



Written Testimony of Janai Nelson

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United States Senate Committee on the Judiciary

In connection with its March 12, 2024 hearing entitled

“The Right Side of History: Protecting Voting Rights in America”

I. INTRODUCTION

Chairman Durbin, Ranking Member Graham, and members of the Committee:

My name is Janai Nelson, and I am President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to offer written testimony regarding the state of voting rights for Black Americans, both on the ground and in the courts, and the urgent need for congressional action to protect and secure the fundamental freedom to vote. My testimony is informed by LDF’s extensive experience litigating under the Voting Rights Act and other key federal voting rights protections, as well as our on-the-ground election protection work in multiple states.

This is a perilous moment for American democracy. March 7th was the 59th anniversary of Bloody Sunday, when heroes such as John Lewis were brutally beaten by state troopers on the Edmund Pettus bridge for demanding the right to vote, leading to the passage of the Voting Right Act (“VRA”). Yet more than a decade after the Supreme Court’s *Shelby County* decision gutted the heart of the VRA and invited Congress to update the Act’s preclearance coverage framework to maintain its protections,¹ Congress has failed to act in accordance with its duty to enforce the Fourteenth and Fifteenth Amendments to the U.S. Constitution; and failed to use its Elections Clause power to set minimum standards for access to the fundamental right to vote across the country.

Unfortunately, in that decade, the landscape around election administration and voting rights has shifted markedly. States such as Alabama, North Carolina, and Texas moved to enforce or enact harsh voting restrictions within days or even hours of the *Shelby County* decision; and this was followed by a wave of such laws across the country.² More recently, in some states, a false narrative around stolen elections, including the “Big Lie,” has stoked a backlash against the growing participation by voters of color in our multiracial democracy. As we head towards the 2024 election, this false narrative continues to drive targeted efforts to disenfranchise voters of color. This month, *The New York Times* reported on a coordinated, multi-state effort to pressure local officials to remove voters from the registration rolls in violation of federal protections against wrongful and discriminatory purges.³

¹ *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (“We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions.”).

² Thurgood Marshall Inst., *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder (Shelby County)* (Oct. 6, 2021), <https://tminstituteldf.org/publications/democracy-diminished/>.

³ Alexandra Berzon & Nick Corasaniti, *Trump’s Allies Ramp Up Campaign Targeting Voter Rolls*, N.Y. Times (Mar. 3, 2024), <https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html>.

Black Americans have faced this backlash and onslaught with a shredded shield—precisely when we’ve needed strong voting rights protections, destructive court decisions combined with inaction by Congress have stripped them away. The result has been alarming backsliding on our most fundamental right. Instead of our democracy becoming more inclusive and more equal, we’ve seen disturbing racial turnout disparities continue to rise.

Right now, we are at a crossroads. The question before us is whether the United States will live up to its highest ideals to embrace the inclusive, multi-racial, multi-ethnic democracy it must become; or will we backslide, losing our grip on our fundamental values, our democratic institutions, and the future of our multi-racial democracy.

The state of voting rights for Black Americans is tenuous. Longstanding protections have been weakened and are under further threat. This is an urgent crisis for voters of color, and for our democracy. We implore Congress to act to protect our rights.

A. Statement of Purpose

My testimony seeks to provide this Committee with insight into the current state of voting rights for Black Americans, and to highlight the urgent need for congressional action. My testimony is informed by our on-the-ground experience working to protect the vote in Black communities across multiple states, which we hope will contribute to your discussions as you consider election-related legislation within your jurisdiction, and also assist your colleagues on other relevant committees. In the pages below I will describe the specific challenges Black voters continue to face in casting their ballots; discuss the limits of the current legal framework protecting Black Americans, and indeed all Americans, from voting discrimination; and detail how Congress can address these problems through much-needed pending legislation.

B. LDF and Our Work

Founded in 1940 under the leadership of Thurgood Marshall, LDF is America’s premier legal organization fighting for racial justice. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was launched at a time when the nation’s aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. From that era to the present, LDF’s mission has been transformative—to achieve racial justice, equality, and an inclusive society, using the power of law, narrative, research, and people to defend and advance the full dignity and citizenship of Black people in America.

Since its founding, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color.⁴ LDF's founder Thurgood Marshall—who litigated LDF's watershed victory in *Brown v. Board of Education*,⁵ which set in motion the end of legal segregation in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright*,⁶ the 1944 case ending whites-only primary elections, as his most consequential case. He held this view because he believed that the right to vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for more than 80 years—representing Dr. Martin Luther King Jr. and the marchers in Selma, Alabama in 1965, advancing the passage of the Voting Rights Act and litigating seminal cases interpreting its scope, and working in communities across the South to strengthen and protect the ability of Black citizens to participate in a political process free from discrimination.

In addition to a robust voting rights litigation docket, LDF has been active in protecting voting rights on the ground in the context of ongoing elections. LDF is a founding member of the non-partisan civil rights Election Protection Hotline (1-866-OUR-VOTE), presently administered by the Lawyers' Committee for Civil Rights Under Law. In addition, LDF has monitored elections for more than a decade through our Prepared to Vote initiative ("PTV") and, more recently, through our Voting Rights Defender ("VRD") project, which place LDF staff and volunteers on the ground for primary and general elections to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South. During primary and general elections over the last two years, LDF has had staff on the ground in seven states (AL, FL, GA, LA, MS, SC, TX), and also engaged in monitoring various media platforms for misinformation, disinformation, or intimidation related to elections.

II. BLACK VOTERS FACE CONTINUED BARRIERS TO PARTICIPATION

LDF's work on the ground and in the courts makes plain that six decades after the enactment of the Voting Rights Act, Black Americans continue to face substantial barriers to political participation. The result has been significant increases in racial turnout disparities. New technologies threaten to amplify existing threats in this consequential election year.

⁴ LDF has been an entirely separate organization from the NAACP since 1957.

⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁶ *Smith v. Allwright*, 321 U.S. 649 (1944).

A. Racial Turnout Disparities Persist

The disturbing growth in racial disparities in voter turnout is a troubling yet defining aspect of our current post-*Shelby County* electoral landscape. These disparities indicate that restrictive state laws and underenforcement of federal laws continue to threaten Black Americans' equal opportunity to participate in our elections.

Our most recent presidential and mid-term elections have featured relatively high turnout compared with historical averages. This is a positive development, but these aggregate numbers do not negate the more disturbing picture just below the surface. White voters remain over-represented in the U.S. electorate, at a steep cost to the voices of, and responsiveness to, communities of color.

Even in the 2020 presidential election—where 66.8% of citizens over age 18 turned out, the highest rate since 1900⁷—white voters were a disproportionate share of the electorate. White voter turnout was approximately eight percentage points higher than that of Black Americans, and more than 12 points higher than the rate for people of color overall.⁸ This reflected an historical trend. These gaps have been stubbornly large for decades and have persisted at substantial levels even during President Obama's historic run for the presidency.⁹

While racial disparities in turnout have been relatively consistent that does not mean they are natural or unrelated to election conditions. As barriers to the ballot for voters of color increase, so too have turnout disparities. After the U.S. Supreme Court gutted the VRA's "preclearance" protection in *Shelby County* in 2013, states immediately responded by making it harder to vote.¹⁰ Turnout disparities between white and Black voters increased substantially in *Shelby County's* aftermath in five out of the six states that were fully covered under the VRA's preclearance protections.¹¹ In Alabama, for example, Black and white voter turnout was roughly

⁷ Michael McDonald, *Voting Statistics*, U.S. Elections Project (2020), <https://www.electproject.org/election-data/voter-turnout-data>.

⁸ *Voting and Registration in the Election of November 2020*, U.S. Census Bureau, tbl.4b, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>; see also Kevin Morris & Coryn Grange, *Large Racial Turnout Gap Persisted in 2020 Election*, Brennan Ctr. for Just. (Aug. 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>.

⁹ *Id.* During the 2008 and 2012 elections the disparity was 9.3 and 8.0 percentage points, respectively.

¹⁰ Thurgood Marshall Inst., *supra* note 2.

¹¹ Kevin Morris, Peter Miller & Coryn Grange, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act Facebook Twitter*, Brennan Ctr. for Just. (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions->

equal in the 2012 presidential election;¹² but, in the aftermath of the *Shelby County* decision and new state-enacted restrictions on voting, the disparity has grown, with Black turnout (54.8%) lagging nearly 8 points behind white turnout (62.5%) in 2020.¹³

This trend continued in 2022. In Georgia, the disparity in turnout between white and Black voters in both the primary and general elections was higher than at any point in the past decade.¹⁴ Disparities between white and Black turnout in mid-term elections have continued to grow in North Carolina, from a five-point disparity in 2014 to eight points in 2018 to a disturbing 16 points in 2022.¹⁵ South Carolina had a greater than 15-point gap between white voters and voters of color.¹⁶ Louisiana had nearly a 15-point turnout disparity between eligible white and Black voters.¹⁷

previously-covered-voting-rights. It is important to note that turnout disparities were at an historical low in 2012 and so some of this increase was likely a return to historical patterns; but given the well-documented backsliding on voting accessibility for Black voters in these jurisdictions it is likely that additional barriers played at least some role.

¹² See U.S. Census Bureau, *Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020*, <https://www2.census.gov/programs-surveys/cps/tables/p20/585/table04b.xlsx>.

¹³ See *id.*

¹⁴ Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 2023 WL 7037537, at *68 (N.D. Ga. Oct. 26, 2023); see also Kevin Morris, *Despite High Voter Turnout, Racial Gap Persisted in Georgia Primary*, Brennan Ctr. for Just. (Aug. 15, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/despite-high-voter-turnout-racial-gap-persisted-georgia-primary>; Sara Loving & Kevin Morris, *Georgia's Racial Turnout Gap Grew*, Brennan Ctr. for Just. (Dec. 16, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/georgias-racial-turnout-gap-grew-2022>.

¹⁵ Bob Hall, *NC Voter Turnout in the Midterms: What the Data Show for Various Groups*, Pulse (Dec. 8, 2022), <https://pulse.ncpolicywatch.org/2022/12/08/nc-voter-turnout-in-the-midterms-whatthe-data-show-for-various-groups/#sthash.QNHe0dH5.w2aLakDb.dpbs>; Statement of Damon T. Hewitt, *Before the House Subcomm. on Elections, Hr'g on "State and Local Perspectives on Election Administration" 13, 2022 Lookback Series: Successes in the 2022 Midterm Elections*, (Mar. 10, 2023), https://cha.house.gov/_cache/files/b/2/b28d0f70-d970-4da6-b7a8-9a1662e65cec/6C84640E7D64D929A4F9400445FB871A.damon-hewitt-house-admin-elections-subcommittee-testimony-3.10.23.pdf.

¹⁶ Statement of Marcia Johnson, *Before the Sen. Subcomm. on Elections, Hr'g on "State and Local Perspectives on Election Administration" 13, 2022 Lookback Series: Successes in the 2022 Midterm Elections*, (Mar. 28, 2023), <https://www.rules.senate.gov/imo/media/doc/Marcia%20Johnson's%20Senate%20Rules%20Committee%20Testimony%203.24%20-%20Revised%20Clean.pdf>.

¹⁷ Statement of Damon T. Hewitt, *supra* note 15, at 11.

B. Restrictive Voting Laws Target Black Turnout

In 2020, Black and Brown voters faced significant barriers to the ballot across the country.¹⁸ Voters of color nonetheless made their voices heard, turning out in record numbers despite a life-threatening pandemic, hurricanes in several states, and threats of violence at the polls. The arc of voter suppression extended beyond Election Day in an unprecedented campaign to disrupt the counting and certification of ballots and overturn the election's results.¹⁹ Despite these obstacles, voters elected the first female Vice-President of the United States, who is also the first Vice-President of African and Asian descent. And the State of Georgia elected its first Black and first Jewish U.S. Senators.

This step towards a more inclusive democracy triggered an intense backlash, including a violent insurrection and increased state efforts to block access to the ballot. With the former president and his allies aggressively pursuing a false narrative that the election had been stolen, the January 6th insurrection attempted to thwart the peaceful transfer of power and undermine trust in our democracy.²⁰

Legislators then introduced more than 400 bills across nearly every state aiming to restrict the franchise.²¹ Many of these measures became law. Since 2021,

¹⁸ Thurgood Marshall Inst., *Democracy Defended* (Sept. 2, 2021), https://www.naacpldf.org/wp-content/uploads/LDF_2020_DemocracyDefended-1-3.pdf.

¹⁹ Simon Romero, Shaila Dewan & Giulia McDonnell Nieto del Rio, *In a Year of Protest Cries, Now It's 'Count Every Vote!' and 'Stop the Steal!'*, N.Y. Times (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/us/electionprotests-vote-count.html>; Bill Bostock, *Videos show Trump protestors chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, Bus. Insider (Nov. 5, 2020), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>; Jake Lahut, *Dozens of pro-Trump protestors chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as voters are being counted*, Bus. Insider (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-2020-11>; Maura Ewing et al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, Wash. Post (Nov. 6, 2020), <https://www.washingtonpost.com/nation/2020/11/06/philadelphiaattack-plot-vote-count-election/>; National Task Force on Election Crises, *Strengthening Our Elections and Preventing Election Crises: Lessons and Recommendations from the 2020 General Election* (2021), https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf.

²⁰ Statement of Janai Nelson, Pres. & Director-Counsel of NAACP Legal Def. & Educ. Fund, Inc., *Submitted to the U.S. House of Representatives Select Comm. to Investigate the January 6th Attack on the United States Capitol* (May 3, 2022), <https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Statement-for-Select-Committee-to-investigate-January-6-Attack-on-the-Capitol-FINAL-05.03.2022.pdf>.

²¹ Brennan Ctr. for Just., *Resource: Voting Laws Roundup: December 2021* (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

more than 20 states have enacted at least 59 restrictive voting laws.²² Separately, through 2021, seventeen states enacted 32 laws to criminalize, politicize, or interfere with election administration.²³ At least 12 similar laws across seven states were added in 2022.²⁴ These include measures to shift authority over elections from executive agencies or nonpartisan bodies to the legislature; roll back local authority through centralization and micromanagement; and criminalize good-faith mistakes or decisions by voters and elections officials.²⁵

Critically, many of these laws are targeted at blocking pathways to the ballot box that Black and Latino voters used successfully in 2020. For example, after Black voters increased their usage of absentee ballots as a result of the pandemic, S.B. 90 in Florida severely curtailed the use of unstaffed ballot return drop boxes and effectively eliminated community ballot collection.²⁶ And in Georgia and Texas, after strong early in-person turnout among Black voters, lawmakers initially moved to outlaw or limit Sunday voting in a direct attack on the “souls to the polls” turnout efforts undertaken by many Black churches to mobilize voters to engage in collective civic participation.²⁷ In both states, after advocacy from LDF and others, lawmakers eventually removed these blatantly discriminatory provisions from the omnibus voting bills under consideration—although in both states, the final forms of the enacted bills remained extremely harmful to voters of color.²⁸

²² Brennan Ctr. for Just., *Voting Laws Roundup: October 2022* (Oct. 6, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2022>; Brennan Ctr. for Just., *Voting Laws Roundup: October 2023* (Oct. 19, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2023>.

²³ Mem. from the States United Democracy Ctr., Protect Democracy, and Law Forward to Interested Parties (Dec. 23, 2021), at 2, https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update_12232021-year-end-numbers.pdf.

²⁴ Brennan Ctr. for Just., *Voting Laws Roundup: December 2022* (Dec 19, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022>.

²⁵ Mem. from the States United Democracy Ctr., Protect Democracy, and Law Forward to Interested Parties, *supra* note 23.

²⁶ See generally Compl. for Declaratory & Injunctive Relief, *Fla. State Conf. of Branches & Youth Units of NAACP v. Lee*, No. 4:21-cv-00187-WS-MAF (N.D. Fla. May 6, 2021), ECF No. 1.

²⁷ Letter from Sam Spital et al., NAACP Legal Def. Fund, to Texas Senate (May 29, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-Conference-Committee-Report-Opposition-Senate-20210529-1.pdf>; Letter from John Cusick et al., NAACP Legal Def. Fund et al., to Georgia House of Representatives, Special Comm. on Election Integrity (Mar. 14, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-SPLC-Written-Testimony-on-SB202-3.18.21.pdf>.

²⁸ See Press Release, NAACP Legal Def. Fund, LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law (May 6, 2021), <https://www.naacpldf.org/press-release/ldf-files-lawsuit->

After robust Black turnout in the January 2021 runoff led to the election of Georgia’s first Black U.S. senator, Georgia lawmakers decided to sharply reduce the number of early voting days in future runoff elections. The same law also hampers vote-by-mail, cuts back on early voting, and more.²⁹ The 2021 omnibus voting law in Texas eliminates several common-sense voting methods, including “drive-thru” voting and 24-hour early voting, that greatly increased accessibility for voters with disabilities and voters of color in Texas’s largest cities in 2020.³⁰

Several of these restrictive laws contributed directly to the barriers to participation by Black voters described in the section below. In addition, as evidenced by the widening racial turnout disparities described above, many of these laws achieved their intended effect.

C. Barriers Black Voters Have Encountered on the Ground

In prior Congressional testimony, including before this Committee, LDF has detailed a litany of challenges Black voters have faced in recent elections.³¹ Unfortunately, these barriers to the ballot persist. In this section, we briefly summarize our past testimony and report on subsequent developments.

against-the-state-of-florida-over-suppressive-voting-law/; Press Release, NAACP Legal Def. Fund, Civil Rights Groups Sue Georgia Over New Sweeping Voter Suppression Law (Mar. 30, 2021), <https://www.naacpldf.org/press-release/civil-rights-groups-sue-georgia-over-new-sweeping-voter-suppression-law/>.

²⁹ See S.B. 202, 2021-2022 Leg. Sess (Ga. 2021), <https://www.legis.ga.gov/api/legislation/document/20212022/201498>.

³⁰ Compl. for Declaratory & Injunctive Relief, *Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. Sept. 7, 2021), ECF No. 1, <https://www.naacpldf.org/wp-content/uploads/Houston-Justice-et-al.-v.-Abbott-et-al.-Complaint.pdf>; see also Press Release, NAACP Legal Def. Fund, Lawsuit Filed Challenging New Texas Law Targeting Voting Rights (Sept. 7, 2021), <https://www.naacpldf.org/press-release/lawsuit-filed-challenging-new-texas-law-targeting-voting-rights/>.

³¹ Test. of Adam Lioz, *Before the Sen. Comm. on Rules & Admin., Hr’g on “State and Local Perspectives on Election Administration”* 12-15, (Mar. 28, 2023), <https://www.naacpldf.org/wp-content/uploads/LDF-Senate-Rules-Testimony-4-4-23.pdf>; Test. of Deuel Ross, *Before the House Comm. on House Admin. Subcomm. on Elections, Hr’g on “American Confidence in Elections: Ensuring Every Eligible American Has the Opportunity to Vote – and for their Vote to Count According to Law”* 5-6 (May. 24, 2023), <https://www.naacpldf.org/wp-content/uploads/HHRG-118-HA08-Wstate-RossD-20230524-1.pdf>; Test. of Sherrilyn Ifill, *Before the House Comm. on the Jud., Subcomm. on the Const., C.R., & C.L., Hr’g on “Voter Suppression and Continuing Threats to Democracy”* 11-12 (Jan. 20, 2022), <https://docs.house.gov/meetings/JU/JU10/20220120/114336/HHRG-117-JU10-Wstate-IfillS-20220120.pdf>.

1. Elections Took Place Under Discriminatory Districts

Congressional and legislative maps produced by states following the decennial census count failed to reflect America’s emerging multiracial democracy. Though the growth of Black people and other people of color fueled population growth, the voting strength of communities of color was diluted through racial gerrymandering. After the Supreme Court undercut the federal VRA’s preclearance protections, states have taken steps to draw discriminatory districting maps that disenfranchise Black and Brown voters. Of the nine states that were previously required to submit district maps for “preclearance” by federal officials or a court, six of these states have faced lawsuits challenging their maps for racial discrimination.³² In litigation involving LDF alone, courts in Alabama,³³ Louisiana,³⁴ and South Carolina³⁵ (all states previously covered by the VRA’s preclearance protections)³⁶ found that state-created maps were racially discriminatory.

The results were often egregious. In Alabama, a unanimous three-judge court found that, despite white residents shrinking to only about 65% of the population, the State drew congressional maps that boosted white political power and ensured that white voters exerted absolute control over 86% of the state’s seven congressional districts—leaving the 27% of Black Alabamians with a meaningful voice in only one of seven (14%) of districts in a scenario akin to a one-person, half-a-vote.³⁷ In South Carolina, three judges unanimously found that the State intentionally removed Black

³² All About Districting, Cases, <https://redistricting.ils.edu/cases/?cycles%5B%5D=2020&states%5B%5D=Alabama&states%5B%5D=Alaska&states%5B%5D=Arizona&states%5B%5D=Georgia&states%5B%5D=Louisiana&states%5B%5D=Mississippi&states%5B%5D=South%20Carolina&states%5B%5D=Texas&states%5B%5D=Virginia&sortby=&page=1>.

³³ Prelim. Inj. Mem. Op. & Order, *Milligan v. Merrill*, No. 2:21-cv-01530-AMM, 2021 WL 5979497 (N.D. Ala. Nov. 23, 2021), ECF No. 107, https://www.naacpldf.org/wp-content/uploads/PRELIMINARY-INJUNCTION-MEMORANDUM-OPINION-AND-ORDER.-Signed-by-Judge-Anna-M-Manasco-on-1_24_2022.-1.pdf.

³⁴ Ruling & Order, *Robinson v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. Ala. June 6, 2022), ECF No. 173, <https://www.naacpldf.org/wp-content/uploads/Robinson-v.-Ardoin-Ruling-and-Order-Preliminary-Injunction.pdf>; *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022).

³⁵ Findings of Fact & Conclusions of Law, *S.C. State Conf. of the NAACP v. Alexander*, No.: 3:21-cv-03302-MGL-TJH-RMG 23 WL 118775 *15 (D.S.C. Jan. 6, 2023), ECF No. 493, https://www.aclu.org/wp-content/uploads/legal-documents/order_-_south_carolina_state_conference_of_the_naACP_v._alexander.pdf.

³⁶ U.S. Dep’t of Just., *Jurisdictions Previously Covered by Section 5* (Nov. 9, 2021), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

³⁷ See Stipulation of Facts, *Milligan v. Merrill*, No. 2:21-cv-01530-AMM (N.D. Ala. 2021), ECF No. 53.

voters from a congressional district and made a “mockery” of traditional districting rules.³⁸

Yet, as a result of appeals to the Supreme Court, injunctions requiring legislatures to redraw racially discriminatory maps—including injunctions issued months prior to the 2022 election in Alabama and Louisiana—were frozen, resulting in the use of discriminatory maps in the 2022 midterms. Because these cases were put on hold, hundreds of thousands of Black voters cast ballots in districts that *courts had already ruled* likely violated the Voting Rights Act. This means that the congressional delegation from these states, as well as the election of other officials, was produced through a process infected with state-sponsored racial discrimination.

Discriminatory redistricting was not limited to congressional and state legislative maps. Local redistricting efforts also produced discriminatory maps in jurisdictions previously covered under Section 5. For example, in November 2021, the Commissioners Court in Galveston County, Texas enacted a redistricting plan that dismantled the county’s sole majority-minority district, Precinct 3, comprised of a 60% combined Black and Latino population.³⁹ This was the County’s second attempt to eliminate Precinct 3; the Department of Justice interposed an objection pursuant to VRA Section 5 against the County’s prior attempt after the 2010 Census because it resulted in a “retrogression in minority voting strength.”⁴⁰ This time, multiple lawsuits were filed, and both the district court and a panel of the Fifth Circuit held that the County’s plan violated Section 2.⁴¹ The case is currently pending rehearing by the full Fifth Circuit, which will reconsider existing precedent allowing for coalition opportunity districts.⁴²

2. Mass Challenges to Voter Eligibility

Ahead of crucial 2022 elections, extremist groups and other partisan actors weaponized state laws to launch mass challenges to voter eligibility in several key

³⁸ Findings of Fact & Conclusions of Law, *supra* note 35, at *15.

³⁹ Findings of Fact & Conclusions of Law, *Petteway v. Galveston Cnty.*, No. 3:22-cv-57 5-6 (S.D. Tex. Oct. 13, 2023), https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/TX_322-cv-57_10-13-23.pdf.

⁴⁰ Review of Compl. from Thomas E. Perez, Asst. Att’y Gen. of U.S. Dep’t of Just. Off. of C.R., to James E. Trainor III, Esq., Beirne, Maynard & Parsons, https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120305.pdf.

⁴¹ *Petteway v. Galveston Cnty.*, 2023 WL 6786025 (S.D. Tex. Oct. 2023), *stayed*, 86 F.4th 214 (5th Cir. 2023).

⁴² *Petteway v. Galveston Cnty.*, 86 F.4th 1146 (5th Cir. 2023).

states such as Florida and Georgia.⁴³ These frivolous challenges sought to prevent eligible citizens from freely exercising the franchise.⁴⁴ This trend continued in 2023 and will continue in increasing numbers in 2024, as reported by several groups carrying out these challenges.⁴⁵

Recent technological developments have amplified the risk of frivolous mass voter challenges. Eagle AI is a tool that allows users to generate thousands of mass voter challenges in just a few clicks.⁴⁶ Using unreliable data, the tool gives conspiracy theorists the ability to inundate election officials, risking election administration failures and potentially intimidating voters whose eligibility is being questioned.

The technology's developers have shopped it around to counties and states as a tool to conduct list maintenance, and at least one county in Georgia is currently beta testing it.⁴⁷ Adoption by governmental entities to perform list maintenance raises significant concerns because of how unreliable and potentially discriminatory the tool is. As Georgia's elections director noted, "EagleAI draws inaccurate conclusions and then presents them as if they are evidence of wrongdoing."⁴⁸

3. *Polling Location Problems*

In Georgia,⁴⁹ Louisiana,⁵⁰ Mississippi,⁵¹ and South Carolina,⁵² changes to polling locations led to widespread voter confusion and delays during early voting and

⁴³ Test. of Adam Lioz, *supra* note 31, at 12-15.

⁴⁴ *Id.*

⁴⁵ Berzon & Corasaniti, *supra* note 3.

⁴⁶ It was developed by the "Election Integrity Network," the same organization campaigning for states to exit the bipartisan Electronic Registration Information Center ("ERIC"). Caroline Haskins, *A new tool targets voter fraud in Georgia – but is it skirting the law*, The Guardian (Feb. 26, 2024), <https://www.theguardian.com/us-news/2024/feb/26/eagleai-georgia-voter-registration-election>.

⁴⁷ *Id.*

⁴⁸ Jane C. Timm, *Inside the Right's Effort to Build a Voter Fraud Hunting Tool*, NBC News, (Aug. 17, 2023), <https://www.nbcnews.com/politics/2024-election/conservatives-voter-fraud-hunting-tool-eagleai-cleta-mitchell-rcna97327>.

⁴⁹ Test. of Adam Lioz, *supra* note 31, at 16.

⁵⁰ *Id.* at 16-17.

⁵¹ *Id.* at 17-19.

⁵² Christina Das, *Voting in South Carolina's Primaries: How Early and Curbside Voting Make the Polls More Accessible*, <https://www.naacpldf.org/south-carolina-voting/>.

on Election Day during elections in 2022, 2023, and 2024. Most recently in the February Presidential Preference Primary elections in South Carolina, LDF's election protection team assisted voters to navigate confusion and delay due to improper notice from local election officials about polling place changes.⁵³ In many instances, these changes, which included closures, relocations, and consolidations, were poorly communicated to voters.⁵⁴ These changes to assigned polling stations disproportionately affected Black voters.⁵⁵ On the ground, voters faced the additional burden of late opening of polling facilities, which led to delays to the election process and long lines.⁵⁶

Voters with physical disabilities, who are disproportionately Black, faced a unique set of challenges while voting in person during elections in 2022 and 2023 throughout the South. Polling places in multiple Southern states lacked accessible parking, signage, and entrances.⁵⁷ In addition, several states have enacted legislation that imposes additional burdens on voters with disabilities who need assistance at the polls. In 2021, Texas enacted S.B. 1, which, among other things, requires those providing assistance to disclose certain personal information and swear an oath under the penalty of perjury. Multiple individuals with disabilities testified during a trial concerning claims challenging S.B. 1 in fall 2023 that S.B. 1's assistance

⁵³ See Nick Neville, *'Disgusting': DNC Chair rails against precinct consolidation during South Carolina Democratic Party*, WIS 10 (Feb. 4, 2024), <https://www.wistv.com/2024/02/04/disgusting-dnc-chair-rails-against-precinct-consolidation-during-south-carolina-democratic-primary/>.

⁵⁴ See, e.g., Ashton Pittman & William Pittman, *Mississippi Officials Made 164 Voting Precinct Changes Since November 2022*, Miss. Free Press (Aug. 7, 2023), <https://www.mississippifreepress.org/35295/mississippi-officials-made-161-voting-precinct-changes-since-november-2022>; Ashton Pittman & William Pittman, *State Has Wrong or Missing Addresses for 92 Voting Precincts, MFP Investigation Finds*, Miss. Free Press (Nov. 7, 2023), <https://www.mississippifreepress.org/37388/state-has-wrong-or-missing-addresses-for-92-voting-precincts-mfp-investigation-finds>; Ashton Pittman & William Pittman, *Mississippi Election Officials Have Made 98 Polling Place Changes Since 2020, Investigation Finds*, Miss. Free Press (Nov. 4, 2022), <https://www.mississippifreepress.org/28941/mississippi-election-officials-have-made-97-polling-place-changes-since-2020-investigation-finds>; Ashton Pittman & William Pittman, *Mississippi Officials Moved Three Times More Polling Places Than Reported for 65,000 Voters*, Miss. Free Press (Oct. 31, 2020), <https://www.mississippifreepress.org/6577/mississippi-officials-moved-three-times-more-polling-places-than-reported-for-65000-voters>.

⁵⁵ Pittman & Pittman, *Mississippi Officials Moved Three Times More Polling Places Than Reported for 65,000 Voters*, *supra* note 51.

⁵⁶ Test. of Adam Lioz, *supra* note 31, at 19-21.

⁵⁷ *Id.* at 12-15.

restrictions deterred them from seeking assistance and deterred potential assistants from providing it.⁵⁸

Election administration problems at polling locations created significant barriers for voters during elections in 2022 and 2023. For example, Hinds County, which is approximately 70% Black, experienced extensive ballot shortages during the 2023 Mississippi statewide election.⁵⁹ Up to nine polling locations ran out of ballots multiple times during Election Day, some before noon.⁶⁰ This caused hours-long lines, resulting in many voters leaving the polling place without voting.⁶¹

4. *Issues with Early Voting*

Accessible and common-sense voting methods have also been rolled back. Early voting, for example, proved critical to the record-breaking voter turnout of Black and Latino voters during the 2020 general election. Nonetheless, it has been eliminated or curtailed in Arizona and Texas.⁶² In Texas, “drive-thru” and 24-hour early voting were used in large numbers in Harris County in 2020, disproportionately by Black and Latino voters. The Texas legislature banned both methods of voting, adding to the burdens imposed on voters who have difficulty getting to voting locations during traditional hours.⁶³

Limitations on the opportunity to vote early lead to greater congestion, and thus longer lines, at Election Day polling locations. During elections in November 2021, after South Carolina eliminated the pandemic measures that allowed in-person absentee voting ahead of Election Day, wait times at polling places throughout the state were exacerbated.⁶⁴ For example, poll monitor volunteers reported to LDF’s

⁵⁸ Proposed Findings of Fact & Conclusions of Law, *La Union Del Pueblo Entero et al. v. Gregory W. Abbott et al.*, No. 5:21-cv-00844-XR 273 (W.D. Tex. Jan. 20, 2024), ECF No. 856.

⁵⁹ Shaunicy Muhammad, ‘Human Error’ Caused Hinds County Election Day Ballot Shortages, *Commissioners Say*, Miss. Free Press (Dec. 20, 2023), <https://www.mississippifreepress.org/38457/human-error-caused-hinds-county-election-day-ballot-shortages-commissioners-say>.

⁶⁰ Paul J. Weber, *Texas releases another audit of elections in Harris County, where GOP still challenging losses*, AP News (Oct. 19, 2023), <https://apnews.com/article/texas-voting-harris-county-4ac9b393ad1d7b91d92232d34620818c>.

⁶¹ Michael Goldberg, *Voting rights groups push for answers from Mississippi election officials about ballot shortages*, AP News (Dec. 7, 2023), <https://apnews.com/article/mississippi-election-ballot-shortage-hinds-county-f669843c918edcc2af15667fb2399f0b>.

⁶² *Id.* at 5, 22-23; Test. of Deuel Ross, *supra* note 31, at 5-6.

⁶³ Test of Adam Lioz, *supra* note 31, at 22.

⁶⁴ Das, *supra* note 52.

election protection team that voters in Rock Hill, South Carolina, where there is a growing Black population,⁶⁵ waited for more than an hour to cast their ballots.

5. *Restrictions on Absentee Voting and Vote-By-Mail*

Restrictions on absentee and mail voting increased the time, cost, and risk associated with voting. States eliminated or severely limited the use of vote-by-mail ballot drop boxes, which Black and Latino voters depended on in 2020.⁶⁶ At least one state required voters to include their state-issued ID number or Social Security Number on their mail ballot application without providing an alternative for voters who did not have such information.⁶⁷ Further, new ID requirements led to a record number of rejected absentee applications and mail ballots.⁶⁸ Florida’s S.B. 90 eliminated the ability of voting advocates to assist with turning in absentee ballots after many Black voters adjusted to the pandemic by voting absentee.⁶⁹

State legislatures have passed a wave of new laws restricting the ability of mail voters to receive assistance. Texas’s S.B. 1, enacted in 2021, requires assistors to fill out additional information on the mail-ballot carrier envelope and makes it a crime to compensate, offer, or receive compensation for providing assistance, deterring would-be assistors, like a person’s paid caregiver or an employee of a civic engagement organization, and increasing the risk that the ballot will be rejected for clerical errors.⁷⁰ In 2023, Mississippi enacted S.B. 2358, which imposes criminal penalties for helping a voter “collect and transmit” their mail ballot.⁷¹ A federal court preliminarily enjoined the new law as a likely violation of Section 208 of the Voting Rights Act.⁷² Alabama appears poised to enact S.B. 1, another bill that restricts vote-by-mail assistance by criminalizing many common forms of assistance, such as paying \$5.00 for gas money for someone who agrees to drive to the registrar’s office to deliver

⁶⁵ U.S. Census Bureau QuickFacts: Rock Hill City, South Carolina—Population estimates, July 1, 2023, <https://www.census.gov/quickfacts/fact/table/rockhillcitysouthcarolina/PST045223>.

⁶⁶ Test. of Adam Lioz, *supra* note 31, at 22.

⁶⁷ *Id.* at 25.

⁶⁸ *Id.* at 25.

⁶⁹ Test. of Sherrilyn Ifill, *supra* note 31, at 11-12.

⁷⁰ S.B. 1 § 6.05-06, 87th Leg. (TX 2021), <https://legiscan.com/TX/text/SB1/id/2424492>.

⁷¹ S.B. 2358, 2023 Reg. Sess. (Miss. 2023), <https://legiscan.com/MS/text/SB2358/id/2749983/Mississippi-2023-SB2358-Enrolled.html>.

⁷² Prelim. Inj. Order, *Disability Rts. Mississippi v. Fitch*, No. 3:23-CV-350-HTW-LGI (S.D. Miss. 2023), <https://www.aclu.org/documents/disability-rights-mississippi-v-fitch-pi-order>.

an absentee ballot.⁷³ These laws impose additional burdens not only on voters with disabilities, but also hamper organized voter turnout drives.

These legislative attacks are part of a broader, concerted effort to limit the vote-by-mail process and undermine public trust in it. Litigation has been filed in Mississippi, Illinois, and North Dakota challenging post-Election Day return dates for mail ballots, asserting a fringe legal theory that federal law setting the date of federal elections prohibits states from counting timely cast mail ballots received after Election Day.⁷⁴ If successful, these lawsuits would increase the risk of rejected ballots for tens of thousands of mail voters, including military members, students, and individuals with disabilities, who rely on post-Election Day return dates. In Florida, an administrative challenge has been filed against a rule promulgated by the Secretary of State allowing voters to request a mail ballot through a designee.⁷⁵ And public officials, like the Mississippi Secretary of State, have publicly discouraged voters from voting by mail “if at all possible” because of purported USPS mail delays,⁷⁶ even though USPS delivered nearly 99% of trackable ballots from voters to election officials within three days during the 2022 midterm elections.⁷⁷

⁷³ S.B. 1, 2024 Reg. Sess. (AL 2024), <https://legiscan.com/AL/amendment/SB1/id/203912>.

⁷⁴ *Republican Nat’l Comm. v. Wetzel*, No. 1:24-cv-25-LG-RPM (S.D. Miss 2024); *Splonskowski v. White*, No. 1:23-cv-00123 (D.N.D. 2023); *Bost v. Illinois State Board of Elections*, No. 1:22-cv-02754 (N.D. Ill. 2022).

⁷⁵ *Boydston v. Department of State Division of Elections*, No. 23-004487RP (Fla. Div. of Admin. Hr’gs, 2023).

⁷⁶ Tweet from Sec. Michael Watson (Feb. 7, 2024), <https://twitter.com/MichaelWatsonMS/status/1755237396294045970>.

⁷⁷ U.S. Postal Serv., *2022 Post-Election Analysis: Successfully delivering the nation’s election mail during the 2022 midterm elections* (2022), <https://about.usps.com/what/government-services/election-mail/pdf/usps-2022-post-election-analysis.pdf>.

6. Voter Intimidation

Voter intimidation is on the rise. For example, in 2020 and 2022, Florida voters faced a surge in incidents of intimidation, leading the Florida Attorney General to issue a public statement warning against intimidation.⁷⁸ This took place against the backdrop of an increase in activity by white supremacist groups in Florida. Between January 2020 and August 2022, there were more than 400 instances of recorded white supremacist propaganda distribution in Florida.⁷⁹ In 2021, the Southern Poverty Law Center's Intelligence Project documented 53 hate groups⁸⁰ and 24 antigovernment groups operating in Florida.⁸¹ Since 2020, an increasing number of election deniers, including current and former members of the Proud Boys, have secured seats on political party executive committees in Florida, including individuals who face criminal charges for participating in the January 6th attack on the Capitol.⁸²

During the 2022 election cycle in Texas, there were a number of complaints of intimidation and harassment faced by voters.⁸³ The 2022 election was the first major electoral contest since the passage of Texas's omnibus voter suppression law, S.B. 1, which gave partisan poll watchers free rein to roam polling locations. LDF's election protection team, with partners, fielded numerous calls into the non-partisan Election Protection hotline from voters reporting intimidation by poll workers and partisan poll watchers.

In one particularly egregious instance in Jefferson County, election workers at two polling places of historical significance to the Black community hovered over and

⁷⁸ See Issac Morgan, *Civil Rights Groups Wait for Response from Attorney General Ashley Moody on Voter Intimidation Issues*, Florida Phoenix (Oct. 30, 2020), <https://floridaphoenix.com/2020/10/30/civil-rights-groups-wait-for-response-from-attorneygeneral-ashley-moody-on-voter-intimidation-issues/>.

⁷⁹ Anti-Defamation League, *ADL H.E.A.T. Map (Hate, Extremism, Antisemitism, Terrorism)*, <https://www.adl.org/resources/tools-to-track-hate/heat-map>.

⁸⁰ Southern Poverty Law Center, *In 2021, 53 Hate Groups Were Tracked in Florida*, <https://www.splcenter.org/states/florida>.

⁸¹ Southern Poverty Law Center, *2021 Antigovernment Groups by State*, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/antigovernment#state-bystate>.

⁸² See, e.g., Ned Parker et al., *'Stop the steal' supporters train thousands of U.S. poll observers*, Reuters (Oct. 13, 2022), <https://www.reuters.com/world/us/stop-steal-supporters-trainthousands-us-poll-observers-2022-10-13/>; Patricia Mazzei & Alan Feuer, *How the Proud Boys Grippped the Miami-Dade Republican Party*, N.Y. Times (Oct. 13, 2022), <https://www.nytimes.com/2022/06/02/us/miami-republicans-proud-boys.html>.

⁸³ Robet Downen, *Texas avoided election violence. Advocates say voters still need more protection.*, Tex. Tribune (Nov. 11, 2022), <https://www.texastribune.org/2022/11/11/texas-midterms-violence-pollwatchers-threats/>.

required Black voters—and only Black voters— to recite their addresses aloud, even after their addresses had been verified. The Lawyers’ Committee for Civil Rights Under Law intervened on behalf of the Beaumont NAACP in this matter and obtained a court order to prohibit election workers and poll watchers at one of the locations from requiring voters to state aloud their addresses and from following voters too closely as they voted. However, the election worker who committed the misconduct was still not removed from the polling place.⁸⁴ As we approach the 2024 general election, we have significant concerns that instances of intimidation like this will increase.

7. Criminalization of Voting

One of the most alarming trends of the post-2020 environment has been the criminalization of the voting process. Between 2020 and 2022, twenty-six states created or heightened punishments for a total of 120 election-related crimes, largely in Southern states previously covered under Section 5.⁸⁵ These laws target voters, assistants, and civic organizations with criminal penalties for benign activities related to the voting process. For example, Georgia’s S.B. 202 criminalizes the distribution of food and water to voters waiting in line, a practice known as “line warming” or “line relief.”⁸⁶ And as noted above, there is a new wave of laws criminalizing the provision of needed assistance to absentee or mail voters.

Under the guise of ferreting out election fraud, some states have even created new police forces to criminalize the voting process. Created in 2022, Florida’s election crimes police force has targeted minority voters and chilled civic participation while achieving only a handful of successful prosecutions.⁸⁷ Other states, including Georgia, Texas, and Ohio, have proposed their own specialized units to investigate and prosecute election fraud.⁸⁸ States like Florida have also targeted returning citizens, passing laws requiring them to pay all judicially mandated financial obligations in

⁸⁴ Agreed Protective Order, *Beaumont Branch of the NAACP et al. v. Jefferson Cnty., Texas et al.*, No. 1:22-cv-00488 (E.D. Tex. 2023), ECF No. 74.

⁸⁵ Benjamin Barber, *Criminalizing voters in Southern states*, Facing South (Jan. 27, 2023), <https://www.facingsouth.org/2023/01/criminalizing-voters-in-southern-states>.

⁸⁶ H.B. 540 § 22, Act 632, Reg. Sess. (Ga. 2010); see also O.C.G.A. § 21-2-414(a)(1), (a)(3).

⁸⁷ John Kennedy, *Florida Election Crimes Office Dealt with 1,300 Complaints, Continues to Stir Controversy*, USA Today Florida (Jan. 17, 2024), <https://www.tallahassee.com/story/news/politics/2024/01/17/first-annual-report-shows-florida-election-crimes-office-1300-complaints-draws-controversy/72255279007/>.

⁸⁸ Mac Brower, *Criminalizing Elections Is on Red States’ Agenda This Year*, Democracy Docket (Feb. 21, 2023), <https://www.democracymarket.com/analysis/criminalizing-elections-is-on-red-states-agenda-this-year/>.

order to register to vote and cast their ballots, and conducting high-profile arrests for voting while ineligible.⁸⁹

8. *Threats to Election Officials*

Election officials have experienced unprecedented threats to their safety and privacy since the 2020 election. Large numbers of election officials have expressed concern for their safety while carrying out their duties.⁹⁰ Some have even been harassed and threatened while on the job, including Secretaries of the States who are responsible for certifying election results.⁹¹ As we heard in powerful testimony to the January 6th Committee, Black election workers Ruby Freeman and Shaye Moss had their lives turned upside down by a relentless campaign of threats and harassment sparked by Rudy Giuliani's false accusations.⁹² Mr. Giuliani was ultimately found liable for defamation by a federal jury and ordered to pay nearly \$150 million in damages, in recognition of the steep cost two diligent election workers had paid for doing their jobs.⁹³

As threats against good-faith election officials and workers rise, there has been an exodus of paid workers and volunteers who have stopped staffing polling locations.⁹⁴ Lawmakers have exacerbated the problem by passing laws that put election workers at risk of criminal penalties for fulfill their duties.⁹⁵ In 2023, at least three states enacted laws that imposed criminal penalties on election officials for performing benign election administration activities. Arkansas's H.B. 1411 made it a crime for an election official to send an unsolicited mail ballot, while Georgia's S.B.

⁸⁹ Test. of Adam Lioz, *supra* note 31, at 28-29.

⁹⁰ Ruby Edlin & Lawrence Norden, *Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference*, Brennan Ctr. For Just. (Apr. 25, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-shows-high-turnover-amid-safety-threats-and>.

⁹¹ Test. of Sherrilyn Ifill, *supra* note 31, at 14-15.

⁹² Select Comm. to Investigate the January 6th Attack on the U.S. Capital, H.R. 117th Cong. 2d Sess., Final Rep. on the Select Comm. to Investigate the January 6th Attack on the U.S. Capital 305-307 (Dec. 2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf>.

⁹³ Daniel Barnes et al., *Rudy Giuliani Hit with \$148M Verdict for Defaming Two Georgia Election Workers*, NBC News (Dec. 15, 2023), <https://www.nbcnews.com/politics/politics-news/rudy-giuliani-hit-148m-verdict-defaming-two-georgia-election-workers-rcna129807>.

⁹⁴ Test. of Adam Lioz, *supra* note 31, at 28-29.

⁹⁵ *Id.*, at 28-29.

222 expanded a prior law making it a crime for election officials to accept third-party funding to support election administration.⁹⁶

D. LDF's Recent and Ongoing Voting Rights Litigation

LDF's extensive voting rights litigation docket illustrates ongoing barriers to equal representation, highlights the resources required to fix problems after the fact, and exposes the shortcomings of the existing legal regime.

1. Redistricting and Racial Vote Dilution

Despite the growth of communities of color over the last decade, congressional and legislative maps following the 2020 Census failed to reflect the nation's increased diversity.⁹⁷ Racial vote dilution has systemically deprived Black and Latino voters of a meaningful opportunity to elect candidates of their choice. LDF has brought a series of lawsuits challenging congressional, state legislative, and local government maps on behalf of Black voters who were unlawfully gerrymandered out of political power in several states.

i. Alabama: Allen v. Milligan

In 2021, Alabama enacted a redistricting plan for its seven congressional districts. The new map divided the eighteen counties in Alabama's Black Belt in a way that prevented the Black community from electing candidates of their choice. The Black Belt is a "community with a high proportion of similarly situated black voters who share a lineal connection 'the many enslaved people brought there to work in the antebellum period.'"⁹⁸ This cracking of the Black Belt denied the Black voters there the opportunity to elect candidates of their choice. Despite Black voters casting on average over 90% of their ballots for their preferred candidates, bloc voting by the white majority uniformly cancelled out their votes. As a result of this cracking and racially polarized voting, Black Alabamians—who comprise 27% of the state's population—formed the majority in only one of the state's seven districts. The impact of this map is that white Alabamians who are only 65% of the population controlled elections in 86% of the state's seven congressional districts.⁹⁹ LDF, along with the American Civil Liberties Union, ACLU of Alabama, Hogan Lovells LLP, and Wiggins, Childs, Pantazis, Fisher & Goldfarb filed a lawsuit on behalf of Greater Birmingham Ministries, the Alabama State Conference of the NAACP, and several individuals

⁹⁶ Brennan Ctr. for Just., *Voting Laws Roundup: 2023 in Review*, (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>.

⁹⁷ Test. of Deuel Ross, *supra* note 31, at 7-8.

⁹⁸ *Allen v. Milligan*, 143 S. Ct. 1487, 1495 (2023).

⁹⁹ See Stipulation of Facts, *supra* note 37.

challenging the state's redistricting plan under Section 2 of the Voting Rights Act. The lawsuit demanded that the state create a second district that gives Black Alabamians an equal chance to see their preferred candidates represent them in Congress.¹⁰⁰

In January 2022 a three-judge panel in the district court in the Northern District of Alabama unanimously agreed with the plaintiffs. It found that the map likely violated Section 2 of the VRA and granted a preliminary injunction that required the state to draw a new map.¹⁰¹ However, the Supreme Court halted the preliminary injunction by a 5-4 decision pending a merits decision in the case.¹⁰² The result of this stay was that Alabama used a map that has been held to be discriminatory as the basis for the 2022 congressional elections in the state. As expected under this map, Alabamians elected only one Black person to Congress in 2022 out of seven seats.¹⁰³

On June 8, 2023, the Supreme Court issued a landmark 5-4 decision affirming and restoring the district court's preliminary injunction.¹⁰⁴ On remand, the Alabama Legislature drew a new map that still would not create a second opportunity district for Black voters. The district court rejected the State's proposal, and the Supreme Court denied Alabama's motion for a stay. On October 5, 2023, the district court adopted a new map, which, for the first time in history, creates a second congressional district where Black voters in Alabama will have an opportunity to elect candidates of choice this November.¹⁰⁵ However, Alabama continues to dispute this result, and the district court has now set a date for a full trial on the merits to begin on February 3, 2025.¹⁰⁶

¹⁰⁰ Compl., *Milligan v. Merrill*, No. DC-775038/000001-16632740 ¶¶ 3-7, (N.D. Ala. Nov. 15, 2021), <https://www.naacpldf.org/wp-content/uploads/COMPLAINT-Milligan-v.-Merrill-1.pdf>.

¹⁰¹ Prelim. Inj. Mem. Op. & Order, *supra* note 33.

¹⁰² Grant of Appls. for Stays or Injunctive Relief, *Merrill v. Milligan*, Nos. 21A375 (21–1086) & 21A376 (21–1087) (595 U.S. 2022), https://www.brennancenter.org/sites/default/files/2022-10/Merrill_stay_opinion_dissent.pdf.

¹⁰³ U.S. Cong., *Members of the U.S. Congress*, <https://www.congress.gov/members?q=%7B%22member-state%22%3A%22Alabama%22%2C%22congress%22%3A118%7D>.

¹⁰⁴ *Allen v. Milligan*, 143 S. Ct. 1487.

¹⁰⁵ Inj., Order, & Court-Ordered Remedial Map, *Milligan v. Allen*, No. 2:21-cv-01530-AMM (N.D. Ala. Oct. 23, 2023), https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/AL_221-cv-1530_311.pdf.

¹⁰⁶ Order, *Milligan v. Allen*, No. 2:21-cv-01530-AMM (N.D. Ala. Jan. 11, 2024), https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/AL_221-cv-1530_324.pdf.

ii. *Louisiana: Robinson v. Landry*

In 2022, Louisiana passed a congressional map over the veto of Governor John Bel Edwards, continuing the State's long history of maximizing political power for white citizens by disenfranchising and discriminating against Black Louisianans. Even though Black voters constitute around a third of the state's voting age population, under the legislature's map, Black Louisianans comprised the majority in only one of the state's six congressional districts, and candidates supported by Black voters were routinely defeated in the five other districts. Indeed, no Black candidate has won election to any congressional seat since Reconstruction in a district in which Black voters were not the majority. The result was underrepresentation of Black voters in Louisiana's congressional delegation, with Black voters having an opportunity to elect candidates of their choice in one of six congressional districts. Simultaneously, Louisiana's white population was dramatically overrepresented. While only 58% of Louisiana's population is non-Hispanic white, white voters controlled the outcome in five out of six (83.3%) districts under the maps.

Governor John Bel Edwards recognized this disparity and vetoed the legislature's proposed map because it was "not fair to the people of Louisiana and does not meet the standards set forth in the federal Voting Rights Act," but the legislature overturned his veto.¹⁰⁷ LDF and coalition partners had submitted several maps containing a second majority-Black district and testified before the legislature.

In March 2022, LDF, the ACLU, ACLU of Louisiana, and Paul, Weiss, Rifkind, Wharton & Garrison LLP filed a lawsuit on behalf of the Louisiana State Conference of the NAACP, Power Coalition for Equity and Justice and nine individual voters, challenging the congressional redistricting maps passed by the Louisiana legislature as a violation of Section 2 of the Voting Rights Act.¹⁰⁸ The lawsuit alleged that the maps diluted the voting power of Black Louisianans by failing to provide Black voters

¹⁰⁷ Press Release, NAACP Legal Def. Fund, Louisiana Legislature Overturns Governor's Veto of Map Lacking a Second Majority-Black Congressional District; Civil Rights Groups File Suit Under Voting Rights Act (Mar. 30, 2022), <https://www.naacpldf.org/press-release/louisiana-legislature-overturms-governors-veto-of-map-lacking-a-second-majority-black-congressional-district-civil-rights-groups-file-suit-under-voting-rights-act>; Wesley Muller & Greg LaRose, *Louisiana Legislature overrides Gov. Edwards' veto of congressional map*, La. Illuminator (Mar. 30, 2022), <https://lailluminator.com/2022/03/30/louisiana-legislature-overrides-gov-edwards-veto-of-congressional-map/>; Mark Ballard et al., *In an historic vote, Louisiana Legislature overturns governor's veto on congressional maps*, The Advocate (Mar. 30, 2022), https://www.theadvocate.com/baton_rouge/news/politics/legislature/in-an-historic-vote-louisiana-legislature-overturms-governors-veto-on-congressional-maps/article_fecf9998-b04c-11ec-be24-17a2c1389e4d.html.

¹⁰⁸ Compl., *Robinson v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. Mar. 30, 2022), <https://www.naacpldf.org/wp-content/uploads/LA-Redistricting-Suit-3.30.22.pdf>.

an equal opportunity to elect their candidates of choice in a second congressional district.

On June 6, 2022, the map was blocked by a federal judge who ruled that it was racially discriminatory and likely violated the Voting Rights Act, and a motions panel of the Fifth Circuit Court of Appeals in New Orleans agreed.¹⁰⁹ The court's determination required legislators to draw a new map with two districts where Black voters can elect candidates of choice to be used during upcoming elections, while litigation continued.¹¹⁰

On June 28, 2022, the U.S. Supreme Court granted Louisiana's bid to temporarily halt the district court's ruling, allowing the discriminatory map to be used in the 2022 mid-term election.¹¹¹ Nearly a year later, following its decision in *Allen v. Milligan*, the Supreme Court lifted its stay, allowing the case to proceed in the lower courts.¹¹² On November 11, 2023, the Fifth Circuit Court of Appeals affirmed the district court's ruling that the State had likely violated the Voting Rights Act, but vacated the injunction for procedural reasons and set a timeline for the legislature or district court to act to install a new congressional map in time for the 2024 elections.¹¹³

The legislature took that opportunity and, on January 19, 2024, enacted a new congressional map with a second majority-Black district. On February 1, 2024, a number of self-described “non-African American” plaintiffs brought a new suit, *Callais v. Landry*, arguing that any new map with a second majority-Black district would be an improper racial gerrymander—despite court rulings that a congressional plan with two Black opportunity districts was likely necessary to comply with the

¹⁰⁹ Ruling & Order, *Robinson v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. June 6, 2022), <https://www.naacpldf.org/wp-content/uploads/Robinson-v.-Ardoin-Ruling-and-Order-Preliminary-Injunction.pdf>; *Ardoin v. Robinson*, No. 21A814, (5th Cir. Jun. 28, 2022).

¹¹⁰ *Id.*

¹¹¹ Misc. Order, *Ardoin v. Robinson*, 597 U.S. — (June 28, 2022), https://www.supremecourt.gov/orders/courtorders/062822zr1_9ol1.pdf.

¹¹² Order dismissing the writ of certiorari before judgment as improvidently granted, and vacating the stay entered on June 28, 2022, *Ardoin v. Robinson*, S. Ct. No. 21-1596, 5th Cir. No. 22-30333 (June 26, 2023), https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA_22-30333_237-1_13cvCoI.pdf.

¹¹³ *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023).

Voting Rights Act.¹¹⁴ This litigation is ongoing and may impact what congressional map will be used in 2024 election.

iii. South Carolina: Alexander v. South Carolina NAACP

In 2021 and 2022, South Carolina enacted new post-Census maps for its congressional and state legislative districts. LDF, along with the American Civil Liberties Union, the ACLU of South Carolina, Boroughs Bryant LLC, Arnold & Porter, and the general counsel's office of the NAACP brought suit on behalf of the South Carolina State Conference of the NAACP and an individual voter alleging that the districts in the congressional and state House maps were racially gerrymandered and designed with a discriminatory purposes under the Fourteenth and Fifteenth Amendments of the U.S. Constitution.¹¹⁵ In 2022, South Carolina adjusted South Carolina state House district lines in some of the most historically significant areas of the state for Black voters by passing a new map in response to the lawsuit. Passage of the maps stems from a private settlement between the parties.¹¹⁶

The challenge to the congressional map continued. In January 2023, after an eight-day trial, a three-judge federal panel unanimously held South Carolina's Congressional District 1 was a racial gerrymander and was designed with a discriminatory purpose. The panel determined that the South Carolina legislature "bleached" Black voters out of Congressional District 1, made a "mockery" of traditional districting principles, and that race rather than partisan affiliation explained the design of Congressional District 1.¹¹⁷ As a result of the injury caused by this congressional map, the panel issued a permanent injunction enjoining the state from conducting an election until a constitutionally valid plan is approved.

¹¹⁴ Compl., *Callais et al. v. Landry*, No. 3:24-cv-00122 (W.D. La. Jan. 31, 2024), https://vhdsfh2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA_324-cv-122_1.pdf.

¹¹⁵ Press Release, NAACP Legal Def. Fund, *Trial Wraps Up in Voting Rights Case Challenging South Carolina's Congressional Map* (Nov. 29, 2022), <https://www.naacpldf.org/press-release/trial-wraps-up-in-voting-rights-case-challenging-south-carolinas-congressional-map/>.

¹¹⁶ NAACP Legal Def. Fund, *South Carolina Passes New Redistricting Maps Following Civil Rights Legal Challenge* (June 22, 2022), <https://www.naacpldf.org/news/south-carolina-passes-new-redistricting-maps-following-civil-rights-legal-challenge/>.

¹¹⁷ Findings of Fact & Conclusions of Law, *South Carolina State Conference of the NAACP v. Alexander*, No. 3:21-cv-03302-MGL-TJH-RMG 15 (D. S.C. Jan. 6, 2023), https://www.aclu.org/wp-content/uploads/legal-documents/order_-_south_carolina_state_conference_of_the_naACP_v._alexander.pdf.

Defendants appealed the January 6 post-trial decision, and the parties expeditiously completed full briefing by September 11, 2023.¹¹⁸ Oral argument took place on October 11, 2023.¹¹⁹ Both parties asked for a ruling by January 2024, but as of this date, the Supreme Court has not issued a decision.

Because the Supreme Court has not issued a decision, Defendants have moved to lift the permanent injunction in Congressional District 1, asking that elections proceed in 2024 under the discriminatory congressional map yet again.¹²⁰ Plaintiffs opposed, and briefing has been completed.¹²¹ Nonetheless, the threat of a future election based on a discriminatory congressional map looms and underscores the urgent need for prophylactic legislation to prevent such discrimination from infecting the composition of Congress and other governing bodies going forward.

iv. Louisiana: Nairne v. Landry

In 2022, LDF challenged Louisiana’s state legislative maps that that diminished the voting influence of Black residents by “packing” them into fewer districts and “cracking” them among other districts, in violation of Section 2 of the Voting Rights Act.¹²² LDF, the American Civil Liberties Union, ACLU of Louisiana, Cozen O’ Connor, and attorneys Ron Wilson and John Adcock brought suit on behalf of the Louisiana State Conference of the NAACP, Black Voters Matter, and four individuals. The complaint showed that Black voters could constitute a majority in three more reasonably configured state Senate districts and six more reasonably configured state House districts, in order to ensure that Black voters had an equal

¹¹⁸ Jurisdictional Statement, *Alexander v. The South Carolina State Conference of the NAACP*, No. 22-807 (2023), https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/SC_22-807_1.pdf.

¹¹⁹ Press Release, NAACP Legal Def. Fund, Oral Arguments Wrap in U.S. Supreme Court Case Challenging South Carolina’s Congressional Map for Racial Discrimination (Oct. 11, 2023), <https://www.naacpldf.org/press-release/oral-arguments-wrap-in-u-s-supreme-court-case-challenging-south-carolinas-congressional-map-for-racial-discrimination/>.

¹²⁰ Press Release, NAACP Legal Def. Fund, LDF Senior Counsel Leah Aden Issues Statement Regarding SC NAACP v. Alexander – State Elected Leaders’ Request to Use Congressional Map Deemed Unconstitutional (Mar. 13, 2024), <https://www.naacpldf.org/press-release/ldf-deputy-director-for-litigation-leah-aden-issues-statement-regarding-sc-naACP-v-alexander-state-elected-leaders-request-to-use-congressional-map-deemed-unconstitutional/>.

¹²¹ *Id.*

¹²² Compl. for Declaratory & Injunctive Relief, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. Mar. 14, 2022), https://vhdsfh2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/Complaint_3.14.22.pdf.

opportunity to participate in the political process and elect representatives of their choice.

In February 2024, after a seven-day trial, the district court ruled in favor of Louisiana voters, finding that the current state House and Senate districts violate Section 2.¹²³ The court agreed that the map diluted Black voters' ability to elect candidates of choice and condemned the packing and cracking of Black communities within the maps. Emphasizing the importance of upholding the principles of equal representation for all citizens, the court prohibited the further use of the discriminatory maps. Proceedings leading to new legislative maps are ongoing.

v. Arkansas: Christian Ministerial Alliance et al. v. Thurston

On July 24, 2023, LDF, along with long-time civil rights attorney Arkie Byrd and O'Melveny & Myers LLP, filed an amended complaint in their lawsuit on behalf of the Christian Ministerial Alliance and five individual Black voters. Specifically, Plaintiffs allege that Arkansas' post-Census map for its Congressional District 2 is a racial gerrymander and designed with a discriminatory purpose under the Fourteenth and Fifteenth Amendments to the U.S. Constitution.¹²⁴ In this plan, Pulaski County, the most populous and diverse county in Arkansas and the long-time heart of the Congressional District 2, was split into three separate congressional districts. This cracking targeted southeastern Pulaski County, well-known as the state's largest community of Black voters. In doing so, the Arkansas Legislature actively disregarded traditional redistricting principles and contradicted its own stated guiding principles. In February 2024, a three-judge district court issued a unanimous order denying Defendant's motion to dismiss on both claims.¹²⁵ The parties are engaged in discovery and a scheduling order has been issued with a trial date set for March 2025.

vi. Arkansas: Christian Ministerial Alliance et al. v. Arkansas

¹²³ Ruling & Order, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. Feb. 8, 2024), https://vhdshf2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/LA_322-cv-178_233.pdf.

¹²⁴ Press Release, NAACP Legal Def. Fund, Black Arkansas Voters Sue Over Racially Gerrymandered Congressional Map (May 23, 2023), <https://www.naacpldf.org/press-release/black-arkansas-voters-sue-over-racially-gerrymandered-congressional-map/>.

¹²⁵ Explanatory Order, *Christian Ministerial Alliance et al. v. Thurston*, No. 4:23-cv-471 (E.D. Ark. Feb. 2, 2024), https://vhdshf2oms2wensvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_423-cv-471_2-2-24_Order.pdf.

In June 2019, LDF filed a lawsuit under Section 2 of the Voting Rights Act on behalf of the Christian Ministerial Alliance, the Arkansas Community Institute, and three individual Black voters, challenging the State's method of electing judges to the Arkansas Supreme Court and Court of Appeals. The lawsuit alleges that the methods of election for both of these important courts unlawfully dilute the voting strength of Black voters in Arkansas.¹²⁶

The election processes for those courts have for decades denied Black voters an equal opportunity to participate in the political process and elect candidates of their choice. Black residents comprise nearly 16 percent of Arkansas' population, are geographically concentrated enough in certain parts of the state to form a majority of the electorate, and, when given the opportunity, routinely vote together for Black candidates of choice. But the methods for electing judges to the state's two highest courts deprive Black voters of a fair opportunity to elect candidates of their choice. In fact, a Black candidate has never been elected to the Supreme Court nor to any statewide, at-large office in recent history.

The Arkansas Supreme Court is comprised of seven justices who are all elected at-large. On the rare occasions Black candidates have run, Supreme Court candidates preferred by Arkansas' Black voting population have been consistently defeated by candidates preferred by white Arkansans. This has resulted in no Black candidate ever being elected to the Arkansas Supreme Court. Because the Black voting age population is geographically compact, and politically cohesive, an alternative method of election such as district-based voting would allow Black voters to elect their preferred candidates to the Supreme Court.

The Arkansas Court of Appeals is comprised of 12 judges who are elected from a mix of single-member and multi-member districts. Black voters comprise the majority in just one district, District 7. This method of elections dilutes Black voting strength because the districts needlessly "crack" communities of Black voters who could otherwise constitute a compact and cohesive political majority in at least two single-member Court of Appeals districts. Under the current system, no Black candidate has ever been elected to the Court of Appeals when facing a white opponent.

Co-counsel with LDF in this matter were Arkie Byrd, Shearman & Sterling LLP, and Howell Shuster & Goldberg LLP. The district court denied requests from Defendants to dismiss the case without a trial, and heard evidence in support of the claims at a bench trial. On July 25, 2023, the Court issued an opinion in favor of the

¹²⁶ NAACP Legal Def. Fund, *Case: Christian Ministerial Alliance et al. v. Arkansas* (June 10, 2019), <https://www.naacpldf.org/case-issue/christian-ministerial-alliance-et-al-v-arkansas/>.

Defendants.¹²⁷ LDF filed a motion for reconsideration in August 2023, but the Court ordered the case stayed in light of the Eighth Circuit’s decision in *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment* that there is no implied private right of action under Section 2 of the Voting Rights Act, delaying resolution of LDF’s motion.¹²⁸

vii. Alabama: McClure v. Jefferson County Commission

In April 2023, LDF, along with Wiggins, Childs, Pantazis, Fisher & Goldfarb, filed a lawsuit on behalf of Greater Birmingham Ministries, the Metro-Birmingham Branch of the NAACP, the Alabama State Conference of the NAACP, and an individual Black voter, challenging the Jefferson County Commission’s redistricting plans as an unconstitutional racial gerrymander in violation of the Fourteenth Amendment.¹²⁹ This litigation is ongoing, and trial is set for October 2024.

2. Vote Suppression

LDF is also actively challenging restrictive voting laws across several states to ensure election workers can effectively execute their lawful duties and that Black, Latino, and other voters have equal access to the ballot.

i. Florida: Florida NAACP v. Lee

In Florida, LDF, along with Benjamin Duke, Cyrus Nasser, Ellen Choi, Nia Joyner, Covington & Burling LLP, and Nellie King, challenged multiple provisions of S.B. 90 on behalf of the Florida State Conference of the NAACP, Disability Rights Florida, and Common Cause, including 1) restrictions and new requirements for standing vote-by-mail applications; 2) limits on where, when, and how drop boxes can be used; and 3) a vague and overbroad definition of solicitation that prohibited certain conduct near polling places, including potentially criminalizing offering free food, water, and other relief to Florida voters waiting in long lines.¹³⁰

¹²⁷ Order, *Christian Ministerial Alliance et al. v. Sanders*, No. 4 :19-cv-00402-JM (E.D. Ark. July 25, 2023), https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_419-cv-402_Order_7-25-23.pdf.

¹²⁸ Order, *Christian Ministerial Alliance et al. v. Sanders*, No. 4 :19-cv-00402-JM (E.D. Ark. Nov. 21, 2023), https://vhdshf2oms2wcnsvk7sdv3so.blob.core.windows.net/thearp-media/documents/AR_419-cv-402_198.pdf.

¹²⁹ Press Release, NAACP Legal Def. Fund, Black Voters Sue Jefferson County Commission for Racial Gerrymandering (Apr. 7, 2023), <https://www.naacpldf.org/press-release/black-voters-sue-jefferson-county-commission-for-racial-gerrymandering/>.

¹³⁰ Test. of Sherrilyn Ifill, *supra* note 31, at 23; Press Release, NAACP Legal Def. Fund, LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law (May 6, 2021),

On March 31, 2022, the district court ruled that S.B. 90 violated Section 2 of the Voting Rights Act, and was motivated by racial discrimination in violation of the First and Fourteenth Amendments to the United States Constitution.¹³¹ Over a year later, on April 27, 2023, the Eleventh Circuit largely reversed the District Court’s decision.¹³² The Eleventh Circuit did, however, find that the second half of S.B. 90’s solicitation definition, “which prohibits engaging in any activity with the . . . effect of influencing a voter,” is “impermissibly vague in all of its applications.”¹³³ While LDF and other plaintiffs filed a petition for rehearing en banc by the Eleventh Circuit, that petition was denied.¹³⁴

ii. Georgia: Sixth District of the African Methodist Episcopal Church v. Kemp

After Georgia voters turned out in record numbers for the 2020 presidential election and U.S. Senate elections in early 2021, state legislators passed S.B. 202, a sweeping racially discriminatory and other unconstitutional and illegal omnibus law that by its individual and collective provisions disenfranchises voters, particularly voters of color.¹³⁵ S.B. 202 bans line relief, restricts access to and usage of drop boxes and mobile voting units, and imposes new voter ID requirements for absentee voting.

In 2021, LDF, along with the American Civil Liberties Union, ACLU of Georgia, SPLC, Wilmer Hale, and Davis Wright Tremaine sued state officials on behalf of the Sixth District of the African Methodist Episcopal Church, the Georgia Muslim Voter Project, Women Watch Afrika, Latino Community Fund Georgia, the Delta Sigma Theta Sorority, Inc., the Arc of the United States, Georgia ADAPT, and Georgia Advocacy Office challenging provisions in S.B. 202 on the grounds that they violate Section 2 of the Voting Rights Act, Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Civil Rights Act of 1964, and the First,

<https://www.naacpldf.org/press-release/ldf-files-lawsuit-against-the-state-of-florida-over-suppressive-voting-law/>.

¹³¹ *League of Women Voters of Florida, Inc. et al. v. Lee*, 595 F.Supp.3d 1042 (N.D. Fla. 2022).

¹³² *League of Women Voters of Florida, Inc. et al. v. Fla. Sec’y of State*, 66 F.4th 905 (11th Cir. 2023).

¹³³ *Id.* at 947 (internal quotations and citations omitted).

¹³⁴ Order, *League of Women Voters of Florida, Inc. et al. v. Lee*, No. 22-11143 (11th Cir. 2023), ECF No. 204.

¹³⁵ NAACP Legal Def. Fund, *LDF’s Lawsuit Challenging Georgia’s Voter Suppression Law*, <https://www.naacpldf.org/naacp-publications/ldf-blog/important-facts-about-ldfs-lawsuit-challenging-georgias-voter-suppression-bill/>.

Fourteenth, and Fifteenth Amendments to the U.S. Constitution.¹³⁶ In order to seek relief for the 2024 elections, LDF filed five preliminary injunction motions. The federal court granted two of these motions – one enjoining the date-of-birth requirement on absentee ballot envelopes and another enjoining one portion of the line-relief ban.¹³⁷

S.B. 202 restricts line-relief activities in two ways. First, it provides for a restrictive zone around polling locations that extends “150 feet of the outer edge of any building within which a polling place can be established (the “Buffer Zone”) and then “25 feet of any voter standing in line to vote at any polling place” (the “Supplemental Zone”) even after the 150-foot restriction.¹³⁸ Practically, this effectively prohibits line-relief activities altogether. In LDF’s litigation, the court recently granted our preliminary-injunction motion seeking to block the Supplemental Zone restriction for upcoming election. In that decision, the court enjoined the ban on providing food and drink more than 150 feet beyond the entrance of a polling location because it is substantially likely to be an unconstitutional restriction on expressive conduct under the First Amendment.”

As of March 2024, the litigation is still ongoing. Motions for summary judgment have been completely briefed and the parties are awaiting a decision.

iii. Texas: Houston Justice v. Abbott

In Texas, LDF is challenging S.B. 1, an omnibus law containing several vote suppression provisions, particularly targeting the means and methods of voting primarily used by Black and Latino voters.¹³⁹ Among its many restrictions, S.B. 1 eliminates drive-thru voting and 24-hour voting, restricts early voting hours, and restricts vote-by-mail opportunities and application distribution, innovations that had given local counties the options and flexibility they needed to help eligible voters of all backgrounds and abilities cast a ballot, and that Black and Latino voters had disproportionately relied on to vote. S.B. 1 also imposes burdens and intrusive documentation requirements on individuals who provide voters with assistance or

¹³⁶ First Amended Compl., *Sixth District of the African Methodist Episcopal Church et al. v. Kemp*, No. 1:21-cv-01284-JPB (N.D. Ga. May 24, 2021), https://www.naacpldf.org/wp-content/uploads/Amended-Complaint-in-AME-v.-Kemp_5.24.2021.pdf.

¹³⁷ Press Release, NAACP Legal Def. Fund, Federal Court Sides with Civil Rights Groups and Lifts Georgia’s Line Relief Ban, Birthdate Requirement on Absentee Ballot Envelopes for 2024 Elections (Aug. 18, 2023), <https://www.naacpldf.org/press-release/federal-court-sides-with-civil-rights-groups-and-lifts-georgias-line-relief-ban-birthdate-requirement-on-absentee-ballot-envelopes-for-2024-elections/>.

¹³⁸ H.B. 540 § 22, Act 632, Reg. Sess. (Ga. 2010); *see also* O.C.G.A. § 21-2-414(a)(1), (a)(3).

¹³⁹ S.B. 1, 87th Leg. 1st Special Sess. (Tex. 2021).

transport them to the polls, subjecting the assistors to the threat of criminal penalties for violations. S.B. 1 additionally broadens, in inscrutably vague terms, the definition of obstructing a poll watcher, another criminal offense that can be charged against election officials. While S.B. 1 threatens criminal penalties against election officials, it grants partisan actors enhanced power: it entitles partisan poll watchers to move freely within a polling place, limits the circumstances in which a poll watcher may be removed, and preserves the ability of political parties to distribute unlimited mail-in ballot applications while prohibiting elections official to do the same.

LDF, along with The Arc, Reed Smith and ArentFox Schiff, challenged S.B. 1 and its various provisions under Section 2 of the Voting Rights Act in that it was enacted with the intent to discriminate against Black and Latino voters and will have a discriminatory result; the Fourteenth and Fifteenth Amendments to the U.S. Constitution as intentional race discrimination in voting; and the First and Fourteenth Amendments to the U.S. Constitution as an undue burden on the right to vote, in addition to other claims. LDF participated in an extensive, six-week trial last fall on most claims, and while waiting for a decision, continues to prepare for a second round of trial addressing discriminatory intent claims.

Prior to *Shelby County*, none of the laws described above, which LDF and our clients have been forced to expend significant resources challenging in court, would have gone into effect without examination by a voting rights expert in the Department of Justice or a court to determine whether they were racially discriminatory. Given that some have proven to be so as a result of protracted litigation, it's likely that many of the provisions referenced above would have been blocked prior to going into effect—both protecting voters and saving civil rights organizations such as LDF and defendant jurisdictions substantial time and resources.

E. The Emerging Threat of AI in Elections

The emergence of artificial intelligence (AI) technology presents many risks to civil rights as it threatens to amplify existing systemic biases in our economy, the criminal legal system, and other arenas.¹⁴⁰ Similarly, AI threatens to turbocharge existing election disinformation efforts, which have historically been targeted at Black communities and other communities of color. The late Harvard Law School professor and LDF attorney Lani Guinier taught us that Black Americans often serve

¹⁴⁰ See e.g. Puneet Cheema et al., *To 'keep Americans safe,' Biden's AI executive order must ban these practices*, The Hill (Aug. 18, 2023), <https://thehill.com/opinion/civil-rights/4156858-to-keep-americans-safe-bidens-ai-executive-order-must-ban-these-practices/>.

as the canaries in the coal mine when it comes to threats to our democracy, and AI is yet another example.¹⁴¹

There is a long history of disinformation directed towards Black communities. From control and manipulation of information during slavery¹⁴² to publishing contact information for those attempting to register to vote in the Jim Crow era with often violent consequences (now known as “doxxing”)¹⁴³ to darkening images of Black candidates running for office in the wake of the Voting Rights Act,¹⁴⁴ this history is deep and disturbing.

The targeting of Black communities has continued through modern-day disinformation campaigns that make use of present technologies like robocalling and the Internet. A Senate Intelligence Committee investigation into Russian interference in the 2016 election found that “no single group of Americans was targeted by ... information operatives more than African-Americans.”¹⁴⁵ Black voters in 2020 received robocalls telling them if they voted by mail their information would

¹⁴¹ Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Harvard Univ. Press 2002).

¹⁴² British missionaries seeking to convert enslaved people in the West Indies edited the Bible itself to remove its many references to slave rebellions or liberation (Exodus and the story of Moses, for example). Michel Martin, *Slave Bible From The 1800s Omitted Key Passages That Could Incite Rebellion*, NPR (Dec. 9, 2018), <https://www.npr.org/2018/12/09/674995075/slave-bible-from-the-1800s-omitted-key-passages-that-could-incite-rebellion>. Most slave states in the U.S. took this even further by making it unlawful to teach enslaved persons to read or write at all. Smithsonian American Art Museum, *Literacy as Freedom* (n.d.), <https://americanexperience.si.edu/wp-content/uploads/2014/09/Literacy-as-Freedom.pdf>.

¹⁴³ After Black people began attempting to register to vote in Mississippi, a law enacted in 1962 required the names of those taking literacy tests for voting to be published in a local newspaper once a week for two weeks. Black applicants whose names were published were quickly met with physical violence, loss of employment, or arrest on spurious charges. Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 28 (Univ. of N.C. Press, 1990).

¹⁴⁴ *U.S. v. Charleston*, 316 F. Supp. 2d 268, 295 (D.S.C. 2003).

¹⁴⁵ Donna M. Owens, *Misinformation may only worsen for Black voters in lead-up to election, experts warn*, NBC News (May 3, 2022), <https://www.nbcnews.com/news/nbcblk/misinformation-may-only-worsen-black-voters-lead-election-experts-warn-rcna26924>. The disinformation included the creation of inauthentic social media accounts that posed as Black influencers and a meme that targeted Black and Latine voters on Facebook and Twitter with the message “avoid the line — vote from home. Text ‘Hillary’ to 59925.”

be used by police departments to track down old warrants and credit card companies to collect outstanding debts.¹⁴⁶

AI threatens to supercharge the problem of targeted disinformation in at least three important ways. First, “deep fakes” can be used to mislead voters about candidate positions or trick voters into believing they are receiving disinformation from a trusted source.¹⁴⁷ We are already seeing this technology targeted at Black voters in the 2024 elections.¹⁴⁸ Second, AI can increase the power of microtargeting and therefore help bad actors spread disinformation with more precision.¹⁴⁹ Third, more effective disinformation can undermine public trust in democracy more broadly. Through a phenomenon known as the “liar’s dividend” the mere existence of deep fakes and other AI tools that blur reality may make it easier for unscrupulous politicians to dupe the public into believing that real audio or video has been manipulated by AI.¹⁵⁰ In addition, as noted above, we have seen AI deployed to promote questionable and potentially discriminatory voter purges.¹⁵¹

III. CURRENT LEGAL PROTECTIONS CANNOT MEET THE MOMENT

A key reason that voting rights for Black Americans are tenuous and under threat is that longstanding federal protections are weakened and now insufficient. This is largely because of judicial decisions that have increasingly misinterpreted, narrowed, and eviscerated portions of the Voting Rights Act of 1965, and have failed to fully enforce the protections of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

¹⁴⁶ Maya Yang, *Rightwing election robocall fraudsters must spend 500 hours registering voters*, The Guardian (Nov. 30, 2022), <https://www.theguardian.com/us-news/2022/nov/30/jacob-wohl-jack-burkman-election-robocall-fraud-registering-voters>.

¹⁴⁷ For instance, during the recent New Hampshire primary in 2024, voters heard a robocall developed using AI that purported to be Joe Biden advocating for voters not to vote at all. Kevin Collier, *FCC Moves to Criminalize Most AI-Generated Robocalls*, NBC News (Jan. 31, 2024), <https://www.nbcnews.com/tech/tech-news/fcc-moves-criminalize-ai-generated-robocalls-rcna136347>.

¹⁴⁸ Marianna Spring, *Trump supporters target black voters with faked AI images*, BBC News (Mar. 4, 2024), <https://www.bbc.com/news/world-us-canada-68440150>.

¹⁴⁹ Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. Davis L. Rev. 1793, 1797 (2020).

¹⁵⁰ See Josh A. Goldstein & Andrew Lohn, *Deepfakes, Elections, and Shrinking the Liar’s Dividend*, Brennan Ctr. for Just. (Jan. 23, 2024), <https://www.brennancenter.org/our-work/research-reports/deepfakes-elections-and-shrinking-liars-dividend>.

¹⁵¹ Haskins, *supra* note 46.

A. The Voting Rights Act of 1965

For nearly 100 years following the Civil War, Congress abdicated its responsibility to enforce the Reconstruction Amendments. Black people were systematically disenfranchised by poll taxes,¹⁵² literacy tests,¹⁵³ threats,¹⁵⁴ and lynching.¹⁵⁵ Finally, Congress—compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically¹⁵⁶—took its constitutional duty seriously by passing the VRA in 1965, justly described as “the crown jewel” of the Civil Rights Movement.¹⁵⁷ Passage and enforcement of the VRA has historically been a bipartisan enterprise as Republicans and Democrats have jointly recognized that voting rights for Black and Brown Americans is fundamental to our aspirations to an equal, just, and racially and ethnically inclusive democracy.¹⁵⁸

¹⁵² Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: Univ. of Chicago Press 2004).

¹⁵³ Jason Morgan Ward, *Hanging Bridge: Racial Violence and America's Civil Rights Century* (N.Y.: Oxford Univ. Press 2016).

¹⁵⁴ Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (Yale Univ. Press 2010); U.S. Comm. on C.R., *Racial and Ethnic Tensions in American Communities: Poverty, Inequality, and Discrimination—Volume VII: The Mississippi Delta Report* ch. 3 (n.d.), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

¹⁵⁵ Brad Epperly et al., *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South*, Soc. Sci. Rsch. Network (Mar. 1, 2016), <https://ssrn.com/abstract=3224412>.

¹⁵⁶ See Lyndon B. Johnson, *Special Message to the Congress: The American Promise, March 15, 1965* 281-87 (1966) (“At times history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.”); Lyndon B. Johnson, *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, August 6, 1965* 811-15 (1966) (“And then last March, with the outrage of Selma still fresh, I came down to this Capitol one evening and asked the Congress and the people for swift and for sweeping action to guarantee to every man and woman the right to vote. In less than 48 hours I sent the Voting Rights Act of 1965 to the Congress. In little more than 4 months the Congress, with overwhelming majorities, enacted one of the most monumental laws in the entire history of American freedom.”).

¹⁵⁷ See *Nw. Austin, Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 198, 201 (2009) (the “historic accomplishments of the [VRA] are undeniable”).

¹⁵⁸ Following its initial passage, Congress reauthorized the VRA several times on a bipartisan basis. Republican presidents signed these VRA reauthorizations in 1970, 1975, 1982, and 2006. In 1982, President Reagan signed a bill that reauthorized the VRA for 25 years and strengthened it significantly by rejecting a 1980 Supreme Court ruling that would have forced voters to prove discriminatory intent to vindicate their rights. With these amendments Congress overrode *City of Mobile v. Bolden*, 446 U.S. 55 (1980). See, e.g., GovTrack, *Senate Vote \$178 in 1965 (89th Congress) To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965* (Aug. 4, 1965),

Yet as Black voters and other voters of color are targeted by a wave of new restrictive voting laws, the Supreme Court has undercut the VRA, and Congress has failed to respond. Due to this inaction, state legislatures across the country recently conducted the first redistricting cycle in six decades without being bound by the full protections of the VRA.

1. *Preclearance Protection (VRA Section 5): Shelby County v. Holder*

For nearly five decades, states and local jurisdictions with a history of voting discrimination were required to secure pre-approval from the U.S. Attorney General or a federal court before making changes to their voting rules, practices, or procedures.¹⁵⁹ This “preclearance” protection was rooted in the principle that when it comes to a matter as fundamental as the right to vote, an ounce of prevention is worth a pound of cure.¹⁶⁰

Preclearance succeeded in preventing discrimination before it occurred. As Congress recognized in 1965, case-by-case litigation alone is inadequate—too slow and too costly—to eradicate voting discrimination and prevent its resurgence.¹⁶¹ Even if voters of color can muster the resources to sue, the discriminatory practices or procedures they challenge can remain in effect for years while litigation is pending. Preclearance relieves voters facing discrimination of the substantial burdens of litigation by “shifting the advantage of time and inertia” from the jurisdiction to the voters themselves.¹⁶² As Justice Kennedy wrote in granting a stay of an election because of a failure to preclear voting changes, “permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election.”¹⁶³ Instead of voters having to go to court to prove that new election laws and practices are discriminatory, under preclearance jurisdictions with a history of discrimination must show that new voting laws and practices are *not* discriminatory. For example, when a polling site in a covered municipality is

<https://www.govtrack.us/congress/votes/89-1965/s178>; Pub. L. No. 91-285, 84 Stat. 314 (signed into law by President Richard Nixon on June 22, 1970); Pub. L. No. 94-73, 89 Stat. 402 (signed into law by President Gerald Ford on August 6, 1975); Pub. L. No. 97-205, 96 Stat. 134 (signed into law by President Ronald Reagan on June 29, 1982); Pub. L. No. 102-344, 106 Stat. 921 (signed into law by President George W. Bush on August 26, 1992).

¹⁵⁹ 52 U.S.C. § 10304.

¹⁶⁰ See Brief of Appellee Travis Cnty. at 11, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009).

¹⁶¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

¹⁶² *Id.*

¹⁶³ *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., Circuit Justice).

relocated, preclearance ensures that local officials first justify the shift and show the change is not harmful to voters of color, instead of requiring voters to sue after the fact.

Preclearance at the federal level was effective at protecting voters of color without unduly burdening local election officials. In fact, some covered jurisdictions appreciated preclearance because the process ensured the use of best practices for fostering political participation, particularly among voters of color.¹⁶⁴ Covered jurisdictions also made clear that they viewed preclearance as a way to prevent expensive and prolonged litigation.¹⁶⁵

In 2013, the Court struck at the heart of the Voting Rights Act through its decision in *Shelby County, Alabama v. Holder*.¹⁶⁶ The ruling undercut Section 5's preclearance regime not by invalidating preclearance itself, but rather by striking the formula Congress prescribed for determining which jurisdictions have a sufficient history of discrimination to require preclearance protection for their voters.¹⁶⁷

The practical result was an abrupt halt to the successes of the VRA's preclearance provisions. As the late Justice Ruth Bader Ginsburg noted in her dissent to the *Shelby County* decision: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."¹⁶⁸

The *Shelby County* decision allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked.¹⁶⁹ At its pre-*Shelby County* strength, Section 5 would have prevented many of the voter suppression schemes that we have encountered since 2013.

¹⁶⁴ See, e.g., Brief for the States of New York, California, Mississippi, and North Carolina as *Amici Curiae* in Support of Respondents at 3, *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (describing preclearance as "a streamlined administrative process" that "fosters governmental transparency" and "provides substantial benefits to covered States and localities").

¹⁶⁵ See, e.g., *id.* at 8-10.

¹⁶⁶ 570 U.S. 529 (2013).

¹⁶⁷ *Id.* at 557 (holding that the coverage formula in Section 4(b) "can no longer be used as a basis for subjecting jurisdictions to preclearance," but "issu[ing] no holding on § 5 itself," and noting that "Congress may draft another formula based on current conditions").

¹⁶⁸ *Shelby Cnty.*, 570 U.S. at 590 (Ginsburg, J., dissenting).

¹⁶⁹ U.S. Comm. on C.R., *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

Through our report “Democracy Diminished: State and Local Threats to Voting post-*Shelby County, Alabama v. Holder*,” LDF tracks, monitors, and publishes a record of discriminatory voting changes in jurisdictions formerly protected by Section 5.¹⁷⁰ *Democracy Diminished* details the many tactics that state and local policymakers have implemented with alarming speed since the *Shelby County* decision, including barriers to voter registration, cuts to early voting, purges of the voter rolls, strict photo identification requirements that target voters of color, restrictions on absentee ballots, prohibiting the provision of water to voters waiting in long lines, and last-minute polling place closures and consolidations. Court findings in litigation filed by LDF and other organizations show that these measures have significantly impacted access to the vote.

2. *Nationwide Antidiscrimination Protections (VRA Section 2): Brnovich v. DNC and Allen v. Milligan*

Preclearance applied only to a subset of the nation’s states and political jurisdictions with the worst history of voting discrimination, but Section 2 of the Voting Rights Act has always applied nationwide. As amended in 1982, it allows voters to file litigation against state or local practices that were enacted with discriminatory intent or that have a discriminatory effect on voters’ ability to participate in the political process and elect their preferred candidates to office. While the Supreme Court’s most recent Section 2 decision preserves it as a viable tool to protect Black voters, this key protection of the Voting Rights Act has also been weakened by another recent Supreme Court decision making it more difficult to bring Section 2 challenges.

i. *Brnovich v. DNC (2021)*

While *Shelby County* struck at the heart of the VRA, the Supreme Court more recently undermined the strongest complement to preclearance by weakening the protections afforded by Section 2 of the VRA. In the *Shelby County* decision, the Court assured the country that its decision would do little harm because it “in no way affect[ed] the permanent, nationwide ban on racial discrimination in voting found in [Section] 2.”¹⁷¹ Indeed, the Court emphasized that “Section 2 is permanent, applies nationwide,” and broadly “forbids any ‘standard, practice, or procedure’ that ‘results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.’”¹⁷²

¹⁷⁰ Thurgood Marshall Inst., *supra* note 10.

¹⁷¹ *Shelby Cnty.*, 570 U.S. at 557.

¹⁷² *Id.* at 536-37 (quoting 52 U.S.C. § 10301(a)).

Yet, in 2021, six Supreme Court justices dealt a substantial blow to Section 2 and the democratic ideals it was designed to protect in *Brnovich v. DNC*.¹⁷³ By weakening Section 2 of the Voting Rights Act based on its own views of how much discrimination is acceptable, a majority of the Supreme Court has once again diminished our democracy.

In *Brnovich*, the Court’s majority created five new factors—or “guideposts,” in Justice Alito’s terminology—to uphold a pair of Arizona laws that the *en banc* Ninth Circuit had found discriminatory in violation of Section 2.¹⁷⁴ The decision disregards the plain text of Section 2, ignores nearly four decades of settled precedent, and severely curtails the broad application of Section 2 that Congress intended, thus making it more difficult to ensure that every eligible citizen is able to freely exercise their right to vote. Justice Kagan explained in her *Brnovich* dissent that “to read [Section 2] fairly. . . is to read it broadly,”¹⁷⁵ and yet the majority opinion’s guideposts “all cut in one direction—toward limiting liability for race-based voting inequalities” and shielding discriminatory laws from Section 2 challenges.¹⁷⁶

While the full scope of its impact is not yet clear, the risks are obvious. VRA Section 2 cases are already arduous and expensive; forcing voters to meet standards skewed towards masking discrimination will cause many meritorious actions to fail in court and many more never to be brought, providing fresh oxygen to discriminatory practices Congress sought to eliminate when it enacted the Voting Rights Act. Just as Congress in 1982 overrode the Court’s cramped interpretation of Section 2 in *City of Mobile v. Bolden*,¹⁷⁷ today Congress must override the *Brnovich* decision and restore the full power of one of our nation’s most important and successful civil rights laws: the Voting Rights Act of 1965.

ii. *Allen v. Milligan* (2023)

As noted above, in 2023 LDF and our co-counsel secured a landmark victory on behalf of our courageous clients to secure a second Alabama congressional district where Black voters can elect a candidate of choice.¹⁷⁸ Beyond its local significance, *Milligan* reaffirmed that Section 2 of the Voting Rights Act remains a viable tool that Black voters, other voters of color, and civil rights organizations that represent them

¹⁷³ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

¹⁷⁴ *Id.* at 2336-40 (opinion of the Court).

¹⁷⁵ *Id.* at 2361 (Kagan, J., dissenting).

¹⁷⁶ *Id.* at 2362 (Kagan, J., dissenting).

¹⁷⁷ 446 U.S. 55 (1980).

¹⁷⁸ *Allen v. Milligan*, 143 S. Ct. at 1498.

can use to fight voting discrimination. States or localities considering changes to their election laws or maintaining existing practices and procedures that unfairly curtail Black political participation should know that LDF and our allies can and will make full use of *Milligan* in 2024 and beyond.

Milligan, however, did nothing to repair the damage done to the Voting Rights Act by previous cases such as *Shelby County* and *Brnovich*. Indeed, it illustrates the egregious racial discrimination that goes unchecked in our elections and ultimately compromises the integrity of our institutions absent preclearance. The nation's most successful and important voting rights law remains a shredded shield for Black voters—unable to meet the current moment of widespread attacks on Black political participation.

3. *Current Threats to Voting Rights Act*

The weakened VRA faces a new set of threats, with cases in the lower courts that threaten to further undermine Section 2. These include efforts to radically reinterpret Section 2 to prevent private individuals from even getting into court to seek enforcement of their Section 2 rights, and to prevent coalitions of different racial and ethnic groups from seeking redistricting plans that fairly reflect their joint voting strength.

iii. VRA Section 2 Private Right of Action

In November 2023, a two-to-one majority of the 8th Circuit ruled that Section 2 of the VRA contains no private right of action.¹⁷⁹ In January, the full 8th Circuit declined to revisit this ruling.¹⁸⁰

In Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, the ruling bars both individuals and civil rights groups from bringing future lawsuits to uphold voting rights directly under a tool they have been using for nearly 60 years to challenge racial discrimination in voting.¹⁸¹ It could leave enforcement of

¹⁷⁹ *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

¹⁸⁰ Order Denying Rehearing, *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), <https://www.aclu.org/cases/naacp-v-arkansas-board-of-apportionment?document=Order-Denying-Rehearing>.

¹⁸¹ Janai Nelson, *Victims and advocates deserve a right to fight through the Voting Rights Act*, The Hill (Dec. 5, 2023), <https://thehill.com/opinion/civil-rights/4341253-victims-and-advocates-deserve-a-right-to-fight-through-the-voting-rights-act/>.

Section 2 solely in the hands of the U.S. Department of Justice, which historically has filed only a fraction of the overall cases enforcing Section 2.¹⁸²

This ruling is also a stark departure from six decades of decisions in hundreds of Section 2 cases, including numerous Supreme Court decisions that have granted relief to private individuals under Section 2.¹⁸³ And the Court has explicitly recognized that Section 2, along with other provisions of the Voting Rights Act, are enforceable by private parties.¹⁸⁴ As the Court said in *Allen v. State Bd. of Elections*, “achievement of the Act’s laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.”¹⁸⁵ Although the divided decision of the Eighth Circuit panel remains an outlier, two Justices of the Supreme Court have also suggested, in a concurring opinion, that the existence of a private right of action under the VRA is an open question.¹⁸⁶

Defendants in Section 2 lawsuits have also begun arguing that private litigants should also be barred from an alternative route of enforcing Section 2 left open by the Eighth Circuit’s recent decision: using 42 U.S.C Section 1983.¹⁸⁷ Section 1983 grants private individuals a cause of action to enforce “rights . . . secured by the Constitution and laws” of the United States against state actors.¹⁸⁸ In a recent North Dakota case related to Native voting rights, the District Court rejected this argument and held that Section 1983 clearly allows private litigants to enforce Section 2; but the state

¹⁸² Br. for Appellants, *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1218 n. 8 (8th Cir. 2023) (“Over the past forty years, there have been at least 182 Successful Section 2 cases; of those 182 cases, only 15 were brought solely by the Attorney General”) (citation omitted).

¹⁸³ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Allen v. Milligan*, 143 S. Ct. 1487.

¹⁸⁴ *Morse v. Republican Party of Virginia*, 517 U.S. 186, 231-32 (1986) (affirming that the text, purpose, and history of the VRA permit private litigants to sue under Section 10 of the Voting Rights Act; *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (holding that Section 5 of the VRA was enforceable by private litigants because of its implied private right of action).

¹⁸⁵ *Id.* at 556.

¹⁸⁶ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., joined by Thomas, J., concurring).

¹⁸⁷ *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-civ-22, 2022 WL 2528256, at *4-*6 (D.N.D. July 7, 2022).

¹⁸⁸ *Id.*

defendants have appealed this decision to the 8th Circuit, the same circuit that recently ruled that Section 2 itself contains no private right of action.¹⁸⁹

iv. Coalition Districts

For decades, courts have entertained vote dilution claims under the Voting Rights Act of 1965 (“VRA”) on behalf of citizens comprised of a coalition of two or more racial groups.¹⁹⁰ The viability of a coalition claim has turned on an intensely local factual question: whether the two racial groups prefer the same candidates in elections, whether their candidates are usually defeated by a majority’s bloc voting, and whether the groups can be drawn into a reasonably configured remedial district.¹⁹¹ Fully aware of these cases, Congress has repeatedly declined to disturb these holdings or otherwise limit the availability of coalition claims.

Nevertheless, in November 2023, a three-judge panel of the Fifth Circuit issued a decision urging the full court to grant rehearing to reconsider its long-standing precedent allowing Section 2 coalition claims.¹⁹² On November 28, the *en banc* court agreed to rehear the case, giving the Fifth Circuit the opportunity to further curtail the vitality of Section 2.

B. The U.S. Constitution

In addition to undercutting the Voting Rights Act, courts have failed to give full effect to the Constitution’s protections for the right to vote.

1. Burdens on the Right to Vote: Anderson-Burdick

In addition to its protections against racial discrimination in voting, the Constitution protects all voters from laws that impose an undue burden on the right to vote. When considering whether a particular law or practice imposes an undue

¹⁸⁹ *Turtle Mountain Band of Chippewa Indians et al. v. Michael Howe*, No. 23-3655 (8th Cir. 2023).

¹⁹⁰ *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs.*, 906 F.2d 524, 526 (11th Cir. 1990); *Pope v. County of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*en banc*); *LULAC v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500-02 (5th Cir.), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987); *Jones v. City of Lubbock*, 727 F.2d 364, 383-84 (5th Cir. 1984); *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981). *See also* *Growe v. Emison*, 507 U.S. 25, 41 (1993) (assuming, without deciding, that it is “permissible” to aggregate “distinct ethnic and language minority groups” under Section 2).

¹⁹¹ *See, e.g., Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988).

¹⁹² *Petteway v. Galveston Cnty.*, 86 F.4th 214 (5th Cir. 2023), *vacated, rehearing en banc granted*, 86 F.4th 1146 (5th Cir. 2024).

burden on voting, courts use the so-called *Anderson-Burdick* test, which involves a two-step inquiry.¹⁹³ A court first determines whether the challenged practice imposes a severe burden on voting rights, and if so, the court applies “strict scrutiny” in determining whether the practice violates the Constitution. If, however, the court does not view the burden on voting rights to be severe, it applies a balancing test, examining both the “character and magnitude” of the burden on the right to vote and the justifications put forward by the state for the challenged practice along with the extent to which those interests make it necessary to burden the voters’ rights.¹⁹⁴

The Supreme Court’s 2008 *Crawford* case was a particularly troubling application of *Anderson-Burdick*.¹⁹⁵ In upholding Indiana’s strict photo identification requirement for in-person voting, the Court credited the state’s interests in preventing fraud and upholding voter confidence, despite acknowledging that “[t]he record contains no evidence of any such [in person impersonation] fraud actually occurring in Indiana at any time in its history.”¹⁹⁶ The ruling gives credence to pretextual justifications for barriers to the ballot that create actual burdens on voters while serving as solution in search of a problem.

Courts in recent years have continued to issue decisions making it more difficult to succeed in enforcing constitutional protections against undue burdens on the right to vote. Indeed, in many of these cases, federal appellate courts have reversed district court decisions finding that the challenged laws imposed undue burdens.¹⁹⁷ In effect, the courts have watered down the *Anderson-Burdick* test by

¹⁹³ *Burdick v. Takushi*, 504 U.S. 428 (1992).

¹⁹⁴ *Id.* at 429 (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiffs seeks to vindicate’ against ‘the precise interest put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

¹⁹⁵ *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

¹⁹⁶ *Id.* at 194.

¹⁹⁷ See, e.g., *New Georgia Project v. Raffensberger*, 976 F.3d 1278 (11th Cir. 2020) (reversing district court decision finding that absentee ballot deadline imposed undue burden on voting during COVID emergency); *Tex. League of United Latin Am. Citizens v. Hughs*, 978 F.3d 136, 140 (5th Cir. 2020) (reversing district court decision finding that limiting ballot drop-boxes to one per county, regardless of the size of the county, unduly burdened access to voting); *A. Philip Randolph Inst. of Ohio v. LaRose*, 831 Fed. App’x 188, 190 (6th Cir. 2020) (reversing district court finding that limiting ballot drop-boxes to only one per county unduly burdened access to voting). See also Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59 (2021), <https://scholarship.law.wm.edu/wmbrj/vol30/iss1/3>.

giving wide deference to a jurisdiction’s alleged justifications for burdening the right to vote and discounting the extent to which a particular provision burdens the right to vote.

2. *The Purcell Problem: A Double Bind for Voters*

In 2006, the Supreme Court articulated a principle that courts should be wary of ordering last-minute changes to election rules that could backfire by confusing voters.¹⁹⁸ Recently, courts have misapplied this guideline to reject changes that opened pathways for participation with no risk of confusion (such as extending ballot return deadlines).¹⁹⁹ Voters challenging election rules have ended up in a bind – it’s too early to sue before the harm is clear and documented, but it’s too late to sue if the election is around the corner.

An aggressive and overinclusive application of the *Purcell* theory has both shielded discriminatory barriers to the ballot and too often meant that elections go forward under redistricting plans that have been found to be racially discriminatory, even though the finding of discrimination is later affirmed. This type of drawn-out litigation where discriminatory laws remain in place while jurisdictions engage in delay tactics is the exact problem the preclearance protection of the Voting Rights Act was intended to address and prevent.

LDF’s *Milligan* litigation is a good example.²⁰⁰ A three-judge federal district court unanimously found that Alabama’s congressional redistricting map unlawfully diluted minority voting strength under Section 2 of the VRA and ordered the map to be redrawn, but the Supreme Court reinstated the map for the 2022 elections in an unsigned order which relied on *Purcell*.²⁰¹ The Court ultimately affirmed the district court’s finding that the map violated plaintiffs’ rights under Section 2, meaning that

¹⁹⁸ *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

¹⁹⁹ See, e.g., *Merrill v. People First of Alabama*, 141 S. Ct. 25, 27 (2020) (Sotomayor, J., dissenting) (in a case litigated by LDF, explaining that the Court’s majority was wrong to rely on *Purcell* in staying a district court’s injunction granting relief to voting-rights plaintiffs, because the injunction “lift[ed] burdensome requirements rather than imposing them” and “d[id] not risk creating ‘voter confusion and consequent incentive to remain away from the polls’”).

²⁰⁰ *Allen v. Milligan*, 143 S. Ct. 1487.

²⁰¹ Grant of Appls. for Stays or Injunctive Relief, *Merrill v. Milligan*, *supra* note 91; *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, B., joined by Alito, S., concurring).

the 2022 elections were conducted under an unlawful, racially discriminatory redistricting plan.²⁰²

IV. THE LIMITS OF CASE-BY-CASE LITIGATION

LDF's decades of experience demonstrates that, even with restored federal protections, we cannot litigate our way past voting discrimination. Voting rights litigation, which requires specialized expertise, tends to be expensive; the parties often spend millions of dollars and countless hours litigating these matters.²⁰³ This can be a significant barrier to identifying and rooting out discrimination, especially at the local level. The cases also expend significant judicial resources.²⁰⁴ Additionally, the average length of Section 2 cases is two to five years.²⁰⁵ In the years during a case's pendency, thousands—and, in some cases, millions—of voters are effectively disenfranchised.²⁰⁶

V. CONGRESS MUST ACT TO RESTORE AND STRENGTHEN PROTECTIONS FOR BLACK VOTERS

Persistent racial turnout disparities; ongoing state-level efforts to restrict participation; legal protections undercut by recent Supreme Court decisions; and the inadequacy of a piecemeal, case-by-case approach to fighting discrimination all confirm the urgent need for Congress to both restore and strengthen the Voting Rights Act and also to enact minimum standards for free, fair, and accessible elections so that Americans' access to our most fundamental right does not depend upon where we happen to live. Congress can accomplish this, and meet this moment, by enacting the strongest versions of the John R. Lewis Voting Rights Advancement Act ("JLVRAA"), including a robust preclearance mechanism, and the Freedom to Vote Act ("FTVA"). Given this Committee's jurisdiction, I focus here on the JLVRAA.

²⁰² *Allen v. Milligan*, 143 S. Ct. 1487.

²⁰³ *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, NAACP Legal Defense Fund, (Feb. 19, 2021), <https://www.naacpldf.org/wp-content/uploads/Section-2-costs-2.19.21.pdf>.

²⁰⁴ Federal Judicial Center, *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed).

²⁰⁵ Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits).

²⁰⁶ See e.g. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). Although LDF was ultimately successful securing an injunction against a post-*Shelby* restrictive voter identification law, in the three years after the trial and while the case made its way twice to the Fifth Circuit Court of Appeals and back to the trial court, Texas voters elected dozens of candidates for office in 2014, 2015, and 2016 elections.

For a discussion of how key aspects of the FTVA address the problems described above, please see my recent testimony before the Senate Committee on Rules and Administration.²⁰⁷

The John R. Lewis Voting Rights Advancement Act (JLVRAA) restores, strengthens, and modernizes the Voting Rights Act by addressing the damage wrought by several Supreme Court and lower court decisions, and providing new ways to address voting discrimination as our population rapidly diversifies.²⁰⁸

Among other provisions, the JLVRAA restores VRA Section 5’s preclearance protections by updating the framework for determining which jurisdictions are subject to its requirements (addressing *Shelby County v. Holder*);²⁰⁹ restores VRA Section 2’s vote denial protections to forcefully address discrimination wherever it occurs (addressing *Brnovich v. DNC*);²¹⁰ clarifies that VRA Section 2 contains a private right of action (addressing *Arkansas State Conference of the NAACP v. Arkansas Board of Reapportionment*);²¹¹ clarifies that voters of different races or ethnicities can work together through “coalition” claims to prevent their voices from being weakened or drowned out by unfair districts or election methods (addressing *Petteway v. Galveston County, Texas*);²¹² makes clear that proximity to an election should not be a barrier to relief unless there is real, irreparable harm to voters caused by changing the rules (addressing the misapplication of *Purcell v. Gonzalez*);²¹³ and adds a form of preclearance based upon known discriminatory practices that persist in locations with substantial diversity (modernizing the law’s protections).²¹⁴

²⁰⁷ Test. of Janai Nelson, Before the Sen. Comm. on Rules & Admin., Hr’g on “Administration of Upcoming Elections”, (Mar. 12, 2024), https://www.rules.senate.gov/imo/media/doc/nelson_testimony.pdf.

²⁰⁸ John R. Lewis Voting Rights Advancement Act of 2023, H.R. 14, 118th Cong. (hereinafter “JLVRAA”). The legislation has been introduced as S4 in the United States Senate, but its text is not yet available at Congress.gov so we refer hereinafter to the House version.

²⁰⁹ JLVRAA § 5.

²¹⁰ JLVRAA § 2.

²¹¹ JLVRAA § 9.

²¹² JLVRAA § 2(b)(3).

²¹³ JLVRAA § 11(b).

²¹⁴ JLVRAA § 6.

Each of these elements of the legislation is both necessary and grounded in Congress’s authority under the Constitution. I offer more detail on just a few of these critical provisions below.²¹⁵

A. Restoring Geographic-Based Preclearance

Our experience litigating against discriminatory practices at every stage of the voting process since *Shelby County* demonstrates the need for Congress to take up the Court’s invitation to restore the “heart”²¹⁶ of the VRA with a new preclearance mechanism grounded in current conditions. The approach to geographic coverage in the JLVRAA is specifically tailored to address the Court’s concerns as articulated in the *Shelby* decision by identifying those States and localities where recent conditions show a pattern of continued discrimination against voters of color.

This geographic-coverage based approach is supported by Supreme Court precedent. As eight Justices explained in *Northwest Austin*, “[t]he doctrine of equality of States does not bar remedies for local evils which have subsequently appeared.”²¹⁷ A statute’s disparate geographic coverage will be upheld so long as it is “sufficiently related to the problem that it targets.”²¹⁸ The JLVRAA clearly satisfies this standard. By limiting geographic preclearance to those States and localities with recent evidence of discrimination in voting, the statute ensures that the preclearance remedy is implemented in places where the evil of voting discrimination is most prevalent.

B. Adding Practice-Based Preclearance

To complement the essential tool of geographic-based preclearance, the JLVRAA adds a form of preclearance based upon known discriminatory practices wherever they occur, referred to as practice-based preclearance or “Known Practices Coverage” (“KPC”). History shows that voters of color become targets for discrimination when they reach a sufficient threshold of the population to shift local power. To protect voting populations growing into power, the JLVRAA highlights a

²¹⁵ Test. of NAACP Legal Def. & Educ. Fund, Inc., *Before the Sen. Comm. on the Judiciary, Hr’g on “Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act”* (Oct. 6, 2021).

²¹⁶ *South Carolina*, 383 U.S. at 315.

²¹⁷ *Nw. Austin*, 557 U.S. at 205.

²¹⁸ *Id.*

set of voting practices known to have the potential to be used to discriminatory effect and requires preclearance of those practices in places where minority voting populations have reached certain thresholds (typically at least 20% of the population).²¹⁹

Together, geographic preclearance and practice-based preclearance hold the promise of both addressing the discriminatory voting schemes we see proliferating today, and also preventing “ingenious methods” that might be devised to suppress votes in the future.²²⁰ The genius of preclearance, and the VRA, was creating a mechanism to prevent such mutations in voting discrimination and suppression—the Hydra of adaptive, unrelenting discriminatory practices described by Justice Ginsburg in her *Shelby County* dissent that we see proliferating in states today.²²¹

C. Restoring and Strengthening VRA Section 2

The next essential components of the JLVRAA work together to again make Section 2 of the Voting Rights Act the robust nationwide protection against voting discrimination that Congress intended.

First, the JLVRAA reasserts Congress’s intent and corrects the Supreme Court’s flawed interpretation of Section 2 in the *Brnovich* case. The legislation’s main approach is simply to codify the Supreme Court’s longstanding framework for interpreting Section 2. It establishes the so-called *Gingles* prongs as elements of proof and Senate Report factors as items for consideration in the “totality of the circumstances” analysis required to establish a Section 2 vote dilution claim. It then explicitly applies similar “totality of the circumstances” factors in the vote denial or ballot access context. In addition, the Act prohibits consideration of

²¹⁹ Certain changes such as to ID requirements and multi-lingual election information require preclearance nationwide. For greater detail on the importance and efficacy of KPC, see Asian Americans Advancing Justice, Mexican Am. Legal Def. Fund, & NALEO Educ. Fund, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes* (Nov. 2019), https://www.advancingjustice-aajc.org/sites/default/files/2019-11/Practice%20Based%20Preclearance%20Report%20Nov%202019%20FINAL%20-%20reduced_0.pdf.

²²⁰ House Comm. on the Jud., Hr’g on Voting Rights 23-25, 89th Cong., 1st sess., 1965, Mar. 18-19, (Apr. 1, 1965).

²²¹ *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting).

certain alleged justifications of unlawful practices that distract from a precise analysis of discriminatory impact.

Next, the JLVRAA takes one of the clearest and most successful concepts from Section 5 of the VRA and applies it in a broader context. To preclear a proposed voting change, a jurisdiction covered under Section 5 must show that it will not diminish the voting power of a protected voting population, a concept known as retrogression.²²² This simple, intuitive, and easy-to-administrate concept—don’t make matters worse—enabled the Department of Justice to efficiently address thousands of preclearance applications each year.²²³ The JLVRAA applies this straightforward concept nationwide, and provides a streamlined cause of action to voters when jurisdictions attempt to roll back the clock and erase hard-won progress. The Act provides that jurisdictions may not enact voting changes that have the purpose or effect of diminishing the ability of voters of color to participate or elect candidates of choice.

Each of the provisions of the JLVRAA is critical on its own; but together the Act is greater than the sum of its parts. The Act as a whole takes critical steps toward restoring and modernizing the Voting Rights Act, embracing Congress’s constitutional mandate by reasserting its original intent through a coherent structure that: a) affirmatively protects voters both in select jurisdictions with established, recent patterns of discrimination *and* in places where an entrenched power structure is tempted to use practices with a known history of discriminatory impact to thwart the growing power of minority voting populations; b) restores and strengthens the VRA’s nationwide protections so that Black and Brown Americans can exercise the freedom to vote no matter where they live; c) clarifies that courts must be flexible and explicitly pro-voter in approaching changes necessary to

²²² 52 U.S.C. § 10304(a)-(b) (setting forth preclearance procedures to ensure that no “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” goes into effect if it “has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color [or language-minority status] to elect their preferred candidates of choice”); *see, e.g., Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 299 (2015) (characterizing these requirements as “the prohibition on retrogression under § 5”).

²²³ H.R. Rep. 109-478, 36, 2006 U.S.C.C.A.N. 618, 640 (recounting that “the Department of Justice received thousands of proposed voting changes annually from covered jurisdictions” since 1982, and that “more than 700” of those submissions were found “to be discriminatory against minority voters.”); *see also Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 562 (2013) (Ginsburg, J., dissenting) (explaining that “the Voting Rights Act became one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history”).

vindicate voting rights in close proximity to elections; and d) provides both voters and the Department of Justice streamlined pathways to enforce these protections.

VI. CONCLUSION

Voting rights for Black Americans are presently undermined and face increased threat. A backlash, rooted in a resurgence of white nationalist ideology, against recent robust political participation by communities of color and changing demographics both stoked a violent insurrection and unleashed a wave of voter suppression across the country. Recent elections have demonstrated that barriers to the ballot persist, driving widening racial turnout disparities. Black voters are forced to vote in districts that courts have already determined drown out their voices and discriminate against them on account of race. LDF and our allies maintain a robust litigation docket, but our legal protections have been weakened and are insufficient to meet the enormity of the threat to Black voters and to our democracy.

Next year will mark the 60th anniversary of Bloody Sunday. Congress must act urgently to address persistent and increasing barriers for Black voters by enacting robust voting rights legislation to honor John Lewis and his fellow foot soldiers in Selma. A full decade after the disastrous *Shelby County* decision struck at the heart of the Voting Rights Act, it's long past time that Congress take this mandate seriously and use its power to preserve our still nascent multiracial democracy.

APPENDIX 1

**United States District Court
for the Western District of Texas
San Antonio Division**

La Unión Del Pueblo Entero, et al.,

Plaintiffs,

v.

Consolidated Case No. 5:21-cv-00844-XR

Gregory W. Abbott, et al.,

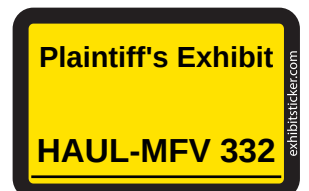
Defendants.

Expert Report of J. Morgan Kousser, Ph.D.

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Caltech Division of the Humanities and Social Sciences
MC 228-77
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Pasadena, CA 91125**

On Behalf of Plaintiffs Houston Area Urban League, Delta Sigma Theta Sorority, Inc., The Arc
of Texas, and Jeffrey Lamar Clemmons in
Houston Justice, et al. v. Abbott, Case No. 5:21-cv-00848-XR

February 28, 2022



Repress and Rally: The Intent and Effect of S.B. 1

I. Prologue and Purpose of this Report

1. In 1972, a three-judge panel of the Western District of Texas considered whether the apportionment system of the Texas legislature that then provided for the election of representatives and senators by single-member districts in Harris County and multimember districts in other Texas cities, particularly Dallas and San Antonio, infringed the constitutional rights of urban Blacks and Latinos.¹ Only a year earlier, the U.S. Supreme Court had turned away an attack on the election of legislators by a multimember district in Marion County, Indiana, brought by Black plaintiffs on similar grounds.² What differentiated the two cases and allowed the panel to distinguish what the State of Texas treated as a controlling Supreme Court precedent? Although they put more emphasis on the power of a slating group in Dallas to choose Black candidates who were acceptable to white leaders, the unresponsiveness of previous Dallas County legislators to the interests of the Black community, and the continued use of racial appeals in Dallas to defeat Black-favored candidates, the judges, with calculated understatement, noted that

. . . unlike the State of Indiana, Texas has a rather colorful history of racial segregation. There exist innumerable instances, covering virtually the entire gamut of human relationships, in which the State has adopted and maintained an official policy of racial discrimination against the Negro. Indeed, even the Negro's right to vote and to participate in the electoral process has not remained untouched by the State's policy. Therefore, it is not unlikely that Texas' use of multi-member districts, taken in the entirety of Texas electoral laws and of Texas history, unconstitutionally infringes the voting rights of racial and political minorities in all Texas cities that are districted as multi-member.³

2. When it turned to possible discrimination against Mexican-Americans in the multimember setup in San Antonio, the *Graves* court mentioned segregation of Mexican-American students in Corpus Christi schools, a property ownership requirement to vote in city council elections in Crystal City, discrimination in jury selection in El Paso, general anti-Mexican-American "discrimination and treatment in the fields of education, employment, economics, health, politics and others," and striking socioeconomic disparities between Mexican-American and other residents of Bexar County.⁴

3. In both Dallas and San Antonio, with respect to both Blacks and Latinos, the three-judge court ruled that, in considering whether multimember election structures were unconstitutional, it was necessary to consider a wide variety of historical and socioeconomic factors, as well as

¹ *Graves v. Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court).

² *Whitcomb v. Chavis*, 403 U.S. 124 (1971)

³ *Graves v. Barnes*, at 725-26.

