Maricopa County Republican Party v. Reagan – Arizona 2018

In 2018, some Arizona county recorders publicly disclosed that they stopped notifying voters that their absentee ballot signatures were deemed mismatched as of 7:00 p.m. on Election Day, effectively denying these voters an opportunity to prove their signatures were genuine even though they had turned their ballots in on time.¹³⁴³ This policy was especially arbitrary in light of the fact that Arizona had a process in place that permitted voters who cast provisional ballots up to five business days to cure those ballots.¹³⁴⁴

To address this issue, the ACLU, ACLU of Arizona, Campaign Legal Center, and others sent a letter to the Arizona Secretary of State and county recorders two weeks prior to the 2018 election warning that this practice violated the due process and equal protection clauses of the Constitution.¹³⁴⁵ The letter informed the Secretary of State that, outside of Pima County, election officials were not providing notice to voters with alleged mismatched signatures if the mail-in ballot was received on or near Election Day. As a result, whether an eligible voter’s mail-in ballot would be counted was arbitrary and dependent on which county they resided in and when they turned in their ballot within the allowable window.¹³⁴⁶ The letter also highlighted the arbitrary nature of the signature matching requirement, since election officials comparing signatures were not handwriting experts nor did they follow uniform procedures or standards in comparing signatures.¹³⁴⁷ The letter argued that the various practices across the state violated the Fourteenth Amendment in

¹³⁴⁰ *Rangel-Lopez v. Cox*, 344 F.Supp.3d 1285, 1290 (D. Kan. 2018).

¹³⁴¹ *Id.* at 1291.

¹³⁴² Order Granting Voluntary Motion to Dismiss, *LULAC v. Cox*, No. 18-2572 (D. Kan. Jan. 29, 2019).

¹³⁴³ See Letter from ACLU et al. to Michele Reagan, Secretary of State, Ariz. (Oct. 22, 2018), <https://campaignlegal.org/document/letter-arizona-secretary-state-michele-reagan-regarding-signature-matching-process>.

¹³⁴⁴ See *id.* at 2.

¹³⁴⁵ See *id.* at 5.

¹³⁴⁶ *Id.* at 7.

¹³⁴⁷ *Ibid.*

three ways: (1) by depriving voters of procedural due process; (2) by imposing an undue burden on the fundamental right to vote; and (3) by counting votes in an arbitrary manner in violation of the Equal Protection Clause.¹³⁴⁸ Accordingly, the letter urged the Arizona Secretary of State to issue immediate guidance to county recorders requiring that all voters whose ballots were flagged for allegedly mismatched signatures be provided notice and an opportunity to cure before their ballots were rejected. Alternatively, the letter requested all county recorders to independently implement procedures ensuring notice to all voters with “mismatched” signatures to cure their ballots if they were submitted within the allowable timeframe.¹³⁴⁹

On November 7, 2018, several county Republican parties filed a motion for a temporary restraining order in state court seeking to enjoin the improved practice because several rural counties were not permitting voters the same notice and cure opportunity.¹³⁵⁰ They argued that “certain County Recorders—specifically those of Maricopa and Pima Counties—[would] allow voters to cure non-compliant early ballots for a period of five days after Election Day...[which] threatens to beget an extended period of confusion and uncertainty following the election” and that this practice denied Arizona voters equal protection.¹³⁵¹

In response, the ACLU, ACLU of Arizona, and Campaign Legal Center intervened and filed a responsive brief late in the evening on November 8, 2018, two days after the general election, on behalf of the League of United Latin American Citizens, the League of Women Voters, and Arizona Advocacy Network Foundation, seeking an order from the court that *all* Arizona counties offer voters whose signatures were flagged notice and an opportunity to cure through the deadline for resolving provisional ballot issues, which was Wednesday, November 14.¹³⁵² The brief argued that the court should not remedy the failure of some Arizona counties to provide voters with due process by prohibiting *all* Arizona counties from doing so. If the court was inclined to address the uniformity question on an emergency basis, it should order all counties to provide voters with notice and an opportunity to confirm their signatures.¹³⁵³ The brief cited data from 2016 showing approximately three-quarters of Arizona’s voters voted by mail and that 2,657 mail-in ballots in Arizona were rejected because officials determined the ballots’ signatures did not match the signatures on record.¹³⁵⁴ The plaintiffs also argued that any administrative burden on the government

¹³⁴⁸ *Id.* at 5.

¹³⁴⁹ *Id.* at 2.

¹³⁵⁰ Verified Complaint for Injunctive and Declaratory Relief, Maricopa Cty. Republican Party v. Reagan, No. CV 2018-013963 (S. Ct. Ariz., Maricopa Cty. Nov. 7, 2018).

¹³⁵¹ *See id.* at ¶¶ 28-30.

¹³⁵² Defendant-Intervenors LULAC et al.’s Brief in Response to Plaintiffs’ Motion for a Temporary Restraining Order, Maricopa Cty. Republican Party v. Reagan, No. CV2018-013963 (Maricopa Cty., Ariz. Nov. 8, 2018).

¹³⁵³ *Id.* at 2, 8-10.

¹³⁵⁴ *Id.* at 3.

was insufficient to overcome these voters' interests in due process protection for their fundamental right to vote.¹³⁵⁵

A hearing was held on November 9, 2018, and the Maricopa County Superior Court, upon agreement of a settlement by the parties, including the state and all fifteen county recorders, ordered all county recorders statewide to permit voters to cure an alleged signature mismatch issue by the provisional ballot cure deadline of Wednesday, November 14, to confirm their vote.¹³⁵⁶

111. Adams Jones v. Boockvar – Pennsylvania 2018

On November 13, 2018, the ACLU, ACLU of Pennsylvania, and Lawyers' Committee for Civil Rights Under Law filed a lawsuit challenging Pennsylvania's deadline for submitting absentee ballots.¹³⁵⁷ The plaintiffs include nine individuals who applied for an absentee ballot on time but received the ballot either too close to or after Pennsylvania's deadline for returning ballots. For an absentee ballot to count in Pennsylvania, the county board of elections must receive the ballot by 5:00 p.m. on the Friday before the election, four days before Election Day, making it the earliest absentee ballot receipt deadline in the country.¹³⁵⁸ The deadline regularly disenfranchises thousands of Pennsylvania absentee voters due to the unreasonably early deadline.¹³⁵⁹ The Philadelphia Inquirer reported that 86% of Pennsylvania absentee ballots rejected in the 2014 election—2,030 out of 2,374—were rejected solely for missing the Friday 5:00 p.m. return deadline, and 2,162 absentee ballots were rejected for the same reason in 2010.¹³⁶⁰ Voters can comply with every legal deadline for registering to vote and requesting an absentee ballot and still receive their ballot too late to return it on time.¹³⁶¹

The burden on these absentee voters is particularly acute because Pennsylvania does not have early in-person voting and Pennsylvania law only permits absentee voting for voters who cannot vote on Election Day for certain specified reasons, so many of these voters have no other option but to vote absentee.¹³⁶² These voters are effectively deprived of their only available option to cast a ballot.¹³⁶³ The problem is only expected to get worse due to cuts to

¹³⁵⁵ *Id.* at 5-8.

¹³⁵⁶ Settlement Order, *Maricopa Cty. Republican Party v. Reagan*, No. CV 2018-013963 (Maricopa County Sup. Ct., Ariz. Nov. 9, 2018).

¹³⁵⁷ Petition for Review, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

¹³⁵⁸ See 25 PA. CONS. STAT. § 3146.6(a); see also Petition for Review at ¶ 3, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

¹³⁵⁹ Petition for Review at ¶ 4, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Nov. 13, 2018).

¹³⁶⁰ *Id.* at ¶ 46.

¹³⁶¹ *Id.* at ¶ 4.

¹³⁶² *Id.* at ¶ 6.

¹³⁶³ *Ibid.*

the postal service.¹³⁶⁴ Most of these disenfranchised individuals do not learn that their ballot was rejected.¹³⁶⁵ This problem has persisted for over a decade; post-election data that became public following the filing of the petition confirmed that the problem continued to be an issue in the November 2018 midterm election.¹³⁶⁶

The plaintiffs seek declaratory relief that Pennsylvania's absentee ballot deadline violates their right to vote under the state and federal constitutions and injunctive relief barring the use of the current absentee ballot deadline in future elections. The respondents filed preliminary objections in motions to dismiss in January 2019, and the petitioners filed their brief in opposition to the preliminary objections in April 2019.¹³⁶⁷ Oral argument on the motions was held on June 5, 2019, and the case is awaiting decision on the preliminary objections. On October 31, 2019, Pennsylvania governor signed a bill expanding absentee ballot access, with provisions for voters to submit their ballot until 8:00 pm on Election Day. On December 11, 2019, the Court issued an order stating that the Pennsylvania legislature's action "has resolved or mooted the claims" of the voters, and therefore dismissed the case.¹³⁶⁸

112. State of Texas v. Crystal Mason – Texas 2018

The State of Texas prosecuted Crystal Mason for the crime of illegal voting pursuant to Tex. Elec. Code § 64.012(B), which bars someone who "votes or attempts to vote in an election in which the person knows the person is not eligible to vote."¹³⁶⁹ She cast a provisional ballot in the 2016 presidential election while on federal supervised release, which the state claims renders her ineligible to vote under Texas law. Her provisional ballot was never counted. She asserted that she cast the provisional ballot upon the suggestion of a poll worker and did not know that the state considered her ineligible to vote at the time, but she was convicted on March 28, 2018, following a bench trial and sentenced to serve five years in state prison.

The ACLU of Texas, along with the Texas Civil Rights Project, filed an amicus brief in support of Ms. Mason's amended motion for a new trial on May 23, 2018. It argued that Texas' criminalizing of the casting of a provisional ballot when the person mistakenly believes he or she is eligible to vote is inconsistent with federal law. The brief argued that the reading of the Texas Election Code to criminalize Ms. Mason is in violation of her protected rights under the Help America Vote Act ("HAVA"), which permits people who believe they are eligible to vote to cast a provisional ballot even when eligibility to vote is

¹³⁶⁴ *Id.* at ¶ 48.

¹³⁶⁵ Petitioners' Brief In Opposition to the Preliminary Objections of All Respondents at 2, *Adams Jones v. Boockvar*, Docket No. 717 MD 2018 (Pa. Commw. Ct. Apr. 8, 2019).

¹³⁶⁶ *Ibid.*

¹³⁶⁷ *Id.*

¹³⁶⁸ Opinion and Order, *Adams Jones v. Boockvar*, No. 717 MD 2018 (Pa. Commw. Ct. Dec. 11, 2019).

¹³⁶⁹ Tex. Elec. Code § 64.012(B).

uncertain.¹³⁷⁰ It further argues that evidence that an individual cast a provisional ballot based on an apparent mistake about her eligibility is insufficient as a matter of law to demonstrate the requisite criminal intent under the Texas law.

On June 11, 2018, the trial court denied Ms. Mason's amended motion for a new trial as untimely and declined to consider the ACLU's brief.¹³⁷¹ The trial court also denied Ms. Mason's original motion for a new trial, rejecting her claims of bias, ineffective assistance of counsel, and legal insufficiency.¹³⁷²

Ms. Mason appealed her conviction. On May 10, 2019, the ACLU, ACLU of Texas, and the Texas Civil Rights Project joined the legal team representing Ms. Mason in her appeal. On September 10, 2019, a three judge panel heard oral arguments on appeal, in which Ms. Mason's defense argued that the evidence was neither legally nor factually sufficient to sustain her conviction because the prosecution failed to prove that: (1) Ms. Mason voted in the 2016 election because her provisional ballot was never counted and a counted provisional ballot is not a "vote" under the Texas Election Code, (2) Ms. Mason was ineligible to vote because the conditions of her release from federal prison did not amount to "supervision" under Texas law; and (3) Ms. Mason knew she was ineligible to vote. The defense also argued that (1) the illegal voting statute is unconstitutionally vague as applied to Ms. Mason because what constitutes "supervision" for purposes of rendering someone ineligible to vote is undefined and ambiguous; (2) HAVA preempts the state's interpretation of the Texas Election Code to criminalize Ms. Mason's actions because HAVA creates a system whereby people who believe they are eligible to vote to cast a provisional ballot may do so, even if they turn out to be incorrect; and (3) Ms. Mason received ineffective assistance of counsel at trial. Ultimately, the panel affirmed Ms. Mason's conviction, finding that whether she was aware she was legally ineligible to vote was not relevant to whether she had the requisite mental state for an illegal voting conviction.¹³⁷³

The ACLU and co-counsel filed a Petition for Discretionary Review in the Texas Court of Criminal Appeals, the state's highest court for criminal cases, seeking review of Ms. Mason's conviction and the intermediate appeals court's decision. On March 31, 2021, the petition was granted. In May 2022, the Texas Court of Criminal Appeals ruled in Ms. Mason's favor and remanded the case to the intermediate appellate court, to determine if there was enough evidence that Ms. Mason was aware that she was ineligible to vote. The remand was argued in early 2023 and a decision remains outstanding.

113. Department of Commerce v. New York – New York 2019

¹³⁷⁰ Brief of ACLU et al. as Amicus Curiae, *Texas v. Mason*, No. D 432-1485710-00 (432nd Judicial District Court of Tarrant County, Texas, May 23, 2018).

¹³⁷¹ Findings of Fact, Conclusions of Law and Order, *Texas v. Mason*, No. D 432-1485710-00 (432nd Judicial District Court of Tarrant County, Texas, June 11, 2018).

¹³⁷² *Id.* at 12-15.

¹³⁷³ *See Mason v. State*, 598 S.W.3d 755 (Ct. App. Tex. 2020).

The ACLU represented a coalition of civil rights groups, including the New York Immigration Coalition (“NYIC”), in a challenge to the U.S. Department of Commerce’s decision to add a citizenship question to the 2020 census, which the department claimed was for the purpose of facilitating enforcement of the Voting Rights Act. The suit alleged that the citizenship question would cause noncitizen households not to respond to the census, leading to an undercounting, and ultimately, underrepresentation, of communities of color. The suit alleged constitutional violations under the Enumeration Clause and the Equal Protection Clause as well as violations of the Census Act and the Administrative Procedures Act (APA). The APA creates a process by which courts can review a government agency’s justifications for taking an action and strike down the action if the decision is found to be arbitrary or capricious.

The district court found for the NYIC coalition, holding that Commerce Secretary Wilbur Ross violated the APA by acting in a manner that was arbitrary and in spite of overwhelming evidence that the question would cause undercounting of immigrant communities.¹³⁷⁴ The court found that the Secretary “failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices.”¹³⁷⁵ The court also found substantial evidence that the reasons given for the decision to include the census question were pretextual, and suggested that discriminatory intent may have been found if the plaintiffs had been permitted to gather additional evidence. Because of the mismatch between the Secretary’s stated reasons for adding a citizenship question to the census and the actual evidence on the record, the district court found the ruling to be arbitrary and capricious and vacated it under the APA.

The Trump Administration appealed the ruling to the Supreme Court, which reversed in part and affirmed in part the district court’s holding in a June 2019 decision.¹³⁷⁶ The Supreme Court reversed the lower court’s finding that the Secretary violated the Census Act, but upheld the ruling that the Secretary violated the APA by providing pretextual justification for the decision. The Court concluded that the Secretary provided a sole reason for including the citizenship question—facilitating enforcement of the Voting Rights Act—yet the record showed that the Voting Rights Act played almost no part in the discussions surrounding the decision and was merely a “distraction.”¹³⁷⁷ The Court found that the APA required the Secretary to provide a full and honest account of the justifications for its decision, and that his failure to do so justified the district court’s ruling vacating the Secretary’s decision to include a citizenship question on the 2020 census.

The Justice Department and Secretary Ross initially announced that they would abandon the citizenship question and begin to print census forms without it, but President Trump

¹³⁷⁴ *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

¹³⁷⁵ *Id.* at 516.

¹³⁷⁶ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

¹³⁷⁷ *Id.* at 2576.

later announced a decision to reverse course and pursue a renewed effort to include the question. In late July, the Trump administration finally abandoned plans to include the citizenship question on the census, a significant victory for voting rights advocates.

114. Texas League of United Latin American Citizens v. Whitley – Texas 2019

In 2019, the ACLU and ACLU of Texas sued the Texas Secretary of State in federal court on behalf of MOVE Texas Civic Fund and other plaintiffs to prevent an unlawful purge of the voting rolls that would target and threaten the voting rights of eligible naturalized citizens and people of color.¹³⁷⁸ Shortly after commencing, this case was consolidated with two other cases.¹³⁷⁹

The action stemmed from a January 25, 2019, press release from Secretary of State Whitley, announcing that his office had identified approximately 95,000 individuals whom he claimed were possible noncitizens registered to vote. According to the press release, a purge list was created to facilitate counties purging these individuals from the county's voter rolls.¹³⁸⁰ When the list was created, officials failed to account for naturalized citizen who submitted documentation to DPS before registering, despite the large number of Texans who naturalize every month and the amount of time, sometimes years, between DPS transactions. When the purge list was released, it was revealed that the data was seriously flawed, and the Secretary of State retracted individuals from the purge list because they were citizens who had been included due to a "coding error." Some of those citizens had already been sent notices threatening them with removal from the rolls.¹³⁸¹

The lawsuit alleged that the purge list was discriminatory and arbitrary in its design, purpose, and effect, violating the U.S. Constitution and the Voting Rights Act of 1965 by targeting naturalized citizens. There are approximately 1.6 million naturalized citizens in Texas, and over 87 % of them are Black or Latino.¹³⁸² With general elections to be held on May 4, 2019, for which the registration deadline was April 4, 2019, eligible voters who were purged through this program would have limited time to re-register before the elections.¹³⁸³ In April 2019, the parties agreed to a settlement providing that with the dismissal of all three consolidated cases, the state would rescind its original advisory announcing the purge

¹³⁷⁸ First Amended Complaint, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 7 (S.D. Tex. Feb. 6, 2019).

¹³⁷⁹ Order of Consol., Tex. League of United Latin Am. Citizens, et al., v. Whitley, No. 5:19-cv-00171-FB (S.D. Tex. Feb. 22, 2019).

¹³⁸⁰ First Amended Complaint at 2, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 7 (S.D. Tex. Feb. 6, 2019).

¹³⁸¹ *Id.* at 4

¹³⁸² *Id.* at 5

¹³⁸³ Pls.' Mot. for Prelim. Injunction, MOVE Tex. Civic Fund, et al., v. Whitley, No. 3:19-cv-00041, Dkt. No. 10 (S.D. Tex. Feb. 10, 2019).

effort, as well as provide and maintain information regarding the implementation of the process.¹³⁸⁴

115. Gruver v. Barton – Florida 2019

In June 2019, the ACLU, ACLU of Florida, NAACP Legal Defense and Educational Fund, Inc., and Brennan Center for Justice filed a federal lawsuit on of a set of plaintiffs challenging a new state law that conditions the restoration of the right to vote after a felony conviction on a person's ability to pay court-related fees.¹³⁸⁵ The lawsuit alleges violations of the First, Fourteenth, and Fifteen Amendments; the Twenty-Fourth Amendment; and the Ex Post Facto Clause.

Over five million Floridians supported Amendment 4 in the November 2018 elections, passage of which automatically restored the right to vote of 1.6 million people with past felony convictions, or nearly 25% of the 6.1 million Americans who had been permanently disenfranchised. Florida had been one of only four states who permanently disenfranchised their citizens based on a single felony conviction, causing the highest percentage of felon disenfranchisement in the country. More than 10% of Florida's voting-age population were ineligible to vote, and of that number, over 20% were Black.

In response, the Florida Legislature quickly passed SB 7066 in response, requiring that returning citizens pay off all court-related fees before their voting rights could be restored. The new law essentially creates two classes of returning citizens: those who are wealthy enough to pay off all court-related fees in order to restore their voting rights and another group who are not. This unconstitutional conditioning of the ability of a returning citizen to vote maintains the harsh racial disparities in the criminal justice system, given longstanding racial disparities in wealth and poverty.

In October 2019, a federal court granted a partial preliminary injunction in the plaintiffs' favor. The court ruled that individual plaintiffs in the case would have their rights restored, and in doing so did not make a definitive decision on the poll tax claim. However, the court held that "Florida cannot deny restoration of a felon's right to vote solely because the felon does not have the financial resources to pay the other financial obligations."

In May 2020, the district court ruled in plaintiffs' favor, holding that disenfranchising citizens with a felony conviction who genuinely could not pay fines and fees violated the Equal Protection Clause, and that conditioning voting on the payment of fees and costs constituted a prohibited "tax" under the Twenty-Fourth Amendment.¹³⁸⁶ Under the district court's ruling, those who were otherwise eligible citizens who genuinely could not pay could

¹³⁸⁴ Settlement Agreement, *Tex. League of United Latin Am. Citizens, v. Whitley*, No. 5:19-cv-00171 (S.D. Tex. Apr. 26, 2019).

¹³⁸⁵ Complaint for Injunctive and Declaratory Relief, *Gruver v. Barton*, No. 4:19-cv-00302 (N.D. Fla. June 28, 2019).

¹³⁸⁶ *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla.), hearing en banc ordered sub nom. *McCoy v. Gov'r of Fla.*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020), and rev'd and vacated sub nom. *Jones v. Gov'r of Fla.*, 975 F.3d 1016 (11th Cir. 2020).

not be excluded from the franchise. While the district court first denied a stay pending appeal,¹³⁸⁷ the Eleventh Circuit granted the stay pending appeal in anticipation of an en banc hearing.¹³⁸⁸ Plaintiffs appealed the stay, but the Supreme Court denied the plaintiffs application to vacate.¹³⁸⁹ In September 2020, an en banc Eleventh Circuit reversed the judgment of the district court, holding that the challenged law did not violate equal protection nor the Twenty-Fourth Amendment.¹³⁹⁰

116. Casey v. Gardner – New Hampshire 2019

On February 13, 2019, the ACLU and the ACLU of New Hampshire filed a federal lawsuit challenging a New Hampshire law that unconstitutionally restricts the right to vote for students, young people, and new residents to the state.¹³⁹¹ The law, HB 1264, burdens their right to vote and acts as a “poll tax” by intending to require new voters to shift their home state driver’s licenses and registrations to New Hampshire — which can add up to hundreds of dollars — solely for exercising their right to vote.

The lawsuit was brought on behalf of two Dartmouth College students who would have been required to pay for New Hampshire driver’s licenses if they vote in New Hampshire. If they did not change their licenses and registration, they could face civil penalties. The lawsuit cites a violation of the Twenty-Sixth Amendment, which lowered the voting age to 18 in 1971. The Amendment’s aim was not only to allow young people to vote, but also to encourage voting by eliminating obstacles. Laws such as HB 1264 aimed at college students target young people in violation of the purpose of the 26th Amendment.

The state filed a motion seeking to have the case dismissed, which was denied. Subsequently, plaintiffs moved for a preliminary injunction, seeking to prevent voter confusion by preventing the state from enforcing the challenged statute, which was denied. Eventually, the federal court certified five questions of state law that were implicated by the lawsuit to the New Hampshire Supreme Court, essentially asking them to clarify certain points before the lawsuit moved forward. In May 2020, the state supreme court held that state law required college students to shift their driver’s licenses and registrations to New Hampshire, and given this interpretation of state law, plaintiffs voluntarily dismissed the case afterward.¹³⁹²

117. League of Women Voters of Tennessee v. Hargett – Tennessee 2019

Even though Tennessee ranks 44th in the U.S. for voter registration, during the 2018 midterm election, the state saw a surge in registrations. Rather than providing greater resources to manage the influx, in response, the Tennessee General Assembly passed a

¹³⁸⁷ Jones v. DeSantis, No. 4:19CV300-RH/MJF, 2020 WL 5646125 (N.D. Fla. June 14, 2020).

¹³⁸⁸ McCoy v. Governor of Fla., No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020).

¹³⁸⁹ Raysor v. DeSantis, 140 S. Ct. 2600, 207 L. Ed. 2d 1120 (2020).

¹³⁹⁰ Jones v. Gov’r of Fla., 975 F.3d 1016 (11th Cir. 2020) (en banc).

¹³⁹¹ Casey v. Gardner, No. 1:19-cv-00149-JL (D. N.H. Feb. 13, 2019).

¹³⁹² See Casey v. New Hampshire Sec’y of State, 173 N.H. 266 (2020).

measure that creates severe penalties against those who fail to comply with onerous and unnecessary requirements, including one mandating state training, which is the organization's responsibility to administer, and one limiting the ability of groups to follow up with applicants who file incomplete forms.

On May 9, 2019, the ACLU, the ACLU of Tennessee, Campaign Legal Center, and Fair Elections Center filed a federal lawsuit, challenging the Tennessee law.¹³⁹³ The lawsuit was filed on behalf of the League of Women Voters of Tennessee, American Muslim Advisory Council, Mid-South Peace & Justice Center, Rock the Vote, and Spread the Vote. The complaint charged the new law violates freedom of speech, freedom of association, due process, and the fundamental right to vote under the First and Fourteenth Amendments. Along with the lawsuit, the groups filed a notice letter to the state citing violations of the National Voter Registration Act.

On September 12, 2019, following the filing of an amended complaint, with additional claims and parties, and an unsuccessful motion to dismiss from the defendants, state officials in charge of elections, the court issued a preliminary injunction against the law.¹³⁹⁴ The court found that the law “creates an onerous and intrusive regulatory structure for problems that, insofar as they are not wholly speculative, can be addressed with simpler, less burdensome tools.”¹³⁹⁵ The defendants declined to appeal the preliminary injunction, meaning it would remain in effect through the 2020 elections. On October 26, 2020, with the consent of the plaintiffs, the court ordered that the case be voluntarily dismissed.

118. Schroeder v. Minnesota Secretary of State – Minnesota 2019

On October 21, 2019, the ACLU, ACLU of Minnesota, and Faegre Drinker filed an action in Minnesota state court challenging the denial of the right to vote of people convicted of felonies but subject to parole, probation, or another form of supervised release violates the Minnesota Constitution.¹³⁹⁶ The Minnesota Court of Appeals rejected this argument, disagreeing with the Plaintiffs' interpretation of the Minnesota Constitution and holding that the due process and equal protection rights of Plaintiffs were not violated by the denial of their right to vote.¹³⁹⁷

The Minnesota Supreme Court accepted the case on appeal, but ultimately affirmed the decision of the Court of Appeals.¹³⁹⁸ The court held that challenged provision “does not deny appellants' fundamental right to vote because Minnesotans can define in their constitution who may vote and who may not vote, subject to the constraints of the United States

¹³⁹³ *League of Women Voters of Tenn. v. Hargett*, No. 3:19-cv-00385 (M.D. Tenn. May 9, 2019).

¹³⁹⁴ *League of Women Voters v. Hargett*, 400 F.Supp.3d 706 (M.D. Tenn. 2019).

¹³⁹⁵ *Id.* at 733.

¹³⁹⁶ Compl., *Schroeder v. Simon*, No. 62-CV-19-7440 (Minn. Dist. Ct. Oct. 21, 2019).

¹³⁹⁷ *Schroeder v. Simon*, 962 N.W.2d 471, 479 (Minn. Ct. App. 2021), *aff'd*, 985 N.W.2d 529 (Minn. 2023).

¹³⁹⁸ *Schroeder v. Simon*, 985 N.W.2d 529 (Minn. 2023).

Constitution and perhaps other provisions of the Minnesota Constitution,” and decided that “persons who have committed a felony may not vote, subject to being restored to that right by the Governor through the pardon process or by a different process approved by the Legislature.”¹³⁹⁹ Despite this ruling, the Court noted that it “recognize[d] the troubling consequences, including the disparate racial impacts, flowing from the disenfranchisement of persons convicted of a felony. The Legislature retains the power to respond to those consequences.”¹⁴⁰⁰ The Minnesota legislature did just that within a few weeks of the decision, amending the law to allow people convicted of felonies but released for incarceration to regain their right to vote.¹⁴⁰¹

119. Georgia NAACP v. DeKalb County Board of Elections – Georgia 2020

On February 26, 2020, the Lawyers’ Committee for Civil Rights Under Law, the ACLU of Georgia, and the ACLU filed a federal lawsuit on behalf of the Georgia State Conference of the NAACP and the Georgia Coalition for the People’s Agenda.¹⁴⁰² The lawsuit alleges that DeKalb County election officials are purging eligible voters in violation of federal law and the U.S. Constitution. Counsel sent notice letters in August, September, and October 2019, as required under the federal National Voter Registration Act (NVRA), asking the county to stop the practice. An investigation has revealed that DeKalb County falsely claimed they have been purging voters at the request of Decatur city officials, even though the city never made any such request nor are municipalities permitted to challenge voters’ eligibility under state law.

DeKalb County also purged voters registered at the Decatur Peer Support, Wellness, and Respite Center, falsely alleging that no one could vote while living at that location. However, people can stay overnight up to seven days a month, and many consider the center to be their “home base” where they receive their mail, receive and apply for services, and conduct meetings and other activities. The NVRA’s protections are intended to ensure that voter list maintenance programs are administered uniformly and in a non-discriminatory manner. Stable housing is not a legal prerequisite to voting, and Georgians who are homeless or housing insecure are permitted to vote under state and federal law.

The governmental defendants filed a motion to dismiss, which was denied on September 2, 2020.¹⁴⁰³ In July 2021, the parties finalized a settlement agreement.

120. Ohioans for Secure and Fair Elections v. LaRose – Ohio 2020

Ohio, like many states, guarantees its citizens the right to amend their constitution using the ballot initiative process. In 2020, Ohio citizens formed Ohioans for Secure and Fair

¹³⁹⁹ *Schroeder v. Simon*, 985 N.W.2d 529, 556 (Minn. 2023).

¹⁴⁰⁰ *Schroeder v. Simon*, 985 N.W.2d 529, 557 (Minn. 2023).

¹⁴⁰¹ Minn. Stat. Ann. § 609.165 (2023).

¹⁴⁰² *Georgia State Conf. of the NAACP v. DeKalb Cty. Bd. of Elecs.*, No. 1:20-cv-00879 (N.D. Ga. Feb. 26, 2020).

¹⁴⁰³ *Georgia State Conf. of the NAACP v. DeKalb Cnty. Bd. of Reg’n and Elecs.*, 484 F.Supp.3d 1308 (N.D. Ga. 2020).

Elections, proposing the Secure and Fair Elections Amendment to the constitution, which would have safeguarded the right to vote against suppressive voting laws which seek to limit access to the ballot.¹⁴⁰⁴ As the period for gathering signatures for the November 2020 ballot began, the proponents of this measure submitted it to the Ohio Ballot Board, the entity responsible for the state law requirement that initiatives only cover one subject.

On March 2, 2020, the Board voted to divide the proposed amendment into four separate amendments, arguing that the Ohio constitution's requirement that a ballot measure only cover a single subject required it to do so, even though all of the provisions of the proposed amendment related to single subject of voting.¹⁴⁰⁵ This imposed serious burdens on the initiative proponents: because of the ruling, they would then have to gather four times as many signatures, effectively denying them access to the ballot with the full proposed amendment.

On March 5, 2020, the ACLU filed a lawsuit directly in the Ohio Supreme Court, challenging Ohio's requirements for signature gathering for upcoming ballot initiatives on behalf of proponents of a proposed constitutional amendment and seeking to have the amendment certified for the ballot.¹⁴⁰⁶ On April 14, 2020, the state supreme court issued a writ of mandamus against the Ohio Ballot Board, compelling it to certify the initiative petition as containing only one subject.¹⁴⁰⁷

121. Thompson v. Dewine – Ohio 2020

Shortly afterward, on April 27 2020 – as the COVID-19 pandemic spread across the country, and states, including Ohio, issued stay at home orders – three individuals who wished to circulate petitions for ballot initiatives in municipal elections filed a lawsuit in federal court.¹⁴⁰⁸ On April 30, the ACLU and the ACLU of Ohio moved to intervene, with our own complaint and motion for preliminary relief, on behalf of Ohioans for Secure and Fair Elections.¹⁴⁰⁹ Both the plaintiffs and our clients argued that with the restrictions on gatherings and the risks of face-to-face contact necessary to gather petition signatures,

¹⁴⁰⁴ See Letter from Donald J. McTigue to Hon. Dave Yost, Ohio Attorney General Re: The Secure and Fair Elections Amendment (Feb. 10, 2020), *available at* [https://www.ohioattorneygeneral.gov/getattachment/c380e08c-ef3f-4408-bfb6-ad4530339393/The-Secure-and-Fair-Elections-Amendment-\(Resubmiss.aspx](https://www.ohioattorneygeneral.gov/getattachment/c380e08c-ef3f-4408-bfb6-ad4530339393/The-Secure-and-Fair-Elections-Amendment-(Resubmiss.aspx) (submitting amendment summary to state officials for certification).

¹⁴⁰⁵ March 2, 2020 Letter from Jeff Hobday, Secretary, Ohio Ballot Board to Dave Yost, Ohio Attorney General, Re: Ballot Board Determination that the Secure and Fair Elections Amendment Contains Four Separate Constitutional Amendments, *available at* https://www.acluohio.org/sites/default/files/OhioansForSecureAndFairElectionsEtAl-v-LaroseEtAl-RelatorsComplaint_2020-0305.pdf.

¹⁴⁰⁶ Original Action in Mandamus, State ex rel. Ohioans for Secure and Fair Elections v. LaRose, No. 2020-0327 (Oh. Mar. 5, 2020).

¹⁴⁰⁷ State ex rel. Ohioans for Secure & Fair Elections v. LaRose, 159 Ohio St.3d 568 (2020).

¹⁴⁰⁸ *Thompson v. Dewine*, No. 2:20-cv-02129 (S.D. Oh. Apr. 27, 2020).

¹⁴⁰⁹ Motion to Intervene, *Thompson v. Dewine*, No. 2:20-cv-02129 (S.D. Oh. Apr. 30, 2020), Dkt. 13.

Ohio's signature requirements for ballot initiatives, as applied during the COVID-19 pandemic, burdened citizens' right to participate in the political process.

On May 19, 2020, the court partially granted the motions for injunctions.¹⁴¹⁰ Specifically, it ordered the state to accept electronic signatures on petitions and extended the deadline for signature gathering from July 1 to July 31. The next day, the state defendants appealed the ruling to the Sixth Circuit on an emergency basis, seeking a stay of the order. In an unusual move, the state also asked the Sixth Circuit to take the case en banc initially, rather than having a three-judge panel make a decision, as is the norm. On May 26, the appeals court granted the stay, meaning that despite stay-at-home orders, proponents of ballot initiatives would, somehow, still have to gather the usual number of signatures in a month's time.¹⁴¹¹ After the stay was issued, plaintiffs filed a motion in the U.S. Supreme Court, seeking an order vacating the stay, even partially, though these efforts were unsuccessful.¹⁴¹² Therefore, on August 20, we moved to be dismissed from the appeal, as the deadline had passed and our position had become moot.

122. Western Native Voice v. Stapleton – Montana 2020

Due to the great distances between people and places in Montana, the majority of voters in the state vote by mail. Rural tribal communities, including those on Native reservations, work with get-out-the-vote organizers to collect and transport ballots to election offices that would otherwise be inaccessible. This is of particular importance for Native American communities, given the disproportionate lack of access to vehicles and vast distances between voters and post offices on reservations. In 2018, the Ballot Interference Prevention Act (BIPA), a legislatively referred ballot initiative, became law.¹⁴¹³ BIPA imposed severe restrictions on ballot collection efforts that are vital to Native American voters, particularly those who live on rural reservations, by limiting who could return a voted ballot and the total number of ballots any one person could return. This law directly targeted efforts to boost turnout within tribal communities, who rely heavily on ballot collection efforts.

On March 20, 2020, the ACLU, the ACLU of Montana, and the Native American Rights Fund sued in Montana state court, representing Western Native Voice and Montana Native Vote, two organizations that promote political engagement in the Native American community.¹⁴¹⁴ On average, the two plaintiff organizations would collect over 85 ballots per organizer, while BIPA limited each organizer to only six ballots. The lawsuit challenged BIPA with violating the voting and due process rights of individuals living on reservations, as well as the free speech and association rights of Western Native Voice and Montana Native Vote as they engage in ballot collection on reservations.

¹⁴¹⁰ *Thompson v. Dewine*, 461 F.Supp.3d 712 (S.D. Oh. 2020).

¹⁴¹¹ *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020).

¹⁴¹² *See Thompson v. Dewine*, No. 19A1054, 2020 WL 3456705 (2020) (denying motion to vacate stay).

¹⁴¹³ Mont. Code Ann. § 13-35-701, *et seq.*

¹⁴¹⁴ *Western Native Voice v. Stapleton*, No. DV-2020-377 (Mont. Dist. Ct. Mar. 20, 2020).

On May 20, 2020, the court issued a preliminary injunction, blocking BIPA in advance of a June 2 primary election, and setting the matter for a hearing. On July 7, 2020, the court granted the plaintiffs' request for preliminary relief, finding that "BIPA serves no legitimate purpose; it fails to enhance the security of absentee voting; it does not make absentee voting easier or more efficient; it does not reduce the costs of conducting elections; and it does not increase voter turnout."¹⁴¹⁵

The case went to trial in September 2020, and on September 25, the court issued its ruling, finding that plaintiffs presented "cold, hard data" about the impact on Native Americans, and how the costs of BIPA are "simply to[o] high and to[o] burdensome to remain the law of the State of Montana."¹⁴¹⁶

123. Texas Democratic Party v. DeBeauvoir – Texas 2020

Texas election law requires that to vote by mail, a voter must have "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of ... injuring the voter's health."¹⁴¹⁷ On March 20, 2020, as the COVID-19 pandemic began its initial spread across the country, several registered voters and the Democratic National Committee sued the Texas Secretary of State, seeking a declaration that the public health emergency constituted a qualifying disability for purposes of absentee voting.

On April 2, 2020, the ACLU, the ACLU of Texas, and the Texas Civil Rights Project moved to join the case on behalf of an individual voter, the League of Women Voters of Texas, MOVE Texas, and other plaintiffs to determine whether Texas law allowed all registered voters to request a mail-in ballot.¹⁴¹⁸ After a hearing in which the court heard testimony concerning COVID-19 and arguments from both sides, the court ruled for the plaintiffs and ordered that all Texans be allowed to vote by mail due to the COVID-19 pandemic for elections held in July 2020.¹⁴¹⁹ The court scheduled further hearings to determine how to handle the November elections, while the state appealed the court's ruling governing the July elections. On May 27, 2020, in a separate case, the Texas Supreme Court ruled that voters could not vote absentee solely due to the risk of COVID-19, but elections officials could take individual circumstances, including heightened risk of COVID-19, into account

¹⁴¹⁵ Order Granting Plaintiff's Motion for Preliminary Injunctive Relief, *Western Native Voice v. Stapleton*, No. DV-2020-377, at 9 (Mont. Dist. Ct. July 7, 2020).

¹⁴¹⁶ Courts Findings of Fact, Conclusions of Law and Order, *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. Dist. Ct. Sept. 25, 2020).

¹⁴¹⁷ Tex. Elec. Code. § 82.002(a).

¹⁴¹⁸ Petition in Intervention, *Texas Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610 (Tex. Dist. Ct. Apr. 2, 2020).

¹⁴¹⁹ Order on Application for Temporary Injunctions and Plea to the Jurisdiction, *Texas Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610 (Tex. Dist. Ct. Apr. 17, 2020).

when processing absentee ballot applications.¹⁴²⁰ Following this ruling, plaintiffs voluntarily dismissed their case.

124. Black Voters Matter v. Raffensperger – Georgia 2020

Arising in the context of the COVID-19 pandemic, this lawsuit challenged Georgia's practice of requiring voters to buy postage stamps when submitted mail-in absentee ballots and absentee ballot applications.¹⁴²¹ The legal claim was straight-forward: The Constitution bans poll taxes, and postage costs money. Requiring Georgia voters to pay postage when submitting mail-in absentee ballots amounts to a poll tax. Plus, because the COVID-19 pandemic made it unrealistic for most, if not all, voters to cast ballots in-person, the state is essentially forcing voters to pay in order to participate in our democracy. In addition to poll tax claims, the lawsuit also alleged that the requirement was an unconstitutional burden on the right to vote.

On April 8, 2020, the ACLU and the ACLU of Georgia filed the lawsuit, seeking a preliminary injunction to require election officials to provide prepaid returnable envelopes for absentee ballots and absentee ballot applications.¹⁴²² Notably, this requested relief would not be burdensome: the law requires election officials to provide postage prepaid returnable envelopes for other purposes. In May 2020, the court denied the motion for a preliminary injunction with respect to the June elections, and in August 2020, the court dismissed the remainder of the motion for a preliminary injunction and the poll tax claim.¹⁴²³ Plaintiffs appealed the decision in September 2020, and the case is still pending in the Eleventh Circuit.¹⁴²⁴

125. Missouri NAACP v. Missouri – Missouri 2020

On April 17, 2020, the ACLU, the ACLU of Missouri, and the Missouri Voter Protection Coalition filed a lawsuit in state court, representing the NAACP of Missouri, the League of Women Voters of Missouri, and several individual voters.¹⁴²⁵ The lawsuit sought to protect the right to vote by mail in the context of the COVID-19 pandemic: even though the state legislature had recently expanded access to vote by mail to all voters due to the pandemic, it had left in place the requirement that voters needed a notary seal on their absentee ballot. The suit argued that this requirement conflicted with Missouri statutes, as well as the state constitution's guarantee of equal protection, given different counties' policies on expanding access to absentee ballots resulted in wildly different opportunities to vote.

¹⁴²⁰ *In re State of Texas*, 602 S.W.3d 549 (Tex. 2020).

¹⁴²¹ *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489 (N.D. Ga. Apr. 8, 2020).

¹⁴²² Motion for Preliminary Injunction, *Black Voters Matter Fund v. Raffensperger*, No. 1:20-cv-01489 (N.D. Ga. Apr. 8, 2020), Dkt. 2.

¹⁴²³ See *Black Voters Matter Fund v. Raffensperger*, 478 F.Supp.3d 1278 (N.D. Ga. 2020).

¹⁴²⁴ *Black Voters Matter Fund, Inc. v. Raffensperger*, 478 F.Supp.3d 1278, *appeal docketed*, No. 20-13414 (11th Cir. Sept. 9, 2020).

¹⁴²⁵ *Missouri Conf. of the NAACP v. Missouri*, No. 20AC-CC00169 (Mo. Cir. Ct., Cole Cnty. April 17, 2020).

On May 5, the defendants submitted a motion to dismiss, which was granted 13 days later. However, the plaintiffs immediately appealed this ruling, and the Missouri Supreme Court unanimously ruled in favor of the plaintiffs – allowing their lawsuit to proceed – on June 23, 2020.¹⁴²⁶ On remand, the trial court denied a motion for a preliminary injunction on July 10, 2020,¹⁴²⁷ and after a trial in September 2020, entered judgment against plaintiffs on all counts.¹⁴²⁸ This decision was affirmed by the Missouri Supreme Court on October 9, 2020, ending the case.¹⁴²⁹

126. League of Women Voters of Virginia v. Virginia State Board of Elections – Virginia 2020

Under Virginia law, any voter who submits an absentee ballot by mail must open the envelope containing the ballot in front of another person, fill out the ballot, and then have that other person sign the outside of the ballot envelope before it is mailed back. In the context of the COVID-19 pandemic, these requirements may place voters at risk, particularly those who live alone and cannot risk contact with others outside their household.

On April 17, 2020, the ACLU and the ACLU of Virginia sued in federal court to protect the rights of Virginia voters.¹⁴³⁰ The lawsuit, brought on behalf of the League of Women Voters and several individual voters, argued that enforcing the witness requirement in the pandemic burdened the fundamental right to vote and due to Virginia’s long history of discrimination would disproportionately impact Black voters, a violation of the Voting Rights Act.

Shortly after the lawsuit was filed, the plaintiffs and state defendants, as well as six voters who wished to intervene in the litigation, reached a consent decree which would govern the June 2020 primaries.¹⁴³¹ Under the decree, the state agreed to waive the witness requirement.¹⁴³² Following the primaries, in July 2020, plaintiffs moved for a preliminary injunction seeking essentially the same relief, and again, the parties came to an agreement that the state would waive the witness requirement for the November general election. This

¹⁴²⁶ *Missouri Conf. of the NAACP v. Missouri*, 601 S.W.3d 241 (Mo. 2020).

¹⁴²⁷ Order Denying Request for Preliminary Injunction, *Missouri Conf. of the NAACP v. Missouri*, No. 20AC-CC00169-01 (Mo. Cir. Ct., Cole Cnty. July 10, 2020).

¹⁴²⁸ Findings of Facts, Conclusions of Law, and Final Judgment, *Missouri Conf. of the NAACP v. Missouri*, No. 20AC-CC00169-01 (Mo. Cir. Ct., Cole Cnty. Sept. 24, 2020).

¹⁴²⁹ 607 S.W.3d 728 (Mo. 2020).

¹⁴³⁰ *League of Women Voters of Virginia v. Virginia Board of Elections*, No. 6:20-cv-00024-NKM (W.D. Va. 2020).

¹⁴³¹ *League of Women Voters of Virginia v. Virginia State Bd. of Elecs.*, 458 F.Supp.3d 442 (W.D. Va. 2020).

¹⁴³² *Id.*

second consent decree was approved on August 21, 2020.¹⁴³³ The plaintiffs subsequently dismissed their case voluntarily.

127. Thomas v. Andino – South Carolina 2020

To cast an absentee ballot, South Carolina requires voters to fall into certain categories of eligibility, including inability to vote in person “because of injury or illness.”¹⁴³⁴ It further falls within a minority of states that requires voters to find a witness to sign their absentee ballot envelope. During the COVID-19 pandemic, state officials took the view that self-isolating due to the pandemic did not qualify voters under the “injury or illness” language. Therefore, on April 22, 2020, the ACLU, the ACLU of South Carolina, and the NAACP Legal Defense and Educational Fund filed a lawsuit in federal court challenging these requirements.¹⁴³⁵ Brought on behalf of individual voters and The Family Unit, a non-profit charitable organization, the lawsuit argued that as applied to voters during the pandemic, these provisions violated the Constitution and the Voting Rights Act.

Shortly after the suit was filed, on May 13, 2020, the governor of South Carolina signed a law allowing voters to cite the COVID-19 pandemic as a valid reason to vote with an absentee ballot, though the law preserved the witness requirement.¹⁴³⁶ On May 25, the court issued an order granting the plaintiffs’ request for a preliminary injunction, barring elections officials from enforcing the witness requirement.¹⁴³⁷ Both the law and the court’s order covered only the June 2020 primaries.

On July 13, the plaintiffs amended their complaint, adding the South Carolina conference of the NAACP as a plaintiff and a claim that the witness requirement violates the Americans with Disabilities Act.¹⁴³⁸ In September, shortly before a trial on the claims was set to begin, the state legislature passed another bill removing the excuse requirement for the November election, meaning the trial would cover only the witness requirement. Then, on September 18, four days before trial was set to begin, the court stayed the case in light of a parallel lawsuit which functionally rendered some of the claims moot. In that suit, *Middleton v. Andino*, the court issued an injunction against the witness and excuse requirements.¹⁴³⁹

This injunction was then appealed to the Fourth Circuit, which stayed the injunction on September 24.¹⁴⁴⁰ The following day, the full Fourth Circuit voted to vacate the stay, allowing the lower court’s injunction to go back into effect.¹⁴⁴¹ Shortly thereafter, on October

¹⁴³³ 481 F.Supp.3d 580 (W.D. Va. 2020).

¹⁴³⁴ S.C. Code Ann. § 7-15-310.

¹⁴³⁵ *Thomas v. Andino*, No. 3:20-cv-01552-JMC (D.S.C. Apr. 22, 2020).

¹⁴³⁶ S.J. Res. 635, 123rd Gen. Assemb. (S.C. 2020).

¹⁴³⁷ *Thomas v. Andino*, No. 3:20-cv-01552, 2020 WL 2617329 (D.S.C. May 25, 2020).

¹⁴³⁸ First Amended Complaint, *Thomas v. Andino*, No. 3:20-cv-01552-JMC (D.S.C. July 13, 2020).

¹⁴³⁹ 488 F.Supp.3d 261 (D.S.C. 2020).

¹⁴⁴⁰ *Middleton v. Andino*, No. 20-2022, 2020 WL 5739010 (4th Cir.).

¹⁴⁴¹ 976 F.3d 403 (4th Cir. 2020) (en banc).

5, the Supreme Court reinstated the Fourth Circuit’s stay, meaning the absentee ballots would need witness signatures.¹⁴⁴² The Court’s order did carve out those absentee ballots already received and those in the mail at the time they ruled, to honor those voters’ interests.

128. Judicial Watch v. Commonwealth of Pennsylvania – Pennsylvania 2020

Voter purges are a serious threat to the right to vote. Although list maintenance, when done responsibly, is appropriate and necessary for election administration, improper purges remove eligible voters, which can result in them being turned away from the polls. States and counties have sometimes engaged in overzealous or sloppy list maintenance which erroneously remove voters, and frequently, these practices disproportionately sweep in voters of color. Unfortunately, there are groups that attempt to compel state entities to conduct these purges, claiming they help protect against voter fraud.

In one such lawsuit, Judicial Watch, an organization well known for its efforts to disenfranchise voters, attempted to compel three counties around Philadelphia to conduct such a purge.¹⁴⁴³ The suit sought to remove thousands of voters from the rolls, based on Judicial Watch’s unverified, self-generated data, similar to litigation it brought around the country. Notably, the group sued on April 29, 2020, as the defendants, elections officials, were attempting to respond to the COVID-19 pandemic, and if the lawsuit had been successful, such a purge program would have siphoned off resources from more pressing matters.

After the suit was filed, on May 11, the ACLU, the ACLU of Pennsylvania, Lawyers’ Committee for Civil Rights Under Law, and Simpson Thacher & Bartlett LLP moved to intervene in the case, representing Common Cause Pennsylvania and the League of Women Voters of Pennsylvania.¹⁴⁴⁴ After briefing on the topic, the motion to intervene was granted in November 2020, and the case continued.¹⁴⁴⁵ On March 8, 2021, the court dismissed Judicial Watch’s claims against the three counties that they improperly failed to meet their list-maintenance and disclosure obligations under federal law.¹⁴⁴⁶

129. Fitisemanu v. United States – American Samoa 2020

ACLU participating as amicus

On May 12, 2020, The ACLU filed an amicus brief in connection with a case addressing the constitutionality of the federal law designating persons born in American Samoa as “non-citizen U.S. nationals.”¹⁴⁴⁷ The brief supports the district court’s judgment that the

¹⁴⁴² *Andino v. Middleton*, 141 S. Ct. 9 (2020) (Mem.).

¹⁴⁴³ See *Judicial Watch v. Commonwealth of Pennsylvania*, No. 1:20-CV-708 (M.D. Pa. Mar. 8, 2021).

¹⁴⁴⁴ Motion to Intervene as Party Defendants, *Judicial Watch v. Commonwealth of Pennsylvania*, No. 1:20-CV-708 (M.D. Pa. Mar. 8, 2021), Dkt. 4.

¹⁴⁴⁵ *Id.* at Dkt. 50.