⁴ *Graves v. Barnes*, at 728-32.

details of the election structures, such as whether the at-large elections featured numbered places⁵ and/or a majority-vote requirement. When *Graves* was appealed to the Supreme Court, the same Justice Byron White who had written the majority opinion in *Whitcomb v. Chavis* endorsed the *Graves* rationale for a unanimous Court in what became the central voting rights case of *White v. Regester*.⁶ *White v. Regester*, in turn, became the basis for the 1982 Senate Report's interpretation of that Congress's amendment to Section 2 of the Voting Rights Act (hereinafter VRA), and multimember districts became the single most important subject of successful VRA cases, settlements, and objections under the Act's Section 5.⁷

4. The point of recounting this familiar history is that Texas should be the last place to claim that an assessment of the intent or effect of a statute such as S.B. 1 should be made on the basis of the bare language of the statute, a comparison of provisions of the law to facially similar statutes in other states, or the author's anodyne statement of intent, which declared that "S.B. 1 amends current law relating to election integrity and security, including by preventing fraud in the conduct of elections in this state, increases criminal penalties, creates criminal offenses, and provides civil penalties."⁸ On the same day as Sen. Carol Alvarado (D-Houston) filibustered against S.B. 1 for 15 hours, the bill's author, Sen. Bryan Hughes (R-Mineola), called the bill simply "common-sense reforms," to which he appended the national Republican slogan for the blizzard of similar bills, "easier to vote, harder to cheat."⁹

5. The purpose of this report is to move beyond such flat and misleading statements by placing S.B. 1 and the tumultuous struggle to pass it in the context of Texas history, especially of electoral discrimination, of previous conflicts over alleged election fraud and the pre-S.B. 1 framework of election laws, and of the events of the 2020 election. An assessment of the background, the narrative of the legislation, and the debates by both the public and the legislators will gather and organize evidence that the finder of fact in this litigation can use to reach a conclusion about the intentions of the framers of the law and its likely effects under the VRA, various disability acts, and the constitution. It is particularly appropriate to view S.B. 1 in such a

⁵ In a numbered place scheme, each candidate in an at-large election runs for a separate post, such as Supervisor #1, rather than having all candidates run against each other and giving each voter more than one vote.

⁶ 412 U.S. 755 (1973).

⁷ I have treated *Whitcomb*, *White v. Regester*, and the issues in the 1982 amendments to Section 2 in *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: University of North Carolina Press, 1999), 335-42. The statement about the incidence of successful at-large election challenges draws on my database of over 4,000 voting rights cases, objections, and settlements that served as the basis for my 2019 testimony before the House Judiciary Committee. See Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary, U.S. House of Representatives, *Legislative Proposals to Strengthen the Voting Rights Act*, Oct. 17, 2019, H. Rept. 116-317 *Voting Rights Advancement Act of 2019*, available at <https://www.congress.gov/congressional-report/116th-congress/house-report/317/1?q=%7B%22search%22%3A%22Voting+Rights+Advancement+Act%22%7D&r=3&overview=closed>, testimony summarized pp. 53-56.

⁸ Senate Research Center, "Bill Analysis. S.B. 1. By: Hughes. State Affairs. 8/8/2021. As Filed," in Tex. Def. Initial Disclosures ATTACHMENT.pdf, at 8.

⁹ Chuck Lindell, "Texas Democrat's filibuster of GOP voting bill ends after 15 hours; SB 1 passes," *Austin American-Statesman*, Aug. 12, 2021, <https://www.statesman.com/story/news/2021/08/12/texas-sb-1-voting-bill-passes-despite-filibuster-carol-alvarado/8105541002/>.

larger perspective because not only has Texas been the site of more infringements on the right to vote that were successfully challenged in voting rights legal actions than any other state,¹⁰ but also because it was the birthplace of the central principle of interpretation of the history of voting rights in the United States – that any legal or extra-legal action relating to voting rights must be assessed in its particular historical, political, and socioeconomic context, or as Justice White put it in *White v. Regester*, in a phrase copied by the 1982 Senate Report, by looking at the “totality of the circumstances.”¹¹

6. The particular provisions of S.B. 1 that I will seek to put into the larger context include those:

- banning drive-thru vote centers (Sections 3.04, 3.12-13);
- restricting early in-person voting hours and eliminating 24-hour voting (Sections 3.09-10);
- completing the elimination of straight-ticket voting (Section 3.15);
- reducing regulations on poll watchers and constraining election officials’ power over them (Sections 4.01, 4.06, 4.07, 4.09);
- prohibiting drop boxes for vote by mail (hereinafter VBM) ballots (Section 4.12);
- imposing additional voter ID requirements on applications for VBM ballots (Section 5.02);
- requiring paperwork of people who provide transportation to the polls of 7 or more voters (Section 6.01);
- and onerously regulating those who assist voters (Sections 6.03-6.05).

¹⁰ 1,021 of the 4,170 successful cases, objections, and settlements from 1957 through 2020 in my database originated in Texas. The next state is Alabama, with 611.

¹¹ *White v. Regester*, at 769; S. Rept. 97-417, at 16.

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III. Organization and Credentials

A. Organization

7. Because this paper is long and detailed, I begin with a fairly brief summary of the contents and argument of the paper. Instead of organizing the report from the beginning under rubrics drawn from the Section 2 “Senate factors,” the *Brnovich* “guideposts,” or the constitutional “*Arlington Heights* factors,” I will first present an analytical narrative, beginning with the history of discrimination in the state and continuing with an analysis of its pre-S.B. 1 election laws, the repeated assertions about fraud in the state’s elections, and an overview of the 2020 elections in Texas. These topics set the stage for the complicated narrative of the consideration of S.B. 1 through several iterations and three legislative sessions, the provisions of the law, and the arguments of proponents and opponents in hearings, on the legislative floor, and in public arenas. Having told the story, I will then refer back to strands of it, paragraph by paragraph, organized under the rubrics of the Section 2 and intent factors, as well as the *Brnovich* “guideposts.” The purpose of the whole report is to review evidence and make it available in a form that will be most helpful to the factfinder and decisionmaker in the case, the judge, whose duties and authority I make no effort to usurp.

B. Credentials

8. I am a professor of history and social science, emeritus, at the California Institute of Technology. Educated at Princeton and Yale, I have been a visiting professor at Michigan, Harvard, Claremont, and the Hong Kong University of Science and Technology. In 1984-85, I was Harmsworth Professor of American History at Oxford. As my curriculum vitae, attached as Appendix A, shows, I have published three books and edited another, in addition to 47 scholarly articles, 86 book reviews, and 27 entries in reference works. In addition to my teaching, I have given 80 talks at universities and 50 at scholarly conventions. My work has focused on minority voting rights, educational discrimination, race relations, the legal history of all of the foregoing subjects, political history, and quantitative methods. I was editor of the journal *Historical Methods*, which specializes in interdisciplinary and quantitative history, from 2000 through 2012. My doctoral dissertation and first book, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974), was the first comprehensive study of the subject. Termed “the definitive monograph on the establishment of the one-party system in the postwar South” by the late David Donald of Harvard and, in the *Harvard Law Review*, as “still magisterial,”¹² *Shaping* concerned the connection between party politics and the disfranchisement of African-Americans and poor whites in the late 19th and early 20th century South. My 1999 book, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction*, was co-winner of the annual Lillian Smith Award of the Southern Regional Council for the best book on the South and co-winner of the annual Ralph J. Bunche Award of the American Political Science Association for the best scholarly work in political science which explores the phenomenon of ethnic and cultural pluralism. One of my

¹² Richard H. Pildes, “Foreword: The Constitutionalization of Democratic Politics - The Supreme Court 2003 Term,” 118 *Harvard L. Rev.* 28 (2004), 60, n. 139.

most recent articles, “The Strange, Ironic Career of Section Five of the Voting Rights Act, 1965-2007,” published in the *Texas Law Review*, is the first comprehensive history of the Voting Rights Act’s first 42 years. Another, “Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in *Shelby County*?” introduced the largest data base of voting rights cases and administrative actions yet compiled, covering the U.S. from 1957 through 2006. It has now been extended through 2020 and is employed in an as-yet unpublished paper. Among my recently-published articles is a 9000-word entry on “Voting Rights” for the *Oxford Handbook of American Political History*.

9. I am being compensated at \$400 per hour for my work on this case. My compensation is not contingent on or affected by the substance of my opinions or the outcome of this litigation. A list of my publications in the previous 10 years and my testimony during the previous 4 years appear as part of my *Curriculum Vitae* in Appendix A. The facts and data that I considered in forming my opinions are identified in the citations in this report.

10. I have previously testified or consulted in 22 state court cases (in Alaska and California) and 39 federal court cases concerning voting rights or redistricting, at least 11 of which have involved the “Senate factors” under Section 2 of the Voting Rights Act and 29 of which have involved discriminatory intent. (Some involved both.) Many cases in which I testified, such as the key case of *City of Mobile v. Bolden*,¹³ concerned whether at-large systems of voting were adopted or maintained with a racially discriminatory intent and/or whether they had discriminatory effects. Others, such as *Garza v. County of Los Angeles Board of Supervisors*,¹⁴ involved questions of intentional “racial gerrymandering.” In some cases, such as the 2003 Texas “re-redistricting” case, *LULAC v. Perry*,¹⁵ the sources of my testimony were primarily qualitative. In others, such as the 2002 California state redistricting case, *Cano v. Davis*,¹⁶ the sources of my testimony were primarily quantitative. My most recent testimony includes testimony in two Florida cases, *Jones v. DeSantis*,¹⁷ and *Williams v. DeSantis*, which was settled before trial. I testified in *Florida Rising Together v. Lee* in February, 2022. I testified about both intent and effect in the Section 2¹⁸ and Section 5¹⁹ Texas redistricting cases and the 2012 Texas voter identification case,²⁰ the 2014 North Carolina photo identification and election law case,²¹ and an at-large elections case in Santa Monica, California that involved both California Voting Rights Act and intent claims.²² I have testified or consulted, often producing written reports on racially polarized voting, in at-large election cases under the California Voting Rights Act in Modesto, Hanford, Tulare County, Compton, Palmdale, Santa Clarita, the Santa Clarita Community College District, Santa Barbara, Highland, Rancho Cucamonga, Fullerton, the

¹³ 446 U.S. 55 (1980), on remand 542 F.Supp. 1050 (S.D. Ala. 1982).

¹⁴ 918 F. 2d 763 (9th Cir. 1990).

¹⁵ 548 U.S. 399 (2006).

¹⁶ 211 F. Supp. 2d 1208 (C.D. Ca. 2002).

¹⁷ 462 F. Supp. 3d 1196 (N.D. Fla. 2020), rev’d sub nom. *Jones v. Governor of Fla.*, 974 F.3d 1016 (11th Cir. 2020).

¹⁸ *Perez v. Abbott*, No. 5:11-cv-360, 2017 WL 962947 (W.D. Tex. Mar. 10, 2017) (three-judge court).

¹⁹ *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2885 (2013).

²⁰ *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2886 (2013).

²¹ *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

²² *Pico Neighborhood Assn. v. City of Santa Monica*, BC616804 (Superior Court, Los Angeles County, 2019), under appeal.

Fullerton School District, Banning, West Covina, Arcadia, Santa Clara, San Marino, West Sacramento, Carson, and the Ramona Unified School District.

11. I have testified twice before subcommittees of the U.S. House Judiciary Committee on voting rights, most recently in “Testimony of Professor J. Morgan Kousser Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary. Legislative Proposals to Strengthen the Voting Rights Act, Oct. 17, 2019, <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>. In H. Rept. 116-317 *Voting Rights Advancement Act of 2019*, at 53, available at <https://www.congress.gov/congressional-report/116th-congress/house-report/317/1?q=%7B%22search%22%3A%22Voting+Rights+Advancement+Act%22%7D&r=3&overview=closed>, the subcommittee referred to my testimony as “compelling and persuasive.”

IV. Summary of Major Findings

12. The history of racial and ethnic discrimination in Texas, particularly discrimination in election laws, is long and deep, and it has demonstrably continued through the passage of S.B. 1. As a slave state, Texas seceded, and although it avoided much fighting during the Civil War, it only reluctantly ended slavery and once it did, it wrote a new Black Code in which freed persons had no rights to vote, hold office, serve on juries, testify against whites, attend schools supported by white taxes, or travel with whites on first-class railroad cars. Unlike whites, Blacks were required to sign labor contracts, and the whole family had to work. Reconstruction gave freedmen more rights – voting, testimony, jury and militia service, state-supported schools, an equal right to contract – but protection of those rights was often weak. Although the poll tax was not made a prerequisite for the suffrage until 1903, Texas political leaders expressed deeply racist attitudes, the father of the basic Texas election law, Alexander W. Terrell, characterizing the fifteenth amendment as “the political blunder of the century.”

13. The movement for suffrage restriction in Texas in the late 19th and early 20th century conforms to the general southern pattern: it proceeded incrementally, in small steps, such as the passage of registration and secret ballot laws applied to what were then considered large cities, in 1891. And when the final step came – in 1903 in Texas, with the passage of a poll tax and a local option white primary – its effects were larger than the individual effects of separate provisions would likely have been. The whole was greater than the sum of its parts. This history has lessons that may be applicable to S.B. 1.

14. In an instructive contrast to the scanty evidence of voting fraud in the 21st century, fraud in the 1902 referendum that adopted a poll tax suffrage restriction was blatant, as Black votes were counted as though they had favored disfranchisement. When in the 1920s and 30s, Black lawyers began to challenge the white-only primary in Texas, the State adopted transparent dodges, shifting the responsibility for the explicit racial discrimination from the State to the Democratic Party Executive Committee to the Democratic State Convention until in the fourth iteration, the U.S. Supreme Court finally called a halt to the charade.

15. Governmental policies in other areas also systematically discriminated against Blacks and Latinos. Black students were segregated into inferior schools explicitly because of their race, and Latinos were segregated on the grounds of language differences, migrant worker status, or alleged differences from Anglos in the way they learned, a “fact” that meant segregated schools were good for them. Texas public schools remained almost completely segregated for years after *Brown*, school districts adopted policies to ensure that they remained so well into the 1970s, and even now, *de facto* segregation is widespread and school districts that predominantly serve Blacks and Latinos are unequally funded.

16. Racial intermarriage was banned in Texas beginning in 1838, and even though allowed by a court decision in 1877, the ban was reinstated by law in 1881 and continued until after the *Loving* case in 1967. Railroad segregation became mandatory in 1891, and segregation in all public accommodations continued until the post-*Brown* legal decisions. Dallas provided for residential segregation block by block in 1916, and the law remained on the books there and

statewide after 1927, even though the U.S. Supreme Court had ruled a similar law in Louisville, Kentucky unconstitutional in 1917. A 1915 state law was interpreted to ban integration in swimming pools.

17. Texas was not a “covered jurisdiction” under Section 5 of the Voting Rights Act as it passed in 1965. When the Texas poll tax law was declared unconstitutional by a federal court in 1966, Texas quickly passed a state constitutional amendment that required annual voter registration, which a federal court struck down in 1971. Another discriminatory device that Texas used was at-large elections in areas with large, but not majority Black and Latino populations. At-large legislative elections in all of the state’s major cities were struck down by federal courts, including the U.S. Supreme Court, in the 1970s. When these and other examples of persistent political discrimination attracted the attention of Congress, Texas quickly cooked up a “Texas Voting Rights Act” in an attempt to head off federal regulation, but pro-civil rights congressional leaders were not fooled, and amendments to the Voting Rights Act brought Texas under Section 5 in 1975. In response, Texas passed S.B. 300, requiring a purge of the voting rolls and a re-registration of every voter, but before the law could be put into effect, the U.S. Department of Justice refused to preclear it under Section 5.

18. The application of Section 5 exposed discrimination in Texas to the light of the law. From 1965 through 1974, minorities won only 10 voting rights cases in Texas. After the expansion of the coverage scheme of Section 4 in 1975, they were successful in 115 instances from 1975 through 1979. Four of the cases in the first decade of the Voting Rights Act in Texas involved Latinos. Sixty of the Texas cases in the five years after the 1975 expansion concerned Latinos. From 1957, when Congress passed the first modern federal voting rights statute, through 2020, nearly a quarter of the voting rights lawsuits, settlements of lawsuits, and objections to discriminatory laws or practices in the United States as a whole concerned Texas – 67% more than in any other state.

19. A few recent examples show that racially discriminatory election laws continue to be passed in Texas. The 2011 voter ID law was ruled to have a discriminatory effect and had to be significantly altered. A purge of supposed non-citizens on the voting rolls in 2019 was found to be so flawed and discriminatory that it had to be scrapped entirely. Every statewide redistricting in Texas since 1971 has been found violative of either the Voting Rights Act or the 14th and 15th amendment, or both. Ninety-six percent of the 1021 voting rights infractions from Texas over the 1957-2020 period involved local jurisdictions. At-large elections in 358 jurisdictions – city councils, school boards, utility districts, etc. – were eliminated as a result of legal action or threatened legal action, enabling minorities finally to be elected. Racial gerrymandering was alleviated in 193 instances. Another 147 cases involved polling place changes, voting materials available only in English, or other instances of “vote denial.” Voting rights laws, including Section 5 before 2013, exposed racial discrimination in local governments throughout Texas.

20. If the past is prologue, Texas’s deep, continuing history of racial discrimination in election laws and procedures should create a rebuttable presumption that a new law might well have a discriminatory intent and/or effect.

21. In October, 2020, Texas newspapers reported a political science study that found that it was harder to vote in Texas than in any other state and that Texas election laws, compared to those in other states, had become much more restrictive since 1996. This fact provides a baseline for S.B. 1. Its effect should be measured against a starting point that was already at the most restrictive level.

22. If Texas had changed its election laws to adapt to population changes, it would have moved in the opposite direction, modernizing the laws to accommodate a doubling of the population since 1980. By 2020, nearly a third of Texas's population lived in its ten largest cities, and the state boasted three of the ten largest cities in the U.S. Service and financial industries operated at 5G speed, but the state had no online voter registration. While other states, red, as well as blue in political leanings, were allowing busy citizens to choose to vote by mail, Texas tried to force them into sometimes hours-long lines at the polls, even during the greatest pandemic in a century. In most small towns and rural areas, in-person voting would not create jammed polling places. In metropolitan areas, the situation might be quite different – a consideration that might suggest the necessity for local control.

23. Two other demographic trends may explain why Texas's election laws became comparatively more restrictive. In 1980, 65.7% of the state's population was non-Hispanic white; in 2020, 41.2%. The Latino population grew from 21% to 39.7% over the same period. Although the Black population grew only from 12 to 12.9%, the Asian population rose from 0.8% to 5.2%. The history of Texas shows that election laws have been used to discriminate against racial and ethnic minorities. This suggests that the correlation between more restrictive laws and a growingly minority population might be causal.

24. Furthermore, the increasingly minority population is much more urbanized than the non-Hispanic white population. The populations of the state's 10 largest cities are only 28.4% non-Hispanic white, while the rest of the state is 44.7% non-Hispanic white. In Texas, any tightening of restrictions on election laws that affects cities more than sparsely populated areas will have a larger effect on people of color than on Anglos.

25. Two previous laws concerning "absentee ballots," H.B. 54 in 2003 and S.B. 5 in 2017, contrast sharply with S.B. 1. They were responses to specific incidents of organized ballot collection in Dallas City Council races, fraud that was exposed under existing laws, after which the laws were further tightened, so that there was little need for further regulation. By contrast, S.B. 1 did not respond to any specific situation, but just to vague and clearly exaggerated charges of illegality, and its regulation was so confusing and restrictive as to have the potential, already realized in 2022, to disfranchise citizens who had every right to vote and no intention to commit fraud. In addition, in 2017, S.B. 5 repealed a two-month-old law, H.B. 658, that sought to mandate temporary polling places at all residential care homes, which would both expand the rights of the disabled to vote and ensure against the possibility that someone might pressure frail residents and collect and deposit their votes. If the legislature was really concerned about fraud, why was this law, which had bipartisan support, repealed?

26. The bitter struggle for a photo ID law that took place over four legislative sessions from 2005 to 2011 provides a close parallel and a prequel to that over S.B. 1. From 2002 through 2008, there was only one conviction in the state for voter impersonation, out of 29 million votes cast in primary, general, and special elections. Nevertheless, Republicans rallied their partisans in the electorate to support increasingly narrow photo ID laws by making claims of vast voter fraud conspiracies, often explicitly pointing to “illegal aliens” as the perpetrators and always designating Democrats as the beneficiaries. Democrats vociferously attacked the laws, led by minority legislators who charged that the bills were intended to disfranchise minorities, who were less likely to possess the particular IDs required by the law. Republicans were so eager to pass the laws that they shattered longstanding rules in both houses of the legislature in attempts to pass photo ID. Minority Democrats were so concerned about the effect of such laws on their constituents that they prepared to filibuster in the Senate, carried out a multi-person “chub” filibuster in the House, fled a sickbed, and even endangered one senator’s life when he left his hospital bed to oppose a photo ID bill. After the Tea Party landslide election of 2010, Republicans pushed through S.B. 14, having so inflated Republican voters’ estimates of the extent of voter impersonation that, as a former author of voter ID legislation put it, “every Republican member of the legislature would have been lynched if the bill had not passed.”

27. From 2002 through 2021, there were 108 convictions, settlements, and closed cases²³ of voter fraud by the Texas Attorney General’s office, compared to 86,890,467 votes in statewide elections – a proven fraud rate of one ten-thousandth of a percentage point. Nevertheless, State officials, legislators, and Republican activists repeatedly made wildly inflated claims of voting fraud, which they never came close to proving. For example, in 2005, then-Attorney-General Greg Abbott launched a \$700,000 public investigation into what his press release called an “epidemic of voter fraud,” promising “a dramatic increase in indictments for voter fraud.” The result after 4 years was 3 convictions, and far from touting his accomplishment, Abbott refused to release the records of his investigation in response to a public records act request by the *Dallas Morning News*. All of the people that the Attorney General’s office prosecuted were Democrats, most of them Latinos or African-Americans. In 2021, Attorney General Ken Paxton spent \$2.2 million on an Election Integrity Unit that closed 3 election cases. At least 72% of the prosecutions of the Unit from 2015 through 2021 were of Black or Latino people. In November, 2020, Lt. Gov. Dan Patrick announced a bounty for proof of voter fraud anywhere in the U.S., promising to pay \$10,000 for each proven instance up to a total of \$1 million. So far, the only publicized payout was to a Pennsylvania Democratic election worker who caught a man voting twice, apparently for Donald Trump.

28. Claims of massive fraud reliably dissolved upon close examination. In 2008, the *Dallas Morning News* investigated a website assertion that 6,000 dead people had voted in Dallas

²³ A “closed case” in this instance apparently means one in which there was some indication of wrongdoing, such as a plea agreement. See Taylor Goldenstein, “Ken Paxton’s beefed-up 2020 voter fraud unit closed 16 minor cases, all in Harris County,” *Houston Chronicle*, Dec. 21, 2020, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/Ken-Paxton-s-beefed-up-2020-voter-fraud-unit-15820210.php>.

County and found that a maximum of 1 person could not be accounted for by clerical errors or mistaken identities. Affidavits about an alleged plot by major Black officeholders in Houston to fabricate and deposit 700,000 fraudulent ballots in the November 2020 election were submitted to the Texas Supreme Court by the Republican Party of Harris County as evidence in a lawsuit aimed at curtailing early in person voting and the ability to drop off ballots before election day. The Texas Supreme Court dismissed the lawsuit without even addressing the affidavits, and the rumored plot was later exposed as completely “made up.”

29. The combination of the miniscule evidence of fraud and the fanatical fight for such measures as photo ID laws suggests that the usual model for legislation, that it is proposed to solve a real problem, is inadequate for such legislation as S.B. 14 and S.B. 1. As the *Austin American-Statesman* put it, S.B. 1 had a two-fold purpose, “to stay in power by making voting harder for people who tend to support Democrats . . . and to energize a GOP base . . .” The evidence suggests, in other words, that the bills were proposed not as a response to fraud, but so that a myth of fraud by minorities could be purveyed and inculcated, a myth that turned out Republican voters at the same time as the laws discouraged minority voters.

30. The 2018 election results frightened Texas Republicans. In the 2014 midterm elections, Texas had the lowest turnout of any state in the country, and Republicans prospered. In 2018, turnout in Texas was the highest in a midterm election in the state since 1970, and Democrats picked up two seats in the state senate, 12 in the state house, 2 in Congress, and lost many unexpectedly close races for each body. Republicans responded by trying to purge 95,000 voters as potential non-citizens, tweeting loudly that “58,000 non-citizens voted in Texas,” only to find that the list used by the Secretary of State’s office was out of date and full of flaws. Sued by civil rights organizations, Acting Secretary Dave Whitley settled, withdrawing the list and promising to reform his office’s procedures.

31. Republicans also proposed an election bill, S.B. 9, during the 2019 legislative session, containing provisions related only by the fact that all discouraged voting or penalized mistakes made during the voting process. Critics began by noting that the hodgepodge bill as a whole was not a response to any particular incident or concern, as H.B. 54 and S.B. 5 had been.

32. In 2017, Rose Ortega, born in Mexico and a permanent U.S. resident, had been sentenced to 8 years in prison for voting. In 2018, a Black woman, Crystal Mason, had been sentenced to 5 years for casting a provisional ballot when she was on supervised release after serving time on a federal tax charge. Both cases were widely publicized, and many questioned whether they should have been prosecuted or given such stiff sentences. The first section of S.B. 9 settled the question for the future by quadrupling penalties for mistakes on registration forms or attempting to vote illegally and removing the need for prosecutors to prove that the mistakes were intentional or that the vote actually counted.

33. Another provision constrained counties with populations of a million or more that used county-wide vote centers for early voting to distribute them geographically in proportion to the number of registered voters in each state representative district. Leaders of those counties

pointed out that this would mean fewer vote centers and longer lines in areas of high minority concentration, because the proportion of registrants to population was lower in minority districts.

34. Other provisions required disabled voters to swear that they were unable to enter a polling place without needing personal assistance or injuring their health, an unsettling oath to take without knowing the exact layout of a polling place. Those who assisted disabled voters with curbside voting had to sign a similar oath about any non-family members whom they were assisting. Within polling places, the bill entitled poll watchers to be present at the voting station of anyone who needed assistance to vote and to inspect the ballot before it was deposited to make sure that the choices on it accorded with the voter's wishes. Sen. Bryan Hughes, the chief sponsor of 2019's S.B. 9, as well as 2021's S.B. 1, denied that such provisions could have a "chilling effect" on voters. Spokespersons for people with disabilities and those who believed in secret ballots disagreed.

35. Other sections of the bill authorized private or official "sting" operations by exempting people from prosecution if they were investigating "a weakness in the electoral process" and enabled Texas to join a much-criticized multi-state "Crosscheck" program that matched the names on voting rolls in different states.

36. The only section of the bill that received bipartisan support provided for paper backup on direct recording electronic voting machines, but this section was dropped from the bill in the House. In the end, the bill was abandoned in the chaotic final days of the legislative session, apparently as a result of a deal between Democrats, who bitterly opposed S.B. 9, and House Republican leaders, who swapped S.B. 9 for Democratic support for a bill slowing the growth of property taxes.

37. S.B. 9 had nothing to say about voting by mail or early voting. Those issues would be added in S.B. 1 as a result of the experiences of Texas voters during the 2020 "Covid election." Controversies over accommodations that urban voting officials sought to make in order to enable their predominantly minority citizens to vote safely during the pandemic and staunch opposition to those measures by Republican activists and officials often overshadowed other issues during the 2020 election in Texas.

38. By election day in 2020, Texas had recorded 918,336 cases of COVID-19 and nearly 20,000 deaths from it, according to the Texas Department of Health. From March to September, the case rate was higher in the six largest counties than in the rest of the state. From May on, case rates were higher for Blacks and Latinos than for non-Hispanic whites. Through election day, the proportion of the Black population who died from Covid was 11% higher than that of the non-Hispanic white population. The proportion of deaths among Latinos was 83% higher than that of non-Hispanic whites. As election day approached, the number of new cases was rising steeply. Polling found that as early as April 2020, opinions on the seriousness of Covid and willingness to expand voting by mail to people of all ages to keep the public safe during the Covid crisis varied dramatically by ethnic group and even more so by partisanship. Blacks and Latinos were much more concerned than non-Hispanic whites, especially white Republicans,

about the pandemic and much more in favor of allowing everyone to vote by mail to cope with the epidemic.

39. At the beginning of the 2020 primaries, 33 states and the District of Columbia allowed “no-excuse absentee voting,” and 13 more states allowed voting by mail during the primaries and 11 during the November general election because of Covid. Only 5 states failed to offer voting by mail to every voter during 2020. Texas was one of those 5 states. Many states mailed applications for vote by mail or actual ballots to all voters during 2020. Texas prohibited either, even to those over 65 or the disabled, who were the only registered voters that the state allowed to vote by mail in 2020.

40. Urban election officials and civil rights organizations sought to contain the spread of the pandemic and allow people to vote without endangering themselves through a variety of means that were not explicitly barred by the Texas election code:

- allowing anyone who believed that they might jeopardize their health by voting in person to claim a disability and vote by mail;
- mailing absentee ballot applications to everyone with instructions on who was eligible to use them, according to a Texas Supreme Court decision;
- establishing multiple drop boxes where people could drop off absentee ballots after showing proper identification;
- reinstating straight-ticket voting to reduce the time anyone would be exposed to possible infection while waiting in line.
- expanding the hours of voting, including polls open for 24 hours on the last two days of early voting;
- expanding access to curbside voting;
- allowing people to cast in-person votes at drive-thru early vote centers;
- and increasing the number of polling places, including vote centers at sports arenas.

41. All but the last of these mechanisms were contested in court, often in both state and federal courts, and only the last four survived attack. The only expansion of voting possibilities put in place by the State was the extension of early voting by a week through a proclamation by Gov. Abbott. S.B. 1 banned every one of them explicitly.

42. Despite Donald Trump’s easy win in Texas, controversy over the election did not end on election day. In Travis County, where some partisan poll watchers reportedly hovered over voters, refused to wear masks or keep social distances from election workers in the small counting rooms, and screamed in the faces of election workers, several watchers contended that they were not allowed to move freely enough in the rooms where votes were being counted so that they could see all operations and hear every conversation. The poll watchers then complained to the Secretary of State, who passed on their complaint to the Attorney General, who indicted the Travis County Clerk for a criminal offense punishable by a one-year jail term, moving the case to an adjacent county thought to be more conservative. The Clerk, Dana DeBeauvoir, reached a settlement with the poll watchers, but the Attorney General persisted in his indictment. To DeBeauvoir’s relief, the Williamson County grand jury refused to indict her.

In Houston, as well, poll watchers had been disrupting voting and counting since at least 2009, and in fact, incidents of poll watcher intimidation of voters in Texas stretched back to the 1920s and intensified with the national Republican Party's "Operation Eagle Eye" in the 1960s and 70s. S.B. 1 would guarantee poll watchers unfettered movement and strengthen the penalties to which election officials were subject if they interfered with the watchers.

43. Besides the normal post-election audits, Texas authorized a special audit of four urban counties in late 2021. When it announced completion of the initial phase of the audit on New Year's Eve, the Secretary of State found no significant discrepancies with the initial vote count. Just like every other search for "massive vote fraud" in recent Texas history, it found none. In fact, true vote fraud believers were forced to rely on scattered examples of lone perpetrators whose misunderstandings of their rights had resulted in considerably longer jail terms than that received by an associate of Rudy Giuliani who committed a much more serious violation of election law by soliciting a \$1 million contribution from a Russian oligarch and funneling it to Republican candidates in Florida.²⁴ Critics of the Texas prosecutions noted that the best advertised examples of election law violators in the state, such as Rose Ortega and Crystal Mason, were Latino and Black.

44. Before the 2020 elections, Republicans had reportedly made more use of absentee voting than Democrats, and the Texas State Legislature had made no serious recent effort to regulate voting by mail. But there was a surge in absentee voting, in Texas as in the rest of the country, in 2020, especially among Democrats, and almost certainly among minorities. This for the first time created an incentive for Republicans to restrict absentee voting, and they did so in S.B. 1.

45. Despite Republican victories in the 2020 elections, Republican legislators introduced almost a dozen election laws in the 2021 regular session of the legislature, several of which were folded into H.B. 6 or S.B. 7 or finally, in the called sessions of the legislature, into S.B. 1. Several bills constrained the leeway of elections officials in heavily minority large cities, leeway which metropolitan county clerks had used to protect voters in their counties from the ravages of Covid by distributing applications for absentee ballots, opening drive-thru sites that allowed ballots to be deposited before election day, and leasing major garages and tents so that people could keep socially distanced while voting early. Others stiffened sentences for election officials who interfered with partisan poll watchers' ability to observe every facet of the voting process.

46. S.B. 1 was not a response to fraud. In a statement quoted repeatedly during debates over the 2021 omnibus election laws, Elections Division Director Keith Ingram testified before the Legislature that the 2020 election in Texas had been "smooth and secure," and he praised county election officials for their "hard work and "creativity."

47. Nor was S.B. 1 an attempt to restore the electorate's "trust in the electoral process," for more than three-quarters of both Democrats and Republicans in the state agreed that election results in Texas were either very or somewhat accurate. Leaders did not respond even to Republican

²⁴ Harper Neidig, "Giuliani associate sentenced to a year in prison in campaign finance case, *The Hill*, Jan. 21, 2022, <https://thehill.com/regulation/court-battles/590834-giuliani-associate-sentenced-to-a-year-in-prison-in-campaign-finance>.

voters, only 2% of whom made “election integrity” their top priority for the 2021 Legislative session before it met. At the time, in February, 2021, 49% of Republicans in the state thought election laws should stay the same or be less strict, compared to 46% who thought they should be more strict. The shift in mass Republican opinion came only after S.B. 1 had been widely discussed, indicating that Republican state legislators were shaping public opinion, not responding to it.

48. S.B. 7 and H.B. 6, the two omnibus election bills in the regular session of the 87th Legislature, were partly based on 2019’s S.B. 9, but more on attempting to restrain practices employed in the 2020 election to make voting safer in a pandemic, practices that produced a surge in turnout and were especially employed by minority voters in metropolitan areas, particularly Harris County. The restrictions on assistance to voters with disabilities or who had less facility than necessary to vote with the English language seemed designed to depress their turnout, even though there were only scattered instances of fraud by assistants in in-person, mail, or curbside voting. There were almost no known instances of fraud in 2020 in drive-thru, extended hours, or even absentee voting. Because drop-off boxes, surveilled in person or by video cameras or just sealed and frequently emptied, had been banned even in 2020, there was no evidence of fraud with drop-off boxes, either. While there were widely reported instances of interference with election processes by partisan poll watchers, S.B. 7 and H.B. 6 extended their authority and threatened election officials with fines and prison terms for interfering with the “free movement” of poll watchers. Election officials were also threatened with prosecution if they distributed absentee ballot request forms or cooperated with third-party voter registrations like the League of Women Voters to do so. Again, there were no instances of fraud in 2020 that required such restrictions.

49. In their initial forms, one or the other of the two bills required those seeking absentee ballots on the basis of disability to document their disabilities with letters from doctors or documents from the Social Security or Veterans’ departments of the federal government. S.B. 7 also threatened to close polling places in metropolitan areas, with those in minority Democratic areas being closed at much greater rates than those in Anglo Republican legislative districts. Both sought to strengthen the ban on straight-ticket voting enacted in 2017. In 2018, straight-ticket voting in very down-ballot races for judgeships in Harris County had resulted in the election of 17 Black female judges.

50. The consideration of S.B. 1 and its predecessors was marred by numerous irregularities. Public comment was hampered by the refusal to allow virtual testimony, by calling snap hearings or canceling hearings on short notice, by repeated marathon, all-night hearings and debates, and by ignoring legislative rules. Because Republicans lost a state senate seat in 2020, the majority needed for the legendarily collegial state senate was reduced from 19 to 18, which allowed Republicans to consider and pass legislation without a single Democratic vote in that body. Completely or substantially revised bills were presented to committees or on the floor without the notice called for in legislative rules.

51. Nonetheless, the bills met with major criticisms centering on their likely effects on the right to vote of minority and disabled citizens. Critics produced statistics demonstrating the

widespread use by minorities of means of voting that were banned or severely restricted by the bills. Proponents, on the other hand, refused to investigate or acknowledge the likely discriminatory effects, disingenuously claiming that since race was not mentioned in the laws, the laws could have no discriminatory effects. Critics quoted statistics on the infinitesimal amounts of proven fraud in Texas elections; proponents hypothesized in the air or repeatedly cited a few minor examples of fraud. Sponsors of the bills pled ignorance about the long and dense history of intimidation of minority voters by poll watchers; opponents educated them. Critics patiently explained how assistance to people with disabilities or difficulty reading ballot language actually worked; proponents of the bills argued that certain voters needed privacy from their chosen assistants, but none from partisan poll watchers, who in early forms of the bills were allowed to videotape voters who needed assistance while voting and post the videos on social media.

52. The legislative debates on the bills focused on racial effects and proxies for racial effects, such as the concentration on Harris County, the largest and most ethnically diverse county in the state. When major business leaders opposed the bills as discriminatory, state leaders from the governor to the chair of the House Elections Committee threatened the business leaders with retaliation. The same politicians bitterly denounced opponents of the bills, terming them “race baiters.” From time to time, proponents admitted the purposes of some provisions, such as when Lt. Gov. Dan Patrick stated that he opposed drive-thru and 24-hour voting because they made it more difficult to recruit poll watchers. The Lt. Gov. and others ignored data showing that banning these practices would disproportionately disadvantage minorities. Peculiarly for anti-government Republicans, they treated people with disabilities as incapable of making choices for themselves, needing intrusive nanny-state protection from friends and relatives who would dictate their votes. Proponents who habitually pled local control against federal initiatives prized statewide uniformity of voting hours and practices, even when it was pointed out to them that unless huge multiethnic counties could design their election systems locally, racial minorities would be disproportionately disadvantaged.

53. Democrats at first won concessions from House Republicans, softening H.B. 6 by, for instance, leaving out bans on drive-thru and extended hours voting. But after both houses passed widely different versions of the bills, a conference committee, without consulting its Democratic members, produced a bill triple the size of the originals and containing radical measures that were not part of the bills passed by either house. Most important, because most lasting, was a section requiring applicants for absentee ballots and those who sent in completed ballots to include a driver’s license or state ID number or the last four digits of the voter’s Social Security number. These numbers had to match numbers on file with the state, though in fact, the state might not have them. The revised bill also changed the standard of proof in election contests, threatening to make them more frequent. And the hours of poll opening for early voting changed such that it would be virtually impossible for Black churches to conduct “Souls to the Polls” turnout operations.

54. House Democrats exploded and managed a late-session walkout, breaking the quorum and temporarily killing the bill. But Gov. Greg Abbott called a special session, primarily to consider

S.B. 1. Even though Republicans deleted a small number of the most egregious provisions, Democrats again broke the House quorum, this time flying to Washington, D.C. to agitate for federal election reform bills. Neither stratagem worked, and when Democrats finally returned for the second special session, Republicans pushed through an only slightly altered S.B. 1 over an epic 15-hour filibuster by the Latina chair of the Democratic Party in the Senate, Carol Alvarado. Democrats offered a strikingly different bill that honored the state's first Black member of Congress since Reconstruction, Barbara Jordan, in order to contrast the desire to expand voting opportunities, particularly for the minority voters that most of them represented, with the Republicans' push to constrict such opportunities for the same minority voters.

55. Democrats pointed out again and again that fraud was unproven and that many of the measures that made up S.B. 1 would not deter determined fraudsters, anyway. For example, banning drop boxes, drive-thru, or extended hours of voting would not stop some evil "ballot harvester" from collecting ballots and depositing them in mailboxes.

V. History of Discrimination in Texas

A. Slavery, Reconstruction, and Disfranchisement

56. It is merely a truism to say that racial discrimination has been a prominent feature of the history of Texas. Texas was, first of all, a slave state, and as the recent national celebrity of Juneteenth reminds us, the state's slaveowners not only seceded to protect the peculiar institution, but were also most reluctant to give it up. Like other rebel states, Texas rejected the Thirteenth and Fourteenth Amendments, and its first post-Civil War legislature and constitutional convention denied Blacks the right to vote, hold office, or serve on juries, and the all-white bodies imposed upon them a distinctly inferior status. To ensure that the status of slave women and children changed as little as possible, Texas's post-Civil War Black Code mandated that labor contracts, which were mandatory for Blacks, but not whites, "shall embrace the labor of all the members of the family able to work." Schools for freedmen and freedwomen during Presidential Reconstruction (1865-66) were not only segregated, but also supported only by the meager taxes and fees paid by Blacks. Under this regime, Blacks in Texas could not testify in court cases involving whites, serve in the state militia, or ride in first-class railroad cars with whites.²⁵

57. When Radical Reconstruction was imposed on Texas by the national Reconstruction Acts of 1866-68, Blacks were granted many more rights – for instance, jury service, voting, and officeholding. The comprehensive Black Code was suspended. But Radical Reconstruction in Texas was very brief, ending by 1873, and even though the percentage of the population that was Black was much lower in Texas than in other southern states, and thus, posed less of a threat to white supremacy, the racially-motivated statutes in post-Reconstruction Texas did not differ

²⁵ Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 199-201, 207, 268-69; Elizabeth Nix, "What is Juneteenth? Juneteenth commemorates the effective end of slavery in the United States," *History* (updated June 17, 2021), <https://www.history.com/news/what-is-juneteenth>; Merline Pitre, "A Note on the Historiography of Blacks in the Reconstruction of Texas," *Journal of Negro History*, 66 (1981-82), 340-48.

from those elsewhere in the South. For example, many in the Redeemer Constitutional Convention of 1875 wished to make payment of the poll tax a requirement for suffrage. As the *Houston Telegraph* put their views succinctly, “Must the low, groveling, equal-before-the-law, lazy, purchasable Negro, who pays no taxes, have the privilege of neutralizing the vote of a good citizen and taxpayer?”²⁶

58. Nevertheless, there was enough opposition to the poll tax from the representatives of poor whites, as well as Blacks, that the poll tax was not made a voting prerequisite until 1903, after the Greenback, Union Labor, and Populist movements, as well as the Republican Party, had been at least temporarily vanquished in the Lone Star State. The legislative sponsor of the 1903 poll tax law, Alexander Watkins Terrell, had first introduced a poll tax bill in the state legislature in 1879. Terrell personified Bourbonism – he had “learned nothing and forgotten nothing” from the Civil War, as the French Bourbons were said to have learned nothing and forgotten nothing from the French Revolution. In particular, he referred to elections not controlled by “intelligence and property” as “the most terrible enemy” and characterized the Fifteenth Amendment as “the political blunder of the century.” He also opposed any government support for elementary education.²⁷

59. Terrell was not atypical of white Texas politicians of the era. In 1904, U.S. Sen. Joseph Bailey declared that “I believe more in the purity of the Anglo-Saxon race than in the principles of democracy.” Bailey did believe in government support for white education, but he proclaimed that “nothing in the world could be more supremely foolish than to spend the people’s money in trying to educate a race of menials. . . lest I be misunderstood, I have no prejudice against the negro in his place, but I think his place is the white man’s kitchen and not the white man’s dining room.”²⁸ When referring to Blacks, newspapers used such nouns as “beast,” “fiend,” or “brute,” and such adjectives as “insolent,” “idle,” and “trifling,” and they often approved public burning or hanging as punishments for what they characterized as Black men’s proclivity to rape white women. When a crowd of 5000 in Dallas in 1910 took Allen Brooks from the Dallas County courthouse, where he was under indictment for assault, and publicly hanged him, the respectable metropolitan *Dallas Morning News* refused to condemn the lynching, explaining that many in the mob “are moved by their contempt for the delays, reversals, and failures of courts.”²⁹ Lynching, the newspaper implied, was the fault of judges, not mobs.

B. Lessons from the First Disfranchisement for the Analysis of S.B. 1

60. There were two interesting turn-of-the-20th-century parallels to more recent struggles over election laws in Texas. First, the legislature in 1891 passed a registration and secret ballot law

²⁶ *Houston Telegraph*, Oct. 10, 1875, quoted in J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, Connecticut: Yale Univ. Press, 1974), 200.

²⁷ All quotations and other information on the post-Reconstruction order may be found in Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, Connecticut: Yale Univ. Press, 1974), 196-209.

²⁸ Bailey quoted in Bruce A. Glasrud, “Child or Beast?: White Texas’ View of Blacks, 1900-1910,” *East Texas Historical Journal* 15 (1977), 38-44, at 38-39.

²⁹ Glasrud, “Child or Beast?” at 40 -41.

that only applied to what were then considered large cities in the state. Only election officials, not friends or advisors, were allowed to provide any assistance to those who were illiterate in English. The most fervent proponents of the secret ballot opposed allowing any assistance whatsoever to illiterates because “the object of the bill could hardly be accomplished” if illiterates could vote. Because in 1890, 60.6% % of Black males over 20 in Texas were illiterate, compared to only 5.1% of their white counterparts,³⁰ the secret ballot was effectively a literacy test that very disproportionately affected Black males. Similarly, SB 1 singled out procedures such as drive-thru, 24-hour voting, and drop boxes that had been employed primarily in large, heavily minority cities, which obviously constrained a county with a population of a million much more than one with a population of 25,000. And S.B. 1 put additional constraints on anyone who needed assistance to vote.³¹

61. Second, the 1902 referendum that mandated the poll tax for voting was obviously passed by virtue of election fraud – election officials clearly created fictitious returns – as were disfranchising constitutional amendments in other southern states. Unlike the unproven charges of widespread fraud that 21st century politicians used to justify such laws as S.B. 1, 19th and early 20th century fraud in southern elections, such as the 1902 poll tax referendum, were overwhelmingly obvious and openly admitted. Estimates of Black voting in the Texas referendum suggest that 75% of Black voters were counted as being in favor of making poll tax payment a prerequisite for voting, despite the fact that taxing voting had always been touted as a weapon against their race, or as Terrell had put its purpose with his characteristic brutal racism, “to collect the tax on the wooly scalp.” Fraud in elections has always been most effective as a political tool when wielded by public officials, and at no time in American history was it wielded – against Black Americans – so effectively as in the late 19th century South. White supremacists at the time openly boasted of their partisan and racial use of fraud, as when a former Democratic governor of Louisiana stated that his state’s 1882 election law “was intended to make it the duty of the governor to treat the law as a formality and count in the Democrats.”³² In crucial contests like the 1902 referendum that fundamentally restructured the state’s politics, Texas closely resembled its Confederate sisters. Actual fraud was used in 1902 as a weapon of disfranchisement; unsubstantiated charges of fraud were employed in 2021 for the same purpose.

62. Two patterns in the post-Reconstruction disfranchisement throughout the South that provide an important context for 21st century restrictive election laws held in Texas, as well.³³ First, 19th century suffrage restriction was an incremental process of small steps. Blacks did not stop voting during the 1870s, but continued to vote in substantial proportions until the passage of the 1903 Terrell Election Law. It took 27 years after the 1875 constitutional convention to pass a

³⁰ Calculated from Eleventh Census, Volume 1, Population, Part 2, Tables 3, 41, 46, <https://www.census.gov/library/publications/1895/dec/volume-1.html>.

³¹ One hundred fifty-five of the 254 counties in Texas have populations under 25,000 in 2021. https://www.texas-demographics.com/counties_by_population.

³² Kousser, *Shaping*, at 46, 202-07.

³³ The application of the theme of incrementalism to race relations in the U.S. is discussed most simply in Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, North Carolina: Univ. of North Carolina Press, 1999), 15-16. Facts about Texas in this paragraph are taken from Kousser, *Shaping*, 200-09.

poll tax amendment, and the 1891 registration and secret ballot law was an important step along the way. Second, the poll tax and a provision of the Terrell Law that allowed county committees on each political party to impose additional requirements for voting – enabling them to establish all-white primaries – had a larger impact than either of the provisions would have had if passed separately. They effectively announced a new regime, one where Blacks and any political parties (Republican, Populist) that had previously sought to appeal to Blacks would move from a small role in politics to virtually none at all. To evaluate the intent and effect of election laws in the 19th century, one must take into account both its incrementalism and the observation that the whole effect of a law may be greater than the sum of its parts. These lessons of the late 19th and early 20th century may have applications in the 21st century.

C. Discrimination in Schools and Other Social Spaces

63. Public education had been so scandalously ignored in antebellum Texas that the Republicans who controlled the state during Radical Reconstruction considered the state as “the darkest field educationally in the United States.”³⁴ A continuation of prewar educational practices would have doomed Blacks to a status little better than slavery. But even the 1868 Radical Republican constitution of Texas mandated school segregation. Segregation on railroads was legalized by state law in 1889 and made mandatory in 1891. Racial intermarriage, banned in 1838 and allowed by a legal decision in 1877, was again and finally banned by state law in 1881.³⁵ In 1916, Dallas even provided for residential segregation, block by block. Despite a contrary decision by the U.S. Supreme Court in a Louisville case, the Dallas ordinance remained on the books for 10 years, and a state law in 1927 nominally applied the block by block segregation statewide. Less nominally, a 1915 state law was interpreted as prohibiting integrated swimming pools.³⁶

64. Although there were some legal cases brought by the League of United Latin American Citizens (LULAC) in the 1930s that prohibited classifying Mexican-American children as non-white, the judges allowed school systems to segregate them based on language or migrant worker status, or on the theory that “Mexicans” had systematically different talents than Anglos and should therefore be segregated for their own good. Anglo-ruled school systems generally took advantage of such subterfuges to keep Latinos segregated through the 1940s and into the 1950s.³⁷ LULAC’s victory in the 1948 case of *Delgado v. Bastrop Independent School District* led to a Texas State Board of Education regulation that reaffirmed the segregation of Blacks even as it formally prohibited segregation based on national origin. But surveys by LULAC and the G.I. Forum showed that the segregation of Mexican-American children persisted, whatever State authorities said, and the organizations had to sue again and again in the 1950s. Through the late

³⁴ Frederick Eby, *The Development of Education in Texas* (New York: Macmillan, 1925), 157.

³⁵ The ban, of course, became unenforceable after the U.S. Supreme Court’s decision in *Loving v. Virginia*, 388 U.S. 1 (1967).

³⁶ Bruce A. Glasrud, “Jim Crow’s Emergence in Texas,” *American Studies*, 15 (1974), 47-60. The Louisville case was *Buchanan v. Warley*, 245 U.S. 60 (1917).

³⁷ Ariela J. Gross, “Texas Mexicans and the Politics of Whiteness,” *Law and History Review*, 21 (2003), 195-205; Rogelio Saenz, “The Latino Population of Texas, 1960-2018,” in Robert Brischetto and J. Richard Avena, *Mexican American Civil Rights in Texas* (East Lansing, Michigan: Michigan State Univ. Press, 2021), 53-88, at 56.

1960s, according to one scholar, “Promises were made to end [Mexican-American] segregation, but little was actually done.”³⁸

65. School segregation against Blacks was not abolished in practice in most of Texas until well after *Brown v. Board of Education*.³⁹ As in other southern states, years and years of legal actions were necessary to disestablish the dual school system, and even more to tear down barriers between Anglos and Latinos. After 1954, the State and its local instrumentalities in rural areas racially gerrymandered school districts and established student transfer policies that perpetuated segregation.⁴⁰ It chose school sites, drew attendance zones, assigned faculty and staff, and instituted transfer policies that kept Black, Anglo, and Mexican-American students in Austin and Corpus Christi separated.⁴¹ Inadequate support for schools and inequality across school districts have been recurring and deeply divisive issues in Texas from the 1870s to the present.⁴² But central to school equity issues was always racial inequality. Even though the legal strategy of the plaintiffs in the Edgewood School District eventually stressed wealth, rather than race, in the case that became *San Antonio I.S.D. v. Rodriguez*,⁴³ it was a fact that the Edgewood District was not only poor, but also approximately 90 percent Mexican-American.⁴⁴ Texas’s persistent resistance to equalizing educational spending ought to be seen as in large part a resistance to equalizing educational opportunities by race and ethnicity.⁴⁵

66. Because until 1921, Texas allowed “alien suffrage,” that is, it allowed people to vote who merely filed legal papers indicating their intention to apply for citizenship, many Mexican citizens actually voted in Texas during this period.⁴⁶ After the increased immigration that followed the Mexican Revolution, however, discrimination against Mexican-Americans in Texas increased. As one scholar put it, by the 1920s in Texas,

³⁸ Guadalupe San Miguel, Jr., “The Struggle against Separate and Unequal Schools: Middle Class Mexican Americans and the Desegregation Campaign in Texas, 1929-1957,” *History of Education Quarterly*, 23 (1983), 343-59, quote at 355.

³⁹ 347 U.S. 483 (1954).

⁴⁰ *U.S. v. Texas*, 321 F.Supp. 1043 (E.D. Tex. 1970).

⁴¹ *U.S. v. Texas Education Agency*, 467 F.2d 848, 865 (5th Cir., 1972); *Cisneros v. Corpus Christi Independent School Dist.*, 567 F.2d 142 (6th Cir. 1972).

⁴² Stephen B. Thomas and Billy Don Walker, “Texas Public School Finance,” *Journal of Education Finance*, 8 (1982), 223-81; Billy D. Walker, “Special Report: Texas School Finance Update,” *ibid.*, 10 (1985), 504-16; Allan Odden, “School Finance Reform in Kentucky, New Jersey and Texas,” *ibid.*, 18 (1993), 293-317; Catherine Clark, “Texas State Support for School Facilities, 1971 to 2001,” *ibid.*, 27 (2001), 683-99; Ken Helvey, “Texas,” *ibid.*, 43 (2018), 311-13. As Helvey notes, the Texas Supreme Court ruled on the school funding system seven times between 1984 and 2016.

⁴³ 400 US. 1 (1973).

⁴⁴ Paul A. Sracic, *San Antonio v. Rodriguez and the Pursuit of Equal Education: The Debate Over Discrimination and School Funding* (Lawrence, Kansas: University Press of Kansas, 2006).

⁴⁵ Connections between educational segregation by race and wealth are stressed in many publications. See, e.g., Marta Tienda, “Thirteenth Annual Brown Lecture in Education Research. Public Education and the Social Contract: Restoring the Promise in an Age of Diversity and Division,” *Educational Researcher*, 46 (2017), 271-83. On persistent funding inequality by race, see, e.g., “The Persisting Myth That Black and White Schools are Equally Funded,” *The Journal of Blacks in Higher Education*, No. 22 (Winter, 1998-1999), 17-20.

⁴⁶ See, e.g., Gregg Cantrell, “‘Our Very Pronounced Theory of Equal Rights to All’: Race, Citizenship, and Populism in the South Texas Borderlands,” *Journal of American History*, 100 (2013), 663-90.

White society denied to all but a very few people of Mexican descent such forms of political expression as office holding, voting, and jury service. Whites were much less willing to marry Mexican-descent women than they had been in the nineteenth century. As the Mexican Revolution prompted hundreds of thousands of Mexicans to flee to the United States, local authorities began to practice a more systematized residential and educational segregation. . . . Klansmen paraded through south Texas towns; signs reading ‘No Mexicans Allowed’ were displayed in numerous restaurants and other public accommodations; and municipalities established separate schools for ‘Mexicans’ and ‘whites.’”⁴⁷

D. The White Primary in Texas

67. Perhaps no set of laws or legal cases better captures the strength and resilience of white supremacy in Texas than the waves of legal cases challenging the all-white primary that broke four times over the U.S. Supreme Court from 1927 to 1944. After the Court ruled in *Nixon v. Herndon* that a state law that explicitly banned non-whites from Democratic primaries violated the equal protection clause, Texas repealed the law and allowed the Democratic State Executive Committee to set its own rules banning Blacks. This gambit was then challenged in *Nixon v. Condon*, the second case brought by the NAACP. In *Condon*, the Court refused the gambit and again ruled against the white primary. In a third case, *Grovey v. Townsend*, argued by a pair of private lawyers, however, the Court allowed an effective delegation of voting rules to the Democratic Party’s state convention. Finally, the post-New Deal Court, again in an NAACP case, *Smith v. Allwright*, abolished the white primary once and for all.⁴⁸ The pattern of replacing one discriminatory law or practice with another in the white primary cases was so familiar to civil rights advocates that it helped inspire Section 5, the preclearance section, of the 1965 Voting Rights Act.

E. Texas and the Voting Rights Act, 1965-75

68. Texas was not a “covered jurisdiction” under the initial coverage scheme of Section 4 of the 1965 Voting Rights Act, because Texas had no literacy test, which was part of the definition of the coverage formula. It therefore did not have to submit changes in its election laws for preclearance to the Department of Justice or the District Court of the District of Columbia before the laws could be put into effect, as six southern states and part of North Carolina did. Texas did, however, have a poll tax, which was widely understood to have had a disproportionately disfranchising effect on minority groups.⁴⁹ In 1965, liberals on the Senate Judiciary Committee

⁴⁷ Benjamin H. Johnson, “The Cosmic Race in Texas: Racial Fusion, White Supremacy, and Civil Rights Politics,” *Journal of American History*, 98 (2011), 404-19, quote at 407.

⁴⁸ Details of and tactics in the cases of *Nixon v. Herndon*, 273 U.S. 536 (1927), *Nixon v. Condon*, 286 U.S. 73 (1932), *Grovey v. Townsend*, 295 U.S. 45 (1935), and *Smith v. Allwright*, 321 U.S. 649 (1944) are described in Charles L. Zelden, *The Battle for the Black Ballot: Smith v. Allwright and the Defeat of the Texas All-White Primary* (Lawrence, Kansas: Univ. Press of Kansas, 2004).

⁴⁹ See, e.g., (Former Texas Secretary of State) Bob Bullock to Rep. Barbara Jordan, April 18, 1975, reprinted in “Extension of the Voting Rights Act of 1965, Hearings before the Subcommittee on Constitutional rights of the Senate Judiciary Committee on S. 407, S. 903, S. 1297, S. 1409 and S. 1443, 94th Congress, April 8, 9, 10, 22, 29, 30; May 1, 1975,” hereinafter referred to as 1975 Senate Hearings, at 247-48.

initially attempted to ban poll taxes everywhere, but in a compromise, Congress finally settled on directing the Attorney General to bring lawsuits to have them declared unconstitutional in the four states where they remained. The Texas case, styled *U.S. v. Texas*, was decided in 1966.⁵⁰ To replace the poll tax, the Texas Legislature quickly passed and the state's voters ratified a constitutional amendment requiring annual voter registration with a four-month window for registration that closed on Jan. 31. This Texas version of Mississippi's massive resistance⁵¹ was overturned in a lawsuit brought by private Corpus Christi lawyers in 1971. That court concluded that the annual registration requirement disfranchised over a million Texans.⁵²

69. Vote dilution in Texas was also challenged, again by private parties, not the U.S. government, in the early 1970s in what became one of the most important vote dilution cases ever, *Graves v. Barnes*.⁵³ Texas state legislators from Dallas and Bexar (San Antonio) Counties were elected in multimember districts in which, a three-judge court ruled, endorsements by white slating groups effectively determined the nominees. This at-large system discriminated against Black and Mexican-American voters, and any justification for the multimember system collapsed because of the fact that voters in the other major Texas city, Houston, were allowed to elect their legislators in single-member districts. On remand from the Supreme Court, the same three-judge court heard extensive evidence and ruled seven more multimember legislative districts illegal because they discriminated against Blacks and/or Latinos.⁵⁴

70. One of the lawyers for the plaintiffs in *Graves* spread much of the evidence developed for the case before the Senate when it was considering expanding Section 5 to Texas in 1975,⁵⁵ and he noted extensive ongoing, but not yet resolved litigation against at-large elections for local offices throughout Texas.⁵⁶ He went on to catalogue a large variety of abuses in Texas elections, some of which were documented in legal cases, and some were simply widely known: racial gerrymanders, the imposition of majority vote or numbered place requirements, discriminatory annexations, last-minute changes of polling places (for instance, placing a polling place for a majority-Black precinct in a segregated white hunting club), and registration forms and ballots available only in English. Several of these laws had been adopted recently, in the face of growing political participation by Black and Mexican-American citizens.⁵⁷ The poll tax, registration, and at-large cases and the Mississippi-like imposition of new laws in apparent reaction to minority activism made it difficult to argue that Texas was different from the other

⁵⁰ 252 F. Supp. 234 (W.D. Tex. 1966), aff'd 384 U.S. 155 (1966). For congressional actions and discussion, see S. Rept. 89-162, 32-35; H. Rept. 89-439, 4, 19-22; H. Rept. 89-711, 6-7.

⁵¹ See Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1990), 34-78.

⁵² *Beare v. Smith*, 321 F.Supp. 1100, 1108 (S.D. Tex. 1971), aff'd aff'd sub nom. *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974). For discussion of these events, see 1975 Senate Hearings, at 458 (statement of George Korbel).

⁵³ 343 F.Supp. 704 (W.D. Tex. 1972) (three-judge court), partially rev'd and remanded sub nom. *White v. Regester* 412 U.S. 755 (1973), 422 U.S. 935 (June 30, 1975), further proceedings sub nom. *Graves v. Barnes*, 378 F. Supp. 640 (W.D. Tex. 1974), 408 F. Supp. 1050 (W.D. Tex. 1976), 446 F. Supp. 560 (W.D. Tex. 1977).

⁵⁴ *Graves v. Barnes*, 378 F. Supp. 640. (W.D. Tex. 1974).

⁵⁵ 1975 Senate Hearings, at 452-61, 466-87.

⁵⁶ 1975 Senate Hearings, at 465.

⁵⁷ 1975 Senate Hearings, at 239 (testimony of Rep. Barbara Jordan), 285 (testimony of Texas Secretary of State Mark White), and 473-82 (testimony of Korbel).

states that had been covered by Section 5. As Rep. Barbara Jordan of Houston summed up recent litigation in her testimony before the Senate, “The entire history of voting legislation in Texas has been one of reluctant acquiescence to federal court orders.”⁵⁸

71. Faced with the prospect of becoming a covered jurisdiction, Texas scrambled to change its laws, even drafting, without consulting MALDEF,⁵⁹ what was termed the Texas Voting Rights Act, which provided for bilingual election materials. The bill, S.B. 165, passed.⁶⁰ Altogether, there had been 60 bills dealing with elections submitted to the Texas legislature during the 1975 legislative session.⁶¹ One of the most active supporters of the federal Voting Rights Act, Sen. Birch Bayh, suggested that these bills, especially the Texas Voting Rights Act, represented little “more than an effort to get the [federal] Voting Rights Act derailed . . .”⁶² Texas newspaper reports echoed Bayh’s charge.⁶³

72. Based largely on evidence about racial discrimination in Texas elections, Congress in 1975 extended the coverage formula under Section 4 to include areas in which Latino, Asian, Native American, or Alaskan Native “language minorities” constituted 5% of the citizen population, which in 1972 printed election material only in English, and where turnout in the 1972 presidential election had been less than 50%.⁶⁴ This expansion enabled courts to discover a great deal of voting discrimination that had been legally invisible before. From 1965 through 1974, minorities won only 10 voting rights cases in Texas. After the expansion of the coverage scheme of Section 4 in 1975, they were successful in 115 instances from 1975 through 1979. Four of the cases in the first decade of the Voting Rights Act in Texas involved Latinos. Sixty of the Texas cases in the five years after the 1975 expansion concerned Latinos.⁶⁵

73. Section 5 immediately proved its effectiveness in Texas. Reversing its stance in considering the “Texas Voting Rights Act,” the 1975 Texas Legislature passed S.B. 300, requiring a purge and re-registration of every voter. Blacks and Mexican-Americans sued and obtained a preliminary injunction against the law from a three-judge federal panel, but a final ruling in the

⁵⁸ 1975 Senate Hearings, at 246.

⁵⁹ 1975 Senate Hearings, at 290.

⁶⁰ 1975 Senate Hearings, at 302.

⁶¹ 1975 Senate Hearings, at 268-90 (colloquy between Texas Secretary of State Mark White and Sens. John Tunney and Birch Bayh); *id.*, 296-367 (copies of bills and legislative analysis).

⁶² 1975 Senate Hearings, at 454.

⁶³ 1975 Senate Hearings, at 744 (statement of Houston City Controller Lionel Castillo).

⁶⁴ H. Rept. 94-196, at 23-24.

⁶⁵ These figures come from my database on over 4,000 Section 5 objections and “more information requests,” Section 2 and constitutional cases, and settlements and cases from all states from 1957 through 2020. For a description and applications of the database, see “Do the Facts of Voting Rights Support Chief Justice Roberts’s Opinion in *Shelby County*?” *Trans-Atlantica*, 1 | 2015, available at <https://transatlantica.revues.org/7462>; “Testimony of Professor J. Morgan Kousser Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary. Legislative Proposals to Strengthen the Voting Rights Act, Oct. 17, 2019, <https://docs.house.gov/meetings/JU/JU10/20191017/110084/HHRG-116-JU10-Wstate-KousserJ-20191017.pdf>.

case was rendered unnecessary when the Department of Justice issued its first Section 5 objection against a Texas state law.⁶⁶

F. A Quarter of All Voting Rights Violations from 1957 through 2020 Took Place in Texas

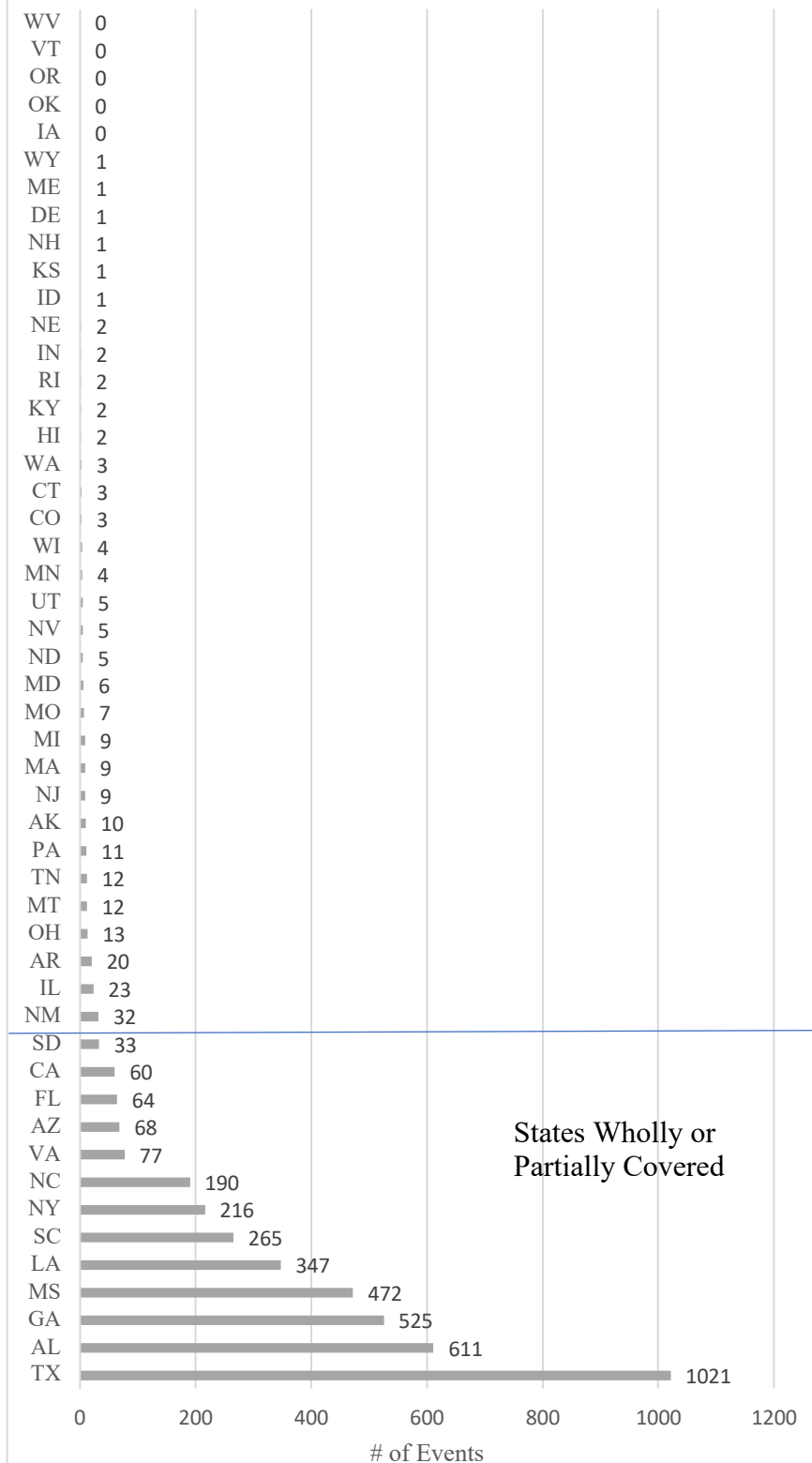
74. Figure 1 shows that 1,021 (24.5%) of all 4,170 voting rights actions won by minorities anywhere in the U.S. from 1957 through 2020 involved Texas election laws and practices – by far the most of any state.⁶⁷ Legally proven instances of election discrimination were massively disproportionate in Texas. In 1990, at the approximate midpoint of the 1957-2020 period, the population of the U.S. was 248.7 million, and that of Texas, 16,986,510,⁶⁸ so that Texas’s share of the U.S. population was 6.8%, while its share of voting rights actions was 24.5%.

⁶⁶ No byline, “Renewal form ban is affirmed,” *Austin American-Statesman*, Nov. 15, 1975, p. 6; Jon Ford, “Judges delay voter registration mailing,” *Austin American-Statesman*, Nov. 26, 1975, p. 1; No byline, “Texas officials say vote opinion ‘unclear,’” *Austin American-Statesman*, Dec. 11, 1975, p. 1; J. Stanley Pottinger to Secretary of State Mark White, Dec. 10, 1975 (objection # X0335), <https://www.justice.gov/crt/voting-determination-letters-texas>. *Flowers v. Wiley* evinced no recorded opinion, but only a decision about attorneys’ fees, 675 F.2d 704 (5th Cir. 1982).

⁶⁷ The graph is based on information in my database, referred to in n.62. By “discriminatory events” in Figure 1, I mean legal actions won by minorities.

⁶⁸ <https://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>; and <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf>.

Figure 1: Total Number of Discriminatory Events, 1957-2020, by State



75. A few examples may give Figure 1 specificity. First, before the decision was vacated after *Shelby County v. Holder*, the District Court of the District of Columbia found the 2011 Texas voter ID law would have a retrogressive effect under Section 5 of the Voting Rights Act.⁶⁹ After a district court in Texas found that the same voter ID law had a discriminatory intent, as well as effect, a panel of the 5th Circuit partially reversed the trial court and remanded the case to it. Various decisions, appeals, stays, and rehearings ensued. Eventually, the 5th Circuit issued a decision holding that the voter ID law had a discriminatory effect.⁷⁰ Second, in January, 2019, then Acting Secretary of State Dave Whitley sent Texas county election supervisors a list of 95,000 registered voters who had apparently not been citizens at the time when they registered with the Department of Public Safety. Further examination showed that many had become citizens and that the list was otherwise hopelessly flawed.⁷¹ A furor, much backtracking by the Secretary of State's office, and lawsuits by MALDEF, Texas LULAC, Demos, the ACLU, the Texas Civil Rights Project, the Campaign Legal Center, and the Lawyers' Committee for Civil Rights Under Law followed, a settlement was reached, and the purging process was extensively reformed. Claims by conservatives that extensive fraud had finally been located were embarrassingly withdrawn, while Latino and other civil rights organizations condemned the error-filled purge as a "witch hunt" that targeted Latinos.⁷²

76. Every Texas statewide redistricting plan since 1971 has been challenged in court, and those in every decade have been found violative of either the Voting Rights Act or the 14th and/or 15th amendments by courts or the Justice Department, an indication of racial discrimination in election arrangements so long and regular that each legislative session at which redistricting is considered has become merely a staged drama preparatory to the real contest in the courts and/or the Department of Justice. In the 1970s, as noted above, at-large districts in nine urban counties were ruled illegal because of racial discrimination. In addition, the Department of Justice objected to state legislative districts in Jefferson, Tarrant, and Nueces Counties.⁷³ In 1982, the Department of Justice objected to state legislative districts in Bexar, Dallas, and Harris Counties, as well as to the congressional redistricting.⁷⁴ In 1991, the Justice Department again objected to

⁶⁹ *Texas v. Holder*, 888 F. Supp. 2d 113 (2012). Because it found a discriminatory effect, the court did not have to reach the question of a discriminatory intent. *Shelby County v. Holder*, 570 U.S. 529 (2013). Because *Texas v. Holder* was vacated, it is not counted as a minority success in my database.

⁷⁰ The complicated history is summarized in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

⁷¹ James Barragan, Robert T. Garrett, and Julieta Chiquillo, "Tens of thousands removed from potential non-citizen voters list after counties find flawed data. More than half of the supposedly suspect names in Harris, Williamson counties – and nearly one-fifth in Dallas – are no longer being pursued, officials say," Dallas Morning News, Jan. 30, 2019, <https://www.dallasnews.com/news/politics/2019/01/31/tens-of-thousands-removed-from-potential-non-citizen-voters-list-after-counties-find-flawed-data/>; Alexa Ura, "Texas will end its botched voter citizenship review and rescind its list of flagged voters. The state had questioned the citizenship status of almost 100,000 registered voters, but many on the list turned out to be naturalized citizens." *Texas Tribune*, April 26, 2019, <https://www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/>.

⁷² The case is *Texas LULAC v. Whitley*, SA-19-CA-074-FB (W.D. Tex. 2019). The complaints, settlement, a narrative, and other documents are available at <https://www.demos.org/case/move-texas-civic-fund-et-al-v-whitley-et-al> and <https://campaignlegal.org/cases-actions/texas-lulac-et-al-v-secretary-state-david-whitley>.

⁷³ See objections X0164 and X0614 (both 1976), <https://www.justice.gov/crt/voting-determination-letters-texas>.

⁷⁴ See the discussion in *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982) and objections 81-0306 and 81-0298, <https://www.justice.gov/crt/voting-determination-letters-texas>.

the state legislative redistricting plans.⁷⁵ Again in 2001, the Department objected to the state House redistricting plan.⁷⁶

77. Two years later, in a mid-term redistricting – a practice virtually never employed in the U.S. since the 1890s – Texas Republicans substantially redrew the state’s congressional districts. Although the Supreme Court rejected a partisan gerrymandering claim and one from Black plaintiffs, the majority, in an opinion by Justice Anthony Kennedy, found that Texas violated Latino rights under Section 2 of the VRA when it revised congressional district 23 in a manner that “bears the mark of intentional discrimination.”⁷⁷ In 2011, obviously fearing that the Department of Justice would not approve its state legislative or congressional plans,⁷⁸ Texas sought preclearance from the District Court of the District of Columbia. But that court found that Texas had failed to prove that its state and congressional plans had neither a discriminatory effect or purpose.⁷⁹ In a separate action, a three-judge panel of the U.S. District Court for the Western District of Texas ultimately concluded that the plans that Texas drew in 2011 had had both the intent and effect of discriminating on the basis of race.⁸⁰ Meanwhile, under pressure from the litigation, Texas drew new congressional and state house plans that altered the initial districts in the Dallas/Ft. Worth Metroplex. Latino voters challenged state House districts in Tarrant County, and both a three-judge panel and the U.S. Supreme Court upheld the challenge.⁸¹

78. But 984 of the 1021 voting rights actions in Texas, came not at the state, but at the county or municipal or special district level. Of the 984, 358 concerned at-large elections, which make it much more difficult for minorities to win where there is racial polarization. Another 193 successfully challenged districting plans as racially discriminatory against racial or ethnic minorities. A further 147 involved vote denial, including polling place changes, voting materials available only in English, and anything else that affected individuals’ right to vote. The rest, many of which were Section 5 preclearance denials, related to any of a myriad of election law provisions and administrative actions that have real and sometimes idiosyncratic effects on minority participation in politics. The very large number of cases, preclearance denials, and settlements in lieu of going to court demonstrate the scope and depth of racial discrimination in Texas political history over the last 64 years.

⁷⁵ See objections 91-3395 and 92-0070, <https://www.justice.gov/crt/voting-determination-letters-texas>.

⁷⁶ Objection 2001-2430, <https://www.justice.gov/crt/voting-determination-letters-texas>.

⁷⁷ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006).

⁷⁸ Aaron Blake, “Department of Justice to fight Texas redistricting map,” *Washington Post*, Sept. 19, 2011, **Error! Main Document Only.** http://www.washingtonpost.com/blogs/the-fix/post/departments-of-justice-to-fight-texas-redistricting-map/2011/09/19/gIQA5RdQgK_print.html.

⁷⁹ *Texas v. U.S.*, 887 F.Supp. 2d 133 (D.D.C. 2012). Like the voter ID case discussed above, this decision was vacated by the Supreme Court after its decision in *Shelby County v. Holder*.

⁸⁰ *Perez v. Abbott*, 250 F. Supp. 3d 123 (W.D. Tex. 2017); 253 F. Supp. 3d 864 (W.D. Texas, May 2, 2017). The partial curing of the 2011 plans by the interim plans complicated the case further and resulted in a Supreme Court reversal of the three-judge court’s 2017 actions in overturning the interim plans. *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

⁸¹ *Abbott v. Perez*, 138 S. Ct. 2305, 2334-35 (2018).

VI. Baselines, Prequels, and Pretexts

A. Baselines

79. Texas not only leads the nation in successful challenges to discriminatory voting laws, but also in overall difficulty of voting. In October, 2020, the *Texas Tribune* reported on political science research that concluded that Texas election laws made it the most difficult state in which to vote.⁸² The study, first published in 2018 and updated through the middle of 2020, used sophisticated statistical methods to develop an index of the difficulty of registering and casting a ballot in each of the 50 states. The measures it was based on included whether one could register online, whether there was no-excuse “absentee” voting, how many days and hours of early voting there were, what restrictions there were on third-party registration organizations, how strict the voter ID laws were, and 35 other facets of state election codes. In 2016, Texas had the 5th most restrictive laws, and its rank in ease of voting had dropped from 1996 through 2016 more than all but two other states. That is, in comparison to other states, Texas had eased voting less and/or restrained it further over the 20-year period than nearly all the rest of the states. By 2020, the state had dropped to the absolute worst in the country.⁸³

80. In fact, Texas had long had restrictive voting laws, as the history section of this paper has already shown. Another political scientist in the early 1970s, using eleven different indexes of restrictions, including whether one could apply for an absentee ballot by mail, whether there was permanent registration across an entire state, how long polls were open, the length of residency requirements, and whether there was straight-ticket voting, found that Texas had the fifth most restrictive voting laws in the country.⁸⁴ And this was after the poll tax had been repealed and annual registration had been forestalled by court order.

81. The assessment of the intent and effect of S.B. 1 ought to begin with the fact – not speculation or an exercise invented for the purposes of this litigation, but based on political science projects wholly separate from this case – that it was already more difficult to vote in Texas than anywhere else.

B. Demographic Change

82. As Texas urbanized and modernized, and as its population exploded and diversified, there were many reasons to expect that its election system would have kept pace with socioeconomic change. In 1980, Texas’s population was 14,229,191. By 2020, it had more than doubled, to 29,145,561.⁸⁵ When cities, suburbs, and towns were smaller and, particularly in Texas, less spread out, it was possible to conduct elections in person with only a relatively few polling

⁸² Ross Ramsey, “Analysis: It’s harder to vote in Texas than in any other state. Voting laws in Texas are the most restrictive in the country. And voter turnout here is among the lowest, too. Maybe those facts are related.” *Texas Tribune*, Oct. 19, 2020, <https://www.texastribune.org/2020/10/19/texas-voting-elections/>.

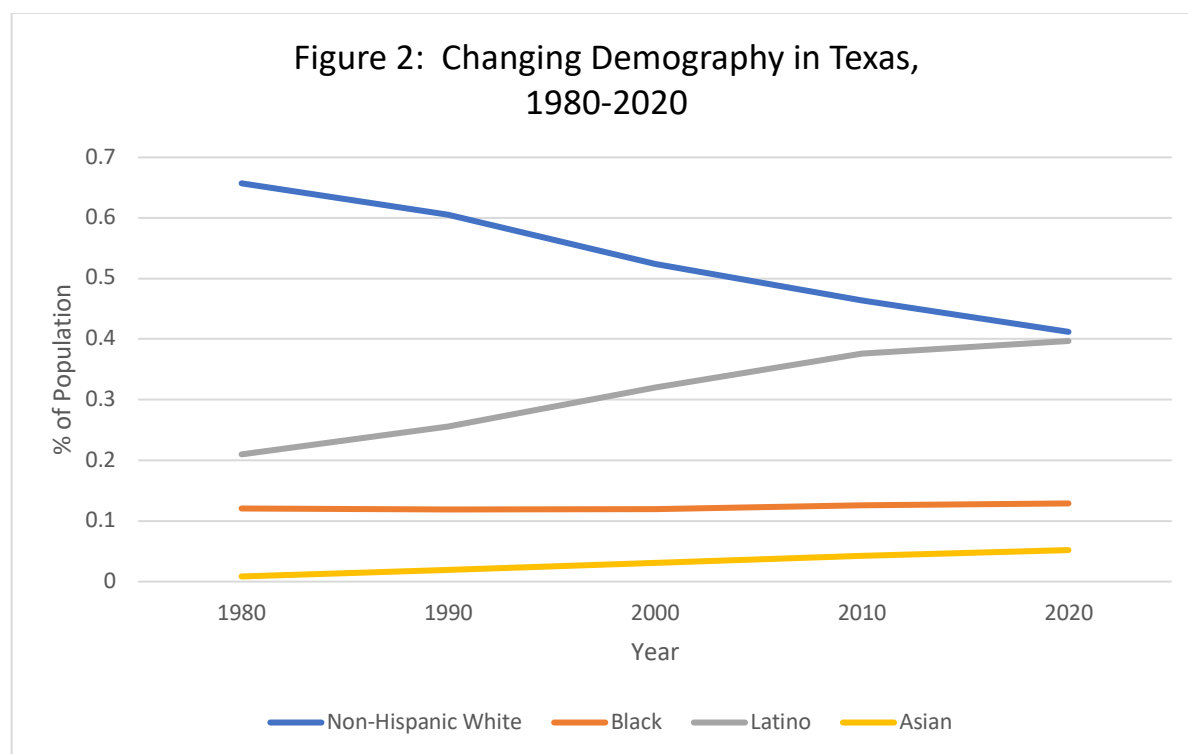
⁸³ Quan Li, Michael J. Pomante, and Scot Schraufnagel, “The Cost of Voting in the American States,” *Election Law Journal* 17 (2018), 234-47; Scot Schraufnagel, Michael J. Pomante II, and Quan Li, “Cost of Voting in the American States: 2020,” *Election Law Journal*, 19 (2020), 503-09.

⁸⁴ Robert H. Blank, “State Electoral Structure,” *Journal of Politics*, 35 (1973) 988-94.

⁸⁵ <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf>.

places. But that became much more difficult in the megalopolises that have become the reality beneath the cowboy image of the Lone Star State. That is to say, merely the growth of Texas's population and expansion of its cities and suburbs over the last 40 years should have produced many changes in electoral laws to facilitate voting in a modernizing state. The baseline should have risen purely because of natural forces.

83. As is well known, the growth of the ethnic groups in Texas over this period has been quite uneven. In 1980, nearly two-thirds of Texans were non-Hispanic whites. By 2020, that group had fallen to 41.2% of the population. By contrast, the Latino percentage had nearly doubled over the same period, from 21.0% to 39.7%, and the Asian-American population had mushroomed from 1.9% to 5.2%. The Black population, on the other hand, was almost stable, increasing only from 12.0 to 12.9%.⁸⁶ Figure 2 shows the dramatic Anglo decline and Latino increase more memorably than with the bare statistics.⁸⁷



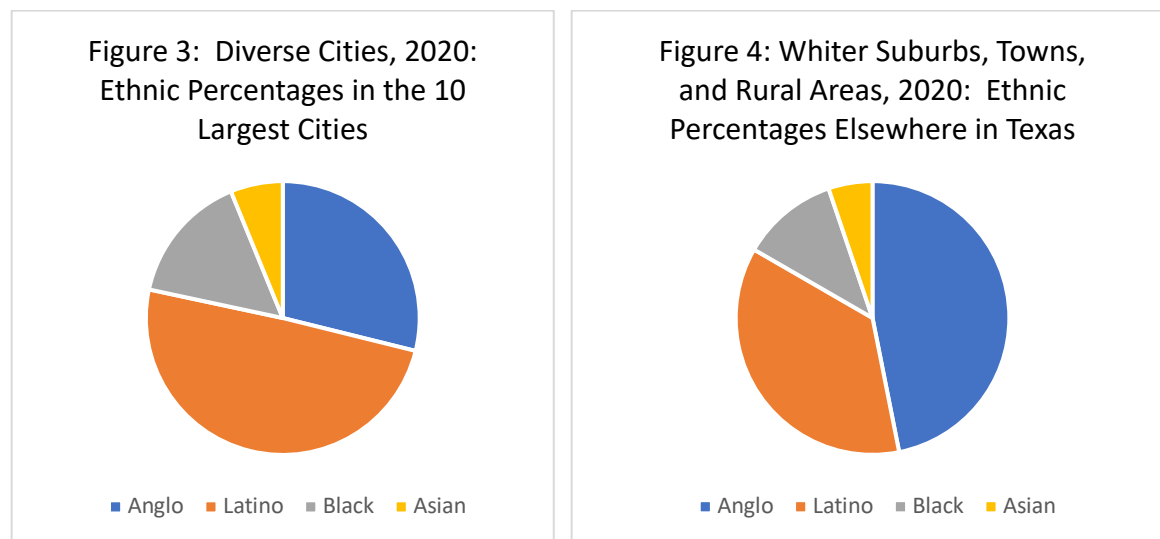
84. Equally important for assessing the intent and effect of election laws, the minority population in Texas is highly urbanized. Because “minority” (i.e., non-Anglo) ethnic groups are much more

⁸⁶ <https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf>; <https://www.census.gov/prod/2002pubs/c2kprof00-tx.pdf>; https://www.ncsl.org/documents/redistricting/texas_census_data_2010.pdf; <https://www.census.gov/quickfacts/TX>.

⁸⁷ This can be seen as the continuation of a longer trend. In 1870, only 4% of the population of Texas was Latino, but this grew to 16% by 1960. Saenz, “Latino Population of Texas,” in Brischetto and Avena, *Mexican American Civil Rights in Texas*, 58.

heavily concentrated in cities than Anglos are, any provisions of election law that make it more difficult to vote in cities than in less urbanized places will have a disproportionately negative impact on the minorities. Since this is well understood and was discussed in various hearings during the consideration of SB 1 and its predecessors, it follows that any changes in election law that clearly disadvantaged voters in cities or advantaged those in smaller areas must have been intended to have a discriminatory effect on minority voters.

85. According to the 2020 census, 30.4% of Texans live in the state’s ten largest cities: Houston, San Antonio, Dallas, Austin, Fort Worth, El Paso, Arlington, Corpus Christi, Plano, and Laredo. But only 21.7% of Anglos do, while 37.3% of Latinos, 37.5% of Blacks, and 32.5% of Asians live in those same ten cities. To put it another way, the populations of the ten cities in 2020 are only 28.4% Anglo, while they are 48.2% Latino, 14.6% Black, and 5.7% Asian – i.e., over two-thirds minority.⁸⁸ In the rest of the state, Anglos make up 44.7% of the population, while the three minority groups comprise 51.2%. Figures 3 and 4 make the point more colorfully.



86. Consider the question of how long polls would remain open. As was often discussed in the consideration of SB 1 and its predecessors, Harris County in 2020 kept its polls open during early voting until 10 p.m. on three days and for 24 hours on the last two days of early voting.⁸⁹ But Harris County was not alone. Polling places during the second week of early voting stayed

⁸⁸ I leave out of both the numerator and the denominator the census category “two or more races,” as well as the Native American and Hawaiian and Pacific Islander categories, which are tiny in Texas.

⁸⁹ Jasper Scherer and Zach Despart, “GOP bills target Harris County’s efforts to expand voting. Here’s how that played out in the 2020 election,” *Houston Chronicle*, May 1, 2021, <https://www.houstonchronicle.com/news/houston-texas/houston/article/GOP-bills-target-Harris-County-s-efforts-to-16143213.php>.

open until 10 p.m. in Bexar County, as well.⁹⁰ By contrast, smaller cities and towns often closed their polling places much earlier. Claiming that they sought only to make the laws more uniform, the authors of SB 1 simultaneously curtailed the ability of cities to keep early voting polls open to accommodate urban voters who worked nights or at more than one job, while requiring that counties whose populations exceeded 30,000 had to keep the polls open for 12 hours each weekday during the final week of early voting.⁹¹ Because of the different percentages of ethnic groups in metropolitan and non-metropolitan areas, an election law standard that was uniform across counties will differentially affect different ethnic groups.

C. Prequels

87. S.B. 1 should not be considered an isolated legal change, but only the most recent episode of generations of restrictive suffrage laws. This way of viewing the law is important for two reasons. First, many of the aspects of the law addressed practices that were already highly regulated to guard against any potential fraud. These changes generally responded to specific incidents, not vague, unproven allegations, they were narrowly targeted, and the ills that they addressed were so apparent that they often attracted bipartisan support. Because the practices that S.B. 1 addressed had already been restricted, there was much less need to do so than there would have been without the previous laws and therefore, a need for a stronger justification to balance benefits and burdens. Second, themes in the epic partisan/racial battles over voter ID from 2005 through the decade of the 2010s echoed perhaps even more loudly in the struggles over H.B. 6/S.B. 7/S.B. 1 in 2021. Texas's discriminatory voter ID law, S.B. 14, and S.B. 1 are part of the same struggle, a struggle whose outcome in S.B. 14 courts found to have been discriminatory in intent and effect. The tactics and appeals on both sides of the S.B. 1 struggle were preceded by and magnified those of the voter ID saga. Therefore, a glance at the conflicts over voter ID in Texas may shed light on those over S.B. 1.

1. The 2003 Wollens Bill

88. Mail ballot forgeries led a state district judge to void the results of the Dallas City Council District 4 race in 2001.⁹² News stories about the practice carried the names of specific voters who denied applying for absentee ballots, though county election officials had received applications, signed in apparently identical handwriting, under their names. The stories named and ran inculpatory statements from political activists and officials who had taken part in some of these activities. As an editorial in the *Dallas Morning News* pointed out, the practice was limited to local, low turnout elections, where “results can be changed through the manipulation

⁹⁰ David Lynch, “Bexar County’s Early Voting Locations Staying Open Later This Week,” KENS 5, Oct. 27, 2020, <https://www.kens5.com/article/news/politics/elections/bexar-countys-early-voting-locations-staying-open-later-this-week/273-c7e85454-46c8-4d7b-a048-85f306fc8281>.

⁹¹ Jasper Scherer and Zach Despart, “GOP bills target Harris County’s efforts to expand voting. Here’s how that played out in the 2020 election,” *Houston Chronicle*, May 1, 2021, <https://www.houstonchronicle.com/news/houston-texas/houston/article/GOP-bills-target-Harris-County-s-efforts-to-16143213.php>.

⁹² Dave Michaels, “Voters: Mail ballot signatures forged - Candidate denies signing applications; DA investigating,” *Dallas Morning News*, April 22, 2003.

of relatively few mail ballots.”⁹³

89. The Dallas scandal led Rep. Steve Wollens (D--Dallas) to propose a carefully-targeted, though controversial bill aimed at the practice. The bill, H.B. 54, increased the penalties for marking another person’s ballot without their consent, required people who assisted others with voting to put their names, addresses, and signatures on the “carrier” envelopes of VBM ballots, and banned the practice of storing mail ballots and sending them to elections departments at the last minute, which prosecutors said made it difficult to clamp down on ballot tampering.⁹⁴ Primarily aimed at those who assisted persons in retirement communities and long-term care facilities, H.B. 54 was narrowly circumscribed to attack practices that distorted voters’ will without depriving them of their votes: friends and even ward heelers could continue to assist voters who actually wanted their help; they just had to identify themselves to authorities as providing that assistance. When then-Attorney General Greg Abbott primarily prosecuted those who assisted elderly and disabled minorities,⁹⁵ the State was sued by the Texas Democratic Party, the Attorney General’s office revised its prosecution guidelines, and the lawsuit was settled out of court.⁹⁶ Framed by a Dallas County Democrat who was a leader in ethics reform⁹⁷ and the husband of Dallas Mayor Laura Miller,⁹⁸ H.B. 54 had bipartisan support, protecting it from charges that it aimed to disadvantage the party to which minority voters overwhelmingly adhered by depriving them and other Democrats of their votes.

90. H.B. 54 accomplished its aims. As a subcommittee of the Texas House Elections Committee found in 2008, “Prior to its passage, Dallas [C]ounty elections officials reported receiving approximately two dozen complaints of VBM ballot assistance abuse out of the 15,000 to 50,000 VBM ballots they received each election year. Since 2003, reports of VBM ballot assistance abuse in Dallas County are extremely rare.” It also led to the prosecution of several *politiqueras*, individuals hired by political campaigns to promote candidates at nursing homes and other residential facilities in South Texas.⁹⁹ According to the Committee, the problem with mail ballots was not so much the inadequacy of laws as it was the bias and inconsistency in prosecutions. Voting by mail “offers its own failsafe tool for the identification and prosecution

⁹³“Vote Harvesters - Beware of fraud in local elections,” *Dallas Morning News*, April 16, 2003. In another incident in 2002, “. . . a Dallas County grand jury indicted an operative on allegations that she had tampered with a blind woman's mail ballot. The voter accused Felicia Ann Pitre, who had been working for a Dallas school board candidate, of taking her ballot before she could mark it.

“Prosecutors lost that case after a judge ruled that the allegation against Ms. Pitre was not a crime under the state election code.” Dave Michaels, “Measure aims to cut vote cheating - But some fear that mail ballot bill would stifle minority turnout,” *Dallas Morning News*, March 12, 2003.

⁹⁴ George Kuempel, “Bill would restrict mail-in ballot aid - Critics say limits may intimidate minorities,” *Dallas Morning News*, April 9, 2003.

⁹⁵ Steven Rosenfeld, “Texas Prosecutes Little Old Ladies for Voter Fraud,” *AlterNet*, March 31, 2008, https://www.alternet.org/2008/03/texas_prosecutes_little_old_ladies_for_voter_fraud/.

⁹⁶ Rafael Anchia, Lon Burnam, and Kirk England, Sub-Committee on Mail-in Ballot Fraud and Non-Citizen Voting of the Texas House Committee on Elections, “Interim Report,” Nov. 19, 2008, at 2, <https://house.texas.gov/media/pdf/committees/reports/80interim/Elections80th.pdf>; Terrence Stutz, “Prosecution of voter helpers halted,” *Dallas Morning News*, Nov. 2, 2006; Polly Ross Hughes, “Judge blocks Texas ban on mailing others’ ballots,” *San Antonio Express News*, Nov. 2, 2006; Wayne Slater, “Democrats, AG settle voter-fraud lawsuit,” *Dallas Morning News*, May 29, 2008.

⁹⁷ Stephanie Sandoval, “Ethics bill faulted - Local officials' reactions mixed on possibility of financial statements,” *Dallas Morning News*, June 15, 2003.

⁹⁸ Henry Tatum, “Warm-up period is over for Miller,” *Dallas Morning News*, May 7, 2003.

⁹⁹ Anchia et al., “Interim Report,” at 6.

of perpetrators of such fraud. Suspicious VBM votes can be targeted using signature verification, and fraudulent VBM votes can be easily tracked to an address where a person resides, facilitating prosecution of those cases.”¹⁰⁰

2. H.B. 658 and S.B. 5, 2017

91. Another absentee ballot scandal in two West Dallas City Council races in 2017 was easily exposed under the existing law and resulted in a single conviction. One man apparently applied in the same handwriting for numerous VBM ballots for senior citizens and later appeared at their doorsteps and tried to collect them. Many called the Dallas County elections authorities, who alerted the news media and the police. Involving perhaps 40 ballots that were thrown out by a judge, it did not change the outcome of any election.¹⁰¹ After its exposure in the newspapers, Democrats and Republicans in the legislature once again came together to reform the system, providing in H.B. 658 for temporary polling places at nursing homes and similar facilities to discourage care workers and political operatives from collecting and potentially influencing ballots. Because it would provide an opportunity for everyone at such facilities to vote, H.B. 658 at once expanded voting access and insured against fraud.¹⁰² The bill passed both houses and was signed by Gov. Abbott. Unfortunately, two months later, the Abbott Administration reversed course and the legislature repealed the prophylactic nursing home polling place law, assertedly on the grounds that it was an unfunded mandate on county election offices. One Republican legislator, Tom Oliverson of Cypress, announced on the House floor and later told the *Texas Tribune* that he “suspected that bipartisan buy-in may have played a role in the repeal. ‘It’s a sad commentary on politics in Texas. People get nervous when they see the other side in favor of something, because they assume it gives them an advantage in elections.’”¹⁰³ The legislature apparently did not consider the small increase in state funding that would have been necessary to run such a program. Sen. Joan Huffman (R-Harris) was sufficiently disturbed about the repeal of

¹⁰⁰ Anchia et al., “Interim Report, at 8.

¹⁰¹ Tristan Hallman, “Reports of voter fraud in West Dallas have ‘deeply troubled’ Mike Rawlings, Rep. Eric Johnson in a letter to Dallas County’s elections administrator, the mayor and state legislator asked her to ‘take whatever steps necessary to restore voter confidence in West Dallas.’” *Dallas Morning News*, April 21, 2017, <https://www.dallasnews.com/news/2017/04/21/reports-of-voter-fraud-in-west-dallas-have-deeply-troubled-mike-rawlings-rep-eric-johnson/>; Naomi Martin, “‘I feel violated’: Senior citizens rattled by voter fraud in West Dallas, Grand Prairie. More than 100 voters of retirement age have filed fraud complaints in recent weeks, the largest number Dallas County has ever received.” *Dallas Morning News*, May 4, 2017, <https://www.dallasnews.com/news/2017/05/04/i-feel-violated-senior-citizens-rattled-by-voter-fraud-in-west-dallas-grand-prairie/>; Stephen Young, “Dallas Man Pleads Guilty in 2017 West Dallas Voter Fraud Investigation,” *Dallas Observer*, June 21, 2018, <https://www.dallasobserver.com/news/dallas-man-gets-six-months-for-vote-fraud-10819409>.

¹⁰² Jim Malewitz, “Texas may expand ballot access for elderly and voters with disabilities. A bill that cleared the Legislature aims to prevent voter fraud at nursing homes and widen ballot access for elderly Texans. Somehow, politics didn’t get in the way.” *Texas Tribune*, June 2, 2017, <https://www.texastribune.org/2017/06/02/texas-might-broaden-ballot-access-elderly-and-voters-disabilities/>.

¹⁰³ Jim Malewitz, “Texas House approves one crackdown on mail-in ballot fraud, but pushes repeal of another. The Texas House on Wednesday tentatively approved a bill that seeks to crack down on mail-in ballot fraud, one of Greg. Abbott’s priorities. But in doing so, they repealed another law meant to prevent such fraud at nursing homes.” *Texas Tribune*, Aug. 9, 2017, <https://www.texastribune.org/2017/08/09/backing-proposal-crackdown-mail-ballot-fraud-texas-house-pushes-repeal/>.

H.B. 658 that she spread her remarks on the pages of the Senate Journal.¹⁰⁴ If the legislature was sincerely concerned about combatting VBM fraud, H.B. 658 seemed an effective vehicle, one used in other states, such as Florida.

92. The same bill through which the legislature repealed the nursing home polling place law was a much larger measure, considered in a special session and labeled a priority measure by Gov. Abbott and Lt. Gov. Patrick. S.B. 5 widened the definition of VBM ballot fraud, boosted penalties from misdemeanors to felonies and from state jail felonies to third-degree felonies, strengthened rules for signature verification, required election judges to notify voters when ballots are rejected, and limited the persons who could assist VBM voters. It was in part a reaction to absentee ballot fraud in the two West Dallas City Council contests, which was prevented by H.B. 54 and the publicity that ensued after amateurish efforts to apply for mail-in ballots illegally exploded in the media.¹⁰⁵

93. Unlike H.B. 658, S.B. 5 provoked a total partisan split, Democrats charging that the bill would criminalize family members advising their elderly family members on whom to vote for on their VBM ballots or even discussing the elections when VBM ballots were physically in the same room. Republicans dismissed all of the Democrats' criticisms and rejected proposed amendments to require that VBM ballots would come with postage paid by the state, require all eligible voters to receive VBM ballot applications, and study voter fraud.¹⁰⁶ Postage paid envelopes would preclude people from posing as ballot collectors, as in the 2017 Dallas instance. A legislative study committee could revisit the issues considered by the 2008 committee.

94. In any event, H.B. 54 and S.B. 5, responses to particular scandals in local elections, where a few votes could potentially make a large difference, greatly strengthened protections against fraud for VBM ballots. The contrast with S.B. 1, which was not a response to a particular event, much less one even more public and consequential than the two Dallas City Council shenanigans of 2001 and 2017, and which came in an area of election law already thickly regulated, is stark.

¹⁰⁴ <https://journals.senate.texas.gov/sjrn/851/pdf/85S108-11-F1.PDF#page=9>.

¹⁰⁵ Robert Wilonsky and Tristan Hallman, "Criminal investigation opens into West Dallas voter fraud after 'off the charts' allegations," *Dallas Morning News*, May 8, 2017, <https://www.dallasnews.com/news/elections/2017/05/08/criminal-investigation-opens-into-west-dallas-voter-fraud-after-off-the-charts-allegations/>; Stephen Young, "Dallas Man Pleads Guilty in 2017 West Dallas Voter Fraud Investigation," *Dallas Observer*, June 21, 2018, <https://www.dallasobserver.com/news/dallas-man-gets-six-months-for-vote-fraud-10819409>.

¹⁰⁶ James Barragan, "Abbott signs bill tackling mail-in ballot fraud," *Dallas Morning News*, Aug. 11, 2017, <https://www.dallasnews.com/news/politics/2017/08/11/abbott-signs-bill-tackling-mail-in-ballot-fraud/>; Mike Ward and Andrea Zelinski, "Time chips away at Abbott's agenda; As clock ticks in Austin, lawmakers cast doubt on governor's priorities," *Houston Chronicle*, Aug. 10, 2017, https://houstonchronicle.newsbank.com/doc/news/166354A1759FB8E0?search_terms=mail-in%2Bballots&text=mail-in%20ballots&content_added=&date_from=Aug.%201%2C%202017&date_to=Aug.%2031%2C%202017&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2017-08-10; Texas Senate Journal, Aug. 11, 2017, at 330-33, 335-40 <https://journals.senate.texas.gov/sjrn/851/pdf/85S108-11-F1.PDF#page=9> (colloquies between Sens. Hancock and Rodriguez, West, and Menendez).

3. The In-Person Voter ID Struggle, 2005-11

95. As the report of the House Elections Committee found in 2008, there had been only 26 cases of election law violations prosecuted or then under indictment by the Texas Attorney General's office from 2002 through 2008, 18 of which involved a defendant illegally possessing or carrying the ballot of another individual. By contrast, there was only one case of voter impersonation fraud, a daughter attempting to vote in the name of her deceased mother. During the period, Texans cast over 29 million votes in primary, general, and special elections.¹⁰⁷ Nonetheless, the Texas legislature fought long and bitter battles during four legislative sessions over whether to supplement each voter's registration card, issued when she registered, with a wide range of other identifying documents, such as a current utility bill, bank statement, or library card. In subsequent legislative sessions, the IDs were required to have a photo attached, and the list of acceptable photo IDs was shortened with each legislative session. Whatever the ID documents required, the voter had to sign in at the polling place, even before 2005, as a check on her identity. The rancor and legislative maneuvering and the entanglement of the voter ID issue with racial, as well as partisan concerns inflamed the Texas legislature for four legislative sessions and led to the largest rules changes in the body in a half-century – all to counteract one proven instance of voter impersonation fraud. Because this struggle paved the way for and in many ways paralleled that over S.B. 1, it is instructive to review it.

96. The 2005 version of the measure, H.B. 1706, authorized either a variety of photo IDs, including one issued by the voter's employer, or two non-photo IDs, including a voter registration card and a library card. After it passed the House on an almost straight party-line vote, 78-67, it came up against the Senate rule, long in force, which required a two-thirds majority of the body before a bill could be brought to the floor. Since Democrats unanimously opposed the bill and they had 12 of the chamber's 31 votes, the bill seemed dead until nearly the end of the session, when the bill's House author convinced a Republican senator to attach her measure to a barely related Senate bill. By another peculiar Senate rule, if the author of a bill in the Senate accepted an amendment, the bill could be taken up on a mere majority vote, not two-thirds.¹⁰⁸ The only tactic opponents of H.B. 1706 had left was a senate filibuster, which was subject to the unusual Texas rules that a filibustering senator could not yield the floor temporarily to use the bathroom by moving for a quorum call, and that the filibusterer could not sit or lean on anything during their speeches. Thus it was that Sen. Rodney Ellis, a Black Democrat from Houston, appeared on the Senate floor in sneakers, wearing a catheter under his dapper suit, with a 12-inch thick stack of books about minority voting rights to read into the record as part of his effort to defeat the bill. Fortunately for Ellis, Sen. Leticia Van de Putte, a Latina Democrat from San Antonio, challenged the amendment as non-germane, since it

¹⁰⁷ Anchia et al., "Interim Report," 1-2.

¹⁰⁸ Texas House Journal, 2005, at 2554-55; Mike Ward, "Gallegos to miss part of session," *Austin American-Statesman*, Jan. 19, 2007; No byline, "In Session," *San Antonio Express News*, May 4, 2005; Karen Brooks, "Voter ID proposal revived - House plan, added to Senate bill, may avoid Democratic blockade," *Dallas Morning News*, May 25, 2005; No byline, "House would make voters show IDs," *Austin American-Statesman*, May 25, 2005.

amended a different part of the Texas Code than the original bill, and Ellis was spared the ordeal.¹⁰⁹

97. Senators Ellis, Van de Putte, and the other members of the Black and Mexican-American Legislative Caucuses opposed H.B. 1706 because, as Black Caucus chair Rep. Garnet Coleman, asserted, in terms that could have been taken from the debate about S.B. 1 in 2021, it represented “part of a nationwide push by Republicans to suppress voting within traditionally Democratic voting blocs – minorities, the elderly and the poor.”¹¹⁰

98. The 2007 iteration of the voter ID fight had the same themes, but an even more dramatic development and climax. The *Austin American Statesman* echoed minority legislators when it charged that 2007’s H.B. 218 would take

Texas back to the bad old days of poll taxes and literacy tests. It's a voter suppression bill, pure and simple. No matter how much its supporters protest that it's not, the bill is designed to suppress certain groups of voters who tend to vote for Democrats: the poor and elderly and minorities. . . .

The legislation, House Bill 218 authored by Rep. Betty Brown, R-Athens, will discourage thousands of voters on election day to prevent a handful of people from voting illegally. That is political overkill that can only be explained as a partisan Republican attack.¹¹¹

99. On the other side of the debate, Brown said that her proposal was “designed to keep *illegal aliens*, noncitizens and other people otherwise not qualified” from voting.¹¹² Like Brown, Lt. Gov. David Dewhurst treated the bill as an effort to protect Texas elections against the depredations of non-citizens: “With eight to 12 million illegal aliens currently living in the U.S., the basic American principle of one person, one vote, is in danger,” he charged.¹¹³ As there was no evidence of widespread voting by undocumented persons, the law did not require proof of citizenship, and Texas allowed non-citizens to obtain driver’s licenses, which were the most common identification documents used for voter ID, the striking statements that the law targeted “illegal aliens” can only be considered barely hidden racial references to Latinos – as close to “smoking gun” statements as one is likely to find in recent times.

100. The struggle was more dramatic in 2007 than in 2005 because even though Democrats

¹⁰⁹ Gary Scharrer, “El Paso footwear may aid filibuster,” *San Antonio Express News*, May 29, 2005; Associated Press, “Democrats derail voter-ID bill with threat of filibuster, exercise of Senate rules,” *Lubbock Avalanche-Journal*, May 29, 2005; Kristen Mack, “THE LEGISLATURE – Session’s close crammed with action - Filibuster threat and phone calls fill lawmaker’s time,” *Houston Chronicle*, May 30, 2005; Clay Robison and R.G. Ratcliffe, “THE LEGISLATURE - AS CLOCK TICKS, TAX BILL SEEMS DOOMED - Lawmakers struggle to bridge rifts 2 days before the session ends,” *Houston Chronicle*, May 29, 2005; No byline, “CAPITOL ROUNDUP,” *Austin American-Statesman*, May 30, 2005.

¹¹⁰ Coleman’s views are summarized in Guillermo X. Garcia, “Voter ID measure gets House nod,” *San Antonio Express-News*, May 3, 2005, p. 11A.

¹¹¹ “House Republicans swarm to vote ... hoping that others won’t,” *Austin American-Statesman*, April 26, 2007.

¹¹² W. Gardner Selby, “House Republicans squeak through voter ID mandate - Senate chances uncertain, pitting Dewhurst against Democrats,” *Austin American-Statesman*, April 24, 2007.

¹¹³ *Austin American-Statesman* blog, “Letter from Lt. Gov. on voter ID bill,” May 16, 2007, /blogs/content/shared-gen/blogs/austin/capitolpressreleases/entries/2007/05/16/letter_from_lt_gov_on_voter_id.html.

gained 10 seats in the House in 2006, leaving the Republicans with only a 77-73 majority, they lost a seat in the Senate, meaning that all 11 Democrats had to be on the floor at all times to prevent Republicans from voting to take up H.B. 218. The slim majority was especially precarious because shortly after the beginning of the legislative session, Sen. Mario Gallegos, Jr. (D-Houston) announced that he was checking into a Houston hospital for a liver transplant.¹¹⁴ With nearly a month to go in the legislative session, Lt. Gov. Dewhurst took advantage of the fact that Sen. Carlos Uresti (D-San Antonio) had a severe case of the flu to threaten to call a snap vote on H.B. 218, which had already passed the House. Disobeying his doctors, Sen. Gallegos checked himself out of the Houston hospital and returned to Austin. As Sen. Van de Putte was preparing herself for a filibuster, Sen. Uresti rushed into the senate chamber, cast his ballot, and promptly proceeded to Senate lounge, where he could hear the applause of his Democratic colleagues for his efforts as he immediately began to vomit.¹¹⁵

101. Initially believing that Dewhurst would not call another vote on the measure, Gallegos returned to Houston for a further surgical procedure, discovering through a biopsy that his body was rejecting the liver that had been transplanted four months earlier. Nevertheless, he again ignored the advice of his doctors and came back to Austin, camping out on a hospital bed in the office of the Senate Sergeant-at-Arms with ten days to go in the session. “If not for voter ID, I wouldn't be here; that's how serious the issue is for me. It's very important for my community that we block this legislation.”¹¹⁶ Despite harsh criticism for caving in from then-Sen. Dan Patrick (R-Houston), Lt. Gov. Dewhurst finally relented in the face of another threatened filibuster from Van de Putte and allowed the bill to die with the end of the session.¹¹⁷

102. With only a 76-74 margin in the 2009 House and Lt. Gov. Dewhurst tying his aspirations for higher office to the passage of “Dewhurst’s voter ID bill,” as his supporters referred to it, the struggle over S.B. 362 was as bitter, if not as medically vicious, as that over H.B. 218 in 2007. When a moderate Republican House Speaker, Joe Straus (San Antonio) appointed another moderate Republican, Todd Smith (Ft. Worth) as head of the Election Committee, there seemed a chance for a bipartisan voter ID bill.¹¹⁸ Indeed, after negotiating with Black and Latino Democrats, Smith proposed a measure that would have allocated \$7.5 million to promote voter registration, allowed registration at the polls during early voting, and delayed the bill’s effective

¹¹⁴ Mike Ward, “Gallegos to miss part of session,” *Austin American-Statesman*, Jan 19, 2007; Kelley Shannon, AP, “Senator returns, vows to block voter ID bill - For now, Senate Democrats have votes needed to block measure,” *Austin American Statesman*, May 4, 2007.

¹¹⁵ *Austin American-Statesman* blog, Mark Lisher, “Senate skirmishes on voter ID bill,” May 15, 2007, </blogs/content/shared-gen/blogs/austin/legislature/entries/2007/05/15/senate_skirmishes_on_voter_id_bill.html>; Gary Scharrer, “Flu-stricken Uresti rushes in to vote,” *San Antonio Express News*, May 16, 2007, at 10A; Kristen Mack, “In trying to win, has Dewhurst lost a friend?” *Houston Chronicle*, May 17, 2007.

¹¹⁶ Mark Lisher, “Ill senator settles in for voter ID fight,” *Austin American-Statesman*, May 22, 2007. Gallegos died Oct. 16, 2012. Ross Ramsey, “To Hold Seat, Democrats Must Vote for Late Senator,” *Texas Tribune*, Oct. 17, 2012, <http://www.texastribune.org/texas-senate/texas-senate/hold-seat-democrats-must-vote-late-senator/>.

¹¹⁷ Mark Lisher, “Senate, used to solidarity, repairs split,” *Austin American-Statesman*, May 18, 2007; Editorial, “Hospital bed handy for Gallegos, Senate ill will,” *Austin American-Statesman*, May 23, 2007; No byline, “Voter ID Measure Dies In Texas Senate Without Vote,” AP (no newspaper source) May 24, 2007.

¹¹⁸ Laylan Copelin, “Lawmakers optimistic as they size up speaker,” *Austin American-Statesman*, Jan 11, 2009; Dave Montgomery, “He's on the inside now - of a pressure cooker,” *Fort Worth Star Tribune*, Feb. 23, 2009, p. b01.

date by four years.¹¹⁹ But Rep. Betty Brown (R-Terrell) and the Executive Director of the Republican Party of Texas, Eric Opiela, convinced 71 of the 76 Republican members of the House to endorse S.B. 362, a clone of Brown's H.B. 218, which had passed the Senate only after Dewhurst and the Republican senators had abrogated the 50-year-old two-thirds rule for taking up a measure.¹²⁰

103. Negotiations and internecine Republican warfare in the House delayed S.B. 362 until the final days of the legislative session, when Democrats applied a uniquely Texas maneuver, "chubbing" a bill. Unlike a filibuster, a "chub" required every member to be organized to give speeches that were limited by House rules to ten minutes each. In this instance, Democrats insisted on addressing the House on every local and "consent" bill, and Republicans insisted on keeping each day's session going indefinitely, forcing Democrats to man the House floor at all hours. Every attempt to compromise by shelving or amending S.B. 362 was rejected by the Republican leadership.¹²¹ To prevent the House from taking up S.B. 362 or any form of a voter ID bill, Democrats quizzed sponsors of bills about, for example, the intricacies of a reform of Matagorda County Navigation District No. 1.¹²² Cherished priorities of legislators of both parties on air quality, insurance reform, transportation funding, and a major expansion of children's health programs were sacrificed because no compromise could be negotiated on voter ID, and because Democrats were sure that any bill would disfranchise its minority, student, and elderly supporters.¹²³ The five-day chub killed more than 200 bills, including S.B. 362, because they were never taken up.¹²⁴ As Speaker Straus remarked, the voter ID issue "just suck[ed] all

¹¹⁹ W. Gardner Selby, "Witnesses give varying views of voter ID bill," *Austin American-Statesman*, April 7, 2009; Jay Root, "Republican seeks delay on Texas voter ID plan," AP (no newspaper source), Mar. 28, 2009; Editorial, "Looking for the middle ground," *Fort Worth Star Tribune*, April 1, 2009, at A10; Jason Embry, "15 bills focus on the border," *Austin American-Statesman*, Nov. 9, 2010.

¹²⁰ Mike Ward and Laylan Copelin, "House elects speaker; Senate in uproar - Potential rule change in upper body infuriates Democrats," *Austin American-Statesman*, Jan. 14, 2009; W. Gardner Selby, "Republican Blowup Over Voter Identification," *Austin American-Statesman* Blog, April 28, 2009, http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2009/04/28/looming_republican_blowup_over.html; W. Gardner Selby, "Rep. Smith's voter ID revisions surfacing Wednesday; he disputes any GOP blow-up," *Austin American-Statesman* Blog, April 28, 2009, http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2009/04/28/rep_smiths_voter_id_revisions.html#postcomment; W. Gardner Selby, "Voter ID compromise gets cool reception - Most House Republicans oppose delay in effective date," *Austin American-Statesman*, April 30, 2009.

¹²¹ Jason Embry, "Slowdown plan took a few turns," *Austin American-Statesman*, May 31, 2009 is the best treatment of the chub.

¹²² Dave Montgomery, "Democrats in House talk to kill voter ID bill," *Fort Worth Star Tribune*, May 23, 2009, at B01.

¹²³ Jason Embry and W. Gardner Selby, "As House delays, senators scramble to save their work," *Austin American-Statesman*, May 24, 2009; Corrie MacLaggan, "Delays by Democrats draw fire from Straus," *Austin American-Statesman*, May 26, 2009; Jason Embry and Corrie MacLaggan, "Key bills left for dead amid House slowdown," *Austin American-Statesman*, May 27, 2009.

¹²⁴ James C. McKinley Jr., "Statehouse Journal: The Talk, and the Talk, and the Talk, of Austin," *New York Times*, May 30, 2009; Mike Ward, "Outlook bad for 200 bills in stalemate," *Austin American-Statesman*, May 29, 2009.

the political oxygen out of the [legislative] session . . .”¹²⁵ Both parties’ willingness to give up so many other legislative priorities to pass or defeat the Republicans’ “marquee issue”¹²⁶ is an indication of how critical voter ID had become – for the Republicans, a symbolic attack on mythical fraud by non-citizens voting, and for the Democrats, a defense of their largely Black and Latino core constituents.