¹⁴⁴⁶ *Judicial Watch v. Pennsylvania*, 2021 WL 858865 (M.D. Pa. Mar. 8, 2021).

¹⁴⁴⁷ *Fitisemanu v. United States*, No. 20-4017 & 20-4019, 2021 WL 2431586 (10th Cir. 2021).

Fourteenth Amendment’s Citizenship Clause applies to American Samoa and “Congress has no authority” to deny the plaintiffs citizenship as a result. The brief focuses on core rights and benefits inherent to U.S. citizenship that have been wrongfully denied to persons born in American Samoa — particularly, to those residing in the fifty states or District of Columbia. On June 15, 2021 the Tenth Circuit reversed the district court, finding that persons born in American Samoa were not birthright citizens.¹⁴⁴⁸

130. Lay v. Goins – Tennessee 2020

Most states allow any eligible voter to cast an absentee ballot, but Tennessee requires that voters provide an excuse to do so. The state has a very narrow set of criteria to qualify for absentee voting, meaning the vast majority of voters would be forced to vote in person — or avoid voting at all for fear of becoming ill during the COVID-19 pandemic, disenfranchising thousands. As part of its efforts to ensure safe access to the ballot, on May 15, 2020, the ACLU, together with the ACLU of Tennessee and Dechert LLP, filed a lawsuit seeking to make absentee voting available to all eligible Tennessee voters during the pandemic.¹⁴⁴⁹

The lawsuit, filed in Tennessee state court, requested an order blocking the state from enforcing the excuse requirement for the 2020 election calendar while COVID-19 transmission is occurring; issue guidance instructing local election officials to issue absentee ballots to all eligible voters; and conduct a public information campaign informing voters about the elimination of the excuse requirement at this time. On June 3, the court held a hearing on the impact of expanded absentee voting, because the state argued expanding it as requested would pose logistical hurdles, and the next day, the court granted the requested injunction. In an order issued shortly afterward, the court required the state to waive the excuse requirement and mail an absentee ballot to any Tennessee voter who requested one.¹⁴⁵⁰

Remarkably, defendants then instructed local election officials not to send absentee ballots, despite the court’s order. On June 8, plaintiffs submitted a motion to enforce the order, while defendants submitted an appeal seeking a stay of the order. On June 11, the court issued a ruling that defendants had to comply with the order immediately, while the appeal remained pending in the state supreme court.

On June 24, the Tennessee Supreme Court declined to block the lower court ruling ordering the state to make absentee voting available to every eligible voter for all elections in 2020.¹⁴⁵¹ Subsequently, on August 5, 2020, the Tennessee Supreme Court issued a final decision, holding that the state must permit every eligible voter with an underlying health

¹⁴⁴⁸ *Id.*

¹⁴⁴⁹ *Lay v. Goins*, No. M2020-00832-SC-RDM-CV (Tenn. Chanc. Ct. May 15, 2020).

¹⁴⁵⁰ June 4, 2020 Memorandum And Order Granting Temporary Injunction To Allow Any Tennessee Registered Voter To Apply For A Ballot To Vote By Mail Due To COVID-19, *Lay v. Goins*, No. M2020-00832-SC-RDM-CV (Tenn. Chanc. Ct. June 4, 2020).

¹⁴⁵¹ Order, *Lay v. Goins*, No. M2020-0823-SC-RDM-CV (Jun. 24, 2020) (per curiam).

condition that makes them vulnerable to COVID-19, as well as any voter who is a caretaker for such individuals, to vote by mail in all elections in 2020.¹⁴⁵²

131. League of Women Voters of Michigan v. Benson – Michigan 2020

In 2018, Michigan voters overwhelmingly approved Proposal 3, a ballot initiative that gives voters a constitutional right to submit an absentee ballot, including by mail, at any point in the 40 days before an election. Despite this, in the spring of 2020, Michigan elections officials announced they would require ballots to be received by Election Day, as opposed to postmarked by Election Day and contradicting the plain text of the initiative. According to data from the Michigan Secretary of State, 1.75% of absentee ballots were rejected for the May 5, 2020 election because they arrived after 8:00 pm on Election Day. On May 22, 2020, the ACLU, the ACLU of Michigan, Goodman Acker, and Arnold & Porter filed a lawsuit in Michigan state court, seeking a writ of mandamus compelling election officials to count ballots received with a postmark on or before Election Day.¹⁴⁵³ Brought on behalf of individual voters and the League of Women Voters of Michigan, the suit argued that the Election Day deadline violated various provisions of Michigan law, including the state constitution’s guarantee of the right to vote via absentee ballot.

On July 14, 2020, the Michigan Court of Appeals upheld the policy, meaning that absentee ballots must be received by the day of the primary.¹⁴⁵⁴ Plaintiffs promptly appealed to the Michigan Supreme Court, which declined to review the judgment below on July 31, 2020.¹⁴⁵⁵ Justice Bernstein dissented from the denial of review, stating that “[t]he people of Michigan deserve nothing less” than full review of the claims, given the “undoubtedly ... significant role in the upcoming general election” that absentee ballots would play.¹⁴⁵⁶ The plaintiffs moved for reconsideration of the July 31 order, which the state supreme court denied on September 11, 2020.¹⁴⁵⁷ Therefore, the November election went forward with a requirement that ballots be received, rather than postmarked, by Election Day.

132. Collins v. Adams – Kentucky 2020

On May 27, 2020, the ACLU, the ACLU of Kentucky, Lawyers’ Committee for Civil Rights Under Law, and the law firm Covington & Burling filed a lawsuit in federal court, on behalf of the League of Women Voters of Kentucky, the Louisville Urban League, and the Kentucky NAACP, as well as individual voters.¹⁴⁵⁸ The suit challenged various provisions of Kentucky election law, including the narrow list of permissible reasons to vote by mail and a photo ID requirement for voting in person and applying for a mail-in ballot. The latter burdens the right to vote, because obtaining the proper photo ID would force voters to visit

¹⁴⁵² *Fisher v. Hargett*, 604 S.W.3d 281 (Tenn. 2020).

¹⁴⁵³ *League of Women Voters of Michigan v. Benson*, No. 353654 (Mich. Ct. App. May 22, 2020).

¹⁴⁵⁴ *League of Women Voters of Michigan v. Benson*, 333 Mich.App. 1 (Mich. Ct. App. 2020).

¹⁴⁵⁵ *League of Women Voters of Michigan v. Sec’y of State*, 506 Mich. 886 (2020).

¹⁴⁵⁶ *Id.* at 308 (Bernstein, J., dissenting).

¹⁴⁵⁷ *League of Women Voters of Michigan v. Sec’y of State*, 506 Mich. 905 (2020).

¹⁴⁵⁸ *Collins v. Adams*, No. 3: 20-cv-00375 (W.D. Ky. May 27, 2020).

ID-issuing offices in person – a huge issue because many of the offices that issue IDs were closed due to the pandemic.

On July 10, 2020, plaintiffs moved for a preliminary injunction, seeking to enjoin state defendants from enforcing the voter ID and excuse requirements – in other words, ordering the state to continue its procedures from the June 23, 2020 election.¹⁴⁵⁹ On August 20, 2020, the state Board of Elections voted to adopt regulations allowing anyone with a fear of contracting COVID-19 to vote by mail. The regulations further stated that the Board would not be enforcing the new photo ID law for mail-in ballots and would be offering an exception for those voting in person who were unable to get a photo ID due to the pandemic. Due to these regulations, on August 27, 2020, the parties jointly agreed to dismiss the case.¹⁴⁶⁰

133. NAACP Minnesota-Dakotas Area State Conference v. Simon – Minnesota 2020

In May 2020, as part of its adaptation to the COVID-19 pandemic, the Minnesota legislature passed a bill allocating money for sanitizing polling places and granting more flexibility for polling place locations. However, it declined to expand voting by mail, over the objections of Democratic Farmer-Labor lawmakers.¹⁴⁶¹

On June 4, 2020, the ACLU, the ACLU of Minnesota, and Faegre Drinker LLP sued the Minnesota Secretary of State, representing the state conference of the NAACP as well as individual voters, seeking to make voting safer in the middle of the pandemic.¹⁴⁶² The suit sought an order that the state mail absentee ballots to all registered voters, and the requirement that voters have a witness sign their ballot envelope be suspended due to the risks of COVID-19 under the protections of the Minnesota constitution, including its guarantee of the fundamental right to vote.

On July 2, 2020, plaintiffs moved for a preliminary injunction, requesting the same relief, and on July 17, representatives from the Trump presidential campaign and Republican party moved to intervene. In an August 3 order, the court denied the preliminary injunction and allowed the interventions; however, it did allow the original parties to settle the witness signature issue.¹⁴⁶³ After further discussions, on September 17, state officials

¹⁴⁵⁹ Motion for Preliminary Injunction, *Collins v. Adams*, No. 3: 20-cv-00375 (W.D. Ky. May 27, 2020), Dkt. 30.

¹⁴⁶⁰ Joint Stipulation of Dismissal, *Collins v. Adams*, No. 3: 20-cv-00375 (W.D. Ky. May 27, 2020), Dkt. 58.

¹⁴⁶¹ See Brian Bakst, *Legislature Agrees on Measures to Make Voting Safer*, MPR News (May 7, 2020 8:33 PM), <https://www.mprnews.org/story/2020/05/07/legislature-agrees-on-measures-to-make-voting-safer>.

¹⁴⁶² *NAACP Minnesota-Dakotas Area State Conf. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. Jun. 4, 2020).

¹⁴⁶³ Order, *NAACP Minnesota-Dakotas Area State Conf. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. Aug. 3, 2020).

agreed to mail absentee ballot applications to registered voters for the November election.¹⁴⁶⁴

134. Connecticut NAACP v. Merrill – Connecticut 2020

On April 20, 2020, as the COVID-19 pandemic spread across the country, Connecticut Governor Ned Lamont issued an executive order mandating the expansion of absentee ballot access for the primary election, rescheduled to August. However, this was not extended to cover the November general election, meaning that the vast majority of voters would have to vote in-person – or choose not to vote at all, for fear of becoming ill – due to Connecticut’s narrow list of eligibility criteria to vote by mail.

On July 2, 2020, the ACLU and the ACLU of Connecticut filed a lawsuit in federal court, on behalf of the Connecticut State Conference of the NAACP and the League of Women Voters of Connecticut, as well as an individual voter who required alternatives to voting in person due to being in a risk group from COVID-19.¹⁴⁶⁵ The suit alleged a violation of Section 2 of the Voting Rights Act, due to the disproportionate impact this would have on Black voters, and the constitutional right to vote. The parties reached a favorable settlement in September 2020, with the state agreeing to allow all voters to vote by mail without an excuse, and the lawsuit was dismissed on September 25, 2020.¹⁴⁶⁶

135. People First of Alabama v. Merrill – Alabama 2020

On May 1, 2020, the NAACP Legal Defense and Educational Fund, the Southern Poverty Law Center, and the Alabama Disabilities Advocacy Program sued state officials, challenging three provisions of Alabama law: the requirement that an absentee ballot be signed by a notary or two adult witnesses, the requirement that absentee ballots include copies of a valid photo ID, and the ban on counties offering curbside voting.¹⁴⁶⁷ It argued that these provisions, as applied to voters in the context of a deadly pandemic, unconstitutionally burdened the right to vote and violated the Voting Rights Act and Americans with Disabilities Act.

On May 12, 2020, plaintiffs moved for a preliminary injunction barring the enforcement of all three provisions, which, on June 15, the court granted, though only with respect to the upcoming July 14 elections.¹⁴⁶⁸ The state promptly applied for a stay of the injunction, which the Eleventh Circuit denied on June 25.¹⁴⁶⁹ The state appealed to the Supreme Court,

¹⁴⁶⁴ See Plaintiffs’ and Defendant’s Joint Motion to Dismiss Counts III & IV, *NAACP Minnesota-Dakotas Area State Conf. v. Simon*, No. 62-CV-20-3625 (Minn. Dist. Ct. Aug. 3, 2020).

¹⁴⁶⁵ *Connecticut Conf. of the NAACP v. Merrill*, No. 3:20-cv-909 (D. Conn. July 2, 2020).

¹⁴⁶⁶ Notice of Voluntary Dismissal, *Connecticut Conf. of the NAACP v. Merrill*, No. 3:20-cv-909 (D. Conn. Sept. 25, 2020).

¹⁴⁶⁷ *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK (N.D. Ala. June 15, 2020).

¹⁴⁶⁸ 467 F.Supp.3d 1179 (N.D. Ala 2020).

¹⁴⁶⁹ 815 Fed.Appx. 505 (11th Cir. 2020).

which did grant the stay on July 2 – twelve days before the run-off elections.¹⁴⁷⁰ This meant that all three of the challenged provisions were in effect for those elections.

On July 6, the ACLU and the ACLU of Alabama joined the case, filing an amended complaint that further challenged the limits on eligibility to vote with an absentee ballot, as well as the three other provisions, seeking to prevent their enforcement for the November general election.¹⁴⁷¹ The case went to trial for two weeks in September 2020, and after hearing from witnesses and weighing the evidence, on September 30, the court issued its decision.¹⁴⁷² It found that the challenged provisions deprived voters of their constitutional right to vote and violated the Voting Rights Act and Americans with Disabilities Act, as applied during the pandemic. Accordingly, it issued a preliminary injunction preventing the enforcement of the witness requirement, photo ID requirement, and curbside voting ban.

The state appealed, and on October 13, the Eleventh Circuit issued an order reinstating the witness and photo ID bans, while maintaining the lower court order that allowed counties to implement curbside voting.¹⁴⁷³ The state further appealed, and on October 21, the U.S. Supreme Court granted a stay of the remainder of the injunction.¹⁴⁷⁴ Therefore, all three provisions were in effect for the November 2020 elections.

136. Chambers v. North Carolina – North Carolina 2020

North Carolina law requires that voters who submit an absentee ballot by mail have at least one other witness sign their ballot envelope. In the context of the COVID-19 pandemic, this requirement poses a particular threat to people who live alone and those with underlying conditions that place them at higher risk of developing serious complications from COVID-19. Although normally, the state requires two witnesses, the legislature enacted a law that temporarily reduced the requirement to only one witness for purposes of “an election held in 2020.” However, this still placed voters at risk, as they would have to identify a witness and break self-isolation to attain the required ballot signature.

On July 10, 2020, the ACLU, the ACLU of North Carolina, and the law firm Sullivan and Cromwell filed a lawsuit in North Carolina state court challenging the absentee ballot witness requirements.¹⁴⁷⁵ The lawsuit argued that enforcing the witness signature requirements violated the state constitution’s guarantees of free elections, assembly, speech, and equal protection.¹⁴⁷⁶ Along with several other voters, Barbara Hart, age 73, served as a plaintiff. Ms. Hart lives alone and has a history of breast and lung cancer;

¹⁴⁷⁰ 141 S. Ct. 190 (2020) (Mem.).

¹⁴⁷¹ First Amended Complaint, *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK (N.D. Ala. Jul. 6, 2020).

¹⁴⁷² 491 F.Supp.3d 1076 (N.D. Ala. 2020).

¹⁴⁷³ *People First of Alabama v. Sec’y of State*, No. 20-13695-B, 2020 WL 6074333 (11th Cir. 2020).

¹⁴⁷⁴ 141 S. Ct. 25 (2020) (Mem.).

¹⁴⁷⁵ *Chambers v. North Carolina*, No. 20-CVS-500124 (N.C. Sup. Ct. Jul. 7, 2020).

¹⁴⁷⁶ See N.C. Const. Art. 1, §§ 10, 12, 14, 19.

chemotherapy for her breast cancer damaged her heart, leaving her particularly at risk of severe illness if she contracts COVID-19. Because of this, she had been self-isolating since March 2020, when the pandemic began. She has voted in every election since she was old enough to vote, and sought to vote with an absentee ballot in the November election to protect her health.

On July 21, 2020, the plaintiffs moved for a preliminary injunction to prevent North Carolina officials from enforcing the witness requirement. On September 3, 2020, the court denied the motion, finding that the administrative burden of mailing out absentee ballots with the corrected instructions that plaintiffs requested, namely that the voter did not need to find a witness, was so burdensome on election officials that it counseled against granting relief.¹⁴⁷⁷ The case was subsequently dismissed on January 11, 2021.

137. Donald J. Trump for President v. Boockvar – Pennsylvania 2020

As part of its response to the COVID-19 pandemic, Pennsylvania legislatively implemented a mail-in voting plan open to all voters for the November 2020 general election. In response, on June 29, 2020, the Trump presidential campaign and the Republican National Committee, and other Republican candidates, sued various state officials in federal court, focusing on the state's use of drop boxes for mail-in ballots and the procedures used to count ballots with certain procedural defects.¹⁴⁷⁸ In short, the plaintiffs argued that the challenged procedures would result in vote dilution, because they insufficiently guarded against fraud.

Shortly after the complaint was filed, on July 15, 2020, the ACLU, the ACLU of Pennsylvania, Lawyers' Committee for Civil Rights Under Law, Public Interest Law Center, and WilmerHale moved to intervene in the case on behalf of the NAACP Pennsylvania State Conference, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, and several individual voters.

At the urging of the state defendants and various intervenors, including the ACLU's clients, the court decided to abstain from deciding the case due to a parallel case making its way through state court.¹⁴⁷⁹ The plaintiffs nevertheless moved for preliminary relief (and a lift of the stay), which was denied.¹⁴⁸⁰ On September 17, 2020, the Pennsylvania Supreme Court issued its decision in the parallel state case, clarifying some of the provisions of state election law and making clear that the underlying basis of the Trump campaign's lawsuit

¹⁴⁷⁷ Order on Injunctive Relief, *Chambers v. North Carolina*, No. 20 CVS 500124 (N.C. Sup. Ct. Sept. 3, 2020).

¹⁴⁷⁸ *Donald J. Trump for President v. Boockvar*, No. 2:20-cv-00966-NR (W.D. Pa. June 29, 2020).

¹⁴⁷⁹ See *Donald J. Trump for President, Inc. v. Boockvar*, 481 F.Supp.3d 476 (W.D. Pa. 2020).

¹⁴⁸⁰ *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966-NR (W.D. Pa. June 29, 2020), Dkt. 414, 444, 445.

was not meritorious.¹⁴⁸¹ Therefore, the court in the federal case dismissed all claims against the state officials and entered judgment in their favor.¹⁴⁸²

138. Pennsylvania Democratic Party v. Boockvar – Pennsylvania 2020

In 2019, Pennsylvania enacted a law allowing all qualified voters the opportunity to vote by mail, without needing to prove some form of special eligibility. On July 10, 2020, the Pennsylvania Democratic Party filed a petition for review, seeking to clarify certain provisions of the law, including the placement of drop-boxes, the ballot receipt deadline, the process for curing potential defects in ballots that would result in them being excluded from the canvass, the handling of secrecy envelopes meant to cover ballots, and the ability to poll watchers to observe elections.¹⁴⁸³ While these issues would have been important in the first year of implementation regardless, due to the COVID-19 pandemic and record participation in absentee balloting – as well as various hotly contested races in Pennsylvania – they took on new importance.

Following the filing of the initial complaint, the ACLU, the ACLU of Pennsylvania, Lawyers' Committee for Civil Rights, the Public Interest Law Center, and the law firm WilmerHale moved to intervene in the case. Together, we represented three individual voters, the Black Political Empowerment Project, Common Cause Pennsylvania, the League of Women Voters of Pennsylvania, and Make the Road Pennsylvania. The court denied this request, but allowed these clients to file briefs before it as amici curiae, or friends of the court. Ultimately, on September 17, 2020, the Pennsylvania Supreme Court issued its decision, largely agreeing with the positions we argued.¹⁴⁸⁴ Specifically, the court held that county boards of elections could set up drop boxes for ballots, and ruled that because of well-documented issues with the postal service, any ballots that arrive by 5:00 pm on the Friday after Election Day would be counted, rather than by Election Day itself.

139. Trump for President v. Boockvar – Pennsylvania 2020

On November 9, 2020, President Trump's campaign filed a federal lawsuit against Pennsylvania Secretary of State Kathy Boockvar and the boards of elections of six counties.¹⁴⁸⁵ In their lawsuit, the Trump campaign claims that their election observers were unable to stand close enough to watch the count of mail and absentee ballots in several counties. The campaign also asserts that it is illegal and unconstitutional for only some counties to notify and allow voters to correct mistakes with the declarations on the envelopes of their mail and absentee ballots. The lawsuit asked the court to issue an order to prohibit the commonwealth from certifying its presidential election results.

¹⁴⁸¹ *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

¹⁴⁸² *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331 (W.D. Pa. 2020).

¹⁴⁸³ *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa. July 10, 2020).

¹⁴⁸⁴ *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020).

¹⁴⁸⁵ *Donald J. Trump for President v. Boockvar*, No. 20-cv-3384 (M.D. Pa. Nov. 9, 2020).

On November 10, the ACLU, the ACLU of Pennsylvania, and co-counsel filed a motion to intervene in the case on behalf of eight impacted voters, Black Political Empowerment Project, Common Cause PA, League of Women Voters of PA, and NAACP Pennsylvania State Conference, which the judge granted on November 12.¹⁴⁸⁶ We then filed a motion to dismiss the lawsuit, arguing that the Plaintiffs' claims about technical irregularities could and should have been brought in state court earlier in the process, when they could have been cured, and that even if there were minor technical problems the Plaintiffs have produced no evidence of fraud or ineligible voters casting ballots to justify disenfranchising a single voter, much less 6.8 million.¹⁴⁸⁷

On November 21, Judge William Brann dismissed the lawsuit, saying, “(T)his Court has been presented with strained legal arguments without merit and speculative accusations...unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state.”¹⁴⁸⁸ On November 27, the Third Circuit upheld the district court's decision.¹⁴⁸⁹

140. Common Cause Rhode Island v. Gorbea – Rhode Island 2020

Rhode Island is in the minority of states in requiring mail-in ballot envelopes to be signed by either two lay witnesses or one notary. Although this requirement can be burdensome in normal times, in the context of COVID-19, it poses public health risks for voters, particularly those who are at high risk of serious complications from COVID-19. Governor Gina Raimondo waived this requirement for the June 2020 presidential primary, but failed to do so for the September primary and November general elections.

On July 23, 2020, the ACLU, the ACLU of Rhode Island, the Campaign Legal Center, and Fried, Frank, Harris, Shriver & Jacobson sued state officials in federal court, challenging the state's witness and notary requirements for voting by mail.¹⁴⁹⁰ We represented Common Cause Rhode Island and the League of Women Voters of Rhode Island, as well as three individual voters with disabilities who would have difficulty obtaining two witnesses for their ballot. The lawsuit requested an order preventing state officials from enforcing the witness requirement for the duration of the COVID-19 pandemic.

Shortly after the lawsuit was filed, the parties came to an agreement.¹⁴⁹¹ In the decree, Rhode Island agreed to forgo enforcing the witness and notary requirement for ballots sent by mail. Meanwhile, the Republican National Committee and the Republican Party of

¹⁴⁸⁶ Motion to Intervene by NAACP Pa. State Conf., et al, Donald J. Trump for President v. Boockvar, No. 20-cv-3384 (M.D. Pa. Nov. 9, 2020).

¹⁴⁸⁷ Motion to Dismiss for Failure to State a Claim, Donald J. Trump for President v. Boockvar, No. 20-cv-3384 (M.D. Pa. Nov. 9, 2020).

¹⁴⁸⁸ Donald J. Trump for President v. Boockvar, 502 F.Supp.3d 899 (M.D. Pa. 2020).

¹⁴⁸⁹ 830 Fed.Appx. 377 (3d Cir. 2020).

¹⁴⁹⁰ *Common Cause Rhode Island v. Gorbea*, No. 1:20-CV-00318-MSM (D. R.I. July 23, 2020).

¹⁴⁹¹ Consent Judgment and Decree, *Common Cause Rhode Island v. Gorbea*, No. 1:20-CV-00318-MSM (D. R.I. July 30, 2020).

Rhode Island moved to intervene in the case, which the court denied, instead entering the consent decree. The Republican entities appealed the denial of their motion to intervene, and the entry of the consent decree, and further sought a stay of the judgment. The First Circuit rejected the application for a stay, though it reversed the order denying intervention.¹⁴⁹² In other words, the Republican entities were permitted to appeal the underlying order further, but the First Circuit upheld the consent decree. The Republican entities then sought a stay in the U.S. Supreme Court, which was denied.¹⁴⁹³

141. New York Immigration Coalition v. Trump – New York 2020

On July 21, 2020, President Donald Trump issued a Memorandum addressed to Secretary of Commerce Wilbur Ross, declaring plans to exclude undocumented immigrants from the apportionment base for purposes of congressional representation.¹⁴⁹⁴ Under the terms of the Memorandum, the President requested two sets of numbers: the total population of each state, and the total population of each state minus the number of people not in lawful immigration status. Notably, the Memorandum provided no guidance on how to determine citizenship status, given that previous attempts to ask Census respondents about their citizenship had been defeated in *Department of Commerce v. New York*.¹⁴⁹⁵

On July 24, 2020, the ACLU, the New York Civil Liberties Union, the ACLU of Texas, and Arnold & Porter filed a lawsuit in federal court challenging the policy.¹⁴⁹⁶ Brought on behalf of the New York Immigration Coalition, Make the Road New York, CASA, American-Arab Anti-Discrimination Committee, ADC Research Institute, and FIEL Houston, the suit alleged the Memorandum violated the statutes governing the census and apportionment, as well as the Constitution. Shortly afterwards, the case was consolidated with another similar lawsuit brought by a coalition of governmental entities, including twenty-two states and the District of Columbia.¹⁴⁹⁷ The parties in the consolidated case then moved for summary judgment, or in the alternative, a preliminary injunction declaring the Memorandum unlawful.

On September 10, 2020, a three-judge panel of the District Court declared that the Memorandum was unlawful, and ordered the Secretary of Commerce not to include any information on the number of undocumented immigrants in each state.¹⁴⁹⁸ The government promptly appealed to the U.S. Supreme Court (an option available in a narrow class of

¹⁴⁹² *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11 (1st Cir. 2020).

¹⁴⁹³ *Republican National Committee v. Common Cause Rhode Island*, 141 S. Ct. 206 (2020) (Mem.).

¹⁴⁹⁴ *Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679, 44,680 (July 23, 2020).

¹⁴⁹⁵ 139 S. Ct. 2551 (2019).

¹⁴⁹⁶ *New York Immigration Coalition v. Trump*, No. 1:20-cv-05781-JMF (S.D.N.Y. July 24, 2020).

¹⁴⁹⁷ *New York v. Trump*, No. 1:20-cv-05770-JMF (S.D.N.Y. July 24, 2020).

¹⁴⁹⁸ *New York v. Trump*, 485 F.Supp.3d 422 (S.D.N.Y. 2020).

cases, including those concerning the census), and sought a stay of the lower court's order, which was denied.¹⁴⁹⁹

At the Supreme Court, the parties first submitted briefs as to whether the case should be resolved on an expedited basis, in light of statutory deadlines concerning the transmission of information from the Secretary of Commerce to the President. On October 16, 2020, the Court issued an order setting the case for a full hearing on the merits on an expedited basis, with oral arguments to occur in late November.¹⁵⁰⁰ On December 18, 2020, the Supreme Court issued its opinion, finding the case not ripe for review, reasoning that future events – including the extent to which undocumented people could and would be excluded from the apportionment count, and whether this exclusion would in fact shift congressional representation – were too speculative to allow for court adjudication.¹⁵⁰¹ Therefore, the Supreme Court vacated the lower court's order. On January 21, 2021, the day he took office, President Biden issued an executive order rescinding the prior Memorandum.¹⁵⁰²

142. League of Women Voters of Ohio v. LaRose – Ohio 2020

As part of the absentee voting process, some states impose a requirement of signature matching with a signature on file, claiming these programs preventing fraud and ensure that the actual voter filled out the ballot. In practice, often election officials – who have no handwriting analysis expertise – reject absentee ballots or absentee ballot applications on the basis of a signature mismatch, and even worse, do not always notify voters when their ballot is rejected because of a potential mismatch. Ohio is one of the states that conducts signature matching, and within the state, counties differ as to the standards they use to analyze signature matching, the procedures they follow to reject perceived mismatches, the notice they provide to voters whose applications are rejected, the opportunity they give to cure absentee ballot applications that have been rejected on the basis of signature mismatch, and the record-keeping they do to document this activity. While every legitimately-cast ballot should be counted, the problem is particularly pernicious because signature match programs disproportionately affect certain groups, including people with disabilities, older people, and people for whom English is a second language, all of whom are more likely to have fluctuating handwriting.

On July 31, 2020, the ACLU, the ACLU of Ohio, and Lawyers' Committee for Civil Rights filed a lawsuit in federal court, challenging Ohio's system of matching signatures on absentee ballots and absentee ballot applications.¹⁵⁰³ The case was brought on behalf of the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and other plaintiffs in preparation for the November 2020 election. The lawsuit argued that Ohio's

¹⁴⁹⁹ *New York v. Trump*, 490 F.Supp.3d 736 (S.D.N.Y. 2020).

¹⁵⁰⁰ *Trump v. New York*, 141 S. Ct. 616 (2020) (Mem.).

¹⁵⁰¹ *Trump v. New York*, 141 S. Ct. 530 (2020).

¹⁵⁰² Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census, 86 Fed. Reg. 7015 (Jan. 25, 2021).

¹⁵⁰³ *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. July 7, 2020).

inconsistent signature matching program violated the constitution by burdening the fundamental right to vote, creating an unequal system for voters depending on which county they lived in, and denied them due process through inadequate procedural safeguards.

On August 24, plaintiffs moved for a preliminary injunction that would order election officials to set up a consistent notice and cure process when they perceive a signature mismatch.¹⁵⁰⁴ Such a process would provide adequate time for the voter to remedy the mismatch, and obligate officials to contact voters by telephone and email with enough time to correct any ballot issues. On September 27, the court denied the motion for a preliminary injunction.¹⁵⁰⁵ Following the 2020 elections, the plaintiffs subsequently dismissed their case.¹⁵⁰⁶

143. Oppenheim v. Watson – Mississippi 2020

As discussed, many states allow any voter to cast an absentee ballot, while a minority of jurisdictions require voters to meet certain eligibility criteria, including the state of Mississippi. In Mississippi, one of the allowable reasons for casting an absentee ballot is “temporary or permanent physical disability.”¹⁵⁰⁷ During summer 2020, the state legislature amended the law to include within “temporary physical disability,” any voter who is “under a physician-imposed quarantine due to COVID-19 ... or is caring for a depending who is under a physician-imposed quarantine due to COVID-19.

As part of the ACLU’s efforts to ensure access to the ballot in the context of COVID-19, the ACLU, the ACLU of Mississippi, and the Mississippi Center for Justice filed a lawsuit on August 11, 2020, seeking to ensure that absentee voting is accessible to all Mississippians.¹⁵⁰⁸ The lawsuit sought a ruling clarifying that those voters who were following public health guidance to avoid contracting or spreading COVID-19 would qualify under the new definition.

On September 2, the court issued a ruling.¹⁵⁰⁹ First, it agreed that the existing excuse requirement covered any voter with an underlying physical condition that placed them at a higher risk of severe COVID-19, including those who were under a recommended quarantine from their doctor. However, it denied relief for a broader class of voters, reasoning that people following public health guidance and social distancing protocols were not under a “physician-imposed” quarantine. However, after appeals to both rulings, the

¹⁵⁰⁴ Motion for a Preliminary Injunction, *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. Aug. 24, 2020).

¹⁵⁰⁵ Opinion and Order Denying Plaintiffs’ Motion for a Preliminary Injunction, *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. Sept. 27, 2020).

¹⁵⁰⁶ Stipulation of Dismissal Without Prejudice, *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-03843-MHW-KAJ (S.D. Oh. May 21, 2021).

¹⁵⁰⁷ Miss. Elec. Code. § 23-15-713.

¹⁵⁰⁸ *Oppenheim v. Watson*, 2020-CA-00983-SCT (Miss. Chan. Ct. 2020).

¹⁵⁰⁹ *See id.*

Mississippi Supreme Court limited the ruling.¹⁵¹⁰ It found that having a preexisting condition that could cause more severe symptoms or cases of COVID-19 was insufficient to qualify under the absentee ballot rule, and further, that a “recommended” quarantine was not a “physician-imposed” quarantine.¹⁵¹¹

144. Ocasio v. Comisión Estatal de Elecciones – Puerto Rico 2020

On August 20, 2020, the ACLU, the ACLU of Puerto Rico, and Paul, Weiss filed a lawsuit challenging the Puerto Rico Election Commission’s failure to implement steps to ensure voters over 60 can safely cast a ballot in the November general election in the midst of the COVID-19 pandemic. The government of Puerto Rico gave the commission powers to implement accommodations to keep older voters safe for the elections, including access to early and absentee voting, through a joint resolution of the Legislative Assembly for the primaries and an updated election code applicable to the November election.

The lawsuit, which sought certification as a class action, sought a court order requiring the Puerto Rico Election Commission to implement policies that will allow older voters to access early and absentee voting. The lawsuit estimates 800,000 voters over the age of 60 could benefit. Shortly after the lawsuit was filed, the court issued a preliminary injunction granting elderly voters the right to vote by mail and extending the deadline to apply for early voting, which was eventually converted into a permanent injunction.¹⁵¹²

145. Arctic Village Council v. Meyer – Alaska 2020

Alaska requires that eligible voters who wish to cast an absentee ballot by mail sign their ballots in the presence of a witness, who must also sign the ballot. In the context of the COVID-19 pandemic, this requirement posed a particular threat to people who are immunocompromised who entered self-isolation as the pandemic spread across the nation. More generally, it burdened those who live alone or with people under the age of 18, who would have to potentially expose themselves to the virus to track down an eligible witness to cast their ballot.

As part of the adaptation to the COVID-19 pandemic, on September 8, 2020, the ACLU brought suit in Alaska state court to challenge this requirement as applied to the November 2020 general election.¹⁵¹³ In the litigation, the Native American Rights Fund (NARF) and Lawyers’ Committee for Civil Rights Under Law represented plaintiff Tribe Arctic Village; the American Civil Liberties Union, ACLU of Alaska, and Lawyers’ Committee represented individual voters as well as the League of Women Voters of Alaska. The lawsuit alleged that enforcing the witness requirement in the pandemic imposed significant burdens on the Alaska constitution’s guarantee of the right to vote.

¹⁵¹⁰ *Watson v. Oppenheim*, 301 So.3d 37 (Miss. 2020).

¹⁵¹¹ *Id.* at 43, ¶ 23.

¹⁵¹² *See Ocasio v. Comisión Estatal de Elecciones*, 486 F.Supp.3d 478 (D.P.R. 2020).

¹⁵¹³ *Arctic Village Council v. Meyer*, No. 3AN-20-07858 (Alaska Sup. Ct. Sept. 8, 2020).

On October 5, 2020, the court granted a preliminary injunction, finding that the witness requirement for absentee ballots is unconstitutional during the COVID-19 pandemic.¹⁵¹⁴ Although the state was quick to appeal the decision, the Alaska Supreme Court quickly affirmed that Alaskans would not need a witness to sign their absentee ballots, upholding the lower court ruling on October 13, 2020.¹⁵¹⁵

146. Hotze v. Hollins – Texas 2020

In advance of the early voting period in Texas, Harris County, which includes Houston, the state's largest city, approved the development of drive-thru voting, where ten polling sites would be constructed using large movable tents, and voters could cast their ballot while remaining in the car. Unlike curbside voting, reserved for certain voters and available at all polling sites, all voters could use drive-thru voting. By the end of early voting, more than 127,000 Texans had done so.

On October 28, 2020, a Republican activist and three candidates for election filed a lawsuit in federal court seeking to disqualify the ballots cast with drive-thru voting.¹⁵¹⁶ They argued the program violated the Texas Election Code – despite the Texas Supreme Court denying a writ of mandamus based on this argument, from the same plaintiff, only *six days previously*.¹⁵¹⁷ Remarkably, the lawsuit did not only seek to shut down drive-thru voting on election day – it also sought to discard the more than 127,000 ballots already cast.

The ACLU and the ACLU of Texas moved to intervene in the lawsuit, representing the League of Women Voters of Texas and several individuals who voted using the drive-thru option. On November 2, 2020, the court held a hearing, and the same day, dismissed the case because the plaintiffs lacked standing, or a sufficiently particularized legal injury, to sue.¹⁵¹⁸

However, the court also held that if the plaintiffs did have standing to sue, it would find the drive-thru voting program illegal. Therefore, the court said, if its decision on standing was reversed on appeal, the program could not operate on election day, though votes already cast using the program would be counted. The Fifth Circuit affirmed the ruling later that day.¹⁵¹⁹ However, because appeals were inevitable – and in fact, were already filed at the time of its decision – Harris County chose not to operate nine out of its ten drive-thru

¹⁵¹⁴ Order Granting Plaintiffs' Motion for Preliminary Injunction (Case Motion #1) and Denying Defendants' Motion to Dismiss (Case Motion #3), *Arctic Village Council v. Meyer*, No. 3AN-20-07858 (Alaska Sup. Ct. Oct. 5, 2020).

¹⁵¹⁵ Order, *Alaska v. Arctic Village Council*, No. S-17902 (Alaska Oct. 12, 2020).

¹⁵¹⁶ *Hotze v. Hollins*, No. 4:20-cv-03709 (S.D. Tex. 2020).

¹⁵¹⁷ *In re Hotze*, 610 S.W.3d 909 (Tex. 2020) (Mem.).

¹⁵¹⁸ *Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668 (S.D. Tex. 2020).

¹⁵¹⁹ *Hotze v. Hollins*, No. 20-20574, 2020 WL 6440440 (5th Cir.).

voting sites on Election Day, out of fear an adverse court decision would cause those ballots not to be counted.¹⁵²⁰

On appeal, the Fifth Circuit concluded that the plaintiffs' request to enjoin the use of drive-thru voting in Harris County was moot as to the 2020 election, which at that point had concluded 11 months prior.¹⁵²¹ The court also held that the plaintiffs lacked standing to enjoin the speculative use of drive-thru voting in an election that was held in November 2021.

147. Sixth District of the African Methodist Episcopal Church v. Kemp – Georgia 2021

The 2020 general election and 2021 runoff election in Georgia saw record voter turnout, particularly among people of color. Rather than celebrating this as a victory for democratic participation, Georgia legislators passed a sweeping omnibus bill, S.B. 202, in March 2021, that limits access to the ballot in many ways. In response, on March 30, 2021, the ACLU, ACLU of Georgia, NAACP Legal Defense and Educational Fund, Inc. (LDF), and law firm WilmerHale brought the case on behalf of the Sixth District of the African Methodist Episcopal Church, Delta Sigma Theta Sorority, Inc., Georgia ADAPT, and Georgia Advocacy Office, in partnership with Southern Poverty Law Center (SPLC) and the law firm Davis Wright Tremaine and their clients Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, and the Arc of the United States.¹⁵²²

On December 9, 2021, the court denied in full the Defendants' motion to dismiss the case, allowing the case to proceed.¹⁵²³ A few weeks later, the Court consolidated the case with five others for purposes of discovery.¹⁵²⁴

In May 2022, the Plaintiffs sought a preliminary injunction on Georgia's criminal line relief ban in advance of the 2022 general election as a violation of the right to expressive conduct and political speech under the First Amendment. After briefing a full day hearing in July 2022 involving witness testimony and argument, the court denied the motion in August 2022.¹⁵²⁵ It agreed that Plaintiffs' line relief activities are expressive conduct under the First Amendment and that the criminal line relief ban is a restriction of First Amendment activity based on content. It also agreed that for line relief provided to voters standing outside the 150-foot "buffer zone" around the polling place, the ban likely violated the First

¹⁵²⁰ Zach Despart, *Reversing Course, Harris County Shuts Down 9 of 10 drive-thru Election Day Voting Sites*, Houston Chron. (Nov. 3, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Reversing-course-Harris-County-shuts-down-9-of-15696434.php>.

¹⁵²¹ *Hotze v. Hudspeth*, 16 F.4th 1121, 1124-25 (5th Cir. 2021).

¹⁵²² *Sixth District of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. Mar. 29, 2021).

¹⁵²³ *Sixth Dist. of African Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260 (N.D. Ga. 2021).

¹⁵²⁴ Consolidation Order, *In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, ECF No. 1 (N.D. Ga. Dec. 23, 2021).

¹⁵²⁵ *In re Georgia Senate Bill 202*, 622 F. Supp. 3d 1312 (N.D. Ga. 2022).

Amendment but found that the ban was justified within 150-feet. Despite finding the plaintiffs' likely to succeed outside of the 150-foot zone, the Court denied the motion due to the proximity to the election.

In April 2023, Plaintiffs renewed their motion to halt the criminal line relief ban outside of the 150-foot buffer zone for the 2024 elections, and after full briefing and a full record of fact and expert discovery in the case, the Court agreed and issued a preliminary injunction against the line relief ban outside the buffer zone.¹⁵²⁶ Although the Defendants have appealed, the ruling against the ban remains in effect as the appeal progresses.

In May 2023, Plaintiffs also sought a preliminary injunction under the ADA for the 2024 elections against SB 202's restrictions on providing ballot return assistance and restriction on drop-box numbers and access as unfairly burdensome for voters with disabilities. The AME Plaintiffs also joined other groups in seeking relief for the 2024 elections against the missing-birthdate ballot rejection rule under the Civil Rights Act, and in challenging several other provisions of the law as intentional racial discrimination under the Fourteenth and Fifteenth Amendments. The court agreed that the ballot-rejection rule for missing birthdates was not material to determining voter qualifications and thus violates the Civil Rights Act, preliminarily enjoining that law.¹⁵²⁷ Defendants have appealed that ruling as well, but like the line relief ruling, the Court's order remains in place unless and until the Eleventh Circuit Court of Appeals decides otherwise. The court denied preliminary injunctions on the ADA¹⁵²⁸ and intentional racial discrimination claims.¹⁵²⁹

Defendants have sought summary judgment, and briefing is ongoing, with no trial date yet set.

148. Western Native Voice v. Jacobsen – Montana 2021

In *Western Native Voice v. Jacobsen*, the ACLU and co-counsel won a permanent injunction against two laws that disproportionately harmed Native American voters, on grounds that the laws violated various provisions in the Montana Constitution.

Like many states following the 2020 election, Montana enacted new laws that limit access to the ballot. In Montana, these laws were aimed at and had disproportionate effects on Native American voters, hindering their participation in the electoral process.

Two of these bills were particularly pernicious. One, HB 176, ended Election Day voter registration ("EDR"), which reservation voters have disproportionately relied upon to cast

¹⁵²⁶ *In re Georgia Senate Bill 202*, No. 1:21-CV-01229-JPB, --- F.Supp.3d ----, 2023 WL 5334617 (N.D. Ga. Aug. 18, 2023).

¹⁵²⁷ *In re Georgia Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *1 (N.D. Ga. Aug. 18, 2023).

¹⁵²⁸ *In re Georgia Senate Bill 202*, No. 1:21-CV-01284-JPB, 2023 WL 5334615 (N.D. Ga. Aug. 18, 2023).

¹⁵²⁹ *In re Georgia Senate Bill 202*, No. 1:21-MI-55555-JPB, 2023 WL 6628601, at *1 (N.D. Ga. Oct. 11, 2023).

votes in Montana.¹⁵³⁰ The second, HB 530, blocked paid third-party ballot collection, another practice on which Native Americans living on rural reservations disproportionately rely.¹⁵³¹ In an earlier case brought by the ACLU and the same co-counsel, a bill similar to HB 530 had previously been struck down as unconstitutional just a couple years prior.

On May 17, 2021, the ACLU, the ACLU of Montana, the Native American Rights Fund, and the Harvard Election Law Clinic sued in Montana state court in Yellowstone County, representing Western Native Voice and Montana Native Vote, two Native lead grass roots organizations who engage in get-out-the-vote (GOTV) work in Montana’s Native communities and several Tribal communities.¹⁵³²

On April 6, 2022, the Montana Thirteenth Judicial District Court granted Plaintiffs a preliminary injunction against both HB 176 and HB 530, finding that Plaintiffs had made a prima facie showing that both laws violated several state constitutional provisions.¹⁵³³ The State appealed the preliminary injunction only against HB 176, leaving unchallenged the preliminary injunction as to HB 530. On September 21, 2022, the Montana Supreme Court affirmed the District Court’s preliminary injunction that found that HB 176 likely violated Plaintiffs’ right to vote.¹⁵³⁴ The Supreme Court found that “Native Americans living on reservations face numerous, severe barriers to voting including long distances between voters and election offices and limited access to transportation,” and “that because of these barriers, Native Americans living on reservations are particularly reliant on EDR—using it at a consistently higher percentage than many other voting groups—and that the elimination of EDR will disproportionately, negatively impact them.”¹⁵³⁵

On September 30, 2022, after a two-week trial, the Montana Thirteenth Judicial District Court, in a 199-page opinion and order, permanently enjoined HB 530 and HB 176.¹⁵³⁶ The Court found that HB 530 violated Plaintiffs’ rights to vote, equal protection, free speech, and due process under the Montana Constitution.¹⁵³⁷ The Court determined that “the un rebutted evidence shows that unequal access to the polls for Native American voters would be exacerbated by [the] restriction on ballot collection” in HB 530.¹⁵³⁸ The Court also found that HB 176 violated Plaintiffs’ rights to vote and equal protection under the Montana Constitution.¹⁵³⁹ As to HB 176, the Court found that “Native Americans face

¹⁵³⁰ H.B. 176, 67th Legis. 1st Sess. (Mont. 2021) (*codified at* Mont. Code Ann. §13-2-304).

¹⁵³¹ H.B. 530, 67th Legis. 1st Sess. (Mont. 2021).

¹⁵³² *Western Native Voice v. Jacobsen*, No. DV 21-0560 (Mont. Dist. Ct. May 17, 2021).

¹⁵³³ Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs’ Motions for Preliminary Injunctions, *Western Native Voice v. Jacobsen*, No. DV 21-0560 (Mont. Dist. Ct. Apr. 6, 2022).

¹⁵³⁴ *Montana Democratic Party et al. v. Jacobsen*, 2022 MT 184.

¹⁵³⁵ *Id.* ¶ 33.

¹⁵³⁶ Findings of Fact, Conclusions of Law, and Order, *Western Native Voice v. Jacobsen*, No. DV 21-0560 (Mont. Dist. Ct. Sept. 30, 2022).

¹⁵³⁷ *Id.*

¹⁵³⁸ *Id.* at 180 ¶ 600.

¹⁵³⁹ *Id.* at 172-77.

disproportionate and severe voter costs due to dramatic socioeconomic and logistical disparities,” and that as a result, “Native American voters disproportionately rely on EDR and thus will be burdened disproportionately by its elimination.”¹⁵⁴⁰

The State appealed the District Court’s decision to the Montana Supreme Court, where the appeal remains pending.

149. State of Texas v. Hervis Rogers – Texas 2021

The ACLU, the ACLU of Texas, and Nicole DeBorde Hochglaube represented Hervis Rogers, a Houston man who faced charges for voting while ineligible to vote. The charges came a year and a half after Rogers, who is Black, waited more than six hours in line to cast his ballot in March 2020.¹⁵⁴¹ The state claimed that Rogers voted while he was still on parole.¹⁵⁴² Rogers was arrested in July 2021 and released on bail, set at \$100,000. He faced up to 40 years in prison, despite believing that he was simply fulfilling his civic duty.

In October 2022, a district court judge dismissed the charges against Rogers, after the Texas Court of Criminal Appeals ruled (in a separate case) that the Texas Attorney General (who had been prosecuting Rogers) did not have the authority to unilaterally prosecute voting crimes.¹⁵⁴³

150. OCA Greater Houston v. Esparza (SB 1) – Texas 2021

In September 2021, the ACLU, the ACLU of Texas, Texas Civil Rights Project, Asian American Legal Defense and Education Fund, and Jenner & Block LLP filed suit in the United States District Court for the Western District of Texas to challenge SB 1 provisions for violating federal law on behalf of the League of Women Voters of Texas, the OCA-Greater Houston, and REVUP Texas.¹⁵⁴⁴

The lawsuit alleges that SB 1 violates the Materiality Provision of the Civil Rights Act of 1964, by requiring voters to provide immaterial information—ID numbers not used to determine whether someone is an eligible voter—on their applications for ballot by mail or mail-in ballot. Applications and ballots without this immaterial information are rejected automatically under SB 1. The lawsuit also alleges that SB 1 violates Section 208 of the Voting Rights Act by impairing voters who need assistance from accessing the assistor of their choice. In addition, the lawsuit alleges SB 1 violates the First Amendment and

¹⁵⁴⁰ *Id.* at 172 ¶ 567.

¹⁵⁴¹ Paul J. Weber, *Houston Voters Who Waited 6 Hours Arrested for Illegal Voting*, Wash. Post (July 9, 2021), https://www.washingtonpost.com/national/houston-voter-who-waited-6-hours-arrested-for-illegal-voting/2021/07/09/57dbb2f2-e103-11eb-a27f-8b294930e95b_story.html.

¹⁵⁴² *ACLU of Texas Comment on the Arrest of Hervis Rogers*, ACLU of Texas, (July 9, 2021), <https://www.aclutx.org/en/press-releases/aclu-texas-comment-arrest-hervis-rogers>.

¹⁵⁴³ Cameron Langford, *Judge tosses case against Black Texan accused of felony voter fraud*, Courthouse News Serv. (Oct. 21, 2022), <https://www.courthousenews.com/judge-tosses-case-against-black-texan-accused-of-felony-voting-fraud/>

¹⁵⁴⁴ *La Union del Pueblo Entero, et al. v. Gregory W. Abbott, et al.*, 5:21-cv-0844-XR (W.D. Tx. 2023).

Fourteenth Amendment of the United States Constitution for restricting Plaintiffs' First Amendment right to free speech, and by being both overly broad and too vague.

After denying Defendants' motion to dismiss in August 2022,¹⁵⁴⁵ the district granted Plaintiffs' summary judgment a year later on their claim that agreed with Plaintiffs' Civil Rights Act claim in August 2023.¹⁵⁴⁶ The state appealed the district court's decision and asked the Fifth Circuit Court of Appeals to place a hold on it while the appeal is pending. Oral argument in the Court of Appeals has not yet been scheduled.

Plaintiffs proceeded to trial on their other claims in September 2023. Trial concluded in October 2023 and a decision remains pending.

151. League of Women Voters of Ohio v. Ohio Redistricting Commission – Ohio 2021

On November 30, 2021, the ACLU, ACLU of Ohio, and Covington & Burling LLP filed a lawsuit in the Ohio Supreme Court challenging Ohio's congressional districts redrawn after the 2020 census as "unduly" favoring a political party, in violation of the Ohio Constitution. Counsel brought the lawsuit on behalf of the League of Women Voters of Ohio, the A. Philip Randolph Institute of Ohio, and eight individual Ohio voters against Ohio Governor DeWine, and other public officials in Ohio.

The Respondents filed a motion to dismiss and a motion to stay proceedings, which the Ohio Supreme Court denied. The Court later ruled in Petitioners' favor, finding the congressional plan violated the Ohio Constitution's proportionality and partisan fairness standards.¹⁵⁴⁷ The Court ordered the Ohio State Legislature to draw new maps within 30 days, which it failed to do, sending the map drawing process back to the Ohio Redistricting Commission.