104. The passage of S.B. 14 in 2011 was anticlimactic. In the 2010 election, Democrats lost 23 seats in the House, 19 of them held by Anglos. Outside of heavily Latino South Texas, there was only one Democrat in the House from the rural areas of Texas.¹²⁷ Five out of six Democrats in the 2011 House were Latinos or African-Americans, making it clearer than ever that any measure with a disproportionate effect on Democrats would have to have a disproportionate effect on members of minority groups. The first measure that a post-election story in the capital city’s newspaper mentioned as likely to pass because of the “50-year flood [that] hit Texas politics” the previous day was “a tougher voter identification requirement.”¹²⁸ As formerly moderate elections committee chair Todd Smith told a reporter, “The feedback we got from our local party representatives and from the grass roots is that their preference is for *a hard photo ID*. They were not comfortable with the concept of nonphoto alternatives unless it was necessary as a political compromise.”¹²⁹ Democratic Sen. Rodney Ellis suggested a racial angle to the Republican grass roots feeling, saying that Republican legislators were “getting a lot of pressure from their base, in part because their base recognizes the changing demographics of Texas.”¹³⁰

105. S.B. 14 was a hard photo ID bill. It was speeded to passage by four maneuvers at the beginning of the legislative session: First, Gov. Rick Perry designated voter ID an “emergency” measure, allowing it to be debated and passed within the session’s first sixty days.¹³¹ Second, Lt.

¹²⁵ Gary Scharrer, “How Texas speaker handled voter ID issue,” *San Antonio Express-News*, June 7, 2009, at 17A. Conservative Rep. Leo Berman, running against Straus for Speaker in 2011, accused Straus of deliberately allowing the chub to kill S.B. 362 when the Speaker complied with legislative custom by allowing Democratic Speaker Pro Tem Craig Eiland to preside over the local and consent calendar, giving Eiland the power to recognize speakers. It was yet another indication of how adamant the Republican core was on the voter ID issue. See Julian Aguilar, “Rep. Berman Explains Why He Wants to Oust Straus,” *Texas Tribune*, June 22, 2010; Scott Stroud, “Immigration policy crucial to GOP,” *San Antonio Express-News*, Nov. 12, 2010, at 1B.

¹²⁶ Aman Batheja, “GOP race centers on voter ID bill, party leader’s role,” *Fort Worth Star Tribune*, Feb. 10, 2010, at B08.

¹²⁷ R.G. Ratcliffe and Gary Scharrer, “Republican gains in Texas House may pose challenge to Straus,” *Houston Chronicle*, Nov. 3, 2010.

¹²⁸ Jason Embry, “Republicans now firmly in control of Texas ... but which Republicans?” *Austin American-Statesman*, Nov. 3, 2010. There were similar reports in other newspapers: Robert T. Garrett and Terrence Stutz, “GOP legislators ready to resurrect divisive bills,” *Dallas Morning News*, Nov. 4, 2010, at A01; Dave Montgomery, “Hispanic Republicans celebrate midterm election victories,” *Fort Worth Star Tribune*, Nov. 7, 2010.

¹²⁹ Dave Montgomery, “Republicans confident of passing Texas voter ID bill,” *Fort Worth Star Tribune*, Dec. 18, 2010. Italics supplied.

¹³⁰ Gary Scharrer, “Senate is set to ponder voter IDs,” *San Antonio Express News*, Jan. 21, 2011, at 1A.

¹³¹ Jason Embry, “Senate taking up voter ID Monday,” *Austin American-Statesman* blog, Jan 20, 2011,

Gov. Dewhurst again successfully pressed the senate to exempt photo ID measures from its two-thirds rule for consideration of a bill, and in what a reporter depicted as part of Dewhurst's "bid for the U.S. Senate in 2012," the Lt. Gov. pushed voter ID to the front of the queue, scheduling it first among the major issues the senate would consider.¹³² Third, Republicans persuaded two legislators who had been elected as Democrats to switch parties. This meant that even if every Democrat left the state (as Democrats had done in 2003 to try to prevent the Tom DeLay midterm redistricting), Republicans would still be able to retain a quorum of 100 members. The two-thirds majority also meant that Republicans could suspend the rules at any point, which would allow them to break any chub in the House.¹³³ Fourth, to prevent a chub from even getting started, the House passed a rule saying that debate on the Local and Consent Calendar could not continue past midnight.¹³⁴ This meant that bills on other calendars, including voter ID bills, would be taken up in their regular order, and that debate on local and consent bills could not block their consideration.¹³⁵

106. Robbed of their ability to use legislative rules to defeat S.B. 14, Democrats resorted to arguments. In the Senate, Democrats filed 37 amendments to S.B. 14, only 6 of which passed, all minor. They detailed the burdens that obtaining a "free" ID from Department of Public Safety offices would pose on those who did not have drivers' licenses or other acceptable forms of photo ID, because 77 counties in Texas currently had no DPS offices, others were rarely open, and offices in central metropolitan areas were inaccessible to minority areas and had long lines, even without a torrent of people needing new photo IDs to vote. They pointed out that S.B. 14 was the most restrictive voter ID bill in the country, having many fewer alternative documents authorized for identification than the laws of Georgia or Indiana and much less money per voter allocated to retraining polling place officials and alerting voters to the new prerequisites.¹³⁶

107. Most of all, Democrats denied that there was any problem of voter impersonation fraud to correct and charged that S.B. 14 would have a disparate impact on seniors, the disabled, the poor, and minorities. The Democrats' leader on the issue, Rep. Rafael Anchia (2021 chair of the Mexican-American Legislative Caucus) recounted years of legislative inquiry into the existence and intent of fraud.

In 2005, Mary Denny filed our -- our first photo I.D. bill. She took testimony, and she couldn't find any cases of voter impersonation. In 2006, I sat on the Interim Committee, and we studied it again. And, again, no -- no documented cases of voter impersonation. In 2006, the A.G. said that voter fraud was epidemic, and he started

<http://www.statesman.com/blogs/content/shared-gen/blogs/austin/politics/entries/2011/01/20/senate_taking_up_voter_id_mond.html>.

¹³² Dave Montgomery, "Governor gives voter ID bill emergency status in legislative session," *Fort Worth Star Tribune*, Jan. 21, 2011.

¹³³ Peggy Fikac, "The power of the party switch," *Houston Chronicle Politics Blog*, Dec. 14, 2010; Jim Vertuno, "The Senate could be Texas Democrats' 'Alamo'," *San Antonio Express-News*, Dec. 19, 2010.

¹³⁴ Andrew Weber, "Explainer: What is Chubbing?" *Texas Tribune*, Feb. 2, 2011.

¹³⁵ Robert T. Garrett, "Republicans act to avert Dems' stalling," *Dallas Morning News*, Jan. 25, 2011, at A03.

¹³⁶ Mike Ward, "After initial OK, Senate set to finish on voter ID," *Austin American-Statesman*, Jan. 26, 2011.

a multi-year investigation that resulted in one case of voter impersonation. Again, ironically, that would not have been prevented by this current bill, because he used the -- the perpetrator used a photo I.D. In 2007 we again heard testimony and again found no evidence of voter impersonation.

On the House floor in 2007, Representative Betty Brown, the author of the photo I.D. bill, held up a stack of papers where she alleged that there was a great number of illegal immigrants that were voting in our elections. And when Representative Hochberg examined those papers, the allegations were proved to be false. At that point the Republican D.A. of San Antonio launched a county-wide initiative on voter fraud and found no cases of voter impersonation.

In the 2008 interim, the Elections Committee Chair¹³⁷ wrote a letter ceasing [sic – calling] upon the state audit of our statewide voter registration database, saying – saying that 90,000 felons and illegal aliens had voted. That also proved to be false, and he was forced to retract the statement to the press.

In 2009, again we took testimony until the late hours; and, again, no documented cases of voter impersonation. And we have recently conducted an election contest where, again, hundreds of votes were examined, and no cases of voter impersonation.¹³⁸

108. The legislature passed S.B. 14 on a party-line vote. According to Election Committee Chair Todd Smith, “every Republican member of the legislature would have been lynched if the bill had not passed.” Although overturned by the District Court of the District of Columbia under Section 5, the voter ID was revived by the State of Texas minutes after the Supreme Court’s decision in *Shelby County v. Holder*.¹³⁹ It was subsequently struck down by the federal district court in Corpus Christi, a decision that was stayed by the 5th Circuit and the Supreme Court.¹⁴⁰ This meant that S.B. 14 was in effect for the 2014 election. Rice and University of Houston political scientists found through a telephone survey with individual voters that misinformation about the exact photo IDs that were necessary to vote may have cost incumbent Democrat Pete Gallego his seat in an election decided by 1.1% of the votes.¹⁴¹

109. The savage four-session partisan and racial struggle over voter ID in Texas embittered old friends, transformed procedures in the Texas legislature, focused the national spotlight on Texas, resulted in several major legal cases, likely changed the result in at least one congressional election, and set the stage for the battle over S.B. 1. Despite the fact that there was only one conviction for in-person voter impersonation fraud in Texas from 2002 through 2008, proponents of S.B. 14 presented it as a response to widespread ballot fraud, particularly by “illegal aliens.”

¹³⁷ Leo Berman, a leading conservative Republican.

¹³⁸ House Debates, March 21, 2011, at 39-42, 46-47.

¹³⁹ Jessica Huseman, “Texas Voter ID Law Led to Fears and Failures in 2016 Election,” *ProPublica*, May 2, 2017, <https://www.propublica.org/article/texas-voter-id-law-led-to-fears-and-failures-in-2016-election>.

¹⁴⁰ 71 F. Supp. 3d 627 (S.D. Tex., 2014).

¹⁴¹ Mark P. Jones, Jim Granato, and Renee Cross, “The Texas Voter ID Law and the 2014 Election: A Study of Texas’s 23rd Congressional District,” <https://www.bakerinstitute.org/media/files/files/e0029eb8/Politics-VoterID-Jones-080615.pdf>.

The gross exaggeration of the evidence of fraud, the stringent restriction of election laws justified by that hyperbole, the titanic battle over the proposals, and the racial and ethnic stakes in the struggles, always made explicit by opponents and sometimes, even by proponents, prepared the way, even wrote the script, for S.B. 1.

D. Pretext: The Fraud about Fraud

1. Attorney General Abbott's "Epidemic of Voter Fraud"

110. Rep. Anchia's summary of the evidence about voter fraud in Texas, quoted extensively above, is borne out by other sources. In fact, the gap between claims of extensive ballot fraud and proven instances of such schemes is nowhere greater than in Texas. After the defeat of the first major Texas voter ID bill, H.B. 1706, in 2005, Attorney General Greg Abbott launched a very public investigation, using \$700,000 in funds from the federal Help America Vote Act, into what his office's press release insisted was an "epidemic of voter fraud" in Texas.¹⁴² His "Special Investigations Unit," the Attorney General promised, would "work with police departments, sheriff's [sic] offices, and district and county attorneys to successfully identify, investigate and prosecute various types of voter fraud offenses."¹⁴³ The result, the Attorney General trumpeted, would be "a dramatic increase in indictments for voter fraud."¹⁴⁴ The website release was followed up not only by newspaper stories, but also by newspaper columns personally authored by the Attorney General, which repeated the words and examples of the news release verbatim.¹⁴⁵

111. The results of the Attorney General's efforts must have disappointed true believers. In 2008, there were 13.6 million Texans registered to vote, and over 8 million votes were cast. As Prof. Chandler Davidson noted in testimony before the Texas Senate in 2009,

In the four years between Jan. 25, 2006, the day the initiative was announced, and March 6, 2009, 26 people have been *indicted* for vote fraud. A mere 5 persons in this same period had been *convicted* of one or more counts of vote fraud, and 2 of those 5 convictions were of people who had committed the fraud before January 2006. In short, of the 26 people indicted over the three-year period since Gen. Abbott's initiative was announced, only 3 have so far been convicted. Most of the indictments concern older women who handled write-in ballots for elderly or disabled friends, some apparently unaware of a law passed in 2003 requiring those rendering such aid to sign the envelope containing the friend's ballot before mailing it.¹⁴⁶

¹⁴² The announcement stimulated, for example, a major news story in the *Dallas Morning News*, Gromer Jeffers, Jr., "State targets election fraud – attorney general calls problem an epidemic in Texas," Jan. 29, 2006, which noted that "Dallas County has not had a major case of election code abuse since 2003."

¹⁴³ Texas Senate Debate, March 10, 2009.

¹⁴⁴ Editorial, "Texas AG's wild goose chase," *Austin American Statesman*, May 23, 2008.

¹⁴⁵ See, e.g., Greg Abbott, "Voter fraud must stop," *Fort Worth Star Tribune*, Feb. 8, 2006: "In Texas, an epidemic of voter fraud is infesting the electoral process, and it's time we rooted it out. . . . Voter fraud is occurring on a large scale when viewed statewide, and our state elections are being affected to a significant extent."

¹⁴⁶ Texas Senate Debate, March 10, 2009.

112. All of the people that Abbott's office prosecuted, according to the *Dallas Morning News*, were Democrats, most of them Latinos or African-Americans.¹⁴⁷ The Attorney General's office refused to release documents sought by the *News* under the state's public records act that would have allowed the newspaper to determine how many complaints of voter fraud had been received and how many investigations had been initiated.¹⁴⁸ As a 2006 federal lawsuit that accused the Attorney General of using his vote fraud investigations to intimidate minority voters documented, PowerPoint slides used by the Attorney General's office to train officials in voter fraud cases included, according to the *Dallas Morning News*, "a photograph of African-American voters standing in line to vote. Another shows a sickle-cell anemia postage stamp that depicts a black woman holding an infant."¹⁴⁹

113. Reflecting the popular debate that was often cleansed from the legislative halls, the *News* editorialized that

self-styled voting reformers have focused on other kinds of perceived threats to clean elections – patterns of voter impersonation at the polls and massive fraud using illegal immigrants.

Were those threats real, Mr. Abbott most certainly would have provided proof, helping Republican state lawmakers make their case for new laws requiring a photo ID at the polls to go along with the traditional Texas voter registration card.¹⁵⁰

114. A 2013 check of the Attorney General's records by *Politifact* concluded that from August 2002 through September 2012, the office had prosecuted 78 violations of the election code, of which 46 ended with "a conviction, guilty plea, no-contest plea or guilty plea as part of deferred adjudication. Of those, 18 cases appeared to involve fraud committed by individual voters: 12 cases with ineligible voters, five cases of voter impersonation and one case of voting more than once."¹⁵¹

2. Infinitesimal Amounts of Legally Proven Fraud Compared to Numbers of Votes

115. According to Prof. Michael McDonald's authoritative U.S. Election Project, the number of ballots cast in the elections spanning the 2002-10 period (5 general elections, plus presidential

¹⁴⁷ Wayne Slater, "Democrats use voter fraud allegations as rallying point," *Dallas Morning News*, June 8, 2008, p. 13A.

¹⁴⁸ Wayne Slater, "Texas AG fails to unravel large-scale voter-fraud schemes in his two-year campaign," *Dallas Morning News*, May 18, 2008.

¹⁴⁹ Wayne Slater, "Texas AG fails to unravel large-scale voter-fraud schemes in his two-year campaign," *Dallas Morning News*, May 18, 2008. The lawsuit was settled in May, 2008, with an agreement of the Attorney General to prosecute only cases of actual fraud. Wayne Slater, "Democrats use voter fraud allegations as rallying point," *Dallas Morning News*, June 8, 2008, p. 13A.

¹⁵⁰ Editorial, "Still looking for massive vote fraud," *Dallas Morning News*, May 23, 2008.

¹⁵¹ Sue Owen, "Voter fraud occurs in Texas, though convictions and guilty pleas are rare," *Politifact*, Sept. 13, 2013, <https://www.politifact.com/factchecks/2013/sep/13/eddie-bernice-johnson/voter-fraud-occurs-texas-though-convictions-and-gu/>.

primaries in 2004 and 2008) in Texas was 35,270,798.¹⁵² Eighteen incidents for over 35 million votes cast is a proven fraud rate of 0.000005 percent.

116. Between 2012 and August, 2016, according to a News21 public records request to the Attorney General's office, there were 15 successful prosecutions by the State of Texas for election crimes, of which 4 were of voters and 11 were of elections officials or third-party volunteers. In the same newspaper story that reported that figure, Greg Abbott, by then governor, referred to fraud in Texas elections as "rampant."¹⁵³ Texans cast 14,760,700 votes in the 2012 primary and general elections and the 2014 general elections, yielding a proven fraud rate for both voters and officials or volunteers in those elections of 0.0001 percent.

117. A records request from KHOU in Houston to the Texas Attorney General's office yielded the information that the State prosecuted 55 people for election fraud from 2015 to 2020, only 2 of whom came from Harris County.¹⁵⁴ In 2020, Attorney General Ken Paxton's office closed 16 election law cases, all of which involved Harris County residents who gave false addresses on their voter registration forms. According to the *Houston Chronicle*, none received any jail time.¹⁵⁵ Despite spending \$2.2 million on an "election integrity unit" in his office in 2021, Paxton closed only 3 election cases.¹⁵⁶ According to a statement during debate on H.B. 7 on the House floor, the Attorney General's office spent 22,000 staff hours investigating election fraud in 2020 and nearly doubled the staff of the "election integrity" unit – all to close 16 cases.¹⁵⁷

118. When those claiming fraud in Texas elections did cite numbers, they were often misleading, as critics pointed out. For example, Sen. Bryan Hughes, chief sponsor of S.B. 1, told a CNN interviewer that Attorney General Paxton had 400 open voter fraud "cases" in April 2021. As the *Houston Chronicle* pointed out, the 386 cases involved only 43 people, and they were only investigations, not indictments, much less convictions.¹⁵⁸

¹⁵² <http://www.electproject.org/>.

¹⁵³ Sami Edge, "Review of States with voter ID Laws Found No Impersonation Fraud," *Texas Tribune*, Aug. 21, 2016, <http://tpr.org/post/review-states-voter-id-laws-found-no-impersonation-fraud#stream/0>.

¹⁵⁴ Jeremy Rogalski, "Despite national outcry, Texas received relatively few voting fraud reports this election/From 2015 to 2020, the Texas Attorney General's office received 197 election fraud complaints across the state." KHOU, Nov. 20, 2020, <https://www.khou.com/article/news/investigations/texas-received-few-voting-fraud-reports/285-deec7c9a-581b-42b1-b430-4cae7aef5f26>.

¹⁵⁵ Taylor Goldenstein, "Ken Paxton's beefed-up 2020 voter fraud unit closed 16 minor cases, all in Harris County," *Houston Chronicle*, Dec. 21, 2020, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/Ken-Paxton-s-beefed-up-2020-voter-fraud-unit-15820210.php>.

¹⁵⁶ Taylor Goldenstein, "Texas AG Paxton's \$2.2M voter fraud unit closed three cases in 2021. GOP lawmakers still boosted its budget." *Houston Chronicle*, Dec. 17, 2021, <https://www.houstonchronicle.com/politics/texas/article/Texas-AG-Paxton-s-2-2M-voter-fraud-unit-closed-16708051.php>.

¹⁵⁷ Transcript of House Debate, May 6, 2021, at 30-31 (colloquy between Representatives John Turner and Briscoe Cain).

¹⁵⁸ Taylor Goldenstein, "Fact checking Texas lawmaker's claim of 400 voter fraud 'cases'," *Houston Chronicle*, April 12, 2021, <https://www.houstonchronicle.com/politics/texas/article/Fact-checking-Texas-lawmaker-s-claim-of-400-16095858.php>.

119. As during Abbott's time in the Attorney General's office, Paxton appears to have concentrated his prosecutions on Blacks and Latinos, a study by the Texas ACLU, based on six years of publicly available data, found. "Since Paxton took office in 2015, at least 72% of the Election Integrity Unit's prosecutions appear to have been against Black and Latinx individuals. Women of color also have been frequent targets of the attorney general's office. At least 45% of all Election Integrity Unit prosecutions appear to have been brought against Black women and Latinx women."¹⁵⁹

120. Adding up the convictions, settlements, and from 2015 through 2021, prosecutions and closed cases, there were 108 actions of all types by the State Attorney General's office from 2002 through 2021. Even leaving out all municipal, county, school board, special district, and referendum elections, there were 86,890,467 votes cast in the elections spanning the period, which gives a proven fraud rate of a maximum of 0.0001 percent, or one ten-thousandth of a percentage point.¹⁶⁰

3. "No Proof" of Fraud in 2020

121. An Election Security Task Force for Harris County composed of personnel of the Harris County Precinct 1 constable's office, the district attorney's office, the county attorney's office, and the county clerk's office investigated 20 complaints of election irregularities in the 2020 election. According to the Task Force's December 2020 report, as summarized in the *Texas Tribune*, "Undercover officers made 6,311 visits to 122 early voting and 806 Election Day polling sites. The task force responded to 77 calls for service. And it used four explosive-detecting K-9 units to make 323 sweeps of polling locations, as well as 'continual sweeps' while voters dropped off ballots at NRG Stadium on Election Day." The report stated that the Task Force "found no proof of any election tampering, ballot harvesting, voter suppression, intimidation or any other type of foul play that might have impacted the legitimate cast or count of a ballot."¹⁶¹

122. Although in November, 2020, Lt. Gov. Dan Patrick announced a bounty for proof of voter fraud, up to a total of \$1 million, to be taken from Patrick's campaign funds, the first and only payout so far went in October 2021 to a poll worker in Pennsylvania who presented the Lt. Gov. with documentation of the conviction of a Republican in his state who cast two votes on election day, one in his own name, and one in his son's. The 72-year-old Republican claimed that he had double-voted by mistake, misunderstanding what the poll worker had said to him through a

¹⁵⁹ "Voters of Color Appear to Be Most Frequent Targets of Attorney General Ken Paxton's Election Integrity Unit," Press Release, March 24, 2021, <https://www.aclutx.org/en/press-releases/voters-color-appear-be-most-frequent-targets-attorney-general-ken-paxtons-election>.

¹⁶⁰ An article in the *Texas Tribune* noted that as of the first week of November 2020, the Attorney General's office had closed cases – not necessarily convicted or settled with anyone – on election law offenses for 150 defendants from 2004 through 2020. Increasing the numerator from 108 to 150 and rounding up to a higher quotient would raise the fraud case rate to two ten-thousandths of a percentage point. Karen Brooks Harper, "GOP lawmakers heading into the legislative session take aim at voter fraud, despite no evidence of widespread problem," *Texas Tribune*, Dec. 1, 2020, <https://www.texastribune.org/2020/12/01/tesas-gop-voting/>.

¹⁶¹ Patrick Svitek, "Harris County elections were fair and secure, task force finds," *Texas Tribune*, Dec. 18, 2020, <https://www.texastribune.org/2020/12/18/harris-county-elections-secure/>. The link to the Task Force's report is now dead.

mask. The poll worker was apparently the first and only person in the entire country to apply for Patrick's bounty.¹⁶²

4. Sensational Charges of Fraud Dissolve under Examination

123. When examined, the most sensational charges of vote fraud have repeatedly collapsed. One of the most telling examples first appeared on the "Texas Watchdog" website in October 2008 under the headline "Dead Voters Cast Ballots in Dallas County," which claimed that 6,000 dead people were still on the rolls in Dallas County.¹⁶³ News media repeated the story immediately, and before anyone could check or explain the shocking news, it became urban myth. It took the *Dallas Morning News* six weeks to follow up each "dead" voter meticulously and to explain the bureaucratic procedures that led to clerical errors – an insignificant number, given that there were 1.2 million voters in Dallas County – which produced the Watchdog's irresponsible story. The unraveling was devastatingly summarized by the newspaper:

6,000 – In a report filed just before Election Day, the number of deceased persons the online journalism group Texas Watchdog concluded might be registered to vote in Dallas County.

3,000 – Roughly the number of dead voters county officials concluded were already "in suspense" on Election Day, meaning ballots could not be cast in their names without additional paperwork.

48 – The number of voters Texas Watchdog concluded might have been dead when votes were cast in their names. A review by The Dallas Morning News indicated a series of clerical errors appears to explain why those people were listed as having voted.

23 – Number of people who appear to have been improperly stamped in precinct poll books as having voted. Frequently, the voter never signed an accompanying signature roster required to receive a ballot.

12 – Number of living registered voters whose names and birthdays match those of dead voters.

7 – Number of people listed as having voted by county employees who incorrectly scanned bar codes listed next to the names in the precinct poll books.

¹⁶² Jeremy Wallace, "Texas Lt. Gov. Dan Patrick offers \$1 million reward for evidence of voter fraud," *Houston Chronicle*, Nov. 10, 2020, <https://www.houstonchronicle.com/politics/texas/article/Texas-Lt-Gov-Dan-Patrick-offers-1-million-1571673.php>; Lauren McGaughy, "Texas Lt. Gov. Dan Patrick has paid his first voter fraud bounty. It went to an unexpected recipient. Patrick, a Republican, promised to pay \$25,000 to any tipster who came forward with evidence of real voter fraud. He cut his first check this week." *Dallas Morning News*, Oct. 21, 2021, <https://www.dallasnews.com/news/politics/2021/10/21/texas-lt-gov-dan-patrick-just-paid-his-first-voter-fraud-bounty-it-went-to-an-unlikely-recipient/>.

¹⁶³ Texas Watchdog ceased operations in 2013 when it lost funding. See https://ballotpedia.org/Texas_Watchdog.

3 – Number of the 48 who cast votes, and whose signatures in the poll books match the signatures on their voter registration cards, suggesting they were alive and properly registered during the elections in question.

2 – Number of people for whom poll books were not available for review. But the accompanying signature roster was not signed, suggesting the voters never received ballots to vote.

1 – The person for whom no information was available for review because the election took place in 2004. The county purges poll books and signature rosters 22 months after an undisputed election.¹⁶⁴

124. When pressed to justify gauzy estimates of fraud, activists generally retreated. In written testimony in favor of S.B. 7, a predecessor of S.B. 1, before the Texas State Senate Committee on State Affairs, Chuck Devore of the Texas Public Policy Foundation, a conservative think tank, speculated confidently that 75,000 people on the voting rolls in Texas in 2018 were ineligible. He did not note that 8.4 million Texans voted in that year's election. In any event, under questioning in his oral testimony, Devore admitted that "perhaps a small number of those [75,000 potential votes] may have been cast."¹⁶⁵

125. Even more impressive as an example of inflated and later collapsed fraud claims was the contention in late September 2020 that a conspiracy of major Black officeholders in Harris County planned to fabricate and deposit 700,000 ballots. As part of a legal effort to curtail early in-person voting and the ability to drop off VBM ballots before election day, the Republican Party of Harris County and well-known conservative activists filed two affidavits with the Texas Supreme Court.¹⁶⁶ One affidavit, signed by a private investigator, charged that unnamed witnesses had told the investigator that two employees in the Harris County Clerk's office were mixing ballots harvested from "the elderly in nursing homes, from the homeless, and from unsuspecting residences' mailboxes" with legitimate ballots. The other, by a former Houston police officer, claimed to have videotaped corroboration of these claims.¹⁶⁷ Papers filed with the Texas Supreme Court stated that one unnamed witness told the investigator that someone else told him that an employee of Harris County Commissioner Rodney Ellis bragged that "he could guarantee that the illegal ballot harvesting operation, with the help of mass mail-in ballots, could harvest 700,000 illegal ballots." The videotapes included interviews with "witnesses" who alleged that they somehow had knowledge of

¹⁶⁴ Randolph Bush, "Review finds no vote fraud in Dallas County," *Dallas Morning News*, Dec. 13, 2008.

¹⁶⁵ Texas Senate Committee on State Affairs, Streamed Video, March 26, 2021, at 1:27:03.

¹⁶⁶ Emma Platoff, "Houston Republicans sue to limit in-person and absentee voting options in Harris County/Conservative activist Steve Hotze and a number of Republican candidates and officials are asking the Texas Supreme Court to shorten the early voting period and limit drop-off locations for absentee ballots in the state's largest Democratic county." *Texas Tribune*, Sept. 28, 2020, <https://www.texastribune.org/2020/09/28/houston-republicans-lawsuit-voting/>.

¹⁶⁷ Holly Hansen and Brad Johnson, "Biden Campaign Operative, Texas State Senator Accused of Mail-in Ballot Fraud/Witnesses allege Texas Sen. Boris Miles and Harris County Commissioner Rodney Ellis were orchestrating a ballot harvesting scheme with help from Biden campaign official Dallas Jones." *The Texan*, Sept. 28, 2020, <https://thetexan.news/biden-campaign-operative-texas-state-senator-accused-of-mail-in-ballot-fraud/>.

groups of people completing thousands of absentee and mail-in ballots, including completing ballots for deceased individuals; illegally going into nursing homes, with the complicity of the nursing home staff, and filling out and forging the signatures of nursing home residents; signing up homeless individuals to vote using the ballot harvester's address then completing the ballot and forging the homeless individual's signature. This entire operation is being run by the elite politicians of the Democrat Party in Houston/Harris County."¹⁶⁸

126. When the Texas Supreme Court dismissed the Republicans' effort, without opinion, it did not mention the wild, unevidenced charges, which one of the individuals named as a conspirator in the ballot harvesting cabal, State Sen. Borris Miles, derided as "false and ludicrous."¹⁶⁹ During debates over S.B. 1 in the legislature, Miles asserted that the authors of the affidavits "had been paid a half a million dollars by a wealthy Republican. . . . They obviously made up this story." Even the sponsor of S.B. 1, State Senator Bryan Hughes, agreed with Sen. Miles that "It was shown that you weren't guilty of anything."¹⁷⁰ While the charges were so outrageous that no reputable newspaper even bothered to refute them, it is worth underlining that they were presented to the state's highest court by the Republican Committee of the state's largest county as part of a lawsuit to wipe out a week of early in-person voting and a means of voting safely, during Covid, that was eventually used by 127,000 people.¹⁷¹ Fraud might not exist, but charges of massive fraud continued to be wielded by Republican activists and officials.

E. Fraud and the Struggle over Voter ID

127. Scholars and newspaper reporters have repeatedly noted the extravagant assertions about the extent of voter fraud, compared to the miniscule actual evidence for its existence.¹⁷² If the

¹⁶⁸ Brandon Waltens, "Affidavits Allege Democrat Officials Planning Colossal Illegal Ballot Harvesting Scheme/Two affidavits claim a massive illegal mail-ballot harvesting operation, led by 'elite' Democrat officials, is being prepared for Texas' most populous county." Texas Score Card, Sept. 28, 2020, <https://texasscorecard.com/local/affidavits-allege-democrat-officials-planning-colossal-illegal-ballot-harvesting-scheme/>.

¹⁶⁹ Emma Platoff, "Houston Republicans sue to limit in-person and absentee voting options in Harris County/Conservative activist Steve Hotze and a number of Republican candidates and officials are asking the Texas Supreme Court to shorten the early voting period and limit drop-off locations for absentee ballots in the state's largest Democratic county." *Texas Tribune*, Sept. 28, 2020, <https://www.texastribune.org/2020/09/28/houston-republicans-lawsuit-voting/>; Jolie McCullough, "Voters in Harris County may continue using drive-thru voting, Texas Supreme Court rules/ A last-minute challenge by the Republican parties of Texas and Harris County argued the largely Democratic county's new drive-thru polling places were illegal." *Texas Tribune*, Oct. 22, 2020, <https://www.texastribune.org/2020/10/22/drive-thru-voting-texas-harris-county/>.

¹⁷⁰ Texas Senate State Affairs Committee Hearing, July 10, 2021, Texas Senate Streaming Video Player, at 1:10:41-1:12:11.

¹⁷¹ Jolie McCulloch, "Texas Supreme Court rejects Republican-led effort to throw out nearly 127,000 Harris County votes/A handful of GOP activists and candidates had asked the state's highest civil court to rule Harris County's drive-thru voting locations illegal and invalidate votes that have already been cast. The challenge has also been filed in federal court." *Texas Tribune*, Nov. 1, 2020, <https://www.texastribune.org/2020/11/01/texas-drive-thru-votes-harris-county/>.

¹⁷² In addition to the material cited above, see Justin Levitt, "The Truth About Voter Fraud," New York: Brennan Center for Justice, 2007, https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf; Lorraine C. Minnite, *The Myth of Voter Fraud* (Ithaca, N.Y.: Cornell Univ. Press, 2010); Justin Levitt,

evidence is so slight, why did Republicans fight so furiously for voter ID, especially in Texas? Why did they propose bills to solve a non-existent problem? I suggest that this formulation has the causal sequence reversed. Usually, we think the order as problem → proposal. But as Royal Masset, the former state political director of the Texas Republican Party, observed of proponents of photo ID laws in Texas:

“They’re just basically using sheer racism to pump their own political points. They’re trying to exploit the public fear of illegal aliens.”

Masset said voter ID bills are an “extremely popular vote on the grassroots level.” But the idea that illegal immigrants vote “is one of those urban myths that just has caught on and everyone assumes is true.”¹⁷³

128. The implication is that the bills were proposed so that a myth of election fraud could be purveyed, a myth that energized the Republican base by focusing on the alleged actions of minorities, particularly the undocumented. Republicans also knew without asking that the bills would have a discriminatory effect. As Todd Smith, the 2009 House Election Committee chair, testified in a deposition in *Veasey v. Abbott*, in *ProPublica*’s summary, “none of the studies that could have been presented would have mattered — he already knew minorities were less likely to possess photo IDs. ‘I think it’s a matter of common sense,’ he testified. ‘I don’t need a study to tell me that.’”¹⁷⁴

129. My view of the purpose of proposing such legislation as the voter ID bills or S.B. 1 is not original. Speaking of the proposals that eventually became S.B. 1, the *Austin American-Statesman* declared: “Texas Republicans’ true motive is two-fold: To stay in power by making voting harder for people who tend to support Democrats, and to energize a GOP base that remains convinced of Donald Trump’s false claims the 2020 presidential election was stolen from him.”¹⁷⁵

“A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast,” *Washington Post*, Aug. 6, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

¹⁷³ Juan Castillo, “ID plan puts spotlight on voter fraud,” *Austin American-Statesman*, May 23, 2007. Speaking about a border security bill being considered in the 2007 House, leading conservative Republican Rep. Leo Berman of Tyler, Texas, demonstrated the candor for which he was known: “Everyone on this floor needs a vote on illegal aliens to take home and say we did a little something about it.”

¹⁷⁴ Jessica Huseman, “Texas Voter ID Law Led to Fears and Failures in 2016 Election,” *ProPublica*, May 2, 2017, <https://www.propublica.org/article/texas-voter-id-law-led-to-fears-and-failures-in-2016-election>.

¹⁷⁵ “Editorial: Tell us, Gov. Abbott, where’s the widespread voter fraud?”, *Austin American-Statesman*, March 17, 2021, <https://www.statesman.com/story/opinion/editorials/2021/03/17/editorial-texas-gov-greg-abbott-where-s-widespread-voter-fraud/4721060001/>.

VII. S.B. 9 + 2020 Election = S.B. 1

A. The 2018 Election

130. The 2018 election, Sen. John Cornyn declared, was “a wake-up call” for Texas Republicans.¹⁷⁶ “Is GOP losing grip on Texas?” asked a *Dallas Morning News* headline.¹⁷⁷ In the 2014 elections, Texas had the lowest turnout of any state in the country, but the state’s 63% increase in turnout from 2014 to 2018 was sixth in the nation. It was the highest turnout in the state in a midterm election since 1970.¹⁷⁸ Despite spending \$4 million in 42 candidate races in 2018, the right-wing political action committee Empower Texans won only 14, and several of their candidates who had defeated more moderate Republicans in primaries lost to Democrats in the general elections.¹⁷⁹ Not only did Democratic senate candidate Beto O’Rourke lose to incumbent Sen. Ted Cruz by only 3% and the less-heralded Democratic candidates for Lieutenant Governor and Attorney General lose by only 5% and 3%, respectively, but Democrats also picked up 12 seats in the Texas House and 2 in the Senate. Half of the House and both of the Senate losses for the Republicans came in the suburbs of the Dallas/Fort Worth Metroplex. Anticipating news stories after the 2020 census,¹⁸⁰ an article explaining the 2018 election results pointed to “the shifting demographics across the state as typically conservative suburban areas start to have more ethnic and economic diversity.”¹⁸¹

131. Although Republicans had sought to end straight-ticket voting, which had long been allowed in Texas, a last-minute amendment to the 2017 law delayed its implementation until 2020.¹⁸² Taking advantage of the opportunity to vote for all down-ticket contests with one

¹⁷⁶ Gromer Jeffers Jr., “GOP ponders path after ‘wake-up call’/ Lost, close races suggest hard-liners could be at risk,” *Dallas Morning News*, Nov. 9, 2018, p. 1A.

¹⁷⁷ Todd J. Gillman, “Is GOP losing grip on Texas? Suburban shifts, mixed views on Trump narrow party’s edge,” *Dallas Morning News*, Nov. 11, 2018, p. 1A.

¹⁷⁸ Maggie Astor and Liam Stack, “Midterm turnout way, way up/ Texas among states with big increases; complete data months away,” *Dallas Morning News*, Nov. 11, 2018, p. 2A, reprinted from *The New York Times*; Elbert Wang, “Texas saw the nation’s sixth-highest turnout increase, but still lagged behind most other states/ Voter turnout in the 2018 Texas midterm elections increased by 18 percentage points compared with the previous midterms, according to data from the United States Elections Project,” *Texas Tribune*, Dec. 7, 2018, <https://www.texastribune.org/2018/12/07/texas-voter-turnout-sixth-highest-increase-2018-midterms/>; Jonathan Silver, “Texas midterm voter turnout highest since 1970,” *Austin American-Statesman*, Nov. 7, 2018, <https://www.statesman.com/story/news/politics/elections/2018/11/07/texas-midterm-voter-turnout-highest-since-1970/8860862007/>.

¹⁷⁹ Eva-Marie Ayala, “\$4M spent, but few wins/ Did GOP advocacy group’s losses result from tilt too far right?” *Dallas Morning News*, Nov. 10, 2018, p. 1A.

¹⁸⁰ Alexa Ura and Mandi Cai, “With surgical precision, Republicans draw two congressional districts that dilute power of Hispanic and Asian voters/ The GOP is losing its hold on suburbs of Dallas and Fort Worth as they grow more diverse. Two proposed districts show how far the party is reaching to entrench rural, white electoral power.” *Texas Tribune*, Oct. 15, 2021, <https://www.texastribune.org/2021/10/15/texas-redistricting-dallas-fort-worth/>.

¹⁸¹ Robert T. Garrett and James Barragan, “O’Rourke effect drives pickups/ Democrats gain 12 in House, but what will the impact be?” *Dallas Morning News*, Nov. 8, 2018, p. 1B; “Elections ’18 Results,” *ibid.*, Nov. 8, 2018, p. 11A; Eva-Marie Ayala, “\$4M spent, but few wins/ Did GOP advocacy group’s losses result from tilt too far right?” *ibid.*, Nov. 10, 2018, p. 1A.

¹⁸² Alex Samuels, “Federal judge blocks Texas’ elimination of straight-ticket voting/ Texas Attorney General Ken Paxton said his office has filed a motion to stop the judge’s order and will file an appeal of the district court’s ruling.” *Texas Tribune*, Sept. 25, 2020, <https://www.texastribune.org/2020/09/25/straight-ticket-voting-texas/>.

checkmark, Democrats swept partisan judgeship races in the Dallas area for the first time in 26 years and elected a full slate of new Black female judges in Harris County who ran under the banner of “Black Girl Magic.”¹⁸³ The *Dallas Morning News* suggested that Republicans should “choose pragmatism over partisanship” or risk becoming “more accustomed to losing.”¹⁸⁴

B. The Whitley Purge

132. Republicans were not used to taking advice from the *News* or any other major Texas newspaper, and they charted a different course. Instead of appealing to the changing electorate, they chose to try to change the electorate itself.

133. Their actions began with Acting Secretary of State Dave Whitley, who in Jan. 2019 compiled a list of 95,000 registered voters taken from those who had not been citizens at the time that they applied for motor vehicle licenses. Whitley, a former deputy chief of staff to Gov. Greg Abbott, then sent the list not only to county election registrars, but also to the Attorney General, suggesting that the Secretary wanted those on the list charged with crimes. Within an hour, Attorney General Ken Paxton tweeted the news under the heading “VOTER FRAUD ALERT.” The same day, Gov. Abbott thanked Paxton and Whitley “for uncovering and investigating this illegal vote [*sic*] registration.” Later that afternoon, the Republican Party of Texas sent out a fundraising email with the subject line “BREAKING: 95,000 Non-Citizens Registered to Vote?!” The next day, President Donald J. Trump claimed on Twitter that “58,000 non-citizens voted in Texas,” adding another unsupported claim -- that “voter fraud is rampant” across the country.¹⁸⁵

134. But when county election administrators closely examined Secretary Whitley’s lists, they discovered that they were full of errors and that many on the list had become citizens since they first applied for licenses. Latino civil rights organizations and the ACLU sued, asserting that the purge represented a “witch hunt” and that the voters on the list were not “illegal immigrants,” as a press release from the Republican Attorneys General Association erroneously charged, but naturalized citizens. The lawsuit, questions raised by county elections officials, outrage among citizens on the list, and much bad publicity forced the Secretary to abandon the effort in embarrassment and settle the case.¹⁸⁶ Although the settlement reached in the lawsuit was

¹⁸³ Rebekah Allen, “Panel flips blue after 26 years full of Republicans/ 8 Democrats are swept into office to overtake majority,” *Dallas Morning News*, Nov. 10, 2018, p. 1B; Adeel Hassan, “‘Black Girl Magic’: 19 seek Harris judgeships, and 17 win,” *ibid.*, Nov. 11, 2018, p. 21A, reprinted from *New York Times*.

¹⁸⁴ Editorial, “A Tea Party Reckoning,” *Dallas Morning News*, Nov. 9, 2018, p. 14A.

¹⁸⁵ James Barragan, Robert T. Garrett and Julieta Chiquillo, “Tens of thousands removed from potential non-citizen voters list after counties find flawed data/More than half of the supposedly suspect names in Harris, Williamson counties – and nearly one-fifth in Dallas – are no longer being pursued, officials say,” *Dallas Morning News*, Jan. 31, 2019, <https://www.dallasnews.com/news/politics/2019/01/31/tens-of-thousands-removed-from-potential-non-citizen-voters-list-after-counties-find-flawed-data/>; Alexa Ura, “‘Someone did not do their due diligence’: How an attempt to review Texas’ voter rolls turned into a debacle/ Texas officials flagged 95,000 voters for citizenship reviews. But after thousands have already been cleared, questions are being raised about how they handled the process,” *Texas Tribune*, Feb. 1, 2019, <https://www.texastribune.org/2019/02/01/texas-citizenship-voter-roll-review-how-it-turned-boondoggle/>.

¹⁸⁶ Allie Morris, “Dems doubt DPS on voter purge claim; Top public safety official shoulders blame, but county officials unmoved by mea culpa,” *Houston Chronicle*, March 16, 2019,

codified in S.B. 1, the purge fanned suspicions among minority leaders because it echoed the “illegal immigrant” focus of proponents of “election integrity” during the voter ID struggles.

C. S.B. 9: Provisions

135. The legislature also considered a new election bill. Even though there had been no incident of fraud, such as the Dallas City Council election problems in 2001 and 2017 that had propelled H.B. 54 in 2003 and S.B. 5 in 2017, Lt. Gov. Patrick made S.B. 9, authored by Sen. Bryan Hughes (R-Mineola), one of his priorities.¹⁸⁷ Section 1 of the bill increased the penalty for providing false information on an application to vote or attempting to vote illegally from six months to two years and removed the necessity of proving that the person knew that she had no right to vote and that the vote was actually counted.¹⁸⁸ Innocent mistakes on registration forms might subject a voter to jail time and a fine of up to \$10,000.¹⁸⁹

136. At a three-day symposium on “Race in America” at the LBJ Foundation in Austin, Julieta Garibay, who gained her citizenship in April, 2020, but whose name appeared on Secretary Whitley’s list, condemned the purge effort and the increase in penalties in S.B. 9: “That’s one of the new tactics that they’re using. How do you put fear into people to believe that there is voter fraud happening in Texas and in many other states? How do you make sure you keep them quiet?” she said. In response, bill sponsor Hughes claimed to be puzzled by the criticism: “We don’t really understand the argument about the chilling effect that would have. We’re trying to thread the needle to make sure folks aren’t cheating while we try to protect the right of every eligible voter.”¹⁹⁰

https://houstonchronicle.newsbank.com/doc/news/172477EDE130CF98?search_terms=voting%2Bfraud&text=voting%20fraud&content_added=&date_from=March%201%2C%202019&date_to=April%2015%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-03-16; Alexa Ura, “Texas will end its botched voter citizenship review and rescind its list of flagged voters/The state had questioned the citizenship status of almost 100,000 registered voters, but many on the list turned out to be naturalized citizens.” *Texas Tribune*, April 26, 2019, <https://www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/>; Settlement Agreement, *Texas LULAC v. Whitley*, (SA-19-CA-074-FB (W.D. Texas, 2019), https://static.texastribune.org/media/files/411cff760b0b2b79a159b2390ef3f939/Voter_rolls_settlement_agreement.pdf.

¹⁸⁷ Lauren McGaughy, “Dan Patrick prioritizes defunding Planned Parenthood, raising smoking age and more,” *Dallas Morning News*, March 9, 2019, <https://www.dallasnews.com/news/politics/2019/03/09/dan-patrick-prioritizes-defunding-planned-parenthood-raising-smoking-age-and-more/>.

¹⁸⁸ Sections 1.03, 1.05, <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB00009S.pdf#navpanes=0>.

¹⁸⁹ Editorial, “Fear, not facts, driving SB 9’s crackdown on voters,” *Austin American-Statesman*, May 17, 2019, <https://www.statesman.com/story/opinion/2019/05/17/editorial-fear-not-facts-driving-sb-9s-crackdown-on-voters/51236000007/>.

¹⁹⁰ Andrea Zelinski, “Texas leads effort to stifle vote, critics say; At Summit on Race, state officials accused of intimidation tactics,” *Houston Chronicle*, April 12, 2019, https://houstonchronicle.newsbank.com/doc/news/172C60BA40D47E70?search_terms=voting%2Bfraud&text=voting%20fraud&content_added=&date_from=March%201%2C%202019&date_to=April%2015%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-04-12.

137. The bill also cracked down hard on disabled people and anyone who sought to provide assistance to a voter for whatever reason. Those applying to vote by mail based on a disability had to sign a form stating that “I am physically unable to enter a polling place without needing personal assistance or injuring my health.”¹⁹¹ Furthermore, the bill entitled poll watchers (appointed by political parties or candidates) to inspect forms and identifying documentation presented by a person assisting a voter, “to be present at the voting station” when a voter was assisted by a person who was not a family member, and “to examine the ballot before it is deposited in the ballot box to determine whether it is prepared in accordance with the voter’s wishes.”¹⁹² Any non-family member providing transportation to three or more disabled voters for curbside voting had to sign a form affirming that the voters “are physically unable to enter the polling place without personal assistance or likelihood of injuring their health . . .”¹⁹³ The offense of giving a voter unlawful assistance was raised from a misdemeanor to a felony.¹⁹⁴

138. Another provision applied only to counties of more than one million, requiring the number of countywide polling places in each state representative district in the county to be proportional to the number of the county’s registered voters who lived in that district.¹⁹⁵

139. Other provisions threatened sting operations by shielding investigators from prosecution if they were engaged in “official activities investigating a weakness in the electoral process.”¹⁹⁶ The bill also provided for the State’s entry into the interstate “crosscheck” program,¹⁹⁷ which sought to make sure that people were not registered in more than one state.

140. In the only section of the bill that attracted bipartisan support, the bill provided for paper backup for direct recording electronic [DRE] voting machines to go into effect in 2024.¹⁹⁸ Under this provision, a voter would be able to see a record of her vote before finalizing it, and a paper trail would exist for potential audits.

D. S.B. 9: Criticisms

141. Critics began by noting that the bill was not a response to fraud. As a *Houston Chronicle* editorial put it,

Bills such as SB9 are voter suppression efforts, pure and simple. A way to intimidate the growing number of potential voters, including minorities and young people, that overall tend to support Democrats. That these attempts come under the guise of protecting the electoral process is particularly galling, since in-person, deliberate voter fraud is virtually nonexistent. When the restrictive 2011 Texas Voter ID law was taken to court, the judge noted that in the decade before the law

¹⁹¹ Section 2.13 (c), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00009S.pdf#navpanes=0>.

¹⁹² Sections 2.07-08, <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB00009S.pdf#navpanes=0>.

¹⁹³ Section 2.11, <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB00009S.pdf#navpanes=0>.

¹⁹⁴ <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB00009H.pdf#navpanes=0>.

¹⁹⁵ Section 4.04 (m) (2), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00009H.pdf#navpanes=0>.

¹⁹⁶ Section 1.07 (2), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00009S.pdf#navpanes=0>.

¹⁹⁷ Section 4.02 (c), <https://capitol.texas.gov/tlodocs/86R/billtext/pdf/SB00009H.pdf#navpanes=0>.

¹⁹⁸ Section 5.02, <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/SB00009S.pdf#navpanes=0>.

was passed, there had been two convictions out of 20 million votes cast in the state.¹⁹⁹

142. Prosecuting people for unintentionally violating election laws, the paper went on, was flagrantly unfair:

Rosa Ortega, a legal immigrant with a sixth-grade education, was sentenced to eight years in prison for voting illegally in Tarrant County. This was a disproportionately harsh penalty for someone who mistakenly believed she could vote and who, as the facts of the case revealed, could have been informed of her ineligibility by the officials who accepted her registration. In another case, also in Tarrant County, Crystal Mason, a black woman, was sentenced to five years in prison for filling out a provisional ballot without knowing she was ineligible due to a felony conviction.²⁰⁰

143. As the examples of Ortega and Mason suggested, opponents of S.B. 9 charged that “the bill would scare minority voters by increasing the punishment for some election crimes and allowing officers to conduct voter fraud investigations.”²⁰¹

144. Allocating polling places in Harris, Dallas, Tarrant, Bexar, Travis, and Collin Counties²⁰² by registered voters would obviously provide fewer of them in areas containing a smaller than average proportion of citizens of voting age – i.e., urban minorities.²⁰³ County judges from the five largest counties opposed S.B. 9 as “a sharp attack on the voting rights of our citizens, especially those who have a disability or who do not speak English,” which “makes voting harder, scarier and more confusing to voters.” In addition, they singled out the polling place allocation section in particular. “We are acutely aware of the discrepancies in voter registration rates across different demographic groups,” they wrote. “This requirement would force our hand in removing polling places from communities of color and placing them in white-majority communities.” The *Houston Chronicle* charged that the purpose of the provision was to cause longer lines in major cities. “After a rout by Democrats in urban areas in the midterms, it was impossible not to find this change suspect.” Harris County Clerk Diane Trautman protested to

¹⁹⁹ Editorial, “SB9 is a bad idea; Poised to pass the state Senate, the measure makes it tougher to exercise voting rights,” *Houston Chronicle*, April 16, 2019, https://houstonchronicle.newsbank.com/doc/news/172DB1BE4A7A0990?search_terms=%22SB%2B9%22&text=%22SB%209%22&content_added=&date_from=March%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-04-16.

²⁰⁰ *Ibid.*

²⁰¹ Renzo Downey, “House panel hears contentious election integrity bill,” *Austin American-Statesman*, May 15, 2019, <https://www.statesman.com/story/news/politics/county/2019/05/15/texas-house-panel-hears-contentious-election-integrity-bill/5152507007/>.

²⁰² These were the six counties with populations over a million in 2020. https://www.texas-demographics.com/counties_by_population.

²⁰³ Renzo Downey, “House panel hears contentious election integrity bill,” *Austin American-Statesman*, May 15, 2019, <https://www.statesman.com/story/news/politics/county/2019/05/15/texas-house-panel-hears-contentious-election-integrity-bill/5152507007/>.

House Elections Committee Chair Stephanie Klick (R – Fort Worth) that the provision would “likely lead to long lines, frustration and disenfranchisement.”²⁰⁴

145. The interstate “Crosscheck” program that the bill apparently envisioned Texas joining had been created by former Kansas Secretary of State Kris Kobach in what he characterized as an effort to uncover voter fraud. But even before Kobach had spurred the formation of the so-called fraud commission under President Trump and had been rebuked by a magistrate judge of the 10th Circuit Court,²⁰⁵ the Crosscheck program had been exposed as unreliable.²⁰⁶ Based on matching names of registered voters, Crosscheck was notorious for its lists of false positives, which critics charged disproportionately focused on minorities. As an article in *The Nation* put it, “Kobach’s Cross Check Project is fueled primarily by the desire to harass immigrants.”²⁰⁷ The most recent work in political science has found that a strategy proposed to reduce double voting would impede approximately 300 legitimate votes for each double vote prevented.²⁰⁸

146. Requiring disabled persons to vote in person unless they were physically unable to enter a polling place ignored the fact that a large number of polling places throughout the country were

²⁰⁴ Jeremy Wallace, “Disputed voter overhaul bill dies; SB 9, criticized as suppression, denied House floor debate,” *Houston Chronicle*, May 20, 2019, https://houstonchronicle.newsbank.com/doc/news/1738E74B45FEFD08?search_terms=SB%2B9&text=SB%209&content_added=&date_from=April%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-05-20/; editorial, “The right move; House saves Texas from shameless, pointless voter suppression bill,” *ibid.*, May 20, 2019, https://houstonchronicle.newsbank.com/doc/news/1738E74B94216588?search_terms=SB%2B9&text=SB%209&content_added=&date_from=April%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-05-20/.

²⁰⁵ Ari Berman, “The Man Behind Trump’s Voter-Fraud Obsession/How Kris Kobach, the Kansas secretary of state, plans to remake America through restrictive voting and immigration laws,” *The New York Times*, June 13, 2017, https://www.nytimes.com/2017/06/13/magazine/the-man-behind-trumps-voter-fraud-obsession.html?_r=0&link_id=29&can_id=0b6021d38d576b50d2b9326d998d89b0&source=email-voting-rights-roundup-new-lawsuit-could-invalidate-pennsylvania-gops-congressional-gerrymander&email_referrer=voting-rights-roundup-new-lawsuit-could-invalidate-pennsylvania-gops-congressional-gerrymander&email_subject=voting-rights-roundup-new-lawsuit-could-invalidate-pennsylvania-gops-congressional-gerrymander; Josh Gerstein, “Magistrate fines Kobach but won’t release Trump meeting memo – yet, Politico, June 23, 2017, <http://www.politico.com/blogs/under-the-radar/2017/06/23/kris-kobach-fined-voting-lawsuit-trump-memo-239910>.

²⁰⁶ Alexa Ura, “Texas House committee signs off on controversial election bill,” *Texas Tribune*, May 17, 2019, <https://www.texastribune.org/2019/05/17/texas-senate-bill-9-house-committee/>.

²⁰⁷ Voting Rights Watch 2012, “A Case Study in How Kris Kobach’s Cabal Aims to Remake Election Law,” *The Nation* Blog, July 5, 2012, **Error! Main Document Only.** <http://www.thenation.com/blog/168733/case-study-how-kris-kobachs-cabal-aims-remake-election-law#>. See, similarly, Peggy Lowe, “Kansans Caught In Crosscheck System Singled Out For Kobach’s Voter Fraud Campaign,” *KMUW*, Feb. 8, 2017, <http://kmuw.org/post/kansans-caught-crosscheck-system-singled-out-kobach-s-voter-fraud-campaign>.

²⁰⁸ Sharad Goel, Marc Meredith, Michael Morse, David Rothschild, and Houshmand Shirani-Mehr, “One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections,” *American Political Science Review*, 114 (2020), 456-69.

inaccessible to people with various disabilities and/or had voting stations that could impede the casting of a private and independent vote. For example, a 2017 study by the federal GAO determined that 60% of polling stations that it examined had one or more impediments that might prevent people with disabilities from entering and at least 65% had voting stations that were not set up to accommodate people using wheelchairs.²⁰⁹ The study did not consider accessibility for people with problems hearing or seeing or those with intellectual and developmental disabilities. Requiring a disabled person who might not be familiar with conditions at a particular polling place to swear that she was unable to enter it seems a heavy burden, and how could she be expected to know whether the setup within the polling place would pose difficult problems for someone with her particular disability? The same considerations would apply to the oath for drivers providing transportation to allow voters with disabilities to vote curbside. The threat of heavy punishment for a violation of such oaths would likely serve as a disincentive to vote or assist someone else to vote.

147. The prospect of a partisan pollwatcher hovering over a voter who needed assistance because of a disability, language barrier, or age – being “present at a voting station” and examining the ballot before it was deposited – the *Chronicle* remarked, was “a clear encroachment on the secret ballot.”²¹⁰ Disability rights advocates worried that potential assistants to voters might be discouraged from volunteering because the law could be interpreted as allowing them to be prosecuted if they suggested even with a gesture how someone might vote. A witness in the House committee who had intellectual disabilities, Kathryn Dodi, opposed the bill: “Having someone with me to support me is my right. They’re only there to make sure I understand what I’m reading. Please don’t take away people with disabilities’ right to vote with support. It makes us feel good, like we matter.”²¹¹

148. Allowing private vigilantes or law enforcement to conduct sting operations “could have a chilling effect on legitimate voter registration efforts and potentially entrap the unwitting.”²¹² Punishing anyone who made a small, inadvertent mistake on a registration form or during a

²⁰⁹ “Voters with Disabilities: Observations on Polling Place Accessibility and Related Federal Guidance [Reissued on December 4, 2017], <https://www.gao.gov/products/gao-18-4>.

²¹⁰ Editorial, “SB9 is a bad idea; Poised to pass the state Senate, the measure makes it tougher to exercise voting rights.” *Houston Chronicle*, April 16, 2019, https://houstonchronicle.newsbank.com/doc/news/172DB1BE4A7A0990?search_terms=%22SB%2B9%22&text=%22SB%209%22&content_added=&date_from=March%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-04-16

²¹¹ Alexa Ura, “This Texas bill that opponents say could lead to voter suppression has lost a key bipartisan provision,” *Texas Tribune*, May 15, 2019, <https://www.texastribune.org/2019/05/15/texas-voting-rights-senate-bill-9/>.

²¹² Editorial, “SB9 is a bad idea; Poised to pass the state Senate, the measure makes it tougher to exercise voting rights.” *Houston Chronicle*, April 16, 2019, https://houstonchronicle.newsbank.com/doc/news/172DB1BE4A7A0990?search_terms=%22SB%2B9%22&text=%22SB%209%22&content_added=&date_from=March%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-04-16.

registration campaign might also discourage volunteers. “We already have a tough time registering people to vote because of all the things we have to do. We can already get in trouble if they mess up or we mess up,” said Ric Galvan, the president of the student chapter of Texas Rising at the University of Texas. “This will only make it worse. If SB 9 were to be implemented, that would put that person at risk to go to jail, at risk of have fines against them. College students don’t want to have that.”²¹³

149. In the House, 120 witnesses registered to testify against the bill, and 233 of 256 people who signed up to record their positions on the bill opposed it, including representatives of MALDEF, the League of Women Voters, MOVE Texas, Disability Rights Texas, and the Texas Democratic Party. The Texas Civil Rights Project and the Texas AFL-CIO delivered a petition to the Elections Committee containing 7,000 signatures. The president of the Texas Association of Election Administrators also opposed the bill because of the added regulations placed on administrators under risk of criminal punishment, which he decried as the “criminalization of poll workers” because it allowed poll watchers to record ballot counting. Testimony in the House Elections Committee lasted for 10 hours, ending after midnight.²¹⁴

150. Despite the straight party split on S.B. 9 in the Senate, members of both parties agreed that requiring a DRE voting machine to display a paper ballot before the vote was recorded and to provide an audit trail if necessary would build voter confidence in the results. The bill also provided \$30 million to help retrofit recently purchased voting machines to allow paper ballots to be produced.²¹⁵ According to Senate sponsor Bryan Hughes, the paper ballot provision was the “heart of SB 9. . . . It’s our responsibility on behalf of the people of Texas to make sure each county is conducting elections in the most secure way possible or practicable and that voters can truly trust the results. This shift to systems with a paper component, with those audits that will follow, will give certainty to every Texan that their vote will be counted fairly.” But when the bill got to the House, the paper ballot provision was stripped from the bill by the House Elections Committee.²¹⁶ Deleting what the *Houston Chronicle* called “the only commendable idea

²¹³ James Barragan, “Texas GOP wants stronger penalties for illegal voting tactics, but some worry about chilling effect/ Advocates opposed the bill because they feared it would make voting harder for people with disabilities,” *Dallas Morning News*, May 17, 2019, <https://www.dallasnews.com/news/politics/2019/05/17/texas-gop-wants-stronger-penalties-for-illegal-voting-tactics-but-some-worry-about-chilling-effect/>.

²¹⁴ Renzo Downey, “House panel hears contentious election integrity bill,” *Austin American-Statesman*, May 15, 2019, <https://www.statesman.com/story/news/politics/county/2019/05/15/texas-house-panel-hears-contentious-election-integrity-bill/5152507007/>; Alexa Ura, “This Texas bill that opponents say could lead to voter suppression has lost a key bipartisan provision,” *Texas Tribune*, May 15, 2019, <https://www.texastribune.org/2019/05/15/texas-voting-rights-senate-bill-9/>.

²¹⁵ Chuck Lindell, “Senate backs paper ballots, harsher election penalties,” *Austin American-Statesman*, April 15, 2019, <https://www.statesman.com/story/news/politics/state/2019/04/16/senate-votes-to-require-paper-ballots-harsher-election-penalties/5430432007/>.

²¹⁶ Alexa Ura, “This Texas bill that opponents say could lead to voter suppression has lost a key bipartisan provision,” *Texas Tribune*, May 15, 2019, <https://www.texastribune.org/2019/05/15/texas-voting-rights-senate-bill-9/>.

contained in the otherwise noxious bill” demonstrated “how some Republicans are more interested in voter suppression than they are in safeguarding elections in Texas.”²¹⁷

151. Showing again how important Democrats considered defeating S.B. 9, House Democrats apparently negotiated a deal, and the bill failed to gain a place on the crowded end-of-session calendar and was never voted upon in the House. The *Chronicle* believed that the bill had failed on its merits or because of opposition from so many groups: “[L]eadership in the House either saw the bill for what it was or relented under growing opposition to the bill from Democrats, civil rights groups, government watchdogs and outraged citizens.”²¹⁸ Sen. Hughes pledged to continue, saying “I’ll be getting with members of the House who care about election reform, and we’re going to keep working on the issue.”²¹⁹

E. Covid-19 and the 2020 Election

1. The Pandemic Hit Minorities and Urban Areas Particularly Hard

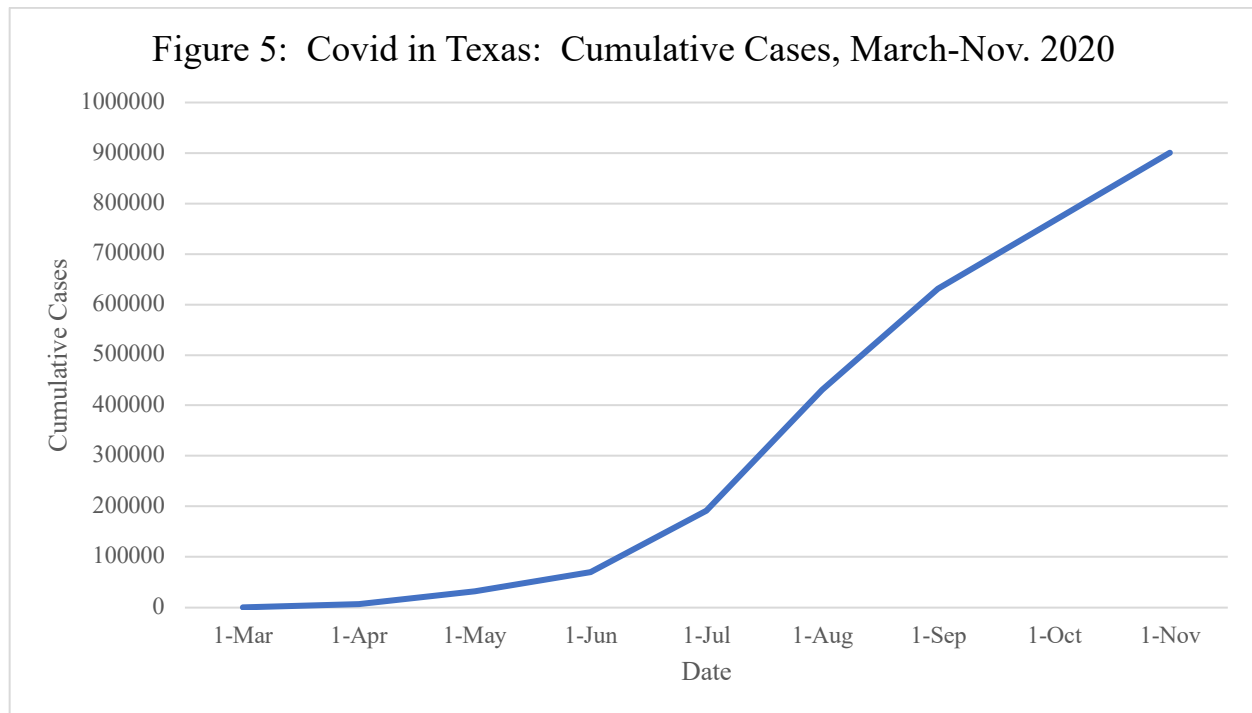
152. The dominant feature, and often, the dominant issue in the 2020 elections in Texas was the shocking and devastating emergence of the worst pandemic that the world had suffered in a century. Covid-19 hit Texas hard, particularly in the second half of the year, raging during the months of early voting and the November election, as Figure 5, drawn from data collected by the Texas Department of Health, shows. By election day, the Department of Health had recorded 918,336 cases in the state and nearly 20,000 deaths. As Figure 6 demonstrates, new cases

²¹⁷ Editorial, “The right move; House saves Texas from shameless, pointless voter suppression bill,” *Houston Chronicle*, May 20, 2019, https://houstonchronicle.newsbank.com/doc/news/1738E74B94216588?search_terms=SB%2B9&text=SB%209&content_added=&date_from=April%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-05-20.

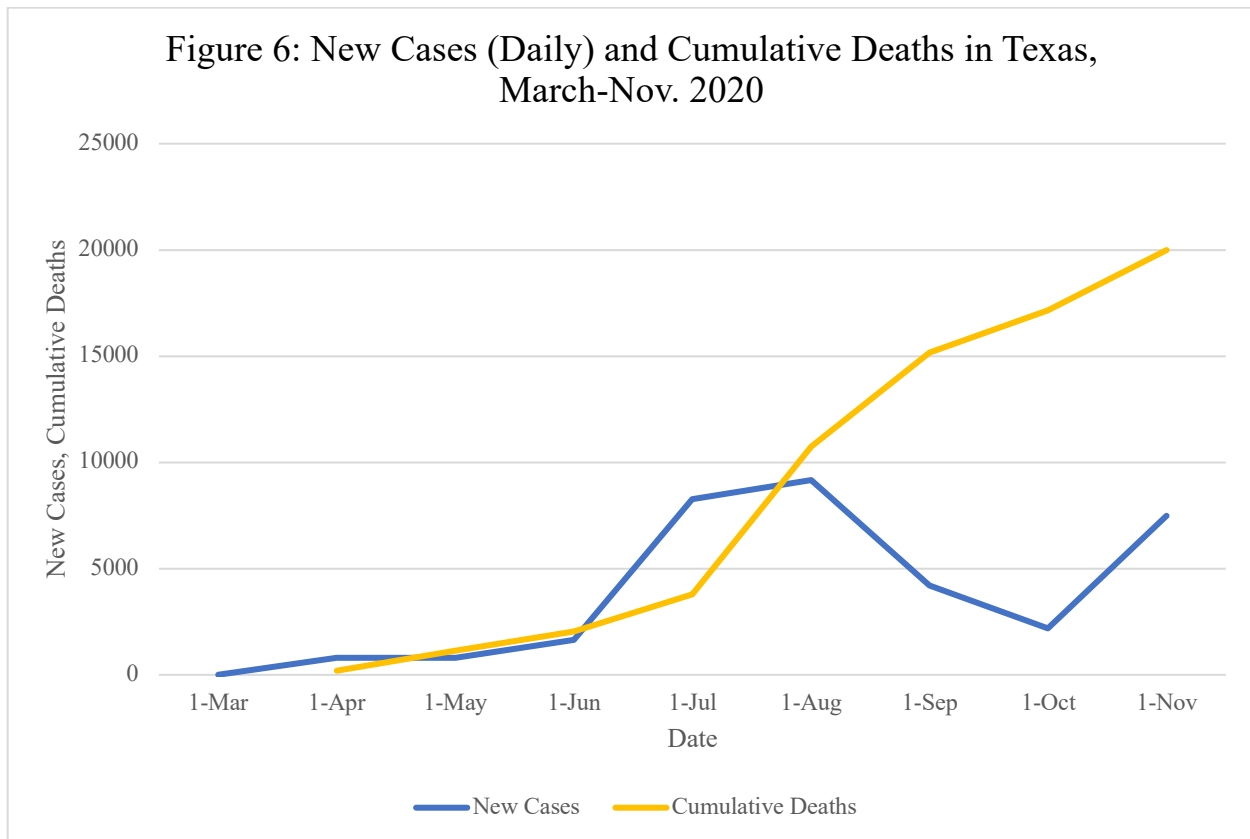
²¹⁸ Editorial, “The right move; House saves Texas from shameless, pointless voter suppression bill,” *Houston Chronicle*, May 20, 2019, https://houstonchronicle.newsbank.com/doc/news/1738E74B94216588?search_terms=SB%2B9&text=SB%209&content_added=&date_from=April%201%2C%202019&date_to=May%2030%2C%202019&pub%255B0%255D=HCBF&s_dlid=&s_ecproduct=SUB-FREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012/31/2080&s_docsbal=%20&s_subexpires=12/31/2080&s_docstart=&s_docsleft=&s_docsread=&s_username=freeusers&s_accountid=AC0121090716090602279&s_upgradeable=no&pdate=2019-05-20. For more details on the deal, see James Barragan and Lauren McGaughy, “To avoid infighting in the Texas House, did Speaker Dennis Bonnen kill controversial bills? ‘The speaker negotiated in good faith. We negotiated the best we could and saved this session from ending like last session.’” *Dallas Morning News*, May 20, 2019, <https://www.dallasnews.com/news/politics/2019/05/21/to-avoid-infighting-in-the-texas-house-did-speaker-dennis-bonnen-kill-controversial-bills/>; Cassandra Pollock, “Texas House Speaker Dennis Bonnen won’t seek reelection after recording scandal/By Tuesday morning, more than 30 House Republicans had either called for the speaker’s resignation or had stated they no longer supported him.” *Texas Tribune*, Oct. 22, 2019, <https://www.texastribune.org/2019/10/22/Dennis-Bonnen-to-not-seek-reelection-to-Texas-House/>.

²¹⁹ Lauren McGaughy, “Controversial Texas voting bill likely dead this year after failing to be set for debate/ Texas Democrats marked the death of a divisive piece of legislation they argued would have suppressed voter turnout.” *Dallas Morning News*, May 19, 2019, <https://www.dallasnews.com/news/politics/2019/05/20/controversial-texas-voting-bill-likely-dead-this-year-after-failing-to-be-set-for-debate/>.

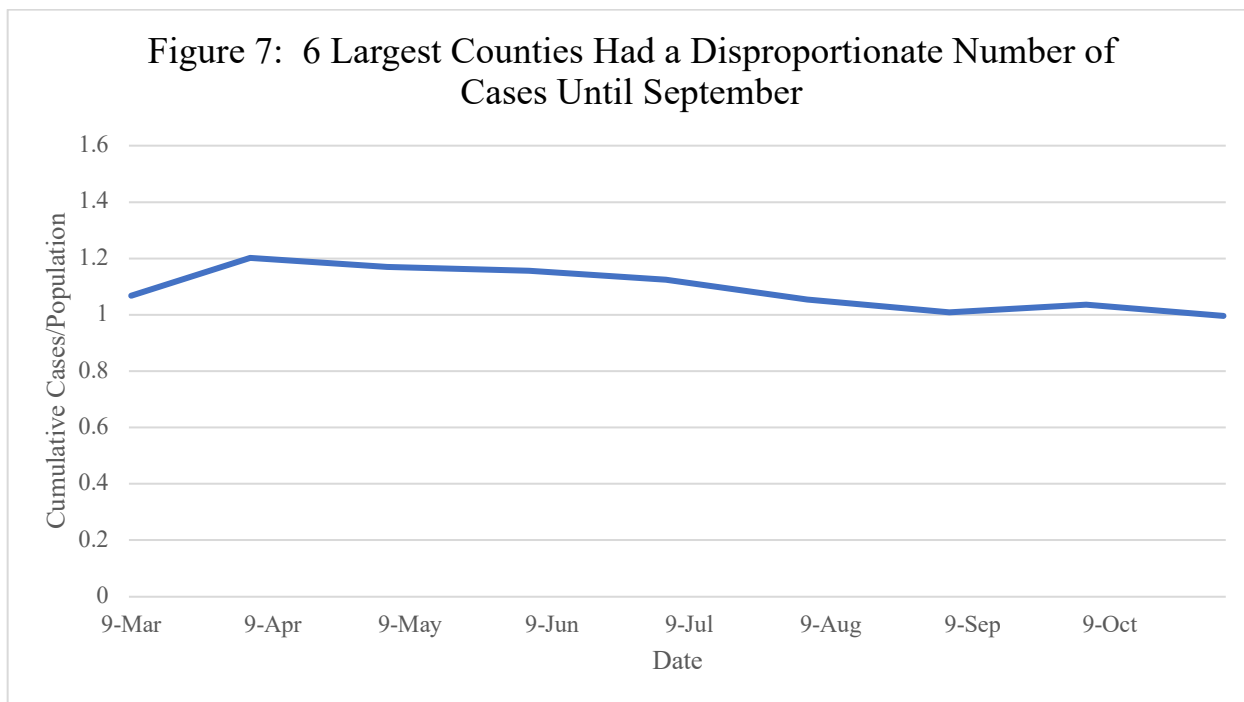
declined from the beginning of August until the beginning of October, but then began to rise again steeply. Deaths, a lagging indicator, rose inexorably, though not at a constant rate.



Source: Compiled from Texas Department of Health, Center for Health Statistics,
<https://dshs.texas.gov/coronavirus/AdditionalData.aspx>



153. But the incidence of Covid was not equal across the state, which helps explain the different reactions to the pandemic in the largest urban counties, compared to the reactions outside the metropolises. Figure 7 focuses on the 6 counties that had populations in excess of a million in 2020: Bexar, Collin, Dallas, Harris, Tarrant, and Travis. The line describes the proportion of cumulative cases in those counties, by date, divided by their percentage of the state's population. The 6 counties comprised 13,819,301 of the state's population of 29,527,941 or 46.8% of the population. From March through September, the proportion of cumulative cases in the six counties was larger than 46.8% of the cumulative number of cases statewide, so the line is above 1. There was good reason for people and political leaders in the largest counties to be especially concerned about Covid and especially worried about the danger of in-person voting in the Spring and Summer of 2020. Since these counties ranged from the recently purple counties of Collin and Tarrant to the other 4 increasingly Democratic counties, the battle was certain to be fought out on partisan lines.

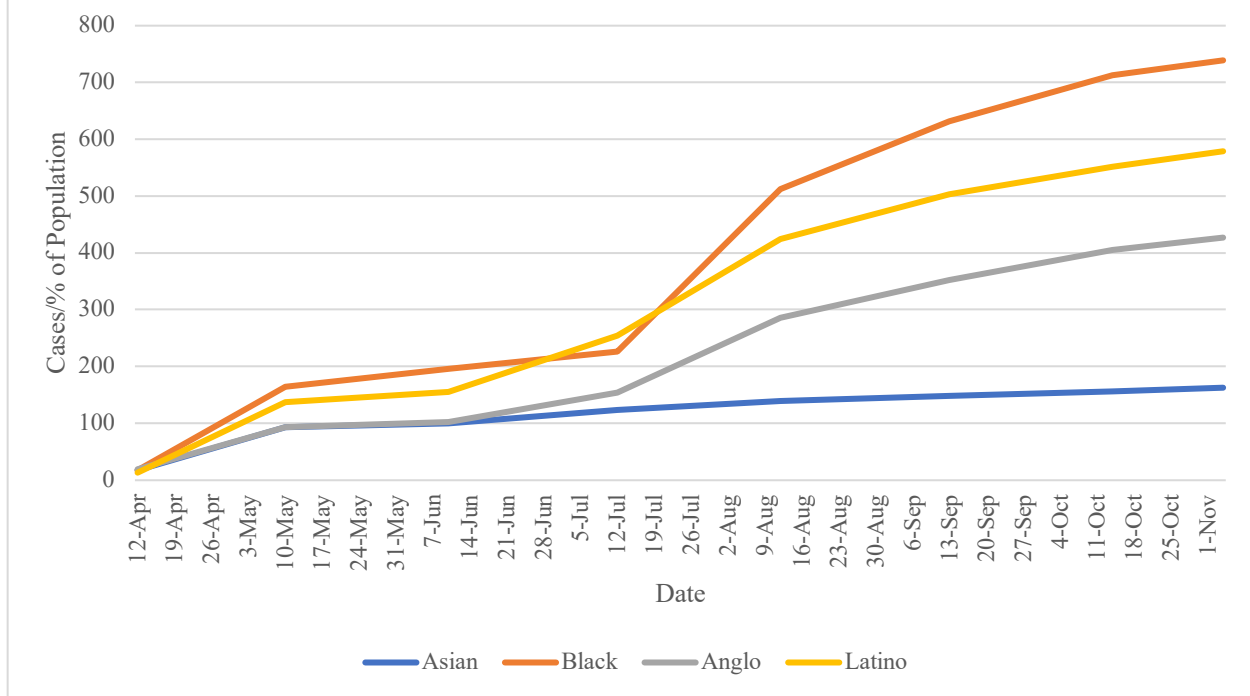


154. Covid also affected members of different races in Texas differently. Funded by the Marguerite Casey Foundation, the Covid Tracking Project of *The Atlantic* magazine collected data, by race, from each state, including Texas, from April 12, 2020 until March 7, 2021.²²⁰ Although Texas did not report complete data by race on cases or any data by race for tests or hospitalizations for this period, the Covid Tracking Project's is the most easily available data by race for Texas that we have. Figure 8, compiled from data from that source, demonstrates dramatically the racial differences in the impact of Covid-19 in Texas. As early as May 2020, Blacks and Latinos were suffering from Covid appreciably more than Anglos were. By August, when the number of cumulative cases had grown considerably, the racial gap had mushroomed. The racial disproportions on death rates from Covid, for which the data is much more complete than for case numbers, were similar. The proportion of the Black population that died from Covid by election day, 2020 in Texas was 11% higher than that of Anglos. Latinos were 83% more likely than Anglos to have died.²²¹ It was entirely rational for Blacks and Latinos in Texas and those who represented them in interest groups and the legislature to have been more concerned than Anglos and those who represented them about the dangers of in-person voting.

²²⁰ <https://covidtracking.com/race/about/>.

²²¹ All data compiled from <https://covidtracking.com/data/state/texas/race-ethnicity>.

Figure 8: Cumulative Covid Cases by Race in Texas, April - Nov. 2020



155. Even as early as April 2020, opinions on the seriousness of Covid, both as a general matter and as a personal threat, differed by party and ethnicity in Texas, as did the percentages who favored allowing all Texans to vote by mail in November 2020 because of Covid. The University of Texas/Texas Tribune poll found Democrats nearly twice as convinced as Republicans that Covid was a significant crisis, more than twice as concerned about getting Covid, and nearly three times as likely to favor allowing all Texans to vote by mail because of the pandemic. Black/white differences on these questions were similar, though more muted than party differences, and Latinos were particularly concerned about getting infected themselves. Both Latinos and Asians favored expanding VBM much more than whites did. (See Table 1.) Opinions in April, in other words, seemed predictive of the course of the disease over the rest of the year: it would have greater effects on Blacks and Latinos. Even this early in the year, the cues given out by partisan leaders had been picked up by the party faithful. Lt. Gov. Dan Patrick, for example, decried efforts to expand VBM as a “scam by Democrats to steal the election,” declaring that there was no reason anyone under 65 should be “able to say I am afraid to go vote” during the pandemic.²²² The battle over easing restrictions on voting to deal with the pandemic promised to be bitter.

²²² Alexa Ura, “Partisan tactic by Lt. Gov. Dan Patrick’s campaign delays thousands of requests for mail-in ballots from Texas voters/ Patrick’s mass mailing urging voters to apply for mail-in ballots included return envelopes addressed to the Texas secretary of state’s office. The applications are supposed to be sent to local offices, but

Table 1: Opinions on Covid and Voting by Mail by Ethnicity and Party

Party or Ethnic Group							
Democrat	Independent	Republican	White	Black	Latino	Asian	Native American
% who agree that COVID-19 is a significant crisis							
91	56	48	64	81	65	65	45
% who are extremely concerned that you or someone you know will get infected with Covid							
47	33	22	30	37	42	20	25
% who favor allowing all Texans to VBM in 2020 in response to Covid							
86	51	29	51	71	60	61	46

Source: University of Texas/Texas Tribune Poll, April 2020, Crosstabs, pp. 62, 71, 125 (questions 23, 27, 35A)

https://static.texastribune.org/media/files/106994040476875e025e88ab87077a52/ut-tt-2020-04-xtabs.pdf?_ga=2.50976681.1435503932.1642822047-914095208.1604524399

2. Nearly All States Except Texas Eased Voting Restrictions Because of the Pandemic

156. At the beginning of the 2020 primaries, 33 states and the District of Columbia allowed “no-excuse absentee voting.” Because of the pandemic, 13 more states changed their rules to allow all voters who feared contracting or spreading Covid to vote by mail in the 2020 primaries – 5 by gubernatorial order, 5 through action by state election officials, and 4 legislatively. For the November general election, 11 of the 13 allowed any eligible voter to vote by mail: 6 legislatively, 4 through action by state election officials, and 1 by gubernatorial action. Only 5 states took no action to allow all voters to cast ballots by mail in any 2020 election. Texas was one of those 5.²²³ Moreover, 11 states in 2020 shifted to mailing applications for VBM ballots to all voters, and 5 other states shifted to mailing actual ballots to all voters, joining other states who already had such voting conveniences in effect.²²⁴ With one exception, Gov. Abbott’s extension of early voting by one week,²²⁵ Texas state officials bitterly fought all efforts to ameliorate the conditions of voting in the state to accommodate health concerns due to the

Patrick’s campaign says voters don’t trust election officials in Democratic counties.” *Texas Tribune*, Feb. 17, 2022, <https://www.texastribune.org/2022/02/17/texas-voting-by-mail-2022-dan-patrick/>.

²²³ Wendy R. Weiser, Eliza Sweren-Becker, and Dominique Erney, “Mail voting: What Has Changed in 2020,” Brennan Center, Sept. 17, 2020, <https://www.brennancenter.org/our-work/research-reports/mail-voting-what-has-changed-2020>.

²²⁴ Kate Rabinowitz and Brittany Renee Mayes, “At least 84% of American voters can cast ballots by mail in the fall,” *Washington Post*, Sept. 25, 2020, <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/>.

²²⁵ Alexa Ura, “Texas appeals court allows expansion of voting by mail during ongoing legal fight/ The appeals court ruled against Texas Attorney General Ken Paxton, who argued that a lower court ruling expanding who can qualify for an absentee ballot during the coronavirus pandemic should have no effect while he appeals it.” *Texas Tribune*, May 14, 2020, <https://www.texastribune.org/2020/05/14/texas-appeals-court-allows-expansion-voting-mail/>.

pandemic. And Republican State Chair Allen West, Agriculture Commissioner Sid Miller, and Republican members of the State Legislature sued, unsuccessfully, to stop Gov. Abbott from extending the early voting period.²²⁶ As the *Houston Chronicle* put it in an editorial, “No one should have to choose between protecting their health and exercising their right to vote. Yet state officials want Texans to do just that.”²²⁷

3. Efforts to Mitigate the Personal and Public Health Risks of Voting Met with Lawsuits

157. In the March 3, 2020 presidential primary, before the general recognition of the pandemic outbreak, lines to vote at historically Black Texas Southern University in Houston were so long that it took up to six hours to vote.²²⁸ On March 19, 2020, four days after Gov. Abbott had predicted an “exponential increase” in Covid cases (only 69 people had tested positive by March 15), Democrats filed a lawsuit in the Travis County District Court. The suit asked Judge Tim Sulak to rule that the provision of the Texas election code that provided that voters who have a “sickness or physical condition” that prevents them from appearing to vote in person without “injuring the voter’s health” required the State to allow any voter to vote by mail “if they believe they should practice social distancing in order to hinder” the spread of Covid.²²⁹

158. The same day that Judge Sulak announced that he would issue the requested injunction, Attorney General Ken Paxton made public a “letter of advice” threatening to prosecute anyone – civil rights activists, local officials, members of civic groups -- who advised voters to apply for a mail ballot based on the fear of contracting or spreading Covid. “Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting COVID-19 does not amount

²²⁶ Patrick Svitek, “Texas Republicans sue to stop Gov. Greg Abbott’s extension of early voting period during the pandemic/ State party Chair Allen West, Agriculture Commissioner Sid Miller and members of the Texas Legislature were among those who filed the suit against Abbott.” *Texas Tribune*, Sept. 23, 2020, <https://www.texastribune.org/2020/09/23/texas-republicans-greg-abbott-early-voting/>.

²²⁷ “Editorial: Safeguard democracy, expand vote-by-mail,” *Houston Chronicle*, May 8, 2020, <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Safeguard-democracy-expand-15255140.php>.

²²⁸ Alexa Ura, “Texas Republicans say their proposed voting restrictions are color blind. But many see ‘Jim Crow in a tuxedo.’/ An outraged Lt. Gov. Dan Patrick castigated those implying that GOP efforts to restrict Texas voting are racist. But the state has a history of marginalizing voters of color, and many business leaders, voting rights advocates and Democrats see it taking another step down that path.” *Texas Tribune*, April 9, 2021, <https://www.texastribune.org/2021/04/09/Texas-voting-GOP/>.

²²⁹ Stacy Fernandez, “Texas Gov. Greg Abbott says to expect ‘exponential’ increase in positive coronavirus cases/ As the virus that causes COVID-19 increasingly spreads through Texas communities and the state’s testing capacity increases, the number of positive cases will rise.” *Texas Tribune*, March 16, 2020, <https://www.texastribune.org/2020/03/16/texas-coronavirus-cases-will-increase-exponentially-gov-greg-abbott/>; Alexa Ura, “Citing coronavirus threat, Texas Democrats sue to expand mail-in voting/ The Democratic Party wants a judge to declare the novel coronavirus a circumstance that allows anyone to request a mail-in ballot. The GOP has opposed expanding the state’s limited absentee voting rules.” *Ibid.*, March 20, 2020, <https://www.texastribune.org/2020/03/20/citing-coronavirus-threat-texas-democrats-sue-expand-mail-voting/>.

to a sickness or physical condition as required by state law.”²³⁰ And Paxton repeatedly threatened to indict anyone who applied to vote by mail because she feared that voting in person at a time of pandemic virulence might threaten her health.²³¹

159. Although a Texas Appeals Court upheld Sulak’s ruling in a 2-1 ruling, the Texas Supreme Court ruled in Paxton’s favor. But Paxton’s victory seemed hollow, because the Supreme Court went on to declare that “We agree, of course, that a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability.” And the court rejected Paxton’s request that it order local elections officials not to send VBM ballots to voters who requested such a ballot by simply claiming a disability, checking a box on a form that did not require the voter to explain what the disability was.²³² As the *Houston Chronicle*, which favored the VBM option for everyone in the Age of Covid, put it, the State Supreme Court had “created a de facto ‘don’t ask, don’t tell’ policy inviting “covert civil disobedience,” a course that would confuse voters.²³³ Meeting with the *Chronicle*’s editorial board two and a half months later, Texas Chief Justice Nathan Hecht, who had written the VBM opinion, underlined its ambiguity: “The statute leaves this decision up to the individual. You can’t ask them. There is no form they have to fill out, they don’t have to swear to it, don’t have to sign anything; all they have to do is say, ‘I want (a mail-in ballot) because in my view I need one.’”²³⁴ He did not note that his decision was based merely on a statute, one that a subsequent legislature could amend.

160. Almost simultaneously with the lawsuit in the state courts, the Texas Democratic Party filed in federal district court, arguing that the restriction of VBM to those over 65 years old (plus those

²³⁰ Alexa Ura, “Texas judge issues order that could greatly expand mail-in voting/ A state district judge issued a temporary injunction expanding who can qualify for an absentee ballot for the upcoming elections. The decision faces certain appeal as Democrats and Republicans clash over voter access.” *Texas Tribune*, April 15, 2020, <https://www.texastribune.org/2020/04/15/texas-judge-will-issue-order-could-greatly-expand-mail-voting/>.

²³¹ Ashley Lopez, “Texas Voters Are Caught In The Middle Of A Battle Over Mail-In Voting,” NPR, May 29, 2020, <https://www.npr.org/2020/05/29/864143739/texas-voters-are-caught-in-the-middle-of-a-battle-over-mail-in-voting>; Stacey Fernandez, “Complaint filed over Texas AG Ken Paxton’s tactics to limit mail-in voting/ In a series of tweets and a public statement, Paxton said eligibility for absentee voting has not been expanded. But a state judge’s order says otherwise.” *Texas Tribune*, May 12, 2020, <https://www.texastribune.org/2020/05/12/texas-attorney-general-ken-paxton-felony-election-fraud/>.

²³² Alexa Ura, “Texas appeals court allows expansion of voting by mail during ongoing legal fight/ The appeals court ruled against Texas Attorney General Ken Paxton, who argued that a lower court ruling expanding who can qualify for an absentee ballot during the coronavirus pandemic should have no effect while he appeals it.” *Texas Tribune*, May 14, 2020, <https://www.texastribune.org/2020/05/14/texas-appeals-court-allows-expansion-voting-mail/>; Alexa Ura, “Texas Supreme Court: Lack of immunity to coronavirus alone isn’t enough for mail-in ballot/ Although the court sided with state Attorney General Ken Paxton’s interpretation of what constitutes a disability, it indicated that it is up to voters to assess their health and determine if they meet the state’s definition, which could allow them to vote by mail.” *Ibid.*, May 27, 2020, <https://www.texastribune.org/2020/05/27/texas-vote-by-mail-coronavirus/>.

²³³ “Editorial: How did ‘don’t ask, don’t tell’ become rule for Texans requesting main-in ballots?” *Houston Chronicle*, June 10, 2020, <https://www.houstonchronicle.com/opinion/editorials/article/mail-in-voting-texas-difficult-coronavirus-15328468.php>.

²³⁴ “Editorial: Ken Paxton can’t stop Texans from voting by mail. It’s the law.” *Houston Chronicle*, Sept. 1, 2020, <https://www.houstonchronicle.com/opinion/editorials/article/ken-paxton-vote-by-mail-texas-election-2020-ballot-15528824.php>.

in jail or disabled) violated the anti-age-discrimination feature of the 26th amendment to the U.S. Constitution, especially in the midst of the pandemic. Although the Party won a preliminary injunction in the Western District of Texas, Judge Fred Biery’s opinion was immediately stayed and subsequently overturned by the Fifth Circuit, and the U.S. Supreme Court refused to reverse the 5th Circuit’s rulings.²³⁵ The federal litigation established that those who wished to expand the right to vote by mail in Texas could not expect federal judicial intervention if the Texas legislature changed state law.

161. Nevertheless, because of the opening left for VBM by the Texas Supreme Court, the Harris County Commissioners Court anticipated a deluge of VBM ballots, and the Commissioners approved \$33 million – eight times the budget for the 2016 elections – to cover the costs of administering the 2020 elections.²³⁶ Believing that the Texas Supreme Court’s decision might confuse voters and discourage some who thought that their health might be compromised by in-person voting from applying for VBM ballots, Harris County Clerk Chris Hollins, who is Black, prepared to send applications for VBM ballots to all 2.4 million registered voters in his 71.3% non-white county²³⁷ with what Hollins described as “detailed guidance to inform voters that they may not qualify to vote by mail and to describe who does qualify based on the recent Texas Supreme Court decision.” As Table 1, above, makes clear, the availability of VBM was both a racial and a partisan issue in Texas, and as emphasized repeatedly in this paper, leaders of Harris County were extremely concerned about the effects of election laws and practices on minority voters.

162. Immediately after Clerk Hollins indicated his intention to send out VBM applications, both the Republican Party and Attorney General Paxton sued to enjoin him from doing so, and Lt. Gov. Dan Patrick denounced efforts to expand VBM during the pandemic as a “scam by Democrats” that would lead to “the end of America.” All the while, the Republican Party of Texas was sending out applications for VBM “like we do every year,” according to a spokesperson for the Party. “Voting by mail,” according to Derek Ryan, a Republican voter data expert, “is our bread and butter.” In 2020 the Republican ballot application mailers featured photos of President Trump and Texas Republican Chair Allen West. The Democratic Party, too, sent out VBM applications – 815,000 in August 2020.²³⁸

²³⁵ *Tex. Democratic Party v. Abbott*, 461 F.Supp. 3d 406 (W.D. Tex., May 19, 2020); reversed by, stay granted by *Hinojosa v. Abbott*, U.S. App. LEXIS 16713 (5th Cir., May 20, 2020); stay granted, *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir., June 4, 2020); request denied by *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (June 26, 2020); vacated by, remanded by *Tex. Democratic Party v. Abbott*, 2020 U.S. App. LEXIS 28799 (5th Cir., Sept. 10, 2020); vacated by, remanded by *Tex. Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir., Oct. 14, 2020); cert. denied *Tex. Democratic Party v. Abbott*, 2021 U.S. LEXS 323 (U.S. Jan. 11, 2021). Judge Biery declared that “Citizens should have the option to choose voting by letter carrier versus voting with disease carriers.”

²³⁶ Editorial: Safeguard democracy, expand vote-by-mail,” *Houston Chronicle*, May 8, 2020, <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Safeguard-democracy-expand-15255140.php>; Karen Brooks Harper and Emma Platoff, “Harris County tried to make voting easier during the pandemic. Texas Republicans fought every step of the way. In a bitterly contested election overlaid with the fears and risks of an uncontrolled pandemic, Harris County has become a case study in raw politics and partisan efforts to manipulate voter turnout.” *Texas Tribune*, Oct. 15, 2020, <https://www.texastribune.org/2020/10/15/harris-county-texas-voting/>.

²³⁷ <https://www.census.gov/quickfacts/harriscountytexas>.

²³⁸ Alexa Ura, “Texas sues Harris County to stop it from sending all voters applications for mail-in ballots/ The Texas secretary of state had threatened the legal action last week, but Harris County Clerk Chris Hollins indicated he

163. Because the election code in 2020 did not explicitly prohibit local officials from sending out unsolicited applications for VBM ballots – indeed, the code said nothing at all about how a voter was to obtain an application -- State District Court Judge R.K. Sandill refused Attorney General Paxton’s motion to enjoin Harris County’s action.²³⁹ Contrarily, the Texas Supreme Court read the code’s silence as a prohibition and blocked Harris County’s effort. Despite Clerk Hollins’s contention that his mailer would clarify who was eligible to use VBM, the Supreme Court concluded that it would further confuse voters.²⁴⁰ The disagreement over the import of silence invited legislative action. In S.B. 1, the legislature would clarify the law by prohibiting nonpartisan election officials from sending out applications for VBM, a prohibition that, as the battle during the 2020 election showed, was expected to disadvantage minorities.

164. Another issue relating to VBM that was litigated was whether a VBM voter had to be notified before the election if a committee of election officials decided that the signature on the flap of her returned VBM ballot did not match those from the last six years on file at an election office. Noting that at least 1567 ballots were rejected for this reason in 2016 and at least 1873 in 2018, groups representing Texans with disabilities, veterans, young voters, and minorities contended that their disfranchisement violated the equal protection clause. Although in an exhaustive 61-page opinion, U.S. District Court Judge Orlando Garcia ruled in their favor and enjoined the practice until the State could come up with a solution that preserved everyone’s right to vote, his decision was overturned by the 5th Circuit, which held that “Texas’s strong interest in safeguarding the integrity of its elections from voter fraud far outweighs any burden the state’s voting procedures place on the right to vote.”²⁴¹ The ballot “curing” question would reverberate during the debates over S.B. 1.

would not drop his effort to send out absentee ballot applications to more than 2 million registered voters.” *Texas Tribune*, Aug. 31, 2020, <https://www.texastribune.org/2020/08/31/texas-harris-county-mail-in-ballot/>; Alexa Ura and Abby Livingston, “In Texas, Republicans fight voting by mail expansion while encouraging their voters to use it./ What was once a lightly used and largely uncontroversial voting option in Texas, one even Republicans relied on, is now the crux of the latest fight over who gets to vote and, equally as crucial in a pandemic, who has access to safe voting,” *ibid.*, Sept. 4, 2020, <https://www.texastribune.org/2020/09/04/texas-republicans-vote-by-mail/>.

²³⁹ Alexa Ura, “Texas judge allows Harris County to send all voters applications for mail-in ballots/ State district judge R.K. Sandill rejected the state’s request for a temporary injunction to bar Harris County from pursuing its mailing plan.” *Texas Tribune*, Sept. 11, 2020, <https://www.texastribune.org/2020/09/11/texas-mail-in-ballot-applications-harris-county/>.

²⁴⁰ Emma Platoff, “Harris County can’t send mail-in ballot applications to all registered voters, Texas Supreme Court rules/ The elections administrator for the county, Texas’ most populous and a critical stronghold for Democrats, has already sent the applications to voter 65 or over. The GOP Texas Supreme Court ruled he may not send them to the rest of the county’s 2.4 million registered voters.” *Texas Tribune*, Oct. 7, 2020, <https://www.texastribune.org/2020/10/07/harris-county-mail-in-ballot-applications/>; Karen Brooks Harper and Emma Platoff, “Harris County tried to make voting easier during the pandemic. Texas Republicans fought every step of the way. In a bitterly contested election overlaid with the fears and risks of an uncontrolled pandemic, Harris County has become a case study in raw politics and partisan efforts to manipulate voter turnout.” *ibid.*, Oct. 15, 2020, <https://www.texastribune.org/2020/10/15/harris-county-texas-voting/>.

²⁴¹ *Richardson v. Tex. Sec’y of State*, 485 F. Supp. 3d 744 (W.D. Tex., Sept. 8, 2020), rev’d sub nom. *Richardson v. Hughs*, 978 F3d 220, 224 (5th Cir., Oct. 19, 2020); Karen Brooks Harper, “Texas can reject mail-in ballots over mismatched signatures without giving voters a chance to appeal, court rules/ A federal judge had ordered the state to give voters a chance to resolve signature questions in time for their ballots to be counted. Now that won’t happen unless counties do it voluntarily.” *Texas Tribune*, Oct. 19, 2020, <https://www.texastribune.org/2020/10/19/texas-mail-in-ballots-signatures/>.

165. In Dallas, the four-person Democratic majority on the County Commission defied Paxton and encouraged voters concerned about Covid to claim a disability and apply to vote by mail. And Democratic Commissioner John Wiley Price, who is Black, suggested that VBM was only one way, not the only way, to make voting less dangerous. “It’s another option in the toolbox. I don’t know what’s going to happen by November. But I want to have that option.”²⁴² And the metropolitan counties exercised other options, too.

166. Two options that several counties used were to expand the hours of early voting and the number of polling places. Bexar allowed voters access from 8 a.m. to 10 p.m. during the last week of early voting.²⁴³ Harris County tripled the number of early vote centers (where anyone from any precinct in the county could vote) from 40 in 2016 to over 120 in 2020. In the most expansive example, Harris County kept eight early voting sites open for 24 hours on the last two days of early voting. More than 10,000 Houstonians whose hours of work made voting in person before 7 p.m. took advantage of the extra hours.²⁴⁴ Latinos were particularly likely to take advantage of the extended hours in Harris County. According to testimony in the Senate by James Slattery, senior staff attorney of the Texas Civil Rights Project, 20% of early voters in Harris County were Latinos, but Latinos comprised 36% of those who took advantage of the extended hours. Overall, minorities comprised 38% of early voters in Harris County, but 56% of those who voted using extended hours.²⁴⁵

167. Seeking to provide as much space as possible so that lines at polling places would move more quickly, avoiding the crowding over a long period of time in a congested area that might spread Covid, several cities rented large buildings to serve as vote centers – the Toyota Center and NRG Park in Houston, the AT&T Center in San Antonio, the American Airlines Center in Dallas, and five mega centers in Austin. As Chris Hollins put it, “What better place to vote in a socially distanced manner than a huge arena that has extremely wide corridors and just no shortage of space?”²⁴⁶

²⁴² Nic Garcia, “Defying Attorney General Ken Paxton, Dallas County commissioners back voting by mail in 2020 elections/ republican J.J. Koch voted against the resolution, which is mostly symbolic, saying it was against the law,” *Dallas Morning News*, May 5, 2020, <https://www.dallasnews.com/news/elections/2020/05/05/defying-attorney-general-ken-paxton-dallas-county-commissioners-back-voting-by-mail-in-2020-elections/>.

²⁴³ David Lynch, KENS 5, Oct. 27, 2020, <https://www.kens5.com/article/news/politics/elections/bexar-countys-early-voting-locations-staying-open-later-this-week/273-c7e85454-46c8-4d7b-a048-85f306fc8281>.

²⁴⁴ Jen Rice, “TSU Voters Waited Hours To Cast A Ballot On Super Tuesday. Harris County Says It Won’t Happen Again/ Here’s what’s happening in the Houston area to fix old problems and prevent new ones on Election Day.” Houston Public Media, Oct. 29, 2020, <https://www.houstonpublicmedia.org/articles/news/politics/election-2020/2020/10/29/384985/voting-probles/>; Peter Holley, “Meet the Harris County Voters Who Showed Up After Midnight to Cast a Ballot/ The county’s decision to open eight locations for round-the-clock early voting drew workers too busy to vote during the day – and others eager to send a message about voter suppression.” *Texas Monthly*, Oct. 30, 2020, <https://www.texasmonthly.com/news-politics/harris-county-24-hour-voting/>; Juan A. Lozano, “Houston looks to boost turnout by offering 24-hour voting,” AP, Oct. 30, 2020, <https://apnews.com/article/election-2020-politics-houston-voting-texas-351f6e1c4820d8f2b2eb7468a725cce0>.

²⁴⁵ James Slattery, Testimony on SB 7, Texas Senate State Affairs Committee, March 26, 2021, <https://drive.google.com/file/d/1eq6fma1yqy26NzD4vGfJVjLIGNrAsz4G/view>.

²⁴⁶ John Engel, “Travis County finalizing plan for five mega voting centers,” KXAN, Aug. 31, 2020, <https://www.kxan.com/news/your-local-election-hq/travis-county-finalizing-plan-for-five-mega-voting-centers/>; “How AT&T Center will transform to become mega voting site in Bexar County, KSAT, Sept. 8, 2020,

168. For similar reasons, Harris County expanded access to curbside voting, and in its most innovative action, set up “drive-thru” voting centers in large garages and tents, where voters could show their IDs and vote on electronic tablets from the safety of their cars. Over 127,000 voters took advantage of the drive-thru option.²⁴⁷ While only 38% of all early voters in Harris County were minorities, 53% of drive-thru early voters were.²⁴⁸ Republican lawsuits not only sought to block the drive-thru option before it happened, but to expunge the votes after they were cast.²⁴⁹ They also sought to prohibit voters from using curbside voting unless they had submitted sworn applications saying they qualified as sick or disabled, despite the fact that nothing in the state’s election law required any such oath and that the Secretary of State’s office had urged voters who had symptoms of Covid to use curbside voting. The Republicans’ efforts failed in the state appeals and supreme courts and a federal district court in 2020 but, as in the case of so many other 2020 election practices, teed up the legislature for restrictions in S.B. 1 in 2021.²⁵⁰

169. Harris County also set up 12 sites (sometimes referred to as drop-off boxes) where voters who provided proper identification could drop off VBM ballots in person beginning in late September. Travis County established 4 drop-off locations, after it received 71,000 applications for VBM, compared to the usual previous total of 27,000. Republicans in Harris County sued to prohibit drop-off sites, but Gov. Abbott preempted them by issuing an order limiting drop-off boxes to one per county. Abbott’s order triggered two federal lawsuits by civil rights groups. One, by the League of United Latin American Citizens (LULAC) and the League of Women

<https://www.ksat.com/news/local/2020/09/08/how-att-center-will-transform-to-become-mega-voting-site-in-bexar-county/>.

²⁴⁷ Jeremy Schwartz and Mandi Cai, “Texas is on track for record turnout in this election after breaking early voting records/ After early voting, 57.3% of registered voters in Texas have cast ballots, just shy of the total turnout of 59.4% in 2016.” *Texas Tribune*, Nov. 1, 2020, <https://www.texastribune.org/2020/10/31/early-vote-tally/>;

²⁴⁸ James Slattery, Testimony on SB 7, Texas Senate State Affairs Committee, March 26, 2021, <https://drive.google.com/file/d/1eq6fma1yqy26NzD4vGfJvJLIGNrAsz4G/view>.

²⁴⁹ Jolie McCullough, “Texas Supreme Court rejects Republican-led effort to throw out nearly 127,000 Harris County votes/ A handful of GOP activists and candidates had asked the state’s highest civil court to rule Harris County’s drive-thru voting locations illegal and invalidate votes that have already been cast. The challenge has also been filed in federal court.” *Texas Tribune*, Nov. 1, 2020, <https://www.texastribune.org/2020/11/01/texas-drive-thru-votes-harris-county/>.

²⁵⁰ Karen Brooks Harper and Emma Platoff, “Harris County tried to make voting easier during the pandemic. Texas Republicans fought every step of the way. In a bitterly contested election overlaid with the fears and risks of an uncontrolled pandemic, Harris County has become a case study in raw politics and partisan efforts to manipulate voter turnout.” *Texas Tribune*, Oct. 15, 2020, <https://www.texastribune.org/2020/10/15/harris-county-texas-voting/>; Jasper Scherer, “Texas Republican Party sues Harris County over drive-thru voting,” *Houston Chronicle*, Oct. 13, 2020, <https://www.houstonchronicle.com/politics/houston/article/Texas-Republican-sues-Harris-County-drive-voting-15644165.php>; Jolie McCullough, “Texas Republicans’ last-minute challenge to drive-thru voting in Harris County dismissed by appeals court/ The court filing from just before early voting began was the latest GOP effort to tamp down voting options in the state’s most populous county.” *Texas Tribune*, Oct. 13, 2020, <https://www.texastribune.org/2020/10/13/texas-republicans-voting-harris-county/>; Jolie McCullough, “Voters in Harris County may continue using drive-thru voting, Texas Supreme Court rules/ A last-minute challenge by the Republican parties of Texas and Harris County argued the largely Democratic county’s new drive-thru polling places were illegal.” *ibid.*, Oct. 22, 2020, <https://www.texastribune.org/2020/10/22/drive-thru-voting-texas-harris-county/>; Jolie McCullough, “Nearly 127,000 Harris County drive-thru votes appear safe after federal judge rejects GOP-led Texas lawsuit/ The Republican plaintiffs in an appeal asked that drive-thru voting be halted on Election Day, but did not immediately ask again that ballots that have already been cast be tossed out.” *ibid.*, Nov. 2, 2020, <https://www.texastribune.org/2020/11/02/texas-drive-thru-votes-harris-county/>.

Voters declared that the Governor’s order “targets Texas’ most vulnerable voters—older voters, and voters with disabilities—and results in wild variations in access to absentee voting drop-off locations depending on the county a voter resides in.” It contended, as well, that the order “results in predictable disproportionate impacts on minority communities that already hit hardest by the COVID-19 crisis.” An 82-year-old plaintiff in a parallel lawsuit by the Texas Alliance for Retired Americans and the get-out-the-vote group Big Tent Creative noted that while he had planned to drop off his ballot at a drop-off box 16 miles from his Harris County home, now he would have to travel 36 miles each way. Civil rights organizations were also concerned that Abbott’s requirement in his order that counties must allow poll watchers to observe activities at drop-off sites might lead to voter intimidation, as they contended that poll watcher activity had in the past.²⁵¹ Abbott did not seek to deny the obvious fact that his order would have a disproportionate impact on voters in metropolitan counties.

170. As in the VBM eligibility case, civil rights organization plaintiffs in the drop-off box litigation won in the federal trial court, but the decision was overturned by a 5th Circuit panel. Citing the facts of the disparate impact of Covid on Latinos and voters over 65 and warnings by the U.S. Postal Service that the delivery of ballots would be delayed in Texas, District Judge Robert Pitman ruled that Gov. Abbott’s restriction of drop-off boxes condemned “older and disabled voters living in Texas’s largest and most populous counties” to “an increased risk of being infected by the coronavirus in order to exercise their right to vote and have it counted.” Circuit Court Judges Duncan and Willett overturned Judge Pittman’s extensive and meticulous decision on the grounds that Texas had expanded opportunities to vote in 2020 by extending early voting and allowing VBM ballots to be hand-delivered to one location per county during early voting, not just on election day, so that restricting drop-off boxes could not be considered retrogressive as part of a larger scheme of gubernatorial actions concerning the 2020 elections. Judge Ho concurred, but he would have gone farther and condemned Gov. Abbott’s extension of early voting as not explicitly authorized by the Texas election code.²⁵² The tension between the traditional discretion granted to local officials to deal with unexpected or emergency situations and the desire for centralized state control would form a major theme of the struggle over S.B. 1.

²⁵¹ Emma Platoff, “Houston Republicans sue to limit in-person and absentee voting options in Harris County / Conservative activist Steve Hotze and a number of Republican candidates and officials are asking the Texas Supreme Court to shorten the early voting period and limit drop-off locations for absentee ballots in the state’s largest Democratic county,” *Texas Tribune*, Sept. 28, 2020, <https://www.texastribune.org/2020/09/28/houston-republicans-lawsuit-voting/>; Ashley Lopez, “Texas Governor Limits Ballot Drop-Off Locations, Local Officials Vow To Fight Back,” NPR, Oct. 1, 2020, <https://www.npr.org/2020/10/01/919283793/texas-governor-limits-ballot-drop-off-locations-local-officials-vow-to-fight-bac>; press release, “Governor Abbott Issues Proclamation Enhancing Ballot Security,” Oct. 1, 2020, <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-enhancing-ballot-security>.

²⁵² *Tex. League of United Latin Am. Citizens v. Abbott*, 493 F.Supp. 3d 548, 560 (W.D. Tex., Oct. 9, 2020), rev’d 978 F.3d 136 (5th Cir., Oct. 12, 2020); Jolie McCullough, Cassandra Pollock, and Perla Trevizo, “Texas counties temporarily blocked from offering multiple mail-in ballot drop-off locations/ An order from a federal appeals court Saturday set up another potential legal showdown over voting in Texas as mail-in ballots are already being collected and just days before early voting begins,” *Texas Tribune*, Oct. 11, 2020, <https://www.texastribune.org/2020/10/11/texas-ballot-drop-off-locations/>; Emma Platoff, “Texas counties can offer only one drop-off ballot location, federal appeals court rules, upholding Gov. Greg Abbott’s order/ Civil rights groups and voting advocates had argued the restriction would disproportionately impact low-income voters, voters with disabilities, older voters and voters of color in Democratic counties,” *ibid.*, Oct. 13, 2020, <https://www.texastribune.org/2020/10/13/texas-election-ballot-drop-off/>.

171. A parallel lawsuit in state courts based on the Texas constitution's right to vote and equal protection clauses took a similar path and had a similar result. Civil rights organization plaintiffs won in a Travis County district court and a state appellate court, but lost in the state supreme court. Citing the 5th Circuit's opinion in the lawsuit on the same subject, the Texas Supreme Court held that the net result of the Governor's July proclamation allowing voters to deposit VBM ballots before election day and his October proclamation limiting the number of places of deposit to one per county "provides Texas voters more ways to vote in the November 3 election than does the Election Code. It does not disenfranchise anyone." Requiring voters in large metropolitan counties to deposit early VBM ballots at single locations within the county, the court continued, was not a "severe burden" under federal court precedents.²⁵³ The emphasis in both state and federal court decisions on the expansion of voting opportunities by allowing a drop box and extending the early voting period gave proponents of minority voting rights some solace.

172. Contending that a 2017 state law that ended straight-ticket voting should not go into effect in 2020 because it discriminated against minorities, who had faced especially long lines at the polls in the past, and because such lines were likely to be particularly harmful in pandemic conditions, Democrats and the Texas Association of Retired Persons sued in March, 2020 to abrogate the law as a violation of the VRA and the 14th amendment.²⁵⁴ Although in April, federal Judge Marina Garcia Marmolejo dismissed the suit without prejudice on the grounds that the plaintiffs had not produced enough evidence to support their contentions, she granted the petition in late September, finding that the law would "impose a discriminatory burden" on Black and Latino voters and cause irreparable injury to all voters "by creating mass lines at the polls and increasing the amount of time voters are exposed to COVID-19."²⁵⁵ The State, however, immediately sought and won reversal from the 5th Circuit on the grounds that changing the rules so late in the election cycle was contrary to Supreme Court precedent. There was no 5th Circuit opinion squarely on the VRA and equal protection issues.²⁵⁶

²⁵³ *Abbott v. Anti-Defamation League Austin, Southwest, & Texoma Regions*, 2020 Tex. App. LEXIS 8391 (3d Dist. C.A., Austin, Oct. 23, 2020), rev'd 610 S.W.3d 911, 923, 920 (Tex. Supreme Court, Oct. 27, 2020); Jolie McCullough, "Texas counties will be allowed only one drop-off location for mail-in ballots, state Supreme Court rules/ the court upheld Gov. Greg Abbott's authority under state law to limit ballot drop-off locations, issuing what is expected to be the final ruling in numerous lawsuits that challenged his order." *Texas Tribune*, Oct. 27, 2020, <https://www.texastribune.org/2020/10/27/texas-voting-elections-mail-in-drop-off/>.

²⁵⁴ Alexa Ura, "Texas Democrats sue the state to keep straight-ticket voting in 2020/ In a federal lawsuit filed in Laredo, Democrats claim the move to end straight-ticket voting is unconstitutional and intentionally discriminates against Hispanic and black voters." *Texas Tribune*, March 5, 2020, <https://www.texastribune.org/2020/03/05/texas-democrats-sue-state-keep-straight-ticket-voting-2020/>.

²⁵⁵ Alex Samuels, "Federal judge blocks Texas' elimination of straight-ticket voting/ Texas Attorney General Ken Paxton said his office has filed a motion to stop the judge's order and will file an appeal of the district court's ruling." *Texas Tribune*, Sept. 25, 2020, <https://www.texastribune.org/2020/09/25/straight-ticket-voting-texas/>.

²⁵⁶ *Bruni v. Hughs*, 468 F. Supp. 3d 817 (S.D. Tex., June 24, 2020); *Tex. Alliance for Retired Americans v. Hughs*, 220 U.S. Dist. LEXIS 176872 (S.D. Tex., Sept. 25, 2020); rev'd 976 F.3d 564 (5th Cir., Sept. 30, 2020); Emma Platoff, "No straight-ticket voting for Texas' 2020 election, federal appeals court says/ A three-judge panel on the 5th U.S. Circuit Court of Appeals affirmed a 2017 state law ending the popular one-punch option – and admonished a lower court judge for trying to bring the practice back so soon before early voting starts Oct. 13." *Texas Tribune*, Sept. 30, 2020, <https://www.texastribune.org/2020/09/30/texas-2020-election-straight-ticket-voting/>.

173. Controversies and litigation did not cease on election day. In another issue that would play out throughout the 2021 legislative sessions, poll watchers appointed by the Republican Party or candidates in Travis and Gillespie Counties contended that county election officials had prevented them from observing some operations involving the counting and tabulating of ballots. One poll watcher in Austin, former Texas House candidate Jennifer Fleck, was arrested when she took pictures of the operation of the counting rooms, in violation of the affidavit that all poll watchers had to sign.²⁵⁷ After a similar controversy involving a losing candidate for an Austin City Council seat in 2014, who claimed that her poll watchers had not been able to observe parts of the vote-counting operation, Travis County Clerk Dana DeBeauvoir had arranged to have a special glassed-in room built, from which observers could see everything that was going on. She also set up microphones in the counting and tabulating room so that they could hear everything. Because of Covid and the refusal of some poll watchers to wear masks in the 125-square-foot counting room, DeBeauvoir was especially keen to confine watchers behind windows or at least partitions. “They can’t go and stand on top of the people doing processing, because it’s COVID, and we don’t let them breathe on top of people,” she told an Austin TV station. Some of the poll watchers complained to the Secretary of State’s office, who referred their complaints to the Attorney General, who joined the Republican Party in seeking an order to require that DeBeauvoir allow the poll watchers into the counting room so that they could have closer views of all operations and not miss any details of conversations. Although DeBeauvoir asserted that her setup let poll watchers see and hear everything, she compromised in the face of the lawsuit, moving all operations into a larger room and allowing poll watchers inside it as long as they wore masks and usually stayed at least six feet away from elections workers. To preserve a safe workplace, DeBeauvoir provided full hazard suits for her staff.²⁵⁸

²⁵⁷ Jody Barr, “Arrested Republican poll watcher accused Travis County Clerk of election violations,” KXAN, Nov. 4, 2020, <https://www.kxan.com/news/your-local-election-hq/republican-poll-watcher-arrested-after-accusing-travis-county-clerk-of-election-violations/?ipid=promo-link-block1>.

²⁵⁸ Jody Barr, “State requests criminal investigation into alleged election violations inside Travis County Clerk’s Office,” KXAN, Nov. 2, 2020, <https://www.kxan.com/investigations/state-requests-criminal-investigation-into-alleged-election-violations-inside-travis-county-clerks-office/?ipid=promo-link-block2>; Jody Barr, “Poll watchers say they were illegally denied entry into Gillespie County ballot counting room,” KXAN, Nov. 4, 2020, <https://www.kxan.com/investigations/poll-watchers-say-they-were-illegally-denied-entry-into-gillespie-county-ballot-counting-room/amp/?ipid=promo-link-block1>; Chelsea Moreno and Jody Barr, “Texas Supreme Court declines to intervene in Travis County poll watcher alleged ‘sequestration,’” KXAN, Nov. 8, 2020, <https://www.kxan.com/news/texas/tx-attorney-general-travis-county-clerks-office-poll-watcher-sequestration-a-criminal-act/?ipid=promo-link-block3>; Jody Barr, “Lawsuit planned over Travis County Clerk’s poll watcher ‘sequester’ during ballot counting,” KXAN, Nov. 9, 2020, <https://www.kxan.com/investigations/lawsuit-planned-over-travis-county-clerks-poll-watcher-sequester-during-ballot-counting/?ipid=promo-link-block1>; Kyle D. Hawkins, Solicitor General to Blake Hawthorne, Clerk, Supreme Court of Texas, Nov. 8, 2020, https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/2020.11.08_CVSG_TCRP%20Final.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=; Jody Barr, “Travis County clerk halts ‘media room’ sequestration of poll watchers,” KXAN, Nov. 10, 2020, <https://www.kxan.com/investigations/travis-county-clerk-halts-media-room-sequestration-of-poll-watchers/?ipid=related-recirc?ipid=promo-link-block1>; Jody Barr, “Travis County clerk agrees to stop blocking poll watchers in GOP settlement,” KXAN, Nov. 11, 2020, <https://www.kxan.com/investigations/travis-county-clerk-agrees-to-stop-blocking-poll-watchers-in-gop-settlement/>; Heather Osbourne, “Travis County to allow poll watchers in counting rooms,” *Austin American-Statesman*, Nov. 12, 2020,

174. Despite the settlement with the Republican Party, poll watchers persisted in their complaints, and the Attorney General’s office charged DeBeauvoir with a criminal offense for interfering with the legally-protected activities of poll watchers, a charge that could bring a jail term of one year.²⁵⁹ Choosing a more conservative venue, Attorney General Paxton presented the case to a grand jury not in Travis County, but in Williamson County. DeBeauvoir, who was forced to hire a personal attorney to defend herself, charged that “part of the AG’s purpose in doing that was to intimidate me and financially bankrupt me.” Fortunately for DeBeauvoir, the grand jury refused to indict her and Travis County Commissioners reimbursed her for attorney fees. In a parallel action, Paxton asked a Montgomery County grand jury for an indictment of Harris County election officials for interfering with poll watchers. This grand jury, too, refused to indict. A columnist for the *Austin American-Statesman* discerned partisan motives behind Paxton’s actions, charging that “Paxton, who is running for reelection next year, could energize his GOP base if he prosecuted the Democratic elections chief in Austin.”²⁶⁰

175. Although she had no legal power to indict, Travis County Clerk DeBeauvoir did have a megaphone. Thus, she reported that in the 2020 election in Austin, “some of the partisan poll watchers would scream in the faces of election workers, intentionally get close to them without masks and improperly hover over voters — especially people of color who might not have spoken English as a first language. ‘These poll watchers were getting in people’s faces and [would] scream and spit. We’re in the middle of a pandemic. So the idea is that they’re either deliberately trying to infect people or they’re just intimidating with that implication.’” One, leaving for the day, took off her mask and threw it in the face of an election worker who had a pre-existing condition, saying “Here, I’ve already had COVID. I’m *gifting* you with my antibodies.”²⁶¹

<https://www.statesman.com/story/news/local/2020/11/12/travis-county-to-allow-poll-watchers-in-counting-rooms/43092665/>.

²⁵⁹ Jody Barr, “Second criminal investigation into Travis County Clerk requested over November election,” KXAN, Dec. 11, 2020, <https://www.kxan.com/news/second-criminal-investigation-into-travis-county-clerk-requested-over-november-election/>.

²⁶⁰ Press Release, Office of the Attorney General, July 1, 2021, <https://www.texasattorneygeneral.gov/news/releases/grand-jury-declines-prosecute-alleged-poll-watcher-obstruction>; Bridget Grumet, “Grumet: Travis elections chief says Texas attorney general tried ‘to intimidate me,’” *Austin American-Statesman*, Dec. 20, 2021, https://www.statesman.com/story/news/columns/2021/12/20/grumet-travis-elections-chief-says-texas-ag-tried-to-intimidate-me/6493013001/?utm_source=statesman-Your%20Week%20in%20Austin&utm_medium=email&utm_campaign=baseline_greeting&utm_term=list_article_t_humb&utm_content=TEXAS-AUSTIN-NLETTER18.

²⁶¹ Reese Oxner, “Amid Texas GOP’s effort to question electoral integrity, attorney general tried to indict Travis County elections chief/ The effort to charge Travis County Clerk Dana DeBeauvoir came at a time when many Texas Republicans questioned the integrity of last year’s election despite there being no evidence of widespread voter fraud.” *Texas Tribune*, Dec. 20, 2021, https://www.texastribune.org/2021/12/20/texas-ken-paxton-travis-county-elections/?mc_cid=ebe18239a2&mc_eid=78249492c1; Bridget Grumet, “Grumet: Travis elections chief says Texas attorney general tried ‘to intimidate me,’” *Austin American-Statesman*, Dec. 20, 2021, https://www.statesman.com/story/news/columns/2021/12/20/grumet-travis-elections-chief-says-texas-ag-tried-to-intimidate-me/6493013001/?utm_source=statesman-Your%20Week%20in%20Austin&utm_medium=email&utm_campaign=baseline_greeting&utm_term=list_article_t_humb&utm_content=TEXAS-AUSTIN-NLETTER18.

176. Although the pandemic caused special difficulties, reports of unruly poll watchers were not new in Texas. In 2010, the Harris County Attorney requested that the U.S. Department of Justice send an election monitor to observe the voting process after complaints about poll watchers “hovering” over voters, “getting in their face,” and talking to election workers. Democrats charged that 300 poll watchers trained by a newly-founded group, the King Street Patriots, had been sent to minority voting precincts in an “effort to intimidate and keep people from voting.”²⁶² There were 56 complaints filed by Harris County voters in 2010, many about voter intimidation.²⁶³ The King Street Patriots spread out nationally from Houston under the name “True the Vote,” which sought purges of registration rolls, as well as providing poll watchers.²⁶⁴ By 2012, it had held a national convention and claimed 300 active chapters in three dozen states.²⁶⁵ In an editorial, the *New York Times* explained how the organization worked:

In an ostensible hunt for voter fraud, a Tea Party group, True the Vote, descends on a largely minority precinct and combs the registration records for the slightest misspelling or address error. It uses this information to challenge voters at the polls, and though almost every challenge is baseless, the arguments and delays frustrate those in line and reduce turnout. . . .

In 2009 and 2010, for example, the group focused on the Houston Congressional district represented by Sheila Jackson Lee, a black Democrat. After poring over the records for five months, True the Vote came up with a list of 500 names it considered suspicious and challenged them with election authorities. Officials put these voters on “suspense,” requiring additional proof of address, but in most cases voters had simply changed addresses. That didn’t stop the group from sending dozens of white “poll watchers” to precincts in the district during the 2010 elections, deliberately creating friction with black voters.²⁶⁶

177. Dallas County’s elections director, Toni Pippins-Poole, reported in 2018 that she had “never seen the likes of” the amount of voter intimidation incidents during 30 years of election administration, including “a partisan poll watcher looking over voters’ shoulders as they cast

²⁶² Joe Holley and Chris Moran, “Harris County warns parties to watch the poll-watchers,” *Houston Chronicle*, Oct. 19, 2010, <https://www.chron.com/news/houston-texas/article/Harris-County-warns-parties-to-watch-the-1703190.php>; David Saleh Rauf and Bobby Cervantes, “Poll watching expected to spike over Trump claims of election rigging,” *ibid.*, Oct. 21, 2016, <https://www.houstonchronicle.com/news/politics/texas/article/Poll-watching-expected-to-spike-over-Trump-claims-10073251.php>.

²⁶³ Abby Rapoport, “What’s the Truth about True the Vote?” *The American Prospect*, Oct. 10, 2012, <http://prospect.org/article/whats-truth-about-true-vote>.

²⁶⁴ Pam Fessler, “Tea Party Spawns New Effort Against Voter Fraud,” NPR, March 13, 2012, <http://www.npr.org/2012/03/13/148518795/tea-party-spawns-new-effort-against-voter-fraud>.

²⁶⁵ Steven Rosenfeld, “Going Undercover at the GOP’s Voter Vigilante Project to Disrupt the Nov. Election/ The Republican True the Vote project is a well-funded scheme with training sessions for activists across the country. Will it work?” *AlterNet*, Aug. 24, 2012, <http://www.alternet.org/news-amp-politics/going-undercover-gops-voter-vigilante-project-disrupt-nov-election?paging=off>.

²⁶⁶ Editorial, “Voter Harassment, Circa 2012,” *New York Times*, Sept. 21, 2012, http://www.nytimes.com/2012/09/22/opinion/voter-harassment-circa-2012.html?smid=tw-share&_r=0.

their ballots and questioning voters on their politics.”²⁶⁷

178. During the House debate on H.B. 6, May 6, 2021, Rep. Nicolle Collier (D-Fort Worth), who is Black, schooled the Chair of the House Election Committee, Rep. Briscoe Cain, about “Operation Eagle Eye,” a poll watcher operation of the Republican National Committee from the 1960s through 1981, when it was enjoined by a consent decree in federal court. (The decree was dissolved in 2019.²⁶⁸) According to Rep. Collier, Operation Eagle Eye recruited over 10,000 volunteers in Texas.²⁶⁹

179. Travis County’s poll watcher controversies in 2020 and the agitation of the question of poll watcher rules in the 2021 legislative sessions had a rich history in Texas.

F. The Significance of Crystal Mason

180. As pointed out in Section VI.D. of this report, there were no reports of significant fraud during the 2020 election in Texas, and State Elections Director Keith Ingram judged the election “safe and secure.” Nevertheless, hours after former President Donald J. Trump asked Gov. Greg Abbott to add an election audit bill to the agenda of the third session of the 2021 legislature, the Secretary of State’s office announced a “full forensic audit” of the 2020 general election in four counties: Collin, Dallas, Harris, and Tarrant.²⁷⁰ Burying the results of the first phase of the audit by releasing them on New Year’s Eve, the Secretary of State’s report showed few discrepancies between the electronic and hand counts of the returns, and it said those resulted from data entry errors or curbside voters whose votes did not produce a paper record.²⁷¹

181. A single example of a person convicted of election fraud in Texas may give concreteness to propositions, already supported by so much numerical evidence, that election fraud is diminishingly small in Texas, and that the sort of organized fraud that would be necessary to affect a statewide election is a complete myth. Consider the poster child for ballot fraud in Texas, Crystal Mason. Far from the stereotypical perpetrator of ballot fraud, a member of the

²⁶⁷ Blake Paterson, “Reports of Voter Intimidation at Polling Places in Texas/ Election official in Dallas County says it’s the worst she’s seen in decades,” *ProPublica*, Oct. 26, 2018, <https://www.propublica.org/article/reports-of-voter-intimidation-at-polling-places-in-texas>.

²⁶⁸ See Richard L. Hasen, “Donald Trump Was Just Handed a Chance to Supercharge Voter Suppression in 2020,” *Slate*, Jan. 8, 2019, <https://slate.com/news-and-politics/2019/01/donald-trump-voter-suppression-plan-2020.html>.

²⁶⁹ Transcript of House Floor Debate, May 6, 2021, at 87-91. Cain at first denied hearing of the operation.

²⁷⁰ Neelam Bohra, “Texas secretary of state’s office auditing four counties’ 2020 elections months after an official called the statewide process ‘smooth and secure’/ The agency did not explain why it was auditing elections in Collin, Dallas, Harris and Tarrant counties. Its announcement came hours after former President Donald Trump asked that an election audit bill be added to a special legislative session agenda.” *Texas Tribune*, Sept. 23, 2021, https://www.texastribune.org/2021/09/23/texas-2020-election-audit/?utm_source=Texas+Tribune+Newsletters&utm_campaign=168d848c48-trib-newsletters-breaking-alert&utm_medium=email&utm_term=0_d9a68d8efc-168d848c48-101201265&mc_cid=168d848c48&mc_eid=78249492c1; Madlin Mekelburg, “Texas secretary of state auditing 2020 election to ensure ‘confidence’ in results,” *Austin American-Statesman*, Sept. 29, 2021, <https://www.statesman.com/story/news/politics/state/2021/09/29/texas-2020-election-audit-ballots-vote-greg-abbott/5913085001/>.

²⁷¹ Alexa Ura and Allyson Waller, “First part of Texas’ 2020 election audit reveals few issues, echoes findings from review processes already in place/ An initial review of four counties’ election results – launched after pressure from former President Donald Trump and touted by GOP leaders – showed few discrepancies between electronic and hand counts of ballots in a sample of voting precincts.” *Texas Tribune*, Dec. 31, 2021, <https://www.texastribune.org/2021/12/31/secretary-state-texas-election-audit/>.

underclass in thrall to a political boss, Mason had run a tax-preparation business with her husband. She pled guilty to inflating their clients' refunds and spent four years in jail. Working at a Dallas bank while on a supervised-release program in November 2016, she did not realize that she was ineligible to vote, drove to her polling place, the Tabernacle Baptist Church in Tarrant County, on a rainy night just as the polls were closing, and offered to vote. When a polling place official could not find her name on the rolls, he offered her a provisional ballot, which was not counted when officials realized that Mason had not yet completed all the terms of her sentence. Despite the fact that no one contends that Mason, who is Black, was part of any larger vote fraud effort, she was arrested on Feb. 16, 2017, lost her job, and after the prosecution argued for "a stern prison sentence" in order to "send a message," was convicted of illegal voting and sentenced to five years in prison. While her conviction was under appeal – it is still under appeal – she served ten months in prison.²⁷²

182. Mason, who has become a voting rights activist, is not only a symbol of the unfairness of existing voting laws and prosecutorial practices, but an indication of the weakness of the case that voting fraud is widespread and that in 2021 it needed further harsh restrictions to restore "election integrity." The best example that the Jeremiahs of vote fraud could come up with was a middle-class woman who acted alone, without any intent to break the law, and whose vote did not count, because the laws in existence for many years were quite adequate to ensure that her innocent mistake had no impact on any political outcome. That Crystal Mason, as well as the other two most highly publicized people who were convicted of vote fraud in Texas in the last few years, Rose Ortega and Hervis Rogers, were all minorities and were given startlingly long sentences, reflects on the motives of the prosecutors/crusaders.²⁷³ That, given the incentive that local and state prosecutors in Texas have had to ferret out election fraud and convict perpetrators, after their hyperbolic claims of election machinations, they have proven so little and convicted so few, completely undermines their case, a case that was fundamental to the arguments for S.B. 1.

²⁷² Vann R. Newkirk II, "When the Myth of Voter Fraud Comes for You/ To support the Republican narrative that our elections are rife with misconduct, someone needs to take the fall." *The Atlantic*, January-February, 2022, <https://www.theatlantic.com/magazine/archive/2022/01/voter-fraud-myth-election-lie/620846/>; Philip Jankowski, "Crystal Mason seeks illegal voting conviction to be overturned under new Texas election law/ Attorneys for the Tarrant County woman filed briefs with the Texas Court of Criminal Appeals that points to a provision under the controversial election law Senate Bill 1 they believe will undo her conviction." *Dallas Morning News*, Dec. 10, 2021, https://www.dallasnews.com/news/politics/2021/12/10/crystal-mason-seeks-illegal-voting-conviction-to-be-overturned-under-new-texas-election-law/?utm_source=Newsletter&utm_medium=email&utm_content=SCOTUS++take+on+Texas+abortion+bill%2C+rumor+gets+school+districts++attention%2C+Nesmith+dies%3A+Your+Friday+evening+roundup&utm_campaign=EveningRoundup_12102021&vgo_ee=2vPR0tE9vKeN0%2BofLVLmF1J%2BdLZKqRZDQ5JtGHic%2Bnc%3D.

²⁷³ "Editorial: On Texas voting rules, the fear is the point," *Austin American-Statesman*, July 18, 2021, <https://www.statesman.com/story/opinion/editorials/2021/07/18/texas-voting-rules-fear-point/7985763002/>; "Editorial: Voting mistake arrest is Paxton's lowest blow in championing the Big Lie," *Houston Chronicle*, July 19, 2021, <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Hervis-Rogers-arrest-for-voting-16323103.php>; Taylor Goldenstein, "At least 72% of AG Ken Paxton's voter fraud prosecutions target people of color, analysis shows," *Houston Chronicle*, March 24, 2021, <https://www.houstonchronicle.com/politics/texas/article/Ken-Paxton-voter-fraud-minorities-target-election-16049496.php>.

VIII.S.B. 1

A. The Partisan and Racial Shifts in Voting by Mail in 2020

183. Absentee voting had not been an entrée on the smorgasbord of S.B. 9. But even with the condemnation of voting by mail by President Donald J. Trump and the largely successful effort of Republican activists and state officials to constrain VBM, the proportion of the state’s registered voters who managed to vote by mail in 2020 appears to have grown by 73.3% over the October/November 2016 total and by 120% over the October/November 2012 total.²⁷⁴ More significantly, according to the *Texas Tribune*, 39% of those who cast votes by mail in November 2020 had voted in the most recent Democratic primary and 26%, in the most recent Republican primary. In 2016, the order of the figures had been reversed: 41% of those who voted by mail in November 2016 had voted in the most recent Republican primary, and only 26% in the most recent Democratic primary. And in the largest counties and some smaller, conservative counties, a higher proportion of VBM ballots went for Biden than for Trump.²⁷⁵ Whereas Republicans had previously had a partisan incentive to keep VBM relatively easy to cast, the Party’s incentives shifted after the 2020 election.

184. Even though there do not seem to be any statistics on the use of VBM by racial or ethnic group in 2020, the correlation between racial and partisan voting patterns was so close that partisan VBM statistics can serve as good proxies for racial statistics. According to the *Washington Post* exit poll of Texas voters, Black voters cast 90% of their votes for Biden, Latinos, 58%, Asians, 63%, but Anglos, only 33%.²⁷⁶ In addition, we know from Table 1, above, that Black, Latino, and Asian voters were more concerned than Anglos about Covid and much more likely to say that, in view of the pandemic, every Texan should be allowed to vote by mail. The combination of Table 1, exit polls, and the statistics on partisanship and VBM voting suggest a strong correlation between race and VBM voting in 2020.

²⁷⁴ Although the Texas Secretary of State’s website gives 2020 early in-person and mail voting for all 254 counties, it only contains similar totals for the 15 largest counties in 2012 and 2016. Because lines at the polls were longer in urban than in suburban or rural areas, the incentive to vote by mail was higher in metropolises, so the fragmentary 2012 and 2016 figures probably overestimate the percentages voting by mail in the earlier elections, diminishing the contrast in mail voting for the state as a whole in 2020, compared to the earlier contests. The data is available at <https://www.sos.state.tx.us/elections/earlyvoting/2012/nov2.shtml>, <https://www.sos.state.tx.us/elections/earlyvoting/2016/nov3.shtml>, and <https://earlyvoting.texas-election.com/Elections/getEVDetails.do>.

²⁷⁵ Karen Brooks Harper, “Four years ago, Texas Republicans were the most likely to use mail-in voting. Here’s how that flipped in the last election. Absentee ballots, which only certain groups of Texans are eligible to use, have traditionally been a tool utilized by the GOP, and in 2016, higher percentages of Republican voters cast absentee ballots than did Democratic voters.” *Texas Tribune*, Jan. 11, 2021, <https://www.texastribune.org/2021/01/11/texas-mail-in-ballot-absentee-democrats-republicans/>.

²⁷⁶ <https://www.washingtonpost.com/elections/interactive/2020/exit-polls/texas-exit-polls/>. The AP exit poll gave similar results: <https://www.ksat.com/news/local/2020/11/04/heres-how-texans-voted-in-the-2020-election-by-age-race-and-more-according-to-aps-votecast/>.

B. A Response Not to Fraud, But to Efforts to Cope with a Pandemic

1. Keith Ingram’s Undermining of the Case for Fraud as the Motive for S.B. 1

185. A statement before the House Elections Committee on March 4, 2021 by Keith Ingram, the Director of the Elections Division of the Secretary of State’s office, seriously undermines any contention that S.B. 1 was a response to proven fraud. Summarizing his extensive experience in overseeing the 2020 election in Texas, Mr. Ingram stated that “In spite of all the circumstances, Texas had an election that was smooth and secure.” Rather than condemning county clerks for exceeding the bounds of state law in efforts to enable people to vote safely, Mr. Ingram, a Republican, declared that “Texans can be justifiably proud of the hard work and creativity shown by local county election officials.”²⁷⁷ But it was at exactly that “creativity” that several of the major provisions of S.B. 1 were aimed.²⁷⁸

2. Did the Legislature Adopt S.B. 1 Because “The People” Demanded It?

186. Despite the lack of evidence of fraud in Texas in the 2020 election and the easy victory of Republicans up and down the ticket, a victory that undercut pre-election warnings that, for example, minority Democrats were planning a massive ballot-harvesting operation in Harris County,²⁷⁹ Republicans introduced almost a dozen “election integrity” bills in the 2021 regular session of the legislature. Delicately avoiding asserting that significant fraud had actually taken place, House Elections Committee Chair Briscoe Cain rested his case on the proposition that trust in the electoral process had been eroded, although he did not explain who had eroded it or how or why it had eroded: “Filing legislation that will prevent voter fraud ensures that we have fair elections. If people do not trust in the electoral process, they will not trust those who are elected.”²⁸⁰ Admitting that there was no “specific incident, event, or a crime” that motivated H.B. 6, and that he accepted Director Ingram’s statement that the 2020 election had been “secure,” Cain portrayed the intent of the bill as purely prophylactic: “. . . we don’t need to wait

²⁷⁷ https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=19496, at 45:40.

²⁷⁸ When Republicans in the State Senate declined to confirm the appointment of Director Ingram’s boss, Acting Secretary of State Ruth Hughs, as Secretary of State, rumors spread that it was the “smooth and secure” statement, which was repeated endlessly during the debates over S.B. 1 and its predecessors, that was the reason Hughs had to resign. Taylor Goldenstein, Jeremy Blackman, “Did a ‘smooth and secure’ 2020 election cost the Texas secretary of state her job?” *Houston Chronicle*, May 21, 2021, <https://www.houstonchronicle.com/politics/texas/article/Texas-Secretary-of-State-Ruth-Hughs-resigns-under-16195586.php>.

²⁷⁹ See above, paragraph XX.

²⁸⁰ Karen Brooks Harper, “GOP lawmakers heading into the legislative session take aim at voter fraud, despite no evidence of widespread problem/Nearly a dozen pieces of legislation, all of them filed by Republicans, target mail-in balloting, illegal voting and misbehaving election officials – inspired by events and talking points from the previous election cycle.” *Texas Tribune*, Dec. 1, 2020, <https://www.texastribune.org/2020/12/01/texas-gop-voting/>. In 2020, Cain had volunteered with the Trump campaign after the November election to go to Pennsylvania in an effort to overcome the results of the election in that state. The case was thrown out of court. Alexa Ura, “Texas House committee advances bill that would make it a crime for election officials to send unsolicited vote-by-mail applications/ Like other Republican proposals, the measure would target Harris County’s initiatives from the 2020 general election, including a shift to proactively send out vote-by-mail applications.” *Texas Tribune*, April 8, 2021, <https://www.texastribune.org/2021/04/08/texas-elections-vote-by-mail-applications/>.

for – for bad things to happen.”²⁸¹ Similarly, Lt. Gov. Dan Patrick remarked at a news conference that “People in America have lost faith in their elections. We have to resolve that issue in this country and in this state. That’s why SB 7 is needed.”²⁸² In a press conference, Sen. Bryan Hughes admitted that “we don’t know how pervasive it is, how much fraud . . .”²⁸³

187. In his State of the State address, Gov. Greg Abbott made “election integrity” one of five emergency items, allowing the Legislature to evade some of its normal rules and act more quickly. The starting point, the Governor asserted, should be S.B. 9 from the 2019 legislative session, and he especially emphasized the bill’s increases in penalties for any violations of the election code, provisions that the state’s Republican Party announced as its top legislative priority for the year. To the S.B. 9 core of the legislation, Gov. Abbott favored adding restrictions on absentee balloting, noting specifically that Sen. Paul Bettencourt had proposed legislation to correct “practices used in Harris County over the course of this past election” [2020], such as sending out absentee ballot applications to voters who had not specifically requested them (S.B. 208).²⁸⁴ Declining in an interview with the *Dallas Morning News* to endorse former President Donald J. Trump’s claim that the presidential election of 2020 was stolen, Gov. Abbott fell back on the assertion that “This is something that people want to see accomplished” to justify the push for more election regulation.²⁸⁵ But in fact, “the people” were starkly divided on the issue. A poll by the University of Houston’s Hobby School of Public Affairs found that 83% of Texas Republicans believed that there was widespread fraud in the 2020 election, while 87% of Democrats said fraud was not an issue in 2020.²⁸⁶

188. Was S.B. 1, then, a response to a demand not from the people, but from the subset of the population composed of Republican voters? On this question, a University of Texas/*Texas Tribune* poll of February, 2021, before the omnibus election bill had taken shape and before it had garnered enough publicity for voters to start to follow a definite and widely publicized party

²⁸¹ Transcript of House Floor Debate, May 6, 2021, at 6-12 (colloquy between Reps. Jessica Gonzalez and Briscoe Cain).

²⁸² Brandon Mulder, “Fact-check: Dan Patrick insists that SB 7 doesn’t change early voting rules. Is he right?” *Austin American-Statesman*, April 9, 2021, <https://www.statesman.com/story/news/politics/politifact/2021/04/09/yes-texas-senate-election-bill-sb-7-changes-early-voting-rules/7144819002/>.

²⁸³ Transcript of Press Conference, Lt. Gov. Dan Patrick and Sen. Bryan Hughes, July 14, 2021, at 17:55-18:37.

²⁸⁴ Robert T. Garrett, “Gov. Abbott says Texas must be ‘Freedom Capital of America’ in State of State speech that plays to GOP base,” *Dallas Morning News*, Feb. 1, 2021, <https://www.dallasnews.com/news/politics/2021/02/02/watch-live-texas-gov-greg-abbott-delivers-state-of-the-state-speech/>; Robert T. Garrett, “Texas Gov. Greg Abbott says tighter restrictions on mail-in ballot procedures will deter voter fraud/Abbott has declared ‘election security’ an emergency legislative item, but critics say it’s more about voter suppression than fraud.” *Ibid.*, Feb. 2, 2021, <https://www.dallasnews.com/news/politics/2021/02/03/texas-gov-greg-abbott-says-tighter-restrictions-on-mail-in-ballot-procedures-will-deter-voter-fraud/>; <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB208>.

²⁸⁵ Robert T. Garrett, “Texas Gov. Greg Abbott says tighter restrictions on mail-in ballot procedures will deter voter fraud/Abbott has declared ‘election security’ an emergency legislative item, but critics say it’s more about voter suppression than fraud.” *Ibid.*, Feb. 2, 2021, <https://www.dallasnews.com/news/politics/2021/02/03/texas-gov-greg-abbott-says-tighter-restrictions-on-mail-in-ballot-procedures-will-deter-voter-fraud/>.

²⁸⁶ Chuck Lindell, “Was the election rigged? Polls show 1 factor determines your answer: party affiliation,” *Austin American-Statesman*, Feb. 4, 2020, <https://www.statesman.com/story/news/2021/02/04/most-texas-republicans-see-election-fraud-most-democrats-dont/4389997001/>.

line, provides a clear answer: In contrast to party leaders, Republican voters did not care very much about “election integrity.” Whereas the state Republican Party leadership made an “election integrity” bill their top priority, only 2% of Republican voters did. Nor were Republican voters united in believing rules for voting in Texas should be made stricter: While 46% of Republican voters (compared to 27% of Democrats) thought election laws should be made more strict, 49% of Republicans (and 75% of Democrats) thought the laws should be less strict or stay as they were. And 76% of Republicans, compared to 78% of Democrats, thought official election results in Texas were very accurate or somewhat accurate. Only 6% of Republicans and 5% of Democrats thought the Texas results were very inaccurate.²⁸⁷ After the failure of S.B. 7 in the 2021 regular session, the opinions of members of each party became more polarized. By June, 2021, 60% of Republicans believed that the rules for voting in Texas should be made more strict – up from 46% in February – while only 9% of Democrats did – down from 27% in February. Among Republicans, only 34% thought election laws should be less strict or remain as they are, compared to 49% in February; among Democrats, the numbers were 83% in June, compared to 75% in February.²⁸⁸ The changes over time suggest that voters followed cues from leaders on this set of issues, rather than the other way around.

3. Provisions

189. In addition to his bill banning election officials from sending out applications for absentee ballots, Sen. Bettencourt filed 6 other bills, which Gov. Abbott touted on Twitter. One withheld funds from local election administrators who did not purge voter rolls promptly (S.B. 1113),²⁸⁹ another required uniform hours and days of voting in the largest and smallest counties (S.B. 1115),²⁹⁰ and a third increased penalties for infringements of voting laws, particularly by election officials (S.B. 1112).²⁹¹ Two other Bettencourt bills made less substantial changes in the code (S.B. 1110 and S.B. 1116).²⁹² The final Bettencourt bill, in an echo of the 2019 Whitley Purge, required comparisons of motor vehicle and voting rolls in an effort to ensure that non-citizens

²⁸⁷ Ross Ramsey, “Voters think Texas election results are accurate – but many question U.S. results, poll finds/Almost a third of Texas voters said they don’t think official election results in the U.S. are accurate, though a large majority trust the results of Texas elections, according to the latest University of Texas/Texas Tribune Poll.” *Texas Tribune*, Feb. 26, 2021, <https://www.texastribune.org/2021/02/26/texas-republicans-elections-integrity/>.

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²⁸⁸ Alexa Ura, “Few Texans believe voting fraud is common, UT/TT poll shows, undercutting GOP rationale for tightening voting rules/With no evidence of widespread voting fraud to cite, Republicans are shifting their argument to insist that new voting restrictions are needed to forestall even isolated instances of ineligible voters casting ballots.” *Texas Tribune*, June 25, 2021, <https://www.texastribune.org/2021/06/25/texas-voting-polling-restrictions/>. Cross-tabs at https://static.texastribune.org/media/files/bd07f2bb3a1f2a8d8a3c47804297a9ad/ut-tt-2021-06-crosstabs.pdf?_ga=2.123997071.466957112.1645580442-914095208.1604524399.

²⁸⁹ <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1113>.

²⁹⁰ <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1115>.

²⁹¹ <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1112>.

²⁹² <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1110>; <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1116>.

did not register to vote (S.B. 1114).²⁹³ While some of these bills were considered separately, others were wrapped into the omnibus bills, H.B. 6 and S.B. 7, which were joined together into S.B. 1 after the failure of the two original bills during the regular session.

190. S.B. 7, sponsored by Sen. Bryan Hughes, who had carried S.B. 9 in 2019, continued some of the provisions of the 2019 bill. Like S.B. 9, the 2021 bills increased penalties for registering or voting illegally and required additional information and an oath from those who assisted senior or disabled voters or those who needed language assistance to cast an in-person, curbside, or VBM ballots. Those who drove voters to the curbside outside of a polling place had to exit the vehicle while the disabled person voted, unless the disabled person needed assistance while voting.²⁹⁴ While the provisions of S.B. 9 that allowed partisan poll watchers to oversee voting and examine the ballot of anyone who voted with the assistance of another voter were dropped in S.B. 7 and H.B. 6, the paperwork that the assistant had to file became sufficiently complex and the penalties for mistakes so harsh as to be intimidating to anyone who was contemplating helping a friend or patient to vote. For instance, the assistant had to state the reason for assistance and swear that “I did not pressure or intimidate the voter into choosing me to provide assistance.”²⁹⁵ Another provision that disproportionately affected minorities that was carried over from the 2019 S.B. 9 required counties with populations over 1 million to allocate vote centers proportionately to voters in the previous election which, as discussed above, would discriminate against minorities, whose turnout in Texas is disproportionately lower than their percentages of the population.²⁹⁶

191. But the most important provisions of H.B.6 and S.B. 7 were reactions to the innovations that county clerks, the most prominent of whom was Chris Hollins, had deployed in 2020 in an effort to make the elections safer in the midst of the pandemic in his nearly three-fourths non-white county.²⁹⁷ It was patently disingenuous for Rep. Briscoe Cain (R-Deer Park) to claim that H.B. 6 “is not a response to 2020.”²⁹⁸ The new bills prohibited drive-thru voting,²⁹⁹ more than one drop box in even the largest county,³⁰⁰ 24-hour voting and most extended hours of voting,³⁰¹ and voting in a parking garage, tent, or other temporary structure.³⁰² The S.B. 208 ban on the distribution by election officials of applications for absentee ballots was incorporated into S.B. 7,

²⁹³ Alex Briseno, “Bill filing deadline: Republicans file election legislation that Democrats call voter suppression/With Friday marking the bill filing deadline, lawmakers filed a flurry of election and voter bills. Democrats say it’s just the latest attempt at voter suppression.” *Dallas Morning News*, March 12, 2021, <https://www.dallasnews.com/news/politics/2021/03/12/bill-filing-deadline-republicans-file-election-legislation-democrats-call-voter-suppression/>; <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1114>.

²⁹⁴ S.B. 7, final Senate version, Section 3.10.

²⁹⁵ Section 4.02 of the Committee Substitute for H.B. 6.

²⁹⁶ S.B. 7, Committee Substitute, Section 3.05. In the version of S.B. 7 that passed the Senate, “voters” was changed to “eligible voters,” which might mean registered voters or perhaps voting-age citizens.

²⁹⁷ Ashley Lopez, “Texas Republicans Look To Curb Local Efforts To Expand Voting Access,” NPR, March 26, 2021, <https://www.npr.org/2021/03/26/981308277/texas-republicans-look-to-curb-local-efforts-to-expand-voting-access>.

²⁹⁸ Transcript of Texas House Floor Debate, May 6, 2021, at 35.

²⁹⁹ S.B.7, Section 3.06.

³⁰⁰ S.B.7, Committee Substitute, Section 2.06.

³⁰¹ S.B. 7, Sections 3.13, 3.14, 3.15, 3.18.

³⁰² S.B. 7, Sections 3.16, 3.17.

which added a provision prohibiting election officials from assisting third-party voter registration organizations (3pvros) from distributing such applications, as well.³⁰³ (There was no restriction on the distribution of applications for absentee ballots in any quantities by political parties or candidates.)

192. The numerous and stringent restrictions on the ability of election officials to regulate the activities of poll watchers can also be seen as arising from the experiences of poll watchers during the 2020 election, especially those in Travis County. Poll watchers could not be denied entry into polling or counting facilities,³⁰⁴ they had to be allowed to be “near enough to see and hear” the activity that they are seeking to observe, and in general, the watcher “may not be denied free movement within the location at which the watcher is serving.”³⁰⁵ Under the version of S.B. 7 that passed the Senate, poll watchers could also videotape voters who were obtaining assistance if the watchers reasonably believed that the assistance was illegal, and the poll watchers could then transmit the videos directly to the Secretary of State.³⁰⁶ This was a stark reversal from the previous election code, which prohibited recording sound or images within 100 feet of a polling place.³⁰⁷ After harsh criticism, the videotaping provision was dropped from the bill.

193. The strict restrictions of S.B. 7 on voting by people with disabilities can also be traced to experiences in the 2020 election. As pointed out earlier, metropolitan county clerks and other big city officials, many of whom were minorities, serving jurisdictions with large minority populations, attempted to allow voters who feared catching Covid standing in lines for hours and congregating inside polling places to claim a disability and vote by mail. Although this big-city interpretation of the existing law was rejected by the Texas Supreme Court, that court did allow voters to decide for themselves whether they had a disability. As pointed out above, the number of votes by mail grew by as much as 73%, compared to 2016.

194. To stifle such use of the disability exemption from in-person voting, S.B. 7 in its initial form required anyone claiming such an exemption to provide written documentation of a disability from the Social Security Administration, the U.S. Department of Veterans Affairs, or a doctor.³⁰⁸ Although the written proof of disability was deleted by the time that S.B. 7 passed the Senate,³⁰⁹ someone applying for a disability waiver had to swear that “I have a sickness or physical condition that prevents me from appearing at the polling place on election day without a likelihood of needing personal assistance or injuring my health” and to certify that he understood

³⁰³ S.B.7, Section 2.03; H.B. 6, Section 5.05.

³⁰⁴ S.B. 7, Section 4.02; H.B. 6, Section 3.04.

³⁰⁵ S.B. 7, Sections 3.03, 3.04.

³⁰⁶ S.B. 7, Section 3.08.

³⁰⁷ Editorial, “Call Senate Bill 7 what it is: The Texas Voter Harassment Act,” *Austin American-Statesman*, April 2, 2021, <https://www.statesman.com/story/opinion/editorials/2021/04/02/editorial-call-sb-7-what-is-texas-voter-harassment-act/4845012001/>.

³⁰⁸ S.B. 7, Section 2.05.

³⁰⁹ Taylor Goldenstein, “Here’s how Texas Republicans want to further restrict voting,” *Houston Chronicle*, April 1, 2021, <https://www.houstonchronicle.com/politics/texas/article/Five-things-to-know-about-voting-restrictions-16070072.php>.

that giving false information on the application was a “state jail felony.”³¹⁰ The oath and certification might well be a strong disincentive to vote by mail.

195. One provision of S.B. 7 was apparently inspired not by the 2020 election, but by the 2018 election. In 2017, the Legislature had ended straight-ticket voting, a procedure that had long been used and which, by facilitating one-step voting, reduced the time it took to vote and therefore, lines at polling places.³¹¹ Straight-ticket voting also made it more likely that minority Democratic candidates in down-ticket contests could be elected, even if they were not well-known and could not afford an expensive campaign effort. But the law did not go into effect until the 2020 election, and in 2018, as pointed out above, 17 Black female judges were elected in Harris County. S.B. 7 made such a down-ticket sweep much less likely by prohibiting ballots from being “arranged in a manner that allows a political party’s candidates to be selected in one motion or gesture.”³¹² Another, seemingly innocuous provision of S.B. 7 also made it easier for voters to ignore down-ticket contests by requiring any voting machine used in Texas to allow voters to cast incomplete ballots, known since the 2000 Florida presidential election debacle as undervotes.³¹³ Seen in the context of recent electoral events, this provision of the omnibus bill makes the connection between race, party, and the mechanics of election laws especially clear.

4. Procedural Irregularities

196. Unusual procedures marred the hearings, committee actions, and larger maneuvers during the months-long consideration of H.B. 6/S.B.7/H.B. 3/S.B.1. Noting that there were no Black members of the House Elections Committee, Vice-Chair Rep. Jessica Gonzalez (D-Dallas) sought to allow the Chair of the Texas Legislative Black Caucus, Rep. Nicole Collier, to address the Committee. But the inexperienced Committee Chair, Rep. Briscoe Cain (R-Deer Park), not only refused to hear from Collier, but also made a procedural error that prevented 200 people who had traveled to Austin to testify from doing so.³¹⁴ Because the first Senate hearing on S.B. 7 was called with less than the standard 48 hours of notice, Democrats on the State Affairs Committee had to request that the hearing be put off so that people who wanted to testify could arrange to come to Austin.³¹⁵ Severe limits on virtual testimony prevented many people, especially those with disabilities, from testifying.³¹⁶

³¹⁰ S.B. 7, Sections 2.02-2.03.

³¹¹ Written testimony of Kathryn C. Sadasivan, NAACP-LDF, at Senate State Affairs Committee hearing, March 25, 26, 2021.

³¹² S.B. 7, Senate Committee Substitute, Section 3.18.

³¹³ S.B. 7, Senate Committee Substitute, Section 3.19. Many voting machines warn voters of undervotes or overvotes before they record their ballots. See <https://www.ncsl.org/research/elections-and-campaigns/voting-equipment.aspx>.

³¹⁴ Taylor Goldenstein, “200 Texans can’t testify on GOP voting bill due to chairman’s error,” *Houston Chronicle*, March 25, 2021, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/GOP-lawmakers-overstate-prevalence-of-voter-fraud-16053073.php>.

³¹⁵ Alex Brisenno, “Voting bills remain hot topic in Texas Senate committee/ Republican priority bill SB 7, filed by Sen. Bryan Hughes, R-Mineola, would allow partisan poll watchers, restrict poll hours for early voting among several other provisions.” *Dallas Morning News*, March 26, 2021, <https://www.dallasnews.com/news/politics/2021/03/26/voting-bills-remain-hot-topic-in-texas-senate-committee/>.

³¹⁶ Amber Mills of the MOVE Texas Action Fund, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

197. The first chamber to act on the omnibus election bill, the Senate, adopted it at 2 a.m., April 1, 2021, at the end of a marathon seven-hour session. After a flurry of amendments late in the debate, the Senate had to adjourn at 1:39 a.m. and reconvene at 1:40 a.m. in order to comply with public notice rules. Declaring the 1:40 session a new legislative day, the senate did a morning roll call, followed by a prayer, followed, thirty minutes later, by passage of S.B. 7. Even though the public had been able to testify the week before at a 13-hour hearing, the bill that they then addressed was quite different from that which the Senate passed on April Fool's Day.³¹⁷ That the Senate even considered such a partisan bill was the result of a further weakening of the threshold for senate action on any bill, which had been two-thirds (21 or 31) from 1947 until 2015, in order to preserve comity between senate members. Under the leadership of Lt. Gov. Dan Patrick, the threshold was lowered to 19 in 2015, and when Republicans lost a seat in 2020, reducing their majority to 18, Republicans lowered the threshold again, to 18, so that they did not need any Democratic votes to pass legislation.³¹⁸ As John Whitmire, the longest-serving member of the Senate, remarked during the March 31/April 1 debate on S.B. 7, "if we hadn't changed the rules, we would've never taken this piece of legislation up."³¹⁹

198. More procedural irregularities took place in the House Elections Committee on April 29, when the Chair of the Elections Committee, Rep. Briscoe Cain, suddenly gutted S.B. 7, which had already passed the Senate, and substituted the significantly different H.B. 6. However, Cain had failed to warn all Republican members of the committee, one of whom, Rep. Travis Clardy, initially "passed" on the vote. In what was described as "chaos," Democrats, who had been presented with the bill minutes before the meeting, responded with fury, and Cain had to withdraw his motion and temporarily adjourn the committee meeting in order to preserve the bill. Democratic members of the committee wrote a letter to U.S. Attorney General Merrick Garland to inform the Justice Department of the committee's "grave deviation from standard operating procedure." A few hours later, Rep. Clardy had been brought into line, and the bill passed the committee on a party-line vote.³²⁰

199. When in late May, a conference committee was appointed to reconcile the Senate and House versions of S.B. 7, the committee at first included no Black or Latino members, and when

³¹⁷ Jeremy Wallace, "Voting bill a study in how Texas lawmakers routinely skirt public notice rules," *Houston Chronicle*, April 2, 2021, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/Voting-bill-is-a-study-in-how-Texas-lawmakers-16071273.php>.

³¹⁸ Patrick Svitek and James Barragan, "Lt. Gov. Dan Patrick, Trump's man in Texas, has quietly amassed influence – to the detriment of fellow Republicans/ Patrick urged former Gov. Rick Perry to mount a challenge to Gov. Greg Abbott, who is seeking a third term. He's taken the already considerable power concentrated in the state's No. 2 job to another level, forcing opponents from races and tightening his grip on the Senate." *Texas Tribune*, Feb. 18, 2022, https://www.texastribune.org/2022/02/18/dan-patrick-donald-trump-texas-rick-perry-greg-abbott/?utm_source=Texas+Tribune+Newsletters&utm_campaign=fa5d941c4a-trib-newsletters-top-story-alert&utm_medium=email&utm_term=0_d9a68d8efc-fa5d941c4a-101201265&mc_cid=fa5d941c4a&mc_eid=78249492c1.

³¹⁹ Transcript of Senate debate, at 19.

³²⁰ Alexa Ura, "In push for new Texas voting restrictions, House panel sets up GOP faceoff over which chamber's legislation will advance/ The House elections committee gutted the Senate's priority voting bill and replaced it with language from the house's preferred legislation, signaling a divide over which new restrictions will make it to the governor's desk." *Texas Tribune*, April 29, 2021, <https://www.texastribune.org/2021/04/29/texas-voting-restrictions-fight/>.

two were appointed, Reps. Terry Canales (D-Edinburg) and Nicole Collier (D-Fort Worth), they were largely excluded from taking part in the negotiations, which was reportedly negotiated by the two chairs of the relevant committees in the Senate and House, Sen. Bryan Hughes and Rep. Briscoe Cain, perhaps with the help of Lt. Gov. Dan Patrick. Rep. Collier received the considerably revised bill, which had grown from 23 pages to 67 pages in the conference committee, at 11 p.m. before the next day's debate. The conference committee report was 180 pages long. Rep. Canales and Sen. Beverly Powell (D-Burleson), the other Democratic member of the conference committee, did not see the final draft of the revised bill until Hughes and Cain had completed it, and none of the Democrats signed the conference committee report. Republicans overrode objections from Democrats and waived rules requiring a 24-hour delay before debate could begin. The session eventually started at 10 p.m. Saturday. During the debate, Rep. Jessica Gonzalez (D-Dallas), the vice-chair of the House Elections Committee, tweeted that "Republicans are trying to pass SB 7 with new language that was not discussed and the public was not allowed to testify on." The Senate approved the bill at 6 a.m. Sunday, May 30.³²¹

200. A letter to Speaker Dade Phelan (R-Beaumont) signed by 36 House Democrats described the conduct of the conference committee as "at best a blundering mess and at worst a deceptive, hyperpartisan sham." It requested that in the special session committee substitutes of election bills be laid out for at least 24 hours before votes are taken; votes be taken at regularly scheduled meetings, not hurry-up "formal meetings" called with little notice; public testimony be taken virtually; and hearings be held on weekends if possible, "to allow our constituents with full-time jobs and family obligations to participate in the process."³²²

201. Public testimony on the omnibus election bills during the first special session was not held virtually, and the sessions were less participatory democracy than ordeal. People who had registered to testify about H.B. 3 before the House Select Committee on Constitutional Rights

³²¹ Lauren McGaughy, "Limits on voting hours, new criminal penalties included in GOP-backed Texas elections bill/ Democrats said they were locked out of debate on the sweeping voting bill, which senators planned to debate during an overnight session beginning late Saturday." *Dallas Morning News*, May 28, 2021, <https://www.dallasnews.com/news/politics/2021/05/28/gop-announces-deal-on-divisive-elections-bill-democrats-say-they-were-locked-out-of-process/>; Chuck Lindell, "GOP unveils final version of Texas elections bill, which includes more restrictions," *Austin American-Statesman*, May 29, 2021, <https://www.statesman.com/story/news/2021/05/29/gop-unveils-final-and-far-longer-version-texas-elections-bill-sb-7/5263347001/>; Alexa Ura, "Texas lawmakers poised to pass sweeping voting bill to restrict voting hours and change election rules/ House and Senate negotiators have reached a deal on competing versions of Senate Bill 7. Once both chambers sign off on the agreement, it will head to the governor's desk before it becomes law." *Texas Tribune*, May 29, 2021, <https://www.texastribune.org/2021/05/29/texas-voting-restrictions-bill/>; Robert T. Garrett, "Texas House Democrats ask for public hearings on election bills in preview of special session tactic/Democrats also want House speaker Dade Phelan not to move any bills through the House until legislative-branch funding that was vetoed by Gov. Greg Abbott is restored." *Dallas Morning News*, July 5, 2021, <https://www.dallasnews.com/news/politics/2021/07/05/texas-house-democrats-ask-for-public-hearings-on-election-bills-in-preview-of-special-session-tactic/>.

³²² Robert T. Garrett, "Texas House Democrats ask for public hearings on election bills in preview of special session tactic/Democrats also want House Speaker Dade Phelan not to move any bills through the House until legislative-branch funding that was vetoed by Gov. Greg Abbott is restored." *Dallas Morning News*, July 5, 2021, <https://www.dallasnews.com/news/politics/2021/07/05/texas-house-democrats-ask-for-public-hearings-on-election-bills-in-preview-of-special-session-tactic/>.

and Remedies at 8 a.m. July 10 did not begin to testify until 17 and a half hours later, at 1:41 a.m. on July 11. Many left without testifying, even if they had traveled long distances. One who had tried, but failed to testify during the regular session, when Rep. Cain made his procedural error, Claudia Torres-Yanez, stuck it out to the end, waiting until 9:30 p.m. to get her 2-minute allotment of time to oppose the bill.³²³

202. To speed S.B. 1 in the second special session in August, the Senate suspended several rules, including a rule that required that the public receive at least a 24-hour notice about a hearing on a bill. That allowed one committee hearing to begin with less than 10 minutes of notice and two others, with less than an hour's notice.³²⁴ No citizens and few senators could show up, ready to testify, debate, or take action under such rules.

5. Criticisms

203. From the outset of the battle over H.B. 6/S.B. 7/S.B. 1, racial issues were front and center. When the Senate hearing took place, charges that S.B. 7 had a racial purpose were repeated again and again. Not only was it impossible that legislators could have been unaware of these charges, but witnesses pointed out exactly how particular provisions could be expected to have racially discriminatory impacts. In contrast to S.B. 1 proponents' vague assertions about fraud, opponents' statements were precise and often laden with facts. Thus, James Slattery of the Texas Civil Rights Project attacked S.B. 7 on the grounds that "Limiting voting hours and flexibility in polling locations would disproportionately harm communities of color, who tend to have less flexible work schedules. . . . voters who used the extended voting hours and drive thru voting in Harris County were more likely to be people of color than early voters as a whole." Charts attached to his testimony showed that while Anglos constituted 62% of all early voters, they comprised only 44% of those who voted during extended hours and 47% of the drive-thru early voters.³²⁵ Ignoring evidence of the actual disproportionate effect of these provisions, S.B. 7 sponsor Sen. Bryan Hughes riposted "There's nothing in this bill that has to do with targeting specific groups," Hughes said. "The rules apply across the board."³²⁶

204. Devin Branch of Houston, an organizer for the Texas Organizing Project, charged that S.B. 7 would "disproportionately impact Black and Latino voters. . . . Allowing partisan poll watchers

³²³ Alexa Ura, "Texans testifying on GOP voting bill faced a 17 hour wait to be heard by lawmakers in the dead of night/Members of the public arrived at the Texas Capitol as early as 6 a.m. to sign up to speak before lawmakers considering the legislation. In the House, public testimony wouldn't begin until early the next morning." *Texas Tribune*, July 11, 2021, https://www.texastribune.org/2021/07/10/texas-legislature-gop-voting-bill/?utm_source=Texas+Tribune+Newsletters&utm_campaign=55dc927668-trib-newsletters-breaking-alert&utm_medium=email&utm_term=0_d9a68d8efc-55dc927668-101201265&mc_cid=55dc927668&mc_eid=78249492c1.

³²⁴ Chuck Lindell, "New Texas special session opens with no House quorum, but Senate sprints into action," *Austin American-Statesman*, Aug. 7, 2021, <https://www.statesman.com/story/news/2021/08/07/special-session-2-still-no-house-quorum-senate-sprints-into-action/5513353001/>.

³²⁵ Slattery, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021. See similar written testimony by Adrian Shelley, Director of the Texas Office of Public Citizen, before the House Select Committee on Constitutional Rights and Remedies, Aug. 23, 2021.

³²⁶ Taylor Goldenstein, "Here's how Texas Republicans want to further restrict voting," *Houston Chronicle*, April 1, 2021, <https://www.houstonchronicle.com/politics/texas/article/Five-things-to-know-about-voting-restrictions-16070072.php>.

to record videos and photos of voters who they ‘reasonably believe’ are receiving unlawful assistance will only add to the prospects of poll watcher intimidation. This is especially troubling given the history of poll watcher harassment targeting Black voters in Texas.”³²⁷ Stephanie Gomez of Common Cause Texas specified Branch’s charges: “Partisan poll watchers activities often target Black and Brown neighborhoods - there are examples throughout our history. Dating back to at least 2010, there are documented reports of poll watchers in Harris County and other parts of the states intimidating voters, primarily Black and Brown voters, and election workers at the polls.”³²⁸ While the debates on S.B. 7 were going on, Common Cause leaked a video of a meeting of Harris County Republicans in which a county precinct chair called for an “election integrity brigade” of 10,000 suburban Republicans with the “courage” to volunteer in Houston’s racially diverse urban core.³²⁹ Written testimony before the House Elections Committee pointed to a study of the 2020 election in Texas by the Texas Civil Rights Project that catalogued 267 reports of voter intimidation, including reports of intimidation of Black and Latino voters by poll watchers.³³⁰

205. Nina Perales of MALDEF pointed out that mandating that poll watchers could closely observe Latino and Asian voters who needed language assistance in voting, including video-recording them and peering into cars while they voted curbside, might violate Section 208 of the Voting Rights Act.³³¹ Fatima Menendez, also of MALDEF, presented statistics showing how dependent Latino voters were on assistance in voting because of their limited proficiency in English that buttressed Perales’s statement:³³²

Assistors are relied upon by limited English proficient voters in order to cast their ballots. For example, one in ten U.S. born Latino adults does not speak English well.[1] Slightly more than half of naturalized U.S. citizens who are Latino do not speak English well.[2] Texas is home to close to two million naturalized U.S. citizens.[3] These individuals, who are eligible to vote, are also eligible to receive language assistance when casting their ballots.

1 Pew Research Center, “English Proficiency on the Rise Among Latinos,” May 12, 2015, available at <https://www.pewresearch.org/hispanic/2015/05/12/english-proficiency-on-the-rise-among-latinos>.

2 U.S. Department of Commerce, “Language Use in the United States: 2011,” August 2013, available at <https://www2.census.gov/library/publications/2013/acs/acs-22/acs-22.pdf>.

3 Migration Policy Institute, “2019 State Immigration Data Profiles (Texas),” available at <https://www.migrationpolicy.org/data/state-profiles/state/demographics/TX>.

³²⁷ Branch, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

³²⁸ Gomez, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

³²⁹ Taylor Goldenstein, “Video shows GOP targeting Houston minority communities with poll watcher ‘brigade,’” *Houston Chronicle*, April 9, 2021, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/Video-shows-GOP-targeting-Houston-minority-16089177>.

³³⁰ Emily Eby and Joaquin Gonzalez, “Opening the Floodgates for Racial Intimidation, Disenfranchisement, and Violence by Expanding Poll Watcher Authority,” Texas Civil Rights Project, <https://txcivilrights.org/wp-content/uploads/2021/05/TCRP-Poll-Watcher-Report.pdf>.

³³¹ Perales, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021. Similar written testimony by Savannah Kumar, Staff Attorney, ACLU, before House Constitutional Rights and Remedies Committee, Aug. 23, 2021.

³³² Menendez, written testimony before House Select Committee on Constitutional Rights and Remedies Committee, Aug. 23, 2021.

In her testimony before the House Elections Committee, Ms. Perales placed the possible voter intimidation facilitated by H.B. 6 in the context of the long history of voter intimidation of Latinos in Texas.³³³

206. Mary Fero of Austin not only feared that poll watchers would intimidate voters, but also that they would cause chaos, because any candidate, political party, write-in candidate, or political action committee could appoint a poll watcher, and by her count, that would have allowed for 332 poll watchers in Travis County in 2020.³³⁴ According to David Weinberg of the Brennan Center, the provision of H.B. 6 and S.B. 7 that made it a criminal offense for an election official to remove a disruptive poll watcher unless the watcher had actually broken a law, “could create unnecessary havoc and delays at polling places. It would also invite voter harassment and disruption by making overworked election officials have to worry about criminal charges for doing their job and protecting voters from obvious harassment.”³³⁵

207. Jeff Miller of Disability Rights Texas pointed to the possible chilling effects of poll watchers on the right to vote of people with disabilities: “Assisting many voters with developmental disabilities, traumatic brain injuries, etc., includes using words, signs, or gestures to cue or support the voter. Because poll watchers are not required to take any training that would help them identify ‘unlawful’ assistance, this provision creates a potential risk for individuals volunteering to provide assistance to voters to be recorded or reported by the poll watcher. Therefore, this would have a chilling effect on the number of people willing to assist voters with disabilities and Texas voters with disabilities.”³³⁶ Lauren Gerken of the Texas Council for Developmental Disabilities gave a specific example. Suppose “a support person, who has the voter's independence and civil rights as their top priority, knows the voter they are assisting requires the ballot read aloud slowly. The voter has Autism, and they simply require more time to process information. A poll watcher, unfamiliar with Autism and support needs, may interpret the assister's slow reading as coercion. To the poll watcher, it sounds like the support person is trying to get the voter to question her choices, and they report the interaction as unlawful assistance. As a result, the support person may be penalized, and the voter may not get the assistance they need to exercise their rights.”³³⁷

208. Emily Eby of the Texas Civil Rights Project presented data showing that even in 2020, polling places in Harris and Travis Counties were disproportionately placed in predominantly Anglo precincts and pointed out that S.B. 7's provision allocating vote centers in counties above a million proportionally to voter registration or recent turnout would further discriminate against persons of color, because minority registration and turnout lagged that of Anglos.³³⁸ Sen. Carol Alvarado said that in Harris County, 12 of the 14 House districts that would lose polling places under this provision of S.B. 7 were represented by House members who were Black, Latino, or

³³³ Perales, written testimony before Texas House Election Committee, April 1, 2021.

³³⁴ Fero, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

³³⁵ Weinberg, written testimony before House Election Committee, April 1, 2021.

³³⁶ Miller, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

³³⁷ Gerken, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

³³⁸ Eby, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021.

of Asian descent. Sen. Bryan Hughes responded that “We cannot imagine a more objective criteria [*sic*] to use.”³³⁹

209. In written testimony before the House Elections Committee, the NAACP-LDF suggested that H.B. 6’s ban on the distribution of applications for absentee ballots by election officials would have a discriminatory impact, since many in jail were eligible to vote absentee, and persons in jail were disproportionately likely to be Black or Latino. Without access to the internet, prisoners would have more difficulty initiating the absentee process under H.B. 6.³⁴⁰ James Slattery of the Texas Civil Rights Project emphasized that the vagueness of this provision could hamper the distribution of absentee ballots generally. The prohibition on election officials “soliciting” applications for absentee ballots

would likely cover nearly any statement – whether verbal, written, or online – by a government employee about vote by mail. For instance, statements by public officials about the mere existence of vote by mail, or explanations about how to apply for and cast a mail ballot, could be interpreted as efforts to encourage (and therefore solicit) people to vote by mail. Similarly, posting a vote by mail application on a county’s website could also be considered ‘distribut[ing]’ it to someone unsolicited.³⁴¹

210. Another barrier to voting by people with disabilities was S.B. 7’s requirement that people who transported disabled people to the polls had to complete forms affirming “that the voter is physically unable to enter the polling place without personal assistance or likelihood of injuring the voter’s health” and containing the transporter’s name and address and whether the person is also serving as an assister to the voter. As Jeff Miller of Disability Rights Texas pointed out,

staff from State Supported Living Centers, assisted living facilities or nursing homes may refuse to transport groups of residents to vote. Additionally, many people with disabilities rely on ride share companies or paratransit providers for transportation. Ride share drivers are not going to be willing to exit their own vehicle to allow the person to vote and then sign the form on behalf of essentially a stranger. This is also true of paratransit drivers.³⁴²

211. After S.B. 7 was amended to require that voters include their driver’s license or personal identification card number or the last four digits of their Social Security number to apply for an absentee ballot and to return it, critics pointed out the confusion and disfranchisement that this

³³⁹ Taylor Goldenstein, “Here’s how Texas Republicans want to further restrict voting,” *Houston Chronicle*, April 1, 2021, <https://www.houstonchronicle.com/politics/texas/article/Five-things-to-know-about-voting-restrictions-16070072.php>. Although this provision was finally stricken from the conference committee version of S.B. 7, its serious consideration, despite the criticisms made of it as racially discriminatory when it was part of S.B. 9 in 2017, and Sen. Hughes’s disingenuous “colorblind” defense of it in 2021 provides further evidence related to the racial attitudes of proponents of the law.

³⁴⁰ Sadasivan, written testimony before Texas House Elections Committee, April 1, 2021.

³⁴¹ Slattery, written testimony before Texas House Elections Committee, April 1, 2021.

³⁴² Miller, written testimony before Texas Senate Committee on State Affairs, March 25-26, 2021. There was similar testimony at the same hearing by Ginger Mayeaux, Director of Public Policy and Advocacy at The Arc of Texas.

new mandate would cause. Election officials might not have all of these numbers, and voters might fail to remember which one they had included when they registered to vote. And of course, they might fail to include any of them at all.³⁴³

6. The Debates: Targeting Minorities and Persons with Disabilities

212. An exchange between the Democratic leader in the State Senate, Carol Alvarado of Houston, and the sponsor of S.B. 7, Bryan Hughes (R-Mineola), encapsulates the contrast between the practical arguments of minority legislators and the formalistic, legalistic position of the proponents of the bill. Referring to an analysis by the Harris County election office that estimated that Black and Latino voters cast more than half of the votes at both drive-thru and extended hours locations in the county, Alvarado asked “Knowing that, who are you really targeting?” Ignoring the fact that explicit racial restrictions in election laws had been illegal since the passage of the fifteenth amendment in 1870, Hughes replied, “There’s nothing in this bill that has to do with targeting specific groups. The rules apply across the board.”³⁴⁴ According to Hughes, the purpose of these bans was to make it “easier for political parties to find poll watchers.”³⁴⁵ The exchange between the two senators reaffirmed the connection between racial and partisan motives.

213. Both sides in the debate, in the legislature and in the larger public sphere, repeatedly reaffirmed that the omnibus election bills also targeted large metropolitan counties, especially Harris County. At a press conference launching the struggle for the omnibus election law, Gov. Greg Abbott specifically pointed to Harris County’s actions during the 2020 elections: “Whether it’s the unauthorized expansion of mail-in ballots or the unauthorized expansion of drive-thru voting, we must pass laws to prevent election officials from jeopardizing the election process.”³⁴⁶ Similarly, Lt. Gov. Dan Patrick name-checked Harris County in discussing the provisions of S.B. 7: “I have news for Harris County: You’re not the capital of Texas.”³⁴⁷ On the other side, former Harris County Clerk Chris Hollins remarked that S.B. 7 was “certainly targeted at Harris

³⁴³ Cinde Weatherby, League of Women Voters, written testimony before the House Select Committee on Constitutional Rights, Aug. 23, 2021; Savannah Kumar, Staff Attorney of the ACLU, written testimony before the same committee on the same day; Glenn Maxey, written testimony before the same committee on the same day.

³⁴⁴ Alexa Ura, “Texas Senate advances bill limiting how and when voters can cast ballots, receive mail-in voting applications/Senate Bill 7 is at the forefront of Texas Republicans’ crusade to further restrict voting in the state after last year’s election,” *Texas Tribune*, April 1, 2021, <https://www.texastribune.org/2021/04/01/texas-voting-restrictions-legislature>.

³⁴⁵ Editorial, “Call Senate Bill 7 what it is: The Texas Voter Harassment Act,” *Austin American-Statesman*, April 2, 2021, <https://www.statesman.com/story/opinion/editorials/2021/04/02/editorial-call-sb-7-what-is-texas-voter-harassment-act/4845012002/>.

³⁴⁶ Alexa Ura, “Gov. Greg Abbott formally opens Texas GOP bid to clamp down on local efforts expanding voting access/Texas has some of the strictest voting rules, but Republican lawmakers are now hoping to outlaw efforts by local officials in places like Harris County intended to widen access for voters, including drive-thru voting and extended early voting hours,” *Texas Tribune*, March 15, 2021, <https://www.texastribune.org/2021/03/15/texas-voting-greg-abbott/>.

³⁴⁷ Paul J. Weber, “Houston’s expanded voting becomes target of GOP restrictions,” *Houston Chronicle*, April 15, 2021, <https://www.chron.com/politics/article/Houston-expanded-voting-becomes-GOP-target-16104581.php>.

County in particular.”³⁴⁸ During the debate on S.B. 7 on May 29, Sen. Carol Alvarado (D-Houston) remarked, “Let’s talk about the elephant in the room. This is about Harris County.”³⁴⁹

214. But Harris was not just the state’s largest county and the source of the largest number of Democratic votes. It was the center of minority political power in the state. As Sen. Judith Zaffirini put it in the Senate floor debate on S.B. 1 on August 11,

It’s not a mistake that many of these provisions are aimed at Harris County, our biggest and most diverse county in the state. Persons of color voted in record numbers in Harris County in 2020, and they have become a target of this legislation.³⁵⁰

215. One of the flash points of the Senate floor debate on March 31/April 1, 2021 was the section of S.B. 7 that allowed poll watchers (but not voters or election officials) to videotape any actions that they “reasonably believe” to be violations of election laws and upload them to social media. Bill sponsor Sen. Bryan Hughes at first defended the provision, saying that poll watchers, “are the eyes and ears of the public, and if a dispute does arise about what happened, what was said, what was done, the more evidence we can have the better.” But Black and Latino legislators and activists recalled that during the 1960s, law enforcement officials in some counties in Texas would take photos of Black and Latino voters and send them to the voters’ employers. Just after 2 a.m. on April 1, Sen. Judith Zaffirini (D-Laredo) stated that “Every minority member of the Texas Senate, all nine of us, believe that this bill will impact minorities negatively by making it more difficult for African Americans and Mexican Americans to vote, making it easier for them to be harassed by overzealous poll watchers . . .” In the face of such criticisms, Sen. Hughes agreed to ban posting the videotapes on social media, allowing them to be sent only to the Secretary of State’s office, and to require some training for poll watchers. Hughes also agreed to delete a provision that was questionable under the Americans with Disabilities Act and the Voting Rights Act requiring those claiming a disability to submit proof of their disability from the Social Security Administration, the Department of Veterans Affairs, or a physician. But Republicans rejected more than a dozen Democratic amendments that would have made it easier, not harder, to vote, and the bill passed the Senate on a party line vote, 18 to 13. The chair of the Texas Democratic Party decried the bill as “a full-on assault on the voting rights of Texans with disabilities and Black and Latino voters.”³⁵¹

³⁴⁸ Taylor Goldenstein, “GOP state lawmakers take aim at 2020 Harris County voting expansions,” *Houston Chronicle*, March 12, 2021, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/GOP-state-lawmakers-take-aim-at-2020-Harris-16022563.php>.

³⁴⁹ Amy Gardner, “Texas Democrats block restrictive voting bill by walking off the floor to deny GOP-majority House a quorum,” *Washington Post*, May 30, 2021, https://www.washingtonpost.com/politics/texas-voting-restrictions/2021/05/30/51dfa134-c140-11eb-93f5-ee9558ecef4b_story.html.

³⁵⁰ Transcript of Senate Floor Debate, Aug. 11, 2021, at 6.

³⁵¹ James Barragan, “In overnight vote, Texas Senate passes bill that would make it harder to vote/Republicans said the bill was aimed at protecting election integrity even as state officials found no irregularities during the November elections,” *Dallas Morning News*, March 31, 2021, <https://www.dallasnews.com/news/politics/2021/04/01/texas-senate-on-track-to-pass-bill-that-would-make-it-harder-to-vote/>; Jeremy Wallace, “LULAC, NAACP decry bill allowing partisan activists to record Texas voters without consent,” *Houston Chronicle*, April 1, 2021,

216. Without even pretending to answer these criticisms, Sen. Hughes ended debate on April 1 by claiming that the provisions of S.B. 7 were “about making it easier to vote.”³⁵² He characterized assertions that S.B. 7 had a racially discriminatory intent as “race baiting” by Black and Latino leaders.³⁵³ Similarly, Lt. Gov. Patrick, the most powerful person in the State Senate and perhaps in Texas government,³⁵⁴ called a press conference to denounce business leaders who opposed S.B. 7, seeming to threaten a boycott of the companies. Gov. Abbott echoed his Lt. Gov., announcing, somewhat surprisingly for a Republican who has touted Texas as the “best state for business,”³⁵⁵ that Texas business leaders “need to stay out of politics.” Referring to the characterization of S.B. 7 as a return to Jim Crow, Patrick declaimed “I take it personally. You’re questioning my integrity and the integrity of the governor and the integrity of Republicans who voted for this. You are in essence, between the lines, calling us racists, and that will not stand.” According to the *Austin American-Statesman*’s report, the last phrase was shouted.³⁵⁶ After American Airlines and Dell Technologies both announced opposition to S.B. 7, Rep. Briscoe Cain sought to amend the state budget to ban any “entity that publicly threatened any adverse action against this state based on any legislative or executive action related to election integrity” from eligibility for certain funds to be disbursed by the State.³⁵⁷

217. Proponents of the bills sometimes supplemented such generalized, highly rhetorical responses to criticisms by specific defenses of particular provisions, but they avoided addressing

<https://www.houstonchronicle.com/politics/texas/article/LULAC-NAACP-decry-bill-allowing-partisan-16070960.php>; Alexa Ura, “Texas Senate advances bill limiting how and when voters can cast ballots, receive mail-in voting applications/Senate Bill 7 is at the forefront of Texas Republicans’ crusade to further restrict voting in the state after last year’s election,” *Texas Tribune*, April 1, 2021, <https://www.texastribune.org/2021/04/01/texas-voting-restrictions-legislature/>.

³⁵² Transcript of Senate debate, March 31/April 1, at 25.

³⁵³ Alexa Ura, “Texas Republicans say their proposed voting restrictions are color blind. But many see ‘Jim Crow in a tuxedo.’/ An outraged Lt. Gov. Dan Patrick castigated those implying that GOP efforts to restrict Texas voting are racist. But the state has a history of marginalizing voters of color, and many business leaders, voting rights advocates and Democrats see it taking another step down that path.” *Texas Tribune*, April 9, 2021, <https://www.texastribune.org/2021/04/09/Texas-voting-GOP-suppression/>.

³⁵⁴ Patrick Svitek and James Barragan, “Lt. Gov. Dan Patrick, Trump’s man in Texas, has quietly amassed influence – to the detriment of fellow Republicans/ Patrick urged former Gov. Rick Perry to mount a challenge to Gov. Greg Abbott, who is seeking a third term. He’s taken the already considerable power concentrated in the state’s No. 2 job to another level, forcing opponents from races and tightening his grip on the Senate.” *Texas Tribune*, Feb. 18, 2022, https://www.texastribune.org/2022/02/18/dan-patrick-donald-trump-texas-rick-perry-greg-abbott/?utm_source=Texas+Tribune+Newsletters&utm_campaign=fa5d941c4a-trib-newsletters-top-story-alert&utm_medium=email&utm_term=0_d9a68d8efc-fa5d941c4a-101201265&mc_cid=fa5d941c4a&mc_eid=782494921.

³⁵⁵ <https://gov.texas.gov/news/post/governor-abbott-celebrates-texas-being-ranked-best-state-for-business-for-eighth-consecutive-time>.

³⁵⁶ Chuck Lindell, “Political fight over GOP election bills intensifies in Texas with economic effects debated,” *Austin American-Statesman*, April 6, 2021, <https://www.statesman.com/story/news/2021/04/06/dan-patrick-defends-gop-election-bills-opponents-organize-response/7104873002/>.

³⁵⁷ Nick Corasaniti, “Republicans Target Voter Access in Texas Cities, but Not Rural Areas/ In Houston, election officials found creative ways to help a struggling and diverse work force vote in a pandemic. Record turnout resulted. Now the G.O.P. is targeting those very measures.” *New York Times*, April 24, 2021, https://www.nytimes.com/2021/04/24/us/politics/texas-republicans-voting.html?action=click&module=RelatedLinks&pgtype=Article;https://capitol.texas.gov/tlodocs/87R/amendments/prefiled/pdf/SB00001H2_E870211.PDF.

critics' charges about the differential impact of particular provisions on minority voters. For instance, Sen. Jose Menendez (D-Bexar) charged that by prohibiting drive-thru voting locations and 24-hour voting, "the Legislature is severely limiting voting methods that are primarily used by people of color, people who are experiencing disabilities, and working class Texans."³⁵⁸ In a July 14, press conference, Lt. Gov. Patrick responded to these concerns by calling drive-thru voting "electioneering in an automobile . . . So the reason we don't have drive in voting is because you're supposed to be able to vote in private." The Lt. Gov. opposed 24-hour voting because it's "Very tough to get volunteers and workers overnight."³⁵⁹ During floor debate in the Senate on July 13, Sen. Hughes echoed Lt. Gov. Patrick's concerns about needing "plenty of election workers and plenty of poll watchers."³⁶⁰ Former Executive Director of the Texas Republican Party Eric Opiela³⁶¹ likewise claimed that drive-thru voting "facilitated illegal assistance by persons in the same vehicle as a voter who had not taken the prescribed oath by the code. Uh, it obstructed poll watchers from seeing and hearing the process and put them in physical danger, being around a parking lot with vehicles that were moving . . ."³⁶² And Sen. Paul Bettencourt (R-Houston) pointed out that at one point during the 2020 election, Harris County Clerk Chris Hollins feared that drive-thru votes might not count.³⁶³

218. Besides ducking questions of the racially discriminatory effects of banning drive-thru and extended hours voting, the statements by proponents of S.B. 1 were either factually incorrect, contradictory, or disingenuous. As for factually incorrect comments, Sen. Judith Zaffirini (D-Laredo) pointed out that workers could have different shifts, and former Harris County Clerk Chris Hollins said he had had no trouble staffing polling sites during extended hours.³⁶⁴ The contradictions about privacy – poll watchers had to be able to peer in, but companions such as family members in a car were threats to other voters' privacy – were as unexplored as the possibility that people might drive-thru vote by themselves, the reality that voters of different races had differed in the use they made of drive-thru and 24-hour voting in 2020, and the likelihood that they might do so in the future, if the options were again offered.³⁶⁵ And Sen. Bettencourt's statement must have been delivered tongue in cheek, because he surely knew that the reason that Clerk Hollins was worried about drive-thru votes not counting was that Republicans had sued to try to prohibit them from counting.

219. Justifications for restrictions on assistance to persons with disabilities or who needed language assistance portrayed the State as stepping in to protect helpless people from predators.

³⁵⁸ Texas Senate Journal, Second Called Sess., Aug. 31, 2021, at 190-91.

³⁵⁹ Transcript of Press Conference, Lt. Gov. Dan Patrick and Sen. Bryan Hughes, July 14, 2021, at 9:42-12:29.

³⁶⁰ Transcript of Senate Floor Debate, July 13, 2021, at 155.

³⁶¹ Captain Watchdog, "Mr. Opiela's Opus," *Texas Scorecard*, Feb. 13, 2014, <https://texasscorecard.com/local/mr-opielas-opus/>.

³⁶² Transcript of Senate Committee on State Affairs hearing, March 26, 2021, at 3:19:30-3:22:20.

³⁶³ Transcript of Senate Floor Debate, July 13, 2021, at 155, 177.

³⁶⁴ Transcript of Texas Senate State Affairs Committee hearing, March 26, 2021, at 3:33:50 (Zaffirini remarks); Transcript of Senate Floor Debate, July 13, 2021, at 155 (Zaffirini remarks); Jasper Scherer, Zach Despart, "GOP bills target Harris County's efforts to expand voting. Here's how that played out in the 2020 election," *Houston Chronicle*, May 1, 2021, <https://www.houstonchronicle.com/news/houston-texas/houston/article/GOP-bills-target-Harris-County-s-efforts-to-16143213.php>.

³⁶⁵ See the colloquy between Reps. Anchia and Murr, Transcript of House Floor Debate, Aug. 26, 2021, at 253.

“These are people,” House Elections Committee Chair Briscoe Cain intoned, whom “our society generally believe to be easily taken advantage of. These sections [of the bill] seek to protect them . . . ensure they’re never taken advantage of.”³⁶⁶ In a senate hearing, Sen. Bryan Hughes stated that S.B. 7 was “designed to address areas throughout the process where bad actors can take advantage . . .”³⁶⁷ Cain did not address the sort of criticism made by Sen. Royce West (D-Dallas), who contended that this poll watcher provision of S.B. 7 “discriminates against voters who need assistance by denying them the privacy granted other voters.” It “can intimidate both the voter and the assistant, and it has a disparate negative impact on Latino and other minority voters.”³⁶⁸ And according to disability rights advocates, the paternalistic portrayal of people with disabilities was incorrect. As Ginger Mayeaux, Director of Public Policy and Advocacy at The Arc of Texas, told the Senate State Affairs Committee hearing on March 26,

people with disabilities have proven they are proud of their right to choose who and what to vote for, just like everyone else. People who need assistance have the right to choose who supports them so they can have someone who understands their support needs and allows them to vote as they see fit, not as their supporter may vote. Self-advocacy groups continuously teach self-advocacy skills, including voting rights, and how to make informed choices. However, there is a misconception that people with disabilities are likely to be exploited and need protection.³⁶⁹

220. Proponents of limiting drop boxes and banning drive-thru voting and extended hours often spoke of the importance of uniformity or equality. There was an instructive exchange on this issue between Reps. Andrew Murr (R-Kerrville) and Ann Richards (D-Houston) during the hearing in the House Select Committee on Constitutional Rights and Remedies on July 10. Murr, a representative from a rural multi-county district in West Texas who had become the chief sponsor of H.B. 3 in the first special session of the legislature, set out the case for uniformity:

we all desire uniformity and consistency because the State of Texas needs to have that framework in place or we’re going to have election officials doing it differently in different places, and I think that’s not necessarily what we all want. . . . Case in point, if you have elections that happen to include larger jurisdictions . . . if multiple counties are all doing it a little differently, does that – does that inconsistency cause concern and lack of confidence in the outcome?³⁷⁰

221. Rep. Johnson, of Houston, replied with an analogy:

So again, with promoting voter access and talking about uniform and consistent, it just – if you will, by analogy, in a small rural town, you might have a – a state highway that’s two lanes. . . . And in our jurisdiction in Harris County, you might

³⁶⁶ Transcript of House Elections Committee hearing, March 25, 2021, at 3:15-13:00.

³⁶⁷ Transcript of Senate Committee on State Affairs hearing, March 26, 2021, at 2:49:09-2:50:02.

³⁶⁸ Transcript of Senate Committee on State Affairs hearing, March 26, 2021, at 3:06:25 – 3:10:07.

³⁶⁹ Mayeaux, Written Statement Prepared for Senate Committee on State Affairs hearing, March 26, 2021.

³⁷⁰ Transcript of House Select Committee on Constitutional Rights and Remedies Hearing, July 10, 2021, at 81-82.

have a highway that's 16 lanes. . . . But those are uniform and consistent, [in] that they're forms of transportation, but they meet the differing needs of the population, correct?

Do you know who took advantage of drive-through voting in Harris County? . . .

It would sure be nice if we could allow diverse urban communities with an excessive amount of population, a high percentage of communities of color, of frontline workers, 24-hour workers, janitors, everybody who is keeping this state economically moving to have an opportunity to vote and to truly promote voter access, which is what the policies in Harris County did.³⁷¹

222. The rationale that proponents used to defend several provisions of the omnibus bills was the necessity of combatting “ballot harvesting,” despite the facts, first, that there were no specific publicized incidents of “ballot harvesting” in 2020, as there had been in 2001 and 2017; second, that such practices were already heavily regulated; and third, that the bills did not contain provisions like those of H.B. 658 in 2017, which could stop potential pressure on the residents of care homes at the same time as it expanded their opportunities to vote. During debate on S.B. 7 in the House on May 6, 2021, for example, Rep. Rafael Anchia (D-Dallas) asked Rep. Briscoe Cain “What fraud is it [S.B. 7] designed to stop?” Without giving any examples, Cain replied “. . . we’re trying to maybe stop the – what we called ballot harvesting.”³⁷² In the first special session, S.B. 1 author Sen. Bryan Hughes contended that “The security measures in this bill, by and large, are directed at vote harvesters or folks who are trying to steal votes.”³⁷³ As Sen. Hughes and Rep. Cain used it, “vote harvesting” or “ballot harvesting” just meant anyone who engaged in any sort of election fraud.

7. Explosions and Excursions

a. House Compromises

223. After a delay of several hours for backroom negotiations, the House passed S.B. 7 at 3 a.m. on May 6, 2021 by a party-line vote except for one Republican, Rep. Lyle Larson (R-Bexar), who declared that the bill would “weaponize” the electoral process despite the fact that “There’s no evidence we’ve had any widespread voter fraud in Texas.”³⁷⁴ Some of the amendments to the bill that were negotiated off the floor were largely cosmetic. The phrase “purity of the ballot

³⁷¹ Transcript of House Select Committee on Constitutional Rights and Remedies Hearing, July 10, 2021, at 83, 98.

³⁷² Transcript of House Floor Debate, May 6, 2021, at 58 (colloquy between Reps. Rafael Anchia and Briscoe Cain).

³⁷³ Alexa Ura and Cassandra Pollock, “GOP voting bills advance in Texas House and Senate after overnight committee hearings/ Authors of the legislation are moving to ban drive-thru and 24-hour voting options, enhance access for partisan poll watchers and prohibit local election officials from proactively distributing applications to request mail-in ballots. Both bills also include language to further restrict the state’s voting-by-mail rules, including new ID requirements for absentee voters.” *Texas Tribune*, July 10, 2021, <https://www.texastribune.org/2021/07/10/voting-bill-texas/>.

³⁷⁴ Lauren McGaughy, “Texas House approves contentious elections bill with several changes from Democrats/After making numerous changes, the GOP-led House OK’d the divisive legislation mostly along partisan lines. The bill now heads back to the Senate for its approval.” *Dallas Morning News*, May 6, 2021, <https://www.dallasnews.com/news/politics/2021/05/06/texas-house-hunkers-down-for-late-night-debate-on-gop-backed-elections-bill/>.

box,” redolent of the Jim Crow era,³⁷⁵ was removed, and the preamble was polished. Counties, school districts, and the Secretary of State were required to post dates of upcoming elections on their websites, and persons convicted of felonies had to be notified about the effect of their conviction on their voting rights. Voter registration applications had to be made available to high school students twice a year.³⁷⁶

224. But there were several important differences between this bill and the Senate version, some of which were due to Democratic “guerilla warfare” tactics that lined up 130 amendments to be voted on during the House’s consideration of the bill, and some to what the *Houston Chronicle* termed the “formidable” debating skills of such legislators as Rep. Rafael Anchia (D-Dallas) and Jessica Gonzalez (D-Dallas). According to the *Chronicle*, Anchia peppered Rep. Cain “with questions he couldn’t answer about his own bill and elicited his admission that he hadn’t bothered to study the bill’s impact on Black and Latino voters in a state with a history of discriminating against them.” The House version did not ban drive-thru or late-night voting or authorize streamlined voter purges, and it did not reduce early voting locations in certain sections of cities and counties, as the Senate version did. Moreover, Rep. Cain accepted amendments that mandated the creation of a system for individuals to track the progress of their absentee ballots, cautioned poll watchers about taking photos of a voter’s ballot or intimidating voters, and allowed election officials to expel poll watchers for disturbing the peace, not merely for violating a law “related to voter fraud.” Although still critical of the bill, the *Chronicle* expressed the hope that the legislature would accept the House version, because it believed the Senate version “Much, much worse” even though it “still reduces access . . . still stems from a lie that Texas has a problem with widespread voter fraud about which there isn’t a shred of evidence.”³⁷⁷

b. The Uncompromising Conference Committee Bill Produces a Walkout

225. The *Chronicle*’s hope was too sanguine. House and Senate leaders appointed a 10-person conference committee to reconcile the House and Senate versions of the bill. The three Democrats on the committee, two of them minorities, were largely excluded from the negotiations on the bill. After two weeks of secret meetings, the committee stripped out most of

³⁷⁵ Transcript of House Floor Debate, May 6, 2021, at 39-46 (colloquy between Reps. Rafael Anchia and Briscoe Cain).

³⁷⁶ Lauren McGaughy, “Texas House approves contentious elections bill with several changes from Democrats/After making numerous changes, the GOP-led House OK’d the divisive legislation mostly along partisan lines. The bill now heads back to the Senate for its approval.” *Dallas Morning News*, May 6, 2021, <https://www.dallasnews.com/news/politics/2021/05/06/texas-house-hunkers-down-for-late-night-debate-on-gop-backed-elections-bill/>.

³⁷⁷ Editorial: Texas GOP voting suppression efforts take welcome turn toward compromise,” *Houston Chronicle*, May 8, 2021, <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-Texas-GOP-voting-suppression-efforts-16162461.php>; Editorial, “Texans, don’t miss your last chance to oppose SB7 and voter suppression,” *Houston Chronicle*, May 24, 2021, <https://www.houstonchronicle.com/opinion/editorials/article/texans-voter-suppression-sb7-fight-column-16194944.php>; Jeremy Wallace, “Texas voting bills target Democratic strongholds, just like Georgia’s new laws,” *Houston Chronicle*, April 15, 2021, <https://www.houstonchronicle.com/politics/texas/article/texas-voting-laws-georgia-bills-democrat-16104283.php>.

the amendments that the Democrats had negotiated so painstakingly in the House and added a series of new provisions. The most important changes were:

- Uniform early voting hours were imposed statewide, instead of allowing counties to adopt extended hours, as several majority-minority counties had done in 2020. (Section 3.09)
- An application to vote by mail had to be in writing, using ink on paper, which meant that no one could apply by telephone or electronically. (Section 5.02)
- Applicants for absentee ballots were required to include their driver's license number, personal ID card number, or the last four digits of their Social Security number, and if those numbers did not match those on record with election officials, the applications were to be rejected. This provision had not appeared in any version of the omnibus bill until the Conference Committee report, and the Senate had failed to pass the standalone bills that it was based on. A prominent publication of the Heritage Foundation about "election integrity" recommended such a law, which was also adopted in Florida.³⁷⁸ (Section 5.03)
- The definition of a disability that allowed voting by mail was made much more stringent. (Section 5.01)
- An election could be declared fraudulent if the number of allegedly fraudulent votes exceeded the margin of victory, without verifying for whom they were cast, and the standard of proof was reduced from "clear and convincing" evidence to a "preponderance of evidence." (Section 8.05)
- Polling places could not open before 1 p.m. on the last Sunday of early voting, hampering "Souls to the Polls" voting that had become popular in Black churches. (Section 3.10)
- The ballot curing and tracking provisions that had been added in the House were deleted.³⁷⁹

226. But Rep. Cain and Sen. Hughes had overreached and waited too late. Although the bill passed the Senate before the end of the session, House Democrats scrapped their planned speeches, which Republicans had indicated they would cut off, anyway. Instead, the Democrats quietly disappeared, one by one, from the House floor until the quorum in that body was broken

³⁷⁸ Heritage Foundation, "The Facts About Election Integrity and the Need for States to Fix Their Election Systems," Factsheet No. 196 (Heritage Foundation, Feb. 1, 2021), at 3, https://www.heritage.org/sites/default/files/2021-02/FS_196_0.pdf.

³⁷⁹ Lauren McGaughy, "Limits on voting hours, new criminal penalties included in GOP-backed Texas elections bill/Democrats said they were locked out of debate on the sweeping voting bill, which senators planned to debate during an overnight session beginning late Saturday," *Dallas Morning News*, May 28, 2021, <https://www.dallasnews.com/news/politics/2021/05/28/gop-announces-deal-on-divisive-elections-bill-democrats-say-they-were-locked-out-of-process/>; Chuck Lindell, "GOP unveils final version of Texas elections bill, which includes more restrictions," *Austin American-Statesman*, May 29, 2021, <https://www.statesman.com/story/news/2021/05/29/gop-unveils-final-and-far-longer-version-texas-elections-bill-sb-75263347001/>; Alexa Ura, "After drastic changes made behind closed doors, and an overnight debate, Texas Senate approves voting bill/Senate Bill 7 includes provisions to limit early voting hours, curtail local voting options and further tighten voting by mail. The upper chamber suspended its own rules to approve it after debating it for hours overnight," *Texas Tribune*, May 30, 2021, <https://www.texastribune.org/2021/05/30/texas-voting-restrictions-senate/>; Amy Gardner, "Texas Democrats block restrictive voting bill by walking off the floor to deny GOP-majority House a quorum," *Washington Post*, May 30, 2021, https://www.washingtonpost.com/politics/texas-voting-restrictions/2021/05/30/51dfa134-c140-11eb-93f5-ee9558eef4b_story.html.

before the midnight Sunday deadline for the House to adjourn, blocking passage of S.B. 7 during the regular session. Decamping to Mt. Zion Fellowship Hall, a Black church in Austin, House Democrats held a press conference, choosing the church to emphasize their view that the most egregious provisions of the bill targeted voters of color.³⁸⁰ Despite the fact that they had been discussing such a walkout since April, it was only on Sunday afternoon, at a “Black and Brown Summit” of the Black Caucus and the Mexican-American Legislative Caucus that the plan was agreed upon.³⁸¹ It was the fourth time in Texas history that lawmakers had broken a quorum and the first since the protest against the Tom DeLay-led redistricting in 2003.³⁸² House Democratic Caucus Chair Chris Turner (D-Grand Prairie) crowed that “The 67 members of the House Democratic Caucus have been fighting SB7 – the Republican anti-voter legislation – all year long. Tonight we finished that fight.” That was wishful thinking, for Gov. Greg Abbott immediately promised to call a special session of the legislature to consider, among other things, an omnibus election law patterned on S.B. 7.³⁸³

c. Republicans Dig In and Democrats Fly to D.C.

227. Two weeks later, 9 minority and 2 Anglo Texas state legislators flew to Washington, D.C., drawing on their experiences with S.B. 7 in an effort to move Congress toward passing a bill restoring Section 5 of the Voting Rights Act or the omnibus Democratic voting rights bill, H.R. 1.³⁸⁴ Three days later, Gov. Greg Abbott vetoed the line item in the state budget that provided for salaries for state legislators and their staff in retaliation for the earlier Democratic walkout.³⁸⁵ The Democratic trip and the Governor’s intransigence were portents for the special session(s).

³⁸⁰ Taylor Goldenstein, “Outnumbered Democrats defeat Texas voting restriction bill with flurry of objections, and a walkout,” *Houston Chronicle*, May 30, 2021, <https://www.houstonchronicle.com/politics/texas/article/politics/texas/article/Democrats-voting-restrictions-bill-Texas-16213706.php>.

³⁸¹ Dave Montgomery and Nick Corasaniti, “After Dramatic Walkout, a New Fight Looms Over Voting Rights in Texas/After killing a Republican-sponsored bill to restrict voting in the state, Democrats vowed to oppose any efforts to revive it. Republicans pledged to pass it in a special legislative session.” *New York Times*, May 31, 2021, <https://www.nytimes.com/2021/05/31/us/politics/texas-voting-bill-.html?action=click&module=Top%20Stories&pgtype=Homepage>.

³⁸² Lauren McGaughy, “Texas Democrats walk out of House chamber to stop debate on sweeping GOP-backed elections bill/The Democrats’ unusual protest of breaking the chamber’s quorum, tapped only three other times in Texas history, killed a divisive elections bill. But Gov. Greg Abbott promised to revive the legislation.” *Dallas Morning News*, May 30, 2021, <https://www.dallasnews.com/news/politics/2021/05/30/debate-on-sweeping-texas-elections-bill-stretches-into-the-early-morning-hours/>.

³⁸³ Alexa Ura, “Texas Democrats abandon House floor, blocking passage of voting bill before final deadline/Midnight was the deadline for the House to approve the legislation that would alter nearly the entire voting process, create new limitations to early voting hours, ratchet up voting-by-mail restrictions and curb local voting options.” *Texas Tribune*, May 30, 2021, https://www.texastribune.org/2021/05/30/texas-voting-restrictions-house/?utm_source=Texas+Tribune+Newsletters&utm_campaign=35787178f9-trib-newsletters-breaking-alert&utm_medium=email&utm_term=0_d9a68d8efc-35787178f9-101201265&mc_cid=35787178f9&mc_eid=78249492c1.

³⁸⁴ Benjamin Wermund, “Texas Democrats who derailed GOP voting restrictions head to D.C. today,” *Houston Chronicle*, June 15, 2021, <https://www.houstonchronicle.com/politics/texas/article/Texas-Democrats-who-derailed-GOP-voting-16249523.php>.

³⁸⁵ Cassandra Pollock, “Gov. Greg Abbott vetoes funding for Texas Legislature and its staff as punishment for Democrats’ walkout on elections bill/The governor’s move comes after House Democrats led a walkout in the final

228. In the first special session, which began on July 8, the omnibus bills were renumbered H.B. 3 and S.B. 1, and their content resembled S.B. 7 more than H.B. 6. Two more stringent provisions were added. S.B. 1 required a monthly matching of voter rolls with lists of people who told the Department of Public Safety that they were not citizens when they obtained or renewed their driver's licenses or ID cards. Both S.B. 1 and H.B. 3 prohibited county elections officials from using public funds to facilitate the unsolicited distribution of applications for absentee ballots. Only two contentious provisions were deleted from what had been the conference committee version of S.B. 7 – the limitation on Sunday voting before 1 p.m. and the changes in the standard of proof in election contests.³⁸⁶

229. Two concessions that Democrats had previously won, but which had disappeared from the conference committee version of S.B. 7, were restored. One allowed the correction of mistakes in the application or return of an absentee ballot. The other, the so-called “Crystal Mason provision,” prevented someone from being charged with a crime if she cast a provisional ballot without knowing that she was ineligible to vote. But these were small concessions, and Democrats were still angry, beginning the special session with a rally on the steps of the Capitol organized by Black Voters Matter, the Texas Right to Vote Coalition, and the Texas for All Coalition.³⁸⁷ Armando Walle (D-Houston), speaking for the Mexican American Legislative Caucus, captured their mood: “We’re going to use every parliamentary means available to us to stop these [election] bills.”³⁸⁸ Republicans remained choleric, as well, Fort Worth Rep. Matt Krause remarking that Democrats “may come to regret that they didn’t take SB 7 when they could and now they’ve got this other one [election bill] that is much more difficult for them to stop.”³⁸⁹

days of the regular legislative session to block passage of Senate Bill 7, Abbott’s priority elections bill that would have overhauled voting rights in the state.” *Texas Tribune*, June 18, 2021, https://www.texastribune.org/2021/06/18/greg-abbott-veto-legislature-democrats/?utm_source=Texas+Tribune+Newsletters&utm_campaign=f54588570e-trib-newsletters-breaking-alert&utm_medium=email&utm_term=0_d9a68d8efc-f54588570e-101201265&mc_cid=f54588570e&mc_cid=78249492c1.

³⁸⁶ Alexa Ura, “What’s in the new voting restriction legislation introduced in the Texas House and Senate /Senate Bill 1 and House Bill 3 will be the starting points for the Legislature’s efforts to tighten Texas voting laws. Here’s what the bills would do.” *Texas Tribune*, July 8, 2021, https://www.texastribune.org/2021/07/08/texas-voting-bill-special-session/?utm_source=Texas+Tribune+Newsletters&utm_campaign=ff006333cf-trib-newsletters-top-story-alert&utm_medium=email&utm_term=0_d9a68d8efc-ff006333cf-101201265&mc_cid=ff006333cf&mc_cid=78249492c1.

³⁸⁷ Nick Corasaniti, “Texas Republicans Reveal Bills of Far-Reaching Voting Restrictions/In their second attempt to pass a sweeping elections overhaul, Republican lawmakers followed the broad outlines of the first, including a wide range of measures to limit voting access.” *The New York Times*, July 8, 2021, <https://www.nytimes.com/2021/07/08/us/politics/texas-voting-bill-restrictions.html?action=click&module=Spotlight&pgtype=Homepage>.

³⁸⁸ Robert T. Garrett, Allie Morris, and Morgan O’Hanlon, “Texas Legislature moves quickly on contentious election bills as special session opens/House starts with push to restore vetoed legislative funding, as Senate swiftly sets hearings on rewriting election laws.” *Dallas Morning News*, July 8, 2021, <https://www.dallasnews.com/news/politics/2021/07/08/texas-legislature-moves-quickly-on-contentious-election-bills-as-special-session-opens/>.

³⁸⁹ Alex Briseno, “Legislative Journal: Sherman, Krause discuss Texas’ special session, round two of voting bills/ reps. Matt Krause and Carl O. Sherman return to the Capitol just over a month after Democratic lawmakers walked

230. House Speaker Dade Phelan, apparently displeased with the stumbles and perhaps with the compromises of the House author of H.B. 6, Rep. Briscoe Cain, appointed a new committee to oversee H.B. 3, the Select Committee on Constitutional Rights and Remedies, to be chaired by Rep. Andrew Murr (R-Junction), who represented a rural West Texas constituency. Asserting that the regular session's Election Committee kept African-Americans off of its membership, the Speaker named two Black members of the Select Committee, Reps. Senfronia Thompson (D-Houston) and James White (R-Hillister), the legislature's only Black Republican. Left off the committee was Rep. Jessica Gonzalez (D-Dallas), vice chair of the Elections Committee, who had so deftly questioned Rep. Cain during committee hearings in the regular session.³⁹⁰ These personnel and bureaucratic moves, as well as the careful tuning of the provisions of the bills from the beginning of the session, were an indication of how central S.B. 1 was in the minds of the Republican leadership.

231. Wishfully, Democrats offered the Barbara Jordan Fair Elections Act, S.B. 61, by Sen. Royce West (D-Dallas), which would allow online and same-day registration, automatic registration when obtaining a driver's license, no-excuse absentee voting for everyone, college campus polling places, 17 days of early voting, a relaxation of voter ID requirements, an election day holiday, and restrictions on poll watchers. The point of the bill, every provision of which would have made voting easier in Texas, was to advertise a contrast between the approaches to election laws of the overwhelmingly minority Democratic legislators and the overwhelmingly Anglo Republicans. The bill did not receive a hearing in either house. Offered in the Senate as an amendment to S.B. 1, it lost on a party-line vote.³⁹¹ But it did underline the irony of Sen. Bryan Hughes's boast that S.B. 1 would make the Texas election process "more accessible."³⁹²

232. Republicans pushed S.B. 1/H.B. 3 quickly, holding an overnight hearing nearly 24 hours long on H.B. 3 only two days after the start of the legislative session. Four hundred and seven of the 484 citizens and representatives of civil and disabilities rights groups who turned out for the ultra-marathon hearing opposed the bill. Nina Perales of MALDEF again criticized the

off the House floor, blocking the passage of the contentious voting bill." *Dallas Morning News*, July 8, 2021, <https://www.dallasnews.com/news/politics/2021/07/08/legislative-journal-sherman-krause-gear-up-for-special-session-round-two-of-voting-bills/>.

³⁹⁰ Patrick Svitek and Cassandra Pollock, "Texas House attempting to reset on contentious elections bill with new author, new committee in special session/The lower chamber, led by House Speaker Dade Phelan, is trying to start off on a new foot with a controversial election bill that blew up during the regular session." *Texas Tribune*, July 8, 2021, <https://www.texastribune.org/2021/07/08/texas-house-reset-election-bill/>.

³⁹¹ <https://capitol.texas.gov/tlodocs/871/billtext/pdf/SB000611.pdf#navpanes=0>; Robert T. Garrett and Allie Morris, "Democratic senators decry Texas GOP's election bills, push back with one named for Barbara Jordan/On Friday, all 13 Democratic state senators in Texas co-authored and filed the Barbara Jordan Fair Elections Act, their answer to Republican 'election integrity' bills in the special legislative session that began Thursday." *Dallas Morning News*, July 9, 2021, <https://www.dallasnews.com/news/politics/2021/07/09/democratic-senators-decry-texas-gops-election-bills-push-back-with-one-named-for-barbara-jordan/>; Transcript of Senate Floor Debate, Aug. 11, 2021, Part I, at 93-101.

³⁹² Alexa Ura, "Forging ahead, Texas Senate committee again passes voting restrictions bill/ Senate Bill 1 is nearly identical to legislation considered in the first special session, containing many of the provisions that have spawned a monthslong game of legislative brinkmanship with House Democrats, who continue to deny Republicans the quorum needed to enact the bill." *Texas Tribune*, Aug. 9, 2021, <https://www.texastribune.org/2021/08/09/texas-voting-bill-senate/>.

restrictions on assistance to non-English speaking voters and warned of a possible lawsuit over the purge provisions, which drew comparison to the 2019 Whitely Purge. Linda Litzinger of the disability rights group Texas Parent to Parent, pointed out the consequences for disabled persons of the provision that forced all but the voter out of a car using curbside voting. If disabled people van-pooled to a polling place, would all but one have to exit the car while each in turn voted? Sen. Royce West and Houston Mayor Sylvester Turner pointed out how much minority voters in Houston used drive-thru and 24-hour voting in 2020 and contended that these practices should be extended, not prohibited.³⁹³

233. A day after the 24-hour House hearing, the fifth day of the 30-day legislative session, a majority of House Democrats flew to Washington, D.C., breaking the legislative body's quorum and promising not to return before the end of the session on Aug. 7. The only issue was H.B. 3. They hoped that by drawing even more attention to this bill than it had already received nationally, they could move members of Congress to pass national election reform legislation.³⁹⁴ "Texas' generations-long pattern of discrimination is not in the past; it is alive and present today in the anti-voter bills before the Texas State Legislature," state Rep. Trey Martinez Fischer (D-San Antonio) said in a statement about the quorum break. "This is part of a calculated and deliberate Republican plan to chip away at the freedom to vote and to choose our leaders."³⁹⁵ Three Texans, Reps. Senfronia Thompson (D-Houston), Diego Bernal (D-San Antonio), and Nicole Collier (D-Fort Worth), all minorities representing districts with large populations of color, testified before a U.S. House committee. Thompson described the appearance of white poll watchers "that looked like they was from the Proud Boys" appearing at polling places in

³⁹³ Morgan O'Hanlon and Allie Morris, "GOP-led Texas House committee advances elections bill; Senate panel likely to vote later Sunday/Critics turn out in large numbers to voice concern as House and Senate committees weighed controversial elections bills in marathon hearings." *Dallas Morning News*, July 10, 2021, <https://www.dallasnews.com/news/politics/2021/07/10/watch-live-elections-overhaul-bills-in-texas-house-senate-committees/>; Alexa Ura and Cassandra Pollock, "GOP voting bills advance in Texas House and Senate after overnight committee hearings/ Authors of the legislation are moving to ban drive-thru and 24-hour voting options, enhance access for partisan poll watchers and prohibit local election officials from proactively distributing applications to request mail-in ballots. Both bills also include language to further restrict the state's voting-by-mail rules, including new ID requirements for absentee voters." *Texas Tribune*, July 10, 2021, <https://www.texastribune.org/2021/07/10/voting-bill-texas/>.

³⁹⁴ Nicole Cobler, Chuck Lindell, John C. Moritz, "Texas Democrats leave state to block GOP voting bill in special session," *Austin American-Statesman*, July 12, 2021, <https://www.statesman.com/story/news/politics/state/2021/07/12/texas-democrats-special-session-greg-abbott-agenda/7939596002/>.

³⁹⁵ Alexa Ura, "Behind the partisan drama lies a profoundly serious struggle over who gets shut out under Texas voting laws/Whose voices will be heard in Texas halls of power? That question beats at the heart of the Democratic quorum break that has brought the Legislature to a halt and focused national attention on GOP efforts to make voting in Texas harder." *Texas Tribune*, July 14, 2021, https://www.texastribune.org/2021/07/14/texas-democrats-walkout-voting-rights/?utm_source=Texas+Tribune+Newsletters&utm_campaign=938157fc4a-trib-newsletters-top-story-alert&utm_medium=email&utm_term=0_d9a68d8efc-938157fc4a-101201265&mc_cid=938157fc4a&mc_eid=78249492c1.

Black areas of Houston in 2010 and 2012. “In a minority area,” Thompson declared, “that has a chilling effect.” She noted that H.B. 3 strengthened the power of poll watchers.³⁹⁶

234. But the House members’ gesture was futile. Republican U.S. Senators, joined by two Democrats, held up national election bills that would have prevented or overturned S.B. 1, and Gov. Abbott called another special session of the legislature to pass the measure finally.³⁹⁷ S.B. 1, almost identical to the bill of the same number in the first special session, passed out of the Senate State Affairs Committee on the third day of the second special session. Seeming to admit the lack of evidence of widespread fraud, Sen. Hughes pointed to provisions of S.B. 1 that would create new requirements for people assisting voters as vehicles that could be used to “build a record” against wrongdoers – i.e., to find evidence of fraud to justify the legislation under which it was found.³⁹⁸ After Speaker Phelan signed arrest warrants for boycotting House members and the state Supreme Court authorized them, House Democrats straggled back, one by one, and S.B. 1 moved to its now-inevitable passage.³⁹⁹

d. A 15-Hour Filibuster by Latina Senator Dramatizes Stakes in S.B. 1

235. With a House quorum now assured, the Senate moved to final passage of S.B. 1 on August 11, with Sen. Bryan Hughes summing up the Republicans’ case for the bill. It is instructive that he began, as though speaking to a court, by listing four minor ways in which S.B. 1 eased the act of voting. It allowed those in line at poll-closing time during early voting to vote, a privilege that voters in Texas already enjoyed during “election day” voting.⁴⁰⁰ It required employers to allow voters time off to vote during early voting, again a privilege already enjoyed for those Texans who voted on election day, and which continued to be so qualified as to make it inconsequential.⁴⁰¹ It allowed ballot “curing” – fixing problems on applications for absentee

³⁹⁶ Benjamin Wermund, “‘Damn right I left Texas’: Texas House Democrats get the mic at congressional hearing,” *Houston Chronicle*, July 29, 2021, <https://www.houstonchronicle.com/politics/texas/article/Texas-House-Democrats-mic-congress-hearing-16349718.php>.

³⁹⁷ Marissa Martinez, “Texas governor calls second special session for GOP’s push to change election laws/Democrats have been blocking a Republican elections law by fleeing the state to deny the GOP a quorum during the current legislative session,” *Politico*, Aug. 5, 2021, <https://www.politico.com/news/2021/08/05/texas-second-special-session-election-laws-502615>.

³⁹⁸ Alexa Ura, “Forging ahead, Texas Senate committee again passes voting restrictions bill/Senate Bill 1 is nearly identical to legislation considered in the first special session, containing many of the provisions that have spawned a monthslong game of legislative brinkmanship with House Democrats, who continue to deny Republicans the quorum needed to enact the bill,” *Texas Tribune*, Aug. 9, 2021, <https://www.texastribune.org/2021/08/09/texas-voting-bill-senate/>.

³⁹⁹ Jaclyn Diaz, “Texas House Speaker Signs Arrest Warrants For Democrats Still Refusing To Return,” *NPR*, Aug. 10, 2021, <https://www.npr.org/2021/08/10/1026573381/texas-democrats-can-be-lawmakers-can-be-arrested-for-evading-votes>; AP, “Texas Democrats Return, Ending A 38-Day Holdout That Blocked A Voting Bill,” Updated Aug. 19, 2021, <https://www.npr.org/2021/08/19/1029509510/texas-democrats-end-holdout-voting-bill>.

⁴⁰⁰ Section 3.09 (d). Almost every state guarantees any qualified voter who is standing in line when the polls close the right to vote. See, e.g., Rebecca Harrington, “This is what happens if you’re still in line to vote when the polls close,” *Business Insider*, Nov. 7, 2016, <https://www.businessinsider.com/what-happens-still-in-line-to-vote-when-polls-close-2016-11>.

⁴⁰¹ Section 7.02 (a) (1). The qualification stated that if there were two consecutive hours of in-person voting, early or election day, in which the polls were open and the voter was not working, the employer did not have to allow time off. Section 7.02 (b).

ballots or on returned ballots – a provision much more necessary than before S.B. 1 because of the confusing ID requirements for applications for and receipt of absentee ballots that S.B. 1 imposed.⁴⁰² And it expanded early voting hours in mid-size counties.⁴⁰³ As Sen. Judith Zaffirini pointed out in the same debate, 40 of those 41 midsized counties where voting hours were expanded were majority Republican, while the four metropolitan counties in which the hours were reduced contained about one in three Black Texans, one in three Latino Texans, and one in three Asian Texans.⁴⁰⁴

236. Sen. Hughes then turned to the restrictive portions of S.B. 1. Without giving any actual examples of fraud already committed, Sen. Hughes asserted that the bill “cracks down on those vote harvesters, those paid political operatives who try to coerce voters, who try to mislead voters, who try to get in between the voter and her ballot.”⁴⁰⁵ The Senate then turned to a series of amendments to the bill and colloquies between Sen. Hughes and others. Sen. Sarah Eckhardt (D-Austin) asked Sen. Hughes “What is the difference dropping a mail-in ballot into a metal box marked US Mail to be delivered to the elections administrator versus dropping a vote-by-mail ballot into a metal box in front of the office of the elections administrator?” When Sen. Hughes reposted that it was risky to leave a drop box unattended and Sen. Eckhardt responded that mailboxes would pose the same risks, Sen. Hughes backtracked to the position that “we’ve had ballot voting by mail for a long time.”⁴⁰⁶ Although Republicans accepted some minor amendments, they rejected attempts by Sen. Royce West to add the Barbara Jordan Act to S.B. 1 and to require the Secretary of State to conduct a study of the disparate racial effects of S.B. 1. Both lost on party-line votes.⁴⁰⁷ In the House, both Reps. Briscoe Cain and Andrew Murr were questioned about whether they had bothered to make any study of the potential racial impacts of the law. Both said they had not.⁴⁰⁸

237. The most important speech of the day and perhaps of the year’s legislative sessions was by Sen. Carol Alvarado (D-Houston), the Democratic leader in the Senate, who blended the state’s history of discrimination with voting rights law and critiques of S.B. 1 made in months of legislative hearings and debates in a 15-hour filibuster that recalled the threatened filibusters against voter ID laws in 2005 and 2007 and Sen. Wendy Davis’s abortion rights filibuster in

⁴⁰² Section 5.12.

⁴⁰³ Section 3.10 (e). These portions of Sen. Hughes’s remarks are at Transcript of Senate Floor Debate, Aug. 11, 2021, Part 2, at 3-6.

⁴⁰⁴ Transcript of Senate Floor Debate, Aug. 11, 2021, Part 2, at 5, 15.

⁴⁰⁵ Transcript of Senate Floor Debate, Aug. 11, 2021, Part 1, at 5.

⁴⁰⁶ Transcript of Senate Floor Debate, Aug. 11, 2021, Part 1, at 27-28.

⁴⁰⁷ Transcript of Senate Floor Debate, Aug. 11, 2021, Part 1, at 93-104. Rep. Toni Rose (D-Dallas) made a similar motion for a study in the House. Alexa Ura, “Texas House passes new voting restrictions as Democratic hopes of killing the legislation wane/Democrats used every tool they had, fleeing the state en masse and forcing two special sessions, but a Republican bill to rewrite state election laws won final approval in the House on Friday. Once the House and Senate work out some differences, it appears headed to the governor’s desk.” *Texas Tribune*, Aug. 26, 2021, <https://www.texastribune.org/2021/08/26/texas-house-voting-restrictions-bill/>.

⁴⁰⁸ Editorial, “A final plea to Republicans on Texas voting bill – make it less awful,” *Houston Chronicle*, Aug. 24, 2021, <https://www.houstonchronicle.com/opinion/editorials/article/Editorial-A-final-plea-to-Republicans-on-Texas-16407017.php>.

2013.⁴⁰⁹ Since in Texas, the member filibustering must stand without leaning, drinking water, or taking bathroom breaks during her performance, the tactic is reserved for the very most serious and divisive issues. The overriding question, Alvarado declaimed, was

What do we want our democracy to look like? Do we want access to our electoral process to be more difficult for people with disabilities, or do we want to remove barriers for them?" . . . "For communities of color, do we want to defend the tremendous progress that we've made in civil rights and equality or chip away at their voting rights one Senate bill at a time? . . .

Senate Bill 1 slowly but surely chips away at our democracy. It adds rather than removes barriers for Texas seniors, persons with disabilities, African Americans, Asian and Latino voters from the political process

[President Lyndon B. Johnson] said the Voting Rights Act struck away the last major shackle of the fierce and ancient bond of slavery. . . Senate Bill 1 is a regressive step back in the direction of that dark and painful history."⁴¹⁰

Sen. Paul Bettencourt (R-Houston), whose 7 election bills in the regular session had paved the way for S.B. 1, mocked Sen. Alvarado's gravity, tweeting that her speech was "laughable."⁴¹¹

238. The final debate in the House was bitter, notable mostly because Speaker Phelan prohibited the use of the word "racism" by members and because Republicans, after a claim by bill sponsor Andrew Murr that "All viewpoints have been and are being considered, regardless of party affiliation," rejected all three dozen Democratic amendments.⁴¹² A conference committee even stripped out the "Crystal Mason Provision," allowing people to be convicted of crimes even if they attempted to vote without realizing that they were ineligible and even if their provisional

⁴⁰⁹ On Davis's filibuster, see Alana Rocha, Justin Dehn, Todd Wiseman, and Tenoch Aztecatl, "Running out the clock: The Wendy Davis abortion filibuster, 5 years later,/Former state Sen. Wendy Davis' 2013 filibuster of anti-abortion legislation was an unforgettable event for lawmakers and political observers on both sides of the aisle. Five years later, listen in as key players in the debate reflect on their longest night." *Texas Tribune*, June 25, 2018, <https://www.texastribune.org/2018/06/25/wendy-davis-abortion-filibuster-five-year-anniversary/>. There is apparently no complete transcript of Alvarado's remarks.

⁴¹⁰ Alexa Ura, "Texas Senate outlasts 15-hour filibuster by Sen. Carol Alvarado to pass GOP voting-restrictions bill/ The Houston Democrat was on her feet speaking, not allowed to sit or lean against her desk, and unable to take bathroom breaks or drink water, since Wednesday evening. But ultimately the bill she opposed passed Thursday on an 18-11 vote." *Texas Tribune*, Aug. 11, 2021, <https://www.texastribune.org/2021/08/11/texas-voting-bill-filibuster/>.

⁴¹¹ Chuck Lindell, "Texas Democrat's filibuster of GOP voting bill ends after 15 hours; SB 1 passes," *Austin American-Statesman*, Aug. 12, 2021, <https://www.statesman.com/story/news/2021/08/12/texas-sb-1-voting-bill-passes-despite-filibuster-carol-alvarado/8105541002/>.

⁴¹² Allie Morris, "Texas House advances GOP elections bill after weeks-long stalemate/Democrats say the bill will make it harder to vote, while Republicans say it is needed for election integrity," *Dallas Morning News*, Aug. 26, 2021, <https://www.dallasnews.com/news/politics/2021/08/26/watch-live-texas-house-takes-up-gop-elections-bill-after-weeks-long-stalemate/>; Alexa Ura, "Texas House passes new voting restrictions as Democratic hopes of killing the legislation wane/Democrats used every tool they had, fleeing the state en masse and forcing two special sessions, but a Republican bill to rewrite state election laws won final approval in the House on Friday. Once the House and Senate work out some differences, it appears headed to the governor's desk." *Texas Tribune*, Aug. 26, 2021, <https://www.texastribune.org/2021/08/26/texas-house-voting-restrictions-bill/>.

votes were not counted. State Sen. Hughes feared that it might encourage non-citizens to try to vote.⁴¹³

IX. Did Texas Adopt S.B. 1 with a Discriminatory Intent? A Distillation of the Evidence

239. In this section of the report, I lay out the evidence presented earlier in a schematic form in an effort to be helpful to the finder of fact. To organize and systematize inquiries into the intent of the framers of a law or redistricting plan, I set out nine “intent factors” in a law review article in 1991, basing them on Supreme Court and lower federal court opinions, as well as on law journal articles and my experience in analyzing such questions in normal scholarship and for trials.⁴¹⁴ While in the central U.S. Supreme Court case on such matters, *Arlington Heights*, Justice Powell did not spend much time explaining the rationale for each factor, I tried to do so, drawing on fuller discussions in lower courts, law reviews, and historical research.⁴¹⁵ I subdivided some of Justice Powell’s factors for purposes of clarity. What Justice Powell termed the historical background and the sequence of events, I divided into three rubrics: the historical context, demographic facts, and the climate of racial politics. What he called departures from the normal sequence, I termed state policies and institutional rules. What he grouped under legislative or administrative history, I subdivided into the backgrounds of key decisionmakers, other actions of key decisionmakers, and the text of the law or, in redistricting cases, the pattern of the district lines. I used Justice Powell’s categories of impact and statements by decisionmakers without change. In my later book, *Colorblind Injustice*, I increased the number of factors to ten and expanded the discussion and examples.⁴¹⁶

240. Instead of repeating evidence already set out in detail above, I will summarize it briefly below and refer to it by paragraph number, which I will place in boldface type for the reader’s convenience. I will also highlight each of the ten factors, which I have employed in expert witness reports since 1991 and which, as explained above, track the factors of *Arlington Heights*, as I discuss them.

A. Models of Human Behavior

241. Underlying every causal explanation in history is an implicit or explicit **model of human behavior**, a theory, often inchoate, of how people typically act in certain kinds of situations. Sometimes based on empirical generalizations, sometimes, on rough analogies, sometimes, on common sense, these frameworks should not mechanically determine conclusions -- if they do,

⁴¹³ Allie Morris, “GOP elections bill headed to Texas Gov. Greg Abbott for signature/The Republican-led House and Senate signed off on the legislation they say will ensure election integrity, over Democrats’ objections that it will suppress voters.” *Dallas Morning News*, Aug. 31, 2021, <https://www.dallasnews.com/news/politics/2021/08/31/gop-elections-bill-headed-to-texas-gov-greg-abbott-for-signature/>; Taylor Goldenstein, “Texas Republicans pass priority voting bill after six-month siege,” *Houston Chronicle*, Aug. 31, 2021, <https://www.houstonchronicle.com/politics/voting-rights/article/voting-abbott-gop-priority-bill-16425827.php>.

⁴¹⁴ “How to Determine Intent: Lessons from L.A.,” *The Journal of Law and Politics*, 7 (1991), 591-732, at 704-14.