After the Commission passed a new congressional plan, Petitioners filed a motion to enforce the Court's order so the new plan could be adopted. Because the Commission was dismissed from the case initially, Petitioners needed to amend their complaint to read the Commission to enforce the Court's order. The Court denied Petitioners' motion to amend but invited the Petitioners to file a new lawsuit naming the Commission. Petitioners proceeded to do that.

152. South Carolina NAACP v. Alexander – South Carolina 2021

After a delay in administering the 2020 decennial census due to the COVID-19 pandemic, the census results—which are used for, among other things, redistricting—were released on August 12, 2021. Rather than using this census data to begin state legislative and congressional redistricting, the South Carolina legislature chose to further delay these processes by adjourning in the fall of 2021 without addressing its redistricting

¹⁵⁴⁵ *La Union del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 388 (W.D. Tex. 2022).

¹⁵⁴⁶ *La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348 (W.D. Tex. Nov. 29, 2023).

¹⁵⁴⁷ *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 167 Ohio St.3d 255, 2022-Ohio-65.

responsibilities or setting any clear timeline for doing so. In response, on October 12, 2021, the ACLU, ACLU of South Carolina, NAACP LDF, and Arnold & Porter filed a malapportionment lawsuit in federal court challenging South Carolina's failure to timely update its state legislative and congressional district maps to reflect changes in population with each decennial census, as required under the Constitution.¹⁵⁴⁸ The lawsuit was filed on behalf of the South Carolina NAACP and an individual voter.¹⁵⁴⁹ Plaintiffs argued that by further delaying the redistricting process, the South Carolina legislature was not leaving enough time for review and enactment of legally compliant maps prior to the 2022 election.

South Carolina eventually enacted state House and Senate maps on December 10, 2021. Upon review of the state's enacted maps, plaintiffs amended their complaint to assert racial gerrymandering and intentional discrimination claims alleging that multiple state House districts were drawn to pack or crack Black communities as a result of an unconstitutional race-predominant redistricting process.¹⁵⁵⁰ Prior to trial, and after mediated settlement negotiations, the parties signed a settlement agreement on May 5, 2022, in which the South Carolina legislature agreed to introduce a new state House map that would address plaintiffs' claims by adjusting district lines in key historically significant areas of the state for Black voters.¹⁵⁵¹ This map was then enacted on June 17, 2022, thus resolving plaintiffs' state House-related claims.

Meanwhile, South Carolina enacted its congressional map on January 26, 2022. Plaintiffs amended their complaint to add claims of unconstitutional racial gerrymandering and intentional discrimination in challenging three of the seven congressional districts: Congressional Districts 1, 2, and 5.¹⁵⁵² Plaintiffs argued that the state mapmakers intentionally moved and sorted voters based on race, limiting Black voters' influence in the challenged districts and resulting in a statewide map where Black voters would have no meaningful opportunity to elect their preferred candidates in six of the seven districts in

¹⁵⁴⁸ Compl., *South Carolina NAACP v. McMaster*, No. 3:21-cv-03302-JMC-TJH-RMG (D.S.C. Oct. 12, 2021), ECF No. 1.

¹⁵⁴⁹ At the time, the lawsuit was captioned *South Carolina NAACP v. McMaster* (referring to one of the defendants, Governor McMaster). After a shift in defendants, the case eventually became *South Carolina NAACP v. Alexander*.

¹⁵⁵⁰ First Am. Compl., *South Carolina NAACP v. McMaster*, No. 3:21-cv-03302-JMC-TJH-RMG (D.S.C. Dec. 23, 2021), ECF No. 84.

¹⁵⁵¹ Letter providing status update regarding settlement by legislation and exhibit, *South Carolina NAACP v. Alexander*, No. 3:21-cv-03302-MBS-TJH-RMG (D.S.C. May 5, 2022), ECF No. 260, 260-1.

¹⁵⁵² Second Am. Compl., *South Carolina NAACP v. Alexander*, No. 3:21-cv-03302-JMC-TJH-RMG (D.S.C. Feb. 10, 2022), ECF No. 154. To reflect the above-referenced settlement agreement regarding the state House-related claims, plaintiffs amended their complaint again on May 6, 2022, Third Amended Complaint, *South Carolina NAACP v. Alexander*, No. 3:21-cv-03302-MBS-TJH-RMG (D.S.C. May 6, 2022), ECF No. 266-2, making the Third Amended Complaint the operative complaint in this case.

South Carolina. On June 28, 2022, the court denied in full the defendants’ motion to dismiss the case, allowing the case to proceed to trial.¹⁵⁵³

After a two-week trial in October of 2022, a panel of three federal judges unanimously concluded that South Carolina’s Congressional District 1 violated the constitution. The court found that the legislature imposed an unconstitutional racial target of 17% Black voters in Congressional District 1—the coastal district including Charleston—from which tens of thousands of Black Charlestonians had been excised and “bleach[ed]” out of the district in order to accomplish a partisan goal.¹⁵⁵⁴

South Carolina appealed directly to the U.S. Supreme Court and the Court noted probable jurisdiction.¹⁵⁵⁵ On October 11, 2023, oral arguments were held before the Supreme Court, with a significant focus on the issue of disentangling motivations based on race and partisanship in the context of racial gerrymandering claims. A decision is pending.

153. Commonwealth of Pennsylvania v. Dush/Costa v. Corman – Pennsylvania 2021

In 2021, the Pennsylvania Senate’s Intergovernmental Operations Committee issued a subpoena to the Pennsylvania Department of State requesting a “complete list containing the name, date of birth, driver’s license number, last four digits of Social Security number, address and date of last voting activity of all registered voters within the Commonwealth of Pennsylvania as of May 1, 2021, by County.”¹⁵⁵⁶ The Pennsylvania Department of State produced instead non-privileged, non-protected information responsive to some of the requests. The Senate Democratic Caucus filed a lawsuit seeking declaratory and injunctive relief forbidding enforcement of the subpoena.¹⁵⁵⁷ The ACLU, the ACLU of Pennsylvania, and co-counsel sought intervention on behalf of the League of Women Voters of Pennsylvania, Common Cause Pennsylvania, Make the Road Pennsylvania, and individual Pennsylvania voters, which the court granted.¹⁵⁵⁸

After denying several cross-motions for summary relief, the court ordered the parties to submit briefs on whether the case was ripe for adjudication and whether it had jurisdiction to grant relief.¹⁵⁵⁹ The ACLU and co-counsel filed a brief on behalf of the intervenors

¹⁵⁵³ *S.C. State Conf. of NAACP v. Alexander*, No. 3:21-CV-03302-TJH-MBS-RMG, 2022 WL 2334410 (D.S.C. June 28, 2022).

¹⁵⁵⁴ *S.C. State Conf. of NAACP v. Alexander*, 649 F. Supp. 3d 177 (D.S.C. 2023).

¹⁵⁵⁵ *Alexander v. S.C. State Conf. of the NAACP*, 143 S. Ct. 2456 (2023).

¹⁵⁵⁶ See Subpoena Duces Tecum, Sept. 15, 2021, https://www.lwv.org/sites/default/files/2023-03/2021-09-15_Pennsylvania-Senate-Subpoena.pdf.

¹⁵⁵⁷ Petition for Review, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Sept. 17, 2021).

¹⁵⁵⁸ Application for Leave to Intervene, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Nov. 4, 2021); see Memorandum Order, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Nov. 26, 2021) (granting intervention motion).

¹⁵⁵⁹ Memorandum & Order, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Jan. 10, 2022) (denying cross-motions for summary relief); Order, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Jan. 25, 2022) (requesting jurisdictional briefing).

arguing that the court had jurisdiction to hear the matter.¹⁵⁶⁰ Specifically, the intervenors argued that longstanding precedent confirmed that courts in equity have jurisdiction to address alleged legislative overreach before a legislative committee initiates contempt proceedings; that cases raised by the court as possibly suggesting otherwise were distinguishable on other grounds; and that the intervenors' petition was ripe for review because they were not subpoena recipients.¹⁵⁶¹ The court heard arguments in September 2022 and dismissed the case in February 2023 in a split decision holding that the case was not ripe for adjudication because the committee had not taken steps to enforce the subpoena through the legislative process.¹⁵⁶² The court noted that if the committee did attempt to enforce the subpoena, then the Secretary of the Commonwealth could contest the issue in court, but until then, separation of powers concerns favored passing on the case.¹⁵⁶³

After the court denied a petition for rehearing, the intervenors appealed to the Pennsylvania Supreme Court.¹⁵⁶⁴ On February 21, 2024, the court dismissed the matter as moot and vacated the commonwealth court's order because the "subject subpoena became unenforceable upon the General Assembly's adjournment *sine die* of the 2021-2022 legislative session."¹⁵⁶⁵

154. League of Women Voters of Ohio v. DeWine – Ohio 2021

On November 30, 2021, the League of Women Voters of Ohio (LWVO), A. Philip Randolph Institute of Ohio, and several individuals filed a lawsuit challenging Ohio's congressional map in the Ohio Supreme Court.¹⁵⁶⁶ The complaint contended that the new map was drawn to guarantee a Republican majority in the state's Congressional delegation in violation of Ohio Constitutional prohibitions on partisan gerrymandering. The suit asked the court to declare the new map invalid and order the creation of fair congressional districts. The Ohio Supreme Court ultimately struck down the map and ordered the Legislature to redraw the entire map within 30 days of the decision.¹⁵⁶⁷

After the Legislature failed to pass a second map, the Ohio Redistricting Commission passed a new map on March 2, 2022.¹⁵⁶⁸ On March 22, the same organizations and individuals again challenged the map as a partisan gerrymander, alleging that the new map

¹⁵⁶⁰ Br. of Petitioners-Intervenors, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Feb. 15, 2022).

¹⁵⁶¹ *Id.* at 1–13.

¹⁵⁶² Opinion & Order, *Costa v. Corman*, No. 310 MD 2021 (Pa. Commonw. Ct. Feb. 9, 2023).

¹⁵⁶³ *Id.* at 34.

¹⁵⁶⁴ See Br. of Appellants Voter-Intervenors, *Costa v. Corman*, Nos. 26, 27, and 28 MAP 2023 (Pa. July 31, 2023). The ACLU Voting Rights Project was not counsel on the brief submitted to the Pennsylvania Supreme Court.

¹⁵⁶⁵ *Costa v. Ward*, No. 26 MAP 2023, — A.3d —, 2024 WL 697160, at *1 (Pa. Feb. 21, 2024).

¹⁵⁶⁶ Compl., *League of Women Voters of Ohio v. DeWine*, 2021 WL 5631712 (Ohio Nov. 30, 2021).

¹⁵⁶⁷ *Adams v. DeWine*, 2022-Ohio-89, 167 Ohio St. 3d 499, 528.

¹⁵⁶⁸ *Neiman v. LaRose*, 2022-Ohio-2471, 169 Ohio St. 3d 565, 566, *cert. granted, judgment vacated sub nom. Huffman v. Neiman*, 143 S. Ct. 2687 (2023).

was almost identical to that struck down and was therefore unconstitutional. On July 19, the Ohio Supreme Court again struck down the congressional map for violating the Ohio Constitution. In direct contravention of the Court's order, neither the General Assembly nor Redistricting Commission passed a plan. Because Republican lawmakers waited out the clock, however, the illegal map would have to be used for the 2022 election cycle.

On Oct. 14, 2022, Ohio Republican lawmakers filed a petition in the U.S. Supreme Court asking it to review the Ohio Supreme Court's decision to strike down the state's congressional map under the Independent State Legislature theory. On June 30, 2023, the Supreme Court vacated the Ohio Supreme Court's July 19, 2022 order and remanded the case back to the Ohio Supreme Court in light of its ruling in *Moore v. Harper*. On Sept. 7, 2023, after becoming clear that Republican lawmakers would never comply with a Court order invalidating the plans, the Ohio Supreme Court dismissed the case without prejudice.¹⁵⁶⁹

155. League of Women Voters of Ohio v. Ohio Redistricting Comm'n – Ohio 2021

The ACLU, ACLU of Ohio, and Covington & Burling LLP filed a lawsuit on Sept. 23, 2021, in Ohio Supreme Court challenging Ohio's newly drawn maps for state House and Senate districts that give extreme and unfair advantage to the Republican Party.¹⁵⁷⁰ The lawsuit was brought on behalf of the League of Women Voters of Ohio, the Ohio chapter of the A. Philip Randolph Institute, and several individuals.

The Ohio Redistricting Commission — which is dominated by Republicans — approved extreme Republican gerrymanders by a 5-2 party-line vote, disrespecting the letter and spirit of the constitutional proportionality standard passed overwhelmingly by Ohio voters in 2015. The maps locked in Republican veto-proof supermajorities in both chambers of the Ohio General Assembly.

On January 12, 2022, the Ohio Supreme Court struck down the maps as unconstitutional partisan gerrymanders ordered the commission to adopt a new plan within 10 days of the judgment.¹⁵⁷¹ The Court retained jurisdiction to review the new plan for compliance with the Ohio Constitution.

On January 22, 2022, the commission submitted a new plan to the Ohio Supreme Court. On February 7, 2022, this plan was again rejected as an unconstitutional Republican partisan gerrymander.¹⁵⁷² This cycle continued six times over, with the Court again and again rejecting the unconstitutional plans adopted by lawmakers. With the 2022 election

¹⁵⁶⁹ *Huffman v. Neiman*, 143 S. Ct. 2687 (2023).

¹⁵⁷⁰ *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, 167 Ohio St. 3d 255, 255.

¹⁵⁷¹ *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, 167 Ohio St. 3d 255, 294

¹⁵⁷² *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, (*LOWV II*), Nos. 2021-1193, 2021-1198, 2021-1210, 168 Ohio St.3d 28 (Ohio Feb. 7, 2022)

approaching, and no map yet enacted, a federal three-judge court imposed the Republican gerrymander for use in the 2022 elections on May 27, 2022.¹⁵⁷³

On November 27, 2023, the Ohio Supreme Court granted the Defendants' motions to dismiss Plaintiffs' action and denied Plaintiffs' motions for leave to file objections instant.¹⁵⁷⁴

156. Milligan v. Allen – Alabama 2021

On November 15, 2021, the ACLU, Legal Defense Fund, ACLU of Alabama, Hogan Lovells LLP, and Wiggins Childs LLC filed a lawsuit in federal court challenging Alabama's newly drawn political maps for congressional districts on behalf of Greater Birmingham Ministries, Alabama State Conference of the NAACP, and individual voters. The complaint alleged that the congressional redistricting map drawn by the state legislature denies Black residents equal opportunity to participate in the political process and elect candidates of choice, in violation of Section 2 of the Voting Rights Act, and also that it was a racial gerrymander and intentionally discriminatory under the Fourteenth Amendment.¹⁵⁷⁵ Under the map, Black Alabamians would control only one out of the state's seven congressional districts (14%), even though they make up nearly 27% of the state's population and that population is distributed in reasonably compact areas including the longstanding community of interest known as the Black Belt.

On December 15, 2021, the *Milligan* plaintiffs filed a motion for preliminary injunction, based on their Section 2 and racial gerrymandering claims.¹⁵⁷⁶ From January 4-12, 2022, the court held an evidentiary hearing on the preliminary injunction motion before a three-judge panel in the Northern District of Alabama. On January 24, 2022, the court issued a 225-page decision granting a preliminary injunction enjoining the use of the state's map and giving the legislature fourteen days to redraw it.¹⁵⁷⁷ The court did "not regard the question whether the *Milligan* plaintiffs are substantially likely to prevail on the merits of their Section Two claim as a close one."¹⁵⁷⁸ It not only found that plaintiffs readily met the *Gingles* preconditions, but also noted other recent "federal judicial rulings involving official voting-related discrimination," and credited opinions showing "current socioeconomic disparities between Black Alabamians and white Alabamians on several dimensions: education, economics, housing, and health," "that these disparities are inseparable from and (at least in part) the

¹⁵⁷³ *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LOWV III)*, Nos. 2021-1193, 2021-1198, 2021-1210, 168 Ohio St.3d 309 (Ohio Mar. 16, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n (LOWV IV)*, 166 Ohio St.3d 1460 (2022).

¹⁵⁷⁴ *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 172 Ohio St.3d 597, 2023-Ohio-4271.

¹⁵⁷⁵ Compl., *Milligan v. Merrill*, No. 2:21-cv-01530-AMM, ECF No. 1 (N.D. Ala. Nov. 16, 2021).

¹⁵⁷⁶ Mot. For Preliminary Injunction, *Milligan v. Merrill*, No. 2:21-cv-01530-AMM, ECF No. 69 (N.D. Ala. Dec. 15, 2021).

¹⁵⁷⁷ *Milligan v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022).

¹⁵⁷⁸ *Id.* at 1026.

result of, the state's history of official discrimination,” and “that these disparities hinder Black Alabamians’ opportunity to participate in the political process today.”¹⁵⁷⁹

Defendants immediately filed a motion for the court to stay its order, which the district court denied in a 40-page decision.¹⁵⁸⁰ Defendants then filed a motion for a stay pending appeal with the U.S. Supreme Court, which the Court granted in a 5-4 decision while also accepting jurisdiction of the case on the merits, halting the District Court’s ruling from taking effect as the case is litigated and allowing Alabama’s congressional elections to proceed under the state’s adopted map.¹⁵⁸¹

After extensive briefing and oral argument, the Court announced its decision in June 2023, affirming the preliminary injunction and maintaining the *Gingles* standard for vote dilution under Section 2 of the VRA.¹⁵⁸² The Court saw “no reason to disturb the District Court’s careful factual findings,” and found “no basis to upset the District Court’s legal conclusions,” which “faithfully applied our precedents and correctly determined that, under existing law, HB1 violated § 2.”¹⁵⁸³ Rather, the Court rejected Alabama’s arguments, which it characterized as attempting “to remake our § 2 jurisprudence anew,” but it found this approach—focused on re-imposing a discriminatory intent standard and requiring plaintiffs to prove their face against a “race-neutral benchmark”—“compelling neither in theory nor in practice.”¹⁵⁸⁴ The Court also rejected “Alabama’s argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment,” as they were “not persuaded by Alabama’s arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.”¹⁵⁸⁵ Given this affirmance, the Court lifted the stay and remanded the case to the three-judge district court.

Back before the three-judge district court, the court provided the Alabama legislature the opportunity to enact a remedial plan before imposing its own map for 2024 elections. The Legislature enacted a new plan, but Plaintiffs challenged the plan as insufficient to remedy the violation or comply with Section 2. The district court agreed and enjoined the 2023 plan and charged a special master with proposing new plans.¹⁵⁸⁶ The court was unsparing in its criticism of Alabama, explaining that it had “now said twice that this Voting Rights Act case is not close” and it was “deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires” and “disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture

¹⁵⁷⁹ *Id.* at 1022.

¹⁵⁸⁰ *Milligan v. Merrill*, No. 2:21-CV-1291-AMM, 2022 WL 272636 (N.D. Ala. Jan. 27, 2022).

¹⁵⁸¹ *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

¹⁵⁸² *Allen v. Milligan*, 599 U.S. 1 (2023).

¹⁵⁸³ *Id.* at 23.

¹⁵⁸⁴ *Id.*

¹⁵⁸⁵ *Id.* at 41.

¹⁵⁸⁶ *Milligan v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156 (N.D. Ala. Sept. 5, 2023).

the ambition to provide the required remedy.”¹⁵⁸⁷ Indeed, the court was “not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district.”¹⁵⁸⁸ Among other things, the Court focused “on how clearly it illustrates the lack of political will to respond to the needs of Black voters in Alabama in the way that we ordered. We infer from the Legislature’s decision not to create an additional opportunity district that the Legislature was unwilling to respond to the well-documented needs of Black Alabamians in that way.”¹⁵⁸⁹

The court ultimately selected a plan that remedied the section 2 violation and created a second district in which Black voters can elect preferred candidates.¹⁵⁹⁰ The Defendants sought a stay in the Supreme Court but it denied the motion with no noted dissents.¹⁵⁹¹ The map with two districts in which Black voters can elect will be in place for 2024 elections.

The Court has set trial for the case, which will determine the fate of the map for the rest of the decade post-2024 elections, for February 2025.

157. Stone v. Allen – Alabama 2021

On November 16, 2021, the ACLU, NAACP Legal Defense Fund, Southern Poverty Law Center, and co-counsel filed a lawsuit in federal court challenging Alabama’s newly drawn state legislative maps as racial gerrymanders.¹⁵⁹² The complaint alleged that the maps for the State Senate and House pack and crack Black communities in the state as a result of a race-predominant redistricting process. Plaintiffs amended their complaint in February 2022 to add a claim under Section 2 of the Voting Rights Act, arguing that the map denies Black residents in the Montgomery region an equal opportunity to participate in the political process and elect candidates of choice.¹⁵⁹³ Defendants moved to dismiss the action on March 11, 2022; however, the three-judge panel stayed the action on March 21 pending the outcome of the Supreme Court’s review of the preliminary injunction enjoining Alabama’s congressional map in *Milligan v. Allen* (described in the preceding section).¹⁵⁹⁴

In summer 2023, after the *Milligan* plaintiffs prevailed before the Supreme Court, the *Stone* Court lifted the stay.¹⁵⁹⁵ The Plaintiffs sought a schedule that would allow for trial to

¹⁵⁸⁷ *Id.* at *3–4.

¹⁵⁸⁸ *Id.* at *70.

¹⁵⁸⁹ *Id.*

¹⁵⁹⁰ *Milligan v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 6567895, at *14 (N.D. Ala. Oct. 5, 2023).

¹⁵⁹¹ *Allen v. Milligan*, 144 S. Ct. 476 (2023).

¹⁵⁹² Compl., *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. 2021), ECF No. 1.

¹⁵⁹³ Am. Compl., *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Feb. 11, 2022), ECF No. 54.

¹⁵⁹⁴ Motion to Dismiss, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Mar. 11, 2022), ECF No. 58; Order, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Mar. 21, 2022), ECF No. 61.

¹⁵⁹⁵ Order, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. June 9, 2023), ECF No. 75.

be held in early 2024 to preserve the opportunity to seek special elections, but the Court denied the request and set the case to be trial ready in the fall of 2024.¹⁵⁹⁶ Plaintiffs sought to amend the complaint, over the objection of Defendants, to dismiss their racial gerrymandering claims and add another claim under Section 2 of the Voting Rights concerning Alabama's failure to draw a state Senate district in the Huntsville area that provides Black residents an equal opportunity to elect candidates of choice.¹⁵⁹⁷ The Court granted the motion for leave to amend, and the three-judge panel dissolved leaving only a single judge hearing the case.¹⁵⁹⁸ Defendants moved to dismiss the remaining Voting Right Act claims related the State Senate map on multiple grounds,¹⁵⁹⁹ but the Court denied their motions (except for dismissing one defendant based on legislative immunity) and scheduled the case to proceed to trial in November 2024.¹⁶⁰⁰

158. Arkansas NAACP v. Arkansas Board of Apportionment – Arkansas 2021

On December 29, 2021, the ACLU, the ACLU of Arkansas, the Law Office of Bryan L. Sells LLC, and Dechert LLP filed a lawsuit challenging the redistricting map for Arkansas's state House of Representatives, on grounds that it violated Section 2 of the VRA by undermining the voting strength of Black Arkansans.¹⁶⁰¹ The litigation was one of several lawsuits the ACLU filed on behalf of Black voters challenging discriminatory redistricting maps in the 2020 redistricting cycle. On that same day, Plaintiffs moved for a preliminary injunction, arguing that it was possible to draw a map for the state House that had 16 majority-Black districts, *five* more than the adopted plan, which had only 11 such districts.¹⁶⁰² The adopted plan, therefore, diluted the voting strength of Black voters in Central Arkansas, the Upper and Lower Delta, and Southwest Arkansas.¹⁶⁰³ The lawsuit, filed in the United States District Court for the Eastern District of Arkansas, was brought on behalf of the Arkansas State Conference NAACP and the Arkansas Public Policy Panel, who represent thousands of Black voters whose political power is severely and unlawfully diminished by the state House map.

¹⁵⁹⁶ Report of the Parties' Planning Meeting, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. June 30, 2023), ECF No. 80; Scheduling Order, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. July 11, 2023), ECF No. 84.

¹⁵⁹⁷ Plfs.' Motion for Leave to File Fourth Amended Complaint, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Dec. 1, 2023), ECF No. 123.

¹⁵⁹⁸ Order, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Dec. 5, 2023), ECF No. 125; Order, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Dec. 7, 2023), ECF No. 127.

¹⁵⁹⁹ See Motions to Dismiss, *Stone v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Dec. 20, 2023), ECF Nos. 130 & 131.

¹⁶⁰⁰ *Stone v. Allen*, No. 2:21-cv-1531-AMM, 2024 WL 578578, at *1 (N.D. Ala. Feb. 13, 2024).

¹⁶⁰¹ Compl., *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 4:21-cv-1239-LPR, Doc. 1 (Dec. 29, 2021).

¹⁶⁰² Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 4:21-cv-1239-LPR, Doc. 3 (Dec. 29, 2021).