⁴¹⁵ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁴¹⁶ *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of North Carolina Press, 1999), at 347-58.

why bother about the evidence? But they do establish baselines of initial plausibility for different possible interpretations. How have scholars treated politicians' explanations of their actions? Do political scientists generally believe that politicians are self-interested actors who manipulate electoral rules for their own advantage, or to secure the triumph of their particular ideals, or do they accept at face value the frequent claim by politicians that they are merely transparent vehicles for public opinion? Overwhelmingly, they picture politicians who craft election laws as self-interested.⁴¹⁷ The history of election laws in Texas and other southern states illustrates again and again how dominant whites sculpted election laws to restrain Blacks and Latinos and whichever party those groups identified with.⁴¹⁸ In the first instance in American history in which a large number of members of an ethnic minority were able to vote, during the post-Civil War era in the Deep South, politicians immediately demonstrated both the willingness and the ability to gerrymander district lines in order to crack, stack, and pack African-American voters.⁴¹⁹ Other election laws, such as the sudden, widespread adoption of the Australian or secret ballot, have been characterized as responses to scandals or crises – in the case of the Australian ballot, to organized and apparently paid-for voting in the 1888 presidential election.⁴²⁰ The Texas Legislature's regulation of absentee ballots in H.B. 54 in 2003 was, like the adoption of the secret ballot over a century earlier, explicable as a response to a scandal – in Texas's case, to the 2001 Dallas City Council race. (See above, paragraphs 88-90.) And its further tightening of laws on absentee balloting in H.B. 658 and S.B. 5 in 2017 responded to another widely noted Dallas City Council absentee ballot incident. (See above, paragraph 91-94.)

242. By contrast, the bitter 2005-11 struggle over voter ID bills was not a response to any specific incident of election fraud. Indeed, the bills appear to have been proposed to create the impression in the minds of voters that there was a problem with fraud, a problem that could never be entirely solved, lest the appeal of the issue dissipate. Voter ID could therefore be only a partial solution. In a convenient irony, the very lack of evidence of widespread fraud meant that the search for it, the agitation of the issue, and the proposal of new areas for more legislation had to continue, perhaps indefinitely. The scholarship and the recent history of electoral changes in Texas lead us to expect three patterns from the 2021 Texas legislative session:

- any substantial change in election laws would either address widespread, well-documented abuses or they would continue to focus attention on phantom abuses, in order to rally core voters;
- if the Legislature did act, the changes would be crafted in the interest of the dominant political party;

⁴¹⁷ See, e.g., Samuel Merrill III and Bernard Grofman, *A Unified Theory of Voting* (New York: Cambridge Univ. Press, 1999); Peter H. Argersinger, "Electoral Processes," in Jack P. Greene, ed., *Encyclopedia of American Political History*, (New York: Charles Scribner's Sons, 1984), III, 489-512.

⁴¹⁸ See, e.g., Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, Connecticut: Yale Univ. Press, 1974); Richard M. Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: Univ. of Chicago Press, 2004).

⁴¹⁹ See *Colorblind Injustice*, 26-31.

⁴²⁰ Lionel E. Fredman, *The Australian ballot: the story of an American reform* (East Lansing, Michigan: Michigan State Univ. Press, 1968).

- since that party was overwhelmingly white and its opposition drew disproportionate support from ethnic or linguistic minorities, the resulting legislation would likely disadvantage minority voters.

B. Historical Context

243. The second factor is the **historical context**, especially the sequence of events, which is important for what it reveals about the general attitudes and interests of decisionmakers. Laws passed during periods of racial turmoil, such as the First Reconstruction or its aftermath, or the Civil Rights Era, or after an upsurge in minority voting or minority candidate success, must be viewed with suspicion. The longer historical context for election laws in Texas is replete with examples of racial discrimination, from the registration and secret ballot laws of 1889 through the poll tax and other facets of the Terrell Election Laws of the early 20th century, through the four Supreme Court cases about the Texas white primary through the more than a thousand voting rights cases, objections, more information cases, and settlements from 1957 through 2020 – by far the most of any state in the country. (paragraphs **56-62, 67-78**) Those events and the well-documented history of Jim Crow discrimination in every facet of Texas social life, not wholly overcome even today, casts a shadow over any election law that makes it more difficult for any Texan to vote. (paragraphs **63-66**)

244. Crucial to the more immediate historical context of S.B. 1 are five facts about the election of 2020 in Texas. First is the overwhelming impact of Covid, particularly in heavily-minority big cities. Leaders in public health and other metropolitan agencies, not to mention citizens of large cities, were justifiably concerned about the effects of voting in close quarters, and so, adopted innovative methods to avoid more spreading of the deadly virus. But these acts outraged small town and suburban, largely white Republicans, whose social environments made Covid less dangerous. (paragraphs **152-155**) Second is the weakness of evidence of fraud. (paragraphs **110-129**) Third is the upsurge in the use of VBM by Blacks and Latinos – indexed by the large increase in the use of VBM by Democrats. (paragraphs **183-84**) In 2016, Democrats had been much less likely than Republicans to make use of this form of voting. Fourth, as Table 1 shows, people of color were much more concerned than Anglos about Covid and much more favorable toward the use of VBM. (paragraph **155**) Fifth is the successful and sometimes unsuccessful invention or exploitation of different forms of voting – drive-thru and 24-hour voting, temporary structures or garages or civic or sports facilities, and drop boxes – in racially diverse metropolitan areas in an effort to make it possible to vote without endangering one’s health. (paragraphs **157-179**) Democratic Party groups also filed a lawsuit in an attempt to make it possible for people without conventional disabilities to vote by mail in order to avoid voting in conditions where social distancing was difficult. (paragraph **159**)

245. The expectation from scholarship and previous events in Texas that there would need to be a significant event, such as serious fraud with VBMs or any of the other unconventional means of voting used in 2020 proved incorrect, for no such fraud was discovered. The sponsors of S.B. 1 acted not because of evidence of frauds or irregularities, but in spite of the lack of such evidence. Anyone trying to determine the sponsors’ intent, therefore, should more strongly consider the other expectations drawn from political science and the state’s recent history – that

the Legislators acted to stir up their core voters, to bias election laws in the interest of their political party, and/or to make changes in election laws that would likely disadvantage ethnic/linguistic minorities – likely supporters of the opposition party.

C. Provisions of the Law

246. The third factor should be the **provisions of the law** or regulation. In the Alabama constitutional convention of 1901, delegates added some, but not other misdemeanors to the list of felonies for which men were disfranchised. This selectivity was taken to be an indication of racially discriminatory intent by the Supreme Court in *Hunter v. Underwood*, especially since one of the misdemeanors appended was miscegenation, a racist “crime” for which white men were rarely convicted in the South.⁴²¹ Many textual details of S.B. 1 are crucial to understanding its motivation – the addition of identification requirements for applying for VBM ballots that some voters and election officials may not have (paragraphs **211, 225**); banning election officials, but not political parties or candidates, from sending unsolicited applications for VBM (paragraph **191, 209**); banning drop boxes (paragraphs **191, 220**), while leaving mail boxes unconstrained (paragraph **236**); the restriction of the hours of voting (paragraph **220, 225, 235**); lifting restrictions on poll watchers, while threatening election officials with fines and criminal charges if they interfere with poll watchers’ free movement (paragraphs **192, 206, 224**); requiring burdensome paperwork from those who assist voters, and threatening assistants with punishment for minor errors (paragraphs **190, 210, 219**).

247. Blacks and Latinos are more likely to be affected by these provisions for many reasons.⁴²²

- They are less likely to own automobiles, and thus, less likely to have driver’s licenses numbers for absentee ballot applications. According to the 2019 one-year American Community Survey, 4.7% of whites, 13.4% of Blacks, and 7.5% of Latinos in Texas do not own an automobile.⁴²³ The same survey shows that the proportion of white Texans who commuted by public transit in 2019 was 1.1%, compared to 4.2% for Blacks and 1.9% for Latinos.⁴²⁴
- They are less likely to own computers or have an internet subscription, and therefore, they have less access than Anglos to applications for absentee ballots. According to the same survey, only 2.9% of white households in Texas do not have a computer, compared to 5.7% of Black and 5.7% of Latino households. The same pattern holds for internet subscriptions: only 4.9% of white households were without one in 2019, compared to 8.8% of Black and 9.6% of Latino households in Texas.⁴²⁵

⁴²¹ *Hunter v. Underwood*, 471 U.S. 222 (1985), at 226-28.

⁴²² Statistics in this paragraph are also relevant to the basic demographic facts factor.

⁴²³ Table DP04 of the U.S. Census contains the information, but because figures for each ethnic group must be examined separately, there is no single link to the relevant information. Here is the link for the category “Black or African American alone:” <https://data.census.gov/cedsci/table?q=DP04&t=004%20-%20Black%20or%20African%20American%20alone&g=0400000US48>.

⁴²⁴ Table DP03 which, like DP04 has no single link for all ethnic groups.

⁴²⁵

<https://data.census.gov/cedsci/table?q=S2802%3A%20TYPES%20OF%20INTERNET%20SUBSCRIPTIONS%20BY%20SELECTED%20CHARACTERISTICS&g=0400000US48&y=2019>.

- They are less likely than Anglos to work in management jobs, and therefore less likely to have flexible work schedules. The percentages of Texans holding management, business, science, and arts occupations, according to the same survey, was 35.8% for whites, compared to 29.3% for Blacks and 18.8% for Latinos.⁴²⁶ Minority voters would therefore benefit disproportionately from the ability to vote using drop boxes, extended hours, and drive-thru voting.
- Because Blacks and Latinos suffer from the effects of past discrimination, their contemporary educational levels are depressed, compared to those of whites. At the lower end of the educational spectrum, 8.0% of whites, 4.1% of Blacks, but fully 25.4% of Latinos have completed less than 9 years of schooling. At the upper end, 27.4% of whites, 18.9% of Blacks, and only 11.2% of Latinos have completed four or more years of college.⁴²⁷ As a consequence, minorities are more likely to have more difficulty working through the complicated and confusing S.B. 1 requirements for absentee voting.
- The history of poll watcher intimidation of minority voters in Texas suggests that S.B. 1's guarantee of "free movement" by poll watchers would disproportionately affect minorities. And especially for Latino voters, the heightened restrictions and burdensome requirements on voters who are uncomfortable with English will predictably depress their ability to vote.

D. Basic Demographic Facts

248. The fourth variety of evidence is **basic demographic facts**. A rising and/or concentrated minority population, or populations whose depressed educational and economic levels reflect the vestiges of past and present racial and ethnic discrimination are facts that politicians can be expected to observe, and that, therefore, should be assumed to affect their design of electoral rules and structures. Two very marked trends in Texas's population growth since 1980 condition the way that election laws work in the state propel changes in those laws. First is the pure growth in the state's population. From 1980 to 2020, the state's population more than doubled, and it became the country's second largest state. (paragraph **82**) When cities and suburbs were smaller and less spread out, it was possible to conduct elections in person on Election Day with relatively few polling places. When nearly a third of the state's population is living in the 10 largest cities, that is no longer possible. (paragraphs **83-85**) Most states in the country have now adopted not only early in-person voting, but no-excuse absentee voting, but not Texas, with the predictable effect of long lines and low turnout purely from the natural force of population growth and Texas's refusal to accommodate it. (paragraph **156**)

249. As Adrian Shelley of Public Citizen put it in his testimony before the House Select Committee on Constitutional Rights and Remedies,

We want everybody to have an equal chance to vote. And in a county like Harris County where we have a more than a million registered voters, an equal chance is going to mean something different, right? We need all of the hours possible, we

⁴²⁶ Table DP03, which like DP04 has different links to different ethnic groups.

⁴²⁷ Table DP02, which has the same linkage problems as DP03 and DP04.

need all of the locations possible, all the methods possible in order to get just that sheer number of people to the polls, right?⁴²⁸

250. The second fact is ethnic change. In 1980, as Figure 2 shows dramatically, nearly two-thirds of Texans were non-Hispanic whites. By 2020, that group had fallen to 41.2% of the population. By contrast, the Latino percentage had nearly doubled over the same period, from 21.0% to 39.7%, and the Asian-American population had mushroomed from 1.9% to 5.2%. The Black population, on the other hand, was almost stable, increasing only from 12.0 to 12.9%. (paragraph 83)

251. Along with these trends is the basic fact that large cities are much more ethnically diverse than suburbs, smaller towns, and rural areas. As Figures 3 and 4 show, the state's 10 largest cities were nearly half Latino and only a little more than a quarter Anglo, while the rest of the state was about a third Latino and nearly half Anglo. (paragraph 85) Any election law that focused on reducing opportunities to vote in large metropolitan areas, as S.B. 1 is, would be expected to have a disproportionate effect on minority voting, a fact that proponents of such a law were sure to understand, especially since it was repeatedly pointed out during debates over the law.

E. Climate of Racial Politics

252. The fifth factor is the **climate of racial politics**, which is usually indicated by two basic political facts, the number of minority candidates elected and the approximate extent of racial polarization among voters. Such facts condition the expectations of officials who frame or maintain electoral arrangements.

253. Table 2 summarizes the numbers of state and national officials of each ethnic group from Texas as of 2020. It includes the party affiliations of the elected officials as another indication of the racial polarization of Texas politics. The overall conclusions of the table will come as no surprise to even the casual observer of contemporary Texas politics: First, Anglos (whites) are considerably overrepresented, and Latinos and Asian-Americans are severely underrepresented. See the last two rows. Note that these two rows provide an underestimate of the real underrepresentation, because to simplify matters, I have included only members of the state legislature and the national House, who represent sub-state districts, to the number of statewide elected officials, all but two of whom were white in 2020.⁴²⁹ Second, Republican officials are overwhelmingly white – 142 of the 151 Republican elected officials, or 94%. By contrast, only 18 of the 96 elected Democrats (19%) are white. So minorities were very underrepresented and race and party affiliations were very highly correlated among elected officials.

⁴²⁸ Transcript of House Select Committee on Constitutional Rights and Remedies Hearing, Aug. 23, 2021, at 70.

⁴²⁹ Justice Eva Guzman has resigned from the State Supreme Court to run for State Attorney General.

Table 2: State and Federal Elected Officials by Race

Level	Total Officials	White	Black	Latino	Asian
U.S. Senate & House	38	25 (2D, 23R)	5 (5D)	8 (6D, 2 R)	0
Statewide	27	25 (25R)	0	2 (R)	0
State Legislature	181	110 (16D, 94R)	19 (18D, 1R)	46 (44D, 2 R)	4 (2D, 2R)
Total, all officials	246	160 (18D, 142R)	25 (24D, 1R)	56 (50D, 6R)	4 (2D, 2R)
% of all officials		65.0	9.8	22.8	1.6
% of Population		41.2	12.9	39.7	5.2

Sources:

State Legislature: <https://apps.texastribune.org/features/2020/2021-texas-legislature-representation/>

Black Congress: <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-State-and-Territory/>

Latino Congress: https://naleo.org/wp-content/uploads/2019/12/2019_National_Directory_of_Latino_Elected_Officials.pdf#page=22

Total statewide elected officials: <https://www.sos.state.tx.us/elections/voter/elected.shtml>

Ethnicity of Statewide elected officials: photographs on internet, NALEO

254. Table 3 demonstrates that the correlation of race and party choice was not confined to officeholders, but pervaded the public, that there have been no sustained trends since the millennium, and that polarization by race is quite similar in state and presidential contests. Between a quarter and a third of white voters have supported the Democratic party candidates throughout, along with between 83% and 98% of Black voters, and between 50% and 70% of Latino voters. The exceptions are the four-way gubernatorial contest in 2006 and certain contests (2000 and 2012 presidential and 2002 governor and senator) when there were no available exit polls for all ethnic groups and different polling organizations only polled Latinos. Even so, the results are not very different from the rest of the pattern. Asian-Americans in Texas only became a large enough percentage of the population in Texas for national polling organizations to include them as a separate group or consolidated with an “other” category in 2018. If the 2020 results hold, the pattern of Asian voter support for Democratic candidates will continue to resemble that for Latino voters.

Table 3: Democratic Support from Ethnic Groups in Exit Polls (Percentages)

Year	Ethnic Group				
	White	Black	Latino	Asian	Other
President					
2020 Pres.	33	90	58	63	42
2016 Pres.	26	84	61	72	
2012 Pres.			70		
2008 Pres.	26	98	63		
2004 Pres.	25	83	50	48	
2000 Pres.			65		
Off-Year					
2018 Sen.	31	90	69	52	
2014 Gov.	25	92	55		
2012 Sen.			65		
2010 Gov.	29	88	61		
2006 Gov.	24 (31 others)	63 (19 others)	41 (27 others)		
2002 Gov.			85		
2002 Sen.			79		

Sources:

2020: <https://www.washingtonpost.com/elections/interactive/2020/exit-polls/texas-exit-polls/>2018: <https://www.washingtonpost.com/graphics/2018/politics/voter-polls/texas.html>2016: <https://www.cnn.com/election/2016/results/exit-polls/texas/president>2014: <https://www.cbsnews.com/elections/2014/governor/texas/exit/>2012: https://americasvoice.org/press_releases/new-poll-how-texas-latino-and-new-citizen-voters-influenced-the-2012-elections/2010: <http://www.cnn.com/ELECTION/2010/results/polls/#TXG00p1>2008: <https://www.nytimes.com/elections/2008/results/states/exitpolls/texas.html>2006: <https://www.cnn.com/ELECTION/2006/pages/results/states/TX/G/00/epolls.0.html> (others = Kinky Friedman, Carole Keeton Strayhorn)2004: <https://www.cnn.com/ELECTION/2004/pages/results/states/TX/P/00/epolls.0.html>2002: https://wcvi.org/latino_voter_research/polls/tx/2002/exit_results02.html2000: https://wcvi.org/latino_voter_research/polls/tx/2000/latino_vote_for_candidates.html

255. The current and continuing furor over “critical race theory” and banning books that focus on the history of minorities or discrimination from k-12 schools, state universities, and public libraries provides a more qualitative index of the climate of racial politics. A sense of the controversy may be gleaned from, for example, the following articles:

- Duncan Agnew, “GOP lawmakers want to ban ‘woke philosophies’ like critical race theory in Texas schools,” *Texas Tribune*, May 5, 2021, <https://www.texastribune.org/2021/05/05/texas-critical-race-theory-schools-legislature/>.
- Patrick Svitek, “Texas public schools couldn’t require critical race theory lessons under bill given House approval,” *Texas Tribune*, May 11, 2021, <https://www.texastribune.org/2021/05/11/critical-race-theory-texas-schools-legislature/>.
- Kate McGee, “Texas’ divisive bill limiting how students learn about current events and historic racism passed by Senate,” *Texas Tribune*, May 22, 2021, <https://www.texastribune.org/2021/05/22/texas-critical-race-theory-legislature/>.
- Kate McGee, “Texas educators worry bill limiting the teaching of current events and historic racism would ‘whitewash history,’” *Texas Tribune*, May 26, 2021, <https://www.texastribune.org/2021/05/26/texas-teachers-critical-race-theory-legislature/>.
- Kate McGee, “Texas ‘critical race theory’ bill limiting teaching of current events signed into law,” *Texas Tribune*, June 15, 2021, <https://www.texastribune.org/2021/06/15/abbott-critical-race-theory-law/>.
- Valeria Olivares and Talia Richman, “Dan Patrick wants to fight critical race theory by ending tenure at Texas’ colleges, universities,” *Dallas Morning News*, Feb. 18, 2022, https://www.dallasnews.com/news/education/2022/02/18/dan-patrick-wants-to-fight-critical-race-theory-by-ending-tenure-texas-colleges-universities/?utm_source=Newsletter&utm_medium=email&utm_content=Dan+Patrick+takes+on+college+tenure%2C+check+your+baby+formula%2C+Grigsby+on+At+Last+program%3A+Your+Friday+evening+roundup&utm_campaign=EveningRoundup_02182022&vgo_ee=2vPR0tE9vKeN0%2BofLVLmF1J%2BdLZKqRZDQ5JtGHiC%2Bnc%3D.

F. Background and Other Actions of Decisionmakers

256. The sixth and seventh factors are the **background and other actions of key decisionmakers and the legislature as a whole**, because they may reflect on their motives in particular instances. Sponsors of bills are extraordinarily important in the Texas legislature, not only drafting the bills, but presenting them in hearings and on the floor, answering critics, and negotiating with interested parties. Almost unique to Texas is the central role of the Lieutenant Governor, who presides over the state senate, appoints senators to committees at will, raises money to donate to favored candidates, and at least in the current instance, intervenes not only in general elections, but also in party primaries to shape the senate’s future actions. The backgrounds and other actions of these key decisionmakers are keys to understanding the nature of and intent behind bills, even more than in most legislatures.

257. The 87th sessions of the Texas Legislature were among the most conservative in the state’s modern history, particularly on matters related to race. On the same day in the 2021 regular

session that the startling conference committee report on S.B. 7 began to be debated, the Senate killed a bill by Rep. Garnet Coleman (D-Houston), who is Black, to restore the state Office of Minority Health Statistics and Engagement, which had been defunded in 2017, under the new title of “Office of Health Equity.” The purpose of the bill was to centralize information about health disparities by race and gender, organize funding and grants, and work with existing local and federal agencies to promote access to care. Sponsors noted that the State had collected demographic statistics on only 3% of the Covid cases in the state, although data on hospitalizations and deaths by race were more complete. Coleman decried the lacunae, saying “The way to make the future better for people who are at risk for these illnesses is to use surveillance to go in and try to eliminate illness or intervene so people live longer.” The bill passed the House as part of a bipartisan package on health care, but it was not included on the Senate Calendar. It then got caught up in the “critical race theory” controversy, for when it was considered in the House, Rep. Jeff Cason (R-Bedford), who is white, objected to the establishment of an agency to study health equity.

Today, we gather here voting on legislation that assumes our health care system is institutionally racist, and that certain people are oppressed when receiving health care due to their gender or color of their skin. No one in America is turned away from a hospital. Health care has been open to all who seek it.

Rep. Jarvis Johnson (D-Houston), who is Black, later reacted. Opponents of the bill, which Johnson co-sponsored, “don’t want to know the truth about health disparities and inequities. They don’t want to know that — if you tell them that, they gotta do something about it.”⁴³⁰

258. Rep. Johnson was also the author of another bill that went nowhere during this session of the legislature, H.B. 36/S.B. 128, to eliminate the Texas State holiday called “Confederate Heroes Day,” which was introduced and died in committee. In the Senate, it met its silent death in the State Affairs Committee, chaired by Sen. Bryan Hughes, principal sponsor of S.B. 1.⁴³¹ Along with Sen. Paul Bettencourt, the author of 7 election bills in the 2021 regular session, some of which became provisions of S.B. 1, Sen. Hughes was a co-sponsor of S.B. 1416, which would have required supermajority votes in the Legislature to remove monuments, plaques, and portraits that were placed in the Capitol complex 25 or more years ago – in other words, S.B. 1416 would have protected Confederate monuments. The bill, along with its companion bill, H.B. 2571, did not get a hearing, but it indicates the sympathy of the two election reformers with

⁴³⁰ Marissa Martinez, “Amid a pandemic with unequal impact, a proposal for a new Office of Health Equity died in the Texas Senate/Democratic lawmakers wanted to replace a defunded agency by creating a new office that would look at health inequities across the state. But after Republicans pulled it into ongoing debates about transgender rights and critical race theory, the bill died in the Senate.” Texas Tribune, May 28, 2021, <https://www.texastribune.org/2021/05/28/texas-legislature-office-health-equity/>; <https://capitol.texas.gov/tlodocs/87R/analysis/pdf/HB04139H.pdf#navpanes=0>.

⁴³¹ Dave Lieber, “Texas lawmaker shares his pleas with colleagues to end Confederate Heroes Day. Is anyone listening?/ The Watchdog shows how state lawmakers lobby one another for pet bills.” Dallas Morning News, April 23, 2021, <https://www.dallasnews.com/news/watchdog/2021/04/23/texas-lawmaker-shares-his-pleas-with-colleagues-to-end-confederate-heroes-day-is-anyone-listening/>; <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB36>.

preserving markers of Texas's proslavery history.⁴³² The legislature also failed to consider a bill by Rep. Rafael Anchia (D-Dallas) that would have facilitated removing the seven Confederate monuments on display at the state Capitol.⁴³³

259. One bill that Sen. Hughes did not kill, but instead authored, S.B. 3 of the first special session of the 2021 legislature, amended the so-called "critical race theory" law, which he had also authored, passed in the regular session, to strip out most mentions of women and people of color that had previously been required to be treated in the k-12 social studies curriculum – Cesar Chavez, Dolores Huerta, Martin Luther King, Jr., Susan B. Anthony, and Frederick Douglass among them. It also removed the requirement to teach "the history of white supremacy, including but not limited to the institution of slavery, the eugenics movement, and the Ku Klux Klan, and the ways in which it is morally wrong." The bill passed the Senate in the first special session.⁴³⁴ To a denial that racial discrimination has been a deep societal problem in America, Sen. Hughes added blinders to documents that might convince students otherwise.

260. The author of the 6-weeks abortion bill with the unusual enforcement mechanism, Sen. Hughes was rated the most conservative member of the Texas Senate in the well-known quantitative scoring rankings of Prof. Mack P. Jones of the Rice University Political Science Department and Rice University's James A. Baker III Institute for Public Policy. Rep. Briscoe Cain, author of H.B. 6, was ranked the most conservative of the 150 members of the Texas House by the same index, and Rep. Andrew Murr, the author of H.B. 3, the 23rd most, of 83 Republican members.⁴³⁵

261. Because the Lieutenant Governor in Texas enjoys power over the legislative process that is unparalleled in state governments in the U.S., the views of Lt. Gov. Dan Patrick also deserve attention. Entering the Senate as a "rabble-rousing outsider" in 2007, Patrick made his mark, in part, by pushing through legislation banning "sanctuary cities," a racially-tinged cause. After upsetting the relatively moderate Republican David Dewhurst for Lieutenant Governor in 2014,

⁴³² <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB1416>.

⁴³³ <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=HB1186>; Alex Brisenno, "Texas Legislature renews fight over removing Confederate monuments, other historical markers/Dallas Democratic Rep. Rafael Anchia's bill would remove Confederate portraits, monuments and artillery from the state Capitol and its grounds." *Texas Tribune*, April 19, 2021, <https://www.dallasnews.com/news/politics/2021/04/19/texas-legislature-renews-fight-over-removing-confederate-monuments-other-historical-markers-92/>.

⁴³⁴ <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87I&Bill=SB3>; Isabella Zou, "Texas Senate bill seeks to strip required lessons on people of color and women from 'critical race theory' law/the bill would also remove a requirement to teach that white supremacy is 'morally wrong.' One Democratic lawmaker said the bill's attempts could lead to a 'frightening dystopian future.'" *Texas Tribune*, July 9, 2021, https://www.texastribune.org/2021/07/09/texas-critical-race-theory-schools-legislation/?mc_cid=92258f9d4b&mc_eid=78249492c1.

⁴³⁵ Patrick Svitek, "The Texas GOP lawmaker behind the abortion ban, voting restrictions bill and more/State Sen. Bryan Hughes authored the six-week abortion ban and the elections bill and carried other conservative priorities that grabbed national attention." *Texas Tribune*, Sept. 17, 2021, <https://www.texastribune.org/2021/09/17/texas-abortion-ban-voting-bryan-hughes/>; Mack P. Jones, "Analysis: After months of legislating, ranking the 2021 Texas House and Senate from right to left/These rankings across the ideological spectrum are based on roll-call votes in the Texas House and Senate during this year's regular and special sessions." *Texas Tribune*, Nov. 3, 2021, <https://www.texastribune.org/2021/11/03/texas-house-senate-right-left/>.

Patrick has worked carefully to install more socially conservative Republicans in the state senate, for example endorsing five candidates for open senate seats in the 2022 Republican primaries.⁴³⁶ Termed “the GOP’s leading – and unapologetic – culture warrior” by the Austin American-Statesman, Patrick often makes extreme, unfactual statements, as when he claimed that unvaccinated Black Texans were to blame for a Covid surge.⁴³⁷ It has been widely noted that Lt. Gov. Patrick has threatened to push through as a “top priority” a bill abolishing tenure at Texas state universities for anyone who teaches “critical race theory,” and that he was an avid supporter of banning the teaching of such doctrines in k-12 state schools.⁴³⁸

G. Statements by Important Participants

262. The eighth factor, **statements** by important participants, which are referred to as “smoking gun” evidence if they are sufficiently incriminating, are difficult to come by, especially for laws passed in the very recent past. It was surprising to hear proponents of voter ID laws in Texas say publicly that such laws were aimed at “illegal aliens” (paragraphs 99, 107). Although I have not found any forthright admissions of racial motives by proponents of S.B. 1, such “smoking gun” statements are rare. However, the very vehemence of their denials may be instructive. “The lady doth protest too much, methinks,” says Hamlet’s remarried mother Gertrude of an actor who swears she will never remarry after the death of her husband. When Lt. Gov. Dan Patrick shouts at a press conference “You’re questioning my integrity and the integrity of the governor and the integrity of Republicans who voted for this. You are in essence, between the lines, calling us racists, and that will not stand,” or when Speaker Dade Phelan prohibits members of the House from using the word “racism” during the final debate on S.B. 1, one has to wonder whether denial and admission are two sides of the same coin. (paragraphs 216, 238)

H. Institutional Rules

263. State policies and formal and informal **institutional rules** constitute the ninth general category of relevance. Procedural irregularities and actions that severely limited democratic debate were pervasive during the consideration of S.B. 1 and its predecessors. Many members of the public were shut out of hearings because the Legislature refused to allow virtual testimony, because hearings were canceled or delayed or abruptly called, and because bills were drastically altered at the last moment, making previous public comments irrelevant. Legislators were shut out of committees or ignored, and last-minute bills and constricted debate times meant that many

⁴³⁶ Patrick Svitek and James Barragan, “Lt. Gov. Dan Patrick, Trump’s man in Texas, has quietly amassed influence – to the detriment of fellow Republicans/ Patrick urged former Gov. Rick Perry to mount a challenge to Gov. Greg Abbott, who is seeking a third term. He’s taken the already considerable power concentrated in the state’s No. 2 job to another level, forcing opponents from races and tightening his grip on the Senate.” Texas Tribune, Feb. 18, 2022, https://www.texastribune.org/2022/02/18/dan-patrick-donald-trump-texas-rick-perry-greg-abbott/?utm_source=Texas+Tribune+Newsletters&utm_campaign=fa5d941c4a-trib-newsletters-top-story-alert&utm_medium=email&utm_term=0_d9a68d8efc-fa5d941c4a-101201265&mc_cid=fa5d941c4a&mc_eid=78249492.

⁴³⁷ Editorial, “Patrick is best for hard-right,” *Austin American-Statesman*, Feb. 22, 2022, https://statesman-tx.newsmemory.com/?token=13349df33577e329dba408361a578991_6215118e_c99a069&selDate=20220222.

⁴³⁸ Megan Menchaeca, “Critical Race Theory/Patrick pledges to end tenure/Plan targets professors who teach certain topics,” *Austin American-Statesman*, Feb. 19, 2022, https://statesman-tx.newsmemory.com/?token=cd49038f7b8ab8116751883a3d59432a_62111ba8_c99a069&selDate=20220219.

facets of the complex bills were never thoroughly considered. Minority alternatives never received hearings or serious consideration. Norms and rules were broken, time after time. Probably most important was the Senate's decision after Republicans lost a Senate seat in 2020 to reduce the number of votes it took to take up a bill. If that change had not been made, it is extremely doubtful that as radical a change as S.B. 1 could have passed or would even have been seriously considered. (paragraphs 196-202)

I. Impact

264. Whether or not elections have been held under the system being evaluated, there is a factor, the **impact** of the adopted rule, that overlaps with several of the previous nine. This may be prospective, concerned with the expected impact of a proposed law, even before it goes into effect or even if it initially fails. The rationale for using effect as a measure of intent is that, especially with electoral rules, framers may be assumed to be aware of and calculate the consequences of their actions carefully and to be quite good at such calculations. Often, the legislative record, official or unofficial, will make clear that the impact in question was fully foreseen, at least by opponents of the measure. (paragraphs 203-216) In considering the impact of a measure, it is necessary to pay attention not only to individual provisions, but also to the bill as a whole. During the first disfranchisement in the late 19th and early 20th centuries, the constitutional conventions called with the widely-advertised purpose to disfranchise Blacks, the adoption of poll taxes and/or literacy tests by referendum, or, as in Texas, the adoption of two potent disfranchisement measures (a poll tax and the all-white primary) all sent signals to both election officials and voters that the system as a whole had changed.⁴³⁹ In the case of S.B. 1, restrictions on applying for VBM; on the availability of drop boxes, drive-thru voting, and the hours of early voting; on assistance to voters with disabilities, including fluency in English; and on straight-ticket voting; and reductions on controls over partisan poll watchers should be added together in any assessment of how S.B. 1 will affect minority voters or potential voters. Particularly after the upsurge of use of VBM and other innovative means of voting in 2020, these procedures, combined, will likely discourage minorities from voting.

J. Hypotheses

265. Historians and social scientists implicitly or explicitly reach their conclusions about explanations of events or the intentions of actors by testing competing hypotheses against each other. To assist the finder of fact in this case, it may be useful to state the competing hypotheses about the intent of Texas legislators in framing and adopting S.B. 1 and to summarize the evidence for and against each position. There are essentially three hypotheses:

- The legislature acted in response to evidence of systematic ballot fraud.
- The legislature acted to guard against the possibility of future fraud, even if such fraud had never taken place in Texas.
- The Republican-controlled legislature put forth proposals that members knew would disproportionately diminish minority voting, because race and party were so closely

⁴³⁹ Kousser, *Shaping of Southern Politics*, 196-209.

correlated in Texas that anything that decreased minority, particularly Black voting, would increase the probability that Republicans would continue to win elections.

266. The first hypothesis is easily rejected. Elections Director Keith Ingram told the legislature, in a much-repeated statement, that the 2020 election in Texas had been “smooth and secure;” besides the usual audits, there was a special audit of four urban counties that found no inexplicable disparities with the initially reported results; the Harris County Election Security Task Force found no irregularities; there were no documented public charges of widespread fraud; Attorney General Paxton closed only 16 minor fraud cases in 2020; and chief proponents of S.B. 1 carefully avoided saying that the reason they proposed the law was that there had been demonstrated cases of massive fraud. (paragraphs **117, 121, 180, 185-186**)

267. The second hypothesis is the line adopted by proponents of such laws across the country when they realize that they cannot produce hard evidence of large enough scale fraud to justify major changes in state election codes. That is what they said in Texas. For example, House Elections Committee Chair Briscoe Cain, admitting that there was no “specific incident, event, or a crime” that motivated H.B. 6, and that he accepted Director Ingram’s statement that the 2020 election had been “secure,” portrayed the intent of the bill as purely prophylactic: “. . . we don’t need to wait for – for bad things to happen.” Similarly, Lt. Gov. Dan Patrick remarked at a news conference that “People in America have lost faith in their elections. We have to resolve that issue in this country and in this state. That’s why SB 7 is needed.” (paragraph **186**)

268. The evaluation of the second hypothesis turns partly on the plausibility of the arguments for each provision, since each lacks evidence from Texas’s experience to justify it. The ID requirement for applying for VBM, which we know will prohibit from using VBM those voters whose ID numbers are not on record at the county supervisors’ offices, only supplements the signature matching requirement. It puts all those voters whose records, through no fault of their own, are not held by election officials, on a different plane with respect to voting, which seems the definition of inequality, and it has already resulted in mass confusion and probable disfranchisement of up to a third of those who have applied for absentee ballots in various urban counties.⁴⁴⁰ (paragraph **211**) And it is easier to steal numbers on driver’s licenses or Social

⁴⁴⁰ See, e.g., Amy Gardner, “Texas counties reject unprecedented numbers of mail ballots ahead of March 1 primary under restrictive new law/Some counties have seen rejection rates improve as voters learn of new requirements, including ID numbers with ballots,” *Washington Post*, Feb. 11, 2022, <https://www.washingtonpost.com/politics/2022/02/11/texas-voting-law-ballots-rejected-poll-watchers/>; Cayla Harris, “Mail ballot rejection rates still high as Texas early voting kicks off,” *Houston Chronicle*, Feb. 16, 2022, https://www.houstonchronicle.com/news/legislature/article/Mail-ballot-rejection-rates-still-high-as-Texas-16924833.php?sid=599cec1b2ddf9c6a35e369a7&utm_source=newsletter&utm_medium=email&utm_content=&utm_campaign=HC_TexasTake; Philip Jankowski, “Some election woes persistent in North Texas as mail-in ballot deadline passes for March 1 primary,” *Dallas Morning News*, Feb. 22, 2022, https://www.dallasnews.com/news/politics/2022/02/22/some-election-woes-persistent-in-north-texas-as-mail-in-ballot-deadline-passes/?utm_source=Newsletter&utm_medium=email&utm_content=DART+limits+services+anticipating+winter+weather%2C+election+woes%2C+Uptown+Dallas+shootings%3A+Your+Wednesday+morning+roundup&utm_campaign=MorningRoundup_02232022&vgo_cc=2vPR0tE9vKeN0%2BofLVLmF1J%2BdLZKqRZDQ5JtGHic%2Bnc%3D.

Security cards than it is to manufacture a signature. If this provision is aimed at preventing future fraud, it is likely to be ineffective.

269. Banning drop boxes makes it more difficult for anyone with inflexible hours, especially in large metropolitan counties, where the many minorities in Texas live. And the fact that they can use mailboxes, if they can find them and if the mail is trustworthy, undermines the argument that somehow reducing the availability of drop boxes will inhibit some future fraud. (paragraph **236**)

270. In a 24/7 world, it would not be difficult to recruit poll workers or watchers, and there is no logical reason to believe that people are more likely to commit fraud at polling places in the dead of night or that banning voting after “normal business hours” will effectively prevent election schemes. (paragraph **217-218**). It will just make voting more difficult for those with irregular hours of working. (paragraph **221, 232**)

271. Why would anyone believe that it would be an effective means of preventing fraud to prohibit election officials from sending out applications for absentee voting or assisting third-party-voter-registration-organizations from doing so, while allowing candidates and political parties from sending out as many as they wish? How could one look at such an inconsistent provision and conclude anything other than that the provision’s supporters wished for partisan control of who votes absentee and to strip such power from election officials or organizations that serve minority voters, voters with disabilities, or other voter interest groups? (paragraph **162**)

272. Finishing the elimination of straight-ticket party voting has no plausible connection to inhibiting fraud. It merely makes it less likely that down-ballot candidates like the 17 Black female judges elected in 2018 in Harris County would be elected. (paragraphs **131, 195**)

273. Establishing onerous burdens for those who assist voters with difficulties reading English or with disabilities would only prevent fraud if the stereotype of helpless voters and predator assistants is valid. (paragraph **219**) If one were really worried about fraud, then one would protect the most dependent, those who live in care homes, by establishing temporary polling places there, as 2017’s H.B. 658 did. (paragraphs **91, 222**)

274. Reducing restraints on poll watchers, who already had adequate opportunities to observe voting and counting, seemed less an effort to oversee as it was an opportunity for intimidation and chaos, both of which had well-documented examples in Texas. (paragraphs **169, 176-179, 204-205**)

275. If these arguments are correct, then the provisions of S.B. 1 would not effectively combat future fraudulent practices, even if we assume that there might be an attempt, at some future time, to engage in such practices. This casts doubt on the second hypothesis, which leaves the third.

276. Charges of discriminatory vote suppression in the passage of S.B. 1 by minority and white Democrats do not prove that the bill’s proponents had such motives, but they do show that Republicans had been aware of the necessity of balancing the high likelihood of disadvantaging minority voters against the importance of preventing notional fraud sometime, somewhere in the

future. The charges have been rehearsed repeatedly in this report (e.g., in paragraphs **203-205, 208-209, 212-217**) and the exhaustive review under the 10-factor analysis above examines the case in detail. By laying out the evidence and arguments in favor of this hypothesis and the lack of evidence for the other two, I have completed my task on the intent part of this report, leaving the evaluation of that evidence, of course, to the factfinder.

X. Is S.B. 1 Likely to Have a Discriminatory Effect?

277. Senate Report 97-417 sets out seven “typical factors” and two “additional factors” that might be used to prove a violation of Section 2 of the Voting Rights Act.⁴⁴¹ As the Report notes at p. 28, n. 113, “These factors are derived from the analytical framework used by the Supreme Court in *White* [*v. Regester*, 412 U.S. 755 (1973)], as articulated in *Zimmer* [*v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)].”⁴⁴² Because *White v. Regester* concerned at-large elections in Dallas and San Antonio, these factors are not entirely congruent with the particulars of state-wide election laws. Moreover, political conditions have changed a great deal since 1973 – the Latino population has grown markedly in many states, more minorities have been elected to office, and the Republican Party has replaced the Democratic Party as the dominant one in the South. As a consequence, some of the “Senate factors,” such as factor #4 on slating processes, may be ignored in this case. To avoid excessive repetition, the Senate factors will be treated summarily here.

A. History of Racial Discrimination

278. Texas has an extensive history of racial discrimination, especially in elections, and that history has continued to be documented in legal cases through the 20th and 21st centuries. (paragraphs **56-78**)

B. Racially Polarized Voting

279. Voting in Texas continues to be quite racially polarized (paragraph **254** and **Table 3**).

C. Voting Practices that Tend to Enhance the Opportunity for Discrimination

280. The State and localities in Texas have used such practices, such as at-large elections. From 1957 through 2020, at-large elections were struck down in 358 jurisdictions as a result of legal action or threatened legal action, enabling minorities finally to be elected. Racial gerrymandering was alleviated in 193 instances. Another 147 cases involved polling place changes, voting materials available only in English, or other instances of “vote denial.” Voting rights laws, including Section 5 before 2013, exposed racial discrimination in local governments throughout Texas. (paragraph **19**) Because Blacks and Latinos are less likely to have jobs that

⁴⁴¹ The factors are laid out in S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29, conveniently available at <https://www.justice.gov/crt/section-2-voting-rights-act>.

⁴⁴² For discussions of *White v. Regester* and the connections of that case to the 1982 amendments to the Voting Rights Act, see Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, N.C.: Univ. of N.C. Press, 1999), 56-58, 336, 341-42.

provide flexible hours and more likely to depend on public transportation, bans on drop boxes and extended hours for voting are likely to have a disproportionate effect on their political participation. Because they are less likely to own computers or have internet connections, they are likely to be disproportionately disadvantaged by restrictions on sending out absentee ballot applications. Discouraging assistance to voters who do not read English well will likely decrease participation among Spanish speakers.

D. Minorities Bear the Effects of Discrimination

281. Blacks and Latinos are less affluent than whites in Texas. According to the 2019 American Community Survey, white median household income was \$53,286, compared to \$36,464 for Black households and \$37,019 for Latino households.⁴⁴³ In other words, the average white Texas household receives nearly 50% more income than the average Black or Latino household. The deficits extend to education, as well. While in the 2010 5-year American Community Survey, which is the most recent data available on the Census website for this statistic, only 8.9% of whites finished less than 9 years of schooling, compared to 25.4% for Latinos and 4.1% for Blacks. A full 27.4% of whites have at least bachelor's degrees, compared to 11.2% of Latinos and 18.9% of Blacks.⁴⁴⁴

282. Racial inequality in Texas is pervasive in healthcare. In 2018, 14% of white Texans aged 19-64 were uninsured, compared to 21% of Blacks and 37% of Latinos. Twenty-three percent of whites, compared to 29% of Blacks and 45% of Latinos had no usual source of care – no doctor, no clinic, no HMO.⁴⁴⁵ The age-adjusted prevalence of disability for whites in Texas was 26.1%, compared to 28.5% for Blacks and 30.0% for Latinos.⁴⁴⁶

E. Racial Appeals

283. The shrill and pervasive controversy in the Texas Legislature, school boards, and public libraries about “critical race theory” has brought back issues thought to be settled long ago. While many other southern states have found a way to remove Confederate monuments, they still stand tall in Texas. A discussion over the provocative book “Forget the Alamo” had to be canceled because of pressure from Lt. Gov. Dan Patrick.⁴⁴⁷ Racial appeals and issues still sizzle in Texas. (paragraphs **257-261**)

⁴⁴³ Table DP03.

⁴⁴⁴ Table DP02.

⁴⁴⁵ Commonwealth Fund 2020 Scorecard on State Health System Performance, <https://www.commonwealthfund.org/publications/scorecard/2020/sep/2020-scorecard-state-health-system-performance>.

⁴⁴⁷ Jordan Bontke, “Lt. Gov. Patrick calls for a ‘Forget the Alamo’ panel. Author suspects ‘debunking’ effort,” CBS Austin, July 22, 2021, <https://cbsaustin.com/news/local/lt-gov-patrick-calls-for-a-forget-the-alamo-panel-author-suspects-debunking-effort>.

F. Election of Minorities to Office

284. Whites still dominate officeholding in Texas, holding 65% of state or federal elective offices, far above their 41.2% proportion in the population. (paragraph **253** and **Table 2**)

G. Responsiveness to the Particularized Needs of Minorities

285. Texas is the largest state that has refused to expand Medicaid under the Affordable Care Act. The result, as shown in paragraph **282**, is that Blacks and Latinos are much more likely than whites to have no medical insurance, and that Texas has the largest number of uninsured adults of any state in the country. This is despite the fact that the program would be almost entirely paid for by the federal government. “The chasm between Texans and their elected officials has never been more stark,” according to Patrick Bresette, executive director of the Children’s Defense Fund-Texas.⁴⁴⁸

286. School segregation still exists in Texas, as more than a million Black and Latino students in the state learn in classrooms with few white peers.⁴⁴⁹

XI. Five “Guideposts”

287. Since there have not been many cases that have tried to apply the *Brnovich* “guideposts,”⁴⁵⁰ it is difficult to know what sort of evidence experts should gather and how it should be analyzed. But there is a lot of evidence in this paper that might be considered relevant.

A. Size of the Burden

288. The restrictions on methods of voting relied on by so many Texans, especially by minorities who lived in urban areas, in 2020, may be considered a substantial burden. S.B. 1 makes it more difficult to apply for an absentee ballot, even for the restricted class of people who are allowed to use one in Texas. Election officials may not even be able to advertise their availability. (paragraph **209**) The requirement to provide identification numbers that election officials may not be able to match and to cure mistakes on applications for absentee ballots in person may deter disabled and other persons from voting. (paragraph **211**) Increasing penalties and multiplying bureaucratic paperwork that needs to be filed in order to assist voters, therefore multiplying the chances of errors, may discourage many people from providing such assistance and therefore disfranchise people who would otherwise be able to vote in person, at curbside, or absentee. (paragraph **210**) Prohibiting the use of drop boxes, drive-thru voting, and voting in temporary or unusual structures, and restricting hours in urban areas will decrease the opportunities to vote, particularly for those who have inflexible schedules. Making it even more difficult to vote a straight-party ticket will increase wait times at in-person polls and therefore, increase lines. All of these burdens are more than additive. In huge metropolitan areas, they are

⁴⁴⁸ Karen Brooks Harper, “Medicaid expansion for uninsured Texans had bipartisan support, but lawmakers won’t pass it this session,” *Texas Tribune*, May 7, 2021, <https://www.texastribune.org/2021/05/07/texas-medicaid-expansion-legislature/>.

⁴⁴⁹ <https://www.tpr.org/show/the-source/2019-01-02/segregation-still-exists-in-texas-schools>.

⁴⁵⁰ *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2338-41 (2021).

multiplicative, reducing opportunities to vote by every means, and therefore having a larger expected effect than any of them singly.

B. Widespread Use and Change from 1982

289. A political science study in 2018, updated in 2020 and widely discussed in Texas newspapers and in the Legislature, found Texas the most difficult state in which to vote. So any restriction that S.B. 1 added, and it added many, began from the lowest baseline in the country. The study suggests that provisions should not be considered one at a time, but should be viewed as a whole, from the point of view of a voter attempting to minimize the difficulty of a civic task. Compared to all but two other states, Texas had become more restrictive between 1996 and 2016. That is, other states had made voting more convenient, while Texas had resisted change. (paragraphs 79-81)

290. The mere growth of the population in Texas since 1980 – it had more than doubled between 1980 and 2020 – and its concentration in dense metropolitan areas ought to have encouraged more actions by the state to make voting easier. (paragraphs 82-85) Before Covid, 33 states and the District of Columbia had instituted no-excuse absentee voting, and 13 more changed their rules to allow that because of Covid. Not Texas. (paragraph 156) State officials bitterly fought nearly every accommodation that county clerks, particularly in Harris County, sought to make in order to make voting safer. (paragraphs 157-179) And as soon as the election was over, they sought to clamp down on every accommodation for a voter that officials in the multiethnic metropolises might eventually devise.

291. In fact, by finishing the repeal of straight-ticket voting, which had been available in 1982, the framers of S.B. 1 made voting more difficult and lines potentially longer than in 1982.

C. Size of the Disparate Effects on Different Ethnic Groups

292. The expected differential impact different ethnic groups has been reviewed in paragraphs 246-247, 264 and 277-286 under the *Arlington Heights* and Senate Factors frameworks. In particular, I specify in paragraph 247 just how specific provisions of S.B. 1 will likely affect minority ethnic groups. But I stress again that, as was the case with 19th century disfranchising laws, the whole may be expected to be greater than the sum of the parts of a law. (paragraph 62)

D. Overall Opportunities to Vote

293. Texans have increasingly fewer opportunities to vote than citizens in other states, and since S.B. 1 closed off so many potential avenues of change, and since population growth, particularly by minorities, shows no signs of slowing, Texas is likely to fall further behind other states in ease of voting. In the 87th Legislature, the Republican leadership was so antagonistic to proposals, bundled into the Barbara Jordan Act, that other states have adopted or are moving to adopt that it could not even get a hearing, much less a vote on the floor. As the state has grown since 1980, keeping the same formal opportunities to vote did not keep up. In-person voting at local precincts could not accommodate such a huge, urbanized population. Like the Red Queen, Texas would have had to run faster just to keep up. But it did not.

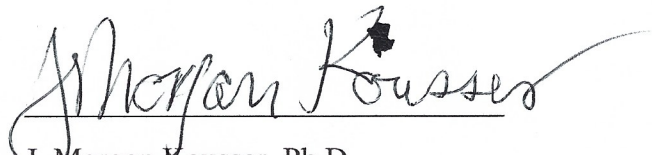
E. Strength of the State Interests

294. Since there was no demonstrated fraud, combating it could not have been a state interest. (paragraphs **110-126, 185**) Since there was no strong demand from the people, not even from Republican voters, responding to their pleas to guard against fraudulent Texas elections could not have been an interest. (paragraphs **186-188**) Since the provisions of the law are unlikely to deter fraud, that could not have been an interest. (paragraphs **268-275**) In fact, it can be argued that the interest pursued in the parallel struggles for voter ID and S.B. 1 was not that of the state, but of the Republican Party (paragraphs **127-129**), the party that was the choice of two-thirds of whites, but not of more than two-thirds of minorities (paragraph **254**), and that the overall purpose was, as the title of this report puts it, to repress racial and partisan opponents and to rally the core of the Republican voters.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

I am aware that discovery in this case is ongoing, and I reserve the right to continue to supplement the foregoing report in light of additional facts, testimony, and/or materials that may come to light.

Executed this February 28, 2022, in Los Angeles County, California.


J. Morgan Kousser, Ph.D.

Appendix A

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GENERAL INFORMATION

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EDUCATION AND HONORS

Ph.D., Yale University, 1971, History
M.Phil., Yale University, 1968, History
M.A., Oxford University, 1984 (honorary)
A.B., Princeton University, 1965 (*summa cum laude*, Phi Beta Kappa), History
Woodrow Wilson Fellow, 1965-66

EMPLOYMENT

California Institute of Technology

Professor of History and Social Science, 2020 - present
Professor of History and Social Science, 1980-2020
Professor of History, 1979-80
Associate Professor of History, 1974-79
Assistant Professor of History, 1971-74
Instructor in History, 1969-71

Visiting and Adjunct Appointments

University of Michigan
Visiting Instructor, summer, 1980
Harvard University
Visiting Professor, fall, 1981
Oxford University
Harold Vyvyan Harmsworth Professor of American History, 1984-85
Claremont Graduate School
Adjunct Professor of History, 1993
Hong Kong Institute of Science and Technology, 2014

PUBLICATIONS

Books

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Kenneth C. Barnes, *Who Killed John Clayton? Political Violence and the Emergence of the New South, 1861-1893*, on H-Pol, H-Net Reviews, (July 1999) URL: <https://networks.h-net.org/node/9997/reviews/10532/kousser-barnes-who-killed-john-clayton-political-violence-and-emergence>.

Lee J. Alston and Joseph P. Ferrie, *Southern Paternalism and the American Welfare State: Economics, Politics, and Institutions in the South, 1865-1965*, in *The Independent Review*, 4 (Winter, 2000).

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Samuel L. Webb, *Two-Party Politics in the One-Party South: Alabama's Hill Country, 1874-1920*, in *Journal of Economic History*, 59 (1999), 234-35.

Stewart E. Tolnay and E.M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882-1930*, in *Historical Methods* 31 (1998), 171-75.

Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* in *Journal of Interdisciplinary History* 28 (1998), 484-85.

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- Daniel I. Greenstein, *A Historian's Guide to Computing*, in *Journal of Interdisciplinary History*, 27 (1996), 103-05.
- Howard N. Rabinowitz, *Race, Ethnicity and Urbanization*, in *Slavery and Abolition* 16 (1995), 267-69.
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- James Goodman, *Stories of Scottsboro*, in *Princeton Alumni Weekly* 95, #9 (Feb. 8, 1995), 20-21.
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- Robert C. McMath, Jr., *American Populism: A Social History, 1877-1898*, in *Georgia Historical Quarterly* 77 (1993), 634-36.
- Michael F. Holt, *Political Parties and American Political Development from the Age of Jackson to the Age of Lincoln*, in *Reviews in American History* 21 (1993), 207-12.
- William Cohen, *At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control, 1861-1915*, in *Slavery & Abolition* 13 (1992), 239-41.
- Loren Haskins and Kirk Jeffrey, *Understanding Quantitative History*, and Konrad H. Jarausch and Kenneth A. Hardy, *Quantitative Methods for Historians*, in *Journal of Interdisciplinary History* 23 (1992), 139-40.
- Donald G. Nieman, *Promises to Keep: African-Americans and the Constitutional Order, 1776 to the Present*, in *Journal of Southern History* 58 (1992), 704-05.
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- Gail Williams O'Brien, *The Legal Fraternity and The Making of a New South Community, 1843-1882*, in *North Carolina Historical Review*, 64 (1987), 219-20.
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- Robert F. Durden, *The Self-Inflicted Wound: Southern Politics in the 19th Century*, in *Journal of American History*, 73 (1986), 189-90.
- Alexander M. Bickel and Benno C. Schmidt, Jr., *History of the Supreme Court*, Vol. X, in *Journal of Southern History*, 52 (1986), 479-81.
- Eric Foner, *Nothing But Freedom*, in *Slavery and Abolition*, 7 (1986), 77-79.
- Alexander P. Lamis, *A Two-Party South*, in *Times Literary Supplement* (October 10, 1985).

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- Michael Perman, *The Road to Redemption: Southern Politics, 1869-1879*, in *Political Science Quarterly*, 100 (1985), 350-51.
- Catherine A. Barnes, *Journey From Jim Crow: The Desegregation of Southern Transit*, in *Constitutional Commentary*, 2 (1984), 197-202.
- Raymond Arsenault, *The Wild Ass of the Ozarks: Jeff Davis and the Social Bases of Southern Politics*, in *American Historical Review*, 90 (1985), 228-29.
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- Stephen Hahn, *The Roots of Southern Populism*, in *American Historical Review*, 89 (1984), 854-55.
- Paul Kleppner, *Who Voted?* and W. Dean Burnham, *The Current Crisis in American Politics*, in *Social Science History*, 9 (1985), 215-28.
- Patricia C. Cohen, *A Calculating People: The Spread of Numeracy in Early America*, in *American Historical Review*, 89 (1984), 203-04.
- John W. Cell, *The Highest Stage of White Supremacy*, in *Journal of American History*, 70 (September 1983), 424-25.
- David L. Kirp, *Just Schools: The Idea of Racial Equality in American Education*, in *The Public Historian*, 5, #3 (1983), 119-22.
- Anthony P. Dunbar, *Against the Grain: Southern Radicals and Prophets 1929-1959*, in *Business History Review*, 54 (1982), 608-09.
- Jody Carlson, *George C. Wallace and the Politics of Powerlessness*, in *American Historical Review*, 87 (1982), 884.
- Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second*, in *Journal of Southern History*, 48 (1982), 123-25.
- William Gillette, *Retreat From Reconstruction, 1869-1879*, in *Register of the Kentucky Historical*

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- Bruce A. Campbell and Richard J. Trilling, eds., *Realignment in American Politics*, in *Reviews in American History*, 9 (1981), 23-28.
- Paul Kleppner, *The Third Electoral Era*, in *Journal of American History* (December 1979), 670-71.
- Jonathan M. Wiener, *Social Origins of the New South: Alabama, 1865-1885* in *American Historical Review* (December 1979), 1482-83.
- Joel Silbey et al., *The History of American Electoral Behavior* in *Reviews in American History*, 7 (1979), 157-62.
- Jack Bass and Walter DeVries, *The Transformation of Southern Politics*, in *American Historical Review* (December 1978), 1368-69.
- Michael P. Johnson, *Toward a Patriarchal Republic: The Secession of Georgia* in *Journal of Interdisciplinary History*, 9 (Autumn 1978), 374-76.
- Michael Schwartz, *Radical Protest and Social Structure: The Southern Farmers' Alliance and Cotton Tenancy, 1880-1890*, in *Journal of American History* (December 1977), 811-812.
- Hugh D. Graham and Numan V. Bartley, *Southern Politics and the Second Reconstruction*, in *American Historical Review* 82 (1977), 217.
- Lawrence Grossman, *The Democratic Party and The Negro: Northern and National Politics, 1868-92*, in *Journal of Ethnic Studies*, 4 (1977), 114-117.
- John Shelton Reed, *The Enduring South*, in *Red River Valley Historical Review*, 4 (1979), 98-99.
- Louis Galambos, *The Public Image of Big Business in America, 1880-1940* in *Journal of American History* (September 1975), 437-38.
- Monroe Lee Billington, *The Political South in the Twentieth Century*, in *Political Science Quarterly*, 90 (1975), 561-562.
- Roger L. Hart, *Redeemers, Bourbons, and Populists: Tennessee, 1870-1896*, in *Journal of American History* (March 1976), 1005-06.
- James B. Murphy, L.Q.C. Lamar: Pragmatic Patriot, in *Mississippi Quarterly*, 27 (1974-75), 109-114.

Charles M. Dollar and Richard J. Jensen, *Historian's Guide to Statistics: Quantitative Analysis and Historical Research*, in *Journal of the American Statistical Association*, 67 (1972), 493.

Unpublished Works

"Tennessee Politics and The Negro, 1948-1964" (A.B. thesis, Princeton University, 1965).

POST-DOCTORAL GRANTS AND AWARDS

National Endowment for the Humanities Grant #R-9980-140, "Political Outputs in the South: Who Got What, When, Where, and Why?" January 1, 1974--May 31, 1975, \$23,641.

Graves Foundation Award, Summer, 1976

Howard Foundation Fellowship, 1979-80

National Endowment for the Humanities Grant #RO-20225-82, 1981-83, "Separate But Not Equal: A Social History of School Racial Discrimination Law in the Nineteenth Century," \$74,860.

Guggenheim Fellowship, 1985-86

Woodrow Wilson Center Fellowship, 1985-86

Haynes Foundation Grant, 1989-90

Lillian Smith Award, Southern Regional Council, 1999 (co-winner)

Ralph J. Bunche Award, American Political Science Assn., 2000 (co-winner)

Richard P. Feynman Prize for Excellence in Teaching, Caltech, 2011

Associated Students of Caltech Teaching Award, 1988-89, 2012-13

TEACHING

Undergraduate

U.S. History, Colonial - Present (many courses)
Why Were We in Vietnam?

Nuclear Weapons Policy and Star Wars
The Supreme Court
Race Relations in History and Social Science

Graduate

American Electoral Behavior
American Political Development
Race Relations in U.S. History
Social Science History
Topics in Econometrics
Writing for Social Scientists

Ph.D. Theses Directed

Gary W. Cox, "Party and Constituency in Victorian Britain" (1982)

Shawn Everett Kantor, "Politics and Property Rights: The Closing of the Open Range in the Postbellum South" (1991)

Micah Altman, "Districting Principles and Democratic Representation" (1998)

PAPERS AND LECTURES

Popular Writings

"Voting Rights: Yes ___ No ___ Maybe ___ Obstructionists Threaten to Undo 16 Years of Effort," *Los Angeles Times*, February 7, 1982.

"Jim Crow in the Voting Booth," *Los Angeles Times*, June 24, 1984.

"The District that Stretched Almost Anywhere but East," *Los Angeles Times*, June 12, 1990.

"The Open Primary Will Ruin California Politics," *Public Affairs Report*, May 1996, 7.

"Charges of bias way off target," *Sacramento Bee*, Oct. 9, 1998, B9.

"How the Supreme Court Feeds a Rumor," *Los Angeles Times*, Oct. 10, 1999, M2.

"Revamping the Doctrine of Separate and Equal," *Los Angeles Times*, March 26, 2000, M2.

Remarks at Lillian Smith Award Ceremony, *Southern Changes* 21, #4, Winter 1999, 8-11.

“The Duties of Historians,” debate on review of *Colorblind Injustice*, H-POL.

“The Supreme Court and the Undoing of the Second Reconstruction,” *National Forum*, 80, # 2, Spring 2000, 25-31.

“Proposition 77: How It Would Really Work,” *San Diego Union-Tribune*, Oct. 31, 2005, p. B7.

“Are We Better Off Redistricting by Citizen Panel?” *San Francisco Chronicle*, Nov. 13, 2011.

“The Strong Case for Keeping Section 5,” *Reuters*, Feb. 15, 2003, <http://blogs.reuters.com/great-debate/2013/02/15/the-strong-case-for-keeping-section-5/>.

“Gutting the Landmark Civil Rights Legislation,” *Reuters*, June 26, 2013, <http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation/>.

INVITED LECTURES

Universities (American)

University of Pennsylvania (1976)

California State University at Los Angeles (1977)

Harvard University (1978)

Duke University Law School (1979)

Michigan State University (1980)

University of California, Santa Barbara (1980, 1984)

University of Chicago (1980, 1984)

University of Michigan (1980)

University of California, Irvine (1981)

University of Alabama at Birmingham (1981)

Brandeis University (1981)

California State University, Fullerton (1982)

University of California, Los Angeles (1981, 1983, 1988, 1993)

University of Miami (1983)

Claremont-McKenna College (1984)

University of Maryland, College Park (1985)

University of Maryland, Baltimore County (1985)

New School for Social Research (1986)

University of Dayton (1986)

Ohio State University (1987)

Albany Law School (1988)

University of Texas, Austin (1988)
 Stanford University (1990, 1999, 2016)
 Univ. of CA, Berkeley (1991, 1999, 2020)
 Univ. of CA, San Diego (1991, 2000, 2016)
 Claremont Graduate School (1993)
 Northwestern University Law School (1993)
 Rutgers Law School, Camden (1993)
 Georgetown Law Center (1994)
 C. Vann Woodward Lecture, Henderson State College (1994)
 Yale University (1994)
 American U. Law School (1994)
 Univ. of Michigan Law School (1996, 1998)
 Univ. of Southern California Law School (1996, 2018, 2020)
 Univ. of CA, Los Angeles School of Law (1994, 1996, 1999)
 CA State Univ., San Bernardino (1999)
 Harvard Univ., Du Bois Center (1999, 2000, 2001)
 Augusta State University (1999)
 Paine College (1999)
 University of Kansas (2015)
 University of LaVerne (2000)
 University of Montana (2004)
 University of Texas, Austin, Law School (2004)
 University of Texas, San Antonio (2004, 2005)
 University of North Carolina, Chapel Hill, Law School (2006)
 University of Texas, Austin (2006)
 Duke University (2006)
 Whittier Law School (2006)
 Indiana University School of Law (2009)
 U.C.L.A. School of Law (2010)
 Hong Kong University of Science and Technology (2014)
 Kansas University (2015)
 Caltech (2016, 2020)
 University of California at San Francisco (2020)

Universities (English)

Oxford University (1984, 1985)
 Cambridge University (1984, 2009)
 University of Leeds (1985)
 University of East Anglia (1985)
 East Anglia University (1985)
 Southampton University (1985)

Warwick (1985)
Sussex, Keele (1985)

CONVENTIONS

Papers Delivered

American Historical Association (1974, 1976, 1988, 2015, 2017)

Social Science History Association (1976, 1978, 1980, 1981, 1983, 1987, 1989, 1991, 1993, 1994, 1995, 1996, 1997, 2000, 2004)

Southern Historical Association (1978, 1980, 1992, 2005, 2012)

Organization of American Historians (1981, 1984, 1986, 1990)

International Conference on Quantitative History (1982)

Association of American Law Schools (1983)

Joint Center for Political Studies Forum on Run-Off Primaries (1984)

16th International Congress of Historical Sciences, Stuttgart, Germany (1985)

Brookings Institution Conference on the 25th Anniversary of the Voting Rights Act (1990)

Continuing Legal Education Conference, Los Angeles (1990)

Voting Rights Symposium, University of San Francisco Law School (1992)

California Studies Association Convention (1994)

Midwest Political Science Association (1997, 2004)

USC/Caltech Conference, "Election Reform: 2000 and Beyond" (2001)

NAACP/MALDEF/APLAC Conference, "Making Our Communities Count: United for a Fair Redistricting Process" (2001)

AALS/APSA Conference on Constitutional Law (2002)

“The Future of the Voting Rights Act” (Columbia University Law School, 2003)

American Society of Legal History (2003)

American Political Science Association (2004, 2018)

“Who Draws the Lines: The Consequences of Redistricting Reform for Minority Voters”
(University of North Carolina, 2006)

“Whither the Voting Rights Act? Agreements and Contestations in the Debate over its Renewal”
(Duke University, 2006)

Southern Political Science Association (2017)

AALS (2018)

Discussant on Convention Panels

American Historical Association (1983, 1989)

American Political Science Association (1977, 1988, 1989, 1995, 2000, 2007)

Pomona College Conference on Voting Rights (1983)

California Institute of Technology Conference on Political Institutions (1984)

Organization of American Historians (1988, 2002)

Conference on The Future of African-American State Universities (1990)

UCLA Conference on American Politics in Historical Perspective (1990)

Federal Judicial Center, Conference on Civil Rights Act of 1964 (1994)

American Historical Association, Pacific Coast Branch (1996)

Southern Historical Association (1997, 2000, 2002)

Social Science History Assn. (1998, 1999, 2001, 2003, 2006, 2008, 2011)

Southern Sociological Society (1999, 2007)

Western Political Science Assn. (2001, 2002, 2004)

The Historical Society (2010)

Other

Rand Corporation (1978)

Town Hall of Los Angeles (1979)

Severance Club of Los Angeles (1979)

NAACP Legal Defense Fund Conference on Voting Rights, New Orleans (1982)

Constitutional Rights Foundation of L.A. (1990)

Caltech, Martin Luther King Day Speaker (1990, 1992, 1999, 2010)

All Saints Church Issues Forum (1992)

Church of the Good Shepherd Issues Forum (1995)
Pasadena Jewish Temple (1996)
The Field Institute, San Francisco (1997)
“Beyond 2007: Voting Rights in the 20th Century,” (Washington D.C., 1997)
Augusta-Richmond County Museum (1999)
Princeton University Reunion Forum, “Fifty Years of the Voting Rights Act” (2015)
Pasadena-Foothills Democratic Club (2016)
Pasadena Playhouse (2017)
Pasadena NAACP (2017)
MonteCedro Senior Living Community (2018)
League of Women Voters, Pasadena Area (2021), available at
<https://www.youtube.com/watch?v=0ot4cm4FR74>

ORGANIZATIONS AND PROFESSIONAL SERVICE

Committees

Chairman, Methodology Network, Social Science History Association, 1976-80
Program Committee, Social Science History Assn., 1981, 1983
Membership Committee, Southern Historical Association, 1976-77, 1983, 1991-92
American Historical Association Committee on Quantitative Methods, 1983-86
Anglo-American Historical Committee, 1984-85
Committee on Harmsworth Professorship, American Historical Assn., 1985-88
Executive Committee, Social Science History Assn., 1989-1993

Editorial Boards

Journal of American History, 1977-1980
Historical Methods, 1983-86
Social Science History, 1987-92
Journal of Interdisciplinary History, 1989-
Co-Editor, *Historical Methods*, 2000-05
Editor, *Historical Methods*, 2005-13

EXPERT WITNESS TESTIMONY

Hunter v. Underwood, 471 U.S. 222 (1985).

Mobile v. Bolden, 542 F. Supp. 1050 (S.D. Ala. 1982).

Moore v. Brown, 542 F. Supp. 1078 (S.D. Ala. 1982).

United States v. Dallas County Commission, 548 F. Supp. 875 (S.D. Ala. 1981).

Taylor v. Haywood County, Tenn. Commission, 544 F. Supp. 1122 (W.D. Tenn. 1982).

Sumter County Council v. U.S., 444 F. Supp. 694 (D.D.C. 1983).

Brown v. Board of Commissioners of the City of Chattanooga, Tenn. 722 F. Supp. 380 (E.D. Tenn. 1989).

Garza v. Los Angeles County Board of Supervisors, 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

Brooks v. Harris (N.D. GA., Civ. Action No. 1: 90-CV-1001-RCF, July 1990), preliminary injunction refused to plaintiffs.

U.S. v. City of Memphis (W.D. Tenn. 1991), further proceeding *sub nom. Muhammad v. City of Memphis*, 1995 U.S. Dist. LEXIS 22538 (W.D. Tenn. 1995).

Gonzales v. Monterey County, Cal., 808 F. Supp. 727 (N.D. Cal. 1992).

Members of the California Democratic Congressional Delegation v. Eu, summary judgment granted to defendants.

DeBaca v. San Diego County Board of Supervisors (S.D. Cal., Civ. No. 91-1282-R(M), May 11, 1992), summary judgment granted to defendants.

Cousin v. McWherter (E.D. Tenn., 1993), 904 F. Supp. 686 (E.D. Tenn. 1995).

Rural West Tennessee African-American Affairs Council v. McWherter 836 F.Supp. 453 (W.D. Tenn. 1993), *vacated*, 512 U.S. 1248 (1994).

Shaw v. Hunt, 861 F.Supp. 408 (E.D. N.C. 1994).

Vera v. Richards, 861 F.Supp. 1304 (S.D. Tex. 1994).

Georgia v. Reno, 881 F.Supp. 7 (D.D.C. 1995).

Lopez v. Monterey County, 871 F. Supp. 1254 (N.D. Cal. 1994), *order clarified* (Jan. 10, 1995).

In Re 2001 Redistricting Cases v. Redistricting Board (Alaska, 2002).

Cano v. Davis, 191 F.Supp. 2d 1135 (C.D. Cal. 2002)

Sessions v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004), *vacated sub nom. Henderson v. Perry*, 543 U.S. 941 (2004), *and vacated sub nom. Jackson v. Perry*, 543 U.S. 941 (2004), *and vacated sub nom. Am. GI Forum of Texas v. Perry*, 543 U.S. 941 (2004), *and vacated sub nom. Lee v. Perry*, 543 U.S. 941 (2004), *and vacated sub nom. Travis Cty., Tex. v. Perry*, 543 U.S. 941 (2004).

Farrahkan v. Locke, (Federal District Court, Washington State, D.C. No. CV-96-0076-RHW (2005); reversed by 9th Cir. Ct. of Appeals, No. 06-35669 (Jan. 5, 2010)).

U.S. v. Osceola County, FL, 475 F.Supp. 2d 1220 (2006), later proceedings at 474 F. Supp. 2d 1254 (2006).

American Civil Rights Foundation v. Los Angeles Unified School District (Los Angeles County Super. Ct. No. BC341363) summary judgment granted to defendants and affirmed by Court of Appeal, Second Appellate District, Division 5, in B205943.

Sanchez v. City of Modesto, 145 Cal.App. 4th 660 (2006) (App. 5 Dist. Cal. 2007), cert. denied, 552 U.S. 974 (2007), settled before trial.

Gomez v. Hanford Joint Union School District, No. 04C0294 (Kings Co. Super. Ct.), settled before trial.

Avitia v. Tulare County Local Healthcare District (07-224773, Sup. Ct. Tulare County), settled before trial.

Gonzalez v. City of Compton, CA. (Case No. BC 450494, Superior Court, Los Angeles County), settled before trial.

Perez v. Perry, 835 F. Supp. 2d 209 (W.D. Tex., San Antonio Div. 2012), *sub nom. Vesey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *stay granted* 769 F.3d 890 (5th Cir. 2014), *vacatur denied*, 135 S.Ct. 9 (2014), further proceedings *sub nom. Perez v. Abbott*, 250 F.Supp.3d 123 (W.D. Tex., San Antonio Div., 2017).

Texas v. U.S., (C.A. No. 1:11-cv-01303, D.D.C.), decided Aug. 28, 2012, 887 F.Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

Texas v. Holder, (C.A. No. 1:12-cv-00128-RMC-DST-RLW, D.D.C.), 888 F. Supp. 2d 113 (D.D.C. 2012), decided Aug. 30, 2012.

Jauregui v. City of Palmdale, California (Case No. BC483039), decided July 23, 2013.

Soliz v. City of Santa Clarita (LASC Case No. BC512735), settled before trial.

Soliz v. Santa Clarita Community College District (LASC Case No. BC512736), settled before trial.

Banales v. City of Santa Barbara (Case No. 1468167, Superior Court, Santa Barbara County), settled before trial, 2014.

League of Women Voters v. McCrory (Case No. 1:13CV658, M.D. N.C., decided as *N.C. State Conf. of the NAACP v. McCrory*, 2016 WL 1650774 (M.D.N.C. Apr. 25, 2016), rev'd 831 F.3d 204 (4th Cir. 2016), cert. denied, sub nom. *N.C. v. N.C. State Conf. of the NAACP*, 2017 U.S. LEXIS 2947 (U.S., May 15, 2017).

Georgia State Conference of the NAACP v. Fayette County [Georgia] Board of Commissioners (CA No. 3:11-CV-123-TCB), settled before trial, 2015.

Garrett v. City of Highland (Case No. CIVDS 1410696, Superior Court, San Bernardino County), Decided Jan. 19, 2016.

Jaramillo v. City of Fullerton, settled before trial, 2015.

Burgess v. City of Banning, RIC 1603770 (Riverside Superior Court, 2016), settled before trial.

SVREP v. City of Rancho Cucamonga, settled before trial.

Sanchez v. City of West Covina, CA, BC634674, 2017, settled before trial.

Greater Birmingham Ministries v. State of Alabama C.A. No. 2:15-cv-02193-LSC (N.D. Ala.), pending before 11th Circuit on appeal from summary judgment for defendants.

HQH Chinese American Equalization Association v. The City of Arcadia, settled before trial.

Luna v. County of Kern, 291 F.Supp.3d 1088 (E.D. Cal. 2018).

Yumori Kaku v. City of Santa Clara, Case No. 17CV319862 (Superior Court, Santa Clara County), decided for plaintiffs, June 6, 2018.

Pico Neighborhood Assn. v. City of Santa Monica, BC616804 (Superior Court, Los Angeles County), decided for plaintiffs, Feb. 13, 2019

Jones v. De Santis, Case No. Case No. 4:19cv300-RH/MJF, 462 F. Supp. 3d 1196 (N.D. Fla. 2020), rev'd sub nom. *Jones v. Governor of Fla.*, 974 F.3d 1016 (11th Cir. 2020).

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Separate But Not Equal: The Cumming Case and Race Relations in America (University of Kansas Press, under contract).

“The Supremacy of Equal Rights”: School Desegregation in Nineteenth Century America (Cambridge University Press, under contract), a collection of three of my revised essays.

“The Onward March of Right Principles”: School Segregation and Race Relations in the 19th Century United States (book) is an investigation of late nineteenth century state and federal court cases and the adoption of state laws on racial discrimination in schools in 22 states. The purposes are to throw new light upon black political power and the black social structure; to discover the identities and motivations of white supporters and opponents of black civil rights; to illuminate the murky history of the lower courts; and to integrate legislative and judicial history into a broader socio-political history.

The Democracy Cycle: How Voter Suppression Has Followed Voter Expansion and What We Can Do About It.

February 2022

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

DR. DOROTHY NAIRNE, JARRETT
LOFTON, REV. CLEE EARNEST LOWE,
DR. ALICE WASHINGTON, STEVEN
HARRIS, ALEXIS CALHOUN, BLACK
VOTERS MATTER CAPACITY BUILDING
INSTITUTE, and THE LOUISIANA STATE
CONFERENCE OF THE NAACP,

Plaintiffs,

v.

R. KYLE ARDOIN, in his official capacity as
Secretary of State of Louisiana,

Defendant.

CIVIL ACTION NO. 3:22-cv-00178
SDD-SDJ

Preliminary Expert Report of Dr. R. Blakeslee Gilpin

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Credentials, Purpose

I am an Associate Professor of History and the Director of Graduate Studies at Tulane University in New Orleans, Louisiana. I earned my Ph.D. in 2009 from Yale University, my M.Phil from Cambridge University (2003) and a combined BA/MA from Yale University (2001). I study the history of the American South with a particular focus on the legacies of slavery and the Civil War. My first book, *John Brown Still Lives!: America's Long Reckoning with Violence, Equality, and Change*, was published by the University of North Carolina Press after winning the C. Vann Woodward Prize for the best dissertation by the Southern Historical Association in 2010.

I have worked extensively in the editorial realm as a historian. I co-edited *The Selected Letters of William Styron*, published in 2012, a *New York Times* Editor's Pick and nominated by Random House for the Pulitzer Prize. I have recently finished another editorial project as the historian paired with a literary scholar for the 2020 Norton Critical Edition of Frederick Douglass's *My Bondage My Freedom*. By far the most completely notated and thoroughly contextualized edition of this landmark text, this project is the most thorough historical treatment of Douglass's second autobiography.

My scholarship has been published and appreciated widely in academic and popular publications. My article on New Orleans' Hansen's Sno-Bliz was a finalist for the James Beard Award for best magazine writing of 2019. I have published chapters on the Reconstruction era in two prominent volumes: *Reconstruction* (Kent State University, 2016) and *Routledge History of Terrorism* (2016). My essays have appeared in the scholarly journals *Slavery & Abolition* and *Early American Literature*. My work has also appeared in *The Paris Review*, *The Boston Globe*, and *The New York Times*' "Disunion." Other scholarship has appeared in *The American Scholar*, *The Journal of Mississippi History*, and *Biography: An Interdisciplinary Quarterly*. I have reviewed books for *The Journal of American History*, *Journal of Southern History*, *Slavery & Abolition*, *The New England Quarterly*, and *The Journal of American Studies*.

I include with this report a complete CV with my academic qualifications, academic positions, publications, fellowships and prizes, invited lectures, media appearances, and presentations. I am compensated at the rate of \$300 per hour for my work in preparing this the report. This compensation is not dependent upon my findings, and my opinions herein do not represent the sum total of my opinions in this matter, which are subject to change upon further research or revelations. I have not testified as an expert in any litigation in the past four years.

I have been asked by plaintiffs to examine any relevant historical evidence and determine if there are sociohistorical factors relevant to Louisiana's election laws that might affect the ability of Black voters in Louisiana to participate in the political process and elect candidates of their choice. My analysis adheres to the common standards of the historical profession, but I am also guided by the "totality of circumstances" test, as applied using the "Senate Factors," to evaluate whether the election laws in question do and will prevent Black voters in the State from equitably exercising their right to vote.

I. Introduction

The State of Louisiana's long history of voting-related racial discrimination is without dispute. Since before Louisiana was admitted to the Union on April 30, 1812, the main consideration in determining a person's legal and political rights were the countless color

gradations created by white people in power (“black,” “creole,” “quadroon,” “octaroon,” etc.). Until Louisiana’s Constitution of 1864 abolished slavery, the State relied on its ownership and control of Black bodies. “Efforts to restrict black participation in the governmental process,” explains the definitive history of voting rights in the South, “have been a permanent feature of Louisiana’s political environment.”¹ When Black Louisianans gained the right to vote following the ratification of the Fourteenth and Fifteenth Amendments in 1868 and 1870, the State’s racial discrimination actually intensified even as opportunities to exercise the vote reached their historical peak.

Overall, the story of Black suffrage in Louisiana is the story of “freedom-seeking former slaves and status-preserving masters.”² Disenfranchising efforts after 1868 were now fueled by a special desire to exclude a burgeoning electorate likely hostile to white supremacist policies that had so long dominated the State. Hand in hand with foundational societal beliefs and customs built to reinforce white supremacy, Louisiana’s laws and lifeways were explicitly designed to exclude non-white people from the political, social, educational, and economic rights enjoyed by white citizens. These discriminatory practices have been extensively documented by historians and plainly admitted to by Louisiana’s lawmakers across its 210-year statehood. Even with so much evidence of and open hostility to Black political participation, contesting the tools of white supremacy has taken many forms across the past 150 plus years, including in state and federal courts. Louisiana overwhelmingly and consistently designed policies that could protect white voters while disenfranchising Black voters.

I summarize that history here for the Court, beginning with a brief account of antebellum racial attitudes that underpin modern-day, voting-related discriminatory practices in the State. I highlight the laws and strategies deployed for racial control during that period, and the tools used for racial suppression that reverberate today. As this report makes clear, white Louisianans’ conception of the “appropriate” level of white political control since slavery undergirds strategies of disenfranchisement stretching from Emancipation to the present day.

II. The History of Racial Discrimination and Control in Louisiana

From the Code Noir to the End of Spanish Rule, 1724–1803

In the context of 21st century voter disenfranchisement, early Louisiana laws and racial practices demonstrate the incredible depth and longevity of white anxieties about race and control.

The story of Louisianan laws governing Black people is fundamentally a story of the area’s fluid racial categories colliding with the encroaching realities of racial slavery and the official implementation of slave laws. That collision began with 1724’s Code Noir, “borrowed with only slight modifications from Saint-Domingue’s 1685 slave code.” Louisiana made miscegenation illegal and introduced “restrictions against owners keeping slave concubines.” All these measures were simply “a transparent attempt to widen racial divisions by fostering feelings of white superiority.” Most notably in this regard, Louisiana’s Code Noir strengthened the penalties for Black people guilty of the same crimes committed by white people. Indeed, most of

¹ Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, & Victoria M. Caridas-Butterworth, *Louisiana, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990* 103 (Chandler Davidson & Bernard Grofman, eds., Princeton Univ. Press 1994).

² Marek D. Stedman, *Jim Crow Citizenship: Liberalism and the Southern Defense of Racial Hierarchy* 53 (Routledge 2012).

the legal apparatus of the 18th century was dedicated to policing racial boundaries, particularly lines that were hard to visually discern. From attempts to control interracial socializing in “gambling dens and cabarets” and policing Black sartorial choices, “these boundary-fixing measures revealed ... a nascent governing class still unsure of its grip on power, still uncertain of its identity and status.”³

American Louisiana, 1804–1861

The Louisiana Purchase extended the frontiers of the United States and enabled the explosive expansion of the young republic’s slave-based sugar and cotton kingdoms and a new birth of unfreedom. Antebellum Louisiana consisted mainly of large plantations under the armed guard of mounted overseers, spaces whose explosive economic success and very survival depended upon uniting all sectors of white society under the banner of uncompromising white supremacy as a deterrent against slave insurrection. Understanding this deliberate cultivation of State power to control and marginalize Black people is essential to understanding later white strategies of disenfranchisement.

Slavery and Race

As one celebrated historian of antebellum Louisiana has explained, American Louisiana was, by every real measure, the exemplary center of North American slavery.⁴ And yet, the Louisiana the United States purchased was more complex than any other slaveholding society in the United States. “Situated at a variety of indeterminate points between masters and slaves were Louisiana’s free people of color, numbering almost 19,000 in 1860,” writes Rebecca Scott.⁵ The 1803 Treaty of Cession actually “recognized a formal claim to citizenship by this community, but President Thomas Jefferson quickly backed off on that promise.”⁶ Jefferson’s sidestepping this citizenship issue is not the earliest example of the State restricting non-white freedoms but does mark the earliest concrete instance of the State restricting non-white political rights.

For four decades, sugar was the unparalleled driver of New Orleans’ exponential population growth and unremitting economic ascendance.⁷ Between 1803 and 1810, New Orleans’ population doubled and did so every decade until 1840, when the city became the third largest in the United States.⁸ At that same moment, New Orleans reached its all-time historical peak as the fourth largest port in the world. Slavery defined every aspect of antebellum Louisiana;

³ Larry Powell, *The Accidental City: Improvising New Orleans* 118 (Harvard Univ. Press 2013).

⁴ As Walter Johnson explained, New Orleans “is, in no small measure, the story of antebellum slavery.” Walter Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* 3 (Harvard Univ. Press 1999). Johnson also explains that New Orleans, was “the commercial emporium of the Midwest, the principal channel through which Southern cotton flowed to the global economy and foreign capital came in to the United States, the largest slave market in North America, and the central artery of the continent’s white overseers’ flirtation with the perverse attractions of global racial domination.”

⁵ Rebecca Scott, *Degrees of Freedom: Louisiana and Cuba After Slavery* 14 (Harvard Univ. Press 2005). Scott explains that “Many of these families were descended from early French, Spanish, and African settlers, augmented by exiles and migrants from Haiti and Cuba, and by newly manumitted slaves.”

⁶ Scott, *supra* note 5, at 14.

⁷ It took more than a few decades for cotton production in Louisiana and Mississippi to start rivaling and outstripping the historically dominant growers in Georgia and South Carolina. Sven Beckert, *Empire of Cotton* (New York: Vintage, 2015), 103.

⁸ Richard Campanella, *Bienville’s Dilemma: A Historical Geography of New Orleans* 149 (Ctr. for La. Studies, Univ. of La. at Lafayette 2008).

“slavery was the pivot around which everything revolved.”⁹ Sugar created a massive capitalist engine and an insatiable demand for enslaved labor. Not only did American sugar fuel one final explosion of transatlantic slave trading before that avenue legally closed in 1808, Louisiana sugar was the point of origin for the devastating internal slave trade in the United States, the so-called Second Middle Passage, and the true eruption of the institution of American slavery itself.¹⁰

Connecticut-born Amos Stoddard (who would become the Commandant of the military district of Upper Louisiana after the Louisiana Purchase) attributed this financial boon to the massive increase in the importation of enslaved individuals, primarily the invigorated domestic slave trade originating in the Upper South. “The number of slaves has increased,” Stoddard explained, so that “sugar estates are cultivated on a more extensive scale, and the number of them greatly multiplied.”¹¹ Stoddard estimated “each good slave will annually earn his master from four hundred, to four hundred and fifty dollars” per year.¹²

White Fear and Black Repression

White fear of Black agency was the most important aspect of the antebellum Louisianan mindset. Those fears were most deeply focused on perceived manifestations of Black freedom and the possibility of violent Black revenge.

As Black bodies laid the cornerstones of a new nation’s physical edifice and Black labor built a world conquering capitalist economy, a concomitant fear of blackness anchored the country’s imagination. The country’s rapid ascension to heretofore unseen achievements of democratic governance and economic success depended upon racial fears. The historian Alan Taylor’s research into fear in antebellum Virginia explored the complex zero-sum game that governed early Americans’ thoughts about the benefits and costs of slavery. “Slavery enslaved blacks,” Taylor explains, “but it also imprisoned whites in a web of distortions and deceptions of their own making.”¹³

Life under American slavery was, in the words of Taylor, an “ongoing cold war,” an arrangement always on the verge of “erupt[ing] into bloody retribution.” Events like the Haitian Revolution reaffirmed and encouraged both delusions: “powerful dread” at an “internal enemy” and a corresponding obsession with white “safety and prosperity.” The illusions of control—slave patrols, restrictive laws, physical punishment, even the idea of genetic superiority—were evidence of white America’s perpetual “war against the black enemy within.”¹⁴

Slave Uprising

The brutality of Louisiana’s slave economy soon generated the 1811 slave revolt 25 miles upriver from New Orleans, the largest slave uprising in the history of the United States. The

⁹ Scott, *supra* note 5, at 15.

¹⁰ This massive forced migration transported slaves from the upper South—particularly increasingly unprofitable tobacco plantations across the South to the bloody fields of sugar and cotton of the Deep South—destroying families and enslaved communities across America. See Ira Berlin, *Coming to Terms with Slavery in Twenty-First-Century America*, in *Slavery and Public History: The Tough Stuff of American Memory* 16 (New Press 2006).

¹¹ Amos Stoddard, *Sketches, Historical and Descriptive, of Louisiana* 162 (HardPress 2018).

¹² *Id.* at 181.

¹³ Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772–1832* 81 (Norton 2013).

¹⁴ *Id.* at 86, 88.

barbarity of the resulting suppression underscores the violent lengths white Louisianans would go to protect their investments and control. There is perhaps no event in early Louisiana more symbolic, not just because the enslaved rebels so specifically targeted sugar, but because the revolt confirmed planters' paranoid fantasies about the violent potential of their slaves. It was at these moments when the State's planter elite truly revealed the worldview that would be expanded upon for another 200 years.

As the definitive history of the Crescent City explains, "it took no time at all for the full force of federal and slaveholder power to be brought to bear." The rebels were stopped near the present-day suburb of Kenner where a militia of planters led by one whose son had been killed by the rebels "routed them completely." Sixty-six slaves "were mutilated and beheaded on the spot" followed by an improvised "tribunal of planters [who] ordered the shooting and beheading of eighteen additional slaves." A further 21 slaves were decapitated by the New Orleans City Court, "hung upon the levee within the Parish of Orleans" and others "exposed at one of the lower gates of this city."¹⁵ The decapitated heads of the enslaved were mounted on poles "to decorate our Levee, all the way up the coast." This was the kind of justice meted out by Louisiana's Slave Code of 1806, and the Mississippi River air was dominated by the stench of rotting flesh for weeks.¹⁶

State Control of Black Louisianans

Meanwhile, the racialized penal system and public executions of slaves show the increasing involvement of the State in policing and controlling Black Louisianans.

The violent terror, constant discipline, and elaborate mechanisms of control to keep Black majority populations at bay were defining characteristics of Louisianan slavery. Louisianans became pioneers in the emerging science of penology. In 1822, Edward Livingston, a Louisiana statesman and sugar planter, published his "plans for the total redesign of Louisiana's criminal laws, punishments, and penal institutions."¹⁷ Livingston imagined a "totalizing system" of "workhouses, penitentiaries, prisons, lock-ups, public school, and juvenile reformatories . . . bent on reform rather than retribution, molding and upholding disciplined republican citizens from cradle to grave."

Livingston's "cradle to grave" dream underscores Louisianans' historic commitment to racial control. Livingston's insistence that "each institution would scientifically classify offenders" exposed Louisianans' obsession with racial categories (among others). These were the cornerstones of a regime that would eventually embrace voter discrimination and disenfranchisement, the bedrock of the cultural and eventually legalized racism that would come to define Louisiana. Indeed, perhaps the most crucial element of Livingston's proposed

¹⁵ See Inventory of criminal cases tried by Orleans County and City Courts (1807–1812), Case No. 188 (January 18, 1811) New Orleans Public Library.

¹⁶ Powell, *supra* note 3, at 345.

¹⁷ Livingston came from an illustrious background. His older brother had served in the Continental Congress and on the five-person drafting committee of the Declaration of Independence. After a term in Congress and mayor of New York City, Livingston was forced to resign in scandal and fled to New Orleans in 1804. Livingston quickly embedded himself in the planter elite, purchasing two sugar plantations and dozens of slaves. See John Bardes, *Mass incarceration in the age of slavery and emancipation* 106, Unpublished Dissertation, Tulane Univ.

innovations to Louisianan law and order was the author's insistence that the State distinguish its laws and punishments by making "absolute distinctions" between the races.

The enthusiastic use of the State to help police race and control the populace was a harbinger of postbellum Louisiana. Such practices would be essential to white supremacist interactions with Black citizens after 1865. As the State gave up the most extreme form of racial terrorism, the strength and intensity of its policing kept increasing in scale and frequency. Arrest rates in New Orleans during the 1850s were more than five times the next highest city in the United States. Alongside the city's commercial boom came an influx of sailors, international travelers, immigrants, and refugees. These populations, with their varying identifying markers, threw the color classifications so central to law and order in New Orleans and Louisiana into disarray. Authorities had great trouble trying to discern between free and enslaved. Papers and passes, so easily forged, were essentially meaningless. Free Black sailors were regularly arrested and imprisoned and, in several instances, sold into slavery by the State of Louisiana.¹⁸

Experiments with Voter Control

The 1840s and 1850s saw the State's first experiments with voter disenfranchisement in the history of Louisiana, initially designed to deal with populations that white elites found undesirable and were generally classified as non-white. These practices, from taxpaying and residency requirements, would be sharpened astools of disenfranchisement when Black Louisianans gained the right to vote.

While voting rights for Black people were being hammered into a logical and legal impossibility, the targets of antebellum voter disenfranchisement were immigrants, largely from Germany, Ireland, and Italy, populations considered at the time to be non-white people.¹⁹ During the 1830s and 1840s, white Louisianans practiced their methods on these other groups. In 1845, leaders in the southern parishes of Orleans, St. Bernard, Jefferson, Lafourche, Saint Tammany, and Plaquemines, afraid that a perceived flood of immigrants would shift the political status quo, "succeeded in doubling the state residency requirement from one year to two, while demanding a full year's residence in the parish. Residency also would be voided by an absence of ninety days or longer."²⁰ These were the exact methods (refashioned for Black voters) Louisianan leaders would revisit and revive two decades later when the fearsome potential of Black voting power threatened white political control. White Louisianans practiced this two-front battle on perceived political threats by creating hurdles for undesirable voters while "eliminating taxpaying requirements" to expand desirable white votes, the "mortar solidifying the edifice of white supremacy."²¹

White authorities were soon confronted with the regular seasonal arrival of immigrants—fluxes that coincided with the cotton harvest. Ships arriving to carry cotton also represented "the period of peak international immigration because the same ships that arrived to collect cotton had little *cargo* to deposit and thus offered exceptionally inexpensive passenger fares," explains

¹⁸ *Id.* at 160–70.

¹⁹ Matthew Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard, 1999).

²⁰ *Ibid.*

²¹ Alexander Keyssar, *The Right to Vote* 77 (Basic Books 2000).

historian John Bardes. Some of the ships made a second round trip and carried a “second, smaller wave of immigrants in May.”²²

Since the repressive and disciplinary tools against the enslaved and Black population had been so refined, this influx of immigrants was an additional population that white elites were eager to control. “We are losing a valuable, manageable, and healthy population for one, in every sense the reverse,” cautioned the *Southern Quarterly Review* in 1853—“the submissive, acclimated, non-voting negro pushed aside by the turbulent, feverish, naturalized foreigner.”²³ This writer’s specificity, particularly in the odd construction of “non-voting negro,” was both revealing and prescient—the paramount priority of the white elite.²⁴

Eliminating Free People of Color

Up until the 1840s, one of the defining characteristics of Louisiana, and particularly New Orleans, was the presence of a significant population of free people of color. To understand the recalcitrant and repressive state of postbellum Louisiana, it is crucial to understand how white Louisianans cracked down on the racial fluidity that had been so common in earlier times.

While the State was attempting to exact greater control over enslaved people and reject any attempts by white immigrants to vote, the heaviest brunt of the racial backlash fell on the francophone free people of color, who were increasingly regarded as a fifth column threat to white supremacy and solidarity. Self-help societies, organizations created by free people of color to protect their special privileges, were dissolved and their members were forbidden to hold meetings without the presence of a white person.²⁵ Louisiana quickly banned the possibility of slaveholders emancipating their slaves (manumission) and free people of color were invited by the State to find themselves masters.

“In the decades that preceded the Civil War, Louisiana’s legislators systematically tightened the constraints on people of African descent, slave and free, rural and urban” and this change became visible in the form of everyday harassment from the police and other white authorities. Creoles “chafed at the humiliations imposed on them,” but in every way this population was even more of an anomaly in the 1850s than it had been on the eve of American rule. “In 1860 Ascension Parish held 7376 slaves but counted only 168 free people of color. In Lafourche Parish the figures were 6395 slaves, 149 free.”²⁶ There were fewer and fewer opportunities to be emancipated by one’s master, to “live in free union with a white man,” or “own property in [one’s] own name.”²⁷

“The free population of color in New Orleans fell in size between 1840 and 1850, and in 1857 the Louisiana legislature prohibited all future manumissions.”²⁸ This was part of a series of laws within Louisiana designed to further marginalize the civic existence of free Black people in a slave state. “The squeezing out of free people of color translated into isolation and diminished

²² Bardes, *supra* note 17, at 227.

²³ *Ibid.*

²⁴ *Id.* at 200.

²⁵ Scott, *supra* note 5, at 15. Also note the similarity to white registrars in the 1950s and 1960s demanding potential Black voters have a white person to prove their legitimacy.

²⁶ *Ibid.*

²⁷ *Id.* at 12.

²⁸ *Id.* at 16.

hopes for those held as slaves ... By 1860 Louisiana law was implacable in its hostility to the very existence of free persons of color, and fierce with regard to fugitives. Although individual masters still found ways to free occasional favored slaves, the freedom thus gained was hemmed about with dangers.”²⁹

The “bedrock reliance on a coercive labor system marked by brutality” was matched by the extreme hostility to living alongside Black people with any legal status at all.³⁰ “Some slaves in rural Louisiana,” writes Rebecca Scott, “would live their whole lives without ever seeing a Black man or woman who was legally free.”³¹

The Civil War, 1861–1865

The American Civil War represented one principal moment when white fears of Black freedom materialized. Louisiana saw wartime emancipation advance faster and extend further than anywhere else in the Confederacy. On the very eve of Black political rights, white Louisianans demonstrated the dogged resistance that would take many forms in the years that followed.

Indeed, white Louisianans’ investment in Black people held as slaves was the very reason Louisiana ultimately tilted towards seceding from the Union. On December 10, 1860, Governor John Moore warned his State that “the election of Mr. Lincoln by the Northern people ... shews[sic] that the Northern mind is poisoned against us, and that it no longer respects our rights ... as a slaveholding State.”³² Louisiana seceded from the Union on January 26, 1861. Shortly after, the St. Bernard sugar planter P.G.T. Beauregard ordered his artillery to fire upon federal troops stationed at Fort Sumter in Charleston—the shots that began America’s bloodiest conflict.

Louisiana was unique among the states that seceded from the Union in being largely defeated militarily and occupied by federal troops by 1862. “Local and Federal officials initially worked together to maintain the city’s preexisting infrastructure for capturing, disciplining, and returning fugitive slaves,” writes John Bardes, but enslaved people refused to “to remain static [and] demolished slavery’s foundation.”³³ “As slavery collapsed, local and Federal officials transformed the city’s antebellum infrastructure for policing and containing fugitive slaves into postbellum infrastructure for policing and containing” Black people.³⁴

New Orleans witnessed the arrival of 30,000 Black Louisianans over the 1860s. Some of the fugitive slaves “sought *de facto* emancipation, safety from white violence, escape from white surveillance, and the possibility of reassembling divided family” that the city offered.³⁵ Even

²⁹ Scott, *supra* note 5, at 16.

³⁰ *Id.* at 27.

³¹ *Ibid.*

³² Charles B. Dew, *Who Won the Secession Election in Louisiana?*, 36 J.S. Hist. 20 (1970).

³³ Bardes, *supra* note 17, at 258–59.

³⁴ *Ibid.* Bardes writes that “As the nation debated the meaning and future of Black freedom,” “daily struggles in the streets of New Orleans – between police, jailors, local authorities, Federal officials, planters, free people of color, and fugitive enslaved people themselves – would have lasting repercussions on the reconstruction of Black punishment, the design of postbellum criminal justice, and white Southerners’ theories of African American deviance and criminality.”

³⁵ *Id.* at 264.

before the Black population swelled, New Orleans was experiencing the consequences of the heady arrival of some kind of freedom.

Ultimately, white Louisianans and Union troops agreed that the collective solution could not be to let Black people determine their own fates. Some runaway slaves were declared contraband. Others were returned to owners who had “maintained loyalty” to the Union. But reports continued to flood the Union lines. “Darkies come flocking in here,” Col. E.F. Jones, commander of Forts St. Philip and Jackson, reported in June.³⁶ “[T]hey have heard all sorts of stories ... all tending to implant the notion that if they can only get to the forts they are free.”³⁷

“In July of 1862 Welman Pugh, the son of the owner of Woodlawn plantation, had reported ‘a perfect stampede of the negroes’ on several plantations,” writes Rebecca Scott, “and Union officers near New Orleans reported the arrival of thousands of ‘contrabands,’ a term used by Butler for the slaves of disloyal southerners.”³⁸

“The jails have become full, and I have no means of feeding them,” came a report from St. Bernard Parish.³⁹ As the Union army liberated more territory, the problem only grew. “What shall I do about the negroes?” complained General Godfrey Weitzel in Lafourche river region, “I have no rations to issue to them. I have a great many more negroes in my camp now than I have whites. These negroes are a perfect nuisance.”⁴⁰

“Hoping to control” the massive influx of fugitive slaves to both Union lines and New Orleans, “Butler ordered that they be impressed as military laborers, turned over to Unionist slaveholders, or expelled from Union lines” “to save them,” Butler argued, “from idle and vicious habits.”⁴¹

By January of 1864, elites began to acknowledge that the laws and provisions of the State constitution pertaining to slavery were now “inoperative and void,” but those same elites continued to seize any opportunities to salvage elements of white supremacist rule.⁴² Police in New Orleans began to ignore the antebellum distinctions between free Black people and possibly fugitive slaves, efforts that simply radicalized the Afro-Creole population and allied them (tenuously at first) with the enslaved population,⁴³ and the color gradations that had characterized the State’s early laws broke down. Efforts by white elites to control the Black population without the benefit of prior color distinctions backfired immediately by fostering cross-class solidarity. Arrests of Afro-Creole people and the obliteration of those clearly honored antebellum color distinctions suggested to “the city’s freeborn people of color ... that their security was now firmly bound to the security of the formerly enslaved.”⁴⁴

The racist consolidation of non-white people “was to have profound consequence for local and national politics during Reconstruction,” writes John Bardes, and “white Unionists’ pervasive

³⁶ *Id.* at 261.

³⁷ *Ibid.*

³⁸ Scott, *supra* note 5, at 31.

³⁹ Bardes, *supra* note 17, at 261.

⁴⁰ *Ibid.*

⁴¹ *Id.* at 264.

⁴² Scott, *supra* note 5, at 35.

⁴³ Bardes, *supra* note 17, at 328.

⁴⁴ *Id.* at 287.

racism during the 1864 Louisiana constitutional convention, the failure of all efforts to win suffrage rights, and the legislature's rejection of the 'Quadroon Bill' which would have given the vote to free men of color possessing three-fourths white ancestry" all helped radicalize this population.⁴⁵ "Yet no single factor more forcibly demonstrated to New Orleans' free people of color the new racial reality that they now faced than the repeated experience of having members of their community physically locked in cells with former slaves, and the realization that their traditional right to walk New Orleans' streets unimpeded, without the law presuming their maroonage, was forever lost."⁴⁶

This interclass alliance of Black Louisianans would face formidable challenges before the war was over, specifically because Lincoln's readmission plan only required 10% of Louisiana's prewar white population to take a loyalty oath to the United States, a policy that allowed a flood of ex-Confederate power brokers to regain their positions very quickly. In 1864, white Louisianans wrote a new Constitution that abolished slavery a year before the Thirteenth Amendment but intentionally made no provision for the right of Black people to vote.

After the assassination of Abraham Lincoln in April of 1865, President Andrew Johnson met with Louisiana's new Governor Wells to strike a deal to keep the white ruling class in power. Johnson shared elite Louisianans' distaste for any increase of Black civil and political rights and had no problem with extending military occupation of the South. Johnson reassured white elites and "proclaimed the return of suffrage rights to virtually all former Confederate soldiers and officials. Louisiana, one contemporary noted, "was now controlled by 'the disloyal and proslavery element.'"⁴⁷

Planters simply refused to allow former slaves to rent or purchase land, which served a dual purpose of distancing them from political rights. There was the "immediate hardship" as well as a separation of the population which would make organizing against white supremacy even more difficult.⁴⁸ "Class position thus continued to map closely onto color categories," writes Rebecca Scott: "'sugar worker' was associated with black-ness and former slave status, 'farmer' with whiteness and a birthright to freedom."⁴⁹

Scott explains further that the creation of a postbellum labor system was directly guided by white fears of and priorities for "the definition and prerogatives of citizenship."⁵⁰ Black political organizations even ran candidates "alongside the lily-white official elections" as a symbolic act, despite their candidates having no possibility of actually being elected to or holding office.⁵¹

Louisiana Black Codes and the New Orleans Massacre

Black Codes are among the earliest examples of white efforts to maintain the level of control white Louisianans enjoyed during slavery. While these attempts at a legal failsafe

⁴⁵ *Id.* at 288.

⁴⁶ *Ibid.*

⁴⁷ *Id.* at 318.

⁴⁸ Scott, *supra* note 5, at 39.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

ultimately failed, the Black Codes established the guidelines for white Louisianans' violence, beginning with racial massacres like the New Orleans Massacre of 1866.

Black Codes, designed explicitly to control Black citizens, began to be written and passed as soon as the Civil War ended and furthered these same ends. Passed on December 21, 1865,⁵² Louisiana's Black Code was slightly modified by individual parishes but the template was nearly identical. All the codes sought to establish *de facto* slavery by restricting the right of Black Louisianans to travel within parishes "without special permits" or be fined and forced to work a chain gang.⁵³ Drunkenness in the parish also drew a fine or work on the chain gang. Black people were not "permitted" to rent homes, preach, sell goods, "carry fire-arms, or any kind of weapons."⁵⁴ "Every negro is required to be in the regular service of some white person" the Code delineated, and "no public meetings or congregations of negroes shall be allowed."⁵⁵ "It shall be the duty of every" white Louisianan to "act as a police officer for the detection of offences and the apprehension of offenders."⁵⁶

This immediate postwar period also saw the revival of antebellum laws surrounding loitering and vagrancy that created both a penal and labor system for a Louisiana now bereft of captive labor. Arresting Black Louisianans became a primary function of the State to keep the battered Plantation economy running. These harsh punishments were used for over a century, with New Orleans police sent on arresting binges as late as 1943, collecting as many as 100 Black Louisianans for vagrancy in just two nights, for "the crime of wandering or loitering without apparent employer or employment."⁵⁷

The Louisiana Democratic party platform, authored by many of the same white elites responsible for the Black Code, explicitly set out that "we hold this to be a Government of white people, made and to be perpetuated for the exclusive benefit of the white race" and "people of African descent cannot be considered as citizens of the United States, and that there can, in no event, nor under any circumstances, be any equality between the white and other races."⁵⁸ The fight by white Louisianans in the following 150 years to preserve this power dynamic would take many forms, but the most persistent was the dogged effort to disenfranchise.⁵⁹

The New Orleans Massacre of 1866 was a direct response to the Black Codes. Angered by the State legislature's refusal to extend voting rights to Black men, a peaceful demonstration was being held by mostly Black freedmen outside the Republican Constitutional Convention. What followed was a harbinger of the extreme efforts white supremacists would make to control Black freedom.

On July 30, 1866, a mob of ex-Confederate soldiers attacked the Black demonstrators. "The whites stomped, kicked, and clubbed the black marchers mercilessly," author Ron Chernow describes, while "policemen smashed the institute's windows and fired into it indiscriminately until the floor grew slick with blood. They emptied their revolvers on the convention delegates,

⁵² See Appendix 2.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Appendix 2.

⁵⁶ Scott, *supra* note 5, at 39.

⁵⁷ Bardes, *supra* note 17, at 321.

⁵⁸ *Documentary History of Reconstruction* 229 (Walter Lynwood Fleming ed., Kessinger Publishing 2007).

⁵⁹ *Ibid.*

who desperately sought to escape. Some leaped from windows and were shot dead when they landed. Those lying wounded on the ground were stabbed repeatedly, their skulls bashed in with brickbats. The sadism was so wanton that men who knelt and prayed for mercy were killed instantly, while dead bodies were stabbed and mutilated.”⁶⁰

Federal troops were required to suppress the riot. They jailed many of the white insurgents, and New Orleans remained under martial law until August 3. Though the exact figure is unknown, nearly 200 people were killed, almost all Black Louisianans. On the national level, the New Orleans Massacre allowed radical Republicans to gain a supermajority and overturn vetoes by President Johnson, who opposed voting rights for Black people.

While most historians consider the major transition in Louisiana’s history to be from the antebellum period (up to 1865) to the postbellum period (after 1865), it was the transition to Black citizenship and Black suffrage that defines the primary shift in the State’s history. Until Black Louisianans gained the right to vote, the practice of white supremacy was based in racial slavery, driven by fear, and focused on control and punishment. Indeed, the culminating act of pre-suffrage, the New Orleans Massacre, underscores the overall story of Louisiana before and after the Black vote. That story, developed until 1866 and doggedly followed since 1868, is one of tightening control over Black Louisianans and the relentless efforts to preserve power relations established in the antebellum era.

III. The History of Black Voting in Louisiana

The Dawn of Black Voting and the Height of White Supremacist Violence, 1868–1877

The century following the passage of the Fourteenth and Fifteenth Amendments was defined by utter intransigence in voting equality. In broad strokes, that century was defined first by white terrorism designed to intimidate Black voters and eventually by legislation intended to disenfranchise Black voters. The most outrageous terrorist violence in American history defined this 12-year period in Louisiana, a ferocious blowback to the legislative advancements in Black peoples’ rights.

While the passage of the Fourteenth and Fifteenth Amendments to the U.S. Constitution guaranteed citizens the right to vote free of discrimination, the defining experience of the 150-plus years since their passage has been “a history of efforts to render the guarantee meaningless.”⁶¹ Those efforts have taken many forms over the years but once power had been taken away from white Southern governments in the five military districts of Reconstruction, the white South’s answer was overwhelmingly highly targeted violence designed to intimidate or physically prevent Black Louisianans from exercising their right to vote.

In the first such elections in the fall of 1868, U.S. Congressional testimony on Louisiana established that “over 2000 persons were killed, wounded and otherwise injured in Louisiana within a few weeks prior to the presidential election; that half the State was overrun by violence;

⁶⁰ Ron Chernow, *Grant* 574–75 (Penguin 2017).

⁶¹ La. Advisory Comm. for the U.S. Comm’n on Civil Rights, *Barriers to Voting in Louisiana* (June 2018).

midnight raids, secret murders, and open riot that kept the people in constant terror until the Republicans surrendered all claims, and the election was carried by the (white) democracy.”⁶²

Political terrorism and violence in service of white supremacy became defining features of Reconstruction Louisiana, perpetrated by the Ku Klux Klan and its many imitators. It was the violent threat of the antebellum slave patrol that guided white supremacist violence in Louisiana, aimed specifically at voter intimidation and disenfranchisement. The Klan organized across many states and eventually similar groups were founded under many different names: the White Line, the White Caps, and others revived antebellum methods meant to keep first slaves, then freed Black people in whatever white people defined as “order.” Louisiana’s most popular white terror group, the Knights of the White Camelia, was organized in May 1867 and grew so famous that the organization crossed into “the western Alabama Black Belt by 1868, the year of its maximum growth.”⁶³ Each of these organizations functioned to derail Black civil rights, but most specifically Black suffrage—always considered by white Louisianans the most outrageous expression of racial equality. In Louisiana, the Knights of the White Camelia were “bands of postwar regulators and vigilantes” using violence to roll back postbellum Black advancements, particularly in the political sphere, white men trying to restore some semblance of the antebellum racial order.⁶⁴

In 1868, one St. Martinville newspaper reported on white Louisianan regulators murdering a Republican judge and sheriff in a neighboring parish. The judge and sheriff, reasoned the paper, were pushing “advanced political ideas, and of progressive social reforms [and] we are compelled to own that they have met the fate they deserved.”⁶⁵ “We people of the South, who have suffered wrongs beyond endurance,” the writer maintained, “radicalism and negroism, which in the South are one and the same thing” have forced responsible Louisianans to “use such harsh means, but we have not the courage to blame them.”⁶⁶

The open embrace of murder and violence to halt the advance of Black suffrage in the former Confederacy became the lever by which Southerners decided to reclaim their region. Outrages during election times got so terrible—murders, riots, and blatant political fraud—that the federal government was eventually forced, despite great reluctance, to get involved.⁶⁷ The result, in the words of the first historian to study white supremacist violence during Reconstruction, was “open white paramilitary organization and wholesale intimidation backed up on occasion by mob violence and more or less inspired rioting.”⁶⁸ Indeed, in his history of racial terrorism, historian Allen Trelease established beyond any doubt that white supremacist organizations like the Klan served deliberately as the paramilitary wing of the Democratic Party.⁶⁹

Federal response to white terrorist violence temporarily drove the Ku Klux Klan as an individual organization underground but its imitators fought on, especially at election time. One of

⁶² Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, J. Rep. No. 41, at 21–22 (1872).

⁶³ Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 126 (La. State Univ. Press 1995).

⁶⁴ *Id.*

⁶⁵ *Courier of the Teche* (St. Martinville), Oct. 30, 1868, Misc. La. Newspapers Collection 1830–1995.

⁶⁶ *Ibid.*

⁶⁷ Trelease, *supra* note 63, at 472.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

the most notable ways that white Louisianans organized against Black suffrage were so called “race riots,” interracial collisions organized and planned by white supremacist groups to antagonize and intimidate Black voters. “Many of the so-called riots came close to being massacres,” most notably the July 30, 1866 New Orleans Riot.

It was only the Republican Party’s overwhelming success in the midterm elections of 1866 that gave new hope to the suffrage issue. The Reconstruction Acts placed Louisiana in the Fifth Military District. Beginning in late spring of 1867, the fifth district commander was tasked with supervising voter registration to prepare for delegate elections to a State Constitutional Convention. Although a congressional order allowed registration without restriction to color, disloyalty to the Union was a disqualifying condition. As countless contemporaries and historians have commented, loyalty oaths were fundamentally meaningless; former Confederates would have been willing to pledge loyalty to nearly anything to regain power. In the end, treasonous Confederates voted en masse, presenting the central obstacle to racial equality in the democratic process. But enthusiasm was infectious for these first elections, and Black Union veterans seized on suffrage as a validating and empowering measure. Republicans were elected in nearly every district to draw a new Constitution and “roughly half of the ninety-eight seats went to candidates of some African ancestry.”⁷⁰ Indeed, “The First Colored Senator and Representatives,” one of the most iconic images of Reconstruction, did not depict the reactionary violence of the Klan but Louisiana’s new Constitution and the State’s first ever group of Black political representatives. The achievement was so revolutionary that it was lithographed and sold by printmakers Currier and Ives under the heading “Extract from the Reconstructed Constitution.”⁷¹

But this explosion of Black political participation came with real human cost. White Louisianans reacted with outrage at this new behavior by a population who just a few years earlier had been, in theory, an endless source of labor and obedience. Across 1866 and 1867, voter intimidation took the form of violent attacks and murders of freedmen. In February of 1867, “210 cases of whipping, beating, and stabbing” were reported in Louisiana, “almost all of them unpunished.”⁷² Moreover, 70 Black Louisianans were murdered but “the actual total . . . might have been twice that number” if the victims were not so fearful of even reporting the violence.⁷³

Legislating Equal Rights

The Fourteenth and Fifteenth Amendments, along with a new state Constitution, were the foundation of Black voting rights in Louisiana. These early experiments with using the law to aid Black voting were met with tremendous violence, and Black Louisianans were keenly aware of the precariousness of their newly gained rights.

Truly marking the beginning of an era, the draft Louisiana Constitution was both a fulfillment of the promises of the founding of the nation to Black Louisianans and a promise that would remain mostly unfulfilled.

“Louisiana’s new Bill of Rights held that all citizens of the state should enjoy ‘the same civil, political and public rights and privileges, and be subject to the same pains and penalties,’”

⁷⁰ Scott, *supra* note 5, at 40–41.

⁷¹ See Appendix 3.

⁷² Trelease, *supra* note 63, at xliii.

⁷³ *Ibid.*

writes Rebecca Scott.⁷⁴ Along with “the bold claim of civil and political rights” the Louisiana Constitution, in Article 13, “clarified an explicit prohibition of racial discrimination on public conveyances and in places of ‘public resort,’ or what we would now term public accommodations. This document became a touchstone of political commitment for activists, fusing their claim to political voice with an insistence on public respect.”⁷⁵

Article 13 is powerfully important to the rest of Louisiana’s legal history and its deep patterns of voter disenfranchisement because it explicitly reclaimed the public space denied to the enslaved and free people of color before the Civil War. As Article 13 explained, “all persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color.”⁷⁶

As Rebecca Scott explains, the insistence of delegates on spelling out these rights about “public character” “had its roots in a keen recognition of the shaming intent of separate streetcars, alongside a memory of the multiple humiliations heaped on free people of color in the years prior to the Civil War.”⁷⁷

But even further, the draft State constitution anticipated the eventual strategies of white supremacist disenfranchising legislation like 1898’s grandfather clause. The document “granted suffrage to all men who had been resident in the state for a year, and in the parish for ten days, except for those explicitly disenfranchised for crime or sedition by the constitution itself.” “Broad suffrage” was not just a bedrock priority of the postbellum Republican Party, it also spoke “to the need of former slaves in the countryside for political voice to counteract the reassertion of mastery by their former owners.”⁷⁸

With a knowing prescience, “Representative P. F. Valfroit, a propertyless Black schoolteacher from Terrebonne, proposed unsuccessfully that the convention resolve that no legislative body be able to amend the constitution or call another convention for a period of seventy years.”⁷⁹ It was a strategy hedging against the white supremacists whom Black people and Republicans saw whetting their blades. “Planters and other anxious defenders of racial hierarchy” reacted typically to the 1868 Constitution.⁸⁰ “The ratification elections of April 1868 were a wild, freewheeling battle that conservatives characterized as white versus black,” recounts Rebecca Scott. “Laborers left the fields to cast their votes, and in the end the constitution carried the day, 66,152 to 48,739. The constitution thus went into effect, functioning as the state’s fundamental document for the next eleven years.”⁸¹

Black Louisianans held the 1868 Constitution in almost holy regard, “a shining beacon of what was and could be again.”⁸² For the first time in the State, the massive Black population had

⁷⁴ Scott, *supra* note 5, at 42.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Id.* at 45.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Id.* at 46.