¹⁶⁰³ *Id.*

In its response to Plaintiffs’ motion for a preliminary injunction, the State did not argue that there is no private right to sue under Section 2; *i.e.* that Plaintiffs had no ability to bring their lawsuit because they are private organizations and not the Attorney General.¹⁶⁰⁴ The next day, the District Court issued an order *sua sponte* asking the parties to prepare arguments on whether Section 2 contains a private right of action.¹⁶⁰⁵

In February 2022, the Court held a five-day hearing on Plaintiffs’ preliminary injunction motion—which sought to enjoin Arkansas’ state House map ahead of the November 2022 elections—featuring extensive fact and expert testimony. On February 17, 2022, the Court acknowledged that Plaintiffs had a “strong merits case” but nevertheless issued an unprecedented and radical decision, becoming the first Court in the history of the United States to find that Section 2 of the VRA does not allow private plaintiffs to sue under the statute.¹⁶⁰⁶ The decision contradicted binding Supreme Court case law in *Morse v. Republican Party of Virginia*, in which five Supreme Court justices held that “the existence of the private right of action under Section 2 ... has been clearly intended by Congress since 1965.”¹⁶⁰⁷ And it flew in the face of nearly 60 years of unbroken case law in which private plaintiffs brought cases under Section 2 to vindicate their right to vote free from racial discrimination. More than 400 Section 2 cases have been litigated in federal court; the vast majority of Section 2 cases and successful Section 2 cases have been brought by private plaintiffs, including at least twelve at the Supreme Court.¹⁶⁰⁸

Plaintiffs appealed the District Court’s decision. In a split 2-1 decision, a three-judge panel of the Eighth Circuit Court of Appeals on November 20, 2023, affirmed the District Court’s ruling that Section 2 does not contain a private right of action.¹⁶⁰⁹ Chief Judge Smith dissented, noting that the Court should have “adhere[d] to the extensive history, binding precedent, and implied Congressional approval of Section 2’s private right of action.”¹⁶¹⁰

On January 30, 2024, the Eighth Circuit declined to rehear the case *en banc*, which would have enabled the full appellate court—rather than just the three-judge panel—to hear and consider the case.¹⁶¹¹ Dissenting from the denial of the petition for rehearing, Judge Colloton found that the panel failed to “apply [Supreme Court] precedent straightforwardly” and find that Section 2 contains a private right of action.¹⁶¹² Judge Colloton also found that

¹⁶⁰⁴ Response in Opposition to Motion for Preliminary Injunction, *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 4:21-cv-1239-LPR, Doc. 53 (Jan. 19, 2021).

¹⁶⁰⁵ Order, *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 4:21-cv-1239-LPR, Doc. 55 (Jan. 20, 2022).

¹⁶⁰⁶ Order, *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 4:21-cv-1239-LPR, Doc. 100 (Feb. 17, 2022).

¹⁶⁰⁷ 517 U.S. 186, 232 (1996) (internal quotation marks omitted) (Stevens, J., for two justices, writing for the Court); *see also id.* at 240 (Breyer, J., for three justices).

¹⁶⁰⁸ Brief of Plaintiffs-Appellants, *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, No. 22-1395, at 7-8 (8th Cir. Apr. 18, 2022).

¹⁶⁰⁹ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

¹⁶¹⁰ *Id.* at 1223 (Smith, C.J., dissenting).

¹⁶¹¹ *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 91 F.4th 967 (8th Cir. 2024) (*en banc*).

¹⁶¹² *Id.* at 970 (Colloton, J., dissenting).

the District Court’s decision to even rule on the issue was “erroneous” because Arkansas had waived the issue by failing to raise it.¹⁶¹³ Judge Colloton concluded by stating that “the court regrettably misses an opportunity to reaffirm its role as a dispassionate arbiter....”¹⁶¹⁴

159. Alpha Phi Alpha v. Raffensperger – Georgia 2021

On December 30, 2021, the American Civil Liberties Union, ACLU of Georgia, and WilmerHale filed a federal lawsuit on behalf of Alpha Phi Alpha Fraternity Inc., the Sixth District of the African Methodist Episcopal Church, and several individual Georgia voters challenging newly drawn state House and Senate district lines as unlawfully minimizing the voting strength of Black Georgians.¹⁶¹⁵ The lawsuit charges that the newly drawn maps deny Black residents an equal opportunity to participate in the political process and elect candidates of choice, in violation of Section 2 of the Voting Rights Act of 1965.¹⁶¹⁶

Plaintiffs prevailed after an eight-day trial in September 2023.¹⁶¹⁷ In October 2023, the district court ruled that the maps unlawfully diluted the voting strength of Black Georgians in multiple parts of the state and enjoined the state from using the enacted maps in future elections.¹⁶¹⁸

In response, the state appealed the ruling to the Eleventh Circuit Court of Appeals,¹⁶¹⁹ and, pending that appeal, the Georgia General Assembly drew new maps that failed to fully fix all of the injuries to Black voters that Plaintiffs proved in court.¹⁶²⁰ The ACLU’s objections to these maps were overruled by the district court, which found that Georgia’s remedial plan fully addresses the Plaintiffs’ injuries.¹⁶²¹ Plaintiffs are currently appealing that decision.¹⁶²²

160. Adkins v. Virginia Redistricting Commission – Virginia 2021

ACLU and ACLU of Virginia participating as amicus

¹⁶¹³ *Id.* at 972 (Colloton, J., dissenting).

¹⁶¹⁴ *Id.* at 974 (Colloton, J., dissenting).

¹⁶¹⁵ Compl. ¶ 1, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337-SCJ (N.D. Ga. Dec. 30, 2021), ECF No. 1.

¹⁶¹⁶ Am. Compl. ¶ 6, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337-SCJ (N.D. Ga. Mar. 30, 2022), ECF No. 141.

¹⁶¹⁷ *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-05337-SCJ, 2023 WL 7037537, at *5 (N.D. Ga. Oct. 26, 2023).

¹⁶¹⁸ *Id.* at 144.

¹⁶¹⁹ Defs.’ Notice of Appeal, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337-SCJ (N.D. Ga. Nov. 22, 2023), ECF No. 341.

¹⁶²⁰ Pls.’ Objections to Defendants’ Remedial Proposal, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337-SCJ (N.D. Ga. Dec. 12, 2023), ECF No. 354.

¹⁶²¹ *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-05337-SCJ, 2023 WL 9424682, at *5 (N.D. Ga. Dec. 28, 2023).

¹⁶²² Pls.’ Notice of Appeal, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 21-CV-05337-SCJ (N.D. Ga. Jan. 22, 2024), ECF No. 379.

In 2021, A Virginia state legislator and individual voters filed a mandamus petition in the Supreme Court of Virginia challenging the statutory criteria for redistricting passed in House Bill 1255 a year after the Virginia voters approved a constitutional amendment establishing an independent redistricting commission.¹⁶²³ Among other requirements, H.B. 1255 ended “prison gerrymandering,” or the practice of counting incarcerated people in the districts where they are incarcerated for the purposes of redistricting and reapportionment.¹⁶²⁴ The practice artificially inflates the political power of disproportionately rural districts that have opted to build prisons at the expense of the disproportionately urban and suburban, and far more diverse, districts from which incarcerated people hail.

Petitioners argued that the redistricting commission cannot use any of the statutory criteria in H.B. 1255 when they redraw districts because the Constitutional Amendment passed by referendum in 2020 laid out the exclusive criteria for redistricting.

The ACLU and ACLU of Virginia filed an amicus brief on behalf of the ACLU of Virginia itself, the League of Women Voters of Virginia, and the National Black Nonpartisan Redistricting Organization filed an amicus brief in support of the Redistricting Commission.¹⁶²⁵ Amici defended the statutory criteria, and particularly the ban on prison gerrymandering, by explaining that the 2020 Amendment required that the Commission look outside of the Constitution for additional redistricting criteria, including to “federal and state statutes that address racial and ethnic fairness,” which H.B. 1255 promoted. They further argued that even if the Court did not agree that H.B. 1255 promoted these criteria, it did not implicate the 2020 Amendment because it affects the population base for districting rather than the process of drawing lines. And the only two other Statutory Factors that Petitioners claimed conflict with the 2020 Amendment merely incorporate standards recognized under Section 2 of the Voting Rights Act of 1965—a statute explicitly incorporated into the 2020 Amendment as a districting factor. The brief also highlighted the anti-democratic and racially disproportionate effects of prison gerrymandering.

In 2021, the Supreme Court of Virginia dismissed the case, holding it did not meet the standards for granting a writ of mandamus.¹⁶²⁶

161. Vote.org v. Callanen – Texas 2021

ACLU and ACLU of Texas participating as amicus

In 2021, Vote.org filed a lawsuit against several Texas counties challenging the Texas “wet signature” law, which required individuals who register to vote electronically or via fax to

¹⁶²³ Pet’n for Writ of Mandamus, *Adkins v. Va. Redistricting Comm’n*, No. 210770 (Va. Aug. 13, 2021).

¹⁶²⁴ Va. Code Ann. § 24.2-304.04.

¹⁶²⁵ Br. of Amicus Curiae Am. Civil Liberties Union of Va., et al., *Adkins v. Va. Redistricting Comm’n*, No. 210770 (Va. Sept. 1, 2021).

¹⁶²⁶ Order Denying Pet’n, *Adkins v. Va. Redistricting Comm’n*, No. 210770 (Va. Sept. 22, 2021).

provide a copy with their original, wet-ink signature. Vote.org argued that the law unduly burdened the right to vote and targeted voting advocacy groups in violation of the First and Fourteenth Amendments and imposed an immaterial voting requirement in violation of the Civil Rights Act of 1964. The court granted plaintiff's motion for summary judgment, granting a permanent injunction block the law on both statutory and constitutional grounds.¹⁶²⁷ Texas Attorney General Ken Paxton appealed the case to the Fifth Circuit as an intervening defendant and sought a stay, which the Fifth Circuit granted.¹⁶²⁸

On appeal, the ACLU and ACLU of Texas argued as amici in support of Vote.Org that the Materiality Provision of the Civil Rights Act is privately enforceable and bars the application of the wet signature law.¹⁶²⁹ The Materiality Provision is privately enforceable via §1983 because it contains rights-creating language and itself provides an implied right of action by referring to enforcement actions by a “party aggrieved”. It also argued that the Materiality Provision protects qualified voters from vote denial based on minor errors in voting-related paperwork regardless of racial impact, and thus bars Texas from enforcing extraneous paperwork requirements like the wet-ink-copy required by the Texas statute.

In December 2023, the Fifth Circuit reversed the district court's decision, allowing the wet-ink statute to remain, but agreed that a private right of action exists under the statute.¹⁶³⁰

162. White v. Mississippi State Board of Elections – Mississippi 2022

On April 25, 2022, a group of Black voters and civic leaders filed a lawsuit challenging the districts used for electing justices to the Mississippi Supreme Court.¹⁶³¹ Plaintiffs alleged that the current district plan is unlawful under Section 2 of the Voting Rights Act, for denying Black voters an opportunity to elect their preferred candidates.¹⁶³²

Black Mississippians make up nearly 40% of the state's population, yet not a single one of the three Supreme Court districts is Black-majority, and none affords Black voters an equal opportunity to elect a candidate of their choice.¹⁶³³

In Mississippi's 100-year history of electing state supreme court justices, only four Black justices have ever served on the court.¹⁶³⁴ No Black candidate has ever prevailed in an open election—all required the benefit of a gubernatorial appointment and incumbency; and the

¹⁶²⁷ *Vote.org v. Callanen*, 609 F. Supp. 3d 515 (W.D. Tex. 2022), *rev'd*, 89 F.4th 459 (5th Cir. 2023).

¹⁶²⁸ *Vote.Org v. Callanen*, 39 F.4th 297 (5th Cir. 2022).

¹⁶²⁹ Br. of Am. Civil Liberties Union Foundation & Am. Civil Liberties Union Foundation of Texas as *Amici Curiae*, *Vote.Org v. Callanen*, 2022 WL 16855751 (5th Cir. Nov. 4, 2022).

¹⁶³⁰ *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023).

¹⁶³¹ Compl., *White v. State Board of Election Commissioners*, No. 22-CV-00062-SA-JMV, ECF No. 1 (N.D. Miss. Apr. 25, 2022).

¹⁶³² Am. Compl., *White v. State Board of Election Commissioners*, No. 22-CV-00062-SA-JMV, ECF No. 133 (N.D. Miss. Mar. 27, 2023).

¹⁶³³ *Id.*

¹⁶³⁴ *Id.*

last time a Black incumbent prevailed in a contested election was 2004.¹⁶³⁵ The judicial districts at issue have not been updated since 1987, despite significant demographic changes in the state.¹⁶³⁶

Trial is scheduled for the summer of 2024, in the Northern District of Mississippi.

163. Mississippi NAACP v. Mississippi State Board of Elections – Mississippi 2022

In December 2022, the ACLU, the ACLU of Mississippi, the Lawyers' Committee for Civil Rights Under Law, the Mississippi Center for Justice, the Law Offices of Carroll Rhodes, and Morgan, Lewis, and Bockius LLP filed suit in federal court to challenge the 2022 redistricting plans for the state house and state senate, on behalf of the Mississippi State Conference of the NAACP as well as individual voters affected by the unlawful district lines.¹⁶³⁷

The lawsuit alleges that the 2022 redistricting plans violate Section 2 of the Voting Rights Act. Plaintiffs contend that multiple additional Black-majority districts could and should have been created—at least four in the state Senate and three in the state House.[2] The lawsuit also alleges that the 2022 redistricting plans violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs contend that voters in at least five districts—three in the state Senate and two in the state House—were sorted and assigned predominantly on the basis of their race, in order to lower the Black population percentage in those districts.

On June 23, 2023, the Court granted Plaintiffs' motion to expedite the trial in anticipation of seeking special elections in Fall 2024.¹⁶³⁸ The case went to trial in February 2024, before a panel of three federal judges at the U.S. District Court courthouse in Jackson, Mississippi

164. Ritter v. Migliori – Pennsylvania 2022

The ACLU, the ACLU of Pennsylvania, and Hogan Lovells sued on behalf of five voters whose votes were among the 257 mail-in ballots rejected by the Lehigh County Board of Elections during a 2021 municipal election due to the omission of a handwritten date on the outside of the ballot-return envelope.¹⁶³⁹ These ballots were excluded based on a provision of state law that instructs mail-ballot voters to “fill out, date, and sign” a form declaration on the outer envelope used to return mail ballots.¹⁶⁴⁰ Their ballots were timely received and date-stamped by Election Day and the handwritten date had no bearing on voter eligibility

¹⁶³⁵ *Id.*

¹⁶³⁶ *Id.*

¹⁶³⁷ Compl., Doc. 1, *Miss. State Conference of the NAACP v. State Bd. of Elections Comm'rs*, 3:22-cv-734-DPJ-HSO-LHS (S.D. Miss. 2022).

¹⁶³⁸ Order Granting Miscellaneous Relief, Doc. 44, *Miss. State Conf. of the NAACP v State Bd. of Elections Comm'rs*, 3:22-cv-734-DPJ-HSO-LHS (S.D. Miss. 2022).

¹⁶³⁹ Compl., *Migliori v. Cohen*, No. 5:22-cv-397-EGS (E.D. Pa., Jan. 31, 2022), ECF No. 1.

¹⁶⁴⁰ 25 P.S. §§ 3146.6(a), 3150.16(a).

or timeliness of the vote.¹⁶⁴¹ The plaintiffs argued that disenfranchising voters for failure to handwrite a nonessential date violates the First and Fourteenth Amendments and the Materiality Provision of the Civil Rights Act, which prohibits denying the right to vote based on an immaterial error or omission on any paper or record requisite to voting.¹⁶⁴²

After the district court dismissed the case on procedural grounds,¹⁶⁴³ the plaintiffs appealed and a panel of the United States Court of Appeals for the Third Circuit reversed and remanded, instructing the district court to enter an injunction requiring the ballots to be counted in compliance with the Materiality Provision.¹⁶⁴⁴

The Supreme Court denied a defendant's motion for an emergency stay and, as a result, every ballot was counted.¹⁶⁴⁵ Later, because the election's certification mooted the controversy, the Supreme Court subsequently vacated the Third Circuit's decision in *Migliori* as moot in a non-merits order.¹⁶⁴⁶

165. Robinson v. Landry – Louisiana 2022

On March 30, 2022, the ACLU, ACLU of Louisiana, the Legal Defense Fund, and Paul Weiss filed an action in federal court on behalf of the Louisiana State Conference of the NAACP, Power Coalition for Equity and Justice, and several individual voters challenging the congressional redistricting plan adopted by the state legislature over the veto of Governor Edwards. The lawsuit argues that Section 2 of the Voting Rights Act required the state to add a second congressional district in which Black voters had an equal opportunity to elect their candidates of choice.¹⁶⁴⁷ A related action, *Galmon v. Ardoin*, in which the Elias Law Group serves as counsel for the plaintiffs, was subsequently consolidated with *Robinson*.¹⁶⁴⁸

On June 6, 2022, after a week-long evidentiary hearing, the district court found that plaintiffs were likely to succeed in proving that Louisiana's congressional map violated Section 2 of the VRA, and granted their motion for a preliminary injunction, prohibiting the state from conducting elections under the challenged redistricting plan and allowing the legislature two weeks to adopt a new plan.¹⁶⁴⁹ Defendants sought to stay the decision in the

¹⁶⁴¹ Compl. ¶ 47, *Migliori v. Cohen*, No. 5:22-cv-397-EGS (E.D. Pa. Jan. 31, 2022), ECF No. 1.

¹⁶⁴² *Id.* ¶¶ 38–63.

¹⁶⁴³ *Migliori v. Lehigh Cnty. Bd. of Elections*, No. 5:22-cv-397-EGS, 2022 WL 802159, at *1 (E.D. Pa. Mar. 16, 2022).

¹⁶⁴⁴ *Migliori v. Cohen*, 36 F.4th 153, 162–64 (3d Cir. 2022); *see also id.* 164–66 (Matey, J., concurring).

¹⁶⁴⁵ *Ritter v. Migliori*, 143 S. Ct. 297 (U.S. June 9, 2022) (Mem.).

¹⁶⁴⁶ *Ritter v. Migliori*, 143 S. Ct. 297 (U.S. Oct. 11, 2022) (Mem.).

¹⁶⁴⁷ Compl., *Robinson v. Ardoin*, No. 22-cv-211-SDD-RLB, ECF No. 1 (M.D. La. Mar. 30, 2022).

¹⁶⁴⁸ See Consolidation Order, *Robinson v. Ardoin*, No. 22-cv-211-SDD-RLB, ECF No. 34 (M.D. La. Apr. 12, 2022).

¹⁶⁴⁹ *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 858 (M.D. La.), *cert. granted before judgment*, 142 S. Ct. 2892 (2022), and *cert. dismissed as improvidently granted*, 143 S. Ct. 2654 (2023), and *vacated and remanded*, 86 F.4th 574 (5th Cir. 2023).

Fifth Circuit, but the Court denied the stay on June 12, 2022, holding that “plaintiffs have prevailed at this preliminary stage given the record as the parties have developed it and the arguments presented,” and “the defendants have not met their burden of making a ‘strong showing’ of likely success on the merits.”¹⁶⁵⁰ Defendants sought a stay and a writ of certiorari before judgment in the Supreme Court, which the Court granted but held the case in abeyance pending its decision in *Allen v. Milligan*.¹⁶⁵¹

Plaintiffs defended that ruling on appeal in an oral argument before the 5th U.S. Circuit Court of Appeals in October 2023. In November, the 5th Circuit agreed that map is probably discriminatory, but determined it would allow the state Legislature an opportunity to draw its own map. The court was clear that it expects a new map to be in place by May 2024. The court has now set a schedule requiring the Legislature to present new maps by January 30, 2024.

In June 2023, the Supreme Court dismissed the appeal and lifted the stay following its decision in *Milligan* and remanded the case to the Fifth Circuit, where the parties submitted supplemental briefing regarding the impact of *Milligan* and presented oral argument on October 6, 2023.¹⁶⁵² In November 2023, the Fifth Circuit issued its decision, agreeing that Plaintiffs were likely to succeed on the merits of their VRA claim that the congressional map unfairly dilutes the votes of Black Louisianians, but vacated the prior preliminary injunction on the grounds that there was time for a trial prior to the 2024 midterm elections, and sent the case back to the district court for further proceedings including trial if needed.¹⁶⁵³

The district court set two alternative dates for trial, providing the Louisiana legislature the opportunity to pass a new map first if it desired and giving the plaintiffs time to decide whether to challenge that map. In January 2024, the legislature passed a new map containing two majority Black voting age population districts that satisfied the plaintiffs, and the court thus vacated the trial date.

166. Nairne v. Landry – Louisiana 2022

In March 2022, the ACLU, ACLU of Louisiana, NAACP LDF, and Louisiana attorney John Adcock brought a Section 2 challenge to Louisiana’s House and Senate legislative maps on behalf of Black voters across the state. Both plans pack Black voters into a small number of majority-Black districts and crack other Black communities across other districts to prevent them from forming an effective voting bloc. As a result, Black voters in Louisiana cannot participate equally in the political process or elect candidates of their choice outside of a few majority-Black districts.

¹⁶⁵⁰ *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022).

¹⁶⁵¹ *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022).

¹⁶⁵² *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023).

¹⁶⁵³ *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023).

A federal court heard the full trial on the merits from November 2023 to December 2023. In the seven-day trial, the court heard testimony from Black Louisiana voters who brought the case as well as statistical evidence of vote dilution and evidence of historical and ongoing voting discrimination in the state from the plaintiffs' experts.

On February 8, 2024, the district court ruled in the plaintiffs' favor, finding Louisiana's House and Senate legislative maps violated Section 2 of the VRA across the state, including around Shreveport, Baton Rouge, Natchitoches, and Lake Charles.¹⁶⁵⁴ Plaintiffs satisfied the Gingles preconditions, and every relevant Senate Factor to overwhelmingly satisfy the totality of the circumstances test demonstrating a clear Section 2 violation. Defendants filed a notice of appeal of the decision in late February 2024.

167. Hopkins v. Watson/Harkness v. Watson amicus – Mississippi 2022

ACLU and ACLU of Mississippi participating as amicus

Two plaintiff groups in this case—disenfranchised formerly incarcerated individuals—filed a lawsuit challenging Mississippi's felony lifetime disenfranchisement scheme as violating the Eighth Amendment's prohibition on cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment as motivated by racial discrimination. On cross motions for summary judgment, the district court ruled in Defendants' favor, finding in part that the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974), foreclosed relief for litigants challenging state laws denying suffrage to certain formerly incarcerated individuals under the Eighth Amendment.¹⁶⁵⁵ Both Plaintiff groups appealed, with the Harkness Plaintiffs appealing under their Equal Protection Clause claim,¹⁶⁵⁶ and the Hopkins Plaintiffs proceeding under their Eighth Amendment Clause claim.

In *Harkness*, the Fifth Circuit affirmed, followed by the full Court en banc, in a 10-7 decision.¹⁶⁵⁷ The majority held that “notwithstanding the potential impact of past discrimination on reenacted laws, . . . we remain confident, contrary to plaintiffs' principal assertion, that the critical issue here is not the intent behind Mississippi's 1890 Constitution, but whether the reenactment of Section 241 in 1968 was free of intentional racial discrimination,” and the Court found it was.¹⁶⁵⁸

Plaintiffs sought cert from the Supreme Court, and the ACLU and Legal Defense Fund filed an amicus brief in support of that position, explaining how the initial constitutional provision was infused with white supremacy, how Black Mississippians continue to face disproportionate harm from this provisions, and how subsequent reenactments did not

¹⁶⁵⁴ *Nairne v. Ardoin*, No. 22-178-SDD-SDJ, 2024 WL 492688, (M.D. La. Feb. 8, 2024).

¹⁶⁵⁵ *Harkness v. Hosemann*, 2019 WL 8113392, *11-*12 (S.D. Miss. Aug. 7, 2019).

¹⁶⁵⁶ *Harkness v. Watson*, 47 F.4th 296 (5th Cir. 2022) (en banc).

¹⁶⁵⁷ *Id.*

¹⁶⁵⁸ *Id.* at 307.

dissipate the racist taint of the original law.¹⁶⁵⁹ The Supreme Court denied cert on June 30, 2023, over the dissent of Justices Jackson and Sotomayor.¹⁶⁶⁰

In *Hopkins*, on August 4, 2023, a Fifth Circuit panel issued an opinion holding that Mississippi's lifetime ban on voting under Section 241 of the Mississippi Constitution violated the Eighth Amendment. On September 28, 2023, the Fifth Circuit voted to rehear the case en banc.

The ACLU, ACLU of Mississippi, and the Reason Foundation submitted an amicus brief before the en banc Fifth Circuit in *Hopkins v. Watson* to highlight why Mississippi's felon disenfranchisement scheme violates the Eighth Amendment.¹⁶⁶¹ The ACLU filed an amicus brief in support of Plaintiffs-Appellees on December 12, 2023, arguing that the scheme is cruel and unusual for three reasons. First, the scheme causes disproportionate dignitary harms to Black Mississippians. The scheme's design perpetuates dignitary harms today because regardless of minor amendments, it was designed in 1890 to exclude Black Mississippians from civic and political life. Being subjected to a lifetime disenfranchisement ban with these origins perpetuates dignitary hurt and injury and is unconstitutionally cruel.

Second, the scheme's cruelty is further enhanced because the lifetime disenfranchisement scheme is mandatory, and the rights restoration process is inaccessible, making the ban effectively irrevocable. This barrier to reenter civic life risks disproportionately punishing Black Mississippians and supports the conclusion that the scheme is cruel and unusual. Finally, Mississippi is the only state that imposes lifetime disenfranchisement upon a single felony conviction and is thus out of step with contemporary values as expressed through legislative enactments and state practices. The scheme is unusual in its severity, irrevocability, and in preserving a form of punishment rooted in express racial animus.

The full court heard the case on January 23, 2024. A decision remains pending.

168. Coca v. Dodge City, KS – Kansas 2022

In December 2022, the ACLU, ACLU of Kansas, UCLA Voting Rights Project, and Cleary Gottlieb Stein and Hamilton LLP, brought a Section 2 challenge to the at-large method of electing members to the Board of Commissioners on behalf of Latino Plaintiffs in Dodge City, Kansas.¹⁶⁶²

Despite comprising 65% and 46.13% of Dodge City's total and citizen voting age population in 2021, Latinos remain severely underrepresented on the town's at-large city commission.

¹⁶⁵⁹ Br. of Amici Curiae of NAACP Legal Defense Fund & Am. Civil Liberties Union, *Harness v. Watson*, No. 22-412, 2022 WL 17487974 (U.S. Dec. 2, 2022).

¹⁶⁶⁰ *Harness v. Watson*, 143 S. Ct. 2426 (2023).

¹⁶⁶¹ *Hopkins v. Watson*, 76 F.4th 378, 387 (5th Cir. 2023).

¹⁶⁶² Compl., *Coca v. City of Dodge City*, No. 22-CV-1274 (EFM), ECF No. 1 (D. Kan. Dec. 15, 2022).

After the Court denied Dodge City’s motion for summary judgment,¹⁶⁶³ Plaintiffs presented compelling evidence at a February 2024 trial that the City’s at-large method of election for City Commission prevents Latine voters from electing their candidates of choice because of racially polarized voting and past and present discrimination. A decision is expected by the end of 2024.

169. Moore v. Harper – North Carolina 2022

ACLU and ACLU of North Carolina participating as amicus

After 2020 redistricting, several groups of plaintiffs challenged North Carolina’s legislatively enacted congressional and state legislative redistricting maps in state court as a partisan gerrymander, and the North Carolina Supreme Court agreed, holding that such extreme gerrymanders violate the North Carolina Constitution.¹⁶⁶⁴ A group of North Carolina legislators sought cert, asking the U.S. Supreme Court to restore the gerrymandered map by arguing under the “independent state legislature theory,” state judicial review of state legislative enactments touching upon federal elections violates the U.S. Constitution’s Elections Clause, which delegates the power of redistricting to state legislatures alone. The Supreme Court granted certiorari.

The ACLU, joined by the ACLU of North Carolina, the Rutherford Institute, and the Niskanen Center, filed an *amicus* brief in demonstrating how petitioners’ theory flunks all traditional modes of constitutional analysis.¹⁶⁶⁵ The brief argued that the Petitioners’ independent legislature theory is contrary to the Constitution’s plain language and the original and ordinary meaning. The Framers fundamentally understood the power of “legislatures” and indeed all lawmaking power to be drawn from and bound by a written constitution. There is no reason to believe that the Framers departed from the ordinary understanding of how legislative power operates in our constitutional system in enacting the Elections Clause. Petitioners’ theory is also contrary to the Constitution’s federalist design, which requires deference to the way that state constitutions arrange the checks and balances of state government. The Elections Clause must be read in harmony with the Constitution’s federalist design. The brief also argued that Petitioners’ theory would also have disastrous practical consequences. It would green-light rampant, unchecked partisan gerrymandering just as state courts have begun to step in to address that issue, as they did this year in Ohio, New York, and Maryland as well as North Carolina. And it would open a Pandora’s Box of unreviewable election rules in other areas, like mail ballot rules, voter registration rules, and more.

¹⁶⁶³ *Coca v. City of Dodge City*, No. 22-CV-1274 (EFM), 2023 WL 8627654, at *1 (D. Kan. Dec. 13, 2023).

¹⁶⁶⁴ *Harper v. Hall*, 2022-NCSC-17, 380 N.C. 317, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022), and *overruled in later appeal*, 384 N.C. 292 (2023), and *aff’d sub nom. Moore v. Harper*, 600 U.S. 1 (2023).

¹⁶⁶⁵ Br. for *Amici Curiae* the American Civil Liberties Union, the ACLU of North Carolina, the Rutherford Institute, and the Niskanen Center in Support of Respondents, *Moore v. Harper*, No. 21-1271, 2022 WL 16555248 (U.S. Oct. 6, 2022).

After the 2022 elections, the North Carolina Supreme Court underwent a partisan shift in its composition, and reconsidered its prior decision, reversing itself and finding partisan gerrymandering presented a nonjusticiable political question.¹⁶⁶⁶ Though several parties argued the pending case in the Supreme Court was now moot, the Supreme Court disagreed and rendered its decision on the merits. In a 6-3 decision, the U.S. Supreme Court ruled that the U.S. Constitution’s Elections Clause does not allow state legislatures to ignore their own state constitutions when making rules for federal elections, rejecting the “independent state legislature” theory to the extent it was advanced by Petitioners.¹⁶⁶⁷

170. State of Ohio v. Urbanek – Ohio 2022

ACLU and ACLU of Ohio participating as amicus

During the 2020 election, Edward Urbanek travelled to Summit County, where he had previously voted. Uncertain of whether that was his correct precinct, he asked poll workers to confirm that he was at the correct precinct. They were unable to do so and instructed him to fill out a provisional ballot, which Mr. Urbanek believed would not count as a vote. After filling out the provisional ballot, Urbanek traveled to the correct precinct, filled out a regular ballot, and voted. He was told by poll workers that he had only voted once. After the election, he was prosecuted and convicted for felony illegal voting under Ohio Revised Code § 3599.12.

The trial court held that §3599.12 creates a strict liability offense for attempting to vote more than once at the same election, including by provisional ballot. On appeal, the ACLU and ACLU of Ohio argued as amici in support of Mr. Urbanek that this reading of §3599.12 contradicts the federal Help America Vote Act (HAVA) and is thus preempted. Further, ACLU argued that the trial court’s interpretation violated the rule of lenity, which provides that ambiguities in criminal statutes be construed against the state. Finally, ACLU argued that the trial court violated the due process provisions of the Ohio and United States Constitutions by failing to admit intent evidence while charging the jury that purpose was an element of the charged “attempt” offense.

The Ohio Court of Appeals upheld the decision of the trial court, and the Ohio Supreme Court denied review of the appeal.¹⁶⁶⁸

171. Cook v. Cobb County – Georgia 2022

On November 4, 2022—the last day of early voting in Georgia and four days before the November 2022 midterm elections—Cobb County Elections Director Janine Eveler disclosed for the first time that approximately 1,036 absentee ballots marked as issued on October 13,

¹⁶⁶⁶ *Harper v. Hall*, 384 N.C. 292 (2023).

¹⁶⁶⁷ *Moore v. Harper*, 143 S.Ct. 2065, 2074 (2023).

¹⁶⁶⁸ *State v. Urbanek*, 2023-Ohio-2249, 220 N.E.3d 146, 148, *appeal not allowed*, 2023-Ohio-4015, 172 Ohio St. 3d 1402, 221 N.E.3d 853.

2022 and October 22, 2022 had never been mailed to voters, due to staff error.¹⁶⁶⁹ Upon learning this news, the ACLU heard from several Georgia voters who: (i) temporarily lived out of state; (ii) requested absentee ballots in October 2022; (iii) never those absentee ballots; and (iv) when they contacted Cobb County to inquire about the status of those ballots, were told that their absentee ballots had likely been sent out and to await delivery of their ballots in the mail.¹⁶⁷⁰ While some of the 1,036 voters voted in-person, there were still hundreds of voters in need of the absentee ballots they had requested, just days before Election Day, many of whom lived hundreds or thousands of miles away from Georgia.¹⁶⁷¹

On November 6, 2022, the ACLU, ACLU of Georgia, Southern Poverty Law Center, and Dechert LLP filed a complaint and emergency motion for an interlocutory injunction and temporary restraining order on behalf of Georgia voters on the brink of disenfranchisement due to the county's failure to send their absentee ballots.¹⁶⁷²

The next day, on November 7, 2022, the Superior Court for the State of Georgia, in Cobb County, issued an order approving the parties' consent order.¹⁶⁷³ The Court ordered that Cobb County must: (i) extend the ballot receipt deadline for all affected voters by six days, to November 14, 2022, the same deadline for Uniformed and Overseas Voters, provided those ballots were postmarked by Election Day; (ii) send replacement absentee ballots on that same day, November 7, to impacted voters who had not yet received a ballot and who had not already voted, via overnight mail; (iii) send immediate notice by email and text message to affected voters and release a public announcement on its website; and (iv) permit affected voters to vote in-person, by replacement absentee ballot, or by Federal Write-In Absentee Ballot ("FWAB").¹⁶⁷⁴ One day later, on Election Day, the Court entered an amended consent order to "add language permitting any remaining unsent absentee ballots [to] be delivered to Affected by the deputy registrars, attorneys barred by the State of Georgia who are not law enforcement officers, or private courier services."¹⁶⁷⁵

While the litigation was a success, Plaintiffs' attorneys noted that there was "a direct correlation between" Georgia's anti-voter bill Senate Bill 202 ("SB 202")—which the ACLU, ACLU of Georgia, and other co-counsel have challenged—and Cobb County's error.¹⁶⁷⁶ SB

¹⁶⁶⁹ Verified Compl. for Declaratory and Injunctive Relief, *Cook v. Cobb County Board of Elections & Registration*, No. 22107734, Ex. I (Nov. 6, 2022).

¹⁶⁷⁰ Verified Compl. for Declaratory and Injunctive Relief, *Cook v. Cobb County Board of Elections & Registration*, No. 22107734, at 7-8 (Nov. 6, 2022).

¹⁶⁷¹ *Id.* at 7-9.

¹⁶⁷² Plfs.' Emergency Motion for Interlocutory Injunction and Temporary Restraining Order, *Cook v. Cobb County Board of Elections & Registration*, No. 22107734, (Nov. 6, 2022).

¹⁶⁷³ Consent Order, *Cook v. Cobb County Board of Elections & Registration*, No. 22107734, (Nov. 7, 2022).

¹⁶⁷⁴ *Id.*

¹⁶⁷⁵ Am. Consent Order, *Cook v. Cobb County Board of Elections & Registration*, No. 22107734, (Nov. 8, 2022).

¹⁶⁷⁶ *ACLU and SPLC File Emergency Litigation to Ensure Cobb County Residents Can Vote Absentee After Local Board of Elections Fails to Send Over 1,000 Ballots*, ACLU, (Nov. 6, 2022)

202 reduced the timeframe for counties to receive and process absentee ballot requests, which “put tremendous pressure on elections officials to accomplish a number of responsibilities under a very tight timeline, and in Cobb County, that pressure [] resulted in a huge error and hundreds of voters at risk of being disenfranchised.”¹⁶⁷⁷

172. Crowell v. Cobb County – Georgia 2022

After the November 2022 general election, Georgia’s race for the U.S. Senate proceeded to a runoff election, held on December 6, 2022. As noted in the preceding section on *Cook v. Cobb County*, the ACLU was forced to seek emergency relief ahead of the November 2022 election because Cobb County failed to timely send absentee ballots to more than 1,000 voters who had requested them, risking mass disenfranchisement.

Remarkably, just weeks later, ahead of the December 2022 runoff election, voters in Cobb County found themselves in a very similar situation. In the runup to that runoff election, Cobb County admitted that it had failed to timely send absentee ballots to more than 3,400 voters whose absentee ballots had been marked as issued on November 23, 2022.¹⁶⁷⁸ The data suggested that these delays had a real impact on Cobb County voters, as a much smaller percentage of requested absentee ballots in Cobb County had been returned as compared to the return rate statewide.¹⁶⁷⁹

The same counsel group as in *Cook v. Cobb County*—the ACLU, ACLU of Georgia, Southern Poverty Law Center, and Dechert LLP—brought another emergency motion for an interlocutory injunction and temporary restraining order on December 1, 2022, on behalf of Cobb County voters who had timely requested absentee ballots but had not received them.¹⁶⁸⁰

One day later, on December 2, 2022, the Superior Court for the State of Georgia, in Cobb County, granted Plaintiffs’ motion for an interlocutory injunction.¹⁶⁸¹ The Court ordered that Cobb County must: (i) extend the ballot receipt deadline for all affected voters by three days, to December 9, 2022, the same deadline for Uniformed and Overseas Voters, provided those ballots were postmarked by Election Day; (ii) allow affected voters who had not received their absentee ballot by two days before Election Day to use the Federal Write-In Absentee Ballot (“FWAB”) to cast their ballots; and (iii) issue a public announcement on its Board of Elections website.

<https://www.aclu.org/press-releases/aclu-and-splc-file-emergency-litigation-ensure-cobb-county-residents-can-vote>.

¹⁶⁷⁷ *Id.*

¹⁶⁷⁸ Plfs.’ Motion for Leave to File Supplemental Complaint, *Crowell v. Cobb County Board of Elections and Registration*, No. 22107734, Ex. F (Dec. 1, 2022).

¹⁶⁷⁹ Plfs.’ Motion for Leave to File Supplemental Complaint, *Crowell v. Cobb County Board of Elections and Registration*, No. 22107734, at 6 (Dec. 1, 2022).

¹⁶⁸⁰ Plfs.’ Emergency Motion for Interlocutory Injunction and Temporary Restraining Order, *Crowell v. Cobb County Board of Elections and Registration*, No. 22107734, (Dec. 1, 2022).

¹⁶⁸¹ Interlocutory Injunction, *Crowell v. Cobb County Board of Elections and Registration*, No. 22107734, (Dec. 2, 2022).

While this was another successful litigation, as in *Cook v. Cobb County*, Georgia’s sweeping anti-voter law Senate Bill 202 (“SB 202”) again helped create the emergency situation for the runoff elections in Cobb County. Prior to SB 202, voters could request an absentee ballot 180 days before an election and the county could mail those ballots 49 days before an election.¹⁶⁸² Yet under SB 202, voters could request an absentee ballot just 78 days out from an election and counties could mail those ballots 29 days before the election.¹⁶⁸³ These compressed windows unnecessarily created more time pressure on county election officials in the runup to elections.

173. Alonzo v. Schwab – Kansas 2022

On February 14, 2022, the ACLU of Kansas, Campaign Legal Center, and Arnold & Porter filed a lawsuit in Kansas state court challenging the state’s newly drawn congressional redistricting map as a racial and partisan gerrymander.¹⁶⁸⁴ This case was filed on behalf of multiple individual Kansas voters and was later consolidated with another case filed on behalf of individual Kansas voters and Loud Light.¹⁶⁸⁵ Plaintiffs argued that the state engaged in a rushed redistricting process and enacted a plan that split the state’s only majority-minority county, Wyandotte County, for the first time in forty years, diluting minority and Democratic voting power in violation of the Kansas Constitution.

After a four-day trial in April of 2022, the Kansas trial court found in favor of plaintiffs and struck down the enacted map in a 209-page opinion on April 25, 2022.¹⁶⁸⁶ Defendants quickly appealed to the Kansas Supreme Court.¹⁶⁸⁷

Shortly after oral arguments were held, on May 18, 2022, the Kansas Supreme Court reversed the trial court ruling.¹⁶⁸⁸ The Kansas Supreme Court found that partisan gerrymandering was a nonjusticiable political question and was not suitable for Kansas courts to rule on, and also reasoned that in this case, minority voters in Kansas could not have been harmed because there were not enough minority voters to form the majority of a congressional district. Plaintiffs moved for rehearing, but the Kansas Supreme Court denied this motion on August 26, 2022.¹⁶⁸⁹

¹⁶⁸² *Cobb County Fails to Send Absentee Ballots for Second Time as ACLU and SPLC File Second Round of Litigation*, ACLU, (Dec. 2, 2022) <https://www.aclu.org/press-releases/cobb-county-fails-send-absentee-ballots-second-time-aclu-and-splc-file-second-round>.

¹⁶⁸³ *Id.*

¹⁶⁸⁴ Pet’n for Declaratory and Injunctive Relief and Mandamus, *Alonzo v. Schwab*, No. 2022-CV-000090 (Wyandotte Cty. Dist. Ct. Feb. 14, 2022).

¹⁶⁸⁵ The other consolidated case was *Rivera v. Schwab*, No. 2022-CV-000089.

¹⁶⁸⁶ Decision and Findings of Fact and Conclusions of Law, *Alonzo v. Schwab*, No. 2022-CV-000089 (Wyandotte Cty. Dist. Ct. Apr. 25, 2022).

¹⁶⁸⁷ Notice of Appeal, *Alonzo v. Schwab*, No. 2022-CV-000089 (Wyandotte Cty. Dist. Ct. Apr. 25, 2022).

¹⁶⁸⁸ Syllabus by the Court, *Rivera v. Schwab*, No. 125092 (Kan. Sup. Ct. May 18, 2022).

¹⁶⁸⁹ *Alonzo and Rivera Plaintiffs-Appellees’ Motion for Rehearing, Rivera v. Schwab*, No. 125092 (Kan. Sup. Ct. July 12, 2022); Order, *Rivera v. Schwab*, No. 125092 (Kan. Sup. Ct. Aug. 26, 2022).

Joining the ACLU of Kansas, Campaign Legal Center, Arnold & Porter, and the ACLU, along with Elias Law Group and Grissom Miller Law Firm, filed a petition for writ of certiorari to the U.S. Supreme Court on November 23, 2023, on the issue of whether the Court improperly held that intentional discrimination claim could not stand without proof that the effected racial group could form a majority in an additional district.¹⁶⁹⁰ On March 27, 2023, the Supreme Court denied the petition and decided not to hear this case on appeal, allowing the Kansas Supreme Court ruling to stand.¹⁶⁹¹

174. Pennsylvania State Conference of the NAACP v. Schmidt – Pennsylvania 2022

The ACLU and the ACLU of Pennsylvania filed a federal lawsuit on behalf of numerous nonpartisan organizations seeking to ensure that mail-in ballots cast by Pennsylvania voters that are missing a handwritten date on the return envelope or dated incorrectly are counted.¹⁶⁹² Although the Pennsylvania Election Code instructs voters to sign and date the declaration printed on the main-in ballot return envelope, that handwritten date is not material to determining an individual's qualification to vote.¹⁶⁹³ Accordingly, the plaintiffs argue that disenfranchising otherwise qualified voters who omit a date or incorrectly date their return envelope violates the Materiality Provision of the Civil Rights Act, which prohibits disqualifying voters "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election."¹⁶⁹⁴ The dating provision for mail-in ballot envelopes has generated significant litigation, including a 2022 decision by the United States Court of Appeals for the Third Circuit concluding that the law violated the Materiality Provision, which was later mooted by the election's certification and vacated as moot by the Supreme Court in a non-merits order.¹⁶⁹⁵

On November 30, 2022, the plaintiffs amended their complaint to add eight voters from across the commonwealth, all of whom were disenfranchised in the 2022 general election because of the rule prohibiting the counting of mail ballots with undated or incorrectly dated return envelopes.¹⁶⁹⁶

¹⁶⁹⁰ Pet'n for Writ of Certiorari, *Alonzo v. Schwab*, No. 22-501 (Sup. Ct. Nov. 23, 2022).

¹⁶⁹¹ Denial of Petition, *Alonzo v. Schwab*, No. 22-501 (Sup. Ct. Mar. 27, 2023).

¹⁶⁹² Compl., *Pa. State Conf. of the NAACP v. Chapman*, 1:22-cv-339 (W.D. Pa., Nov. 4, 2022), ECF No. 1.

¹⁶⁹³ 25 P.S. §§ 3146.6(a), 3150.16(a).

¹⁶⁹⁴ 52 U.S.C. § 10101(a)(2)(B).

¹⁶⁹⁵ See *Migliori v. Cohen*, 36 F.4th 153 (3d Cir.), cert. granted, judgment vacated sub nom. *Ritter v. Migliori*, 143 S. Ct. 297 (2022).

¹⁶⁹⁶ Am. Compl., *Pa. State Conf. of the NAACP v. Chapman*, 1:22-cv-339 (W.D. Pa., Nov. 30, 2022), ECF No. 121.

The plaintiffs moved for summary judgment on April 21, 2023.¹⁶⁹⁷ On November 21, 2023, the district court ruled in favor of the plaintiffs, finding that federal law requires that Pennsylvania voters' mail ballots be counted even when the voter forgets to write the date on the outer mail ballot envelope or writes a date that is somehow "incorrect."¹⁶⁹⁸ The ruling is currently on appeal before the Third Circuit.¹⁶⁹⁹ Argument was heard by the Court of Appeals on February 20, 2024.

175. AZ Petition Partners v. Thompson – Arizona 2022

ACLU and ACLU of Arizona participating as amicus

In 2017, the Arizona legislature enacted a statute restricting payment for ballot initiative petition gatherers. Arizona filed various charges against the organization Petition Partners alleging that their pay model based in part on the number of signatures collected and the incentive programs they operated violated Arizona statute § 19-118.01. After making its way through the superior court, the court of appeals held that the statute bans more than per-signature payments and therefore violates the First Amendment. Arizona petitioned the Arizona Supreme Court for review of the statute to determine whether it is facially unconstitutional under the First Amendment.

In December of 2022, in a case challenging an Arizona state law that banned payments on the basis of the "number of signatures collected on a statewide initiative or referendum petition," the ACLU, ACLU of Arizona, and Keker, Van Nest & Peters filed an amicus brief arguing that this law imposed a severe burden on the core political speech embodied in Arizona's ballot initiative process (and the corresponding use of petition circulators) and would not withstand strict scrutiny.¹⁷⁰⁰ The brief presented three core arguments. First, the circulation of ballot initiatives is a vital form of political speech and is entitled to expansive First Amendment Protections. The ballot initiative process is a form of citizen participation in lawmaking which is a practice deeply rooted in our history. And the ballot initiative process fosters democratic values by underscoring that all power flows from the people and by ushering in the institutional diversity envisioned by our federalist system. The ballot initiative process embodies "core political speech" and is entitled to maximal protection under state and federal law.

Second, restrictions on how petition circulators are paid are a "direct restraint" on freedom of expression. The First Amendment protects both the right to advocate a cause and to select the method for doing so. The restrictions are a severe burden on the initiative process and the legislature fails to offer serious evidence of fraud arising from the use of per-

¹⁶⁹⁷ See Plfs.' Motion for Summary Judgment, *Pa. State Conf. of the NAACP v. Schmidt*, 1:22-cv-339 (W.D. Pa., Apr. 21, 2022), ECF No. 274.

¹⁶⁹⁸ *Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-cv-339, 2023 WL 8091601, at *1 (W.D. Pa. Nov. 21, 2023).

¹⁶⁹⁹ *Pa. State Conf. of NAACP v. Schmidt*, No. 23-3166 (3d. Cir. 2023).

¹⁷⁰⁰ *Br. of Amicus Curiae American Civil Liberties Union of Arizona in Support of Petitioner, AZ Petition Partners LLC v. Thompson*, No. CR-22-0154-PR (Ariz. Sup. Ct. Dec. 23, 2022).

signature payment. Further, this rule is not the least restrictive means the state can use to prevent fraud in the election process.

Finally, criminalizing core political speech undermines the democratic system by seizing power from voters, inviting partisan manipulation into the administration of elections, sowing distrust in elections, and by constricting electoral officials' ability to do their jobs.

In June 2023, the Arizona Supreme Court ruled that the challenged statute does not facially violate the First Amendment because only per-signature compensation to petition circulators is prohibited.¹⁷⁰¹

176. VoteAmerica v. Schwab – Kansas 2023

ACLU and ACLU of Kansas participating as amicus

Kansas's Personalized Application of Prohibition statute made it a crime to send voters partially pre-filled applications for an early ballot, regardless of whether the information is truthful and accurate or whether the information populated was provided by the voter or the ballot was requested by the voter.¹⁷⁰² Because it restricted their core activities, VoteAmerica and the Voter Participation Center sued the Kansas Secretary of State, arguing that the statute criminalizes political speech protected under the First Amendment by preventing advocacy organizations from encouraging Kansans to vote by mail.¹⁷⁰³ After a bench trial, the court found that the mailing of personalized absentee ballot applications was inherently expressive conduct under the First Amendment and implicated Plaintiffs' right of association, that under any mode of analysis, strict scrutiny should apply, and that the prohibition was not narrowly tailored to advance the state's interest in preventing voter fraud or voter confusion or in facilitating efficient election administration, and enjoined the law.¹⁷⁰⁴

Defendants appealed to the Tenth Circuit, and the ACLU, ACLU of Kansas, ACLU of Colorado, ACLU of New Mexico, ACLU of Oklahoma, ACLU of Utah, and ACLU of Wyoming filed an amicus brief urging the Court to affirm the lower court decision.¹⁷⁰⁵ The brief argued that First Amendment speech protections apply to restrictions on political speech and that the *Anderson-Burdick* test used to evaluate laws regulating electoral mechanics does not apply. Any suggestion that courts "uniformly" apply *Anderson-Burdick* to all challenges to state laws in some way related to electoral mechanics misreads the case law. Further, the Supreme Court and the Tenth Circuit have applied the First Amendment's protections to laws that burden "core political speech," even when those laws arguably relate in some way to the electoral process. Finally, the brief refuted an argument

¹⁷⁰¹ *AZ Petition Partners v. Thompson*, 530 P.3d 1144, 1146 (Ariz. 2023).

¹⁷⁰² Kan. Stat. Ann. § 25-1122(k)(2).

¹⁷⁰³ Compl., *VoteAmerica v. Schwab*, No. 21-cv-2253-KHV (D. Kan. 2023).

¹⁷⁰⁴ *VoteAmerica v. Schwab*, 671 F. Supp. 3d 1230, 1244 (D. Kan. 2023).

¹⁷⁰⁵ Br. of Amici Curiae, ACLU, ALCU of Kansas, ACLU of Colorado, ACLU of New Mexico, ACLU of Oklahoma, ACLU of Utah, ACLU of Wyoming, *VoteAmerica v. Schwab*, No. 23-3100 (10th Cir. Sept. 14, 2023).

asking the court to evaluate the statute’s “burden on the right to vote” in its application of the *Anderson-Burdick* framework rather than on its speech rights.

The appeal remains pending in the Tenth Circuit.