⁸² *Ibid.*

expressed their democratic voice, by voting for universal suffrage, interracial marriage, civil and political rights of citizens without regard to color or previous condition. “In other words, they enlarged the scope of civil privileges of all races, instead of restricting it.” Despite their inability to maintain a political majority, the authors of the document had written a text whose vision of public rights would inform the initiatives of several generations of Louisiana activists.⁸³

That hope was counterbalanced by violence aimed squarely at undoing Black suffrage. For example, one former slave, John J. Moore, “returned to St. Mary Parish after the war and took up work hoeing cane on George Cleveland’s plantation [and] organizing Republican clubs on various plantations.” Historian Rebecca Scott recounts that “it did not take long for a group of white men to come to the Cleveland plantation” to threaten violence, and a concealed Moore “heard them try to coax information on his whereabouts from one of his fellow Republicans.” Moore later testified about the incident for a Congressional Committee, recalling:

[T]he white gang told Moore’s friend that “there is but one way that you niggers can live here with us, and that is to let politics die. Leave them alone; you cannot live with us, and live and work and vote against our interests. All that you get and all that you have comes from us and by us; and now if you do not let politics alone you will get killed here. It is white peoples’ business; the business of negroes is to go into the fields and work, and we will pay you.”⁸⁴

Moore decided that even though this visit gave him only “a very poor chance” he continued organizing: The ‘civil, political and public rights’ asserted in the new state constitution were costly to exercise, but activists like Moore responded with defiance rather than with deference.”⁸⁵

The Belligerence of White Political Terror

Violence aimed at intimidating Black voters was a plague on Reconstruction Louisiana. At no other time or place in American history has there been more sustained and varied acts of political terrorism designed to disenfranchise Black voters.

White Louisianans continued to respond with belligerence, violence, and a relentless determination to roll back Black suffrage. “We proclaim that we are opposed to negro suffrage under any circumstances, and stand ready to use all legitimate means to prevent its present and future exercise,” plainly explained one St. Martinville newspaper in 1868, speaking on behalf of “an overwhelming majority of the enlightened and liberal white people of the State.” “The Caucasian needs not to kneel to any other race,” the paper reasoned, and Black suffrage was “pregnant with future disaster and disgrace.”⁸⁶

Even in this environment so hostile to Black suffrage, the power of the Black vote was immediately apparent. Plantation records in November of 1870 recorded “No work today. All hands gone to vote ... Cutting cane today and hauling wood. The Rads carried the Parish by about 415 votes!” Despite electing many Black representatives, including the fearless John Moore, the overall story was one of increasing power of white supremacists. “Organization and voting by black fieldhands remained dangerous, and the physical security of those who undertook these

⁸³ *Ibid.*

⁸⁴ Scott, *supra* note 5, at 47–48.

⁸⁵ Scott, *supra* note 5, at 47–48.

⁸⁶ *Courier of the Teche*, *supra* note 65.

projects depended to a considerable extent on Republican rule of the state, backed up by the presence of federal troops,” write Rebecca Scott.

Indeed, this period was marked by the proliferation of “white-supremacist leagues, clubs, and ‘rifle companies.’” These groups portrayed “themselves as the legitimate representatives of the people” and violently antiblack groups like the Knights of the White Camelia” began to thrive. The White Line was eerily reminiscent of Louisiana’s policing in the 1850s, obsessed with “forbidding blacks to beat drums and cutting the drums up” at political rallies or election times. “This is a white man’s country, and we don’t allow that,” Black republicans were informed before they were beaten with sticks and pistols. “On election day ... White Liners dragged a [twenty-four-pound cannon] to the polling place and then began beating potential black voters.” The votes told the story of racial terrorism in the South: Republican votes plummeted from 1400 in 1873 to 90 in 1875.⁸⁷ The story was the same across the former Confederacy.

Those plummeting numbers were not accidental, but rather the very design of white terrorism in Louisiana and elsewhere. That terrorism, intended to disenfranchise Black voters and their Republican allies, reached its apotheosis on Easter Sunday of 1873, which struck the tone for nearly a century of white supremacist domination of the State of Louisiana, a period where Black political rights were under relentless attack. On April 13, 1873, white terrorists perpetrated what became best known as the Colfax Massacre—an event that would influence Louisiana far beyond the 1870s. An outgrowth of the disputed electoral results of 1872, dueling governments converged on a courthouse in Colfax, a town on the Red River 220 miles north of New Orleans. Tension between Democrats and Republicans had simmered and boiled over into violence several times before hundreds of local Black people, including women, children, and armed men gathered at the Colfax courthouse to show their support for the Republican candidates they had voted for. At least 150 local white people, armed with a cannon and mounted riders forced the Black attendees into the courthouse and set fire to it. Shots were fired, and one of the white leaders, James Hadnot, a principle in the Knights of the White Camelia, was killed along with another white man. The white force began firing into the crowd and over the course of the day, somewhere between 60 and 250 of the Black people strategizing to defend the election results were murdered.⁸⁸

One day later, the U.S. Supreme Court handed down the decision in the *Slaughter-House Cases*, which grew out of the Reconstruction government in Louisiana creating a single slaughterhouse downstream from New Orleans that replaced several operating within the city. The law required the entirely white population of butchers to bring cattle and hogs to this new facility. The case arose because Black butchers were also allowed to use the new slaughterhouse, entering a closed white occupation. While the butchers did not convince the Court of the unconstitutionality of the new slaughterhouse, the Supreme Court undercut the Fourteenth Amendment with its ruling. “To fetter and degrade the state governments by subjecting them to the Control of Congress” was not the amendment’s intent, according to the majority opinion, and the Supreme Court would not serve as a “perpetual censor” of state laws.⁸⁹ The decision

⁸⁷ Michael Fellman, *In the Name of God and Country: Reconsidering Terrorism in American History* (Yale Univ. Press 2010).

⁸⁸ Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (Norton 2019), 335; see also LeeAnna Keith, *The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction* (Oxford Univ. Press 2008).

⁸⁹ *Slaughter-House Cases*, 83 U.S. 36, 78 (1872).

“eviscerated the U.S. Constitution’s Privileges and Immunities Clause so effectively,” explains the most revered historian of the period, that it “ceased to have constitutional meaning.”⁹⁰ Thereafter, Black Louisianans “were deprived of a potential constitutional avenue for asserting claims for expanded rights.”⁹¹

To see the effect that the *Slaughter-House* ruling would have on Black political rights in Louisiana is to observe the realpolitik that white violence could wreak when it operated hand in hand with a deferential federal government. August and September of 1874 witnessed two of the most significant acts of violence aimed at Black disenfranchisement in the history of the state: the Coushatta and New Orleans massacres. The geography of Louisiana—specifically the Red River and Mississippi River valleys—helps explain the Coushatta massacre. Republican rule during Radical Reconstruction depended on the votes from freed Black people in these “alluvial bottomlands” in the heart of Louisiana, specifically Red River Parish.⁹²

During Reconstruction, the upper Red River Valley had come under the purview of a Vermont carpetbagger (the derogatory term applied to Northerners who came to the South after the Civil War) named Marshall H. Twitchell, a former Captain of Black troops in the Union Army and a ready symbol to white Louisianans of the frightening future of Black suffrage and Republican rule. The White League came to dominate the Red River Valley after the KKK and the Knights of the White Camelia were driven underground. It was “less secret, better organized, and more explicitly political in its aims,” argues the writer Nicholas Lemann, and “its purpose was to use extralegal violence to remove the Republican party from power, and then to disenfranchise black people.”⁹³

“We have been preserving the ascendancy of white people by revolutionary methods. In other words we have been stuffing ballot boxes, committing perjury, and here and there in the state carrying the elections by fraud and violence,” explained one verbose fellow traveler.⁹⁴ Quite simply, the White League “tried to drive the Republican officeholders out of power, to disrupt Republican campaign activities, and to prevent Negroes from voting – all aims that were to be accomplished by any means necessary.”⁹⁵

Political Massacres and Coup D’Etats

Beyond the intense political terrorism of the 1860s and 1870s, Louisiana witnessed two racial massacres—Coushatta and Colfax—where significant numbers of Black Louisianans were murdered to disenfranchise Black voters. Along with the crushing legal decisions in *Slaughterhouse* and *Cruikshank*, Louisiana proved to be on the cutting edge of schemes to eliminate Black voters from the body politic.

In Louisiana, where some of the most brutal terrorist violence in American history took place, white planters defended the violent tactics of white citizens. For B.W. Marston, white Republicans, particularly carpetbaggers, were simply trying “to organize the freedmen element

⁹⁰ Foner, *supra* note 88, at 318.

⁹¹ *Id.* at 310–11, 312; *Slaughter-House Cases*, 83 U.S. 36.

⁹² Ted Tunnell, *Coushatta Massacre*, 64 *Parishes* (Jan. 18, 2021), <https://64parishes.org/entry/coushatta-massacre>.

⁹³ Nicholas Lemann, *Redemption: The Last Battle of the Civil War* 25 (FSG 2006).

⁹⁴ Judge Chrisman, *quoted in* James G. Hollandsworth, *Portrait of a Scientific Racist: Alfred Holt Stone of Mississippi* 57 (La. State Univ. Press 2008).

⁹⁵ Lemann, *supra* note 93, at 25.

against the interests of the white people.” With such “incendiary purposes” in mind, Marston explained to Congress that Black and white Louisianans who supported the Republican Party would be dealt with “promptly.” Marston was referring, however obliquely, to the Coushatta Massacre, where the local White League assassinated six white Republicans and as many as 20 Black bystanders who witnessed the killings.⁹⁶ Coushatta was the most significant community in that alluvial heart of Louisiana and one where aggrieved white residents were particularly outraged by the alliance of carpetbagging Yankees and local Black people. The local White League decided a project of “extermination” was in order and these political vigilantes began by murdering a Black Republican in the Brownsville community on the night of August 25, 1874. The next day several prominent white Republicans, including two of Twitchell’s family members, were arrested “on the pretext that they were plotting a murderous Negro rebellion.”⁹⁷

The invocation, recalling the German Coast uprising so well known to white Louisianans, “drew heavily armed whites from neighboring parishes” who “thronged the streets” of Coushatta “swearing, drinking, and demanding blood.” Sham trials were conducted, and all the accused white Republicans were murdered before White Leaguers seized a Black leader named Levin Allen, broke his arms and legs, and burned him alive. Two more Black voters were subsequently hanged by the White League. The so-called Coushatta Massacre was nothing more than a coup d’état, indeed “the officialdom of an entire parish—and white men at that—had been virtually decapitated in a single murderous act.” The Massacre was a stunning revelation to Black and white Republicans alike about the future of Louisiana. White terrorists in service of the Democratic party had removed and executed the Republican leadership of the parish and murdered them “with impunity (none of the lynch mob would ever be brought to justice).”⁹⁸ Republican safety, let alone government, was shown to be a hollow shell.

Just two weeks later in New Orleans, the illusion of Republican political control and even basic control over public safety was shattered. Indeed, far from a spontaneous eruption of hostility between the Republican-run police force and the White League of New Orleans, the conflict that erupted had been in planning for quite some time, a concerted effort to intimidate Black people and Republicans and regain control of New Orleans and the State.

The city’s White League had first called for volunteers on July 5, 1874, raising 1,500 men under Frederick Nash Ogden, a Confederate officer and prominent local Democrat and president of the Crescent City White League. Highly directed political violence was Ogden’s design and the 1874 White League “represented political militarism on a scale that had never before been seen in the city nor has been seen since.” Throughout the summer, “dozens of companies of White League volunteers drilled in private club rooms and ward meeting halls across the city” while Ogden and other League leaders procured decommissioned Civil War weaponry cheaply available “from merchants in the North.”⁹⁹

In addition to the secret military drills, the White League, deliberately invoking the slave patrols of the antebellum era, made torch-lit marches through the city throughout the summer of 1874. With an arms shipment arriving on September 14, an enormous rally whipped 5,000 white

⁹⁶ Testimony of B.W. Marston Re: The Coushatta Affair, H. Rep. No. 816, at 645–727 (1872).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Justin A. Nystrom, *Battle of Liberty Place*, 64 Parishes (Jan. 3, 2011), <https://64parishes.org/entry/the-battle-of-liberty-place>.

Democrats into an anti-Republic frenzy; barricades were built and battle lines were set on Canal Street. Alongside the Metropolitan Police, Black troops were the only federal forces still in uniform, under the command of former Confederate General James Longstreet.

What followed was an intense military battle with the White League, which routed the Republican authorities and brought the white supremacists control of the city of New Orleans within hours.¹⁰⁰ The Black state militia was “forcibly disarmed and disbanded.” However, Ogden was careful not to commit murderous outrages because of the public opinion fiasco generated by the Colfax Massacre. Indeed, Colfax soon wheeled back into the center of Louisianan politics when the Massacre, the bloodiest act of terrorism during Reconstruction, produced a real rarity—a trial of nine white men, charged not with murder but with depriving murdered Black Louisianans of their civil rights.

After an initial mistrial, four of the nine accused were convicted, including a participant in the massacre named William B. Cruikshank. Cruikshank’s conviction was appealed and the case ended up before the same Supreme Court that had crippled the Fourteenth and Fifteenth Amendments in the *Slaughter-House* ruling. On March 27, 1876, Cruikshank and his three compatriots had their convictions overturned by the Supreme Court. Chief Justice Waite cited the *Slaughter-House* decision in affirming state authority over its citizens and denied the Fourteenth Amendment’s ability to take such authority away from Louisiana. “Sovereignty, for the protection of the rights of life and personal liberty within the respective States,” Waite wrote, “rests alone with the States.” The Fourteenth Amendment “prohibits a State from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, but it adds nothing to the rights of one citizen as against another ... The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty.”¹⁰¹

James R. Beckwith, U.S. Attorney for the District of the Circuit Court of Louisiana, wrote to the U.S. Attorney General to explain that following the *Cruikshank* ruling, white terrorist organizations had actually proliferated, “sprung to life and grown influential precisely because of this decision.” As one historian explains, the State of Louisiana had, contrary to the Supreme Court’s ruling, “defaulted in their duty to protect citizens, so the federal government had to step in.” But the crucial distinction in the Court’s ruling in *Cruikshank* was that the federal government could only defend Black rights if the State itself was the violator. “The Cruikshank decision therefore gave a green light to acts of terror wherever local officials either could not or would not enforce the law.”¹⁰²

¹⁰⁰ This coup d’état was referred to as “The Battle of Liberty Place” as a way of muting its revolutionary and white supremacist character. What was certainly the bloodiest act of terrorism during Reconstruction in the entire South also generated one of the most offensive monuments to white supremacy ever erected in the United States, a meeting place for the Ku Klux Klan and other white supremacist groups from its erection in 1891 to its removal on April 24, 2017. See Lawrence N. Powell, *Reinventing Tradition: Liberty Place, Historical Memory, and Silk-stocking Vigilantism in New Orleans Politics, in Slavery and Abolition* 20–21, 127–49; see Lawrence N. Powell, *A Concrete Symbol, in Southern Exposure* (Spring 1990).

¹⁰¹ *United States v. Cruikshank*, 92 U.S. 542, 543 (1875).

¹⁰² Carol Gelderman, *Cruikshank Case*, 64 *Parishes* (July 18, 2019), <https://64parishes.org/entry/cruikshank-case>.

Endlessly trotted out as a relatively clear-headed observer of the horrors of Redemption, Adelbert Ames, the carpetbagger governor of Mississippi, captured the flavor of post-*Cruikshank* Louisiana quite well. “Through the terror caused by murders and threats, the colored people are thoroughly intimidated,” Ames explained. They “are disenfranchised [and] are to be returned to a condition of serfdom – an era of second slavery.”¹⁰³

And yet, even these concerted efforts to intimidate and disenfranchise went through almost two decades of sustained failure. By 1888, the voter rolls in Louisiana read like a nightmare to white elites: 128,150 Black voters and 125,407 white voters. It was this very situation—the frightening prospect of Black voting majorities—that prompted the violence of the 1870s and 1880s and inspired the voter disenfranchisement schemes of the next 150 years. While bald intimidation was the most commonplace anti-democratic method in Louisiana during this period, even the audacious Black voting majority recorded in 1888 cannot be taken at face value. Indeed, white electoral authorities, especially at the local level, regularly changed or disposed of Black votes; Black votes were routinely “stolen by Democratic election officials, as was the general practice in the black-majority districts.”¹⁰⁴ At the time, it was paramount to dispose of Black (as well as immigrant) votes regardless of legality.

Legislating Resistance to Black Voting, 1877–1896

This period witnessed a shift from white supremacist violence to the legislative voter disenfranchisement that would define 20th century Louisiana. The introduction of poll taxes, grandfather clauses, and literacy tests would combine with the *Plessy* ruling to introduce nearly seven decades of extreme voter disenfranchisement.

Despite waves of white supremacist violence specifically aimed at intimidating Black voters, the period from 1868–1896 represents the high-tide mark of Black voting in the State of Louisiana. In 1896, Black citizens made up 45% of the State’s registered voters, a number that has never been equaled since.

In other words, despite all the terrorist violence of white Louisianans and its success in driving out the federal government and generally intimidating voters and altering the results of specific elections, Black Louisianans remained intensely dedicated to practicing the freedoms they had so long been denied. Louisianans and visitors to the State marveled at how passionate freed people were for participatory democracy, to the point sometimes of endangering their very lives. In the 1870s and 1880s, southern newspapers, as well as agricultural and political journals, were filled with discussions of how to get rid of Black voters. Indeed, by the late 1880s, efforts proceeded across the states in the former Confederacy to consolidate power in the white democratic minority. In 1889, Florida passed a poll tax law to prevent Black people from voting. In 1890, Mississippi passed the Mississippi Plan, creating laws adding poll taxes and literacy tests to prevent Black people and poor white people from voting. South Carolina, Louisiana, North Carolina, Alabama, Virginia, Georgia, and Oklahoma passed laws adding poll taxes, grandfather clauses, and literacy tests to voting registration requirements, based on the Mississippi Plan.

In May of 1894, a constitutional commission in Louisiana drafted a suffrage amendment that established a series of qualifications designed to disenfranchise Black voters, including a

¹⁰³ Stephen Budiansky, *The Bloody Shirt: Terror After Appomattox* 207 (Viking Press 2008).

¹⁰⁴ Michael Perman, *Struggle for Mastery: Disfranchisement in the South, 1888–1908* 127 (Univ. N.C. Press 2001).

residency requirement, a poll tax, and either a literacy test or a high bar of property ownership. The state legislature was simultaneously considering a secret ballot proposal. Indeed, white supremacist Democrats in the State had not yet figured out the delicate construction of literacy tests and other tools that would allow them to retain the immigrant voters they needed while getting rid of the Black voters they feared.

The 1896 election witnessed voter fraud unprecedented in Louisiana history, where the white supremacist gubernatorial candidate, Murphy Foster, obliterated his opponents in the 25 Black-majority parishes. As the formal protest to these results explained, the results were “so false [and] so infamous” they were going to require a complete audit of the ballot.¹⁰⁵ The premier historian of voter disenfranchisement across the South explains that “as the ink on the forged ballots was still drying, the *Picayune* announced the lesson to be derived from the recent scurrilous election: ‘The illiterate and shiftless population, chiefly, but not wholly, made up of the negro element, should be expunged from the political conditions.’”¹⁰⁶

But it was the dire political crisis that grew out of the fraudulent 1896 election that caused Louisiana’s Democratic leadership to specifically target the Black vote. J. C. Pugh, Ernest B. Kruttschnitt, and Robert S. Landry published “Address to the White Democracy” in which they described just three possibilities for Louisiana: “amalgamation, negro domination, or WHITE SUPREMACY.”¹⁰⁷

“The Democracy is pledged to a limitation upon suffrage which will eliminate the Senegambian from politics as far as can be under the Constitution of the United States,” Louisiana’s Democratic Party leaders explained, and “Mississippi and South Carolina have set us the example.”¹⁰⁸

The history of the fight over voting rights reveals that after *Plessy v. Ferguson*, “segregation took hold of American culture, then spread blood deep into every crevice. Terrorism followed, giving rise to murder with impunity by civilians as well as law enforcement officials. *Plessy v. Ferguson* heralded a disastrous period for all those who believed in American democracy.”¹⁰⁹

Voting and civil rights activists were well aware of the laws white supremacists were passing and their ultimate design. Albion Tourgée, the crusading Reconstruction lawyer and activist, was particularly incensed by the aggressive shift against civil rights that characterized the 1890s. Tourgée had become particularly impassioned and outspoken by the time Louisiana passed its Separate Car Act in 1891. One column helped galvanize “a committee of prominent mixed-race Creoles and several black allies in New Orleans, which was already bent on mounting a legal challenge to the law.”¹¹⁰ Homer Plessy identified as a Black man, but he was classified as Creole by Louisiana custom and could pass for white. Accordingly, Homer Plessy bought a first-class

¹⁰⁵ *The New Orleans Daily Picayune* reported the revised official results on May 15, 1896.

¹⁰⁶ Perman, *supra* note 105, at 133.

¹⁰⁷ Democratic Central Committee, Address to the White Democracy (May 4, 1896).

¹⁰⁸ *Ibid.*

¹⁰⁹ Gloria J. Browne-Marshall, *The Voting Rights War: The NAACP and the Ongoing Struggle for Justice* 215 (Rowman & Littlefield, 2017).

¹¹⁰ Steve Luxenberg, *Separate: The Story of Plessy v. Ferguson and America’s Journey from Slavery to Segregation* 14 (Norton 2019).

ticket on the East Louisiana Railway line on June 7, 1892, taking his seat in the railroad car designated for white passengers.

The enforcement mechanism of these segregated trains is very informative about the ingenious penetrative power of white supremacist laws and the necessity of enlisting as many white accomplices as possible. Under the terms of the 1890 law, conductors on the trains (who were all white) were required to remove violators or risk jail and a fine themselves.

On June 7, Plessy was asked to move to the “Negro-only” car. Upon refusing to, Plessy was removed by police, arrested, and locked up in the Orleans Parish jail. As with test cases that would follow (*Brown v. Board* being the most prominent), Plessy intended to be arrested and also planned on appealing that charge as high up the judicial chain as he could go. The case was appealed to the Supreme Court, where the staunch segregationist Justice Henry Billings Brown wrote the majority opinion, which denied Plessy’s claims of discrimination and dismissed the notion that “a badge of inferiority would be placed on Blacks segregated from the general population.”¹¹¹

“If one race be inferior to the other socially,” Judge Brown wrote, “the Constitution of the United States cannot put them upon the same plane.” Brown’s reasoning was the bedrock of white supremacy before and after Black suffrage, affirming the invented differences of race and the inability of the law to promote actual equality:

A law which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races . . . The object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.¹¹²

“Every aspect of American life was affected by this ruling,” writes Gloria Browne-Marshall in her history of the battle over voting rights, and “the states were given the power to legislate social interaction between the races. The *Plessy v. Ferguson* opinion instituted the ‘separate but equal’ doctrine, which imposed on the country an Americanized version of apartheid.”¹¹³ The dissenting opinion blasted both the logic of the majority and the effects the decision would certainly produce. Justice John Marshall Harlan wrote that “the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.”¹¹⁴

¹¹¹ Browne-Marshall, *supra* note 109, at 211.

¹¹² *Plessy v. Ferguson*, 163 U.S. 537, 543–44 (1896).

¹¹³ Browne-Marshall, *supra* note 109, at 213.

¹¹⁴ *Ibid.*; *Plessy*, 163 US at 559 (Harlan, J., dissenting).

Nadir of Black Voting, 1898–1954

From Louisiana pioneering the grandfather clause to all manner of disenfranchising strategies, 1898–1954 witnessed the lowest numbers of Black voter registration and political participation since Black people were enslaved.

Although the 30 years following Black enfranchisement in Louisiana were replete with violence and struggle, Black voter registration reached its highest point in 1896. The following 70 years would represent the effective creation of legislative white supremacy, a system of economic, social, and political discrimination that effectively removed Black voters from the body politic. Indeed, from 1898–1944, when the Supreme Court voided all-white primaries as unconstitutional, Louisiana’s record on disenfranchising Black voters followed a standard pattern. “When one form of voting discrimination was identified and prohibited,” one Congressional report explained, “another sprang up in its place.”¹¹⁵

States like Louisiana interpreted the *Plessy* ruling as a broad mandate to develop sophisticated and persistent methods to disenfranchise Black voters. The next few decades showed Louisiana’s “unremitting and ingenious” methods of ensuring that its Black citizens would have no effect on the political process.¹¹⁶

The 1896 election debacle drove the Louisiana Democratic Party to embrace the grandfather clause and other voter qualification strategies originally devised at the 1894 constitutional convention. In 1898, when approximately 44% of all the registered voters in the State were Black, Louisiana pioneered imposing byzantine education and property requirements on any citizens whose fathers or grandfathers were not registered voters before January 1, 1867. Black voting numbers plummeted, from 130,334 (45% of the Black population) to fewer than 5,320 (4%) in just two years. With the grandfather clause as its primary driver, the Black vote would be suppressed and not exceed 1% for decades. Indeed, whether it was the grandfather clause, literacy tests, or white-only primaries, for the next 80 years white Louisianans schemed very successfully to exclude Black voters.¹¹⁷ Indeed, those efforts to drive Black voters from the rolls were numerically staggering; researchers have been unsuccessful in locating a single Black Louisianan elected to office until the 1940s.

Ernest B. Kruttschnitt, the President of the 1898 Constitutional Convention, explained disenfranchisement as the exact design of the grandfather clause. “We know that this convention has been called together” Kruttschnitt explained, “to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.” “Doesn’t it let the white man vote,” he continued, “and doesn’t it stop the negro from voting, and isn’t that what we came here for?”¹¹⁸

Indeed, contemporary observers understood that white politicians were attempting to “perpetrate one big steal” in Louisiana so there would be no need for “more fraudulent work to do hereafter.”¹¹⁹ In other words, white Louisianans were legalizing the exclusion of Black voters so

¹¹⁵ *Barriers*, *supra* note 61.

¹¹⁶ Depo P. Adegbile, *Voting Rights in Louisiana, 1892–2006*, 17 Rev. L. & S.J. 417 (2008).

¹¹⁷ Browne-Marshall, *supra* note 109, at 390.

¹¹⁸ Ernest B. Kruttschnitt, February 1898 speech, New Orleans Daily Picayune (Feb. 9, 1898).

¹¹⁹ Editorial, *Southwestern Christian Advocate* (New Orleans Feb. 24, 1898).

that resorting to illegal electoral strategies like voter intimidation, ballot stuffing, or ballot destruction would become unnecessary.

In response to the baldness of the disenfranchising effort in Louisiana, the U.S. Supreme Court struck down the grandfather clause in 1915 in *Guinn v. United States*, but Louisiana was quite creative in searching out alternative means to follow Kruttschnitt's statement of the obvious purpose: to "stop the negro from voting." Laws were written "prohibiting elected officials from helping illiterates," and "potential voters were required to count the number of jellybeans in a large jar just by looking at it."¹²⁰ Poll taxes, literacy tests, so-called "understanding" clauses were all deployed to prevent Black voting.¹²¹ None of these methods were transparent to the potential Black voter; they never were graded in plain sight or in front of the applicant attempting to register, nor were answers shared with the applicant.¹²²

The massive purging of Black voters was incredibly difficult to counteract. Very few Black voters could navigate the numerous "discriminatory hurdles" designed to keep them from exercising their democratic rights.¹²³ To complement these devices, Louisiana "authorized an all-white Democratic primary which functioned to deny blacks access to the determinative elections." The all-white primary completely excluded Black people in Louisiana from the political process between its creation in 1923 and the Supreme Court's condemnation of the practice in 1944.¹²⁴

Black Louisianans would soon have to confront new obstacles to their participation in electoral politics. When the grandfather clause and all-white primaries were found unconstitutional, white Louisianans responded by establishing new barriers to Black voting. It was this cycle that had white authorities creating understanding requirements, poll taxes, and registration purges, a pattern of responding to Black victories with ever more sophisticated strategies to disenfranchise Black voters. Citizenship tests and poll taxes were the two most ubiquitous methods utilized to reduce Black voting numbers. White Louisianans also focused on one of the few 'loopholes' that remained for preserving some degree of Black political power. For example, single-shot voting, a primary practice which allowed Black voters to aggregate votes behind one candidate, was barred by the Louisiana legislature. As has been extensively quantified and documented, these methods were staggeringly effective "in achieving their discriminatory objectives."¹²⁵

Those discriminatory goals can best be measured by the dismal levels of Black voter registration following the massive purge of the grandfather clause era. "From 1910 until 1948, less than 1% of Louisiana's voting age African-American population was able to register to vote."¹²⁶ Only through concerted political and legal efforts did that proportion rise to 5% in 1948. Civil rights groups began conducting voter education classes on the Constitution and freedom schools taught classes on the state and federal constitutions to try and outwit the tactics of disenfranchisement. Those fighting for civil rights and the Black vote came up with the ingenious strategy of turning the *Plessy* ruling on its head, demanding quantifiably equal treatment as they battled *Plessy* and other offenses in the courts. That legal crusade culminated in the *Brown v.*

¹²⁰ Browne-Marshall, *supra* note 109, at 406.

¹²¹ See Exhibit A.

¹²² See Appendix 3 for a contemporary map of the Black population in the Louisiana Parishes.

¹²³ *Major v. Treen*, 574 F. Supp. 325, 340 (1983).

¹²⁴ Adegbile, *supra* note 116, at 417.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

Board ruling of 1954, which found segregation in public schools unconstitutional but only ordered desegregation to take place “with all deliberate speed.”¹²⁷ But even when as the federal government became more earnestly involved in legal efforts for Civil Rights did that proportion rise to 32% “in October 1964.”

The key component in this slow process was the massive power wielded by white voting registrars, which bolstered the discriminatory effect of the myriad laws meant to disenfranchise Black voters. The registrar’s “complete discretion” allowed them to reject 64% of Black registrants (as opposed to 2% of white registrants) between 1956 and 1962. Indeed, “the consistency of Louisiana and other states’ abilities to develop techniques and devices to maintain white supremacy in the political process, even as the Supreme Court condemned one disenfranchising practice after another” prompted the search for more effective legislation and federal oversight of these sustained and innovative attacks on the democratic process.¹²⁸

The Civil Rights Era, 1954–1965

The intensification of legal efforts to fight for Black voting rights was met by a well-practiced and inventive white elite absolutely determined to prevent Black Louisianans from gaining political power. As legal decisions began to go against Louisianan practices, white people became increasingly concerned about how to continue a 200-year tradition of white supremacy.

The realities of Black voting in 1950s Louisiana were grim. After massive voter registration efforts by the NAACP and the YWCA in New Orleans, for instance, only 25% (25,524) of the Black population was registered. Lawsuits were filed against the registrar of Rapides Parish in April of 1954 after efforts to register were denied several times. As happened before and again in Louisiana, Black voters in Rapides were denied registration on what came to be known as understanding clauses, an improvised reinterpretation of literacy tests. In Rapides and elsewhere, the registrar rejected applicants on the grounds that the Black voters could not answer questions about the state and federal constitution to his satisfaction. The U.S. District Court for the Western District of Louisiana found no fault with the disenfranchising effects of these literacy tests.¹²⁹ The ruling explained that “we do not see how we could decide that the administration of the laws ... penalized Negroes more than it did other citizens.”¹³⁰

Efforts elsewhere in Louisiana met with similar obstinance from white authorities. Caddo Parish’s white registrar refused to accept identification from a Black voter without a registered white voter to prove her identity. When the voter produced “a white store owner as well as a white notary,” the “registrar rejected both as sufficient to establish identity.”¹³¹

¹²⁷ *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955).

¹²⁸ Adegbile, *supra* note 116, at 417–18.

¹²⁹ Some examples from the literacy tests used in the 1950s explained that Applicant must correctly answer any four of the following six questions so as to evidence an elemental knowledge of the Constitution and Government, an attachment thereto, and a simple understanding of the obligations of citizenship under a republican form of government. Questions include 1. The church that we attend is chosen, a. by the National Government; b. by ourselves; c. by the Congress. 2. The President must be at least, a. twenty-five years old; b. thirty years old; c. thirty-five years old. 3. It is important for every voter, a. to vote as others tell him to vote; b. to vote for the most popular candidates; c. to vote for the best qualified candidates.

¹³⁰ Shannon Frystak, *Our Minds on Freedom: Women and the Struggle for Black Equality in Louisiana, 1924–1967* 72 (La. State Univ. Press 2009); Adegbile, *supra* note 116, at 419.

¹³¹ Frystak, *supra* note 130, at 73–74.

Therefore, the importance of the *Brown* ruling was not so much how it applied to Black suffrage but to the overall treatment of Black people in Louisiana, and more specifically that it reinvigorated efforts by white Louisianans to try and prevent Black suffrage through any means necessary. It was ultimately this intransigence that would prompt greater federal oversight, just as the violent outrages of the 1860s and 1870s against Black voters had done. The Southern Manifesto was crafted by Southern politicians in 1956 as a means of urging Southerners to use any “lawful means” to resist desegregation.¹³² Indeed, the resistance on the ground in Louisiana was violent, venomous, and dramatic.

Piecemeal legislation to move desegregation forward, particularly in the political realm, proved inadequate to firmly entrenched white supremacist policies. The Civil Rights Act of 1957, which gave the U.S. Attorney General power to prosecute those who obstructed voting in federal elections, could not change extra-legal practices. Indeed, Howard Smith, chairman of the House Rules Committee and author of the Southern Manifesto, remarked on that legislation that “the Southern people have never accepted the colored race as a race of people who had equal intelligence and education and social attainments as the whole people of the South.”¹³³ Sharecroppers continued to be evicted from their land when they tried to register to vote.¹³⁴ The Civil Rights Act of 1960 made the collection of state voter records mandatory and authorized the U.S. Justice Department to investigate and access voter data and history in all states so that civil rights legislation could be enforced. In 1962, just 150,000 Black voters, a mere 31% of eligible voters, were registered in Louisiana.¹³⁵ The year 1964 saw the ratification of the Twenty-Fourth Amendment, which outlawed poll taxes nationwide. And finally, the penultimate legislation of this era, the Civil Rights Act of 1964, made discrimination on the basis of race, national origin, gender, or religion in voting illegal.

Notwithstanding the tremendous effect of this legislation throughout the United States, where 1956 to 1965 represented the watershed of civil rights legislation across American history, Black voters in Louisiana rose just .1%, from 31.7% to 31.8% of eligible voters.¹³⁶ These stalled numbers spoke to a harsh reality: every discriminatory and disenfranchising technique developed by Louisiana since 1868 remained in practice, except for those, like the grandfather clause, that had been specifically condemned by the Supreme Court. Poll taxes, literacy tests, understanding requirements, voter registration purges, and the discretionary power of white registrars were just some of the tools in constant use to disenfranchise Black voters. Until Congress banned these anti-democratic and racist practices expressly, or made them subject to meaningful legal review through the passage of the Voting Rights Act of 1965 (“VRA”), those disenfranchising tactics would remain in place. Indeed, the VRA would reveal just how difficult the struggle for Black voting rights would be in Louisiana and just how glacial was the pace for delivering and securing those rights.

“Race was a factor in every aspect of voting,” writes Gloria Marshall in her account of the path to the Voting Rights Act. This well-known discrimination was also the basis of a Louisiana lawsuit handed down just before the VRA’s passage, which captured the dire need for federal

¹³² U.S. House of Representatives, *The Southern Manifesto of 1956*, <https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/>.

¹³³ 107 Cong. Rec. 1498 (1961).

¹³⁴ Gary May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* 28 (Duke Univ. Press 2014).

¹³⁵ Adegbile, *supra* note 116, at 417–18.

¹³⁶ Browne-Marshall, *supra* note 109, at 461.

oversight to ensure Black suffrage. *Louisiana v. United States* was brought by the U.S. Attorney General's office against the State of Louisiana for, "beginning with the adoption of the Louisiana Constitution of 1898," putting into "effect a successful policy of denying Negro citizens the right to vote because of their race."¹³⁷ The Supreme Court found that the Louisiana Legislature had formed a "Segregation Committee" that cooperated with white supremacist Citizens Councils to instruct registrars to purge Black voters from the voter rolls and promote white political control.¹³⁸

Justice Hugo Black, a former member of the Ku Klux Klan himself, explained that "at least 21 parishes in the mid-1950s began applying the interpretation test, to which was added in 1960 a comprehension requirement, applicable to all persons, which the State Registration Board ordered rigidly enforced."¹³⁹ The Court found that "under the State's statutes and constitutional provisions" voter registrars, "without any objective standard to guide them," had full discretion to enforce interpretation tests and "the manner in which the interpretation [was] to be given, whether it is to be oral or written, the length and complexity of the sections of the State or Federal Constitution to be understood and interpreted, and what interpretation is to be considered correct."¹⁴⁰ The Supreme Court "held that test, on its face and as applied, invalid under the Fourteenth and Fifteenth Amendments and 42 U.S.C. § 1971(a) and enjoined its future use in the State."¹⁴¹

In *Anderson v. Martin*, Black residents of East Baton Rouge brought a lawsuit successfully challenging a Louisiana law that required ballots to specify the race of the candidates running for office. Louisiana defended its measure as necessary information for the electorate; moreover, "the labeling applie[d] equally to Negro and white."¹⁴² In 1964, a unanimous U.S. Supreme Court recognized that this labeling was a violation of the Fourteenth Amendment and that it encouraged its citizens to vote for a candidate "solely on account of race."¹⁴³ The only reason to include race on a ballot was for discriminatory purposes, "so that people can react to it."¹⁴⁴ As the VRA gained traction, Louisiana legislators spoke openly of their opposition to Black enfranchisement. Louisiana's Allen J. Ellender declared of the VRA that he would "talk against it as long as God gives me breath" and once bragged, "I have always voted for white supremacy."¹⁴⁵

Louisiana's Joe D. Waggoner argued that there "were no problems in his home state [and] Blacks could vote just like anyone else."¹⁴⁶ Waggoner's denials of the basic facts of Louisiana's discriminatory practices compelled fellow Louisianan Congressman Hale Boggs to contradict that distorted account: "I wish I could stand here as a man who loves his state, born and reared in the South ... and say there has not been discrimination," Boggs declared, "but unfortunately it is not so."¹⁴⁷ In his own district, Boggs explained, there lived more than 3,000 Black people, but less than 100 were registered. "Can we say there has been no discrimination? Can we honestly say that

¹³⁷ *Louisiana v. United States*, 380 U.S. 145, 147 (1965).

¹³⁸ *Id.* at 149–50.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Id.* at 150.

¹⁴² *Anderson v. Martin*, 375 U.S. 399, 403–04 (1964).

¹⁴³ *Id.* at 404.

¹⁴⁴ Browne-Marshall, *supra* note 109, at 431.

¹⁴⁵ May, *supra* note 134, at 406.

¹⁴⁶ Robert A. Pratt, *Selma's Bloody Sunday: Protest, Voting Rights, and the Struggle for Racial Equality* 108 (Johns Hopkins Univ. Press 2017).

¹⁴⁷ *Ibid.*

from our hearts? I shall support this bill because I believe the fundamental right to vote must be a part of this great experiment in human progress under freedom which America is.”¹⁴⁸

On July 6, Congress nevertheless passed the Voting Rights Act, 333 to 85. The country’s need for racial justice, President Lyndon Johnson explained in the speech in the Capitol Rotunda on August 6, 1965, announcing the VRA’s passage, was necessary because racial equality had been intentionally obstructed at every turn.¹⁴⁹

IV. The Battle Over the Voting Rights Act in Louisiana

The Voting Rights Act Era Begins, 1965–1982

The overall story of the VRA era is that legislation designed to break down prejudice has essentially created a smaller but more greatly impassioned and resistant population in Louisiana, more deeply “committed to perpetrating voting discrimination” and dramatically “more sophisticated at concealing their objectives.”¹⁵⁰ As one report on this era has explained, “the consistent efforts to diminish African-American voting power in Louisiana are not inconsequential remnants of the distant past that can be ignored.”¹⁵¹

By 1965, Louisiana’s history of Black voting and race relations had established a recognizable pattern: whenever there was an advance in Black rights or political power, those changes were met by often violent retrenchment and myriad legal maneuvers to roll back any changes. With this pattern in mind, there is no doubt that the VRA fundamentally transformed the century-long battle over Black political participation by dramatically increasing the number of registered Black voters in Louisiana and the opportunities to elect Black representatives. Unsurprisingly, those changes were immediately met with an even more resistant strain of white supremacy, Louisianans who became more doggedly determined and legally creative in their efforts to disenfranchise Black voters after 1965.

Indeed, the VRA’s federal imprimatur was particularly offensive to white Louisianans who remembered the federal interventions of the Civil War and Reconstruction era. Those Louisianans, many of whom could trace ancestors to the rebels of the Coushatta and Colfax Massacres or the Battle of Liberty Place, had not forgotten that they successively and successfully defeated and drove out federal interference in white supremacist management of the State. Beyond the notion that the VRA was directly threatening the political power and influence of white citizens and politicians in Louisiana by increasing the number of registered Black voters (the core “threat” of the 1890s that was successfully undermined for the previous 75 years by the grandfather clause, literacy tests, etc.), the VRA crucially provided supervision over State practices and a looming threat of federal enforcement of the letter of this legislation. In other words, if and when white Louisianans attempted to mute the power of Black citizens, there was

¹⁴⁸ *Ibid.*

¹⁴⁹ Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (August 6, 1965), <https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act>. “The heart of the act is plain,” Johnson went on, “Wherever, by clear and objective standards, states and counties are using regulations, or laws, or tests to deny the right to vote, then they will be struck down. If it is clear that state officials still intend to discriminate, then federal examiners will be sent in to register all eligible voters ... And under this act, if any county anywhere in this nation does not want federal intervention it need only open its polling places to all of its people.”

¹⁵⁰ Adegbile, *supra* note 116, at 434.

¹⁵¹ *Id.* at 434.

now a mechanism for the federal government to be more readily informed, intervene and potentially stop such discriminatory actions with much greater haste. The danger of this speedy oversight was the core threat of the VRA to the political status quo. Told most simply, the history of Louisiana politics after the VRA is one where the legislation's massive successes have been met with a relentless barrage of attempts by white Louisianans to preserve their power and minimize that of Black Louisianans.

From 1965–1989, the U.S. Attorney General had to issue 66 objection letters (11 to the state and 55 to local governments) nullifying over 200 discriminatory changes designed to lessen the political power and political opportunities of Black Louisianans. Notably, of those changes, the vast majority involved white Louisianans redrawing political districts to dilute the strength of Black votes, but other frequent violations included at-large voting, multi-member districts, eliminating polling places, and annexations. So, while overall the VRA has changed the nature of voter discrimination in Louisiana, most commonly leaving white lawmakers to resort to vote dilution, it is only the “interference” of the VRA that has allowed the State to progress towards “a more open electoral process.”¹⁵² The most crucial objections under Section 5 have allowed the federal government to prevent “the state from implementing racially discriminatory districting plans for the state legislature.”¹⁵³ The most comprehensive study of the effect of the Voting Rights Act in the State explains that “discriminatory election laws ... continue to be a serious problem in Louisiana.”¹⁵⁴

One signature achievement of the VRA was the blanket elimination of literacy tests—the central scheme of the post-grandfather clause era to prevent Black Louisianans from successful registration. No longer could Black Louisianans be forced to demonstrate the ability to read passages selected by hostile white registrars in order to vote. Indeed, the VRA was the central tool in denying such “legal mechanisms [being] used to prevent black southerners from registering.”¹⁵⁵

But it was supervision of Section 5 that precluded those in Louisiana from “simply substituting a new discriminatory trap for its invalidated literacy test.” Louisiana’s preclearance requirement was renewed in 1970, 1975, and again in 1982. “Across Louisiana, Black citizens began to vote for the first time,” but the VRA’s strides were consistently compromised by those who “have remained steadfast in their efforts to minimize African-American voting power.”¹⁵⁶

The Twilight of White Registrars

Indeed, the VRA began in Louisiana mainly as a story of white resistance, particularly by the historic stopgap of disenfranchisement: the registrar. When Orleans Parish Black voters swelled by 13,000 applicants, for example, registrars used every tactic of delay, keeping thousands “waiting patiently under a blazing sun or in drizzling rain.”¹⁵⁷ Registrars in Shreveport rejected 337 Black applicants for inadequate identification in the first weeks following the VRA’s

¹⁵² Engstrom et al., *supra* note 1, at 111.

¹⁵³ *Ibid.*

¹⁵⁴ *Id.* at 103, 110–11.

¹⁵⁵ Michael S. Martin, *Louisiana Beyond Black and White: New Interpretations of Twentieth-Century Race and Race Relations* 148 (Univ. of La. at Lafayette Press 2011).

¹⁵⁶ Frystak, *supra* note 130, at 229; Adegbile, *supra* note 116, at 419.

¹⁵⁷ Adam Fairclough, *Race and Democracy: The Civil Rights Struggle in Louisiana, 1915–1972* 388 (Univ. of Ga. Press 1995).

passage.¹⁵⁸ Five parishes in Louisiana had received more federal examiners and had particularly abysmal registration rates even compared to their counterparts. Morehouse and West Carroll actually saw declines in their Black voters. Across Louisiana, registrars refused Black ballots because of party affiliation or illiteracy; “good character” tests, an utterly subjective standard used by white registrars to use vague aspersions against a potential voter to deny their registration also began in the 1960s. After the threat of statewide federal intervention seemed imminent, Governor John McKeithen “prodded recalcitrant parish authorities to mend their ways.”¹⁵⁹

And yet, instead of mending anything, white Louisianans simply recognized that like the grandfather clause and other similar discriminatory strategies, using the registrar as the frontline of Black disenfranchisement was now greatly impeded. In the first 17 years of the VRA’s implementation, the Department of Justice made 50 formal objections to “attempts by state and local authorities to implement voting changes that would have diluted African-American voting strength.”¹⁶⁰ These attempts constituted the full range of post-VRA strategies that continue to be used by Louisianans to dilute Black voting power: redistricting, at-large elections, school-boards, multi-member districts, staggered terms, polling places, annexations, residency requirements, and reapportionment plans. From 1982–2006, that number ballooned to 96 objections. In other words, white Louisianans efforts to lessen the impact of Black voters have only increased since the VRA was enacted.¹⁶¹

The patterns so entrenched in Louisianan history—of Black citizenship gains followed by white backlash—are as clearly visible in the battle over the Black vote as they were in the German Coast Uprising of 1811. While Black Louisianans were intentionally denied the most fundamental democratic act—voting—by the State of Louisiana since 1868, after the 1965 passage of the VRA, efforts to deny Black votes or stifle Black voting power became especially slippery. The violations detailed in this report, including discriminatory districting, deliberately prejudicial electoral practices, and other racist strategies plague “various public offices, including judicial, aldermanic, councilmanic and school boards,” and remain the defining experience of Black voters in the State.¹⁶² This dynamic has been most visible in the era stretching from the passage of the VRA in 1965 to the gutting of the VRA’s core provisions in the 2013 Supreme Court case of *Shelby County v. Holder*, and no less prevalent in the past decade, simply less visible with the elimination of federal oversight.¹⁶³

Louisianans’ outrage over gains by Black voters are clearly identified because those gains have always precipitated “rejection of readily available non-discriminatory alternatives, inconsistent application of standards [and] drastic voting changes” designed to minimize Black voting strength.¹⁶⁴ Thus, it is crucial to contextualize the very real successes of the VRA by understanding the intransigence of white efforts to roll back those advances in voting equality.

The VRA’s Success

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ Adegbile, *supra* note 116, at 419.

¹⁶¹ U.S. Dep’t of Justice, Voting Determination Letters for Louisiana, <https://www.justice.gov/crt/voting-determination-letters-louisiana>.

¹⁶² Adegbile, *supra* note 116, at 419.

¹⁶³ *Id.* at 460.

¹⁶⁴ *Ibid.*

In Louisiana, more than 350,000 Black residents registered to vote in 1969. Yet, the test of Black voting power was not simply registration, but also Black voters' ability to elect Black leaders. "In the first big test of black voting" after the passage of the VRA, "all twenty-four black candidates lost ... the requirement to gain an outright majority ... proved the bane of black candidates, who invariably led in the first primary only to lose in the runoff."¹⁶⁵ As Adam Fairclough, the preeminent historian of the history of Black voting in Louisiana, has explained, "even a coherent black vote ... could not guarantee the election of black candidates, for strenuous mobilization for blacks often led to equally vigorous counter mobilization on the part of whites."¹⁶⁶ When officials visited Clinton, Louisiana, local businessmen complained about a second Reconstruction. "The Feds are fixing it so the Negroes can take over," the district attorney complained to *The Wall Street Journal*. Indeed, the 57 years since the passage of the VRA in 1965 have been plagued by the same racism and resistance that so characterized the Jim Crow era.

President Johnson had mentioned this possibility in the speech celebrating the VRA's passage, explaining that "there is always room for understanding toward those who see the old ways crumbling. And to them I say simply this: it must come. It is right that it should come. And when it has, you will find that a burden has been lifted from your shoulders, too."¹⁶⁷

But Louisiana's experience of the VRA showed that Johnson's rhetoric was no match for efforts to disenfranchise Black voters. In the first five years that followed the legislation, Black Louisianans made up an absolutely "miniscule proportion of the state's elected officials, fewer than 1 percent."¹⁶⁸

Tensas Parish in Northeastern Louisiana was the last parish in the State to allow Black Louisianans to register to vote. Before the VRA, in 1964, only 15 Black voters were on the rolls when at least 6,000 Black people called Tensas home. By 1967, 34% of the Black population had been registered, a huge leap forward, "but not a single black ran for office."¹⁶⁹ In other words, progress registering Black voters was not instantaneous following passage of the VRA. The Voter Education Project ("VEP") worked doggedly to register more of Tensas' Black population, adding 310 Black voters in just 10 days in 1968.¹⁷⁰ It was only projects like the VEP and the legal oversight of the VRA that produced such astonishing voting and electoral results. In the next election cycle, all five city council seats were contested by Black candidates for the first time in the history of the State. Still, the persistent need for voter education and engagement were evident because fewer than half the eligible Black voters actually cast votes.

Tensas' early post-VRA elections highlighted the myriad subaltern strategies to preserve white supremacy in Louisiana. "Whites told their black employees, most of them maids or farmworkers, that 'there is no use wasting time voting,' and they would lose their food stamps if they did."¹⁷¹ In Waterproof, a Tensas community near the Mississippi River, the town's only

¹⁶⁵ *Id.* at 435.

¹⁶⁶ Fairclough, *supra* note 157, at 394.

¹⁶⁷ Lyndon B. Johnson, Remarks (August 6, 1965).

¹⁶⁸ Fairclough, *supra* note 157, at 394.

¹⁶⁹ Ari Berman, *Give Us The Ballot: The Modern Struggle for Voting Rights in America* 269 (FSG 2015).

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

doctor, a white man, warned “his black patients that he would leave” the town if Black candidates succeeded in town elections.¹⁷²

By 1971, when the population of the Parish dipped to 9,400, with a Black population of roughly 5,600 (60%), Black people still represented just 46% of registered voters.¹⁷³ Despite the slow progress, by 1975, Black voters had at least shown success in the town of Waterproof, which now had a Black mayor, five councilmen, and a Black chief of police.¹⁷⁴

The Backlash Begins: Discriminatory Redistricting

After Louisiana’s Section 5 renewal in 1970, both the House and Senate plans adopted by the State legislature contained a mixture of single and multimember districts that clearly disadvantaged Black voters. These plans utilized both of the most common strategies used to limit Black voters’ political strength in Louisiana: over-concentrating Black residents into fewer districts (“packing”) or breaking up the Black population and spreading them out across white majority districts (“cracking”). “The dilutive consequences of the legislature’s schemes were so blatant that a federal district judge stated in 1971 that if the Attorney General had not objected to their implementation, he would have found them to be unconstitutional for, among other reason[s], ‘employing gerrymandering in their grossest form.’”¹⁷⁵

New Orleans’ second effort at councilmanic redistricting in the 1970s became the basis of a significant Supreme Court decision involving Section 5 preclearance criteria. A unanimous three-judge panel found that the city’s councilmanic districts had a discriminatory effect, specifically by cracking and diluting Black voting power. But when the city council did not accept the Attorney General’s decision, it sought preclearance from the federal judiciary which eventually found that the districts were not retrogressive.¹⁷⁶ *Beer v. United States* (1976) was the first decision restricting the ground upon which the Attorney General could deny preclearance and a frightening sign of the limitations of federal oversight when white intransigence was sufficiently dogged. The Supreme Court’s ruling in *Beer* established, before it was superseded by statute, that Section 5 preclearance applies only to changes in election procedures and not to dilutive structures like at-large elections, in place before November 1, 1964.

In the 1970s alone, school board redistricting generated 16 DOJ objection letters. Assumption, Jefferson Davis, Bossier, Natchitoches, Caddo, St. Mary, St. Helena, East Feliciana, Point Coupée, Lafayette, Evangeline, Rapides, and Ouachita Parishes all attempted what the DOJ referred to specifically as schemes of “disenfranchisement.”¹⁷⁷ In addition to these widespread efforts, the DOJ also called out the State of Louisiana in 1975 for “forcefully” trying to dilute

¹⁷² Eight hundred voters were registered as a result of the VEP efforts, so many “that the white registrar closed his office to process the ‘paper work.’” *See ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Id.* at 271; Federal Reserve Bank of St. Louis, Resident Population in Tensas Parish, LA <https://fred.stlouisfed.org/series/LATENS7POP>.

¹⁷⁵ Engstrom et al., *supra* note 1, at 111.

¹⁷⁶ *Beer v. United States*, 425 U.S. 130 (1976).

¹⁷⁷ Letter from Drew S. Days, III, Acting Assistant Atty. Gen., U.S. Dep’t of Justice, to Kenneth C. DeJean, Assistant Atty. Gen., State of La. (Mar. 7, 1977), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1440.pdf>.

“minority voting rights.”¹⁷⁸ In this instance, Louisiana had banned single-shot voting for statewide school board elections, specifically to deny or abridge “the right to vote on account of race or color.”¹⁷⁹

Polling Places

Another area that white Louisianans resisted advances in Black political power was by shutting down or moving polling places to make access to the physical act of voting itself more difficult—a strategy that would reemerge half a century later when the VRA was crippled in 2013. The first of seven such objections under VRA preclearance came in St. Landry Parish in 1972 when Lawtell, Louisiana changed their polling place from Daigle’s Washerteria to the Knights of Columbus Hall. As the DOJ noted in their letter of objection, “black citizens are not normally permitted free access to the Knights of Columbus Hall.”¹⁸⁰ The City of New Orleans attempted repeatedly to change polling places in majority Black wards and Precincts. A Precinct 3 change in 1973 was found to “have the effect of denying or abridging the right to vote on account of race or color” because the precinct in question was 95% Black.¹⁸¹ The DOJ’s next objection, on May 12, 1978, referenced several discriminatory polling place changes in the city of New Orleans over the previous decade. Those changes “appear to be part of a recurring pattern of polling place changes in New Orleans just prior to elections,” which had incorrect or incomplete signage or announcements, disadvantaged elderly Black voters, and generally “adversely affect[ed] minority participation in the election process.”¹⁸² Two separate DOJ objections were made months later in regard to polling place changes made in Point Coupée Parish, noting that such changes would “have the effect of denying or abridging the right to vote on account of race or color.”¹⁸³ It is worth noting that following these 1978 Point Coupée objections, white Louisianans attempted two polling place disenfranchisements, in Baton Rouge in 1983 and St. Landry in 1994.¹⁸⁴

1982 VRA Extension and Amendment

The extension and amendment of the VRA in 1982 made the retrogression standard slightly less impactful. Indeed, the 1982 amendments to Section 2 were even more vital, as white resistance to Black voting power in Louisiana was just as stubborn after 1982 as it had been before. During the debates over the VRA’s renewal, Louisiana Republican W. Henson Moore

¹⁷⁸ Letter from J. Stanley Pottinger, Assistant Atty. Gen., U.S. Dep’t of Justice, to Kenneth C. DeJean, Assistant Atty. Gen., State of La. (Dec. 15, 1975), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1400.pdf>.

¹⁷⁹ *Ibid.*

¹⁸⁰ Letter from David L. Norman, Assistant Atty. Gen., U.S. Dep’t of Justice, to George Buller, President, St. Landry Parish Police Jury (Dec. 6, 1972), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1290.pdf>.

¹⁸¹ Letter from J. Stanley Pottinger, Assistant Atty. Gen., U.S. Dep’t of Justice, to Blake C. Arata, City Attorney, City of New Orleans (July 17, 1973), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1340.pdf>.

¹⁸² Letter from Drew S. Days, III, Assistant Atty. Gen., U.S. Dep’t of Justice, to Ernest L. Salatich, Assistant City Attorney, City of New Orleans (May 12, 1978), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1450.pdf>.

¹⁸³ Letters from Drew S. Days, III, Assistant Atty. Gen., U.S. Dep’t of Justice, to Sam Cashio, District Attorney (Aug. 11, 1978 and Oct. 20, 1978) <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1460.pdf>, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1470.pdf>.

¹⁸⁴ Letters from Wm. Bradford Reynolds, Assistant Atty. Gen., U.S. Dep’t of Justice, to Lynn E. Williams, Parish Attorney (Feb. 22, 1983 and Oct. 28, 1983), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-1570.pdf>. Letter from Kerry Scanlon, Acting Assistant Atty. Gen., U.S. Dep’t of Justice, to Kathy Moreau, Secretary (Sept. 12, 1994), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/LA-2220.pdf>.

chafed at the continuing oversight under Section 5. Moore denounced his “sanctimonious brethren” in Congress for promoting laws that, he claimed, only hurt his constituents. “We want to be treated like everybody else,” Moore argued.¹⁸⁵

And yet, just months later, when new Congressional maps were proposed in Louisiana, Moore’s position was revealed to be yet another strategy to preserve white power. In these maps, a new Black majority congressional district had been created in New Orleans, not unthinkable for a Black-majority city in a state where Black people made up 29% of the population but held exactly zero statewide elected positions.¹⁸⁶ White political leaders reacted to the potential of a Black congressperson from Louisiana with barely suppressed outrage. Louisiana’s governor, David Treen, explained simply that “any bill in that form is unacceptable and without question will be vetoed.”¹⁸⁷ Treen’s passion on this front was not unexpected; he had begun his political career in the extreme segregationist States’ Rights Party of Louisiana and had run several unsuccessful campaigns opposing civil rights in voting, education, and housing. Once elected, Treen voted “against nearly every piece of civil rights legislation, including the VRA extension of 1975.”¹⁸⁸

Treen’s commitment to vetoing any such map led a “small group of legislators and state officials” to convene “in the subbasement of the state capitol to draft a new congressional map without a majority black district.”¹⁸⁹ Needless to say, no Black officials participated in this secret meeting. Representative Peppi Bruneau, the chairman of the redistricting subcommittee, told Lawrence Chehardy, the Jefferson Parish tax assessor, that “we already have a nigger mayor, and we don’t need another nigger bigshot.”¹⁹⁰

The men concocted wildly-drawn maps that distributed Black New Orleanians into disparate districts in order to dilute the power of potential Black voters. Not only was Governor Treen “aware of the racial consequences” of the deliberate effort to mute Black wards, “racial considerations formed the basis” of the Governor’s logic.¹⁹¹ In the litigation over Treen’s attempts, “the court accepted the plaintiffs’ expert’s testimony, showing racially polarized voting and that such voting played a significant role in the electoral process. It also found that ‘Louisiana’s history of racial discrimination, both *de jure* and *de facto*, continue[d] to have an adverse effect on the ability of its black residents to participate fully in the electoral process.’”¹⁹²

The result of rejecting Treen’s racist redistricting of Orleans Parish was the election of Louisiana’s first Black Congressman since the 1870s. The most notable aspect of the Treen case is not just the bald racism nor staggering absence of Black representatives up until that point, but the fact that none of these facts would likely have been known without the oversight of Section 5 of the VRA.

“By any measure, attempts to dilute African-American voting strength in Louisiana have been widespread,” wrote one expert on voting in the State, “thirty-three—more than half—of

¹⁸⁵ Steven V. Roberts, *House Vote Backs Keeping Key Parts of 1965 Voting Act*, N.Y. Times, October 6, 1981.

¹⁸⁶ Berman, *supra* note 169, at 424.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Id.* at 577.

¹⁸⁹ May, *supra* note 134, at 577.

¹⁹⁰ *Ibid.*

¹⁹¹ Adegbile, *supra* note 116, at 426.

¹⁹² *Id.* at 430.

Louisiana's sixty-four parishes and thirteen of its cities and towns have proposed discriminatory voting changes since 1982, many more than once."¹⁹³ These efforts were so persistent and diverse that collectively Louisianan attempts to disenfranchise Black voters highlight a State utterly determined to not simply resist the laws of the nation but to reinforce the control over Black people that have defined the State since the 1800s.

Voting Rights in Louisiana, 1982–2013

Much like the immediate post-VRA period, 1982–2013 experienced a similar flood of attempts by Louisiana to dilute Black voting strength. If the long history of Black disenfranchisement has shown anything, Louisianans will continue to attempt any combination of strategies to deny equal voting rights to Black residents of the State. This section explores both Section 5 and Section 2 responses to voter disenfranchisement to show how persistent resistance to voting equality has been since the 1982 renewal of the VRA. The time between the 1982 amendments to the VRA and the Supreme Court ruling in *Shelby County v. Holder* is considered below in two separate but interrelated sections. First, the various cases and violations under Section 2 of the VRA will be discussed, and following, the cases and violations under Section 5.

Section 2

Major v. Treen (1983), discussed at the end of the previous section concerning the case's origins in 1980, is an excellent example of the importance of Section 2 oversight. In *Treen*, a federal court found that the State's Congressional redistricting plans cracked Black voters in a "racially selective manner."¹⁹⁴ In perhaps the most concise explanation of cracking that can be found, the court explained that the State had attempted to slice wards "with unerring precision" to leave "predominantly white wards" intact "while carving up those densely populated by blacks."¹⁹⁵ This "sundering of the black populace" was "racial gerrymandering" by the State and provided "strong, objective proof of vote dilution."¹⁹⁶

The Supreme Court's ruling in *Thornburg v. Gingles* (1986), a case on multimember legislative districts in North Carolina, had a deep impact on efforts to invalidate electoral "systems that dilute through submergence."¹⁹⁷ Indeed, the first post-*Gingles* decision by the Fifth Circuit Court of Appeals involved the West Bank of New Orleans municipality of Gretna.

There, aldermanic elections—for mayor and aldermanic board—were the root of almost all political power in the town. No Black candidate had managed to be elected to any municipal office in the town since its incorporation in 1913 despite representing 30% of the population. In Gretna's case, an informal slating process drawn from the reigning mayor and the father-and-son Chiefs of Police excluded Black voters from meaningful participation in the political process.¹⁹⁸ Despite white defendants claiming that if any Black voters supported winning white candidates, then Black voters' inability to elect Black candidates was "legally inconsequential," the court

¹⁹³ *Ibid.*

¹⁹⁴ *Major v. Treen*, 574 F. Supp. 325, 353 (E.D. La. 1983).

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Thornburg v. Gingles*, 478 U.S. 30, 68 (1986).

¹⁹⁸ *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502–04 (5th Cir. 1987).

found that the at-large electoral system effectively barred African-American citizens from any meaningful role in the city's government.¹⁹⁹

In *Citizens for a Better Gretna*, the court observed the “history of black citizens’ attempts, in Louisiana since Reconstruction, to participate effectively in the political process and the white majority’s resistance to those efforts is one characterized by both *de jure* and *de facto* discrimination. Indeed, it would take a multi-volumed treatise to properly describe the persistent, and often violent, intimidation visited by white citizens upon black efforts to participate in Louisiana’s political process.”²⁰⁰

The combined precedents of *Gingles* and *Gretna* represented an important development in the fight against voter disenfranchisement in Louisiana. The Supreme Court ruled in *Gingles* that “plaintiffs need show only the existence of [racial] divisions” in voting, “not the reasons for them.”²⁰¹ The consistent arguments by disenfranchising entities was “that as long as blacks were often on the winning side in white-on-white elections, they had no valid claim of dilution.”²⁰² This argument, explained one historian of Louisiana politics, is “especially pernicious in light of the chilling effects that dilutive arrangements often have on black candidacies.”²⁰³

Fortunately, the Fifth Circuit’s decision in *Gretna* essentially eliminated this rationale in Louisiana. Demonstrating the widespread attempts to persist in disenfranchising and diluting schemes, Jefferson Parish authorities attempted to use this invalidated defense in *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson* (1988).²⁰⁴ A federal district court later found that the parish council plan had a dilutive result and therefore violated Section 2.²⁰⁵

These rulings did not stop efforts to use “multimember districts to elect judges,” which also served to dilute Black voting strength.²⁰⁶ Accordingly, the Louisiana judiciary was particularly ripe for legal intervention. In a series of cases under the *Clark v. Roemer* label, plaintiffs tried to stop these multimember elections. Research for the case showed that “of 156 district court judgeships in Louisiana outside of Orleans Parish, only two African-Americans had ever been elected in the state’s history.”²⁰⁷ Perhaps even more shocking was that across the 20th century in Orleans Parish where there had been periods of Black majorities as high as 65%, only one Black attorney “had ever served on the criminal district court and only three had been elected to serve on the civil district court. Of the forty-eight court of appeal judgeships in the State, only one judge was African-American. No African-American citizen had ever been elected to any statewide office, to the U.S. Congress or to the Louisiana Supreme Court.”²⁰⁸

¹⁹⁹ *Ibid.*

²⁰⁰ *Citizens for a Better Gretna*, 636 F. Supp. 1113, 1116 (E.D. La 1986).

²⁰¹ *Ibid.*

²⁰² Engstrom et al., *supra* note 1, at 121.

²⁰³ *Ibid.*

²⁰⁴ *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 703 F. Supp. 28 (1989).

²⁰⁵ *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 493–94 (5th Cir. 1991).

²⁰⁶ Adegbile, *supra* note 116, at 461.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*; see *Clark v. Roemer* series of cases (*Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990) (*Clark III*); *Clark v. Roemer*, 777 F. Supp. 445 (M.D. La. 1990) (*Clark II*); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988) (*Clark I*)).

Similar appeals formed the basis of the *Chisom v. Roemer* case, where five Black voters in Orleans Parish filed a class action suit on behalf of all Black voters registered in the parish. The case revolved around the system of electing two at-large supreme court justices from Orleans, St. Bernard, Plaquemines, and Jefferson parishes. The plaintiffs argued that this design violated the “VRA, the Fourteenth and Fifteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983 by impermissibly diluting, minimizing and canceling the voting strength” of Black voters.²⁰⁹

Chisom v. Roemer sat on a fault-line between Louisiana’s two most prominent disenfranchising strategies: at-large voting and redistricting. Louisiana’s First Supreme Court F District had 1,102,253 residents, 63.4% white, 34.4% Black and 515,103 registered voters, 68% white, 31.6% Black. The First Supreme Court District, “encompassing only Orleans Parish, would then have a black population and voter registration comprising a majority of the district’s population” while another district “comprised of Jefferson, Plaquemines and St. Bernard Parishes, would have a substantially greater white population than black.”²¹⁰ The *Chisom* case, which was decided and reversed before being superseded as the case wound through district court and the Fifth Circuit, was ultimately resolved by the Supreme Court, which affirmed that vote dilution claims for State judicial elections were within the purview of the VRA.²¹¹

Section 5

Section 5 violations continued to occur after the VRA was renewed in 1982 and the DOJ was forced to respond to “thirty-three parish school board redistricting and expansion plans proposed by twenty-three parishes and one city, thirty-one parish police jury redistricting and reduction plans proposed by twenty parishes, seven parish council redistricting and reduction plans proposed by six parishes, eleven city and town council redistricting plans proposed by ten cities and towns, two board of alderman redistricting plans proposed by two cities and six annexations proposed by the city of Shreveport alone.”²¹²

“In a stark illustration of the persistence of the hostility to equal African-American participation in Louisiana’s political process with statewide consequences, in *every* decade since the VRA was passed in 1965, the proposed Louisiana State House of Representatives redistricting plan was met with a DOJ objection.”²¹³ In 1971, the proposed redistricting plan drew the DOJ’s ire for a 19-sided district that was designed to pack a disproportionate number of Black Louisianans into District 43, who just happened to elect the State’s only Black legislator.²¹⁴ Indeed the DOJ’s report cited many parishes that would regularly attempt to subvert the democratic process and gerrymander districts to dilute Black voting power. Caddo, DeSoto, Bossier, and Webster Parishes reappeared numerous times over the next five decades in attempts to disenfranchise Black votes. Redistricting proposed in 1982 was similarly found to reduce “the number of House districts with black majorities” as the Black population rose by 10% in the

²⁰⁹ Adegbile, *supra* note 116, at 463; *see Chisom v. Roemer* series of cases (*Chisom v. Roemer*, 501 U.S. 380 (1991) (*Chisom V*); *Chisom v. Roemer*, No. 86-4057, 1989 WL 106485 (E.D. La. 1989) (*Chisom IV*); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988) (*Chisom III*); *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. 1988) (*Chisom II*); *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987) (*Chisom I*)).

²¹⁰ *Chisom I*, 659 F. Supp. at 184.

²¹¹ *Ibid.*; *Chisom III*, 839 F.2d at 1064; *Chisom V*, 501 U.S. at 380.

²¹² Adegbile, *supra*, note 116, at 441.

²¹³ LA-1140 (La. Aug. 20, 1971) (C3205-3206).

²¹⁴ LA-1510 (La. June 1, 1982) (81-1624).

previous decade.²¹⁵ Again in 1991, the DOJ report found that numerous Parishes (Caddo, Bossier, Pointe Coupee and others) were being reconfigured to “minimize black voting strength.”²¹⁶

Packing and cracking Black voters remained common strategies for the dilution of Black voting power. These efforts are particularly common after Black voters make significant showings in an election cycle. In 1988, Louisiana attempted to adopt anti-single-shot devices in circuit court elections and add more at-large judges to the circuit courts. Both efforts drew Section 5 objections but exposed the myriad strategies being used in concert to disenfranchise Black voters in the State. Information requests about these changes were ignored by the State, and Louisiana attempted to add at-large or multimember judicial seats again in 1989, twice in 1990, 1991, and 1994, and again adopted anti-single-shot devices in 1990. In its 1991 objection letter, the DOJ noted blatant noncompliance with Section 5. As the objection letter noted, the State had gone ahead and held at-large elections for un-precleared judgeships from its last two submissions, and that white judges were now sitting in these seats. These facts manifest a willful disregard for the VRA mandates.”²¹⁷ Annexing white suburbs was another common strategy used to dilute Black voting power. The city of Monroe attempted to annex their white suburbs in 1990, and Shreveport tried six times to shift the balance of power from 54% Black to 45% Black. Numerous efforts, in Washington Parish, Franklin Parish, and Concordia Parish, among others, continued attempting to dilute or eliminate majority Black districts. Local officials were remarkably consistent and persistent in their efforts to eliminate or minimize the influence of Black majority districts and, at times, remove Black elected officials from office, without resorting to the familiar “packing” or “cracking” associated with discriminatory redistricting techniques.

The year 1994 presented the beginning of another era of disenfranchisement strategy, very much in the century-long tradition of grandfather clause, poll taxes, and the like. Louisiana attempted to require photo identification “as a prerequisite for first-time voters who register by mail,” a requirement the DOJ concluded had both discriminatory purpose and discriminatory effect.²¹⁸ Louisiana distinguished itself with voter identification laws, even among recalcitrant States trying to undo the VRA’s influence. Indeed, Louisiana consistently demonstrated a real dedication to what one scholar has deftly termed “adaptive discriminatory voting changes.”²¹⁹

At-large voting, which the DOJ objected to for the first time on June 26, 1969, has been the most consistently deployed strategy for disenfranchisement in Louisiana. Attempted time and time again, particularly in voting for boards of aldermen, judges, and school boards, at-large voting has been clearly established to dilute minority votes. School boards have been a particularly rich arena for Louisianan voter disenfranchisement through at-large voting schemes. St. Bernard Parish, as one example, altered their school board structure in 2001 with this goal in mind.

Between 1982 and 2003, many parishes (DeSoto, Morehouse, East Carroll, Madison, East Baton Rouge, West Feliciana, St. Landry, Webster, Richland, Lafayette, and Washington) were “repeat offenders” in submitting discriminatory redistricting plans, and the DOJ noted that local authorities were merely resubmitting objected-to proposals with cosmetic or no changes 13 times.

²¹⁵ LA-1730 (La. Sept. 20, 1991) (91-2720).

²¹⁶ Adegbile, *supra*, note 116, at 441.

²¹⁷ *Ibid.*

²¹⁸ Adegbile, *supra*, note 116, at 441.

²¹⁹ *Id.* at 440.

Municipalities played the same game (Shreveport, Monroe, St. Martinsville, Ville Platte, and Minden), leading one expert to comment on the remarkable “tenacity of local resistance to compliance.”²²⁰

Pointe Coupée Parish attempted to alter school board and police jury districts in 1983, 1992, and 2002—all efforts to dilute Black voting by packing as much of the Black population into single districts. Jefferson Parish used a novel (at that point) strategy of actually resisting redistricting plans that would increase Black voting power. In other words, whatever position or strategy would best provide the outcome of diluting Black voting, whether that was claiming redistricting was necessary or that redistricting was an affront to logic, would be utilized. The State of Louisiana demonstrated the same hypocrisy and naked desire to disenfranchise Black voters in Orleans Parish in 2002, arguing that white voters in the State were entitled to proportional representation in the Parish despite never arguing that Black voters were entitled to the same across the State.

Two points on these efforts in Orleans Parish are very instructive about the character of voter discrimination in the State. The only means through which voters in Louisiana learned about these subversions of the law was through Section 5 Reviews under the VRA. Throughout the 1990s, St. Landry Parish, East Carroll Parish, Morehouse Parish, and DeSoto Parish all tried to dilute the Black vote until the DOJ stepped in. Furthermore, Louisiana officials pathologically resisted DOJ requests for any information about changes to voting laws in the State. “In 1993, when Morehouse Parish attempted to reduce the number of its elected justices of the peace, the DOJ noted that the parish’s initial submission ‘contained virtually none of the information required’; that the parish ignored a request for more information for over a year; and that the response, when finally received, still contained no population data by race and included maps of such poor quality” they were illegible.²²¹ “The DOJ noted similar efforts by Louisiana officials to withhold information in the city of Cottonport in 1987, Jackson Parish in 1991, Evangeline Parish in 1993 and Richland Parish in 2003.”²²²

Secondly, Louisiana legislators were engaged in a constant effort to rewrite laws even before Congress had any opportunity to reevaluate renewing Section 5 of the VRA. In other words, the desire to disenfranchise Black voters was so intense that the State constantly had plans prepared in advance, ready to try and roll back advances in Black voting power made since 1965.

All of these efforts reflect a deep hostility to the intent of the VRA—the pursuit of voting equality for Black Americans. Louisiana’s record from 1965–1990 showed local elections were even more prejudicial than State elections. In that same period, the state Simply ignored its preclearance obligations “for 27.5% of the districts created for district court judges and 40% of the districts for circuit court judges.”²²³ The 1990 Census population of 1,299,281 Black Louisianans underscores how “the failure to obtain preclearance as required for district court election districts potentially affected the voting rights of hundreds of thousands of African-Americans, while the failure to obtain preclearance for circuit court election districts potentially adversely affected several hundred thousand African-American citizens of the state.”²²⁴

²²⁰ *Id.* at 463–65.

²²¹ Adegbile, *supra*, note 116, at 450.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

Voting discrimination in the State persists and attempts to dilute Black votes remain commonplace while “many white officials remain intransigent, refusing to provide basic information required under Section 5.”²²⁵ From 1982–2005, “African-Americans have been excluded from local decision-making processes, and African-American officials who advocate for non-discriminatory voting changes have confronted retaliation...[a] record [that] includes examples of discriminatory effects and intentionally discriminatory acts.”²²⁶

The 1990 census came wheeling back into voter litigation because of efforts in Bossier Parish to create 12 single-member districts without any Black-majority districts. This case prompted the *Reno v. Bossier* Parish School Board lawsuit and two separate Supreme Court decisions. The DOJ found that the school board’s plan violated the Section 2 results test as well as Section 5. This case was significant because it showed that retrogression did not provide a high enough standard when Black political power remained at zero between redistricting plans. *Bossier II* (2000) clarified the deep power of the VRA’s Section 5 in states like Louisiana that continued to fight so doggedly to disenfranchise Black voters. The Justice Department’s power “to stop a state or locality from even provisionally implementing districting and other decisions ... shifts the burden of proof, normally on plaintiffs to the defendant jurisdictions [which] must convince the attorney general that any proposed changes are not discriminatory.”²²⁷

In Louisiana, since 1965, that stop-gap against Black disenfranchisement has been utterly necessary. And yet, Justice Scalia, in trying to weaken the protections of the heavily relied-upon Section 5, emphasized that Section 2 and the Fourteenth Amendment do provide legal recourse, but they shift the burden to plaintiffs “for proving their charge of purposeful discrimination in a federal court” because “they could not prevail on the basis of suspected illegality alone.”²²⁸ In Louisiana, much like earlier moments where the doggedness of white people to disenfranchise Black people had worn down federal mechanisms to insure voting equality, Bossier was an encouraging sign to opponents of Black political power.

Barack Obama’s presidential campaigns and elections revealed how divisive race still was for Louisianan voters and the hostility that met the first Black president. Had the VRA produced lasting effects, especially in terms of transforming racist attitudes, Obama should have done much better across many different metrics in both 2008 and 2012. In both election cycles, white supremacist groups like the Ku Klux Klan thrived, particularly following Obama’s successes. In 2008, one white Klan initiate who attempted to back out was murdered in St. Tammany Parish.²²⁹ By 2012, among the states singled out by the original VRA, Louisiana was third from the bottom, and only 14% of white Louisianans voted for Obama. The gulf separating southern white and minority voters was greater than ever before. A similar gulf existed between white voters in the covered and noncovered states. In the latter, Obama received 47% of the white vote, a bit better than Kerry had in 2004, but more than 20% greater than in the covered states of the South.

²²⁵ *Id.* at 452–53.

²²⁶ *Id.* at 405.

²²⁷ Abigail Thernstrom, *Voting Rights – And Wrongs: The Elusive Quest for Racially Fair Elections* 65–66 (AEI Press 2009).

²²⁸ *Id.* at 66.

²²⁹ Patrik Jonsson, *After Obama’s win, white backlash festers in US*, Christian Science Monitor (Nov. 17, 2008), <https://www.csmonitor.com/USA/Politics/2008/1117/p03s01-uspo.html>.

Although Obama's showing among white voters outside the South was encouraging, he won a majority of their vote only in 18 states and the District of Columbia.²³⁰

White supremacist reactions to Obama's reelection were so notable for such numbers of "new people expressing interest in white supremacist groups," like Stormfront and the Council of Conservative Citizens (CCC), that the groups' websites "actually crashed."²³¹ Where Stormfront remains a catchall site for rightwing extremists, the CCC focused on opposing immigration, homosexuality, and "all efforts to mix the races [and] promote nonwhite races."²³² Given the nature of this report, it is especially relevant that the CCC saw their main activity as, in the words of one organizer, trying "to get our people out to vote."²³³ The importance of voting—boosting white participation and diminishing or preventing Black votes was made particularly real for extremist groups by "the disgrace of having a Black man in the White House," explained the Mississippi Klansman Steven Howard on *Nightline*.²³⁴ The crossover interest and promotion by such groups of a potential race war was an eventuality only avoidable by "dividing up the United States of America by race."²³⁵ Such concepts are particularly noteworthy given white Louisianan's unending attempts to pack and crack Black voters to preserve the status quo of white political power in the State. Obama's elections increased this activity significantly.

The *Hays* Cases

The *Hays* Cases deserve separate treatment outside the general chronology of this report because of the singular window the trio of cases provide into the racial and partisan machinations of Louisiana politics and the realpolitik of Black disenfranchisement in the recent history of the State.

When the 1990 Census reduced Louisiana's congressional seats from eight to seven, the decennial redistricting struggle transformed into something quite unusual in the history of Louisiana politics, and the compromise State politicians made might have genuinely transformed electoral politics. On May 26, 1992, the Louisiana Senate passed the State's reapportionment plan—authored by two Democrats and supported by "an unlikely coalition of black and Republican legislators"—before Act 42 was signed into law by Democratic Governor Edwin Edwards. The compromise essentially preserved Republican political power in five districts in exchange for one new black majority district, which the Supreme Court eventually criticized as "[a] Z shaped creature" that "zigzag[ged] through all or part of 28 parishes and five of Louisiana's largest cities."²³⁶

The *Hays* case (which eventually spawned two subsequent lawsuits) was filed in July 1992 by three white and one Black Louisianans, none of whom lived in the newly created district. U.S. Circuit Court Judge Jacques L. Weiner called Act 42 "Louisiana Political Apartheid" in finding

²³⁰ May, *supra* note 134, at 6.

²³¹ Keli Goff, *Hate Groups: Preparing for an Obama win?*, Louisiana Weekly (November 5, 2012) <http://www.louisianaweekly.com/hate-groups-preparing-for-an-obama-win/>. The CCC was a rebirth of the Civil Rights era organization the White Citizens Council which made its name printing the names of NAACP members in newspapers and paying legal bills for Byron De La Beckwith, Medgar Evers' murderer.

²³² *Ibid.*

²³³ Thernstrom, *supra* note 227, at 64–65.

²³⁴ *Id.* at 65.

²³⁵ *Ibid.*

²³⁶ *United States v. Hays*, 515 U.S. 737, 740 (1995).

District 4 unconstitutional and unenforceable because race was the overriding factor in its creation.²³⁷ In the broader context of Louisiana's long history of slavery and segregation as well as consistently subjecting its Black citizens to second-class citizenship, the logic here was not just tragically ironic but also deeply troubling. The response time of the plaintiffs and the courts when Black Louisianans were *gaining* rights was simply staggering especially when compared with the numerous decades-long legal battles discussed in this report. At the same time, like so much of the gerrymandering before and since, Act 42 did violate the 14th Amendment, albeit in the opposite direction to every other instance in Louisiana's sordid history.

Louisiana responded to the ruling by arguing that Act 42 provided proportional representation for Black citizens and a remedy for past racial discrimination in drawing maps generated from "racial harmony" and fundamental "fairness."²³⁸ Still, in invoking "a compelling state interest" state expert witnesses conceded that Republican lawmakers had agreed to the "giant but somewhat shaky 'Z'" because it contained a 63% Black majority, significantly surpassing the safe percentage for a Black majority district.²³⁹ In other words, in addition to using race to draw the district, lawmakers had also packed District 4.

Hays II proceeded along much the same lines as this first case, with Louisiana lawmakers redrawing maps that again failed to satisfy the federal court. Judge Weiner again cited "race-conscious decisionmaking" not providing a compelling state interest.²⁴⁰ The State, in contrast, argued that "past injustices that were clearly unconstitutional were the state's primary motivation for reinforcing black representation."²⁴¹ Weiner's response offers a fascinating prism of Louisiana's hostility to Black political power. "Using the disease as a cure is a dangerous antidote," he explained, "one that must be absolutely warranted before being administered."²⁴²

The Supreme Court responded to *Hays II* on June 29, 1995, but Justice O'Connor's ruling mostly concerned the inappropriateness of the four plaintiffs' standing, given that they did not reside in the newly created district.²⁴³ Nonetheless, the *Hays* case limped on when the original Louisianan plaintiffs added eight plaintiffs who did live in District Four. On January 5, 1996, Weiner ruled in *Hays III* that he was unconvinced that an acceptable plan could be enacted if the legislature was given another chance, and the court imposed its own maps.²⁴⁴ The U.S. Supreme Court affirmed *Hays III* on December 16, 1996 with no opinion.

Taken together, *Hays I, II, & III* offer a curious story in the post-VRA era. To be certain, the courts rightly found that Louisiana had gerrymandered with racial motivation. However, that motivation was to help Black Louisianans gain political power, not take that power away. Just on this basis, these cases actually offer brilliant insight at roughly the halfway point in the 57 years since the VRA's passing. In that pause, Louisianans themselves acknowledged the State's awful record with regard to Black disenfranchisement and, in the words of Weiner, tried to use "the disease as a cure." In no way should their failure and failed logic imply that Louisianans should

²³⁷ *Hays v. State of La.*, 839 F. Supp. 1188, 1209 (W.D. La. 1993) (*Hays I*).

²³⁸ *Id.* at 1206.

²³⁹ *Id.* at 1199.

²⁴⁰ *Hays v. State of La.*, 862 F. Supp. 119, 122 (W.D. La. 1994) (*Hays II*).

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ *United States v. Hays*, 515 U.S. at 742–47.

²⁴⁴ *Hays v. State of La.*, 936 F. Supp. 360, 372 (W.D. La. 1994) (*Hays III*).

accept the disease and simply try to live with it. The 26 years since the Supreme Court affirmed *Hays III* have shown that disease is still running rampant with no actual cure in sight.

Voting Rights in Louisiana after Shelby County, 2013–2022

Given the 50-year history of relentless resistance to Black voting equality under the VRA, the last nine years represent a dangerous experiment in how difficult the post-preclearance period would be for Black voters seeking fair treatment. Indeed, the loss of preclearance oversight has meant that white disenfranchisement efforts are allowed to proceed until plaintiffs can gather evidence and file suit.

In *Shelby County v. Holder*, the Supreme Court declared that the preclearance formula used to protect Black voters in Louisiana was outdated and unnecessary. Curiously, while gutting the core provisions of the VRA, Chief Justice Roberts wrote in his majority opinion that “voting discrimination still exists; no one doubts that.”²⁴⁵ Of course, the practical effect of this ruling was crippling Section 5 of the VRA, specifically eliminating the preclearance protections that have so clearly been the primary defense against Louisianan efforts to disenfranchise Black voters.

The response to the *Shelby County* ruling offers the plainest evidence for how explicitly white Louisianans would continue to pursue minority voter disenfranchisement through past and new schemes. Long aggrieved by the VRA but now absent its legislative oversight, Louisianans have become bolder and more relentless in their attempts to dilute Black political influence.

There are already major barriers to voting in place in Louisiana—many of which disproportionately affect Black voters. In addition to limited early voting and limited voting by mail, Louisianans have outdated voting machines ill-equipped for the State’s frequent elections and runoffs.²⁴⁶ More dangerously for democracy in the State, as this report has shown, Louisiana has an extensive history of voter intimidation and a high risk of that intimidation influencing present and future elections.

The hotly contested election of 2016 was seen as the first major test of the new iteration of the VRA. The state legislature had already used the opening provided by *Shelby County* to push voter restrictions tied to concerns about supposed voter fraud. As *The Times-Picayune* explained, “the federal courts have agreed with increasing frequency that those new laws were improperly based on race.”²⁴⁷ The changes to the VRA in the wake of *Shelby County* meant that states were no longer under the burden of proving their laws to be nondiscriminatory. Voters were now responsible for proving discrimination under Section 2 of the VRA.

“Without the protections of Section 5, Louisiana voters must wait until they are aggrieved before seeking judicial intervention,” reported one Congressional subcommittee, and “Lawsuits

²⁴⁵ *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013).

²⁴⁶ Melinda Deslatte, *Louisiana voting machine search halted amid vendor complaint*, Associated Press, Feb. 13, 2021, <https://apnews.com/article/technology-john-bel-edwards-elections-voting-machines-voting-24412276a2e309daae6937ca5d0b98df>.

²⁴⁷ Richard Rainey, *New Voter Restrictions Crash and Burn*, New Orleans Time-Picayune, Aug. 11, 2016.

prompted by voting restrictions, once handled administratively by the Justice Department, must now be addressed through more expensive and less efficient litigation.”²⁴⁸

Across states formerly under Section 5 preclearance supervision, there has been a pronounced shift to 21st century versions of the jelly-bean counting, poll taxes, and literacy tests of the 1910s and 1920s. In particular, there has been tremendous enthusiasm for conspiracy theories about voting machines and early balloting. Voter suppression laws have shifted focus to identification requirements and registration-drive bans and expanded to other strategies to disenfranchise Black voters. In Louisiana, restricting access to polling places, early voting, and electoral information have all emerged in the 2010s as strategies for those seeking to disenfranchise Black voters. Not surprisingly, redistricting has also returned as a primary vehicle for diluting the strength of Black political power.

School Board Elections

Much like the 50 times Louisianan Parishes and the State were cited by the DOJ under preclearance, Parish school boards have been an especially difficult and intransigent area for change post *Shelby County*. Because of changing demographics, the Jefferson Parish School Board briefly considered doubling the number of majority-minority districts before seemingly undemocratically and abruptly deciding to keep district lines static. Despite two-thirds of the district’s 50,000 students being Black or Latino, only two of nine seats on the board are held by Black or Latino representatives. The decision “drew praise from members of the business community” who felt that expanding the board might “hinder” school administrators.²⁴⁹ Similar battles have been taking place in East Baton Rouge Parish where changing demographics did not convince five white board members to use maps that reflected those changes.²⁵⁰

Polling Places

The final pre-*Shelby County* attempt at a polling place closing to disenfranchise Black voters had occurred in 1994 in St. Landry Parish. However, after the *Shelby* ruling, two-thirds of all parishes in Louisiana closed polling places, numbering 126 in total. Winn Parish, which is 31 percent Black, shuttered almost a quarter of its polling places. Lafayette Parish closed 17 percent, Jefferson Parish closed 15 percent and Bienville and Morehouse each closed 14 percent.²⁵¹

Angie Rogers, the Commissioner of Elections for the State of Louisiana, testified on December 6, 2017, that state “law requires that every precinct is assigned a polling place” but with 3,904 precincts, Louisiana only had 2,068 polling locations or about one polling place for every two precincts.²⁵² The Louisiana Parish Board of Supervisors had eliminated 103 polling places since 2012, requiring greater travel that overwhelmingly impacts Black voters. Furthermore, the

²⁴⁸ Ryan Whirly, *Hearings shine spotlight on roadblocks to voting in La.*, Louisiana Weekly, Oct. 22, 2018, <http://www.louisianaweekly.com/hearings-shine-spotlight-on-roadblocks-to-voting-in-la/>.

²⁴⁹ Faimon A. Roberts III, *Jefferson School Board reverses course*, New Orleans Times-Picayune, June 1, 2022, https://www.nola.com/news/education/article_3df0766e-e1b3-11ec-95e4-d3dcfdfe1b9.html.

²⁵⁰ Charles Lussier, *Courting litigation, EBR School Board OK’s election maps that likely preserve White majority*, New Orleans Times-Picayune, Apr. 7, 2022, https://www.theadvocate.com/baton_rouge/news/education/article_f444dde8-b6a6-11ec-b91a-1bcfde6832c8.html.

²⁵¹ The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* 34 (2019).

²⁵² *Barriers*, *supra* note 61.

consistent patterns of subterfuge and intransigence and even willful ignorance were evident in testimony by Kyle Ardoin (then-First Assistant to Secretary of State Tom Schedler) on behalf of Louisiana. Ardoin either intentionally misled or betrayed a total misunderstanding of which authorities could close or move polling locations when he attributed any such changes to local Orleans Parish elected officials. Schedler explained that “information was provided to the Commission that Louisiana’s polling locations were distributed disproportionately using race and/or income as the determining factor.”²⁵³

Indeed, contrary to Ardoin’s testimony that Orleans Parish elected officials voluntarily shut down polling places, “the number of polling locations per 1,000 registered voters in a census tract is negatively related to the number of black residents in that census tract.”²⁵⁴ Budgetary shortfalls, a frequent excuse, were the proximate explanation of the dearth of early voting locations. However, the State does not merely de-prioritize widening access to voting, particularly for Black voters, many Louisiana politicians continue to actively work against that increased access.

Jefferson Parish, with a population that is 26 percent Black and 14 percent Latinx, shuttered 25 voting locations between 2012 and 2018. These closures represented a novel strategy for Louisianan disenfranchisement schemes: blaming disability groups for calling attention to “significant barriers” accessing polling places.²⁵⁵ Instead of making modifications or accommodations, Parish authorities closed 25 voting locations, disproportionately affecting Black voters. As one account described, such moves are “not out of character for Jefferson Parish, which has a grave record of hostility toward Black residents’ voting rights.”²⁵⁶ That hostility was felt in the 2020 election when voters, especially Black voters, saw five-hour waiting periods to cast ballots when lines in Marrero took less than an hour.²⁵⁷ Jefferson Parish Registrar of Voters Dennis DiMarco claimed the COVID-19 pandemic combined with other unique factors made voting so difficult. DiMarco’s excuses were troubling given the racial makeup of these slow precincts and his refusals of extra help and relief for the 32 out-of-service voting machines.²⁵⁸ East Baton Rouge came up with an even thinner premise for shuttering polling places, claiming that “historic flooding” temporarily forced the closure of ten polling places, but it has only reopened two since.²⁵⁹

St. Landry Parish reconfigured their Parish maps following the 2020 census, requiring some voters, again, disproportionately Black voters, to travel as many as 25 miles to reach new polling places.²⁶⁰ In Jeanerette, Louisiana in Iberia Parish, polling places were moved ten miles from their previous locations, relocations that pose a deliberate challenge to minority voters. The Parish also reduced the number of precincts from 64 to 37, closing 5 of eight polling places that

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Paul Purpura, *Kenner Woman Sues Jefferson Parish to Get Better Access for Disabled Voters*, New Orleans Times-Picayune, June 9, 2010, https://www.nola.com/news/politics/article_161b7c7c-5571-5f6a-a376-39e62d4d2f1c.html.

²⁵⁶ Leadership Conference, *supra* note 251, at 34.

²⁵⁷ Faimon A. Roberts III & Della Hasselle, *Fewer machines, long lines plague Jefferson Parish early voting*, New Orleans Times-Picayune, October 19, 2020, https://www.nola.com/news/politics/article_c76ff7c2-123c-11eb-8360-a7684b6d5aa9.html.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ Bobby Ardoin, *Voting precincts still not set for 2022 elections after backlash from changes*, Yahoo News, Jan. 4, 2022, <https://news.yahoo.com/voting-precincts-still-not-set-174853704.html>.

served higher-than-average Black populations. Reflecting the disproportionate burden on Black voters, the 2021 electoral cycle required outside organizations to provide transportation to both the Iberia Parish Registrar and polling stations. Given the State's sordid history of voter disenfranchisement, it is difficult to accept that such changes to polling places are made without regard to race.²⁶¹ The Louisiana Advisory Committee to the U.S. Commission on Civil Rights specifically explained that the number of polling locations negatively correlated with the number of Black residents. "This means that there are fewer polling locations per voter in a geographical area if that area has more Black residents," Professor Jhacova Williams explained to the Committee, "this in turn implies that Black residents face longer travel distances to reach a polling location."²⁶²

In total contrast to shutting down polling sites that served Black voters was the Jefferson Parish practice of operating a voting machine reserved for so-called VIPs, a list of whom the Parish never provided. "The secretary of state's office seized the machine" following the 2016 election and complaints about party bias and access to this exclusive voting site.²⁶³

Voting Legislation and Voter ID Laws

Much like the flurry of efforts in the 1970s, recent schemes to disenfranchise Black voters have also come through the state legislature. This year's Senate Bill 224 and House Bill 138 are both restrictive voting bills passed by the state legislature and vetoed by Louisiana Governor John Bel Edwards.²⁶⁴ In this case, these bills underscore the consistent efforts to disenfranchise Black voters that stretch from 1868 to the present day. White lawmakers in Louisiana remain determined to reduce Black political power using any means they can.

For example, Senate Bill 224 was legislation aimed at disqualifying mail-in ballots that did not include state I.D. or social security numbers, language disproportionately affecting voters of color. Senate Bill 224 as originally written also tried to ban absentee drop boxes even though such boxes had never been used in Louisiana. Such legislation clearly targeted Black voters and voters of color. House Bill 138 provided for the auditing and purging of voter rolls, unnecessary and expensive procedures designed to cull minority voters. The 2021 establishment of the Voting Systems Commission grew out of a similar impulse, capitalizing on the unfounded conspiracy theories and frequently repeated falsehoods surrounding the 2020 presidential election. The Commission, chaired by Secretary of State Kyle Ardoin, went so far as to welcome out-of-state conspiracy theories from national figures like Mike Lindell, who urged the commission to combat

²⁶¹ Dwayne Fatherree, *Sending a Strong Message: Louisiana activists help voters cast ballots after drastic polling place reductions in Black neighborhoods*, S. Poverty L. Ctr. (Nov. 19, 2016), <https://www.splcenter.org/news/2021/11/19/sending-strong-message-louisiana-activists-help-voters-cast-ballots-after-drastic-polling>; *LDF Sends letter Urging the Iberia Parish Council to Reverse Eight Polling Places Closures that Disproportionately Impact Black Voters*, NAACP Legal Defense Fund (Sept. 17, 2021), <https://www.naacpldf.org/news/ldf-sends-letter-urging-the-iberia-parish-council-to-reverse-eight-polling-places-closures-that-disproportionately-impact-black-voters/>.

²⁶² *Barriers*, *supra* note 61.

²⁶³ William P. Noles III, *Investigation of Jefferson Parish 'VIP' Voting machine now in DA's hands*, New Orleans Times-Picayune, Nov. 30, 2016, https://www.nola.com/news/politics/elections/article_3b5f23f8-7a21-531c-a729-7f5d47c20fa7.html.

²⁶⁴ Office of the Governor, *Notice: Bills Vetoed by Gov. Edwards* (June 20, 2022), <https://gov.louisiana.gov/index.cfm/newsroom/detail/3725>.

non-existent electoral fraud.²⁶⁵ In particular, Lindell argued for a return to hand-marked and hand-counted paper ballots, again drawing on fraudulent claims that voting machines themselves were at fault. As chairman, Ardoin frequently allowed such misinformation “to go essentially unchallenged” and demonstrated the same anecdotal misunderstanding he showed about polling places when he claimed that “everywhere I go” in Louisiana, citizens are crying out for “hand-marked paper ballots.”²⁶⁶ The basic trouble with this reversion to paper is most simply the 150 years of white registrars using any means at their disposal to disenfranchise Black votes. Paper ballots are especially ripe for such abuse. This was not the first time Ardoin was at the forefront of questionable schemes involving voting technology. Ardoin was behind a failed attempt in 2018 to replace 10,000 admittedly outdated and problematic voting machines at the cost of \$100 million, a contract the secretary of state’s office nonetheless attempted to manipulate.²⁶⁷ In particular Ardoin had aligned himself against Dominion Voting because Donald Trump made provably false allegations about the company’s machines.²⁶⁸

Voter identification laws go hand-in-glove with ginned-up concerns about voting machines. Testimony before the June 2018 Louisiana Advisory Committee identified several further methods Louisiana’s voter identification requirements create barriers to voting. First, Carol DeVille of the League of Women Voters of Lafayette, noted that her organization received a number of complaints that voters were being turned away when they did not present a photo identification and were never offered the affidavit as an alternative method of identification. In the context of Louisiana’s proven and extensive disenfranchisement of Black voters, the authority given to election officials and poll workers has the ultimate effect of reinforcing historical patterns where registrars could deny Black voters for essentially infinite reasons. Even in 2018, testimony established that poll workers continue to believe (to the explicit consequence of disenfranchising Black voters) that contrary to State law they have discretion to deny the vote to people without identification. Voter identification requirements “present unique barriers to certain groups of people” and “dissuades many people, particularly the poor and African Americans, from even attempting to vote.”²⁶⁹ Low participation rates for voters in poor and predominantly Black communities has been strongly tied to the increase and intensity of voter identification requirements.

At-Large Voting

From 1969–2011, the Department of Justice made over twenty objections to at-large voting in Louisiana for violations of section 5 of the VRA.²⁷⁰ Accordingly, at-large voting has historically been a favorite Louisianan disenfranchising tactic, a practice that has continued unencumbered by the oversight of the VRA.

²⁶⁵ Greg LaRose, *Vapid Voting Systems Commission spends months perpetuating the Big Lie*, Louisiana Illuminator, July 6, 2022, <https://lailluminator.com/2022/07/06/vapid-voting-systems-commission-spends-months-perpetuating-the-big-lie/>.

²⁶⁶ *Ibid.*

²⁶⁷ Deslatte, *supra* note 246.

²⁶⁸ Jarvis Deberry, *Louisiana Republicans need to admit their complaint about Dominion voting machines is based on a big lie*, Louisiana Illuminator, Mar. 26, 2021, <https://lailluminator.com/2021/03/26/louisiana-republicans-need-to-admit-their-complaint-about-dominion-voting-machines-is-based-on-a-big-lie-jarvis-deberry/>.

²⁶⁹ *Barriers*, *supra* note 61.

²⁷⁰ U.S. Dep’t of Justice, Section 5 Objection Letters, <https://www.justice.gov/crt/section-5-objection-letters>.

April of 2021 saw a settlement between the Justice Department and the City of West Monroe over VRA violations. Not entirely surprisingly, West Monroe's Board of Alderman was resorting to the at-large system proven again and again to disenfranchise Black voters. As the consent decree explained, "Black residents comprise nearly 30% of the electorate" and yet "no Black candidate has ever been elected to the West Monroe Board of Aldermen."²⁷¹ West Monroe agreed in the settlement to "discontinue use of its current at-large method of electing the five members of its Board of Aldermen."²⁷²

More recently, a controversy erupted in Bossier City where Black residents contested the two at-large positions on the Bossier City Council. As press coverage explained, "at-large elections guarantee that the votes of Black residents will be drowned out by the votes of the city's white majority."²⁷³ As a February 17, 2022 letter sent to the Council explained, "since the City Council's creation in 1977, no Black candidate has ever been elected" to an at-large seat and only the city's majority-Black district had elected a Black council member.²⁷⁴ Proposed restructuring into single-member districts would require the matter go in front of the city's white majority.²⁷⁵

Voter Intimidation

Another vetoed House Bill, H.B. 704 (2021) returned to the earliest reaction to Black enfranchisement in Louisiana—voter intimidation—in proposing an expanded role of poll watchers for future elections in the State. Harkening back to the late 1860s and 1870s when the most common sight at a Louisianan election was a scrum of white Democrats brandishing a cannon to intimidate Black and Republican voters, HB 704 belies a troubling inattention to the real history of poll watching in Louisiana. The State has no history of recorded fraud *except* by white supremacists trying to disenfranchise Black voters. Given that history, the idea that poll watchers would be needed for early voting or on election day is not merely patently absurd but a revival of voter intimidation tactics from the grimmest chapter in post-Emancipation Louisiana. Poll watching has, since the 1860s, been a tool for intimidating first Black and now other non-white voters. A prime example of the specter of white supremacist violence was the white Louisianan carrying multiple firearms, including an AR-15 assault rifle, along with Trump and Blue Lives Matter flags near an East Baton Rouge polling station.²⁷⁶ Poll watchers sound

²⁷¹ U.S. Dep't of Justice, Press Release (Apr. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-west-monroe-louisiana-under-voting-rights-act-0#:~:text=April%2015%2C%202021-Justice%20Department%20Reaches%20Agreement%20with%20the%20City%20of%20West%20Monroe,City%20of%20West%20Monroe%2C%20Louisiana>.

²⁷² *Ibid.*

²⁷³ Stacey Tinsley, *Community Members gather to change At-Large election methods*, Bossier Press-Tribune, Apr. 20, 2022, <https://bossierpress.com/community-members-gather-to-change-at-large-election-methods/>; *see also* <https://www.ksla.com/2022/04/19/bossier-naacp-chapter-calling-elimination-at-large-city-council-election-methods/>.

²⁷⁴ *Ibid.*

²⁷⁵ *Bossier Council to consider 2 maps, 1 with 7 single member districts*, KTBS (June 14, 2022), https://www.ktbs.com/news/bossier-council-to-consider-2-maps-1-with-7-single-member-districts/article_663b4436-ec13-11ec-8491-0fdbd8e354e2.html; Destinee Patterson, *Bossier City Council advances discussion on redistricting maps, Jimmie Davis Bridge proposal* (July 5, 2022), <https://www.ksla.com/2022/07/05/bossier-city-council-advances-discussion-redistricting-maps/>.

²⁷⁶ *Man carrying rifle prompts police response near Baker polling location*, WBRZ (Nov. 3, 2020), <https://www.wbrz.com/news/man-carrying-rifle-prompts-police-response-at-baker-polling-location-no-arrests-made>.

innocent in theory but in practice are part of a long history of voter intimidation and voter disenfranchisement in the State of Louisiana.

Incarceration and Disenfranchisement

Finally, an issue facing many states, especially those in the former Confederacy and under Section 5 preclearance, is that of people with felony convictions. If we consider that one focus of postbellum policing and justice in Louisiana was specifically aimed at creating a nexus of law and punishment for freed Black Louisianans, the links between voting and the justice system become readily apparent. Dr. Joshua Stockley of the University of Louisiana at Monroe testified “that approximately 80% of the parolees/probationers currently ineligible to vote are African American, compared with about 32% of the population of the state.”²⁷⁷ Indeed, Stockley helped explain how the racial impact of incarceration in the State is so radically disproportionate and had a disenfranchising consequence, influencing even the “concept of proportional representation. If many members of a community are unable to vote, they are denied the opportunity to be governed by people who might best serve their interests.”²⁷⁸ One little discussed and often misunderstood aspect of incarceration and disenfranchisement is the deep roots this practice has in the State.

Act 636 was passed in 2018 to address the more-than 40,000 voters disenfranchised because of felony convictions, again overwhelmingly Black voters in Louisiana. Mack Terrance, a formerly incarcerated New Orleanian has spoken extensively on the importance of voting but that the State had made registration burdensome and difficult for former felons. Allegations continue to crop up about inappropriate voter purges and State officials “imposing unnecessary and onerous requirements on former incarcerated people attempting to register to vote.”²⁷⁹

Other Issues

The 2022 case of *Harding v. Edwards* demonstrated the recalcitrance of the State of Louisiana to expand the franchise even in the midst of a worldwide pandemic that fell most acutely on the State’s Black residents. Although *Harding v. Edwards* is a case involving restrictions on absentee voting during the COVID-19 pandemic, the case is highly to the State of Louisiana’s sustained efforts to disenfranchise Black voters. In that case, a federal court found evidence of the undue burdens regularly placed on voters, but particularly those disproportionate burdens facing Black Louisianans, exacerbated by the pandemic. The court in *Harding v. Edwards* provided limited injunctive relief for early voting.²⁸⁰

Information and access have also proven to be contentious issues. Louisiana has continued to resist complying with the National Voter Registration Act by not giving citizens information about registration when applying for public benefits. “[T]housands and thousands of African American voters were not being provided with access to this information [which is] a barrier to access to voting.”²⁸¹

In fact, the right to vote has become so politicized that disenfranchising interests cannot even agree to a public discussion of the subject. The Louisiana Endowment of the Humanities

²⁷⁷ *Barriers*, *supra* note 61.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ 487 F. Supp. 3d 498 (M.D. La. 2020).

²⁸¹ *Barriers*, *supra* note 61.

offered a \$2700 grant to promote its “Who Gets to Vote?” reading and discussion program, purchasing some of the sources cited in this very report and promoting virtual roundtable discussions. The Lafayette Public Library Board of Control rejected the grant because there was no political counterbalance to what one library board member called “extremely, extremely far left leaning” interpretations.²⁸² This decision by the board caused the abrupt resignation of Teresa Elbertson, a 38-year employee and director of the Lafayette Public Library.²⁸³

Perhaps the most telling example of the very idea of voting rights representing a danger to the status quo was Senate Bill 199 in the 2022 regular session. Louisiana’s Senate let a constitutional amendment die on the floor rather than go to voters. SB 199 simply stated that “all elections shall be free and equal; and no power, civil or military, shall at any time interfere with or prevent the free exercise of the right of suffrage.”²⁸⁴

Conclusion

Taken as a whole, these incidents in the history of Louisiana underscore a profound and sustained hostility to the freedoms of Black people. In the pre-suffrage era, most of which involved legalized slavery, controlling Black freedoms was the primary cog in the economy, society, and function of the State. After suffrage, these efforts to restrict Black freedom focused mainly on restricting Black voting. As previous studies of voter disenfranchisement in Louisiana have noted, “any careful study of the experience of minority voters in Louisiana reveals that much of the progress that has been achieved in the State is a direct result of the protections of the VRA generally ... the role of the VRA both as a remedy for, and as a deterrent to, voting discrimination is unmistakable.”²⁸⁵ Since the *Shelby County* ruling in 2013, Louisiana has continued in the path established after 1898, “having one of the most severe, adaptive, and violent histories of discrimination in voting.”²⁸⁶ As this report should make clear, that history stretches back even before Black suffrage, when white Louisianans sought to control Black bodies and actions. Because of this deep history and sustained practice of Black disenfranchisement, Louisianans’ efforts to continue in this manner must be recognized and in whatever cases it is possible, stopped.

²⁸² Claire Taylor, Lafayette library board kills voting rights grant over 'far left' speakers, *Acadiana Advocate* (Jan. 30, 2021), https://www.theadvocate.com/acadiana/news/article_e1cfd16-61bc-11eb-bcc5-a77d065b07d7.html.

²⁸³ Lisa Peet, *Lafayette Public Library Board Declines Grant for Voting Rights Discussion, Community Speaks Out in Aftermath* (Mar. 4, 2021), <https://www.libraryjournal.com/story/Lafayette-Public-Library-Board-Declines-Grant-for-Voting-Rights-Discussion-Community-Speaks-Out-in-Aftermath>.

²⁸⁴ S.J. Res. 22RS-31 (2022), <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1255327>.

²⁸⁵ Adegbile, *supra*, note 116, at 472–73.

²⁸⁶ *Ibid.*

Appendices

Appendix 1 is my curriculum vita.

Appendix 2 is an excerpt of Louisiana Code from December 21, 1865.

Appendix 3 is the 1872 Currier and Ives print, “The First Colored Senator and Representatives.”

Appendix 4 is a contemporary map of the Black population in the Louisiana Parishes.

Per 28 U.S. Code 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 22, 2022.

A handwritten signature in dark ink, appearing to read "R. Blakeslee Gilpin", with a stylized flourish at the end.

R. Blakeslee Gilpin, Ph.D.

APPENDIX 1

R. Blakeslee Gilpin

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EDUCATION

- Ph.D. in History (with distinction), Yale University, May, 2009
 - *John Brown Still Lives!: America's Long Reckoning with Violence, Equality, and Change*
 - Winner, 2010 C. Vann Woodward Dissertation Prize, Southern Historical Association
 - David W. Blight, Director. Glenda Gilmore and John Mack Faragher, Dissertation Committee.
- M.Phil in History, Yale University, 2005.
- M.Phil in British History, Cambridge University, 2002.
- B.A., M.A. in History (with distinction), *Magna Cum Laude*, Phi Beta Kappa, Yale University, 2001.

ACADEMIC POSITIONS

- Director of Graduate Studies, 2017-18, 2020-present; Associate Professor, 2018-present; Assistant Professor, 2013-present, Tulane University.
 - Courses: American Race War; US History and the Law; Stars and Bars; Slavery, Banjos and Moonshine; The Southern Imagination; Memory and History; Civil War and Reconstruction; Utopia-Dystopia.
- Gilder Lehrman Institute of American History, Summer Teacher Institute, "Southern Fictions," 2014.
- Assistant Professor, University of South Carolina, 2011-2013.
 - Courses: Southern Intellectual and Cultural History; Readings in Nineteenth-Century U.S. History; Southern Memory and the Civil War; Civil War and Reconstruction; America to 1877.
- Postdoctoral Fellow, United States Studies Centre, University of Sydney, 2010.
- Postdoctoral Fellow, Center for the Study of the American South, University of North Carolina, 2009.

PUBLICATIONS & BOOK PROJECTS

- Editor, with Nicholas Bromell, Frederick Douglass, *My Bondage My Freedom. A Norton Critical Edition* (W.W. Norton, October 2020).
- Editor, with Rose Styron, *The Selected Letters of William Styron* (Random House, 2012).
- 2013 Pulitzer Prize Nominee in Non-Fiction; *The New York Times* Editor's Choice.
- *John Brown Still Lives!: America's Long Reckoning with Violence, Equality, and Change* (University of North Carolina Press, 2011).
- Finalist, 2012 Frederick Douglass Prize, Gilder Lehrman Center, Yale University.

ARTICLES & BOOK CHAPTERS

- "The Family Dynasty," *Gastro Obscura*, August 2019. Finalist for James Beard Award.
- "The Other Side of the World: Battling the Exceptional South," *Early American Literature*, June 2017.
- "Essential and Pure: Imagining Old-Time North Carolina," *Scalawag Magazine*, Spring 2015.
- "Reconstruction: Emancipation and Race," in Smith, ed., *Reconstruction* (Kent State University, 2016).
- "Crimes of a Guilty Land: Racial Terrorism," in *Routledge History of Terrorism* (Routledge, 2016).
- "Love Letters to Black America: Charles White's Art for the People," *Slavery and Abolition*, Sept 2013.
- "John Brown, Religion, and Violent Abolition," *The Huffington Post*, January 22, 2013.
- "Book Bag: The Best Letter Collections," *The Daily Beast*, December 18, 2012.
- "William Styron Letters," *The Paris Review*, December 2012.
- "William Styron to Norman Mailer: Two Letters," *The New York Review of Books*, October 25, 2012.
- "To the Last Pike," *The New York Times*, Disunion, March 2, 2012.
- "Birthday of a Nation," *The New York Times*, Disunion, December 19, 2011.
- "The Battle Hymn of John Brown," *The New York Times*, Disunion, November 25, 2011.
- "The War Not For Abolition," *The New York Times*, Disunion, October 20, 2011.
- "Why they sang about John Brown," *The Boston Globe*, August 14, 2011.
- "The Afterlife of John Brown," *Biography: An Interdisciplinary Quarterly*, Winter, 2007.
- "The Fugitive Imagination: Robert Penn Warren's *John Brown*," chapter in *Memory and Myth: The Civil War in Fiction and Film* (Purdue University Press), 2007.
- "Hopping Freights," *The American Scholar*, July 2003.
- "The Way It Ought To Sound: Mississippi John Hurt and The Blues Of The Mississippi Delta," *Journal of Mississippi History*, July 2000.

BOOK REVIEWS

- Aston Gonzalez, *Visualizing Equality*, *Journal of American History*, December 2021.

- Scott Matthews, *Capturing The South*, *Journal of American History*, December 2019.
- Stephen Lubet, *The "Colored Hero," American Historical Review*, December 2016.
- Jeff Forret, *Slave Against Slave*, *Civil War Book Review*, Fall 2016.
- W. Brent Morris, *Oberlin: Hotbed of Abolitionism*, *Journal of American Studies*, Fall 2015.
- C. Friend and L. Glover, eds., *Death and the American South*, *Journal of American History*, Fall 2015.
- Minrose Gwin, *Remembering Medgar Evers*, *Journal of Southern History*, August 2014.
- Gregory Smithers, *Slave Breeding*, *Journal of American History*, December 2013.
- Jonathan Kahrl, *The Land Was Ours*, *Florida Historical Quarterly*, Spring 2013.
- Stephen Lubet, *John Brown's Spy*, *Civil War History*, Spring 2013.
- Anne Valk and Leslie Brown, eds., *Living With Jim Crow*, *Journal of Southern History*, Spring 2011.
- John McGlone, *John Brown's War Against Slavery*, *Slavery and Abolition*, Winter 2010.
- Bruce Ronda, *Reading the Old Man*, *New England Quarterly*, Summer 2010.
- Elizabeth Varon, *Disunion!*, *Journal of American Studies*, 2009.

FELLOWSHIPS & HONORS

- Inaugural Rosenthal Fellow, New Orleans Center for the Gulf South Food Studies Program, 2019-20.
- Lurcy Fellowship, Tulane University, 2016.
- Heyburn Lecturer, Milton Academy, 2014.
- Monroe Fellowship, New Orleans Center for the Gulf South, 2014.
- Finalist, Frederick Douglass Prize, Gilder Lehrman Center, Yale University, 2012.
- C. Vann Woodward Dissertation Prize, Southern Historical Association, 2010.
- Hutchins Lecturer, University of North Carolina - Chapel Hill, 2010.
- Gilder Lehrman Research Fellowship, Gilder Lehrman Center, 2008.
- Beinecke Rare Book Library Research Fellowship, 2007.
- John Hope Franklin Grant, Duke University, 2007.
- Lamar Scholar, Howard R. Lamar Center for the Study of Frontiers and Borders, Yale University, 2007.
- Gilder Lehrman Fellow, Gilder Lehrman Institute of American History, 2006.
- Joan Nordell Fellow, Houghton Library, Harvard University, 2006.
- W.M. Keck Foundation Fellow, Huntington Library, 2006.
- John F. Enders Grant, Yale University, 2006.
- Paul Francis Speaker Series, Yale University, Spring 2005.
- Beinecke Rare Book Library Graduate Pre-Prospectus Fellowship, 2004.
- Graduate Fellow, Calhoun College, Yale University, 2004-2006.
- Paul Mellon Fellow, Clare College, Cambridge, 2001-2003.
- Class of 1955 Fellowship, 2000.
- Alanne Linck Fellowship, 2000.

INVITED LECTURES

- “Horace Pippin and John Brown,” The Artist’s Institute, Hunter College, November 9, 2021.
- “Imagining History and Finding John Brown,” Milton Academy, Milton, MA, December 3, 2014.
- “John Brown in Antebellum Life,” Peninsula Foundation, Peninsula, OH, September 21, 2013.
- “Letters and Life of William Styron,” Martha’s Vineyard Book Festival, Chilmark, MA, August 2, 2013.
- “William Styron: Tell About the South,” University of North Carolina, February 14, 2013.
- “William Styron: A Discussion,” Perkins Library, Duke University, February 13, 2013.
- “William Styron: Life and Letters,” Jimmy Carter Presidential Library and Museum, January 14, 2013.
- “Meteor of War: John Brown, Slavery, and the Civil War,” Northwestern University, January 9, 2012.
- “The Chains of Slavery: The Literature of John Brown,” Brown University, April 18, 2011.

MEDIA APPEARANCES

- Greater Boston, WGBH, July 6, 2015.
- [*American Experience: Abolitionists*](#), PBS, January 2013.
- National Book Tour, *Letters of William Styron*, December 2012-February 2013.
- [*Walter Edgar’s Journal*](#), South Carolina Public Radio, April 10, 2012, April 8, 2013, April 12, 2013
- [*Southern Belle*](#), 2011.
- “The Letters of William Styron,” *Book World*, ABC Radio National, January 28, 2011.
- “The Long Legacy of American Slavery,” *Saturday Extra*, ABC Radio National, November 27, 2010

PRESENTATIONS & CONFERENCE PAPERS, SELECTED

- Organizer and Speaker, “Making History Come Alive,” Organization of American Historians Annual Meeting, April 8, 2017.
- Organizer and Speaker, “Trailblazing Abolition,” Organization of American Historians Annual Meeting, April 8, 2016.
- “From Dissertation to Book: Testimonials from Three Woodward Prize Winners,” Southern Historical Association, November 2, 2012.
- “A Kiss for the Negro’s Child: Painting an Abolitionist Martyr,” University of Melbourne, November, 2010.
- “The Slave Rebel and Black Power: Nat Turner and the 1960s,” University of Sydney, October 2010.
- “John Brown’s Place in American Art: 1860-2010,” Ackland Art Museum, May 5, 2010.
- “John Brown: Old Testament Avenger or Peaceful Patriarch?,” University United Methodist Church, Chapel Hill, NC, May 2, 2010.

- “Legend, Myth, and Jacob Lawrence’s Harlem,” Gallery Talk, Ackland Art Museum, April 14, 2010.
- “The Mad Hero: John Brown Through the Prism of Paint,” Organization of American Historians Annual Meeting, April 10, 2010.
- “The Dogged Pursuit of Destiny: W.E.B. Du Bois and John Brown,” University of North Carolina – Chapel Hill, February 9, 2009.
- Organizer and Speaker, “John Brown, Slavery, and the Legacies of Revolutionary Violence,” Gilder Lehrman Center 11th Annual International Conference, October 29-31, 2009.
- “John Brown Remembered: 150th Anniversary of the Raid on Harpers Ferry,” Harpers Ferry National Historical Park in Harpers Ferry, West Virginia, October 14-17, 2009.
- “The Fugitive Imagination,” University of North Carolina – Chapel Hill, October 8, 2009.
- “Words and Action: Franklin Sanborn and a John Brown for the Gilded Age,” American Historical Association Annual Meeting, Atlanta, GA, January 6, 2007.
- Panelist, “Race and the Americas,” Gilder-Lehrman Center for the Study of Slavery and Abolition, November 5, 2005.

APPENDIX 2

AN ORDINANCE relative to the police of negroes recently emancipated within the parish of St. Landry.

Whereas it was formerly made the duty of the police jury to make suitable regulations for the police of slaves within the limits of the parish; and whereas slaves have become emancipated by the action of the ruling powers; and whereas it is necessary for public order, as well as for the comfort and correct deportment of said freedmen, that suitable regulations should be established for their government in their changed condition, the following ordinances are adopted, with the approval of the United States military authorities commanding in said parish, viz:

SECTION 1. *Be it ordained by the police jury of the parish of St. Landry*, That no negro shall be allowed to pass within the limits of said parish without a special permit in writing from his employer. Whoever shall violate this provision shall pay a fine of two dollars and fifty cents, or in default thereof shall be forced to work four days on the public road, or suffer corporal punishment as provided hereinafter.

SECTION 2. *Be it further ordained*, That every negro who shall be found absent from the residence of his employer after 10 o'clock at night, without a written permit from his employer, shall pay a fine of five dollars, or in default thereof, shall be compelled to work five days on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 3. *Be it further ordained*, That no negro shall be permitted to rent or keep a house within said parish. Any negro violating this provision shall be immediately ejected and compelled to find an employer; and any person who shall rent, or give the use of any house to any negro, in violation of this section, shall pay a fine of five dollars for each offence.

SECTION 4. *Be it further ordained*, That every negro is required to be in the regular service of some white person, or former owner, who shall be held responsible for the conduct of said negro. But said employer or former owner may permit said negro to hire his own

time by special permission in writing, which permission shall not extend over seven days at any one time. Any negro violating the provisions of this section shall be fined five dollars for each offence, or in default of the payment thereof shall be forced to work five days on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 5. *Be it further ordained*, That no public meetings or congregations of negroes shall be allowed within said parish after sunset; but such public meetings and congregations may be held between the hours of sunrise and sunset, by the special permission in writing of the captain of patrol, within whose beat such meetings shall take place. This prohibition, however, is not intended to prevent negroes from attending the usual church services, conducted by white ministers and priests. Every negro violating the provisions of this section shall pay a fine of five dollars, or in default thereof shall be compelled to work five days on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 6. *Be it further ordained*, That no negro shall be permitted to preach, exhort, or otherwise declaim to congregations of colored people, without a special permission in writing from the president of the police jury. Any negro violating the provisions of this section shall pay a fine of ten dollars, or in default thereof shall be forced to work ten days on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 7. *Be it further ordained*, That no negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special written permission of his employers, approved and indorsed by the nearest or most convenient chief of patrol. Any one violating the provisions of this section shall forfeit his weapons and pay a fine of five dollars, or in default of the payment of said fine, shall be forced to work five days on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 8. *Be it further ordained*, That no negro shall sell, barter, or exchange any articles of merchandise or traffic within said parish without the special written permission of his employer, specifying the articles of sale, barter or traffic. Any one thus offending shall pay a fine of one dollar for each offence, and suffer the forfeiture of said articles, or in default of the payment of said fine shall work one day on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 9. *Be it further ordained*, That any negro found drunk within the said parish shall pay a fine of five dollars, or in default thereof shall work five days on the public road, or suffer corporal punishment as hereinafter provided.

SECTION 10. *Be it further ordained*, That all the foregoing provisions shall apply to negroes of both sexes.

SECTION 11. *Be it further ordained*, That it shall be the duty of every citizen to act as a police officer for the detection of offences and the apprehension of offenders, who shall be immediately handed over to the proper captain or chief of patrol.

SECTION 12. *Be it further ordained*, That the aforesaid penalties shall be summarily enforced, and that it shall be the duty of the captains and chiefs of patrol to see that the aforesaid ordinances are promptly executed.

SECTION 13. *Be it further ordained*, That all sums collected from the aforesaid fines shall be immediately handed over to the parish treasurer.

SECTION 14. *Be it further ordained*, That the corporal punishment provided for in the foregoing sections shall consist in confining the body of the offender within a barrel placed over his or her shoulders, in the manner practiced in the army, such confinement not to continue longer than twelve hours, and for such time within the aforesaid limit as shall be fixed by the captain or chief of patrol who inflicts the penalty.

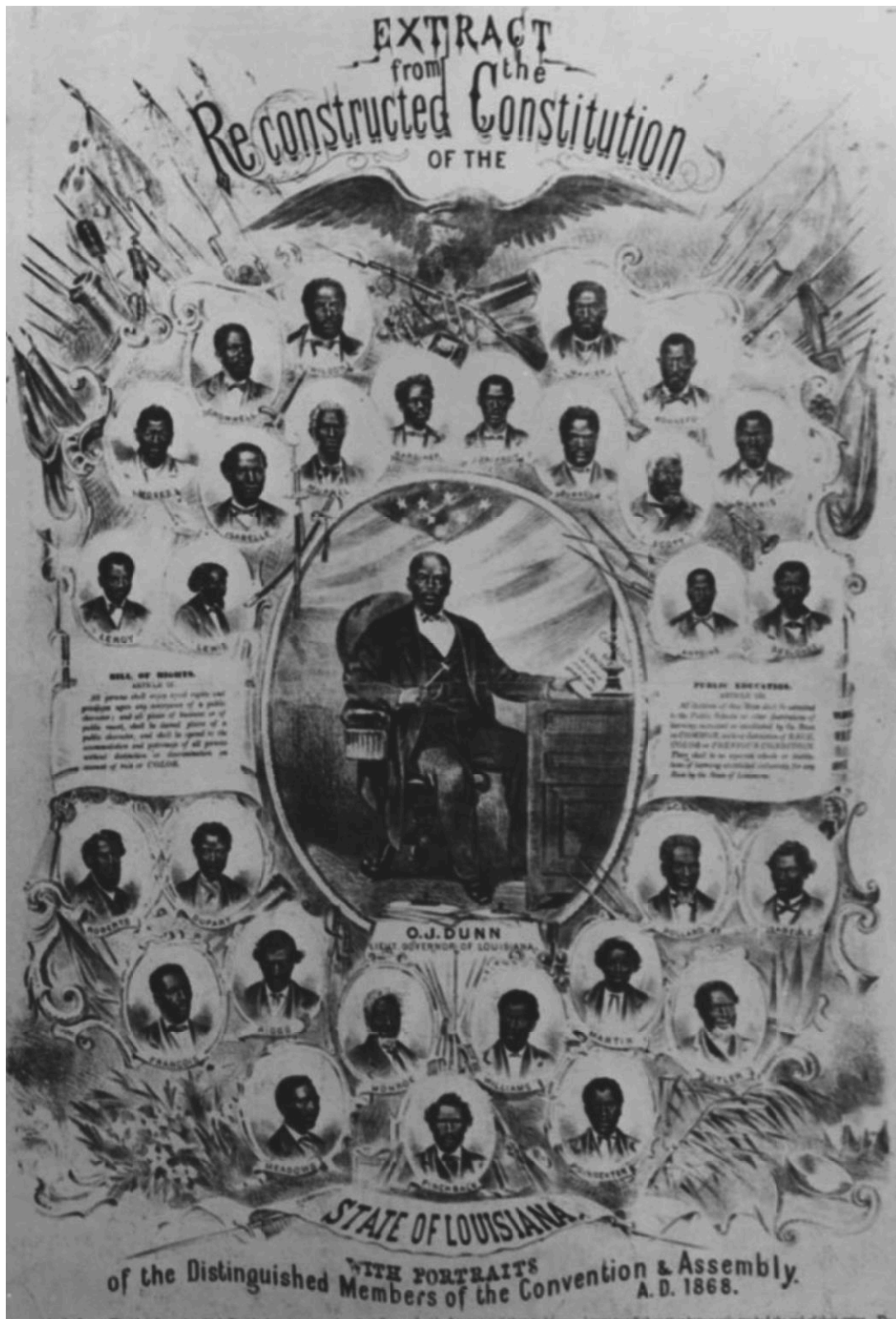
SECTION 15. *Be it further ordained*, That these ordinances shall not interfere with any municipal or military regulations inconsistent with them within the limits of said parish.

SECTION 16. *Be it further ordained*, That these ordinances shall take effect five days after their publication in the Opelousas Courier.

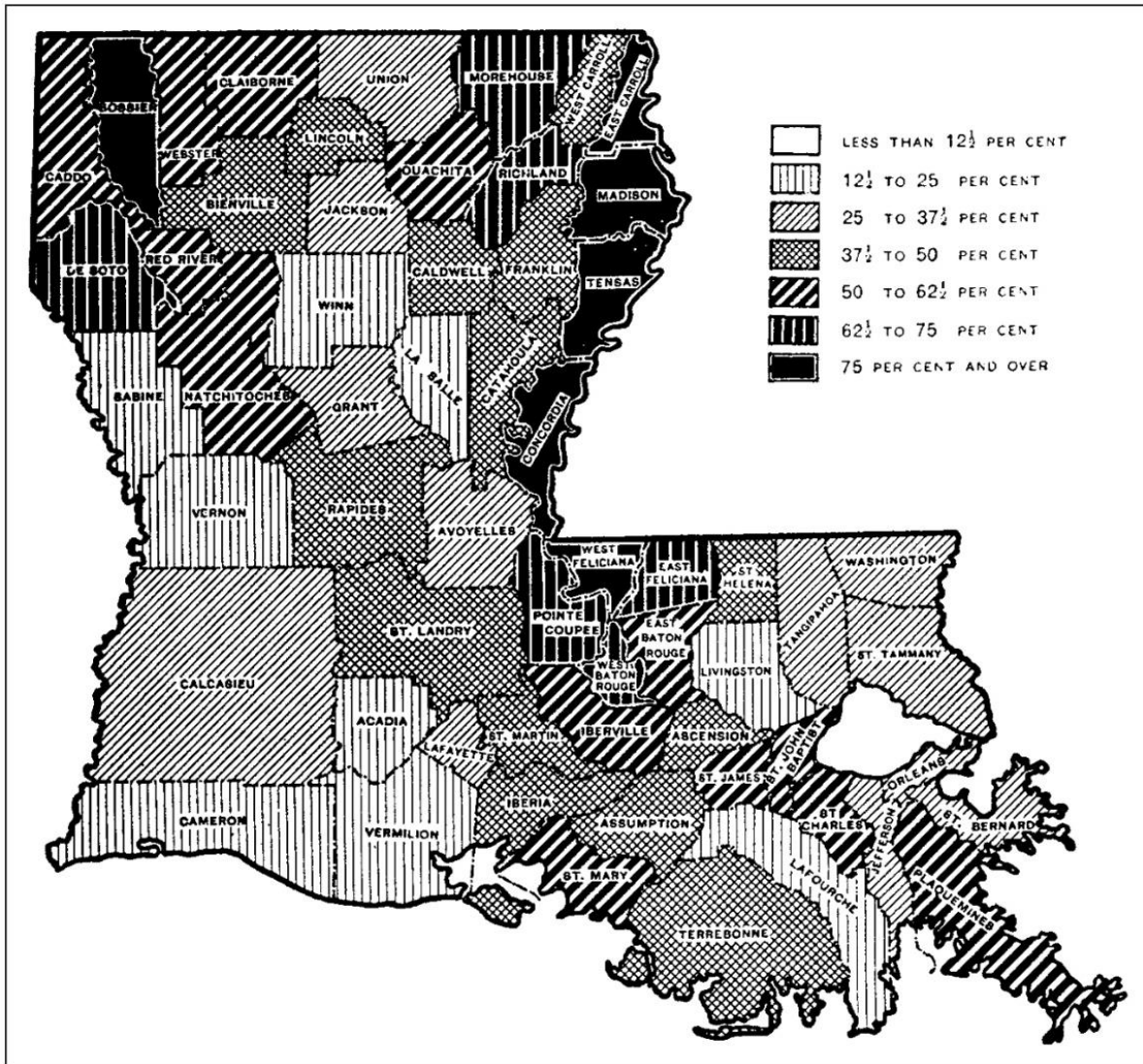
Official copy:

J. LOVELL,
Captain and Assistant Adjutant General.

APPENDIX 3



APPENDIX 4



Map 5. Percentage of African Americans in Total Population of Louisiana, by Parishes, 1910

APPENDIX 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

DR. DOROTHY NAIRNE, JARRETT
LOFTON, REV. CLEE EARNEST LOWE, DR.
ALICE WASHINGTON, STEVEN HARRIS,
ALEXIS CALHOUN, BLACK VOTERS
MATTER CAPACITY BUILDING
INSTITUTE, and THE LOUISIANA STATE
CONFERENCE OF THE NAACP,

Plaintiffs,

v.

R. KYLE ARDOIN, in his official capacity as
Secretary of State of Louisiana

Defendant.

Civil Action No. 3:22-cv-00178
SDD-SDJ

EXPERT REPORT OF DR. TRACI BURCH

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Qualifications and Background

My name is Dr. Traci Burch. I am Associate Professor of Political Science at Northwestern University and Research Professor at the American Bar Foundation. I received my Ph.D. in Government and Social Policy from Harvard University in 2007.

Over the past 15 years, I have led several large, long-term quantitative and qualitative research projects on political participation in the United States. I have participated in and coauthored several book chapters and articles that examine race, political participation, and inequality. For instance, I have worked with Professors Kay Schlozman, Sidney Verba, and Henry Brady on book chapters and articles related to the causes and consequences of inequality in political participation. I also collected data on congressional hearings and interest group activities for that book. For my coauthored article with Jennifer Hochschild and our book with Vesla Weaver, I analyzed the legislative history of several racial policies, including the 1965 Hart-Cellar Act. We also explore political participation and attitudes in our book *Creating a New Racial Order*.

I am widely regarded as an expert on political behavior, barriers to voting, and political participation. My work has been widely cited and replicated and has won several awards. My dissertation on the effects of felony disenfranchisement on voting in North Carolina, Georgia, and other states, “Punishment and Participation: How Criminal Convictions Threaten American Democracy” won the Robert Noxon Toppan Prize for the Best Dissertation on a Subject of Political Science at Harvard in 2007. I also achieved national recognition for this work; my dissertation was awarded the E.E. Schattschneider Award from the American Political Science Association for the best dissertation in American Government and the William Anderson Award for the best dissertation in federalism, intergovernmental relations, and state and local politics. Several articles from this dissertation, including work evaluating voting patterns among people with felony convictions in North Carolina, Georgia, Florida, Missouri, and Michigan, have been published in leading peer-reviewed journals. In particular, my articles “Did Disfranchisement Laws Help Elect President Bush? New Evidence on the Turnout and Party Registration of Florida’s Ex-Felons” and “Turnout and Party Registration among Criminal Offenders in the 2008 General Election,” which appeared in the peer-reviewed journals *Law and Society Review* and *Political Behavior*, respectively, included my calculations of felony disenfranchisement.

My academic book on the community-level effects of criminal convictions on political participation, *Trading Democracy for Justice*, was published by the University of Chicago Press and also won multiple national awards from the American Political Science Association and its sections, including the Ralph J. Bunche Award for the best scholarly work that explores the phenomenon of ethnic and cultural pluralism and best book awards from the law and politics and urban politics sections. *Trading Democracy for Justice*, as well as the articles “The Effects of Imprisonment and Community Supervision on Political Participation,” “Did Disenfranchisement Laws Help Elect President Bush?,” “Skin Color and the Criminal Justice System,” and “Turnout and Party Registration among Criminal Offenders in the 2008 General Election” rely on the analysis of data from Georgia. My most recent articles measure the effects of officer-involved killings on political interest, voter turnout, and protest among community members.

I have had the opportunity to engage in important professional service. Currently, I am a member of the Executive Council of the Elections, Public Opinion, and Voting Behavior Section of the American Political Science Association. I also serve on the Scientific Advisory Board for the General Social Survey, a longstanding national public opinion survey run by the National Opinion Research Center at the University of Chicago. I have served on the editorial boards of leading journals including *Political Behavior* and *Law and Social Inquiry*. I routinely review the work of my peers for tenure, scholarly journals, university presses, and grants and have served as a reviewer for the *American Political Science Review*, *The American Journal of Political Science*, *The Journal of Politics*, *Political Behavior*, the National Science Foundation, Cambridge University Press, Princeton University Press, the University of Chicago Press, Oxford University Press, and many other entities. I have received several grants for my work, including a grant from the Stanford University Center on Poverty and Inequality. I also serve as co-Principal Investigator on a National Science Foundation grant that supports graduate and postdoctoral fellowships at the American Bar Foundation.

My curriculum vitae is provided in the Appendix. I am being compensated \$300 per hour for work in this case, plus expenses. My compensation is not contingent on the analysis and opinions offered or on the outcome of this litigation. This is my eighth engagement as an expert witness. I previously testified at trial and in a deposition in a case in federal district court in Florida, (*Jones v. DeSantis*, Consolidated Case No. 4:19-cv-300), at trial and in a deposition in a case in Wake County Superior Court in North Carolina (*Community Success Initiative, et al. v. Moore*, No. 19-CVS-15941), at trial and in a deposition in federal district court in Alabama (*People First of Alabama, v. Merrill*, No. 2:20-cv-00619-AKK), and at trial and in a deposition in federal district court in Florida (*Florida State Conference of the NAACP v. Lee*, No. 4:21-cv-00187-MW-MAF). The trial courts relied on my expert testimony and I was cited in the courts' opinions in *Jones v. DeSantis*, *People First of Alabama v. Merrill*, *Florida State Conference of the NAACP v. Lee*, and in *Community Success Initiative v. Moore*. Recently, I was deposed in a case in a consolidated case in federal district court in the Western District of Wisconsin (*One Wisconsin Institute Inc. v. Jacobs* and, No. 15-CV-324-JDP and *Luft v. Evers*, No. 20-CV-768-JDP). I also have testified before the U.S. Commission on Civil Rights about the collateral consequences of felony convictions with respect to voting and other issues. Most recently, I testified in the preliminary injunction hearing in *Robinson et. al v. Ardoin* in the U. S. District Court in the Middle District of Louisiana (No. 22-211-SDD-SDJ), where the court relied on my testimony as well.

Scope of the Report

For this case, I was asked by the attorneys for the plaintiffs to examine the Louisiana Legislature's passage of SB1 and HB14 with respect to information relevant for evaluating the totality of the circumstances as it relates to Section 2 of the Voting Rights Act, which I understand to refer to discrimination or practices in the social, political, and economic environment that might make it harder for minority groups to cast ballots. I was asked to discuss information pertaining to Senate Factor 5, or "the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," particularly with respect to Black Louisianans. I also was asked to discuss information that would be relevant for evaluating Senate Factor 6, or "the use of overt or subtle racial appeals in political campaigns;" Senate Factor 7, or "the extent to which members of the minority group have been elected to public office in the jurisdiction;" Senate

Factor 8, or “whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members;” and Senate Factor 9, or whether the policy underlying the challenged standard or practice is tenuous.

In formulating my opinions, I relied on my analysis of standard sources for political scientists such as the reviews of scholarly literature and the analysis of demographic data, census data, historical records, government reports and data, legislative proceedings, and public opinion surveys where noted.

Summary of Opinions

Based on my analyses and review of the scholarly literature, I offer the following opinions:¹

1. Senate Factor 5: There are racial gaps in voter turnout in Louisiana. In particular, voter turnout varies by educational attainment in Louisiana, such that highly educated voters are more likely to turn out than voters with low educational attainment. Educational attainment gaps in Louisiana are the result of contemporary and historical discrimination.
2. Senate Factor 5: There are large gaps in unemployment and other socioeconomic indicators between Black and White Louisianans. Research shows that these disparities are the result of contemporary and historical discrimination by government and market institutions and actors. Educational attainment and other socioeconomic indicators are important predictors of voting behavior.
3. Senate Factor 5: Several cities in Louisiana are marked by racial residential segregation, which has been shown to affect voting. These patterns of residential segregation are the result of contemporary and historical racial discrimination by government and market actors.
4. Senate Factor 5: Health outcomes vary by race in Louisiana, and health is another important predictor of voter turnout. Health disparities in Louisiana are shaped by government and market policies that affect the sites of environmental hazards as well as access to health care.
5. Senate Factor 5: Criminal justice involvement also affects voting, and criminal justice outcomes vary by race in Louisiana. Black people are overrepresented in Louisiana’s correctional populations. Research has shown that racial discrimination played a role in racial disparities in criminal justice in Louisiana in the past and continues to do so today. Patterns of criminal justice outcomes cannot be explained fully by the differential commission of crimes by race.
6. Senate Factor 6: Political campaigns in Louisiana have historically been and remain marked by implicit and explicit racial appeals. Racial appeals featured

¹ This report is essentially the same as my initial report provided in this matter in July 2022; it includes only minor edits since then and a small amount of new content. My opinions remain unchanged.

prominently in the 2019 Gubernatorial election, and other candidates and political organizations make them as well.

7. Senate Factor 7: Black people are one-third of Louisiana’s overall population, yet are underrepresented among elected officials at all levels of government, including among executives (such as Governor, Lieutenant Governor, and mayors), federal and state legislators, and judges.
8. Senate Factor 8: Policy outcomes do not track the specific needs of the minority community in several ways. Moreover, Black Louisianans expressed in surveys and to the Louisiana Legislature that they are not valued equally by elected representatives and feel discriminated against in politics. In redistricting hearings, Black Louisianans specifically connected political inequality with poor outcomes in education and other aspects of life.
9. Senate Factor 9: The sponsor of SB1 admits that drawing additional majority-minority districts was possible, but his primary argument for not doing so was based on the desire to maintain continuity of representation, which is problematic for several reasons. First, continuity of representation or any other form of incumbency protection is not mentioned as a priority in Joint Rule 21, which was adopted by the Louisiana Legislature to guide the redistricting process. Second, prioritizing continuity of representation in situations where the population shifted geographically and racially “is nothing more than a guarantee that inequities in the map will be frozen in place despite changes in population.”² Similarly, the sponsor of HB14 also argued that concerns about incumbent protection, or affecting only districts represented by term-limited members, prevented the drawing of additional majority-minority districts; however, the availability of alternative plans that managed to draw additional majority-minority districts while focusing on moving only districts with term-limited incumbents show that this concern is not an impediment to adding majority-minority districts.
10. Senate Factor 9: Sponsors of SB1 and HB14 argued in both cases, without evidence, that adding a second majority-minority district would “dilute the Black vote” and fail to allow Black Louisianans an opportunity to elect a candidate of their choice. Senate President Patrick Page Cortez argued that the standard for performance was not an opportunity, but a “slam dunk,” and under this standard even districts with 53% minimum Black Voting Age Populations (such as those presented in SB1) would not be adequate under the Voting Rights Act. Evidence presented in the record, as well as scholarly evidence, debunk this argument.

Senate Factor 5: Historical Discrimination in Education, Employment, Health, and Other Areas

Education and Political Participation in Louisiana

² Ruling and Order at 140, *Robinson, et al. v. Ardoin*, No. 3:22-cv-0211 (M.D. La. June 6, 2022), ECF No. 173.

Educational attainment is one of the most fundamental explanatory variables with respect to political participation (Almond and Verba 1963; Brady, Verba, and Schlozman 1995; Burden 2009; Campbell et al. 1980; Verba, Schlozman, and Brady 1995). Voters with higher educational attainment are more likely to vote. Verba, Schlozman, and Brady argue that the relationship between socioeconomic status and voting exists because people with greater income and education also tend to have more of the resources such as time, money, and civic skills that affect the calculus of participation (1995: 282). Education makes it easier for individuals to navigate the costs of voting such as acquiring information about the candidates and issues or learning how to register and vote (Verba, Schlozman, and Brady 1995).

Black Louisianans have faced educational discrimination throughout Louisiana's history. Although the U. S. Supreme Court ruled segregation in public schools unconstitutional in *Brown v. Board of Education* in 1954, and Congress outlawed segregation in public accommodations in the Civil Rights Act of 1964, Louisiana's state and local governments continued to enforce and support segregation in educational institutions well into the 1970s. Despite the court's ruling in *Brown*, the education provided by the state to Black and white students remained separate and unequal. In 1959, the average district in Louisiana spent only 72 cents on Black instruction for every dollar spent on white students (Reber 2011: 406). By May of 1961, the Southern Educational Reporting Service found that only .0004% of Louisiana Black students attended school with White students (1961). Even as late as 1968, Reber writes, "11 of 64 counties [sic] in Louisiana still were completely segregated, but the average black was still in a school that was about 8% white, while whites comprised over 60% of enrollment" (Reber 2004: 5). In 1961, only five of 13 publicly supported colleges and universities in Louisiana enrolled both Black and white students, and even this limited integration occurred only as a result of a court order (1961).

The lack of progress on desegregating public schools was due to Louisiana's state and local governments' policies of consistent resistance. Federal courts issued orders to desegregate the schools in Orleans Parish in 1956 (Douglas and Center 2005), but the Louisiana legislature adopted several laws in special sessions that were designed to maintain segregated schools (1961; Douglas and Center 2005). According to the district court ruling in *Bush v. Orleans Parish School District* (1960), the Legislature:

promptly enacted 25 measures designed to halt, or at least forestall, the implementation of the Orleans Parish School Board's announced proposal to admit five Negro girls of first grade age to formerly all-white schools. The first of these, Act 2 of the First Extraordinary Session of 1960, LSA-R.S. 49:801 et seq., is the so-called "interposition" statute by which Louisiana declares that it will not recognize the Supreme Court's decision in *Brown v. Board of Education*, supra, or the orders of this court issued pursuant to the mandate of that case."

The Louisiana Legislature attempted to abolish the Orleans Parish School Board and passed Act 555, which required separate schools for Black and white children (1961). However, with federal intervention, the first seven Black students integrated New Orleans public schools in November, 1960 (1961). Ultimately, the story of one of those children, Ruby Bridges, inspired the Norman Rockwell painting, *The Problem We All Live With* (Douglas and Center 2005: 1)

Although integration and funding equalization accelerated throughout the late 1960s and early 1970s due to the continued oversight of federal courts (Douglas and Center 2005; Reber 2004, 2011), the State of Louisiana continued to support school segregation. In 1975, federal courts prevented the state from continuing its practice of providing “substantial state assistance to racially segregated private schools” such as “furnishing school textbooks, school supplies and educational materials, library books, and by providing school bus transportation to students attending private, racially segregated schools which serve as a haven to those leaving racially integrated public schools.” *Brumfield v. Dodd*, 405 F. Supp. 338, 348 (E.D. La. 1975).

This long history of persistent racial discrimination in education affects outcomes in educational attainment for Louisianans to this day. Although there have been gains in educational attainment in Louisiana over time, racial gaps persist. Figure 1 shows data from the 2019 1-Year Estimates from the American Community Survey on the percentage of Louisianans over the age of 25 who have earned a bachelor’s degree or higher, by race. The data show that white and Asian Louisiana adults are far more likely than Black and Latino adults to have earned a bachelor’s or postgraduate degree. Louisiana’s history of educational segregation contributes to these disparities because the youngest school-age children in the 1970s are only in their mid-50s today; in Louisiana, people age 55 and older make up 41.6% of registered voters (2022h). Put another way: 41.6% of current Louisiana voters were school age when Louisiana’s state and local governments still funded segregated and unequal schools by law.³ As of the date of this report, Ruby Bridges, one of the young students who integrated New Orleans public schools, is only 67 years old.⁴

Differences in educational attainment can explain some of the racial gap in voter turnout in Louisiana. Based on my calculations of data from the 2020 Current Population Survey Voting and Registration Supplement, 64% of White Louisianans said that they voted in the 2020 general election, compared with 58% of Black Louisianans.⁵ However, as Table 1 shows, voter turnout among Louisianans increases with educational attainment across racial groups. Within educational levels, Black voting may reach parity or, in the case of people without high school diplomas, outperform White voting. But as Figure 1 shows, *Black Louisianans have lower educational attainment overall* due to the factors discussed here, *which results in lower voter turnout overall* (compared with white Louisianans).

³ For reference, 77.6% of Louisiana residents were born in Louisiana (2020b).

⁴ People age 65 and older make up 23.9% of Louisiana’s registered voters (2022h).

⁵ These figures may differ from those calculated using other methods, such as the census voting age population, for several reasons: First, I calculated these figures for non-Hispanic Black alone and White alone citizens aged 18 and older (McDonald and Popkin 2001). Moreover, because the CPS is a household survey, it excludes people in group quarters, which may inflate turnout, especially when certain racial groups are more likely to be in group quarters populations such as prisons (Pettit 2012). Finally, people in surveys sometimes over report voting (Silver, Anderson, and Abramson 1986). Ansolabehere et al. (2022) find that the CPS over-reports voting in Louisiana, and overestimates Black voter turnout worse than White voter turnout, thus underestimating the size of the racial gap in voter turnout in the state (Ansolabehere et al. 2022, Appendix pp 9-12).

Figure 1: Educational Attainment by Race among Louisiana Adults Age 25 and Older

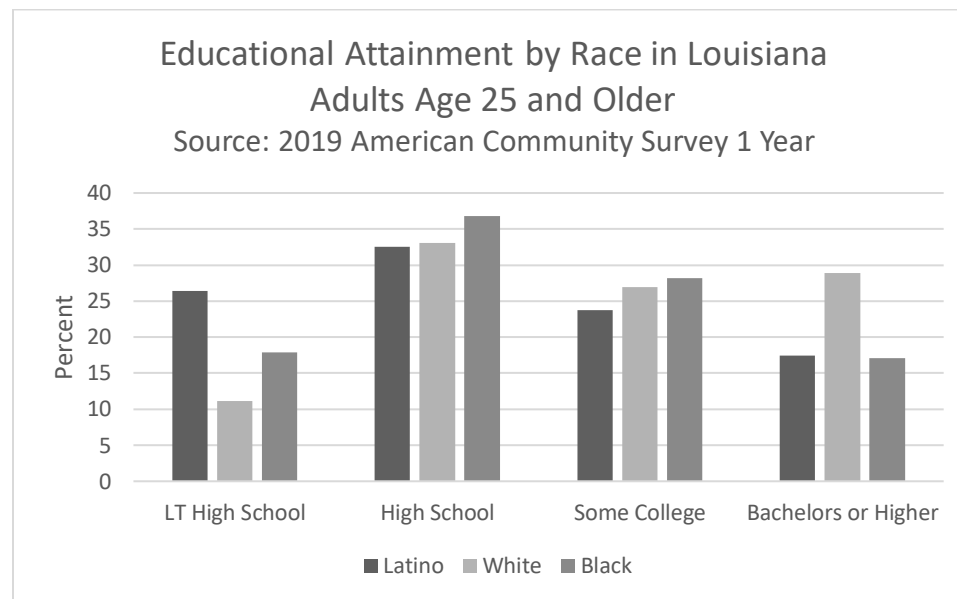


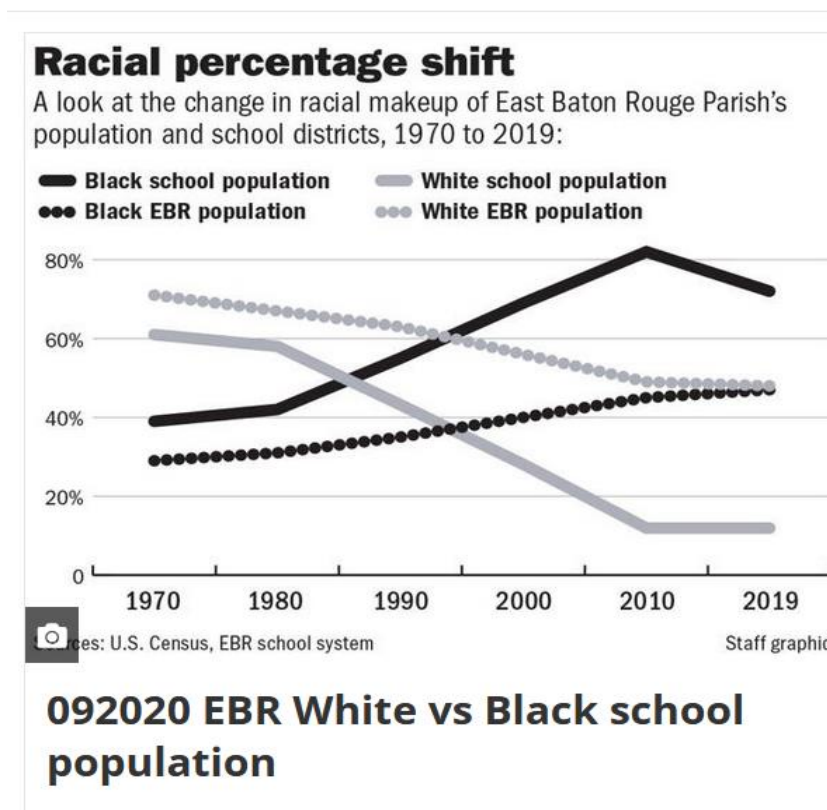
Table 1: 2020 Voter Turnout by Educational Attainment and Race among Louisianans. Source 2020 Current Population Survey Voting and Registration Supplement. Cells contain estimated number who voted, with turnout rate in parentheses.

Educational Level	White Turnout	Black Turnout
No High School Diploma	52,269 (30%)	71,105 (46%)
High School Diploma	432,887 (61%)	258,376 (56%)
Some College or Associates Degree	374,984 (67%)	162,680 (60%)
Bachelor's Degree	293,618 (74%)	62,456 (76%)
Graduate School	152,234 (86%)	39,603 (70%)

Moreover, school segregation and educational inequality still are the reality for current Louisiana students today. School segregation has been shown to detrimentally affect the academic performance of minority students: Black and Latino students who grew up under conditions of segregation were less academically prepared for college and had been exposed to more violence and social disorder than those coming from “majority-dominant settings.” (Massey and Fischer 2006). According to ProPublica’s *Miseducation* project, as recently as 2017, 50% of traditional school districts for which data were available demonstrated high levels of racial segregation within the district (2017). Nine of the 68 traditional school districts in Louisiana were more than 87% non-white (2021b). In part, this persistent educational racial segregation is the result of racial residential segregation and of white parents opting out of integrated schools, and out of public

schools in general (Reber 2011). For instance, as Figure 2 shows, white people are about half of the population in East Baton Rouge Parish, but only 11% of that district's students (Lussier 2020). Secession movements driven by flight from East Baton Rouge schools (2022a) have further contributed to the high concentration of minority students in that district (Harris 2019).

Figure 2: Racial Makeup of East Baton Rouge Parish's Population and School Districts. (Lussier 2020)



Educational outcomes vary among current students by race. As shown in Figures 3 and 4, among current students, there is a gap in scores on assessment tests in Louisiana; for example, Black eighth graders score 30 points lower in Math (on average) and 26 points lower in Reading (on average) than white eighth graders (2019b). In the 2017-2018 school year (the latest data available from the federal government), Black students made up 43.5% and white students made up 44.7% of Louisiana public school students (2019b). However, that year, Black students were only 22.9% of students in gifted and talented programs and 35.5% of students taking Advanced Placement courses (2018). Two out of every three students who had received one or more out of school suspensions that year were Black, while 26.5% of students who had received an out of school suspension were white (2018). School suspensions have been shown to increase subsequent arrests and other anti-social behavior in youth (Mowen and Brent 2016; Hemphill et al. 2006).

Figure 3: Scores on 8th Grade Math Assessments in Louisiana, by Race (2019b)

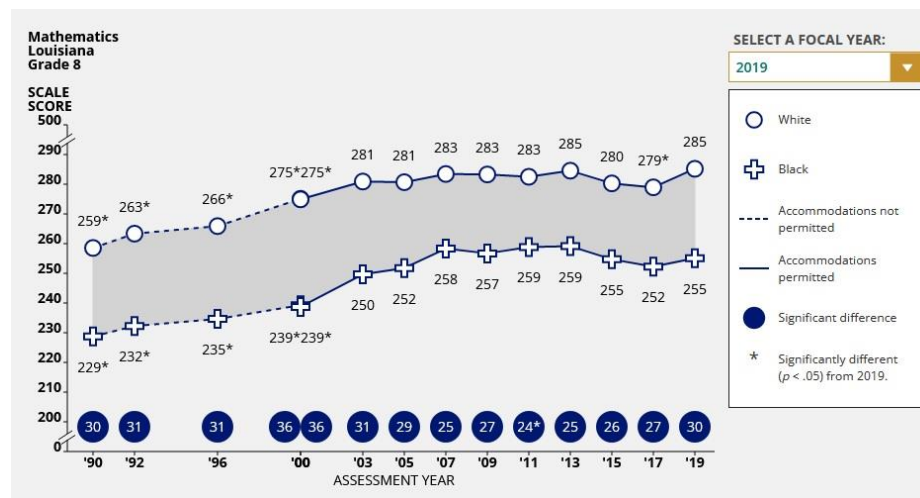
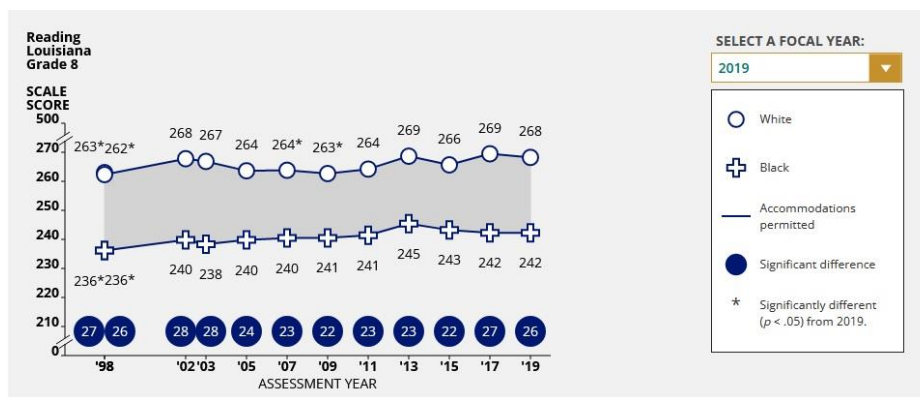


Figure 4: Scores on 8th Grade Reading Assessments in Louisiana, by Race (2019b)



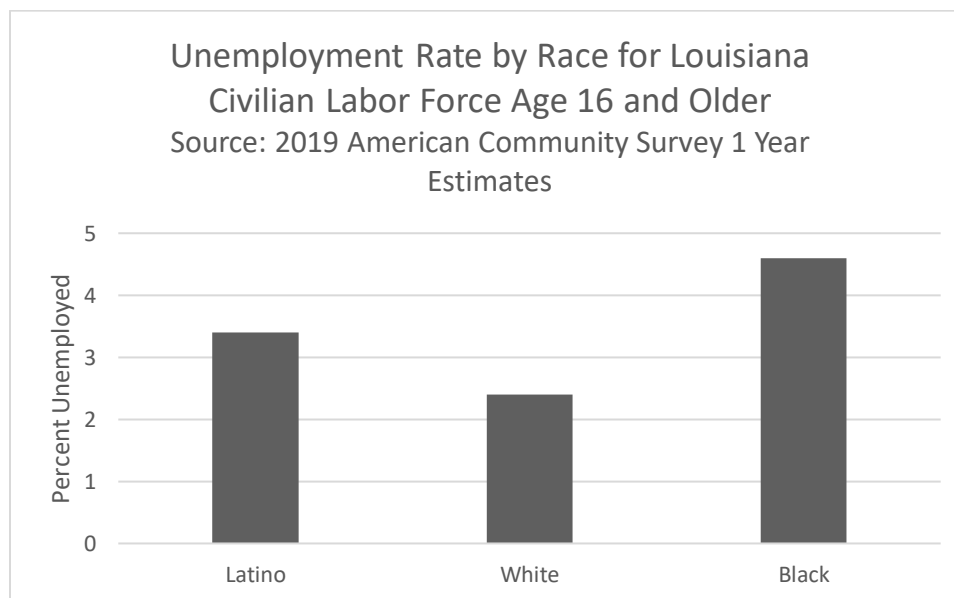
Employment, Socioeconomic Status, and Voting in Louisiana

Employment also may affect voter turnout through several pathways. First, white collar occupations may provide employees with a greater opportunity to develop civic skills that can be useful in navigating electoral bureaucracies (Almond and Verba 1963; Verba, Schlozman, and Brady 1995). Second, salaried workers may have greater freedom to take time off from work to vote without risking their pay. Finally, Rosenstone and Hansen argue that work is an important site for recruitment into politics, which also increases voter turnout (Rosenstone and Hansen 1993).

As depicted in Figure 5, data from the 2019 American Community Survey show there are racial gaps in unemployment, with Black Louisianans nearly twice as likely to be unemployed than white Louisianans. There is evidence that people of color in Louisiana face racial discrimination in employment. In 2021, 74% of Black respondents to the Louisiana Survey agreed that “. . . Black people are treated less fairly than White people . . . in hiring, pay, and promotions at work” (2021a). Research supports these claims: audit studies, which hold constant potentially confounding factors in order to isolate the causal effect of race, have consistently found that employers discriminate against racial minorities in hiring (Bertrand and Mullainathan 2004; Pager and Quillian 2005;

Quillian et al. 2017). This racial discrimination is magnified when job applicants have a criminal background (Pager and Quillian 2005). Data on discrimination filings with the Equal Employment Opportunity Commission show that 8,698 charges of race- or color-based employment discrimination were filed in Louisiana between 2011 and 2021 (2022f).

Figure 5: Unemployment by Race in Louisiana for Civilian Labor Force Age 16 and Older



There are persistent racial gaps in income and poverty among Louisianans as well. The American Community Survey shows that racial gaps in poverty rates, shown in Figure 6, also are large and persist over time: the Black and Latino poverty rates are more than 2.8 times as high as the white poverty rate in Louisiana. The median income for Black Louisiana households is about \$29,000 less than that of white Louisiana households (Figure 7). More than three times as many Black households lack access to a vehicle than white households (Figure 8).

Educational discrimination (Long 2010), as well as discrimination in access to capital, can produce such economic disparities. According to JP Morgan Chase, Black Louisianans are underrepresented among small business owners relative to white Louisianans (Farrell, Wheat, and Mac 2020). Black Louisianans also face more difficulty in securing relief to rebuild homes and businesses after natural disasters such as hurricanes (Fussell, Sastry, and VanLandingham 2010). Among Black respondents to the Louisiana Survey, 72% believe that Black people are treated less fairly when applying for a loan or mortgage (2021a).

Figure 6: Median Household Income in Louisiana by Race

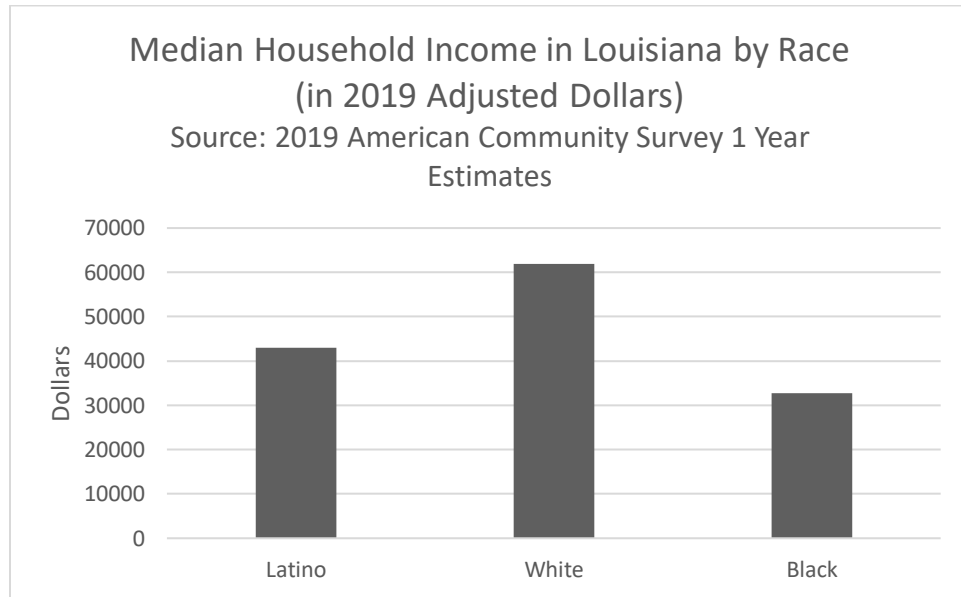


Figure 7: Family Poverty in Louisiana, by Race.

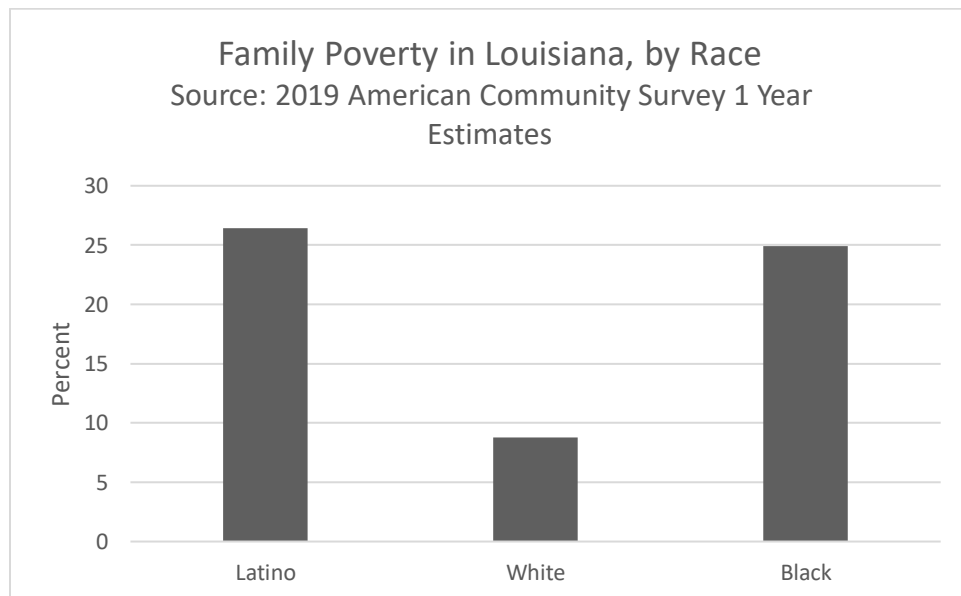
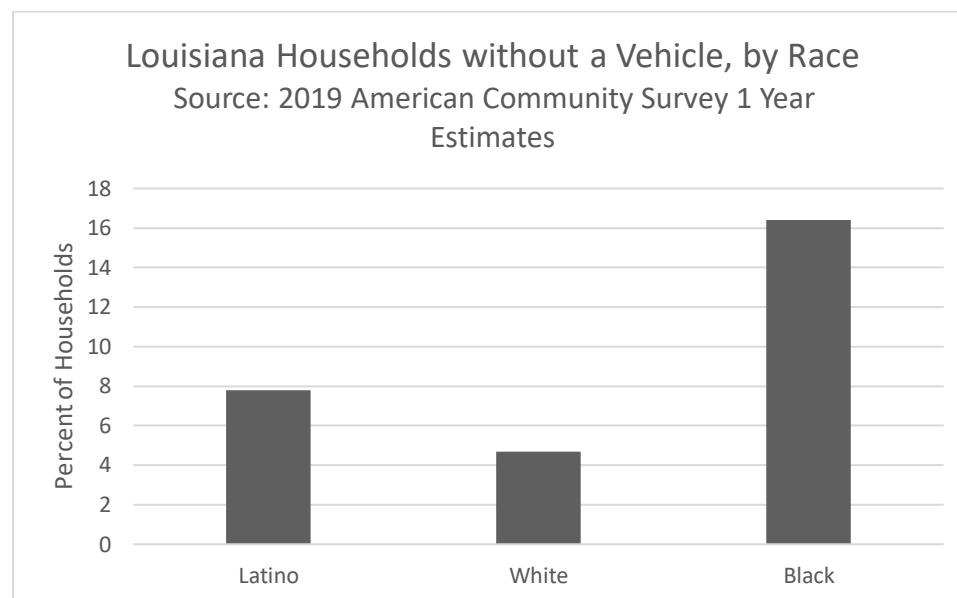


Figure 8: Louisiana Households without Access to a Vehicle, by Race.



In sum, education, employment, and other elements of socioeconomic status are leading predictors of voting. From this discussion, it is clear that Black Louisianans are at a disadvantage relative to white Louisianans along many of the socioeconomic indicators that have been shown to affect voting. These contemporary disparities are the result of historical and present-day discrimination by government policies and market actors.

Racial Residential Segregation and Voting in Louisiana

Neighborhood context matters for political mobilization and political outcomes (Burbank 1997; Burch 2013; Cohen and Dawson 1993; Huckfeldt, Plutzer, and Sprague 1993; Huckfeldt 1979; Tam Cho and Rudolph 2008). In particular, racial residential segregation has been shown to decrease Black voter turnout. Researchers argue that segregated Black areas have less access to public goods, such as polling places or transportation, that might matter for voting (Zingher and Moore 2019). Racial residential segregation also affects politics indirectly because it is an important determinant of economic and health outcomes. Racial residential segregation increases Black poverty rates, lowers Black educational attainment, and increases income inequality between Black and white residents (Ananat 2011). Research attributes these effects to isolation from quality schools and jobs (Kruse 2013; Massey and Fischer 2006; Wilson 1996). Racial residential segregation also contributes to the test score gap between Black and white students (Reardon, Kalogrides, and Shores 2019), to inequalities in the provision of public goods, to lower public goods expenditures (Trounstein 2016), and to worse health outcomes and greater exposure to environmental toxins (Ard 2016; Kramer and Hogue 2009).

Like many southern states, Louisiana operated under a strict regime of *de jure* racial segregation that affected nearly all aspects of public life and even intimate relationships for much of the 20th century. Residential patterns in Louisiana also were affected by local laws and policies that facilitated White suburbanization and Black segregation, such as segregation in public housing

(Spain 1979). Federal housing policy also was a major driver of racial residential segregation in many cities. The Federal Housing Administration (FHA) was created in 1934 in order to “insure lenders against any loss on loans made for purchasing homes” (Kimble 2007: 402). The FHA, in this role, “could dictate the range of acceptable, insurable terms and conditions of home lending” (Kimble 2007: 403). Race was the most important criterion that the FHA used to evaluate “the trajectory of a city and its neighborhoods” (Kimble 2007: 403). Black and racially mixed areas were deemed hazardous for lending; the FHA “instructed financial institutions not to lend to households in integrated or predominantly African American areas” (Kimble 2007: 405). The FHA also encouraged the use of racially restrictive covenants and racial zoning to uphold racial residential segregation (Kimble 2007). The FHA did not officially abandon this policy until 1949 (Kimble 2007).

In order to prevent lending to places where Black people lived, the FHA relied on Residential Security Maps that were produced by the Home Owners Loan Corporation (“HOLC”) (2021g). These maps “color-coded neighborhoods using racial composition as a primary indicator of their acceptability as candidates for mortgage investment” (Kimble 2007: 405). The maps assigned grades to neighborhoods based on racial composition, “with ‘A’ being most desirable and a ‘D’ grade ensuring rejection” (Kimble 2007: 405). For example, the HOLC maps for New Orleans and Shreveport are shown in Figures 9 and 10, respectively. In the maps, hazardous areas are shown in red. In the New Orleans map, flooding and elevation may have played a role in the neighborhood grades. However, the HOLC descriptions of the red zone areas contain several references to race as well: part of Area 34 is described as “composed of 2 story singles and doubles, some camel backs, some negro tenements, a conglomeration of everything. It is the largest area of concentrated negro population in the City;” Area 3 is described as “[a]n area predominantly of cheaply constructed cottages occupied by Negroes. Large Negro school in area;” Area 35 is described as “composed of 2 story doubles, negro row houses, raised singles. This area includes what is often referred to as the ‘Irish Channel’ and it is one of the toughest sections in the entire City. It has a mixed population, some blocks are mixed white and colored, some solid white, some solid colored, and properties are in a varying condition, fair, bad and indifferent. It is a regular conglomeration of the worst features found in the city” (2021g). In Shreveport, all the areas graded A or B were 100% white, while all the areas marked D had some proportion of Black residents (2021g).

Figure 9: Homeowners Loan Corporation Underwriting Map for New Orleans.

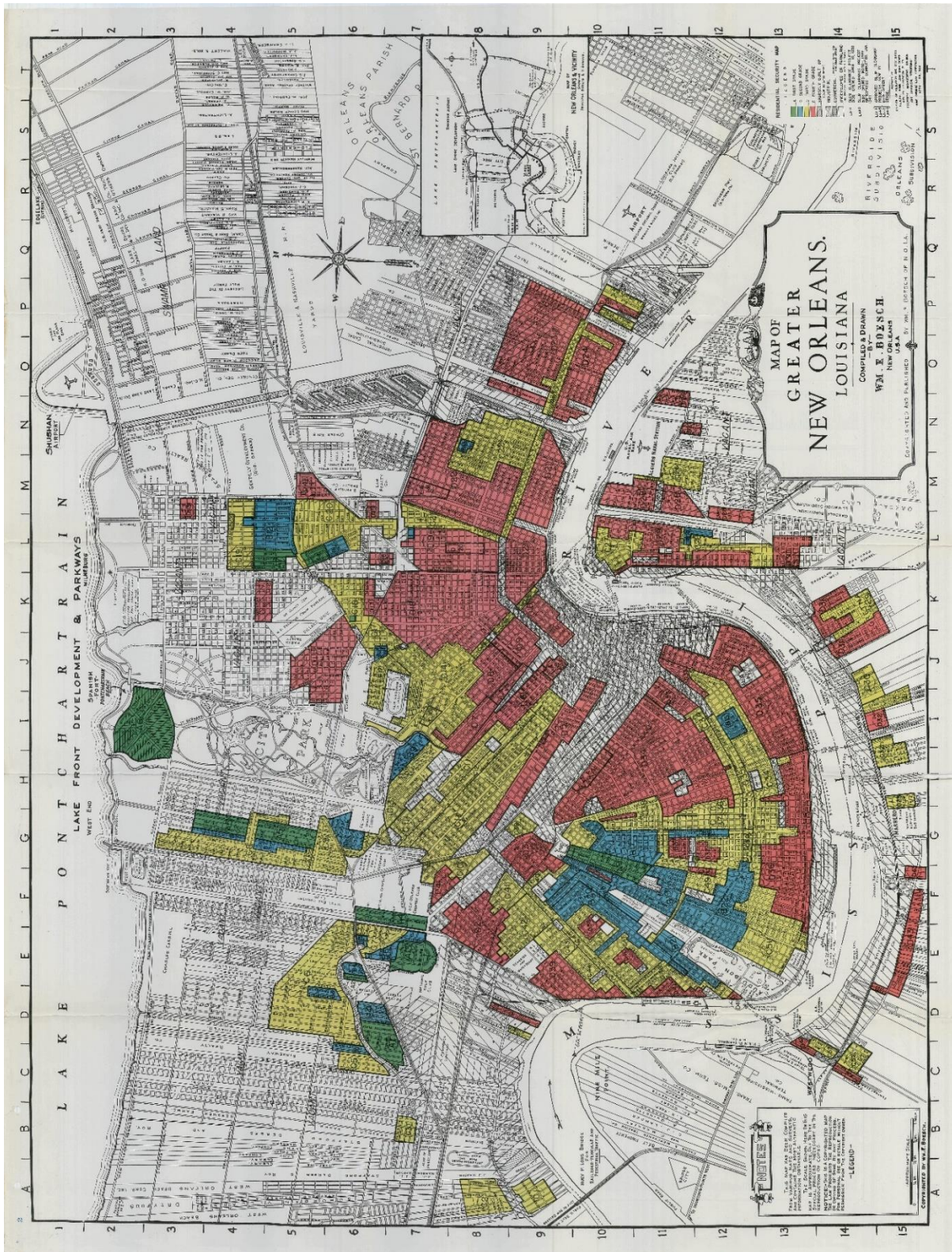
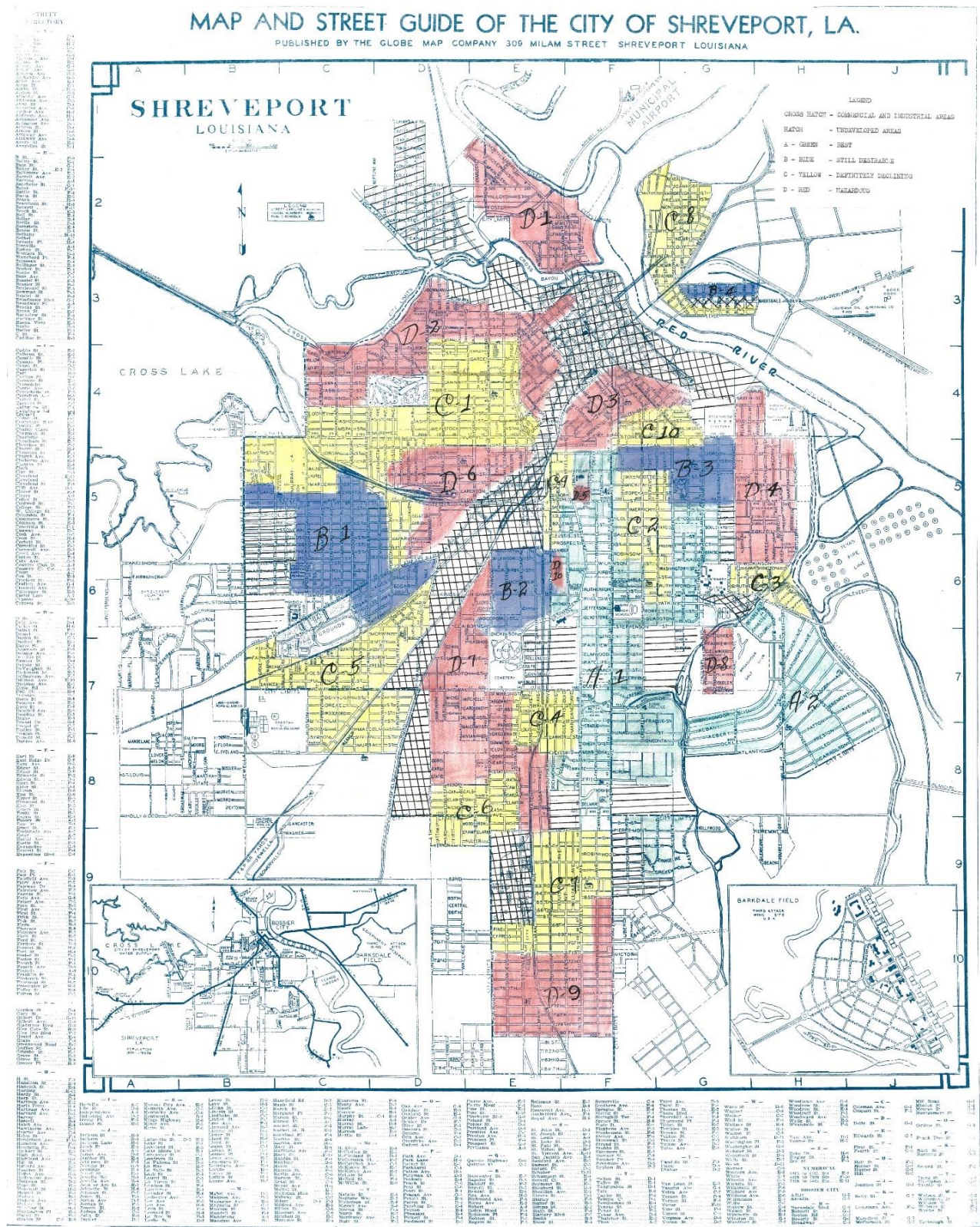


Figure 10: Homeowners Loan Corporation Underwriting Map of Shreveport, Louisiana.



Both 2020 census data and the geographic analysis of cell phone data demonstrate that many of the most populous cities and metropolitan areas in Louisiana still are highly segregated by race. The Othering and Belonging Institute characterized the metropolitan areas of New Orleans-Metairie-Kenner, Baton Rouge, Shreveport-Bossier City, and Lake Charles as high segregation (2021h). Baton Rouge, New Orleans, Monroe, Alexandria, Shreveport, and Lake Charles cities are highly segregated as well (Athey et al. 2021).

Contemporary government policies continue to shape patterns of racialized displacement and resettlement. For instance, neighborhoods damaged by Hurricane Katrina in 2005 were 45.8% Black, on average, compared with undamaged neighborhoods, which were 26.4% Black (Logan 2006). In the aftermath of Hurricane Katrina, preexisting inequalities by race and socioeconomic status made Black New Orleans residents more likely to be displaced, and for longer periods, than white New Orleans residents (Fussell, Sastry, and VanLandingham 2010; Fussell 2015). Black New Orleans residents also had a more difficult time returning to their old neighborhoods due to disparities in the delayed timing of disaster relief and rebuilding efforts (Gotham 2014; Fussell 2015). As a result, New Orleans's Black population still has not recovered to its pre-Katrina levels: in 2000, New Orleans was 67.5% Black, while in 2020, it was only 59.5% Black.

Where a person lives affects their ability to vote. Black Louisianans have been subjected to racial residential segregation for generations. And the existing literature shows that such racial residential segregation detrimentally affects voting.

Race and Health in Louisiana

Health status also may affect voting. Several studies have associated poor health with lower voter turnout (Blakely, Kennedy, and Kawachi 2001; Lyon 2021; Pacheco and Fletcher 2015). The effects of health on voting may take many pathways, such as reducing the availability of free time and money that could otherwise be devoted to politics (Pacheco and Fletcher 2015). Impaired cognitive functioning or physical disability also may make voting more difficult (Pacheco and Fletcher 2015). Poor health is likely the reason that voter turnout declines in old age (Pacheco and Fletcher 2015). People with disabilities also are less likely to vote; problems with polling place accessibility only partially explain this gap (Schur, Ameri, and Adya 2017; Schur et al. 2002).

Black Louisianans have worse health outcomes than white Louisianans on several metrics. For instance, although rates of invasive cancer are similar across Black and white Louisianans (487.9 per 100,000 adults vs. 478.7 per 100,000 adults, respectively), as shown in Figure 11, there is a large disparity in the mortality rate from invasive cancers (211.2 deaths per 100,000 adults for Black Louisianans vs. 173.6 deaths per 100,000 adults for white Louisianans) (CDC). Similarly, Figure 11 also shows large racial differences in the mortality rates for cardiovascular disease and diabetes (for cardiovascular disease: 260.5 per 100,000 white adults vs. 321.5 per 100,000 Black adults; for diabetes: 62.2 per 100,000 white adults vs. 110.8 per 100,000 Black adults) (CDC). Disease prevalence rates also vary by race: 17.7% of Black Louisiana adults have been diagnosed with diabetes, compared with 10.8% of white adults (CDC). Obesity disparities also are large: 42.9% of Black Louisiana adults are obese, compared with 32.4% of white Louisiana adults (CDC). These disparities in health translate into disparities in life expectancy as shown in Figure 12: in Louisiana, white men are expected to live over seven years longer than Black men (72.71

vs. 65.62, respectively), while white women are expected to live over five years longer than Black women (78.37 vs. 73.34, respectively) (2022g). Infant and child mortality rates among Black children are about twice as high as those for white children (Benno and Lake).

Figure 11: Disease Mortality Rates by Race among Louisiana Adults.

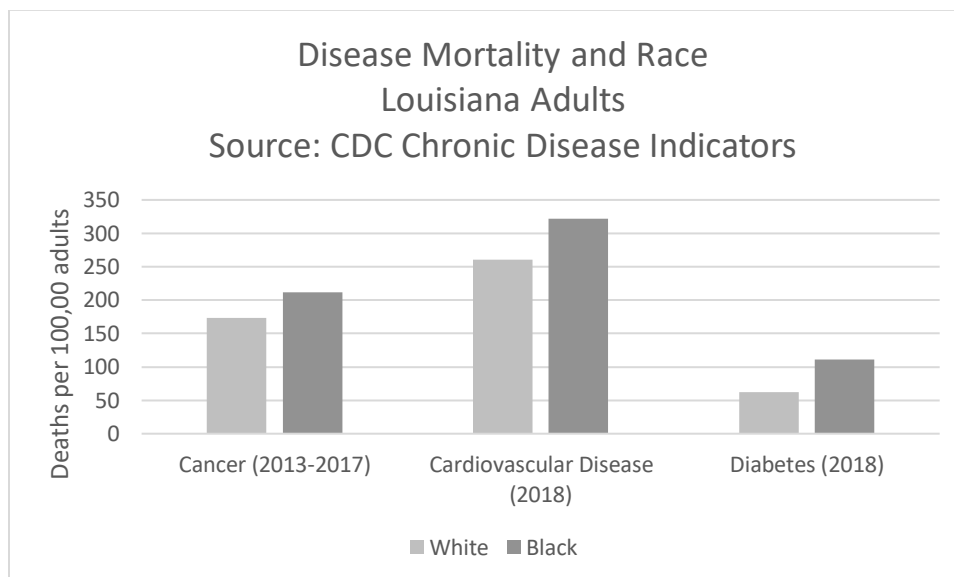
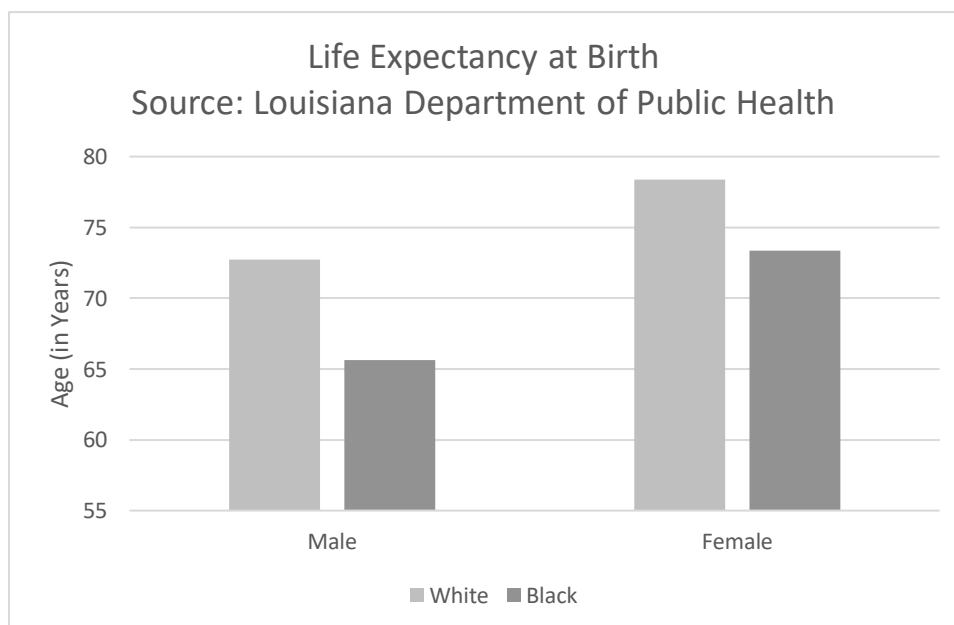


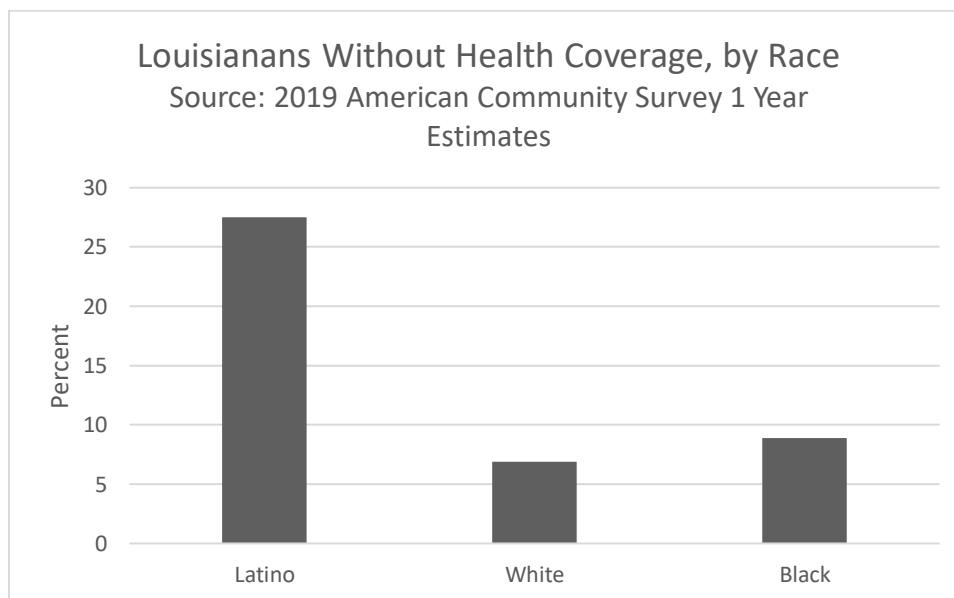
Figure 12: Life Expectancy at Birth, by Race and Gender (2022g).



These racial gaps in health outcomes are partly explained by racial disparities in access to care. According to a 2020 Kaiser Family Foundation survey, Black Louisianans are more likely than white Louisianans to say that there was a time in the past 12 months that they needed to see a doctor but could not because of cost (12.8% of Black respondents vs. 8.2% of white respondents)

(2020a). Moreover, as shown in Figure 13, data from the 2019 American Community Survey 1-Year Estimates shows that white Louisianans also are more likely to have health insurance than Black Louisianans. More than 60% of Black Louisianans also think that Black people are treated less fairly than white people when seeking medical care (2021a).

Figure 13: Health Coverage in Louisiana by Race



Discrimination in other arenas of life also contributes to racial health disparities. Racial residential segregation, which, as discussed above, affects many Louisiana cities, has been shown to lead to worse health outcomes for Black Americans. Several studies have demonstrated that racial residential segregation contributes to racial gaps in cancer outcomes (Landrine et al. 2017; Blanco et al. 2021; Poulson et al. 2021). Racial residential segregation also may make it more difficult for Black Americans to access primary care physicians and other doctors (Gaskin et al. 2012; Anderson 2018). Similar problems have been reported with respect to racial disparities in access to COVID-19 vaccination sites in Louisiana (Berenbrok et al. 2021; McMinn et al. 2021). Such factors, by contributing to racial disparities in health, ultimately may affect voting because of the link between poor health and lower voter turnout.

In Louisiana, environmental factors contribute to racial health disparities. Natural disasters are one such avenue: Black mortality rates during Hurricane Katrina were significantly higher in Orleans Parish across all age group categories 30 years and older (Brunkard, Namulanda, and Ratard 2008:3). The siting of chemical plants and other hazards near heavily Black residential areas exposes residents to high levels of air pollution and other dangers (2021c; Baurick, Younes, and Meiners 2019). In Cancer Alley, an area of Louisiana that stretches between New Orleans and Baton Rouge, studies have linked high levels of air pollution to increased risk of cancer, COVID-19, and asthma (Bakshi et al. 2022; Terrell and James 2020). Cancer Alley includes several unincorporated, mostly Black land areas that have little say in the decisions to locate factories and refineries near their homes (2021c; Baurick, Younes, and Meiners 2019; Terrell and

James 2020). Such policies of siting environmental hazards in ways that detrimentally affect the health of Black communities can shape voting, because health affects voting as shown above.

To reiterate, poor health can decrease voter turnout. In Louisiana, Black people are more likely to be in poor health than white people by several measures, including mortality rates, disease prevalence, and life expectancy. These health disparities partly are the result of racial discrimination (American Medical Association 2022): disparities in access to care, exposure to environmental hazards, and racial residential segregation all detrimentally affect the health of Black Louisianans.

Race, Criminal Justice, and Voting in Louisiana

A growing body of research shows that criminal justice interactions affect political behavior. Several studies (including my own work) have shown that, for individuals, contact with the criminal justice system, from police stops, to arrest, to incarceration, directly decreases voter turnout (Burch 2011; Lerman and Weaver 2014; Weaver and Lerman 2010). Primarily, criminal justice contact decreases turnout through “the combined forces of stigma, punishment and exclusion” which impose “barriers to most avenues of influence” and diminish “factors such as civic capacity, governmental trust, individual efficacy, and social connectedness that encourage activity” (Burch 2007: 12).

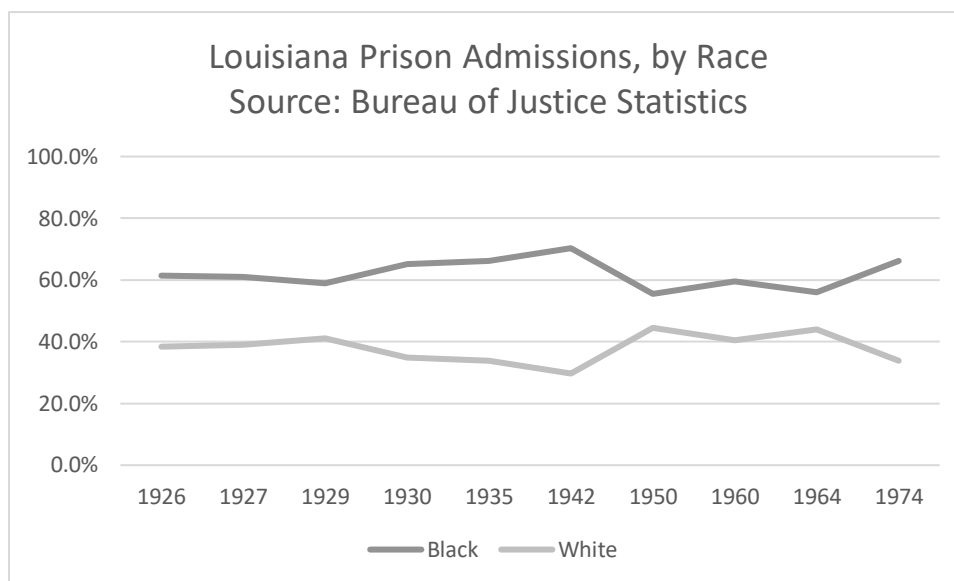
As in other aspects of life, criminal justice outcomes in Louisiana have been shaped by race for more than a century. For instance, like many other southern states, Louisiana enacted Black codes at the end of the Civil War, which were designed to penalize newly freed slaves and control their labor through enticement laws, vagrancy laws, and other schemes (Vandal 2001; Roback 1984; Cohen 1976). Louisiana’s prison was destroyed during the War, so the state turned to a system of convict leasing (2019a; Cardon 2017; Muller 2018; Mancini 1978). Louisiana’s Black Codes were used to force newly freed Blacks into labor contracts, and many people who refused to sign contracts were arrested and “subleased to landowners to replace slaves” (2019a). As a result of the legal changes brought about by the Black Codes, the racial makeup of Louisiana’s convict labor population shifted from mostly white in the antebellum period to mostly Black after the Civil War (Cardon 2017; Vandal 2001).

Louisiana’s contracts were awarded to S. L. James, a civil engineer and planter who bought up several plantations in Louisiana, including Angola Cotton Plantation (2019a; Cardon 2017). The prisoners’ labor also was used for post-war rebuilding and modernization, particularly for the construction of levees and railroads (Cardon 2017). Angola Plantation was known as the James Prison Camp beginning in 1880, and in 1900 the state purchased the site from the James Family (2019a). Currently, Angola is the largest maximum security prison in the world (2019a); its lands have been worked continuously by an unfree, majority Black labor force since before the Civil War.

The pattern of disproportionate racial impact has continued unabated in Louisiana since reconstruction. Between 1925 and 1940, for instance, Adler finds that the Louisiana prison population increased in a racially disproportionate manner: white incarceration rose by 39% during the period, while Black incarceration rose by 143 percent, despite lower overall crime rates in 1940 (Adler 2015: 44). Data from the Bureau of Justice Statistics in Figure 14 shows that Black people

constituted around 60% of Louisiana’s prison admissions in each year between 1926 and 1974 (Langan 1991).

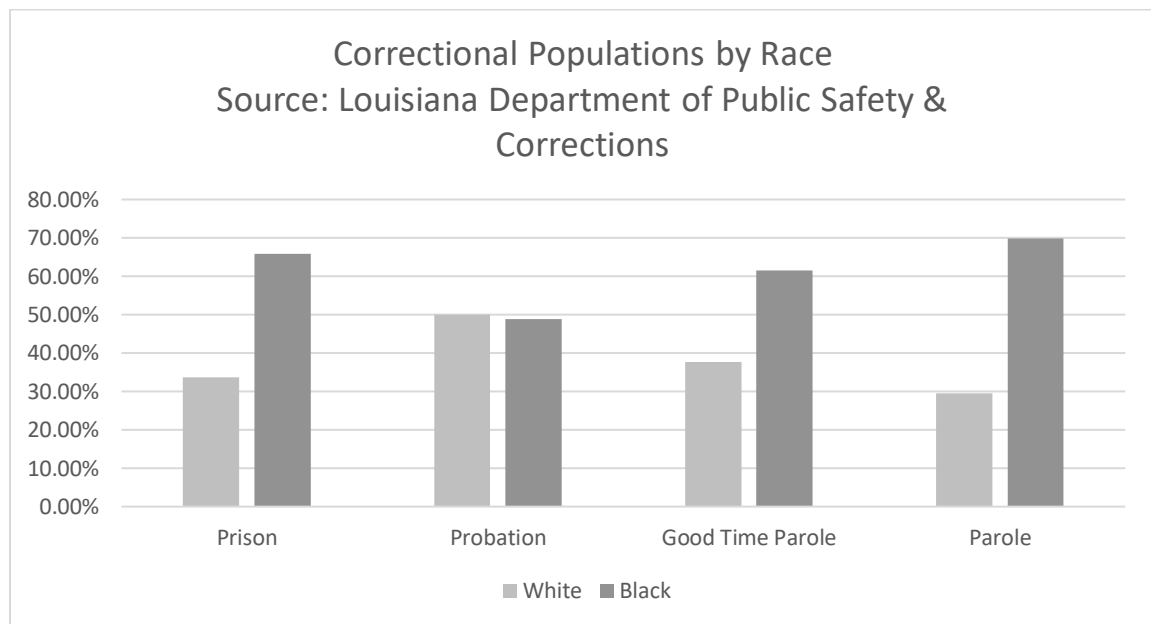
Figure 14: Louisiana Prison Admissions, by Race (Langan 1991).



Today, Louisiana’s incarceration rate is the highest in the country (Minton, Beatty, and Zeng 2021: 11). Black prisoners still constitute about two-thirds of Louisiana’s prisoners and are imprisoned at a rate double their presence in the population. Black Louisianans also are disproportionately on probation and parole in Louisiana. Although only approximately one-third of Louisiana’s population identifies as Black, Black people are a majority of people in prison or on community supervision in the state (2022d). As Figure 15 shows, 65.92% of prisoners, 48.90% of probationers, 61.46% of good-time parolees, and 69.89% of parolees are Black (2022d). Overall, in 2019, the Black incarceration rate in Louisiana was 1,411 per 100,000 adults, which is 3.7 times that of white Louisiana adults (381 per 100,000).

Disparities in punishment may not be explained solely by disparities in crime rates (Mitchell and Caudy 2017). For instance, there is a racial disparity in imprisonment for drugs: about 61.5% of people in prison in Louisiana for drugs as their most serious offense are Black, while 38.3% are white (2022d). However, among Black Louisianans arrested for drug offenses in 2019, 62.5% were arrested for marijuana possession only, while only 42% of white Louisianans arrested for drug offenses were arrested for marijuana possession (2021d). Once marijuana possession is excluded, white people constitute a majority of people arrested for more serious drug offenses (e.g., possession of hard drugs, or the sale or trafficking of any drug) in Louisiana (2021d). The racial disparity in imprisonment, where Black Louisianans make up two-thirds of the incarcerated population, does not reflect the fact that the majority of people arrested for serious drug offenses in Louisiana are white.

Figure 15: Correctional Populations by Race, 2021 (2022d).



Racial discrimination still is an important contributor to the disproportionate representation of Black people in the criminal justice system today. For instance, racial disparities in arrests are caused partially by factors that make it more likely that police will stop or search Black people, such as spatially differentiated policing, racial residential segregation, and discrimination (Beckett, Nyrop, and Pfingst 2006; Gelman, Fagan, and Kiss 2007; Ousey and Lee 2008; Pierson et al. 2020). Racial disparities also exist in bail decisions (Arnold, Dobbie, and Yang 2018) and in sentencing (Bushway and Piehl 2001; Mitchell 2005; Steffensmeier and Demuth 2000; Steffensmeier, Ulmer, and Kramer 1998).

With respect to Louisiana in particular, research shows that racial discrimination affects criminal justice outcomes. For instance, a high proportion of Black Louisianans (86%) believe that Black people are treated less fairly when dealing with police (2021a). Studies have shown that racial disparities are associated with capital sentencing in Louisiana: people who kill Black victims are less likely to receive the death penalty than people who kill white victims (Baumgartner and Lyman 2015). As of 2015, no white person had been executed in Louisiana for killing a Black person since 1752 (Baumgartner and Lyman 2015). A study of prosecutorial case files in Caddo Parish shows that prosecutors extend greater effort in cases with white female victims than Black victims (Pierce et al. 2014).

Another important pathway by which criminal justice contact can decrease voter turnout, at least for people with felony convictions, is through felony disenfranchisement laws (Burch 2007). Louisianans who are serving an active sentence in prison or on parole or probation for a felony conviction cannot vote (Uggen et al. 2020). An estimated 4.41% of the Black voting age population in Louisiana cannot vote due to a felony conviction compared with 2.23% of the state's population as a whole (Uggen et al. 2020). Uggen et al. estimates that 47,951 Black Louisianans were unable to vote in 2020 due to their felony convictions (Uggen et al. 2020).

To summarize, criminal justice involvement has been shown to affect voter turnout through several pathways, such as erecting legal, social, attitudinal, and financial barriers to voting. In Louisiana, Black people are disproportionately arrested, convicted, and punished for crimes. Research suggests that racial discrimination has played a role in these disparities historically and continues to do so because of discriminatory arrest, conviction, and sentencing practices.

Senate Factor 6: Racial Appeals in Campaigns

Whether politics is marked by “the use of overt or subtle racial appeals in political campaigns” is another consideration of Section 2 of the Voting Rights Act. A deep and robust literature on racial appeals in campaigns exists in political science (Hutchings and Valentino 2004; Stephens-Dougan 2021). Writing in 2001, Mendelberg argued that a “norm of racial equality,” which held that “southern segregation and the ideology of white supremacy were illegitimate” gained ascendance in the U.S. (Mendelberg 2001: 70). The norm of racial equality meant that using explicitly racist rhetoric or espousing explicitly racist policy positions would not help, and may even hurt, politicians (Mendelberg 2001). However, because “racial attitudes are still a potent force in American politics,” candidates still have an incentive to appeal to white racial fears (Valentino, Hutchings, and White 2002: 76). These two phenomena, the need to appear racially egalitarian while activating racial attitudes, means that campaigns would work to activate white voters’ negative racial attitudes through covert or implicit means such as images or coded language (Valentino, Hutchings, and White 2002; Mendelberg 2001).

Implicit racial appeals make racial attitudes and concerns more salient in the minds of voters, even without explicitly mentioning or referring to a particular race or group (Valentino, Hutchings, and White 2002; Mendelberg 2001). Implicit racial appeals may rely on certain code words or issues, use images of Black exemplars, or a combination of both, to make race more salient to voters (Valentino, Hutchings, and White 2002). In particular, Caliendo and McIlwain highlight racist appeals, which “prime antiminority racial fear, resentment, and bias . . . through a variety of audiovisual and textual cues that associate persons of color with long-standing, negative, racial stereotypes” (McIlwain and Caliendo 2014: 1159). These implicit racial appeals can rely on code words such as “inner-city” or “sanctuary city” or reference crime, welfare, and illegal immigration (Brader, Valentino, and Suhay 2008; Collingwood and O'Brien 2019; Hurwitz and Peffley 2005; Valentino, Hutchings, and White 2002). More broadly, McIlwain and Caliendo argue that racial appeals in television ads typically include elements such as, “a salient stereotype, most often those of criminality, laziness, taking undeserved advantage, and the charge of liberalism (read, ‘extreme’ liberal, ‘dangerously’ liberal, ‘radical,’ etc.); a minority opponent’s image; all-White, noncandidate images; and an exposed audience that includes a high percentage of White potential voters” (McIlwain and Caliendo 2014: 1159).

The 1988 Willie Horton ad targeting Michael Dukakis is probably the most famous example of an implicit racial appeal (Hurwitz and Peffley 2005; Valentino, Hutchings, and White 2002; Mendelberg 2001). In this ad:

the narrator of the spot states that Willie Horton, a convicted murderer, received multiple weekend furlough passes from prison,” during the last of which, the narrator informs us, he “fled, kidnapping a young couple, stabbing the man and repeatedly raping his girlfriend.” While the ad could have conveyed exactly the same information without

graphics, NSPAC elected to superimpose the most menacing possible picture of Horton, a Black man, over the narrative. (Hurwitz and Peffley 2005: 100).

The ad never explicitly mention's Horton's race, but the ad does incorporate many of the elements common to implicit racial appeals as expressed in the literature: evoking the salient stereotype of criminality and the charge of liberalism by using images of a Black exemplar, in this case, Horton's mugshot.

There are prominent examples of racial appeals in Louisiana politics. Most notably, David Duke, a former Grand Wizard of the Ku Klux Klan, "won a strong majority of Louisiana's white vote in three recent statewide elections: a 1990 U.S. Senate race, a 1991 gubernatorial open primary, and a 1991 gubernatorial runoff" (Voss 1996: 1156). Duke's base of support included white suburbanites as well as white college graduates (Voss 1996). Duke, the founder of the National Association for the Advancement of White People, ran on a platform that openly appealed to white racial fears (Harrison 1989). Duke also endorsed other Louisiana political candidates, such as Governor Mike Foster, who received 84% of the White vote and only 4% of the Black vote (Sack 1995).

Louisiana politicians still resort to implicit racial appeals to mobilize white voters. In the 2019 Gubernatorial race, Eddie Rispone, the Republican candidate, produced an ad that echoed the same themes as the Horton ad (2019c). Like the Horton ad, Rispone blames Governor Jon Bel Edwards for crimes committed by people after their early release from prison (2019c; Governor 2019). The ad never explicitly mentions race, but does discuss crime and sanctuary cities (2019c; Governor 2019). Similar to the Horton ad, Rispone's ad begins with mugshots of Black men prominently displayed, alongside additional mugshots of two other men who could be Latino.⁶ The imagery of the ad also contains the all-white, non-candidate images of Rispone with his constituents that McIlwain and Caliendo mark as common in implicit racial appeals. The mugshots, words such as murder, robbery, New Orleans, and sanctuary city, and Rispone and his white constituents flash as ominous music plays and a narrator says the following:

Dangerous, sick, violent. John Bel Edwards put them back on our streets where they robbed, attacked, murdered. Under Edwards murder is up 20 percent. Thousands of dangerous criminals released and New Orleans a sanctuary city mecca for lawlessness. Eddie Rispone will ban sanctuary cities and leave forgiveness to God, not government. Commit the crime, do the time. Eddie Rispone for governor. (Hilburn 2019).

In an ad placed in a prominent newspaper, Rispone further embraced implicit racial appeals, again relying on "the charge of liberalism" and code words such as sanctuary city, illegal immigration, terrorist, gang, and radical leftists protesting that research has shown to prime racial resentment in white voters (Brader, Valentino, and Suhay 2008; Christiani 2021; Clapp 2019; Collingwood and O'Brien 2019; Hurwitz and Peffley 2005; Major, Blodorn, and Major Blascovich 2018; Mendelberg 2001; Reny, Valenzuela, and Collingwood 2020; Valentino, Hutchings, and White 2002).

⁶ After searching the citations provided in the ad, I was unable to find the news stories that identified all of the people in the mugshots.

The conventional wisdom based on studies conducted primarily before the elections of Presidents Obama and Trump argued that these kinds of implicit racial appeals were more effective than explicit racial appeals, which could backfire (Stephens-Dougan 2021; White 2007; Valentino, Hutchings, and White 2002; Mendelberg 2001). However, recent studies suggest that candidates can increase their vote share by making explicit racial appeals (Reny, Valenzuela, and Collingwood 2020; Valentino, Neuner, and Vandenbroek 2018; Stephens-Dougan 2021; Christiani 2021; Major, Blodorn, and Major Blascovich 2018). The implicit-explicit distinction appears to work only for certain subsets of white voters, meaning that racial appeals need not be subtle in order to activate negative racial attitudes (Wetts and Willer 2019; Huber and Lapinski 2006).

Explicit racial appeals may target Black voters as well. For Black voters, racial appeals operate differently; White argues that racial appeals often activate in-group attachments rather than out-group antagonism among Black voters (White 2007). However, certain kinds of racial campaign rhetoric, specifically messages designed to portray the chosen candidate or party of Black voters as racist or indifferent to Black concerns, can demobilize Black voters (Stout and Baker 2021). Such messages may include assertions “that the Democratic Party and its presidential candidates, Hillary Clinton in 2016 and Joe Biden in 2020, were using African Americans for their votes without providing any solutions for systematic racial inequality” (Stout and Baker 2021: 1).

In a particularly ugly exchange, again during the 2019 Gubernatorial Race, Rispone and Edwards began trading accusations that the other was racist. Supporters of Edwards ran ads targeting Black voters, arguing that Rispone supported Donald Trump and calling Trump a racist. Studies have shown that this type of explicit racial appeal can serve as a counterstrategy to neutralize racial appeals in ways that galvanize white liberals and Black voters (Banks and Hicks 2019; White 2007).⁷ In response, Rispone and the Louisiana GOP said that Edwards, who did not run the ad himself, was a racist taking part in the family tradition of taking advantage of Black people:

It is absurd for John Bel Edwards to attempt to link Eddie Rispone to a Ku Klux Klan member when historical records make it clear that the Edwards family has been racist for generations. From slavery, through segregation the Edwards clan has been taking advantage of black people in Louisiana for their personal benefit since Louisiana was born.

John Bel is just the latest Edwards to follow in this “family tradition”(2019d).

As noted above, studies have shown that messages like these are designed to demobilize Black voters by portraying their chosen candidate or party as insensitive to the group’s needs (Stout and Baker 2021). Other candidates in Louisiana have embraced this tactic as well. For instance,

⁷ More recently, a candidate for Louisiana Senate has been running ads that make a similar kind of explicit racial appeal, galvanizing white liberals and Black voters by making claims about fighting racial inequality. See Video of Senate Candidate Gary Chambers Burning Confederate Flag Viewed Over 600,000 Times (Feb. 10, 2022), <https://www.newsweek.com/video-senate-candidate-gary-chambers-burning-confederate-flag-viewed-over-600k-times-1677875> (last visited July 22, 2022).

Republican State Sen. Conrad Appel argued in a Facebook post that African Americans should not support Democrats because the party's policies will lead to racial replacement:

And this is the great irony of blind support of Democrats by African Americans. The Democrat Party has assumed the position that open borders and unlimited illegal immigration is their cause célèbre. Their logic appears to be that inviting millions of illegal immigrants into the nation will lead to pressure in the future for blanket amnesty and eventual citizenship. That, in their plan, will create an unbeatable mass of Democrat voters for the future.

But that inflow of non-white immigrants will swamp the native black population and accelerate the demand by these new immigrant populations to assume the roles that African Americans enjoy today.

So as this year's Essence Festival ends I am left to wonder why any black American would want to see an acceleration to the inevitable time when other non-white citizens have the voting power to overwhelm and displace African Americans.

But, as in the past, by block voting for Democrats and by ignoring the logic of border and immigration control offered by Republicans that is exactly what they are doing (Rasso 2019).

Comments such as these make it clear that politicians think that explicit racial appeals still resonate and continue to appear in Louisiana politics.

Senate Factor 7: Black Elected Officials

Black Louisianans are underrepresented relative to their share of the population with respect to Senate Factor 7, or "the extent to which members of the minority group have been elected to public office in the jurisdiction." There have been no Black people elected as Governor of Louisiana since Reconstruction, when P.B.S. Pinchback was elected governor. Similarly, three Black men served as Lieutenant Governor of Louisiana (Pinchback, Oscar Dunn, and Caesar Antoine) during Reconstruction; however, none have been elected since. No Black senators have been elected to the U.S. Congress from Louisiana.

Louisiana has sent five Black people to Congress. Charles Nash served during Reconstruction (2022b). Cleo Fields, William Jennings Jefferson, Cedric Richmond, and Troy Carter have been elected since (2022b). Troy Carter is currently the member from the majority-minority 2nd district, which Richmond and Jefferson also represented (2022b).

Black people are underrepresented in other elected offices as well. As noted previously, about one-third of Louisianans are Black. However, Black legislators hold only 25% of state legislative seats, or 36 of 144 total seats (2021f). There are 10 Black Louisiana State Senators out of 39 total seats (2021f). Twenty-six Black legislators serve in the state House of Representatives out of 105 total members (2021f). Less than one-quarter of Louisiana mayors are Black (71/304) and 26.1% of Louisiana's state court judges are Black (2022e). Two of the eight elected Board of Elementary and Secondary Education members are Black (2022e). One Associate Justice on the Louisiana Supreme Court, Piper Griffin, is Black (2022e).

Senate Factor 8: Lack of Responsiveness

When reauthorizing Section 2 of the Voting Rights Act in 1982, the Senate also suggested the consideration of “whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members.” Louisiana ranks among the worst states in the nation on many indicators of well-being. For instance, Louisiana ranks 48th out of 50 states in math achievement scores (2019b), 46th for cancer death rates (2022c), and 44th for overall life expectancy (2021e). As the previous discussion shows, Black Louisianans are even worse off along all of these dimensions, which, in my opinion, indicates a lack of responsiveness of public officials to these problems. Racial disparities in education, segregation, employment, housing, health, and criminal justice have been evident in Louisiana for generations.

Louisiana public officials often are opposed to specific policies that might ameliorate problems experienced by Black communities. For instance, in 2021, when President Biden announced several climate-related executive orders designed to promote environmental justice and mentioned Louisiana’s “Cancer Alley” specifically, Louisiana Senator Bill Cassidy called the remarks “a slam upon our state” and denied that pollution was a factor in elevating cancer rates (Boyle 2021). Instead, Senator Cassidy blamed behavioral factors for the elevated cancer rates:

We have a higher incidence of cigarette smoking, of obesity, of certain viral infections, and other things which increase the incidence of cancer in our state, (Boyle 2021).

An advocate for the affected areas called Senator Cassidy’s comments victim blaming: “It’s always ‘blame the folks’ -the poor, Black folks -for their own demise” (Boyle 2021). Also, as noted previously, peer-reviewed studies (Terrell and St Julien 2022; Terrell and James 2020) do find a statistically significant relationship between pollution and both cancer and COVID-19 in Louisiana.

Senator Cassidy also minimized the severity of Louisiana’s maternal health crisis, arguing that the state is not an outlier if you discount Black maternal mortality:

“About a third of our population is African American; African Americans have a higher incidence of maternal mortality. So, if you correct our population for race, we’re not as much of an outlier as it’d otherwise appear.”⁸

Senator Cassidy says his words were taken out of context.

In light of comments like these, the evidence suggests that Black Louisianans do not feel adequately represented and believe that many public officials are not responsive to their needs. For instance, about 70% of Black respondents to the Louisiana survey agreed that “most elected officials in Louisiana don’t care what people like me think,” a figure that was similar to white Louisianans.⁹ However, Black Louisianans were more likely to express concerns about racism and access to health care, employment, housing, and criminal justice as discussed above. Black

⁸ Why Louisiana’s Maternal Mortality Rates Are So High (May 19, 2022), <https://www.politico.com/news/2022/05/19/why-louisianas-maternal-mortality-rates-are-so-high-00033832> (last visited July 22, 2022).

⁹ Available upon request from the Survey Principal Investigator.

Louisianans also feel that they are discriminated against politically: in the 2022 Louisiana Survey, fewer Black Louisianans were “very confident” that “people who are legally qualified to vote are able to” in the state.¹⁰ Moreover, a majority of Black Louisianans believe that “Black people are treated less fairly than White people” when voting in elections (2021a).

These sentiments were expressed publicly by Black Louisianans throughout the redistricting process. For instance, during the redistricting road shows, where members of the Louisiana Legislature traveled to public meetings throughout the state, several Black Louisianans from across the state offered opinions on the redistricting process and criticized current officials for being unresponsive to their needs. The speakers often explicitly linked officials’ lack of responsiveness to race. For instance, at a meeting in Lake Charles, Louisiana, Lydia Larse, a Black citizen of Lake Charles, said:

[T]he Constitution starts with we the people. I don’t feel that. None of you guys up here represent me, but a few. . . We’re one-third of the state, and I’m not being represented. . . Our voices are not being heard. At all. . . I feel as though my voice is not being heard because y’all don’t need us. We’re not needed. You don’t care.¹¹

As an example of how disregarded she felt by public officials, Ms. Larse further noted, “I’ve been watching Representative Tarver, he’s been sleeping back there. I guess he’s not interested, but I understand. We don’t matter to you. I just want to matter. I just want to matter.”¹² Another Black Lake Charles resident, Adam Moore, expressed similar sentiments when he said, “Do we care about gerrymandering? Hey, let’s isolate these people over here! Do you care? . . . Help us! . . . Do anyone care? Hey, it’s not my fault I’m Black! I was born this way!”¹³ The lack of responsiveness of public officials to the interests of Black Louisianans was a persistent theme in the public comments.

Members of the public also explicitly linked the lack of responsiveness to particularized concerns of minority groups to race and representation. For example, discussing his opposition to SB1, Pastor Chip Taylor said, “We need more. As you look at the numbers in Louisiana, they are not equal when it comes to how many representatives blacks have, how many minorities have, so we need to make the field equal.”¹⁴ Likewise, Deandre Bell II said, “And so, to deprive one-third of the state’s population of the ability to elect their preferred candidate keeps Louisiana at the

¹⁰ Available upon request from the Survey Principal Investigator.

¹¹ “Louisiana Redistricting Video, Lake Charles, Louisiana 12/15/21” at 1:35:40, https://redist.legis.la.gov/default_video?v=house/2021/dec/1215_21_Southwest_Redist (last visited Jul. 22, 2022)

¹² “Louisiana Redistricting Video, Lake Charles, Louisiana 12/15/21” at 1:39:20, https://redist.legis.la.gov/default_video?v=house/2021/dec/1215_21_Southwest_Redist (last visited Jul. 22, 2022)

¹³ “Louisiana Redistricting Video, Lake Charles, Louisiana 12/15/21” at 1:17:20, https://redist.legis.la.gov/default_video?v=house/2021/dec/1215_21_Southwest_Redist. (last visited Jul. 22, 2022)

¹⁴ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 2:01:15, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022)

bottom of nearly every statistic in this country.”¹⁵ Keturah Butler-Reed said, “I challenge you to push for more majority-minority districts because more means more resources poured into black schools and more of a significant voice in black people choosing elected officials because that is reflective of the numbers of the people.”¹⁶

The committee heard overwhelmingly from the public that they wanted increased minority representation in their senate maps. Eighty people submitted public comment cards in opposition to SB1 without speaking. Among the 22 people who spoke in opposition to SB1, all mentioned the need for more majority-minority districts. None of the public comments supported the status quo with respect to the number of majority-minority senate districts. There were 56 cards supporting SB17, which drew two additional majority-minority districts. Again, the public was clearly in support of creating additional majority-minority districts. In committee hearings house redistricting maps, several people spoke out against the changes to HD23 or to support greater minority representation in the house generally. However, despite this clearly articulated policy preference expressed by members of the minority community, the legislature chose do the opposite of what was responsive to the particularized needs of the group and chose not to increase the number of majority-minority districts in the state legislature.

Senate Factor 9: Tenuousness

With respect to Senate Factor 9, or “whether the policy underlying the challenged standard or practice is tenuous,” it is important to note the overarching goals of the sponsors and supporters of SB1, the Senate redistricting plan, and HB14, the House redistricting plan, as well as the specific reasons articulated for failing to draw additional majority-minority districts. As I show below, neither the sponsors nor supporters of SB1 or HB 14 presented convincing evidence that suggested that incorporating additional majority-minority districts into their redistricting scheme would be impossible without violating legitimate redistricting principles or the Voting Rights Act. In fact, examining the legislative record shows the legislature failed to adopt maps that would provide additional minority representation while adhering to these principles. What’s more, the legislature also adopted Amendments that would dilute minority voting power for whimsical reasons, such as helping one senator represent his sister’s precinct.

The sponsor of SB1, Senate President Cortez, said that he prioritized several principles when drawing Louisiana’s state senate maps. The first priority was minimizing the deviation from the ideal district population of “roughly 119,000 people.”¹⁷ The second priority was “that I had to provide in this map that the current majority, minority districts have an equal opportunity for that minority community to elect its candidate of choice.”¹⁸ The third priority “was as best possible to

¹⁵ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 2:04:59, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

¹⁶ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 1:57:20, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

¹⁷ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 7:04, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

¹⁸ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 7:56, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

maintain the continuity of representation.”¹⁹ Finally, compactness, which also incorporates concerns about communities of interest, was considered.²⁰ President Cortez repeated these same principles throughout the process.²¹

Representative John Stefanski, who chairs House and Governmental Affairs and presented HB14, was less clear about the priorities for drawing the map presented in HB 14. He describes his process as taking into account “the population of Louisiana, the geography of Louisiana, our communities of interest, our laws, our public comments, and the members’ desires for their community, to come up with a plan that I feel best reflects Louisiana.”²² He also notes concerns about the population loss in North Louisiana.²³

President Cortez’s map contains the same number of majority-minority senate districts as the existing map, despite the well-documented increase in minority voters in Louisiana and other demographic shifts. These demographic shifts were discussed repeatedly in every presentation by staff members at the road shows, and was brought up specifically during the hearings. African American members in the house and senate repeatedly asked about increasing minority representation; President Cortez admitted that it is fully possible to draw additional majority-minority senate districts in Louisiana:

SENATOR TARVER: Did you increase minority participation, senators and area in your map? Or do we have the same amount of—

PRESIDENT CORTEZ: No, what we did was we maintained.

SENATOR TARVER: You maintained but you did not increase minorities. Is it a possibility that we can increase minorities and so everybody would be represented in Louisiana?

¹⁹ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 8:43, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

²⁰ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 9:41. https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

²¹ See, for instance: “Louisiana House and Governmental Affairs Committee 2/16/22” at 13:06, https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0216_22_HG (last visited Jul. 22, 2022).

²² “Louisiana House Chamber 2/14/2022” at 7:15, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

²³ “Louisiana House Chamber 2/14/2022” at 7:45, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

PRESIDENT CORTEZ: There's always a possibility to do just about anything with these maps.²⁴

Later, President Cortez, again in response to Senator Tarver, says again that it is possible to create additional majority-minority districts:

Can it be done? Yes, it can be done there. Could it be added? Yes, I'm pretty sure Senator Price going to tell you how it could be done in a little bit.²⁵

President Cortez gives three reasons for choosing not to increase the number of majority-minority districts, despite Louisiana's population changes: continuity of representation, minority vote dilution, and compactness.²⁶

Meanwhile, the plan in HB14 also provides for the same number of majority-minority House districts as that from 2010. According to Chairman Stefanski, the protection of incumbents similarly limited the ability to draw additional majority-minority districts, as did concerns about minority vote dilution. As Chairman Stefanski notes:

Well, yeah, and I've explained it to you. There is, first of all, again, like I said, it's **the body, you know, conveyed to me to look to a term-limited member, pretty limited in the selections of term-limited members in North Louisiana.** And again, I'm going to highlight the two other maps that have been submitted thus far and the way House District 23 was drawn and the BVAP in both of those maps. **I think there is a question about whether or not a candidate of choice can be selected with those types of numbers.** I think it's a question and with that type of uncertainty, and based on what the members have told me, and based on the fact that North Louisiana was short in population, all of those factors considered led to that decision.²⁷

I address these arguments in detail below.

Claims that Additional Majority-Minority Districts would "Dilute" the Black Vote

²⁴ "Louisiana Senate and Governmental Affairs Committee 2/2/2022" at 36:44, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

²⁵ "Louisiana Senate and Governmental Affairs Committee 2/2/2022" at 43:30, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

²⁶ "Louisiana Senate and Governmental Affairs Committee 2/2/2022" at 37:15, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

²⁷ "Louisiana House and Governmental Affairs Committee 2/7/2022" at 31:39, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022). For an additional example, see "Louisiana House and Governmental Affairs Committee 2/7/2022" at 1:25:00, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

First, President Cortez’s idea that “diluting” existing majority-minority districts was advanced several times during the redistricting process, typically without reference to any evidence or analysis to support the claim. This claim about dilution essentially argues that the Voting Rights Act requires the packing of minority voters into majority-minority districts in very high concentrations in order to guarantee that the minority group will elect a candidate of choice. In President Cortez’s words, it was not enough that a majority-minority district provide an opportunity for minorities to elect a candidate of their choice, it needed to be a “slam dunk.”²⁸ Both Senators Hewitt, chairwoman of Senate and Governmental Affairs, and President Cortez insisted repeatedly, without empirical evidence, that senate districts needed to have very high percentages of Black voters in order to ensure that the district would perform as a majority-minority district. As Chairwoman Hewitt admits, “we know that federal law defines a minority district as 50% plus one as a minority district.”²⁹ However, she then goes on to argue:

. . . but yet the opportunity for minorities to have an equal opportunity to elect a candidate of their choice there is some number beyond that depending on voter turnout and other things by which they would be able to do that, and so we need some kind of basis of evidence, don’t we, to be able to establish like what is the number? Is it 51? Is it 52? Is it 58? I mean, it could be different things in different parts of the state depending on past elections, don’t you think?³⁰

Likewise, President Cortez argued:

The second thing is you have the Voting Rights Act. And I won’t sit here and tell you, that if you give me a set number of voting age population from a particular minority group that, that guarantees that the minorities if they block vote would have the opportunity to elect the candidate their choice, what I would tell you is that there are some statistical analyses out there that could tell you voter turnout in certain areas by different ethnic groups or lower or higher. So, I’m going to give you a by example. By example, in Orleans Parish, in a particular election, you may find a high voter turnout in the minority groups. In the rural majority-minority districts, you might find a lower turnout. That’s an example. What you have to ask yourself and from a purpose of the Voting Rights Act is consistently. Can you get that minority group the opportunity to elect their candidate of their choice? And the answer is, you can dilute it to the point where you lose minority seats because you’ve diluted it. **So, what is 50% plus one gives you a majority of the minority if that’s the population you looking at, but if they only turn out at a 30% or 35% rate, and the other population turns out at 45 or 50% for an election, the minority group is going to, I’m going to try to be clear. The minority is going to have a higher number of voting age population, but they won’t vote and they won’t elect the candidate of their**

²⁸ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 51:05, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

²⁹ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 49:30, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

³⁰ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 49:39, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

choice. And that’s a violation of the Voting Rights Act. It flies in the face of whatever, given that opportunity. You’re taking it away by diluting it.³¹

Here, as in other places in the record, the senators made claims about low Black voter turnout, again without evidence, to suggest that the districts would not perform.

President Cortez and Chairwoman Hewitt heard several arguments against this view, and they and the other legislators were presented with evidence that maps with additional majority-minority districts would reliably perform to elect candidates of choice. First, the legislators debated the meaning of opportunity—is the requirement that the district provide a majority of minorities, or is a supermajority or “slam dunk” in the words of President Cortez, needed to satisfy the Voting Rights Act? Senator Price, echoing earlier comments made by Senator Tarver, argued that the requirement was for an opportunity, not a guarantee, and that it was up to candidates to turn out voters:

. . . under Section 2 of the 1965 Voting Right Act, it specifically talks about the fact of giving people opportunity and opportunity, I think, it’s all that we can ask for, and you say, well, you may not be able to elect, but as Senator Tarver said, it’s up to the person in the district to get out there and make sure that its constituents comes out and vote and at least give themselves that opportunity. If we do not increase the minority district, we’ll never have that opportunity. If we just stay status quo as the map is right now without even considering increase, then the opportunity goes away, I think, under Section 2, it clearly states that we must be given an opportunity to elect a person of our choice, and by not providing that opportunity, I think, it violates Section 2 of the Civil Rights Act.³²

Senator Price later presented Senate Bill 17 to the committee, which would increase the number of majority-minority senate districts from 11 to 13. In SB 17, Senator Price presented a map in which 11 of the 13 new majority-minority districts would have a Black Voting Age Population over 53%.³³ The most diverse districts, districts 5 and 7, would have Black Voting Age Populations of 51.72% and 52.91%, respectively. The committee was presented with evidence that statistical analyses show that plans such as that presented in SB 17 would reliably perform to allow Black Louisianans to elect candidates of their choice.³⁴

Moreover, political scientists have argued that large majorities are not necessary to ensure the performance of majority-minority districts. In fact, the size of the majority needed to give Black voters a chance to elect their candidate of choice has been decreasing especially since 2010 because of racial partisan polarization (Hicks et al. 2018; Lublin et al. 2020). Even in the deep

³¹ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 37:34, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

³² “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 45:46, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

³³ Senate Bill 17, <http://www.legis.la.gov/legis/ViewDocument.aspx?d=1245118> (last visited Jul. 22, 2022).

³⁴ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 2:39:50, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

south, minority populations in the low 50% ranges dramatically increase the likelihood that a Black candidate will be elected (Hicks et al. 2018; Lublin et al. 2020).³⁵

Meanwhile, for the house, HB14 eliminates an existing majority-minority district in the northern part of Louisiana, HD23, and moves it south. Chairman Stefanski expressed concerns that plans that add an additional majority-minority House district by keeping HD23 in northern Louisiana would not perform to allow Black voters to elect a candidate of choice because HD23 would not perform as a majority-minority district. He argues:

Chairman John Stefanski: So the BVAP in your bill drew House District 23 at only 52% and I will tell you that there is a strong question about whether or not a minority candidate of choice can be selected in that region with that BVAP. Representative Jenkins, who has also filed a bill, drew House District 23 at only 50% BVAP. Again, a strong question of whether or not a candidate of choice can be selected with that type of BVAP in the area. That was taken into consideration as well. The other thing that was taken into consideration was the ability to draw a majority-minority district down in Orleans to, I don't want to say offset, but in an ability to be able to draw a compact district that also, in my opinion, will allow the minority community to elect a candidate of its choice in another part of the state was something that was taken into consideration as well with that move.

Vice Chairman Royce Duplessis: Okay, but if I'm not mistaken, the proposed district in Orleans, the BVAP is just 52% there as well.

Chairman John Stefanski: Exactly, it is. However, I believe that the voting analysis will show white crossover voting in that area, which will allow the candidate of choice by the minority community to elect.

Vice Chairman Royce Duplessis: But don't we already have evidence given we have a member who serves in the body right now who has shown he can be elected with that voting age percentage, that voting age population percentage of being somewhere between 51% and 52%? Don't we have an example of that right now given who currently represents House District 23?³⁶

As is the case here, the notion that HD23 would not perform was disputed several times in the record, noting in particular that HD23 is currently represented by Representative Cox, who is Black.

One can set aside the issue of the performance of HD23, however, because it is possible to create an additional majority-minority district in northwest Louisiana even in plans that move HD23 south to Orleans Parish. Representative Glover presented several plans that had four

³⁵ Older research argues for a higher threshold, but has been disputed (Cameron, Epstein, and O'halloran 1996; Lublin 1999).

³⁶ "Louisiana House and Governmental Affairs Committee 2/7/2022" at 25:01, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

majority-minority districts in northwest Louisiana.³⁷ In the plan presented in HB24, for instance, all four of the majority-minority districts created in northwest Louisiana had Black Voting Age Populations over 58% and the Black share of registered voters was over 55%. The remaining majority-minority districts in HB24 were identical to those created in HB14 with respect to Black Voting Age Population and voter registration. When these bills were not advanced favorably by the House and Governmental Affairs Committee, Representative Glover also presented three floor amendments, Amendments 90, 68, and 113, that created additional majority-minority House districts. As he noted, “When you come up with district configurations of 69 to 74 percent, then you’re left with multiple options with how to unpack them.”³⁸ His amendments were designed to illustrate that “the objective of drawing fair, unpacked districts is more than possible. It is more than possible.”³⁹

Instead, the plan adopted in HB14 diluted Black voting strength by cracking the voters in HD23 among several white, Republican districts (HD 5, HD7, and HD12), as several legislators argued. For instance:

Representative Sam Jenkins: Do you believe that going back to District 23, that dividing an existing minority seat and sending that black population into majority white Republican seat, do you feel like that has **diluted the black voting strength that they did have in District 23?**

Chairman John Stefanski: I will tell you that in similar to the map that you presented in Representative Duplessis, it appears the black voting-age population is significantly low in those two attempts to draw House District 23 **and I think there is a great question of whether or not the minority community in that area will have an opportunity to elect a candidate of choice with those numbers.**

Representative Sam Jenkins: **So do you feel it is better if you split them all up and send them into new districts as opposed to keeping all those communities together, at least having a district there that by pattern has been able to elect a candidate of their choice?**⁴⁰

Representative Cox, from HD23, expressed similar concerns:

³⁷ Text of HB21, www.legis.la.gov/Legis/ViewDocument.aspx?d=1246634 (last visited Jul. 22, 2022).

³⁸ “Louisiana House Chamber 2/14/2022” at 1:46:30, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

³⁹ “Louisiana House Chamber 2/14/2022” at 1:48:48, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

⁴⁰ “Louisiana House and Governmental Affairs Committee 2/7/2022” at 59:01, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

They don't realize that when you divide our people up like that and you now give me 20% here or 25% right there, there's no representation. They don't have any rights so this is voter suppression⁴¹. . . But for my district to be fragmented, cracked and then your districts to be packed and then minimize what my people have so they -- you've taken a historic district that took over 300 years and you just threw a landmine and it's like killing a deer and skinning them out and throwing a piece to this guy and a piece to this guy and a piece to that guy. There's no representation there.⁴²

Again, it is not clear how HB14, by taking away representation from the minority population of HD23, provides them with better representation than plans that add an additional majority-minority district.

Black legislators also expressed concerns that HB14 packed Black voters into as few districts as possible, particularly in northwest Louisiana. As Representative Glover argues,

It has been admitted in committee and here on the floor that the state of Louisiana is a third African American. I don't think it comes to 60 percent total of European American. Of 105, 29 represents 27 percent. A third would necessitate at least 4 to 5 additional predominantly African American seats. **A decade ago, this body approved a plan that created 29, despite the fact that the state of Louisiana is now blacker, despite the fact that both Shreveport and Bossier, Caddo and Bossier, as well as Desoto, as well as Webster, are blacker as well. That number is still at 29. And it only keeps it at 29 by creating districts that are more than 70 percent Black or White.**⁴³

Again, Representative Glover presented the House with several plans that would create at least 30 majority-minority house districts.