177. Hispanic Federation v. Byrd – Florida 2023

The ACLU, ACLU of Florida, LatinoJustice PRLDEF, Demos, and Arnold & Porter LLP filed a federal lawsuit challenging a new Florida law, SB 7050, that targets community-based organizations performing voter registration¹⁷⁰⁶. The case specifically focuses on the law’s non-citizen provision, which would impose a \$50,000 fine on an organization for each non-citizen person who “collects” or “handles” voter registration forms on the organization’s behalf. This would almost certainly put out of business a great number of community-based groups that rely on a combination of citizens and non-citizens as staff and volunteers for their voter registration programs. The provision’s restrictions also target lawful permanent residents, many of whom have longtime, close ties to the communities in which they reside.

On July 3, 2023, the court granted a preliminary injunction on Equal Protection grounds, preventing the \$50,000 fine provision from taking effect.¹⁷⁰⁷ That order is currently on appeal and was argued in early 2024. The Court then granted summary judgment to Plaintiffs on this same issue as well.¹⁷⁰⁸ The case will proceed to trial on First Amendment claims in April 2024.

178. Disability Rights MS v. Fitch – Mississippi 2023

In May 2023, the League of Women Voters of Mississippi, Disability Rights Mississippi (DRMS), and three Mississippi voters filed a federal lawsuit challenging SB 2358, newly passed legislation that significantly diminishes access to the ballot for Mississippians with disabilities by restricting who may return an absentee ballot for a voter to only narrow categories of assistors.¹⁷⁰⁹ The plaintiffs are represented by the ACLU, ACLU of Mississippi, Southern Poverty Law Center (SPLC), Mississippi Center for Justice, and Disability Rights Mississippi.

SB 2358 applies harsh criminal penalties to Mississippians who help members of their communities vote by absentee ballot. It blocks anyone — including a friend, neighbor, or volunteer from a voter services group — from helping a Mississippi voter submit an absentee ballot unless they are an election official, family member, or caregiver. Since the

¹⁷⁰⁶ Compl., *Hispanic Fed’n v. Byrd*, Case No. 4:23-cv-218, ECF No. 1 (May 25, 2023).

¹⁷⁰⁷ *Fla. State Conf. of Branches & Youth Units of the NAACP v. Byrd*, No. 4:23CV215-MW/MAF, 2023 WL 4311084 (N.D. Fla. July 3, 2023).

¹⁷⁰⁸ *Hisp. Fed’n v. Byrd*, No. 4:23CV218-MW/MAF, 2024 WL 906004, at *1 (N.D. Fla. Mar. 1, 2024).

¹⁷⁰⁹ *Voting Rights Groups File Litigation to Protect Voting Rights of Mississippians with Disabilities*, ACLU of Mississippi, (May 31, 2023), <https://www.aclu-ms.org/en/press-releases/voting-rights-group-file-litigation-to-protect-voting-rights-ms>.

term caregiver isn't defined, staff of health care institutions are also chilled from helping residents with voting.¹⁷¹⁰

Plaintiffs alleged that SB 2358 violates the right of Mississippians with disabilities to receive assistance in voting from the person of their choice, as recognized in Section 208 of the Voting Rights Act. More specifically, Section 208 grants voters who need assistance due to disability, blindness, or inability to read or write the right to select a person of their choice to assist them with all aspects of the voting process with only narrow employment-related exceptions,¹⁷¹¹ but SB 2358 winnows down the world of possible assistors to narrow categories of assistors selected by the state. In July 2023, the district court enjoined the law meaning Mississippi voters covered under Section 208 may select a person of their choice to assist them with delivering or returning their absentee mail-in ballot.¹⁷¹² The order remained in place through Mississippi's 2023 elections. The state appealed the order, and the case is currently pending before the Fifth Circuit.

179. Minnesota Voters Alliance v. Hunt – Minnesota 2023

In 2023, the Minnesota Legislature enacted a law that restored voting rights to any individual with a felony conviction and allowed them to vote during any period in which they are “not incarcerated for the offense, “which includes any period when they are on work release.”¹⁷¹³ On June 28, 2023, conservative advocacy group Minnesota Voters Alliance and several Minnesota residents challenged this law as violating the Minnesota Constitution, arguing that people on supervised release, probation, or work release because of a felony conviction are not people who have been “restored to civil rights.”¹⁷¹⁴

The ACLU, ACLU of Minnesota, and the law firm Faegre Drinker Biddle & Reath LLP sought to intervene on behalf of several affected individuals affected by the challenge. On December 13, 2023, the district court granted intervention and denied Plaintiffs' petition, holding that the plaintiffs lack standing and would nonetheless fail on the merits because the law fell within the bounds of the constitutional text allowing the legislature to determine how to restore people to civil rights.¹⁷¹⁵

¹⁷¹⁰ *Disability Rts. Mississippi v. Fitch*, No. 3:23-CV-350-HTW-LGI, 2023 WL 4748788 (S.D. Miss. July 25, 2023).

¹⁷¹¹ See 52 U.S.C. § 10508.

¹⁷¹² *Id.*

¹⁷¹³ Minn. Stat. § 201.014, subd. 2a.

¹⁷¹⁴ Petition for Writ of Quo Warranto, *Minn. Voters Alliance v. Hunt*, Court File No. 02-CV-23-3416 (Minn. Dist. Ct., 10th Judicial Cir. June 23, 2023).

¹⁷¹⁵ Order Denying Petition, *Minn. Voters Alliance v. Hunt*, Court File No. 02-CV-23-3416 (Minn. Dist. Ct., 10th Judicial Cir. Dec.13, 2023).

Defendants appealed and sought accelerated review, and on January 16, 2024, the Minnesota Supreme Court granted accelerated review and set oral argument for April 2024.¹⁷¹⁶

180. *Brown v. Secretary of State - New Hampshire 2023*

ACLU and ACLU of New Hampshire participating as amicus

In the November 2022 elections, Democratic candidates for the New Hampshire Executive Council received more votes statewide than the Republican candidates, and yet the Republican candidates won four of the five seats.¹⁷¹⁷ New Hampshire Democratic candidates similarly won more votes in state Senate races than Republican candidates, but Republicans took 14 of the 24 state senate seats.¹⁷¹⁸

Recognizing this as a stark partisan gerrymander, a group of New Hampshire voters challenged the state's 2022 senate and executive council districts as violative of the state's Constitution. Plaintiffs argued that the plans violated the state's Free and Equal Elections Clause, Equal Protection Clause, and Free Speech and Association Clauses by packing Democratic voters into a small number of districts they could easily win and dispersing the rest into a larger number of districts, diluting their ability to influence elections.¹⁷¹⁹ The trial court granted the state defendant's motion to dismiss, holding that partisan gerrymandering claims are nonjusticiable under the New Hampshire Constitution.¹⁷²⁰

On appeal to the New Hampshire Supreme Court, ACLU and ACLU of New Hampshire filed an amicus brief in support of plaintiffs arguing that the trial court erred in finding that such claims are nonjusticiable and that the New Hampshire Constitution prohibits partisan gerrymandering.¹⁷²¹ ACLU argued that partisan gerrymandering claims are justiciable because, under New Hampshire precedent, the Court can hear claims involving fundamental rights even where certain matters are vested in a co-equal branch by the state Constitution.¹⁷²² Further, the brief argued that the excessive partisanship in the districting violated the New Hampshire Constitution's Free and Fair Elections Clause.¹⁷²³

¹⁷¹⁶ Order, *Minn. Voters Alliance v. Hunt*, No. A23-1940 (Minn. Jan. 16, 2024).

¹⁷¹⁷ Br. of *Amici Curiae* American Civil Liberties Union and American Civil Liberties Union of New Hampshire, *Brown v. Sec'y of State*, No. 2022-0629, at 9 (N.H. Jan. 20, 2023).

¹⁷¹⁸ *Id.*

¹⁷¹⁹ *Brown v. Sec'y of State*, No. 2022-0629, --- A.3d ---, 2023 WL 8245078, at *1-2 (N.H. Nov. 29, 2023).

¹⁷²⁰ *Id.* at *2.

¹⁷²¹ Br. of *Amici Curiae* American Civil Liberties Union and American Civil Liberties Union of New Hampshire, *Brown v. Sec'y of State*, No. 2022-0629, (N.H. Jan. 20, 2023).

¹⁷²² *Id.* at 12-18.

¹⁷²³ *Id.* at 18-24.

In 2023, the New Hampshire Supreme Court ruled against the plaintiffs, holding that partisan gerrymandering were nonjusticiable political questions in the absence of established limitations adopted by statute or constitutional amendment.¹⁷²⁴

181. *League of Women Voters of Utah v. Utah State Legislature* – Utah 2023

ACLU and ACLU of Utah participating as amicus

In 2018, Utahns approved Proposition 4, a ballot initiative that created the Utah Independent Redistricting Commission (UIRC), a bipartisan commission designed to guard against gerrymandering and ensure that “Utahns choose their representatives and not the other way around.”¹⁷²⁵ Yet in 2020, the Utah legislature enacted SB 200, which gutted Proposition 4 and rendered the UIRC a mere advisory entity.¹⁷²⁶ A year later, the state legislature adopted a new congressional electoral map creating an extreme partisan gerrymander. Plaintiffs challenged the redistricting map as a partisan gerrymander violative of the Utah Constitution’s Free Elections, Equal Protections, Free Speech, and Right to Vote Clauses.

In 2022, the trial court denied Defendants’ motion to dismiss Plaintiffs’ claims.¹⁷²⁷ Defendants appealed to the Utah Supreme Court.

ACLU and ACLU of Utah filed an amicus in support of the League of Women Voters of Utah with the state Supreme Court, arguing that: (1) Plaintiffs’ speech and associational claims are subject to heightened scrutiny under the Utah Constitution, and (2) Plaintiffs’ claims are justiciable.¹⁷²⁸

The Utah Supreme Court held oral arguments in July 2023 and a decision is pending.

182. *Graham v. Adams* – Kentucky 2023

ACLU and ACLU of Kentucky participating as amicus

In 2022, the Kentucky legislature passed bills in the state House (HB2) and Senate (SB3) to redistrict state house and U.S. Congressional seats.¹⁷²⁹ “HB2, which created district lines for the Kentucky House of Representatives, is off the charts and contains a pro-Republican bias

¹⁷²⁴ *Brown v. Sec’y of State*, 2023 WL 8245078, at *16.

¹⁷²⁵ Lisa Riley Roche, Utah proposition to battle gerrymandering passes as final votes tallied, *Deseret News*, (Nov. 20, 2018) <https://www.deseret.com/2018/11/20/20659293/utah-proposition-tobattle-gerrymandering-passes-as-final-votes-tallied>.

¹⁷²⁶ Br. of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Utah, *League of Women Voters of Utah v. Utah State Legislature*, No. 20220991-SC, at 3 (Utah May 19, 2023).

¹⁷²⁷ *League of Women Voters of Utah v. Utah State Legislature*, No. 220901712, 2022 WL 21745734, at *1 (Utah Dist.Ct. Nov. 22, 2022).

¹⁷²⁸ Br. of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Utah, *League of Women Voters of Utah v. Utah State Legislature*, No. 20220991-SC (Utah May 19, 2023).

¹⁷²⁹ *Graham v. Adams*, 2022-SC-0522, 2023-SC-0139, 2023 WL 8640825, at *1 (Ky. Dec. 14, 2023).

larger than an expert has ever seen.”¹⁷³⁰ “Similarly, SB3 created a U.S. congressional district that is less compact than 99% of the simulated plans and is an extreme outlier in suppressing voters based on their political views.”¹⁷³¹

The Kentucky Democratic Party, a Kentucky State House representative, and a group of four voters sued, arguing the state House and Congressional maps are unlawful partisan gerrymanders in violation of multiple provisions of the Kentucky Constitution.¹⁷³² The trial court concluded that the maps were political gerrymanders, and the legislature had selectively applied its redistricting principles to neutralize the voting power of one political party. However, the trial court concluded that “consideration of partisan interests in the apportionment process does not violate the Kentucky Constitution.”¹⁷³³ The parties cross-appealed to the Kentucky Supreme Court.¹⁷³⁴

The ACLU of Kentucky, Black Lives Matter Louisville, and the Kentucky Equal Justice Center—with representation from the ACLU and ACLU of Kentucky—filed an amicus brief in that court in support of the challengers.¹⁷³⁵

The amicus brief presents three key arguments. First, gerrymandered maps violate the Kentucky Constitution’s protections for free speech and association.¹⁷³⁶ The brief argued that the Kentucky Constitution’s plain text, the court’s precedent, historical evidence from the 1890 Constitutional Convention, and persuasive authority from sister states all indicate that partisan gerrymandering violates Kentuckians speech and association rights, which are broader than the First Amendment and protect the right to vote.¹⁷³⁷ Second, the gerrymandered maps violate Kentucky’s guarantee of equal protection and the right to vote embodied in Section 1, 2, and 3 of the Kentucky Constitution.¹⁷³⁸ The brief argued that the partisan gerrymander impairs the fundamental right to vote and is subject to strict scrutiny and could not even withstand rational-basis review. And third, the gerrymandered maps violate the state constitution’s prohibition against arbitrary and absolute power outlined in Section 2 of the Kentucky Constitution.¹⁷³⁹ Section 2 of the Kentucky Constitution operates

¹⁷³⁰ Br. of *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Kentucky, Black Lives Matter Louisville, and Kentucky Equal Justice Center in Support of Petitioners, *Graham v. Adams*, No. 2023-SC-0139, 2023 WL 6037161, at *2 (Ky. Aug. 14, 2023) (internal quotation marks omitted).

¹⁷³¹ *Id.*

¹⁷³² *Graham v. Sec’y of State Michael Adams*, No. 2022-SC-0522-TG, --- S.W.3d ---, 2023 WL 8640825, at *2 (Ky. Dec. 14, 2023).

¹⁷³³ *Id.* at *3.

¹⁷³⁴ *Id.*

¹⁷³⁵ *Graham v. Adams*, 2022-SC-0522, 2023-SC-0139, 2023 WL 8640825 (Ky. Dec. 14, 2023).

¹⁷³⁶ *Id.* at *6-8.

¹⁷³⁷ *Id.*

¹⁷³⁸ *Id.* at *9-12.

¹⁷³⁹ *Id.* at *12-19.

as a “curb on the legislature[s]...exercise of political power” and partisan gerrymandering violates the Kentucky Supreme Court’s longstanding interpretation of Section 2.

In December 2023, the Supreme Court of Kentucky ruled against Plaintiffs.¹⁷⁴⁰ While the court held that partisan gerrymandering claims are justiciable in Kentucky state courts, it applied a substantially deferential standard and found that the maps did not involve an unconstitutional level of partisan gerrymandering.¹⁷⁴¹

183. League of Women Voters of Ohio v. LaRose – Ohio 2023

On December 19, 2023, the ACLU, ACLU of Ohio, and Covington & Burling filed a lawsuit in federal court challenging a provision in an Ohio law, HB 458, that impacts how voters who have disabilities can cast absentee ballots.¹⁷⁴² The lawsuit was filed on behalf of the League of Women Voters of Ohio and an individual voter. HB 458 makes it a felony for any person who is not an election official or mail carrier to possess or return the absentee ballot of voters—including voters with disabilities—unless the person assisting that voter falls within a list of statutorily enumerated relatives.

Plaintiffs argued that these restrictions on voter assistance violate Section 208 of the Voting Rights Act and Title II of the Americans with Disabilities Act and the Rehabilitation Act by creating an unlawful burden on the right to vote for many Ohioans with disabilities. For example, many voters with disabilities who are unable to travel to their polling place are also unable to access their mailbox or a drop box, and many of these voters lack one of the “approved” relatives to mail or drop off their ballot for them. The law also criminalizes the critical work of community members and voter assistance organizations like the League of Women Voters of Ohio that assist voters who rely on the assistance of others to cast a ballot. Additionally, the lawsuit asserts that by failing to define what it means to “possess” or “return” the absentee ballot of another, the challenged provisions are unconstitutionally vague, in violation of the 14th Amendment of the Constitution.

In January of 2024, the Republican National Committee and the Ohio Republican Party also moved to intervene in the case, and the court allowed the intervention by order on February 6, 2024. The case is pending.

184. Prisoners Legal Advocacy Network v. Carney – Delaware 2023

In Delaware, eligible incarcerated voters are not offered an opportunity for in-person voting.¹⁷⁴³ While Delaware allowed eligible incarcerated voters to vote by absentee ballot in the past, in 2022, the Delaware Supreme Court struck down universal mail-in voting, with

¹⁷⁴⁰ *Graham*, 2023 WL 8640825.

¹⁷⁴¹ *Id.* at *10.

¹⁷⁴² Compl., *League of Women Voters of Ohio v. LaRose*, No. 1:23-cv-02414 (N.D. Ohio Dec. 19, 2023), ECF No. 1.

¹⁷⁴³ See, e.g., *Lawsuit Filed Challenging Delaware Pretrial Voter Disenfranchisement*, ACLU (Dec. 7, 2023), <https://www.aclu.org/press-releases/lawsuit-filed-challenging-delaware-pretrial-voter-disenfranchisement>.

only few exceptions that did not include eligible incarcerated voters.¹⁷⁴⁴ This leaves thousands of eligible voters without a way to cast a ballot ahead of the November 2024 elections.

Before suing, the ACLU of Delaware sent multiple letters to Delaware agencies asking them to adopt in-person voting in Delaware Department of Correctional (“DDOC”) facilities and explaining that the State has a legal responsibility to ensure eligible voters can cast a ballot.¹⁷⁴⁵ In response, Delaware declined to provide in-person voting opportunities for those residing in DDOC facilities.¹⁷⁴⁶

In November 2023, Prisoners Legal Advocacy Network, represented by the ACLU, the ACLU of Delaware, Shaw Keller LLP, and Proskauer Rose LLP, sued Delaware for its failure to give incarcerated voters a constitutionally guaranteed method to vote, in violation of their First and Fourteenth Amendment rights.¹⁷⁴⁷ PLAN sought a preliminary injunction asking for the court to order relief before the November 2024 elections.¹⁷⁴⁸ The case is pending before a federal court in Delaware with a preliminary injunction hearing set for April 2024.

185. New York Communities for Change v. Nassau County – New York 2024

In Nassau County, the larger of the two counties that make up Long Island in New York State, residents of color make up over a third of Nassau County’s eligible voters. Yet, in February 2023, the Nassau County Legislature passed a map that only creates 4 out of 19 districts where Black, Latino, and Asian residents constitute a majority of eligible voters despite clear indications of racially polarized voting.

In February 2024, the ACLU, New York Civil Liberties Union, LatinoJustice PRLDEF, Asian American Legal Defense and Education Fund, and Steptoe LLP filed a state lawsuit challenging the map Supreme Court of the State of New York County of Nassau.¹⁷⁴⁹ The complaint alleges that the new map unfairly dilutes the votes of Black, Latino, and Asian voters in violation of the John R. Lewis Voting Rights Act of New (NYVRA) and fails to comply with the redistricting requirements of Section 34 of the Municipal Home Rule Law.

186. Callais v. Landry – Louisiana 2024

¹⁷⁴⁴ See *Albence v. Higgin*, No. 342, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022).

¹⁷⁴⁵ E.g., ACLU of Delaware, *Demand Letter to Governor* (Oct. 4, 2023), <https://www.aclu.org/cases/prisoners-legal-advocacy-network-v-carney?document=Demand-Letter-to-Governor#>

¹⁷⁴⁶ Compl., *Prisoners Legal Advocacy Network v. Carney*, Case 1:23-cv-01397-MN (D. Del., Dec. 7, 2023), ECF No. 1.

¹⁷⁴⁷ *Id.*

¹⁷⁴⁸ Memorandum in Support of Motion for Preliminary Injunction, *Prisoners Legal Advocacy Network v. Carney*, Case 1:23-cv-01397-MN (D. Del., Dec. 15, 2023), ECF No. 10.

¹⁷⁴⁹ Complaint at 1, *New York Communities for Change v. Nassau County*, No. 602316/2024 (Feb. 2, 2024)

After the Fifth Circuit Court of Appeals issued a decision find in that the plaintiffs in another case challenging Louisiana’s congressional map were likely to succeed in proving that the map violated Section 2 of the Voting Rights Act by not providing Black Louisianans an equal opportunity to elect a preferred candidate in a second congressional district,¹⁷⁵⁰ the Louisiana legislature enacted a new congressional map in January 2023 containing two districts with majorities of Black Voting Age Population. On January 31, 2024, a group of white Mississippians challenged this new map as a racial gerrymander under the Fourteenth amendment and sought a preliminary injunction against the map,¹⁷⁵¹ and the Chief Judge of the Fifth Circuit assigned a three-judge panel to hear the case.¹⁷⁵²

The plaintiffs from the Voting Rights Act case that had led to creation of the new districts, represented by the ACLU, ACLU of Louisiana, Legal Defense Fund, and Paul Weiss, sought to intervene to defend the map.¹⁷⁵³ While the motion was pending, the panel set the case for expedited trial in April 2024. The panel initially denied the motion to intervene except as to any remedial phase should the plaintiffs prevail, but on reconsideration, allowed the Robinson and Galmon plaintiffs to intervene in the liability phase in part, limiting involvement to presenting evidence as to whether race predominated in drawing the 2024 congressional map, and whether, if so, the map meets strict scrutiny.¹⁷⁵⁴

187. Republican National Committee v. Wetzel – Mississippi 2024

In 2020, in a nearly unanimous bipartisan vote, Mississippi passed a law requiring election officials to accept mailed absentee ballots that are postmarked by Election Day so long as they arrive within five business days after Election Day.¹⁷⁵⁵ In doing so, Mississippi joined at least 18 other states in permitting the post-election receipt of timely mailed absentee ballots.¹⁷⁵⁶

On January 26, 2024, the Republican National Committee, Mississippi Republican Party, and two individuals affiliated with the Republican Party sued the Mississippi Secretary of State and several local election officials, seeking to overturn Mississippi’s law requiring timely cast mail ballots to be counted if received within five business days of Election

¹⁷⁵⁰ *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023).

¹⁷⁵¹ Compl., *Callais v. Landry*, No. 3:24-cv-00122, ECF No. 1 (W.D. La. Jan. 31, 2024).

¹⁷⁵² Order Constituting Three-Judge Court, *Callais v. Landry*, Case No. 3:24-cv-00122-DCJ-CES-RRS, ECF No. 5 (W.D. La. Feb. 2, 2024).

¹⁷⁵³ Mot. to Intervene, *Callais v. Landry*, Case No. 3:24-cv-00122-DCJ-CES-RRS, ECF No. 18 (Feb. 7, 2024).

¹⁷⁵⁴ Order, *Callais v. Landry*, Case No. 3:24-cv-00122-DCJ-CES-RRS, ECF No. 114 (W.D. La. Mar. 15, 2024).

¹⁷⁵⁵ Miss. Code § 23-15-637(1)(a).

¹⁷⁵⁶ See Nat’l Conf. of State Legis., *Voting Outside the Polling Place Report, Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, (last updated July 12, 2022), <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> [perma.cc/DD36-TBVY].

Day.¹⁷⁵⁷ Specifically, they argue that by accepting absentee ballots cast on or before Election Day but received after, Mississippi is “holding voting open beyond the federal Election Day” which “effectively extends Mississippi’s federal election past the Election Day established by Congress” and thereby conflicts with federal law.¹⁷⁵⁸

The ACLU, along with the ACLU of Mississippi and Dechert LLP, represented Disability Rights Mississippi and the League of Women Voters of Mississippi in their effort to intervene as defendants in the litigation.¹⁷⁵⁹ The RNC’s requested relief would disproportionately harm voters with disabilities, older voters, and other communities that rely upon absentee voting. Accordingly, Disability Rights MS and the League sought intervention to safeguard their members’ rights to vote and have that vote counted, and to protect their institutional interests in promoting democratic participation in Mississippi. Along with their intervention motion, the proposed intervenor-defendants filed a proposed motion to dismiss the complaint, arguing that the plaintiffs lacked standing and that their complaint failed to state a claim for relief because it relied on blatant misinterpretations of Mississippi’s law and the three federal laws setting a uniform election day for federal races.¹⁷⁶⁰ Plaintiffs’ radical argument—which flouts binding precedent dictating the plain meaning of the federal election day statutes—would not only disenfranchise thousands upon thousands of voters in Mississippi and eighteen other states, but it would also upend election administration in every state as it would require election officials to count and process every ballot prior to midnight of on Election Day.

The plaintiffs and several defendants opposed intervention by Disability Rights MS and the League, arguing that their interests were adequately represented by another set of proposed intervenors whose intervention was not opposed by the existing parties, despite the fact that those intervenors were not parties to the case at the time Disability Rights MS and the League filed their motion.¹⁷⁶¹ Without allowing the proposed intervenor-defendants to file a reply, the Court denied their motion to intervene but granted them leave to file an amicus brief by March 26, 2024 as part of an expedited summary judgment briefing schedule.¹⁷⁶²

¹⁷⁵⁷ Complaint, *RNC. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss., Jan. 26, 2024), ECF No. 1.

¹⁷⁵⁸ *Id.* ¶¶ 3, 45.

¹⁷⁵⁹ Memorandum of Law in Support of Motion to Intervene, *RNC. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss., Feb. 21, 2024), ECF No. 19.

¹⁷⁶⁰ Proposed Memorandum of Law in Support of Motion to Dismiss, *RNC. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss., Feb. 21, 2024), ECF No. 18-4.

¹⁷⁶¹ Oppositions to Motion to Intervene, *RNC. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss., Mar. 6, 2024), ECF Nos. 40 & 43.

¹⁷⁶² Order, *RNC. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss., Mar. 7, 2024), ECF No. 47.