Concerns about Additional Majority-Minority Districts and Incumbency Protection

President Cortez argued that adding majority-minority districts would violate the principle of “continuity of representation.” This principle, as President Cortez describes it, literally means drawing new district lines in ways that protect incumbents. He says:

⁴¹ “Louisiana House and Governmental Affairs Committee 2/7/2022” at 1:52:06, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

⁴² “Louisiana House and Governmental Affairs Committee 2/7/2022” at 1:53:34, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

⁴³ “Louisiana House Chamber 2/14/2022” at 57:00, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Da y11_20221ES_Redist (last visited Jul. 22, 2022).

The third tenet or principle was as best possible to maintain the continuity of representation. What do I mean by that? It means that if your district elected you and you've done a good job, they also have a right to reelect you.⁴⁴

To President Cortez, redistricting violates the continuity of representation to the extent that plans “grab a group of constituents to elect a different person.”⁴⁵ Maintaining the continuity of representation required that the legislature “maintain the status quo.”⁴⁶ It should be noted that consideration of the “continuity of representation” does not appear anywhere in the redistricting criteria adopted by the legislature in Joint Rule 21.⁴⁷

Continuity of representation is not about voters, rather, it is about the self-interest of legislators. President Cortez, explaining why maps with additional majority-minority districts did not gain traction in the senate, said, “The other part, as you know, in this building, you got to get votes. That map so destroyed many of the districts and didn’t keep that continuity of representation that there was not a real chance of getting the 20 votes.”⁴⁸ President Cortez argued that drawing new majority-minority districts was a non-starter because it would put certain incumbents in jeopardy:

And then get into another area of people that you’ve never met before and have never voted for you. Almost it was more than 50% of the people in that district would never have voted for the person currently holding.⁴⁹

Regarding an amendment to add even one majority-minority district, President Cortez later said:

No one was willing to bring that amendment forward. Now, you may ask the question why, and I can’t speak for other people, but I could speak for me. I believe the only way to add

⁴⁴ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 8:43, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

⁴⁵ “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 41:15, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022). *See also* “Louisiana Senate and Governmental Affairs Committee 2/2/2022” at 45:00, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

⁴⁶ “Louisiana House and Governmental Affairs Committee 2/16/22” at 3:15, https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0216_22_HG (last visited Jul. 22, 2022).

⁴⁷ “Joint Rule 21 Redistricting Criteria,” <https://www.legis.la.gov/Legis/Law.aspx?d=1238755>. Joint Rule 21 does contain references to preserving the core of existing districts, but that concept differs from incumbent protection (Crocker 2012).

⁴⁸ “Louisiana House and Governmental Affairs Committee 2/16/22” at 16:05, https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0216_22_HG (last visited Jul. 22, 2022).

⁴⁹ “Louisiana House and Governmental Affairs Committee 2/16/22” at 15:14, https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0216_22_HG (last visited Jul. 22, 2022).

another one was to dilute other minority districts near it to the point where they would not have the opportunity to elect the candidate of choice that currently do have the opportunity. I think you would have put in peril some of the current minority districts, without a major shift of what we just talked about earlier, to all of those other foundational principles.⁵⁰

Senator Connick also alluded to self-interest with respect to cracking West Bank voters on the senate floor:

Everybody's dividing the West Bank up when its convenient, you know, they take it when its convenient for them. To say that we gotta have compactness and this and this and that but when its not they take the other sides of the coin. I agree we need another west bank district—minority district in Jefferson Parish.⁵¹

Both Senator Connick and President Cortez were clear that political concerns, such as shoring up a particular legislator's seat, took precedence over increasing the number of majority-minority districts.

Although in some circumstances continuity of representation could increase the ability of voters to hold specific representatives accountable or decrease voter confusion (Yoshinaka and Murphy 2011), upholding this principle can detrimentally affect other priorities, especially in Louisiana where large population shifts occurred. For instance, incumbent protection may be difficult to reconcile with maintaining equal district sizes, especially in cases where populations shift or migrate as was the case in Louisiana (McDonald 2004: 373). Incumbent protection also may violate the Voting Rights Act in cases of dramatic racial population change, which again is the case in Louisiana. As Judge Dick ruled in *Robinson v. Ardoin* (22-211-SDD-SDJ), prioritizing continuity of representation in this context “is nothing more than a guarantee that inequities in the map will be frozen in place despite changes in population.”⁵² It is important to note that both adherence to the principles of equal district sizes and respecting the Voting Rights Act ARE explicitly outlined in the redistricting criteria adopted in Rule 21, whereas continuity of representation is not.

Similar to President Cortez, Chairman Stefanski argues that the desire of the body to make changes only to districts where incumbents were not returning because of term limits or other reasons limited the ability of the legislature to draw additional majority minority House districts in HB14. He says:

Representative Lyons: So when you make a decision as to which one of the listed districts that you choose to move based on the numbers of the population, where does the term-

⁵⁰ “Louisiana House and Governmental Affairs Committee 2/16/22” at 21:32, https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0216_22_HG (last visited Jul. 22, 2022).

⁵¹ “Louisiana Senate 2/8/2022” at 56:00., https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2022/02/020822SCHAMB (last visited Jul. 22, 2022).

⁵² Ruling and Order at 140, *Robinson, et al. v. Ardoin*, No. 3:22-cv-0211 (M.D. La. June 6, 2022), ECF No. 173.

limited portion rank at in that decision-making, where all of the other factors of redistricting?

Chairman John Stefanski: So it's one element, you know? And I really want to phrase it based on this. The term-limited portion is really something that was given to me by the members of this body, overwhelmingly, when I discussed the fact that we had population shifts in Louisiana.⁵³

However, it is important to note that Rule 21, which presents the legislature's redistricting priorities, does not say anything about prioritizing districts where incumbents are not returning, as Representative Lyons notes:

It wasn't part of the law, it's just part of one of the processes that we did and it was a decision made based upon other factors that in the district decide to be moved or whatever. That's not part of the actual portion that we talked about, the law or the litigation piece that we defend and through all our testimony what have you I see going on.⁵⁴

It is worth noting that the legislature was presented with several plans, such as HB21 and Amendments 90, 62, and 113 by Representative Glover, that would add an additional majority-minority district while targeting only HD5 (which also had a term-limited Representative). He remarked:

And I think as a general understanding that there would be a need to reapportion districts or change districts or move them, we would look to hopefully do so in a way that would only affected those who were term limited or not returning. So that's what HB21 sought to do.⁵⁵

These alternative plans demonstrate that even if one were to accept the prioritizing of only districts with term-limited members, this criterion does not preclude drawing additional majority-minority House districts.

Claims that Additional Majority-Minority Districts Violate Communities of Interest

Finally, President Cortez argued that it was impossible to create additional majority-minority districts without disrupting the representation of important communities of interest. In particular, President Cortez argues that one of the two new majority-minority districts from

⁵³ “Louisiana House and Governmental Affairs Committee 2/7/2022” at 1:23:10, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

⁵⁴ “Louisiana House and Governmental Affairs Committee 2/7/2022” at 1:27:43, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

⁵⁵ “Louisiana House Chamber 2/14/2022” at ca. 59:10, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Da y11_20221ES_Redist (last visited Jul. 22, 2022).

Senator Price's proposed map made it difficult to maintain the community of interest between St. Charles and St. John Parishes:

I would have violated that because Senator Price's district, the Senate District 2 could go elsewhere, but then it would violate his communities of interest because his district could go all the way to St. John. He may want it to go all the way to St. John, but by doing that, it disrupted the community of interests of St. Charles and St. John Parish that Senator Smith who has represented it for 10 years would argue that they have common interests because they're both River parishes.⁵⁶

President Cortez does not claim here the other new majority-minority district that was proposed would violate a particular community of interest.

The needs of other communities of interest, such as that of the Black residents of the West Bank in Jefferson Parish, were ignored. Senator Peterson argued vehemently that the people of the West Bank of Jefferson Parish constituted a community of interest that deserved representation:

There are African Americans in Jefferson parish who have been asking for a very long time to have a district drawn where they have an opportunity to elect a person of choice.⁵⁷

Instead, she argued, those African Americans were spread across multiple districts in a racial gerrymander that diluted their votes:

Multiple districts all breaking up, what we call cracking. There's a redistricting principle, which is diluting minority voter participation, that doesn't permit them to elect a candidate of choice. When you separate the population—remember! 220,000 are non-white! Half the parish!—But four white male Republicans represent the district, without an opportunity for Democrats or—the core of the district I should say—Democrats or African Americans to get a candidate of choice.⁵⁸

Senator Connick a Republican who represents the West Bank of Jefferson Parish, agreed with Senator Peterson, saying, "On the West Bank, we have an increased minority population that deserves to have one district. That can happen."⁵⁹ Amendment 116, which Senator Peterson said disadvantaged the minority residents of Jefferson Parish, passed.

⁵⁶ "Louisiana Senate and Governmental Affairs Committee 2/2/2022" at 42:40, https://redist.legis.la.gov/default_video?v=senate/2022/02/020222SG (last visited Jul. 22, 2022).

⁵⁷ "Louisiana Senate 2/8/2022" at 46:20, https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2022/02/020822SCHAMB (last visited Jul. 22, 2022).

⁵⁸ "Louisiana Senate 2/8/2022" at 46:59, https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2022/02/020822SCHAMB (last visited Jul. 22, 2022).

⁵⁹ "Louisiana Senate 2/8/2022" at 1:44:10, https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2022/02/020822SCHAMB (last visited Jul. 22, 2022).

The debate over the fate of Jefferson Parish on Amendment 116 also illustrates that the Louisiana legislature was quite willing to deviate from their adherence to traditional redistricting principles for any number of reasons. When asked why he chose the particular precinct configuration at issue in Amendment 116, Senator Henry stressed the fact that he wanted to represent his sister and was still paying student loans to Tulane, a point he made multiple times publicly and privately:

In that area is where a tremendous amount of both Tulane and Loyola professors and students live. This would allow me to represent the students, the professors who live there as well as the actual university. Short of the fact that I actually went to Tulane University and remembered by that every month for my \$283 student loan that I pay that I feel like I'll be paying forever, I felt a good connection to Tulane as well that I felt I would be happy to take them under if I could. Obviously, I have one sister, I have two sisters, a brother, and a father who's deceased and a mother all who are graduates of Loyola University and as obviously many of you know is a Jesuit school where I also went to high school. So, to try to figure out what would be the best fit for me and help those universities both Tulane and Loyola given that Loyola is just coming out of a pretty much close to bankruptcy where it was unfortunately, it does have the first female, Tetlow is her name I believe, the first female president right now which I think is a nice honor for Tulane—excuse me, for Loyola. Tulane has Fitts right now F-I-T-T-S as the man in charge so, that's kind of why I chose them.⁶⁰

Senator Peterson argues that race is driving the deviation from traditional redistricting principles when it comes to the West Bank:

All of this is happening because people don't want to represent the black folks on the west bank of Jefferson, Yeah I said it. What's up with that? Why we got to do all these shifts? Why we got to do that? Ain't right. Always a good time to do what's right, right now. Senator Henry, I have to object to your amendment. Its self-serving, in my opinion. You absolutely knew what you were doing when you took those particular precincts and flipped them out. It doesn't comport with what the president suggested, which is to keep the basic composition of existing districts—these are core elements of economic engine, students, faculty, economic engines of a core district—it goes completely against what the president's laid out in redistricting principles.⁶¹

These particular discussions illustrate the point that traditional redistricting principles, while important in theory, often did not bind the legislature in practice.

Several members of the House also raised concerns that maps that created additional majority-minority districts would violate certain communities of interest. Often, these concerns

⁶⁰ “Louisiana Senate 2/8/2022” ca. 36:00, https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2022/02/020822SCHAMB (last visited Jul. 22, 2022).

⁶¹ “Louisiana Senate 2/8/2022” at 53:20, https://senate.la.gov/s_video/VideoArchivePlayer?v=senate/2022/02/020822SCHAMB (last visited Jul. 22, 2022).

were vague, and no particular community was specified. In fact, many of the maps that added an additional majority-minority district were similar in most respects to HB14, a fact flagged several times in the record. With respect to the New Orleans area, for instance:

Chairman John Stefanski: They are very similar. I think that the main difference is Representative Duplessis chose a different district to move down into the region. But I mean, it's to be expected. I worked with Representative Duplessis. We did, you know? We worked very close on what we thought was best for the Orleans area as well as the other Orleans reps.

Pro Tempore Tanner Magee: But the lines, as they're drawn in -- and I know where they come from -- as they're drawn, is there any significant difference between your map and the one filed by Representative Duplessis?

Chairman John Stefanski: No.⁶²

As noted previously, HB21, HB23, and HB24 substantially were similar to HB14 and treated most communities of interest similarly. These plans focused on changes to northwest Louisiana. In response to the amendments presented by Representative Glover, which made changes in northwest Louisiana affecting HD5, several representatives from northwest Louisiana stood up to object. Representative Pressley, for instance, noted that amendment 90 upset communities of interest; however, he references no specific communities of concern.⁶³ Representative Seabaugh mentioned that all plans changed his district HD5, *including HB14*, so he was not happy with any of them.⁶⁴ Representative Duplessis noted the lack of specificity in the objections:

I listened carefully to everyone who came down here from the northwest delegation who spoke in opposition. I'm not from that area. I don't know the communities of interest like you all do so I respect your perspectives on this. But the only thing I can recall hearing is that "I just don't like it," "It just doesn't work." I don't know that is where our job ends, simply saying, "Well, it makes me uncomfortable, I don't like it, it doesn't work." I think our duty extends beyond that.⁶⁵

⁶² "Louisiana House and Governmental Affairs Committee 2/7/2022" at 1:17:08, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0207_22_HG (last visited Jul. 22, 2022).

⁶³ "Louisiana House Chamber 2/14/2022" at 1:14:40, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

⁶⁴ "Louisiana House Chamber 2/14/2022" at 1:16:00, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

⁶⁵ "Louisiana House Chamber 2/14/2022" at 1:23:30, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Day11_20221ES_Redist (last visited Jul. 22, 2022).

Representative Glover did acknowledge that Representative Horton raised concerns about Barksdale Air Force Base and about population growth in Bossier Parish. In response, Representative Glover noted that his plan respected communities of interest such as Barksdale Air Force Base.⁶⁶ He also acknowledged the growth in Bossier but argued that even with the increase in population in Bossier, that area still was smaller than Caddo:

But still, that population in total is still over 120,000 people less than Caddo Parish. So while their growth is there, the belief that you end up with three in Shreveport and three in Bossier when you have a hundred- and twenty-person difference in population is not necessarily well founded.⁶⁷

The overall point, with respect to discussions of communities of interest, is that none is sacrosanct, and there were no clear rules articulated in the record with respect to which communities of interest, other than political and precinct boundaries, should take precedence. Many of the plans presented were similar to HB14, and only one concern about a particular community of interest was raised in response to an alternative bill that created an additional majority-minority district.

Summary

To justify keeping the number of majority-minority districts in the Louisiana House and Senate the same despite changing racial demographics in the state, the sponsors of SB1 and HB14 advanced several arguments to suggest that drawing additional districts was impossible. They argued that additional districts would dilute Black voting strength, endanger incumbents, and harm communities of interest. These arguments do not stand up to scrutiny. First, the legislature was presented with multiple alternative maps that drew additional majority-minority districts while upholding these priorities and alleviating those particular concerns. Second, the political science literature and evidence presented in the record does not support the claim that additional districts would dilute Black voting strength. Third, incumbent protection is not a traditional redistricting principle that is recognized in Rule 21, and may conflict with priorities that are expressed there, such as respecting the Voting Rights Act and maintaining equal populations across districts. Finally, the legislature was not clear that maintaining any particular community of interest was to take precedence over other considerations such as compliance with the Voting Rights Act, and for the most part, there were few instances in which a legislator pointed out a particular community that would be irreparably divided under alternative plans that was not also affected similarly by HB14.

⁶⁶ “Louisiana House Chamber 2/14/2022” at 1:37:00, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Da y11_20221ES_Redist (last visited Jul. 22, 2022).

⁶⁷ “Louisiana House Chamber 2/14/2022” at 1:38:20, https://www.house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2022/feb/0214_22_Da y11_20221ES_Redist (last visited Jul. 22, 2022).

I declare under penalty of perjury that the foregoing is true and correct.

Traci Burch

Dr. Traci Burch
Dated: June 30, 2023

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APPENDIX 1

Traci Burch

Employment

- Associate Professor, Northwestern University Department of Political Science (2014-Present)
- Research Professor, American Bar Foundation (2007- Present)
- Assistant Professor, Northwestern University Department of Political Science (2007-2014)

Education

- *Harvard University*
Ph.D. in Government and Social Policy
Dissertation: *Punishment and Participation: How Criminal Convictions Threaten American Democracy*
Committee: Jennifer Hochschild (Chair), Sidney Verba, and Gary King
- *Princeton University*
A.B. in Politics, *magna cum laude*

Publications

- Burch, Traci. 2022. "Officer-Involved Killings and the Repression of Protest." *Urban Affairs Review*.
- Burch, Traci. 2021. "Not All Black Lives Matter: Officer-Involved Deaths and the Role of Victim Characteristics in Shaping Political Interest and Voter Turnout." *Perspectives on Politics*.
- Kay Lehman Schlozman, Philip Edward Jones, Hye Young You, Traci Burch, Sidney Verba, Henry E. Brady. 2018. "Organizations and the Democratic Representation of Interests: What Happens When Those Organizations Have No Members?" *Perspectives on Politics*.
- Burch, Traci. 2016. "Political Equality and the Criminal Justice System." In Resources, Engagement, and Recruitment. Casey Klofstad, ed. Philadelphia: Temple University Press.
- Burch, Traci. 2016. "Review of The First Civil Right by Naomi Murakawa." *The Forum*.

- Kay Lehman Schlozman, Philip Edward Jones, Hye Young You, Traci Burch, Sidney Verba, Henry E. Brady. 2015. "Louder Chorus – Same Accent: The Representation of Interests in Pressure Politics, 1981-2011." In Darren Halpin, David Lowery, Virginia Gray, eds. The Organization Ecology of Interest Communities. New York: Palgrave Macmillan.
- Burch, Traci. 2015. "Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Criminal Sentencing." *Journal of Empirical Legal Studies* 12(3): 395-420.
- Burch, Traci. 2014. "The Old Jim Crow: Racial Residential Segregation and Neighborhood Imprisonment." *Law & Policy* 36(3) 223-255.
- Burch, Traci. 2014. "The Effects of Imprisonment and Community Supervision on Political Participation." Detaining Democracy Special Issue. *The Annals of the American Academy of Political and Social Science* 651 (1) 184-201.
- Burch, Traci. 2013. Trading Democracy for Justice: Criminal Convictions and the Decline of Neighborhood Political Participation. Chicago: University of Chicago Press.
- Hochschild, Jennifer, Vesla Weaver, and Traci Burch. 2012. Transforming the American Racial Order. Princeton: Princeton University Press.
- Schlozman, Kay Lehman, Sidney Verba, Henry Brady, Traci Burch, and Phillip Jones. 2012. "Who Sings in the Heavenly Chorus? The Shape of the Organized Interest System." In Schlozman, Kay Lehman, Sidney Verba, and Henry Brady, The Unheavenly Chorus, Princeton: Princeton University Press.
- Schlozman, Kay Lehman, Sidney Verba, Henry Brady, Phillip Jones, and Traci Burch. 2012. "Political Voice through Organized Interest Activity." In Schlozman, Kay Lehman, Sidney Verba, and Henry Brady, The Unheavenly Chorus, Princeton: Princeton University Press.
- Burch, Traci. 2012. "Did Disfranchisement Laws Help Elect President Bush? New Evidence on the Turnout and Party Registration of Florida's Ex-Felons." *Political Behavior* 34 (1); 1-26.
- Burch, Traci. 2011. "Turnout and Party Registration among Criminal Offenders in the 2008 General Election." *Law and Society Review* 45(3): 699-730.
- Burch, Traci. 2011. "Fixing the Broken System of Financial Sanctions." *Criminology and Public Policy* 10(3).
- Hochschild, Jennifer; Vesla Weaver, and Traci Burch. 2011. "Destabilizing the American Racial Order." *Daedalus* 140; 151-165.
- Burch, Traci. 2009. "Can the New Commander-In-Chief Sustain His All Volunteer

Standing Army?” *The Dubois Review on Race* 6(1).

- Burch, Traci. 2009. “Review of *Imprisoning Communities*, by Todd Clear.” *Law and Society Review* 43(3) 716-18.
- Burch, Traci. 2009. “American Politics and the Not-So-Benign Neglect of Criminal Justice,” in *The Future of American Politics*, ed. Gary King, Kay Schlozman, and Norman Nie. (New York: Routledge).
- Schlozman, Kay Lehman and Traci Burch. 2009. “Political Voice in an Age of Inequality,” in *America at Risk: Threats to Liberal Self-Government in an Age of Uncertainty*, ed. Robert Faulkner and Susan Shell (Ann Arbor: University of Michigan Press).
- Hochschild, Jennifer and Traci Burch. 2007. “Contingent Public Policies and the Stability of Racial Hierarchy: Lessons from Immigration and Census Policy,” in *Political Contingency: Studying the Unexpected, the Accidental, and the Unforeseen*, ed. Ian Shapiro and Sonu Bedi (New York: NYU Press).

Grants

- Co-Principal Investigator. “Fellowship and Mentoring Program on Law and Inequality.” September 1, 2020 to August 31, 2023. \$349,313. National Science Foundation.

Honors and Fellowships

- American Political Science Association 2014 Ralph J. Bunche Award (for *Trading Democracy for Justice*).
- American Political Science Association Urban Section 2014 Best Book Award (for *Trading Democracy for Justice*).
- American Political Science Association Law and Courts Section 2014 C. Herman Pritchett Award (for *Trading Democracy for Justice*).
- Research grant, Stanford University Center for Poverty and Inequality (2012).
- American Political Science Association E. E. Schattschneider Award for the best doctoral dissertation in the field of American Government (2009)
- American Political Science Association William Anderson Award for the best doctoral dissertation in the field of state and local politics, federalism, or intergovernmental relations (2008)
- American Political Science Association Urban Section Best Dissertation in Urban Politics

Award (2008)

- Harvard University Robert Noxon Toppan Prize for the best dissertation in political science (2007)
- Institute for Quantitative Social Sciences Research Fellowship (2006-07)
- *European Network on Inequality* Fellowship (2005)
- Research Fellowship, The Sentencing Project (2005)
- Doctoral Fellow, Malcolm Weiner Center for Inequality and Social Policy (2004-07)

Professional Service

- APSA Law and Courts Section Best Paper Award Committee (2020-2021)
- APSA Elections, Public Opinion, and Voting Behavior Executive Committee (2020-2023)
- General Social Survey Board of Overseers (2020-2025)
- APSA Kammerer Prize Committee (2017)
- Associate Editor, *Political Behavior* (2015-2019)
- APSA Law and Courts Section, Lifetime Achievement Award Prize Committee (2014-2015)
- Law and Society Association, Kalven Prize Committee (2013-2014)
- American Political Science Association, Urban Politics Section Dissertation Prize Committee (2012-13)
- American Political Science Association, Urban Politics Section Executive Committee (2012-13)
- Law and Society Association Diversity Committee, (2012-2013)
- American Political Science Association, Urban Politics Section Program Co-Chair (2011)
- Associate Editor, *Law and Social Inquiry*
- American Political Science Association, Urban Politics Section Book Prize Committee (2009)

- Reviewer for *The American Political Science Review*, *Journal of Politics*, *American Journal of Political Science*, *Urban Affairs Review*, *Law and Society Review*, *American Sociological Review*, *Public Opinion Quarterly*, *American Politics Research*, and *Time-Sharing Experiments in the Social Sciences*, among others.

Presentations and Invited Talks

- University of Pennsylvania. Virtual. “Voice and Representation in American Politics.” April 2021.
- University of Michigan. Virtual. “Which Lives Matter? Factors Affecting Mobilization in Response to Officer-Involved Killings.” February 2021.
- University of Pittsburgh. Virtual. “Policing and Participation.” November 2020.
- Hamilton College Constitution Day Seminar. Virtual. “Racial Protests and the Constitution.” September 2020.
- New York Fellows of the American Bar Foundation. New York, NY. “Police Shootings and Political Participation.” March 2020.
- Pennsylvania State University, State College, PA. “Effect of Officer Involved Killings on Protest. November 2019.
- Princeton University. Princeton NJ. “Effects of Police Shootings on Protest among Young Blacks.” November 2019.
- Missouri Fellows of the American Bar Foundation. Branson, MO. Police Shootings and Political Participation in Chicago. September 2019.
- Northwestern University. “Police Shootings and Political Participation.” November, 2018.
- Princeton University. Princeton, NJ. “Police Shootings and Political Participation.” September, 2018.
- University of California at Los Angeles. Los Angeles, CA. “Police Shootings and Political Participation.” August, 2018.
- American Bar Association Annual Meeting. Chicago, IL. “Police Shootings and Political Participation.” August 2018.
- American Bar Endowment Annual Meeting. Lexington, KY. “Effects of Police Shooting in Chicago on Political Participation.” June 2018.

- Vanderbilt University. “Effects of Police Shootings in Chicago on Political Participation.” April 2018.
- Washington University in St. Louis. “Effects of Pedestrian and Auto Stops on Voter Turnout in St. Louis.” February 2018.
- Fellows of the American Bar Foundation, Los Angeles. “Assaulting Democracy.” January 2018.
- Northwestern University Reviving American Democracy Conference. Panel presentation. “Barriers to Voting.” January 2018.
- University of Illinois at Chicago. “Effects of Police Shootings in Chicago on Political Participation.” October, 2017.
- Chico State University. “Constitution Day Address: Policing and Political Participation.” September, 2017.
- Fellows of the American Bar Foundation, Atlanta, Georgia. “Policing in Georgia.” May 2017.
- United States Commission on Civil Rights. Testimony. “Collateral Consequences of Mass Incarceration.” May 2017.
- Northwestern University Pritzker School of Law. “Effects of Police Stops of Cars and Pedestrians on Voter Turnout in St. Louis.” April 2017.
- University of California at Los Angeles. Race and Ethnic Politics Workshop. “Effects of Police Stops of Cars and Pedestrians on Voter Turnout in St. Louis.” March 2017.
- University of North Carolina at Chapel Hill. American Politics Workshop. “Effects of Police Stops of Cars and Pedestrians on Voter Turnout in St. Louis.” February 2017.
- National Bar Association, St. Louis MO. “Political Effects of Mass Incarceration.” July 2016.
- Harvard University, Edmond J. Safra Center for Ethics. Inequalities/Equalities in Cities Workshop. April 2016.
- American Political Science Association Annual Meeting. September 2015. “Responsibility for Racial Justice.” Discussant.
- St. Olaf College. April 2015. “The Collateral Consequences of Mass Incarceration.”
- Northwestern University. Institute for Policy Research. February 2015. “The Civic

Culture Structure.”

- Texas A&M University. Race, Ethnicity, and Politics Workshop. September 2014. “Trading Democracy for Justice.”
- Columbia University Teachers College. The Suburban Promise of Brown Conference. May 2014. “Can We All Get Along, Revisited: Racial Attitudes, the Tolerance for Diversity, and the Prospects for Integration in the 21st Century.”
- University of Kentucky. Reversing Trajectories: Incarceration, Violence, and Political Consequences Conference. April 2014. “Trading Democracy for Justice.”
- University of Chicago. American Politics Workshop. March 2014. “How Geographic Differences in Neighborhood Civic Capacity Affect Voter Turnout.”
- Kennedy School of Government, Harvard University. February 2014. “Trading Democracy for Justice.”
- University of Michigan. American Politics Workshop. December 2013. “Trading Democracy for Justice.”
- Yale University. American Politics and Public Policy Workshop. September 2013. “Trading Democracy for Justice.”
- American Political Science Association Annual Meeting. August 2013. “The Heavenly Chorus Is Even Louder: The Growth and Changing Composition of the Washington Pressure System.” With Kay Lehman Schlozman, Sidney Verba, Henry Brady, and Phillip Jones.
- National Bar Association, Miami Florida, July 2013. “The Collateral Consequences of Mass Imprisonment.”
- Loyola University. American Politics Workshop. December 2012. “Mass Imprisonment and Neighborhood Voter Turnout.”
- Marquette University School of Law. November 2012. “The Collateral Consequences of Mass Imprisonment.”
- Yale University. Detaining Democracy Conference. November 2012. “The Effects of Imprisonment and Community Supervision on Political Participation.”
- Brown University. American Politics Workshop. October 2012. “Mass Imprisonment and Neighborhood Voter Turnout.”
- American Bar Association National Meeting, August 2012. “Mass Imprisonment: Consequences for Society and Politics.”

- University of Madison-Wisconsin. American Politics Workshop. March 2012. “The Spatial Concentration of Imprisonment and Racial Political Inequality.”
- American Political Science Association Annual Meeting. 2011. “Theme Panel: How Can Political Science Help Us Understand the Politics of Decarceration?”
- University of Pennsylvania. Democracy, Citizenship, and Constitutionalism Conference. April, 2011. “Vicarious Imprisonment and Neighborhood Political Inequality.”
- University of Chicago School of Law. Public Laws Colloquium. Chicago, IL. November, 2010. ““The Effects of Neighborhood Incarceration Rates on Individual Political Efficacy and Perceptions of Discrimination.”
- Pomona College. November, 2010. “Incarceration Nation.”
- University of Washington. Surveying Social Marginality Workshop. October 2010. “Using Government Data to Study Current and Former Felons.”
- American Bar Foundation, Chicago, IL, September 2010. “The Effects of Neighborhood Incarceration Rates on Individual Political Attitudes.”
- Northwestern University. Chicago Area Behavior Conference. May 2010. “Trading Democracy for Justice: The Spillover Effects of Incarceration on Voter Turnout in Charlotte and Atlanta.”
- Annual Meeting of the Law and Society Association, Chicago, IL, May 2010. “Neighborhood Criminal Justice Involvement and Voter Turnout in the 2008 General Election.”
- Annual Meeting of the Southern Political Science Association, Atlanta, GA, January 2010. “The Art and Science of Voter Mobilization: Grassroots Perspectives on Registration and GOTV from Charlotte, Atlanta, and Chicago.”
- University of Illinois at Chicago. Institute for Government and Public Affairs. November 2009. “Turnout and Party Registration among Convicted Offenders during the 2008 Presidential Election.”
- Annual Meeting of the American Political Science Association, Toronto, Ontario, Canada, September 2009. “‘I Wanted to Vote for History!’ Turnout and Party Registration among Convicted Offenders during the 2008 Presidential Election.”
- Harris School of Public Policy, University of Chicago. American Politics Workshop. December 2008. “Trading Democracy for Justice? The Spillover Effects of Imprisonment on Neighborhood Voter Participation.”

- Northwestern University School of Law. Law and Political Economy Colloquium. November 2008. "Did Disfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida's Ex-Felons."
- University of California, Berkeley. Center for the Study of Law and Society. October 2008. "Trading Democracy for Justice? The Spillover Effects of Imprisonment on Neighborhood Voter Participation."
- Law and Society Association Annual Meeting, Montreal, Canada, May 2008. "Did Disfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida's Ex-Felons."
- Law and Society Association Annual Meeting, Montreal, Canada, May 2008. "Trading Democracy for Justice? The Spillover Effects of Imprisonment on Neighborhood Voter Participation."
- Midwest Political Science Association Conference, Chicago, IL, April 2007. Paper: "Concentrated Incarceration: How Neighborhood Incarceration Decreases Voter Registration."

Working Papers Under Review

- "Introduction" (with Jenn Jackson and Periloux Peay) in *Freedom Dreams: A Symposium on Abolition*. Eds. Jenn Jackson, Periloux Peay, and Traci Burch. Social Science Quarterly.
- "The Effects of Community Police Performance on Protest in Chicago" (For Symposium Honoring John Hagan)
- "How Police Departments Frame Low-Threat Victims of Officer-Involved Killings"
- Which Lives Matter?

Additional Activities

- Expert witness in *Kelvin Jones vs. Ron DeSantis, etc. et al.* (U.S. District Court for the Northern District of Florida Consolidated Case No. 4:19-cv-00).
- Expert witness in *Community Success Initiative, et al., Plaintiffs v. Timothy K. Moore* (Superior Court, Wake County, NC Case No. 19-cv-15941).
- Expert witness in *People First of Alabama v. Merrill* (U.S. District Court in Birmingham, Alabama, Case No. 2: 20-cv-00619-AKK)
- Expert witness in *Florida State Conference of the NAACP v. Lee* (U.S. District Court in the Northern District of Florida, Case No. 4:21-cv-00187-MW-MAF)

- Expert witness in *One Wisconsin Institute Inc. v. Jacobs* (U.S. District Court in the Western District of Wisconsin, Case No. 15-CV-324-JDP).
- Expert witness in *Alpha Phi Alpha Fraternity Inc., et al. v. Raffensperger* (U.S. District Court for the Northern District of Georgia, Case No. 1:21-cv-05337-SCJ)

APPENDIX 4

DEMOCRACY DEFENDED

Lessons from the
2022 Elections & the
Path Ahead in 2024





LDF’s Prepared to Vote and Voting Rights Defender team. Photo by Roberto Hernandez

ACKNOWLEDGEMENTS

The Legal Defense Fund (LDF) is America’s premier legal organization fighting for racial justice. Using the power of law, narrative, research, and people, LDF defends and advances the full dignity and citizenship of Black people in America.

The data and narratives included in this report build on years of collaboration between LDF and critical national, state, and grassroots partners. Hundreds of volunteers dedicated their time and attention to collecting and reporting the data, visuals, and stories contained herein.

Most photos included in this publication were taken by LDF staff, contracted photographers, and volunteers, or are otherwise credited. Maps were generated by LDF staff, using Social Explorer mapping tools. Data reported from the 866-OUR-

VOTE Hotline was obtained from the Our Vote Live system maintained by the Lawyers’ Committee for Civil Rights Under Law. Much of the other data cited is primary source, directly derived from observations made by LDF staff, volunteers, and partners. This report reflects their tireless efforts.

The report was written by members of LDF’s Prepared to Vote team, including Amir Badat, Anne Houghtaling, Leigh Logan, and Victoria (Tori) Wenger, as well as Rachel Carter, DeMetris Causer, Christina Das, CeCe Huddleston, Evans Moore, Michael Pernick, and Larnee Satchell. Editorial support was provided by Jin Hee Lee, Tona Boyd, and Janai Nelson. Design was completed by Kaye Lee Johnston, Leigh Logan, and Tori Wenger.



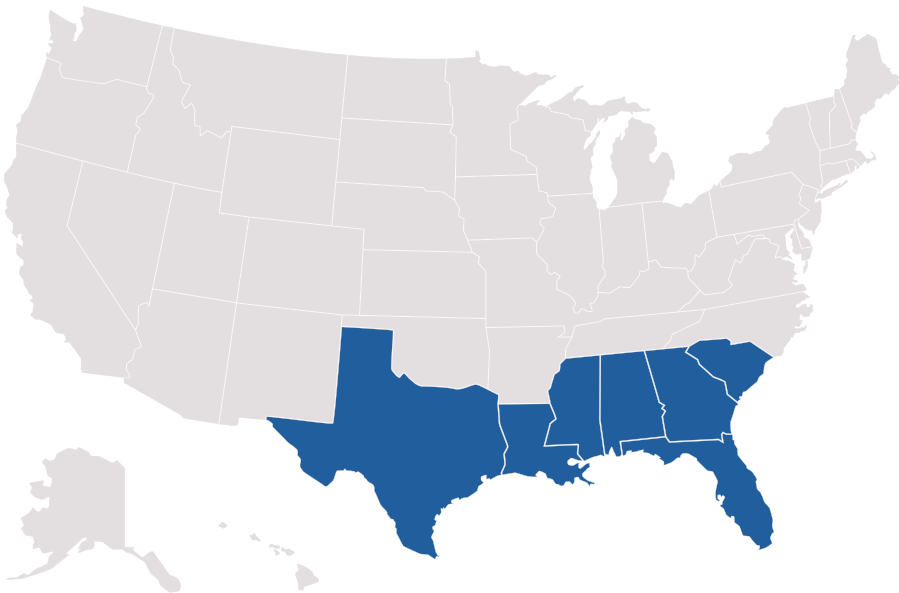
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INTRODUCTION

A Model of Year-Round, Integrated Advocacy

Protecting the right to vote has been a core mission of the Legal Defense Fund (LDF) since its founding in 1940. Following the 2000 elections, LDF joined with fellow civil rights organizations to launch the nonpartisan Election Protection network and 866-OUR-VOTE hotline. In tandem with these efforts, LDF later launched its Prepared to Vote (PTV) initiative to provide nonpartisan voter education and on-the-ground election monitoring and advocacy during elections. In 2020, LDF launched the Voting Rights Defender (VRD) project, a companion effort of PTV, to enhance year-round advocacy to expand voting access, invest in sustained partnerships, and broaden multi-tactic advocacy efforts to protect and expand voting rights in target states.



2022 Midterm Elections — Lessons Learned

In 2022, LDF conducted civic engagement, election monitoring, and advocacy efforts in seven southern states: Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas. As identified through the monitoring and advocacy work during these elections, limitations on the ability of Black voters to access the ballot and have their votes counted remained a prominent factor in U.S. elections. In addition to voter intimidation and election sabotage threats, LDF and our partners observed many obstacles that made it harder for Black voters to vote. This report incorporates just some of the data points and observations captured during elections in LDF’s target states in 2022. It also reflects lessons informed by these findings and key takeaways from prior Democracy Defended reports that can position civil rights advocates to engage strategically to support voters in 2024 and beyond.

Despite warnings to keep away from the polls, thousands of Black voters turned out in the Georgia Democratic primaries in Marietta, Ga., on July 17, 1946. Photo by Bettmann Archive/Getty Images

Voters line up to cast their ballots on Nov. 26, 2022 in Decatur, Ga. Early voting started in select Georgia counties for a special runoff election days after the Georgia Supreme Court rejected an emergency request from Republicans to block counties from offering early voting on Saturday. Photo by Justin Sullivan/Getty Images



prepared to VOTE

Non-Partisan Voter Education

Through the Prepared to Vote/Voting Rights Defender initiatives, LDF works to defend and advance the rights of Black voters and the promise of a free and fair democracy through the full life cycle of the political process.



**TRACKING
ELECTION BILLS**
and supporting
voting rights
legislation

**EDUCATING
VOTERS** on
changes in the
election laws and
their voting rights

**MOBILIZING
COMMUNITIES**
to exercise their
right to vote

OBSERVING and
**ADDRESSING
BARRIERS TO
VOTING** before
and on election
days

**CHALLENGING
DISCRIMINATORY
PRACTICES** at the
polls and referring
issues for litigation

MONITORING the
**POST-ELECTION
PROCESS** to ensure
fair and trusted
results

**PROVIDING
RESEARCH** and
publications to
inform future
advocacy

BUILD BLACK POLITICAL POWER

TOP ISSUES IN 2022



Voters wait in line on Nov. 27, 2022 to vote early in the Georgia Senate runoff election in Atlanta. Photo by Justin Sullivan/Getty Images

Voting Infrastructure & Administration Problems

Issues concerning voting infrastructure and administration permeated the midterm elections in each of LDF's target states. Monitors observed polling locations with barriers for seniors and voters with disabilities, poor signage identifying polling locations, insufficient supplies of voting materials at polling locations, and technology failures.

Limited Availability of Voting Options

The availability of multiple voting options continues to be significant for Black political participation. The lack of mail-in and early voting options in several states increased the need for voters to vote on Election Day, leading to long lines and heightened opportunities for disenfranchisement due to voting administration and process failures. Expansion of early voting options in some states, including South Carolina, where early voting was available to voters for the first time, reduced pressures on Election Day and improved access to the ballot box.

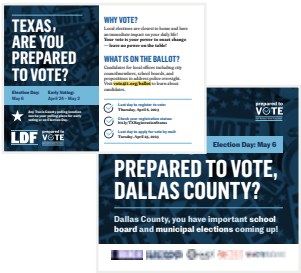
Confusion About Nonpartisan Monitor Role

Poll workers in multiple states improperly restricted LDF monitors and other nonpartisan volunteers who were wearing apparel with nonpartisan messaging from being within the no-electioneering zone around the polling place. These issues arose due to incorrect interpretations of electioneering rules and poor training of poll workers.

Poor Information About Poll Site Changes

The process for poll site selection varies across states and many states failed to effectively communicate poll site information to voters. Poll site listings in many states remain decentralized, resulting in unreliable information and voter confusion. Moreover, the lack of transparency makes it difficult to track patterns of discriminatory changes and closures in Black communities.

2022 IMPACT BY THE NUMBERS

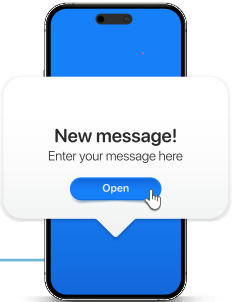


2,444,932

Voters reached through mailings

1,437,594

Voters reached by text message

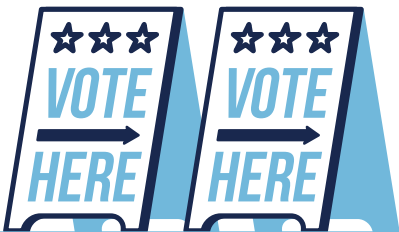


100+

Local partner organizations in target states

70+

Volunteer trainings conducted



2300+

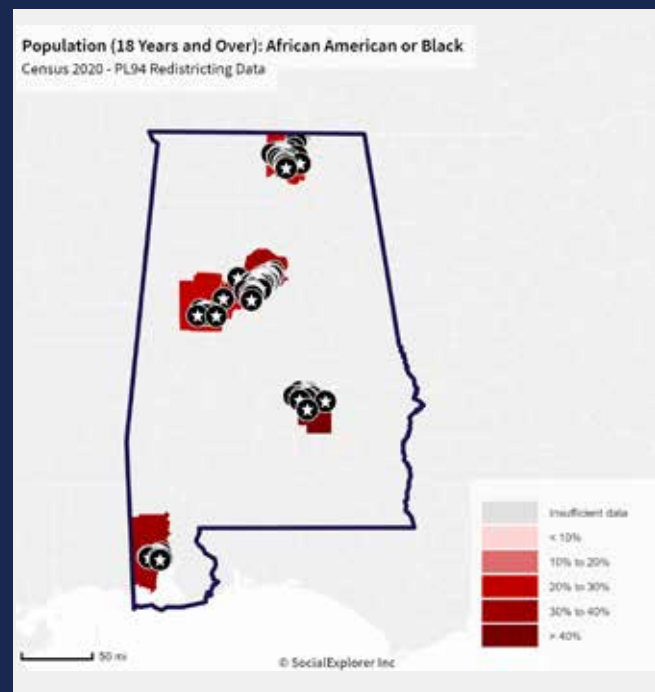
Polling sites visited across target states

STATE REPORTS

People are seen in line to vote on the first day of early voting in Cobb County on Saturday, November 26, 2022 in Marietta, GA.
Photo by Elijah Nouvelage for The Washington Post via Getty Images

ALABAMA 2022

In 2022, the Alabama team addressed issues with poll site changes and transparency in advance of Election Day and dispatched volunteers during the primary and general elections to observe challenges at the polls. As recorded here, problems ranged from poor signage to considerable barriers to accessibility, among other issues.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

30+ nonpartisan field volunteers

18+ cities reached

143 poll sites visited

197+ poll site reports submitted

23% of reports indicating “no issues” – meaning that when the reports were submitted, the poll sites showed no barriers to voting



Polling location in Alabama. Photo by volunteer

HOTLINE REPORTS

During the Primary elections on May 24, 2022, and the General elections on November 8, 2022, the 866-OUR-VOTE Election Protection Hotline received over 550 calls from 35 counties.

Most issues reported through the hotline were related to voter registration and absentee ballot status. These issues, as well as misinformation, were among those reported by our volunteers.

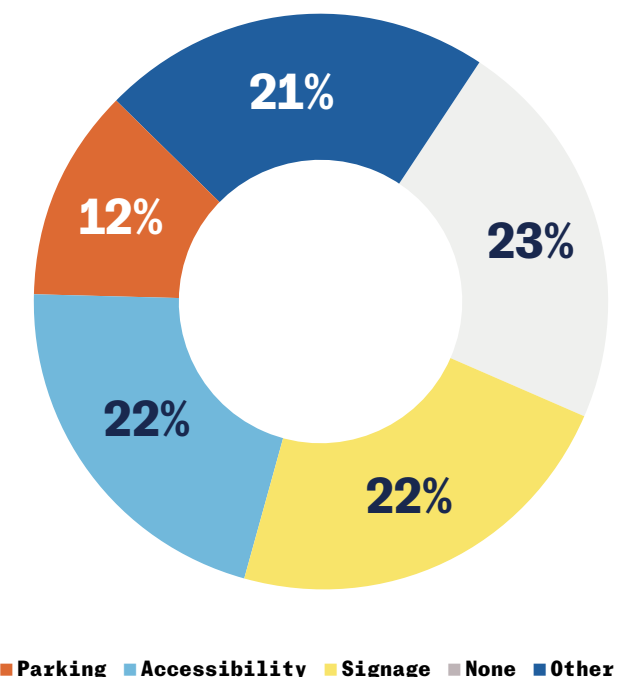
ELECTION PROTECTION **866 OUR VOTE**

550+
calls

35
counties

FIELD REPORTS

The top issues reported by monitors, depicted on the chart below, were accessibility and signage, which were oftentimes intertwined. Parking concerns also recurred across sites, which also often implicated accessibility or lack of signage to designate reserved accessible spots.



■ Parking ■ Accessibility ■ Signage ■ None ■ Other

UNIFORM POLL SITE INFORMATION

In the lead up to the November 2022 midterm elections in Alabama, LDF, along with our partner organizations, determined that the lack of accurate, uniform, and comprehensive polling place information available to voters was a significant barrier to voting that particularly disenfranchised Black voters and other voters of color.

Under state law, Alabama has a duty to notify voters of their polling locations by publishing a list of poll sites. However, some counties failed to publish anything online, while others published information that was inaccurate, contradictory, and at times so seriously lacking in relevant detail as to not meaningfully inform voters of their polling locations. We reviewed poll site information published by county officials in more than a fifth of Alabama counties and found that, among those counties with a Black population greater than 50%, each county lacked a precinct list, poll site map, and an interactive poll locator tool to enable voters to learn their voting location based on their address.

We sent a letter to the Alabama Secretary of State urging him to publish a comprehensive list of poll site locations and precinct information for each county so that Alabamians could have accurate and up-to-date information on their correct polling place on Election Day. We also requested that he issue guidance to each county's election officials on the requirement that any poll site closures or changes comply with Alabama and federal laws. The Secretary of State, however, shirked his responsibility to oversee election administration by stating the duty to publish polling location information falls on county officials.

State and local advocates are now directing efforts to future legislative changes that would ensure all Alabamians have access to information on where to vote. LDF will continue to join partners in advocating for transparency in poll site selection and information.

... among those counties with a **Black population greater than 50%**, each county lacked a precinct list, poll site map, and an interactive poll locator tool to enable voters to learn their voting location based on their address.

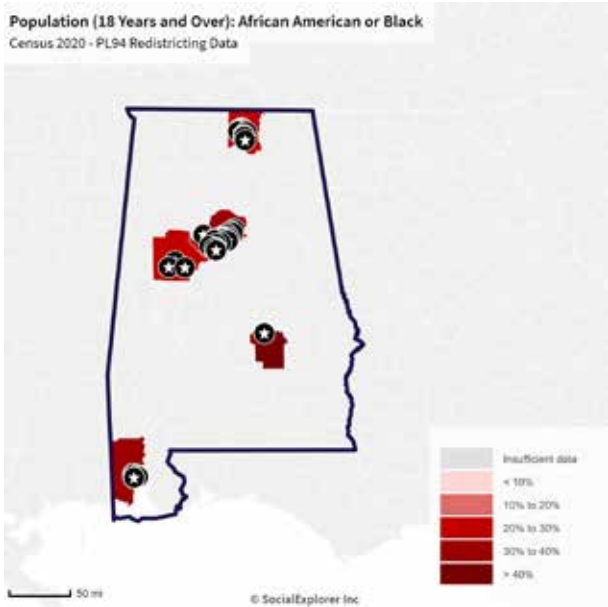


Wenonah High School Gym, Birmingham, AL on May 24, 2022. Photo by volunteer



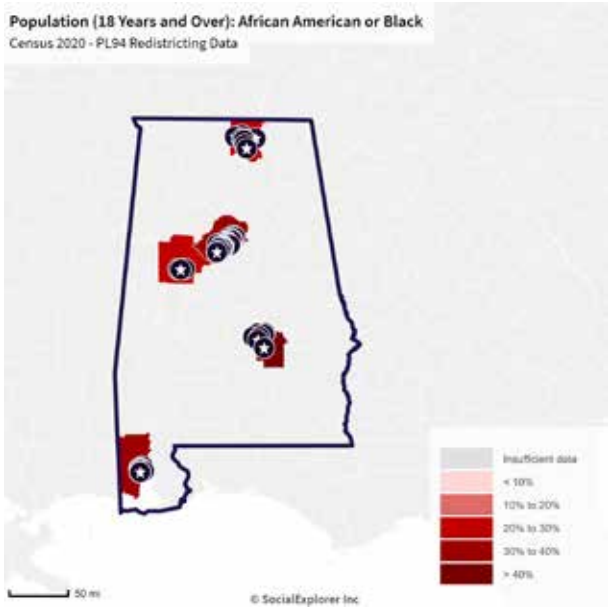
Memorial Recreation Center, Birmingham AL on May 24, 2022. Photo by volunteer

TOP ISSUES ON ELECTION DAY



SIGNAGE: Signage issues were reported in nearly all poll site issue checklists submitted.

Many of the reported signage issues cited problems with directional signage. This included issues with volunteers having difficulty locating the polling location from the street, but also instances in which it was hard to find the poll site entrance from the parking lot. Many sites were in large multi-purpose buildings, and the lack of signage indicating where voters should go to cast their ballots proved to be a significant impediment during the elections.



ACCESSIBILITY: Volunteers reported accessibility issues in almost every poll site issue checklist.

As discussed above, the reported signage and accessibility issues were often intertwined. A majority of the poll site reports that referenced accessibility issues concerned with signs that incorrectly directed voters to inaccessible entrances. In addition, the accessibility issues revolved around inaccessible poll site entrances and lack of parking, i.e., poll sites often lacked curb cuts and ramps that allowed voters who use wheelchairs to access the polling locations.

Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.

ISSUE SPOTLIGHT

LABELED AND ACCESSIBLE PARKING



A voter with a walker is forced to walk over grass to access the pathway to a poll site after a car parked illegally in the area designated for accessible vehicle ramps and lifts next to reserved accessible parking spots on Nov. 8, 2022, Jefferson County, AL. Photo by volunteer

The most common parking issue identified was no designated parking spaces for voters, especially at polling locations that were open to the public for other purposes on Election Day. This caused voters to park in areas that were not designated for parking. Monitors also observed that even at polling locations with an open lot, or open spaces, there often was

no signage to indicate that any parking, including accessible parking, was specifically available to voters.

Some voters with disabilities had no available designated parking spots, or there were no designated spots left at congested parking lots.

NEXT UP FOR ALABAMA

MOBILIZING COMMUNITIES ACROSS THE BLACK BELT

The congressional elections in 2024 will mark the first time that Black voters in Alabama will comprise the majority in two congressional districts, following LDF's success litigating *Allen v. Milligan* in the Supreme Court. In that case, LDF litigators and co-counsel argued that Section 2 of the Voting Rights Act required a congressional map that provides Black voters with an opportunity to elect their candidate of choice in two districts, now enacted for the 2024 elections.

Looking ahead, LDF and partners will...

- ➔ Educate voters about the impact of *Allen v. Milligan* for voters in their communities and nationwide
- ➔ Mobilize Alabama voters to realize their power in the new Black-majority districts, and statewide



Photo by Allison Shelley

LDF

prepared to VOTE

ALABAMA ARE YOU PREPARED TO VOTE?

GENERAL ELECTION DAY
Tuesday, November 8, 2022
Polls open 7 a.m. to 7 p.m.

Your Prepared-to-Vote Checklist

Note: All links are case sensitive.

- ☒ Confirm your registration status. bit.ly/AIVoteInfo
- ☒ See what's on your ballot. bit.ly/AlBallotInfo
- ☒ Find your polling place. bit.ly/AIVoteInfo
- ☒ Bring your Photo ID!

ARE YOU REGISTERED TO VOTE?

Monday, October 24
Last day to register. Register here: bit.ly/REGVote

PICK A VOTING PLAN

PLAN 1: VOTE ON ELECTION DAY

Tuesday, November 8
Vote in person on Election Day!
Polls open 7 a.m. to 7 p.m.

PLAN 2: VOTE ABSENTEE

Tuesday, November 1
You can apply for an absentee ballot through the mail before this date. Make sure to send a copy of your photo ID along with your application.

Thursday, November 3
You can apply for an absentee ballot in person before this date. The sooner, the better!

Monday, November 7 by 5 p.m.
Bring your absentee ballot to your county's Absentee Election Manager by this date and time.

Tuesday, November 8 by 12 p.m.
Your mailed absentee ballot should be received by your county's Absentee Election Manager before this date and time.

Find your county Absentee Election Manager:
bit.ly/AlAbsenteeManager

Check if you qualify to vote absentee here:
bit.ly/AlAbsentee

LDF

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What IDs can I use?

Valid AL Driver's License, non-driver ID, or photo voter ID card	AL law enforcement agency digital driver's license	Valid AL movement/booking sheet (photo required)
Valid pistol permit (photo required)	Valid federal or state issued ID (AL or any other state)	Valid employee ID from federal government or Alabama state or local government
Valid Tribal ID	Valid student ID	

What if I don't have one of these IDs?

Receive a **FREE Voter ID card** at your local Board of Registrars, the Secretary of State's Office, or a mobile location. Find where to obtain one: bit.ly/AlVoterId

Know Your Rights!

- ✔ Vote if you're in line when polls close at 7 p.m.
- ✔ Vote free from intimidation.
- ✔ Get help voting if you need help due to blindness, disability, or you struggle to read English. Anyone can help you so long as they are not your employer or union representative.
- ✔ Move to the front of the line if you have a physical disability or are over the age of 70.
- ✔ Vote by provisional ballot if there is uncertainty about your registration status.
- ✔ Vote if you are currently in prison or jail and have not been convicted of a felony involving moral turpitude, misdemeanor.

Have questions or issues?

Long lines? Polling location changed or not well marked? Name removed from voter roll? Voter intimidation? Misinformation? Voting machine or other technology issues?

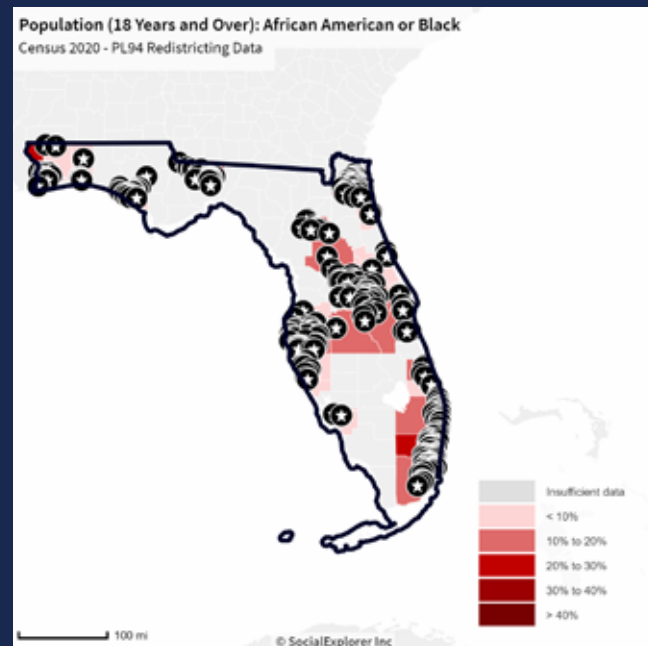
Email vote@naacpldf.org or call Election Protection **866-OUR-VOTE** (866-687-8683). Multiple language support (e.g., Spanish, Arabic, and Asian languages) is available.



Disclaimer: The information here is a resource and not legal advice. It is provided for informational purposes only and not as a substitute for or supplement to the legal advice necessary to address the specific concerns of any individual. Alabama may revise its laws and information after this is published. It is your responsibility to determine how all applicable laws concerning voter registration, voting, and the restoration of voting rights in Alabama affect you.

FLORIDA 2022

In 2022, the LDF team and partners recorded an overwhelming number of issues, ranging from improper voter challenges and other suppression efforts prior to Election Day, to confusing signage, long lines, and accessibility concerns once polls opened. This report provides a lens into just some of these concerns and the steps ahead.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

400+ nonpartisan volunteers

168 cities reached

356 early voting and poll sites visited

1600+ poll site reports

75% of reports indicating “no issues” – meaning that when the reports were submitted, the poll sites showed no barriers to voting.



Leon County Public Works Department, Tallahassee FL, Leon County Signage at entrance of poll site in Florida on August 23, 2022.

Photo by volunteer

HOTLINE REPORTS

From the beginning of the year up to the November 8 elections, the 866-OUR-VOTE Election Protection Hotline received over 2,600 calls from over 40 counties.

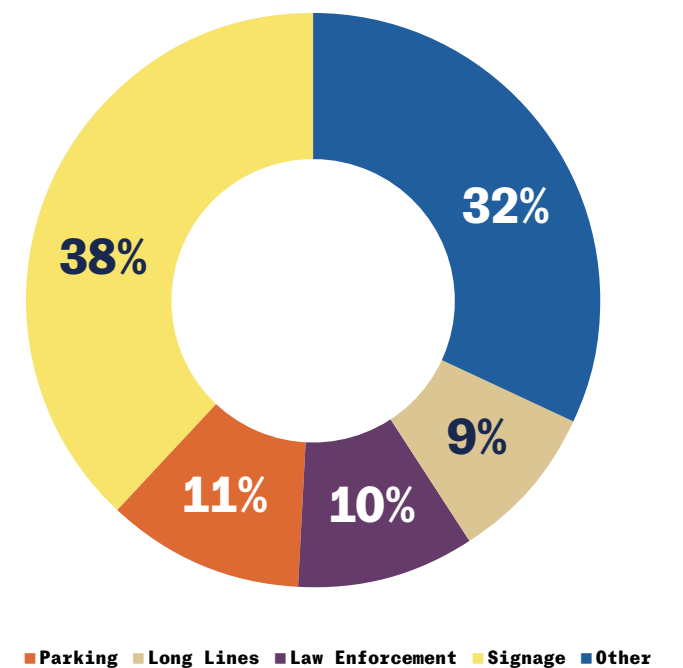
While many of the calls regarded individual voters’ questions about their registration, absentee ballots, or other individualized needs, broader issues reported included topics like malfunctioning or broken machines at poll sites.

ELECTION PROTECTION 

2600+ calls | **40+** counties

FIELD REPORTS

The majority of poll site reports indicated no issues (75.5% of the total reports submitted). Of poll sites with reported issues, charted below, the main concerns related to signage, followed by parking, law enforcement activities, and long lines, while a variety of other miscellaneous issues rounded out the remaining issue reports.



ADVOCACY SPOTLIGHT

RESPONDING TO VOTER CHALLENGES

Voter challenges prior to the election presented a concerning threat in Florida. A member of the public submitted a frivolous mass voter challenge to the eligibility of 2,257 voters in Pinellas County. LDF sent a letter to county Supervisors of Elections (SOEs) ahead of the 30-day challenge period prior to Election Day providing recommendations for how to deal with frivolous mass voter challenges under the law. The Pinellas County Supervisor of Elections followed LDF's recommendations and rejected the challenges outright.

The decision in Pinellas to reject this challenge was an important win and set a helpful precedent for frivolous voter challenges in Florida.

At least 14 Supervisors of Elections submitted voter challenges against at least 2,370 Florida voters during the 30-day period before Election Day defined under law. These challenges were based on information provided to Supervisors by the new Florida Office of Election Crimes indicating that certain voters were ineligible.

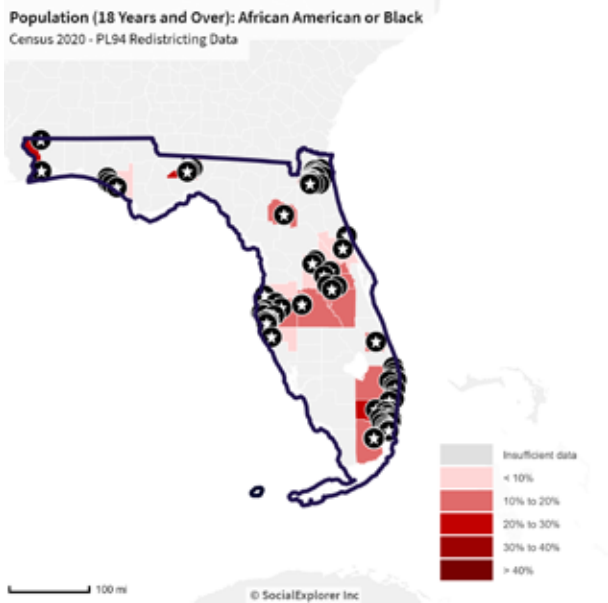
The overwhelming majority of these challenges were based on past felony convictions, although a small number of challenges were based on mental incapacity, death, double-voting in past elections, or residing at a non-residential address. These challenges present a serious concern for Florida voters who may have prior felony convictions.

The decision in Pinellas to reject this challenge was an important win and set a helpful precedent for frivolous voter challenges in Florida.



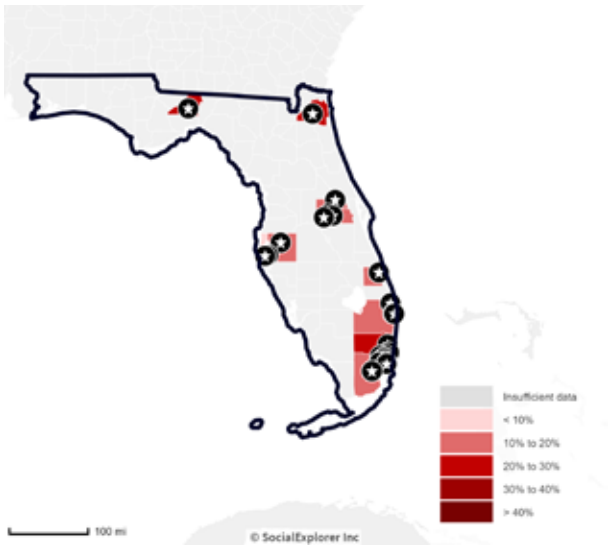
A man looks at an electronic device during an event held by the Florida Rights Restoration Coalition (FRRC) to clear the fines and fees of dozens of Florida residents with past felony convictions, in Miami, Florida, on April 28, 2022. Despite the approval of a 2018 statewide amendment aimed to restore the voting rights of more than 1.4 million Floridians with felony convictions, many voters remain disenfranchised because of requirements for full payment of legal obligations before voting rights restoration. Photo by MARCO BELLO/AFP via Getty Images

TOP ISSUES ON ELECTION DAY



SIGNAGE: When citing signage issues, most volunteers indicated inadequate Spanish-language information.

Signage proved to be a tremendous barrier for Florida voters in the 2022 election season. Spanish translation is required across the state, and many of the reports regarding improper signage cited the lack of Spanish language access. In some instances where the signs had Spanish translations, the font size of the translation was significantly smaller than the English translation. Additionally, many sites did not have enough “Vote Here” signs directing voters to the polling site entrance.



LAW ENFORCEMENT ISSUES: Law enforcement presence was reported in various regions across the state.

Volunteers reported an unexpected amount of law enforcement activity at polling locations this cycle. One volunteer submitted a report noting that there was a police car idling near the poll site entrance and that around the site itself were many signs highlighting the police’s presence in the area. Police presence at poll sites can intimidate voters, which can, in turn, deter voters from casting ballots.

Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.



ISSUE SPOTLIGHT

MISLEADING SIGNAGE

Leading up to Election Day, LDF, the Okaloosa County Branch NAACP, and the NAACP Florida State Conference sent a letter to the Okaloosa County Supervisor of Elections expressing concern over misleading signage outside early voting locations. Temporary signs reading “Republicans Vote Here Today” were placed in the immediate vicinity of at least two early voting sites.

Even if posted beyond the electioneering boundary, these signs created an unacceptable risk of voter confusion and violated state and local law, including prohibitions on dissemination of false information to induce others to refrain from voting.

Specifically, the signs created a risk of voter confusion because they implied that Republicans and non-Republicans vote in different locations and on different days. Neither was true. The risk of confusion was also significant because the signs were similar in color and typography to the official “Vote Here” signs used by election officials.

Due to LDF’s advocacy, the Okaloosa County Attorney arranged to remove misleading signs prior to Election Day.

LDF will continue to monitor this issue in future election cycles.

Misleading signage suggesting that only one party’s voters may cast ballots at certain poll sites certain sites during the early voting period on Aug. 23, 2022, in Okaloosa County, Fla. *Photo by volunteer*



Law enforcement presence near poll site in Florida. Photo by volunteer

NEXT UP FOR FLORIDA

COUNTERING INTIMIDATION

Florida has been a focal point of efforts to deter and intimidate eligible voters from participating in the democratic process—both through the state’s efforts to expand the policing of elections and through voter challenges and the spread of mis- and disinformation by private actors.

Looking ahead, LDF and partners will...

- ➔ Educate voters on their rights to inoculate against mis- and disinformation about registration and voting rights
- ➔ Monitor for mass voter challenges and voter roll purge attempts
- ➔ Continue to recruit volunteers to serve as trusted messengers in their communities for reliable voting rights information and to support poll monitoring efforts

LDF

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Non-Partisan Voter Education

FLORIDA ARE YOU PREPARED TO VOTE?

GENERAL ELECTION DAY
Tuesday, November 8, 2022
Polls open 7 a.m. to 7 p.m.

Your Prepared-to-Vote Checklist

Scan this QR code to:

✔

Confirm your registration status.

✔

See what’s on your ballot.

✔

Find your polling place.

✔

Remember your ID.

ARE YOU REGISTERED TO VOTE?

Tuesday, October 11
Last day to register.

PICK A VOTING PLAN

PLAN 1: VOTE BY MAIL

Saturday, October 29 by 5 p.m.
To vote by mail, apply for a mail ballot before this date and time. You can apply in person, by phone, mail, email, or fax. The sooner, the better!

Tuesday, November 8 by 7 p.m.
Your county Supervisor of Elections needs to receive your ballot before this date and time! Be sure it arrives on time. Send your ballot in the mail or at a drop off location as soon as possible.

Thursday, November 10 by 5 p.m.
If your ballot is rejected you can “cure” your mail or provisional ballot before this date and time. Learn how to cure your ballot here: bit.ly/CureMyFLBallot.

PLAN 2: VOTE EARLY IN PERSON

October 29 – November 5
Your county’s hours may be different. Find your county’s voting hours and dates at your county’s election website.

PLAN 3: VOTE IN PERSON ON ELECTION DAY

Tuesday, November 8
Polls open 7 a.m. to 7 p.m.

LDF

prepared to VOTE

Non-Partisan Voter Education

What Photo IDs can I use?

Florida driver’s license or ID card	Federally Issued ID - including U.S. Passport or Military ID or Veteran Health Card	Employee ID Issued by Federal, State, or Local Government
Concealed Carry License	Student ID	Public Assistance ID
Retirement Center ID	Debit or Credit Card	Neighborhood Association ID

If your Photo ID doesn’t contain your signature, an ID with your signature will be required.

What if I don’t have one of these Photo IDs?

You can cast a provisional ballot.

Changes to Florida Law

Stay up to date! Florida passed new laws that may make your voting experience different from 2020. Learn about the new changes at bit.ly/FLaws2022.

Since 2020, Florida passed new laws impacting voters:

- ➔ Drop boxes (a.k.a. secure ballot intake stations) are now available only during early voting hours at your county Supervisor of Elections office, each branch office, and early voting sites.
- ➔ A request for a mail ballot will now cover only elections through the end of the calendar year of the next general election.



Know Your Rights!

- ✔ Vote free of intimidation.
- ✔ Vote if you’re in line when polls close at 7 p.m.
- ✔ Get help voting if you need help due to blindness, disability, or your inability to read or write. Anyone can help you so long as they are not your employer or union representative.

Have questions or issues?

Long lines? Polling location changed or not well marked? Name removed from voter roll? Voter intimidation? Misinformation? Voting machine or other technology issues?

Email vote@naacpldf.org or call Election Protection 866-OUR-VOTE (866-687-8683). Multiple language support (e.g., Spanish, Arabic, and Asian languages) is available.



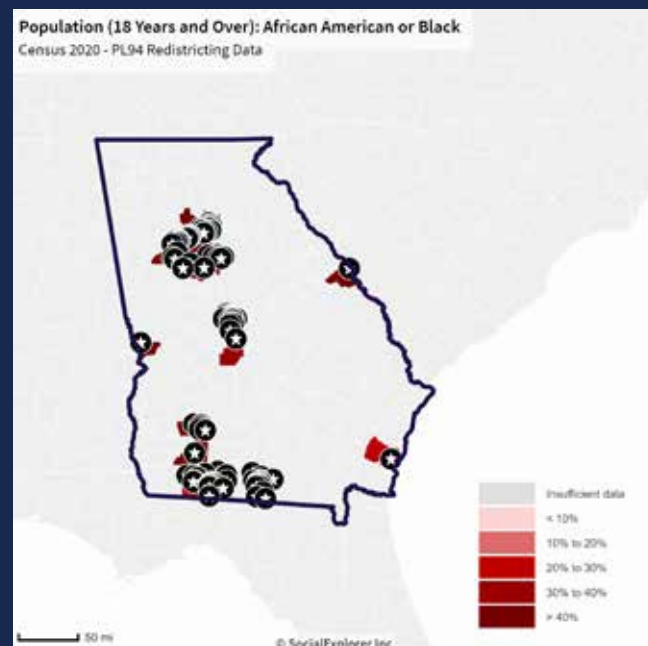
New Gulf Coast Choir



Disclaimer: The information here is a resource and not legal advice. It is provided for informational purposes only and not as a substitute for or supplement to the legal advice

GEORGIA 2022

Facing barriers from the enactment of Georgia's 2021 omnibus voter suppression bill, SB 202, the Georgia team pursued a range of advocacy efforts to reduce harms to voters in advance of the 2022 elections. In addition to proactive advocacy, the team and partners compiled extensive data on barriers experienced by voters at the polls.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

40+ nonpartisan field volunteers

29 cities reached

124 early voting and poll sites visited

148+ poll site reports submitted

37% of reports indicating "no issues" – meaning that when the reports were submitted, the poll sites showed no barriers to voting.



In a photo taken during the primary election on May 5, 2022, a sign describes prohibition on electioneering within 150 feet of a poll site in Newton County, Ga. Photo by volunteer

HOTLINE REPORTS

During the May 24, Nov. 8, and Dec. 6, 2022 elections, the 866-OUR-VOTE Election Protection Hotline received over 2,500 calls from the 120 LDF target counties.

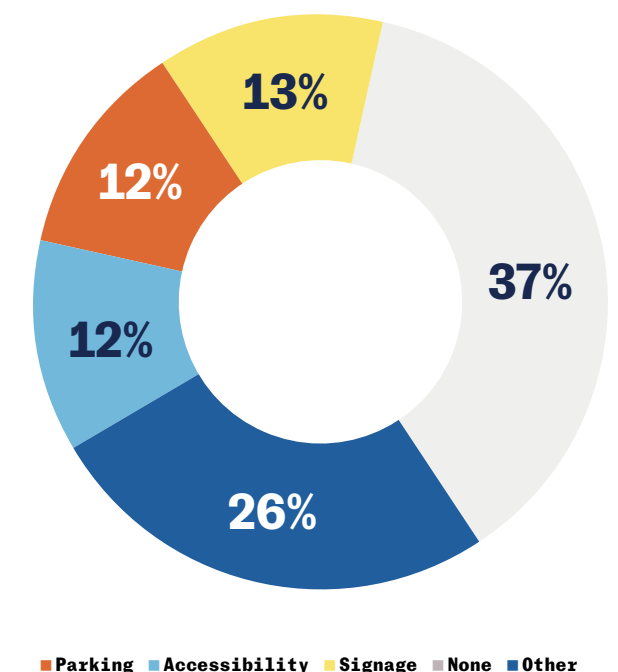
Of the thousands of reports into the hotline, many were questions about individuals' registration status or absentee ballot tracking. The others cited poll sites that opened late, voter roll purges, voting machine malfunctions and more.

FIELD REPORTS

The main trends of the issues reported by monitors visiting poll sites, charted below, revolved around accessibility, parking, and signage, which were reported at comparable rates. Other miscellaneous issues made up over a quarter of issue reports, while over a third of reports submitted indicated no issues at all.

ELECTION PROTECTION 

2500+ calls | **120+** counties



ADVOCACY SPOTLIGHT

EARLY VOTING OPPORTUNITIES

As a result of SB 202, the omnibus voter suppression bill enacted in Georgia in 2021, the time period for early voting in runoff elections was limited to just five mandatory days (compared to 17 mandatory days in previous elections), with discretion among county election officials to offer a limited number of additional days. The Georgia Secretary of State issued a last-minute bulletin further limiting the availability of early voting in runoff elections by prohibiting counties from exercising their discretion to offer early voting on Saturday, Nov. 26, based on an incorrect reading of state law.

LDF filed an amicus brief in support of plaintiffs in a lawsuit challenging the Secretary’s misinterpretation of state law, which emphasized the racial disparities that would result from the Secretary’s incorrect interpretation and also educated the court on the democracy canon as a tool to interpret ambiguities in state law. The court ultimately ruled in favor of the plaintiffs and held that counties could provide Saturday early voting.

LDF coupled this litigation with extensive letter writing efforts urging counties to exercise their discretion to offer weekend voting and sent nearly **300,000 text messages** to voters in 23 counties about these opportunities.



Voters fill out paperwork before casting their ballots in a runoff election on November 26, 2022 in Decatur, Georgia. Early voting was held in select Georgia counties for a special runoff election days after the Georgia Supreme Court rejected an emergency request from Republicans to block counties from offering early voting on Saturday. Photo by Justin Sullivan/Getty Images

Nov. 15, 2022

LDF sends letters to **all 159 Georgia counties** encouraging them to provide at least three additional early voting days

Nov. 17, 2022

LDF files amicus brief in support of Saturday early voting opportunities

Nov. 18, 2022

Court rules that counties **can host Saturday voting**

Nov. 21, 2022

LDF sends letters to all 159 counties encouraging them to provide early voting on Saturday in light of the Court ruling

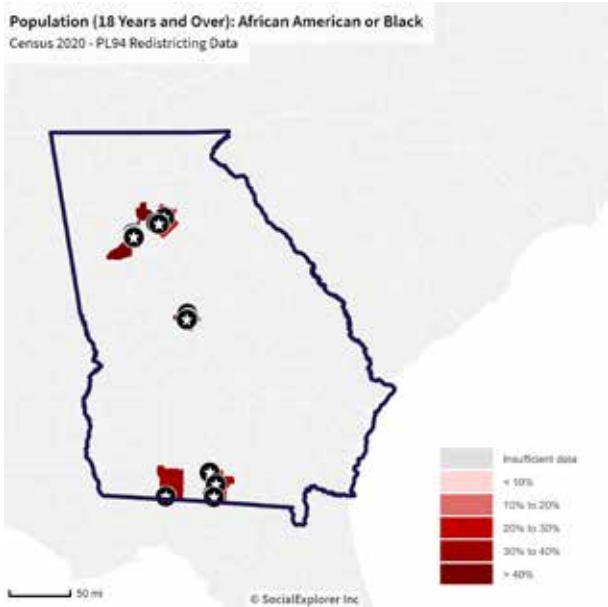
Nov. 26, 2022

27 counties offer early voting and **over 70k voters cast a ballot**

Nov. 27, 2022

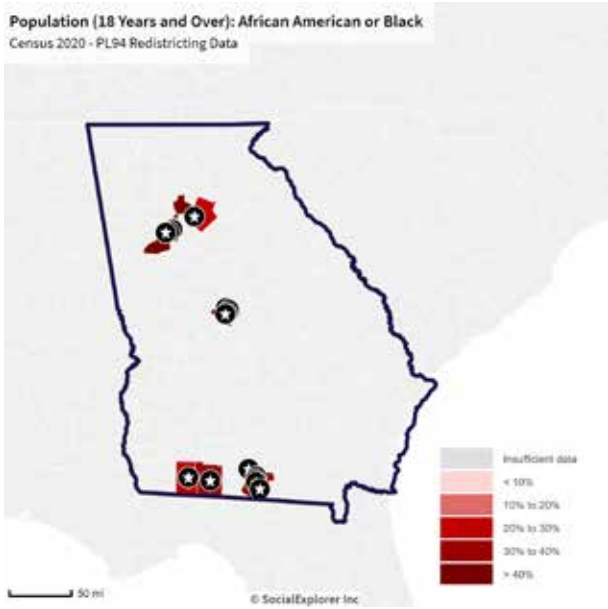
28 counties offer early voting and **over 87k voters cast a ballot**

TOP ISSUES ON ELECTION DAY



PARKING:

Parking issues were identified in almost all reports. Volunteers cited many instances of inadequate parking, which were intertwined with signage and accessibility issues. Often reports indicated that polling locations did not have any parking lots or designated parking spaces for voters and others highlighted sites that did not have any accessible parking. Schools served as the location for many of these poll sites, and school buses and cars that filled the parking lot for pickup and drop off blocked any designated parking for voters.



SIGNAGE:

Campaign signage obstructed the view of “Vote Here” signs at many poll sites. Like parking, signage issues highlighted other underlying inadequacies at poll sites. In addition to the frequent signage issues, e.g., the lack of directional signage to poll site entrances and accessible parking spaces, many sites had issues with electioneering. Voters reported many instances in which campaign signs blocked “Vote Here” signs, which made locating the polling places difficult.

Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.



ISSUE SPOTLIGHT

POLLING PLACE CHANGES & TRANSPARENCY

Changes in polling locations between early voting and Election Day led LDF volunteers to a handful of polling locations not operating on Election Day. This happened across the state, and each location had signage indicating the closure.

Weeks before the election, LDF filed an Open Records Request with the Georgia Secretary of State’s office to receive a list of polling locations statewide but did not receive a list from the office until after the election (well past the deadline for responding to open records requests).

Transparency around polling location placement and changes is an important issue to be addressed moving forward.

Signs indicating relocated polling locations in Georgia. Photo by volunteer



Masked voters walk into a poll site to cast their ballots for the statewide primary on May 24, 2022 in Covington, Georgia. Photo by volunteer

NEXT UP FOR GEORGIA

MOBILIZING VOTERS WHERE THEY ARE

2024 is another important year for our nation’s democracy, and once again, all eyes will be on Georgia.

LDF will work tirelessly to ensure Georgia’s Black voters are able to fairly access the ballot free from intimidation or voter purges and combat any effort at the local or state level to diminish Black voting power.

- Looking ahead, LDF and partners will...
- Build alliances in rural communities to support Black voters across the state
 - Use multi-tactic methods to reach voters and defend democracy through the full life cycle of the voting process: from registration, GOTV, voting days, and the process of counting and certifying the election

LDF

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GEORGIA

ARE YOU PREPARED TO VOTE?

GENERAL ELECTION DAY

Tuesday, November 8, 2022

Polls open 7 a.m. to 7 p.m.

Your Prepared-to-Vote Checklist

Scan this QR code to:

Confirm your registration status.

See what’s on your ballot.

Find your polling place.

Remember your ID.

ARE YOU REGISTERED TO VOTE?

Tuesday, October 11

Last day to register.

PICK A VOTING PLAN

PLAN 1: VOTE BY MAIL

Friday, October 28

To vote by mail, apply for an absentee ballot by this date. The sooner, the better!

Tuesday, November 8 by 7 p.m.

Your county registrar needs to receive your absentee ballot before this date and time! Be sure it arrives on time by sending your ballot by mail or at a drop off location as soon as possible. Visit your county’s election website to find an early voting site to drop your absentee ballot.

PLAN 2: VOTE EARLY IN PERSON

October 17 – November 4

Monday – Saturday, 9 a.m. – 5 p.m.

Your county’s days and hours may be different. Find your county’s voting hours and dates by visiting [bit.ly/GaVotersInfo](#).

PLAN 3: VOTE IN PERSON ON ELECTION DAY

Tuesday, November 8

Polls open 7 a.m. to 7 p.m. Find your polling location and

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What Photo IDs can I use?

Any valid state, federal, or tribal government-issued photo ID	GA driver’s license, even if expired	Student ID from GA public College or University
Valid employee ID from any federal or Georgia state or local government entity.	Valid U.S. passport ID	Valid U.S. military ID

What if I don’t have one of these Photo IDs?

Get a free ID card at any county registrar or Department of Driver Services. Learn more at [bit.ly/GAVoterIDs](#).

Changes to Georgia Law

Stay up to date!

Georgia passed new laws that may make your voting experience different from 2020. Learn about the new changes and how they affect your voting plan at [bit.ly/GANewLaw](#).

→ Drop boxes are now only available during early voting hours inside some early voting locations.

→ The deadline for voters to request absentee ballots is now 11 days before Election Day.

Have questions or issues?

Long lines? Polling location changed or not well marked? Name removed from voter roll? Voter intimidation? Misinformation? Voting machine or other technology issues?

Email vote@naacpldf.org or call Election Protection **866-OUR-VOTE** (866-687-8683). Multiple language support (e.g., Spanish, Arabic, and Asian languages) is available.

Know Your Rights!

Vote if you are in line when polls close.

Vote free from intimidation.

Vote a regular ballot even if you are on the “inactive” list.

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the Peoples’ Agenda

SPLC Southern Poverty Law Center

the NEWGEORGIA PROJECT

Common Cause Georgia

BACK VOTERS MATTER

Disclaimer:

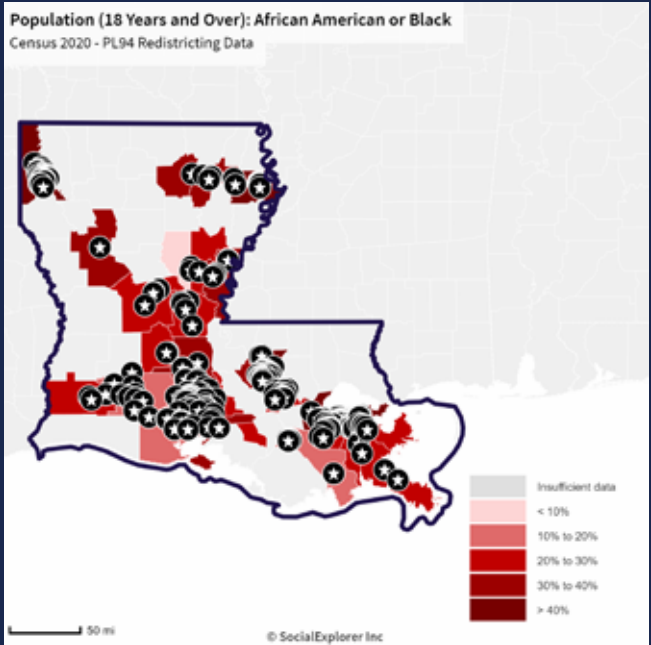
The information here is a resource and not legal advice. It is provided for informational purposes only and not as a substitute for or supplement to the legal advice

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LOUISIANA 2022

In 2022, the Louisiana team provided voter support and poll monitoring efforts during four elections with various municipal and statewide races on the ballots. The data revealed important trends regarding issues such as poll site changes and accessibility concerns. This report sheds light on these topics and more.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

40+ nonpartisan field volunteers

29 parishes reached

348 early voting and poll sites visited

400+ poll site reports submitted

32% of reports indicating “no issues” – meaning that when the reports were submitted, the poll sites showed no barriers to voting.



The image above taken on Dec. 10, 2022, is of the Nina R. Boyette polling site in Jonesville, La. (LaSalle Parish), where there is no paved parking, accessible pathway, or restroom with running water. Photo by volunteer

HOTLINE REPORTS

Across the multiple Louisiana elections held in 2022, the 866-OUR-VOTE Election Protection Hotline received 228 calls from roughly half of Louisiana’s 64 parishes.

While many of the calls regarded individual voters’ questions about their registration, absentee ballots, or other individualized needs, broader issues reported included topics like machine and technology issues and improper instructions from poll commissioners.

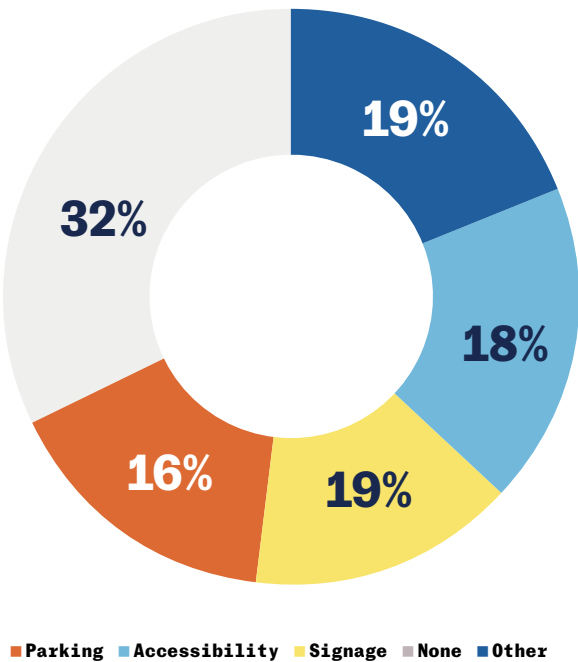
ELECTION PROTECTION

228
calls

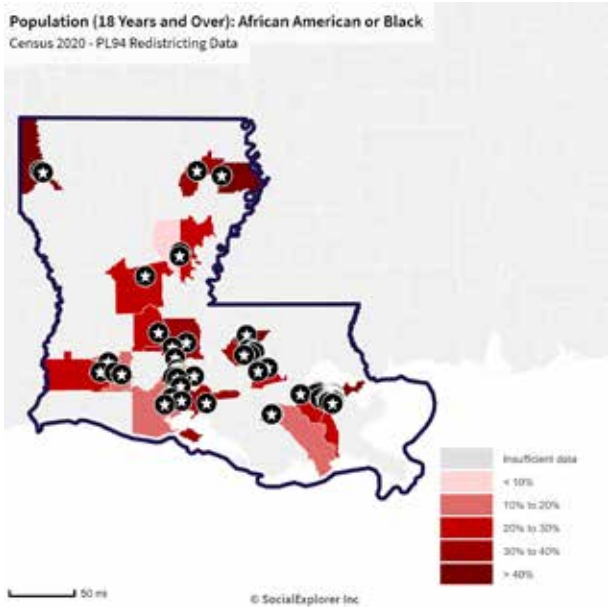
32
parishes

FIELD REPORTS

The main trends of the issues reported by monitors visiting polling sites, charted below, revolved around accessibility and parking, which were oftentimes intertwined. These reports with accessibility issues often had to do with insufficient or lack of accessible parking.

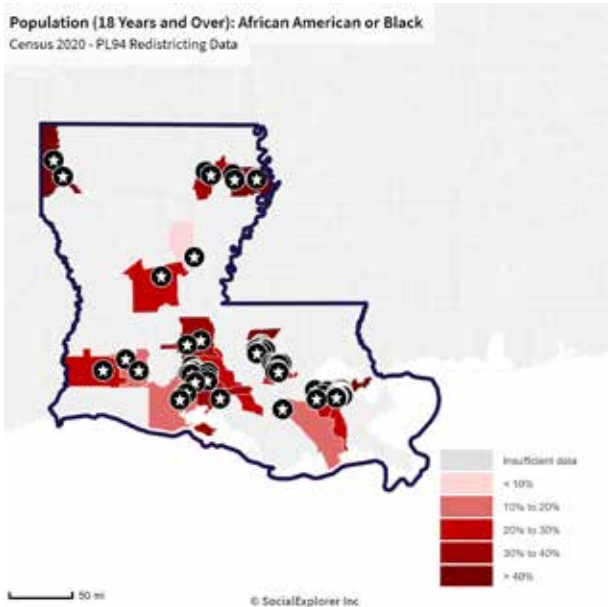


TOP ISSUES ON ELECTION DAY



PARKING: Parking limitations were reported for polling sites in nearly every parish monitored.

Parking proved to be a significant impediment in the voting process for all Louisianans. One monitor submitted a report where the reserved parking at a polling location was paid parking, and even those spots were occupied by law enforcement vehicles. Additionally, many of the polling locations were situated in buildings that have reserved parking spaces, which limited the availability of parking spaces for voters and made it difficult to access the poll site in a timely manner.



ACCESSIBILITY: Inaccessible entrances, parking spaces, and walkways were reported almost 100 times.

Volunteers submitted 94 reports in which poll sites had issues regarding accessibility. These came from the majority of monitored parishes. In addition to the parking issues mentioned above, many volunteers cited accessible entrances being blocked off by vehicles and instances where entrances were inaccessible due to staircases or other barriers but were nonetheless inaccurately marked accessible.

Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.

ISSUE SPOTLIGHT

POLL SITE CHANGES

By the end of 2022, Louisiana implemented hundreds of changes to assigned poll sites, many of which were disproportionately located in three parishes with significant Black populations:

27 in Iberia

31 in St. Landry

26 in St. Martin

In other words, **39% of the changed poll site assignments** were in parishes that represent **less than 5% of Louisiana’s population**.

Many of those changes were complicated—for example, in St. Martin Parish, a previous polling place was split into three new sites, all changed from the previous location.

Some changes were made within days of an election. In one severe circumstance, a poll site in Jefferson Parish had to be evacuated and relocated to a nearby site due to a bomb threat. LDF’s rapid response team sent text messages to the thousands of impacted voters about the relocation and dispatched LDF team members to the site. Later reports confirmed that the threats were not related to the election, but the impact of displacing and frightening voters remained.

In a photo taken on Nov. 8, 2022, a sign indicates that a polling location has been moved in Lafourche Parish, La. Photo by volunteer

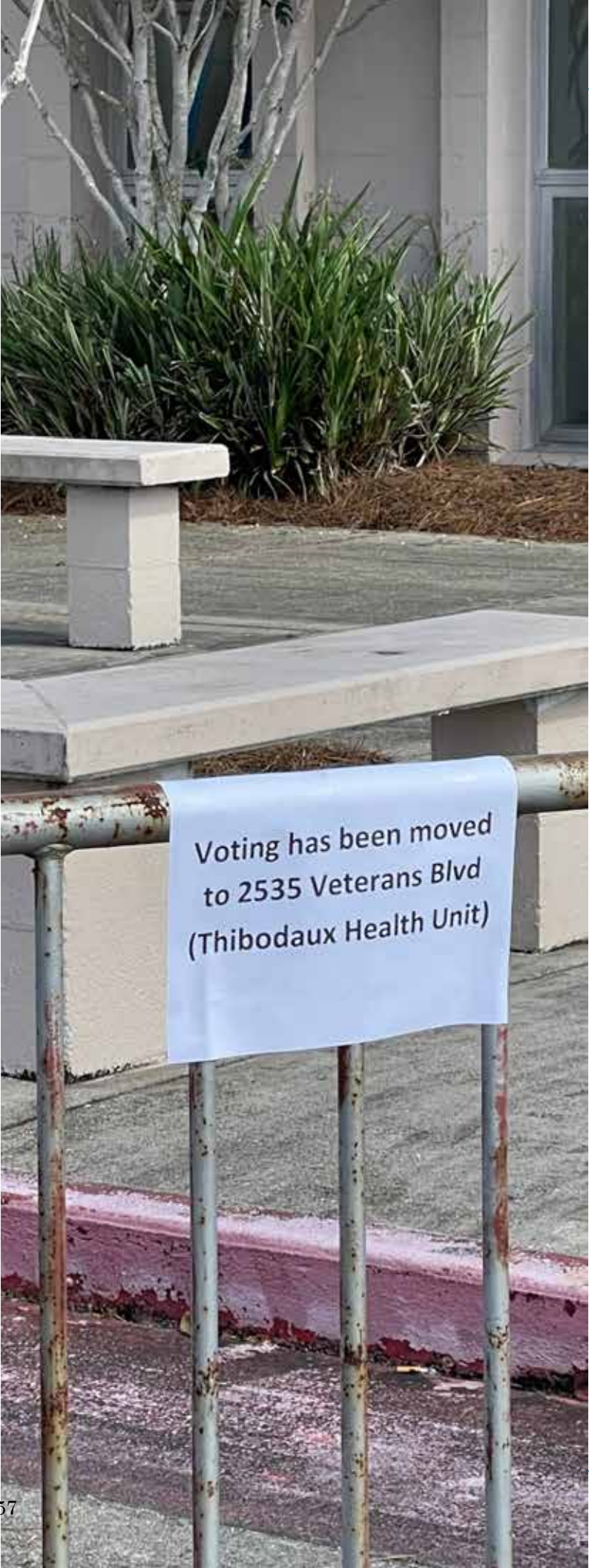




Photo by volunteer



Photo by volunteer



Photo by volunteer



Photo by volunteer

ADVOCACY SPOTLIGHT

VOTING ACCESSIBILITY

May 23, 2022

LDF and partners advocate for the successful passage of HCR14, a joint resolution creating a task force to study voting accessibility and report policy recommendations back to the Louisiana Legislature.

December 10, 2022

Election monitors report multiple accessibility issues during the General Election, including an unstable wooden ramp at a polling site in New Orleans with a hole in the middle of the ramp.

February 10, 2023

The HCR14 Task Force publishes a report with over a dozen recommendations to improve voting accessibility.

June 9, 2023

The Louisiana governor signs Act 277 into law, adopting multiple recommendations from the HCR14 Task Force.

ACT 277 PROVIDES FOR:

- Increased poll commission training and testing on accessibility laws
- Appointment of an Americans with Disabilities Act (ADA) Compliance Officer in the Secretary of State's Office
- The establishment of a Voting Accessibility Advisory Group in the Secretary of State's Office, including voters with diverse disabilities

LDF staff and partners stand by at the Louisiana Capitol on June 9, 2023 as then-Louisiana Governor John Bel Edwards signs Act 277 into law.

Photo by LDF staff





In a photo taken on Dec. 10, 2022, voters are seen waiting in line at a polling location in Orleans Parish, La. Photo by volunteer

NEXT UP FOR LOUISIANA

MAXIMIZING VOTER PARTICIPATION

The December 10, 2022 general election marking the sixth election held in Louisiana that year alone, with similarly packed election calendars set to marking the following calendar years—including, among other elections, the statewide election for executive and state legislative seats in 2023 and the federal election in 2024. Strained resources and voter exhaustion result from Louisiana’s endless election cycles.

Looking ahead, LDF and partners will continue to try to counteract the effects of election fatigue by:

- ➔ Advocating for a comprehensive study of election consolidation options
- ➔ Providing voter education on the importance of voting in every election, including training on the power of local offices
- ➔ Continuing to advocate for fair maps that provide Black voters equal opportunities to elect their candidates of choice.

LDF

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LOUISIANA ARE YOU PREPARED TO VOTE?

PRIMARY ELECTION DAY
Tuesday, November 8, 2022
Polls open 6 a.m. to 8 p.m.

And mark your calendar for runoff elections on Saturday, December 10!

Your Prepared-to-Vote Checklist
Before you vote, remember to visit [GeauxVote.com](#) to:

- Confirm your registration status.
- See what is on your ballot.
- Find your polling place.
- And be sure to bring your ID.

ARE YOU REGISTERED TO VOTE?

Tuesday, October 11
Last day to register in person or by mail.
Tuesday, October 18
Last day to register online, with a LA driver’s license or special ID.

PICK A VOTING PLAN

- PLAN 1: VOTE ABSENTEE BY MAIL*
- Friday, November 4 by 4:30 p.m.
For a mail-in ballot, apply before this date and time. The sooner, the better! Apply online or print an application. Deliver the application to your parish registrar by hand,** mail, or fax.
- Monday, November 7 by 4:30 p.m.
Registrar of voters needs to receive absentee ballots before this date and time.**
- PLAN 2: VOTE EARLY IN PERSON
- October 25 – November 1
Early voting (8:30 a.m. – 6 p.m.) | Closed Sunday
All Louisiana voters qualify to vote early in person! If you have not already cast a ballot, you can vote early.
- PLAN 3: VOTE ON ELECTION DAY

Tuesday, November 8
If you have not already cast a ballot, you can vote on Election Day between 6 a.m. and 8 p.m.!

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Use an ID that has your photo, name, and signature

Driver's License

LA Special ID

LA Wallet Digital ID

U.S. Military ID

No ID? You may still cast your vote by signature on a voter affidavit.

What's on the ballot in my parish?

Have questions or issues?

What's on the ballot in my parish?

Have questions or issues?

Know Your Rights!

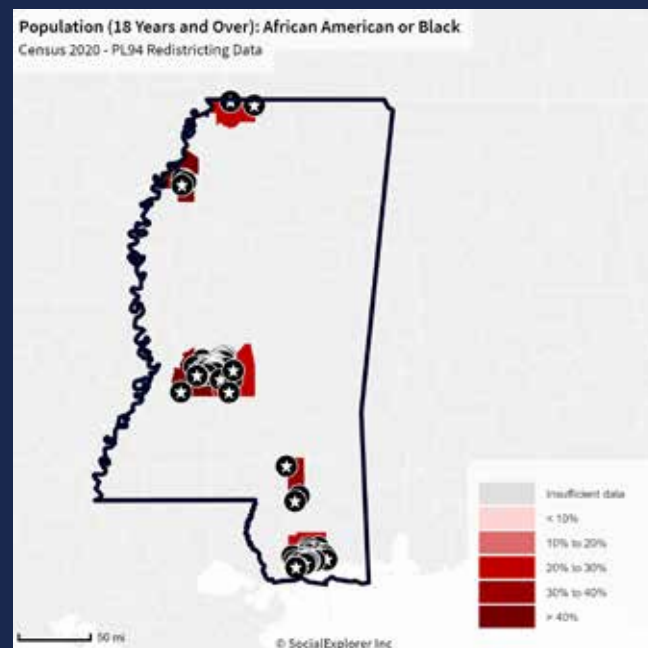
Disclaimer:

Know Your Rights!

Disclaimer:

MISSISSIPPI 2022

In 2022, less than one-third of Mississippi voters cast a ballot, among the lowest voter turnout in the nation. This low turnout is caused in part by multiple barriers: no early voting, no online voter registration, and no simple absentee ballot process. As this report captures, these barriers are compounded by other issues at the polls.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

22+ nonpartisan field volunteers

25 cities reached

108 poll sites visited

100+ poll site reports submitted

16% of reports indicating “no issues” - meaning that when the reports were submitted, the poll sites showed no barriers to voting



The image above depicts the St. Joseph Catholic Church, Gluckstadt, Miss. (Madison County), where a monitor reported that there was an alternative entrance with an accessibility ramp but no directional signage to label that alternative route. Photo by volunteer

HOTLINE REPORTS

During the elections on June 7 and November 8, 2022, the 866-OUR-VOTE Election Protection Hotline received 200 calls from 50 of the 82 counties in Mississippi.

Of the 200 hotline reports, almost all were from individual voters who had questions about their registration status or how to locate their poll site. There were also multiple documented issues of intimidation, electioneering, machine malfunctions, and related problems.

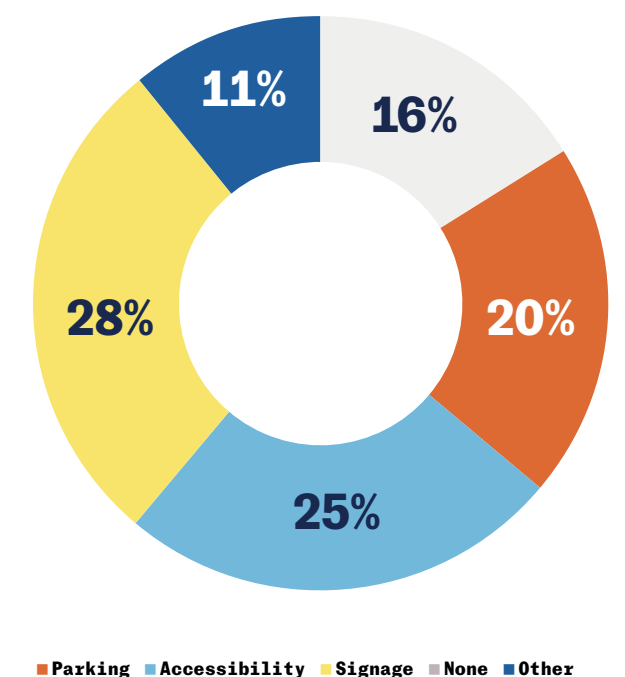
ELECTION PROTECTION 

200
calls

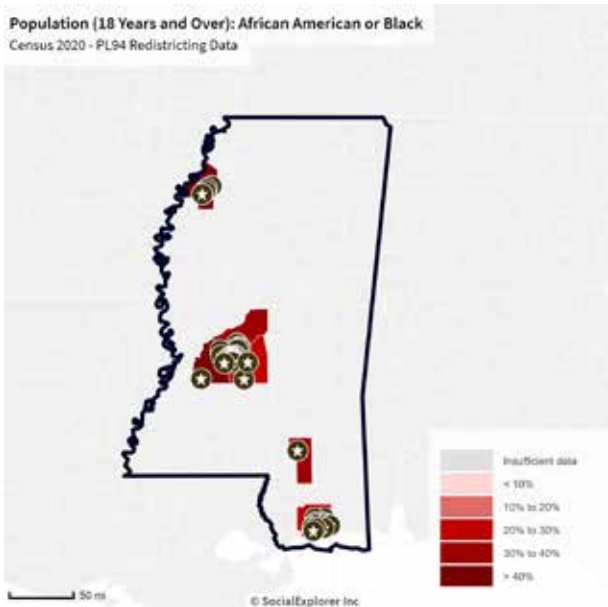
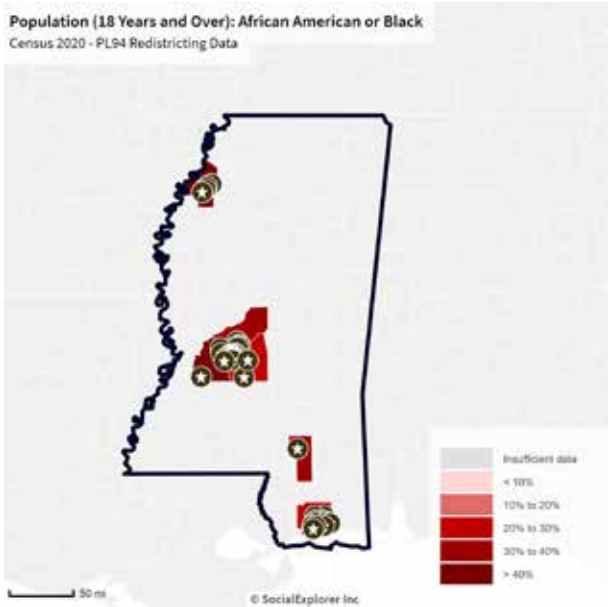
82
counties

FIELD REPORTS

The primary issues reported by monitors, charted below, revolved around accessibility and signage, which were oftentimes intertwined. Parking concerns also recurred across locations, which often included accessibility issues and lack of signage to designate reserved accessible spots.



TOP ISSUES ON ELECTION DAY



Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.

ACCESSIBILITY: Many poll sites did not have accessible entrances. Most poll sites lacked proper accessibility measures which, made it difficult for voters to access the locations. Some sites could only be reached by stairs and did not have an alternative route, while others that may have had a ramp were too steep or narrow for wheelchair users to use safely. Volunteers also reported many polling locations that did not have accessible door handles (those that can be opened with a closed fist). Finally, parking was difficult for voters who use wheelchairs. Volunteers cited many sites that had accessible parking, but in order to enter the poll sites, voters had to cross through an inaccessible grassy area or another lot.

SIGNAGE: Volunteers reported signage issues in at least one poll site in each county monitored. Improper signage outpaced all other issues reported in the state. Volunteers documented poll sites that had zero “Vote Here” signs (which caused confusion on where to enter to vote), no signage directing voters to the accessible entrances (if there were any), and inadequate signage indicating the designated parking for voters.



ISSUE SPOTLIGHT

ELECTION SUPPLIES AND INFRASTRUCTURE

The lack of physical election infrastructure has been a persistent problem in Mississippi’s elections, creating issues for all voters, particularly those with disabilities. This was true of the 2022 elections as well. Throughout Election Day, poll monitors repeatedly cited lack adequate signage at polling locations across the state. Too often, signage was not visible from the street, and was not effective in directing voters to the voting location. Some sites only had one sign affixed to the door with no accompanying signage.

Many polling locations were given a single lawn sign and a single paper sign to tape on the entrance to their polling location. This caused difficulties for voters at polling sites located in a campus-style area, necessitating the need to ask for directions to the specific building and room that served as a polling location. This also caused issues for buildings that were difficult to find off main highways and roads.

At some polling locations, the lack of signage forced poll monitors to create their own signage.

Signage indicating entrance to polling location in Mississippi. Photos by volunteer

POLLING SITE MISINFORMATION

In 2022, Mississippi voters continued to receive inaccurate information regarding their voting locations. In particular, many voters used the Secretary of State’s poll locator to identify their voting site, a tool that contained inaccurate voting site information—leading to confusion and disenfranchisement.

In 2021 and 2022, LDF sent the Mississippi Secretary of State letters demanding that he fix systematic misinformation in the Mississippi online poll locator that gave voters inaccurate information about their poll location. This issue affected over 65,000 voters in 2020 and persisted in the 2022 elections. As a result of LDF’s advocacy, the Secretary of State contacted county officials across the state to confirm that polling locations were accurately reported to

voters. To supplement this effort, LDF sent a letter to all local officials regarding their reporting obligations and discouraging further lack of transparency with polling locations.

This effort resulted in clear publication of polling locations for Mississippi voters and reduced many closures.

Still, despite our advocacy, there were problems related to polling location misinformation on Election Day. In Precinct 45 in majority-Black Hinds County, voters were directed to the wrong polling location because the correct polling location was misidentified by the Secretary of State. LDF sent a mass text to the 2,600 voters in that precinct to inform them of the correct information.

[LDF’s] effort resulted in **clear publication of polling locations** for Mississippi voters and reduced many closures.



Volunteer photo from Triumph Church Jackson, MS on 11/8/2022.



LDF staff with partners at civic engagement event in Jackson, MS. Photo by LDF staff

NEXT UP FOR MISSISSIPPI

FIGHTING FOR VOTER INFORMATION AND ELECTION ADMINISTRATION TRANSPARENCY

In response to the recorded challenges identifying accurate poll site information and anticipating last-minute hurdles to voting access, LDF will continue to organize around advocacy solutions to mitigate voter confusion and increase transparency of election administration decision-making and information.

Looking ahead, LDF and partners will...

- ➔ Monitor poll site misinformation and pursue policy solutions
- ➔ Continue to fight for election administration transparency
- ➔ Coordinate with partners and volunteers to ensure voters have the information they need in advance of Election Day and the support they need to navigate voting barriers in real time on Election Day

LDF prepared to VOTE Non-Partisan Voter Education

MISSISSIPPI ARE YOU PREPARED TO VOTE?

GENERAL ELECTION DAY
Tuesday, November 8, 2022
Polls open 7 a.m. to 7 p.m.

- Your Prepared-to-Vote Checklist
- Note: All links are case sensitive.
- Confirm your registration status. bit.ly/MSVoteReg
 - Know which Photo ID to bring. bit.ly/MSVoteID
 - Find your polling place. bit.ly/PollingMS

ARE YOU REGISTERED TO VOTE?

Monday, October 10
Last day to register.

PICK A VOTING PLAN

- PLAN 1: VOTE ON ELECTION DAY
- Tuesday, November 8
Polls open 7 a.m. to 7 p.m. Vote in person on Election Day!
- PLAN 2: VOTE ABSENTEE IN PERSON
- September 24 – November 5
Monday – Friday, 8 a.m. – 5 p.m.*
Vote absentee in person at your Circuit Clerk’s office during these dates.
- Check if you qualify to vote absentee here: bit.ly/MSAbs
- PLAN 3: VOTE ABSENTEE BY MAIL
- Friday, September 9
To vote absentee by mail, you can apply for a ballot starting on this date. You can request an application from your Circuit Clerk by phone, email, or in-person.

- Tuesday, November 8
When you vote absentee by mail, the envelope must be postmarked by this date. The sooner you mail your ballot, the better!
- Tuesday, November 15
Your Circuit Clerk needs to receive your absentee ballot by this date.

LDF prepared to VOTE Non-Partisan Voter Education

Want more information?
voting.naacpldf.org

What IDs can I use?

MS Driver’s License	Federally Issued ID – including U.S. passport, Military ID, or employee ID
Firearms License (Photo Required)	Photo ID card issued by any branch, department, or entity of any state
Student Photo ID from MS accredited university, college, or community/junior college	Valid employee ID from federal or Mississippi state or local government
MS Voter ID Card	Tribal Photo ID

What if I don’t have one of these IDs?

Receive a FREE Voter ID card at your County Circuit Clerk’s Office during regular business hours. Find out how: bit.ly/MSVoterCard

Know Your Rights!

- Vote if you are in line when polls close at 7 p.m.
- Vote free from intimidation.
- Get help voting if you need it due to blindness, disability, or you struggle to read English. Anyone can help you so long as they are not your employer or union representative.
- Vote by affidavit ballot if there is uncertainty regarding your registration status.

Have questions or issues?

Long lines? Polling location changed or not well marked? Name removed from voter roll? Voter intimidation? Misinformation about voting requirements or polling location? Voting machine or other technology issues?

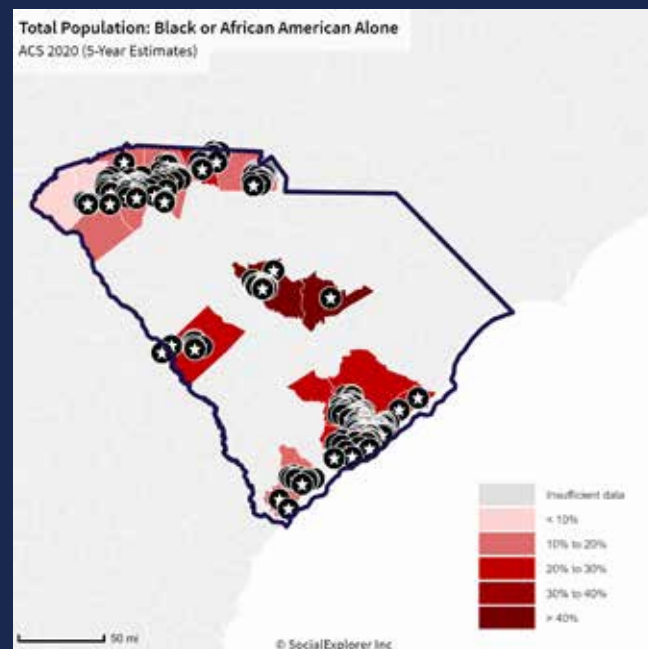
Email vote@naacpldf.org or or call the Mississippi Election Protection **888-601-VOTE** (888-601-8683).

Or call the National Election Protection hotline number: **866-OUR-VOTE** (866-687-8683). Multiple language support (e.g., Spanish, Arabic, and Asian languages) is available.

Disclaimer: The information here is a resource and not legal advice. It is provided for informational purposes only and not as a substitute for or supplement to the legal advice necessary to address the specific concerns of any individual. Mississippi may revise its laws and information after this is published. It is your responsibility to determine how all

SOUTH CAROLINA 2022

The 2022 primary election in South Carolina provided many insights, especially as the first election implementing statewide early voting. LDF worked with the South Carolina Election Protection Coalition to monitor the June primary election and the November general election. This report provides a snapshot of data collected, actions taken to ameliorate issues, and steps ahead.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

50+ nonpartisan field volunteers

21 counties reached

229 poll sites visited

459 poll site reports submitted

52% of reports indicating “no issues” - meaning that when the reports were submitted, the poll sites showed no barriers to voting



Voters in Columbia, SC wait in line to cast their ballots on the last day of early voting. Photo by volunteer

HOTLINE REPORTS

During the November 8, 2022 general election, the 866-OUR-VOTE Election Protection Hotline received 366 calls from 33 of 46 counties across South Carolina.

Similar to the field data, the majority of the reported issues referenced signage and accessibility issues, and the Election Protection Coalition, with the help of LDF attorneys, helped triage issues and support the voters who called.

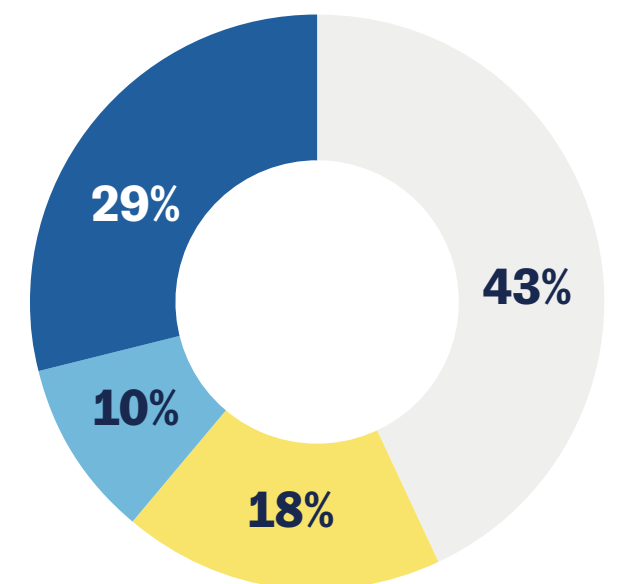
ELECTION PROTECTION **866 OUR VOTE**

336
calls

33
counties

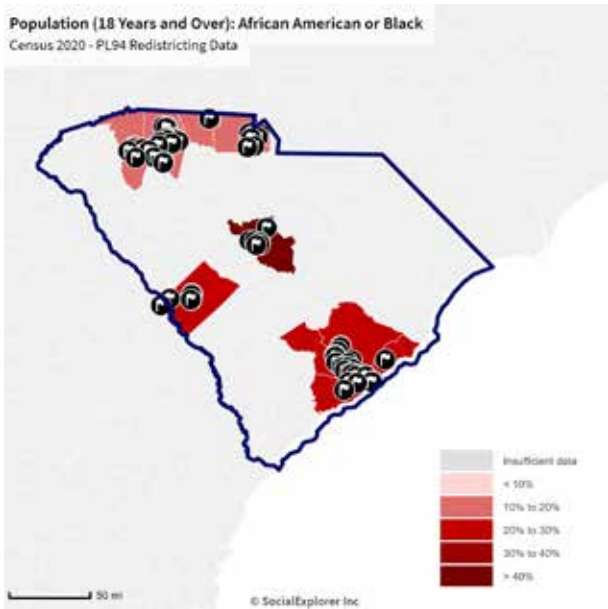
FIELD REPORTS

The most prevalent voting access issues reported during the elections were related to signage, and the next most common issue was accessibility. Analysis of these reports indicated that signage and accessibility issues often originated from the same polling locations. Many causes of these issues were insufficient signage directing voters to accessible entrances, parking, or curbside voting.



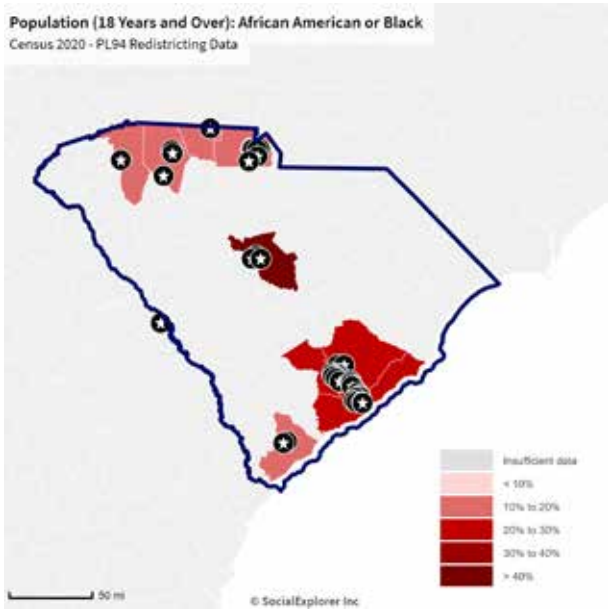
■ Accessibility ■ Signage ■ None ■ Other

TOP ISSUES ON ELECTION DAY



SIGNAGE: Across over two dozen counties, volunteers submitted 83 signage issue reports.

The main signage issues were a lack of directional signage to the poll site entrance and parking. Many of the poll sites in the state are public buildings that transformed a portion of the space to accommodate voting, which meant that the site had more than one entrance. Many sites also did not have designated voter parking or signs directing voters to the reserved parking space. The lack of signage directing voters to the correct locations made it difficult to find the correct entrance and in turn made the voting experience longer than necessary.



ACCESSIBILITY: Almost 10% of field reports submitted statewide referred to lack of accessibility at poll sites.

Many accessibility issue reports were due to a lack of access at curbside voting. Curbside voting laws require that a poll worker check outside for voters looking to vote curbside every 15 minutes. Volunteers reported that poll workers were not checking for curbside voters despite having a designated space for curbside voting. In one instance, a voter got out of their car to notify the workers that they were waiting outside. Curbside voting is supposed to limit barriers to voting for voters with disabilities but that is only the case when the law is followed.

Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.



ISSUE SPOTLIGHT

IMPROPER ENFORCEMENT OF THE ELECTIONEERING BOUNDARY

Monitoring electioneering boundaries and ensuring poll workers’ proper enforcement is crucial to the work of poll monitors. In South Carolina, electioneering is defined as persons wearing or handing out any campaign materials (apparel, buttons, stickers, literature, etc.) within 200 feet of any entrance to the polling place. Often, these boundaries need to be clarified because they are not marked at poll sites, and what consists of campaign materials can be subjective.

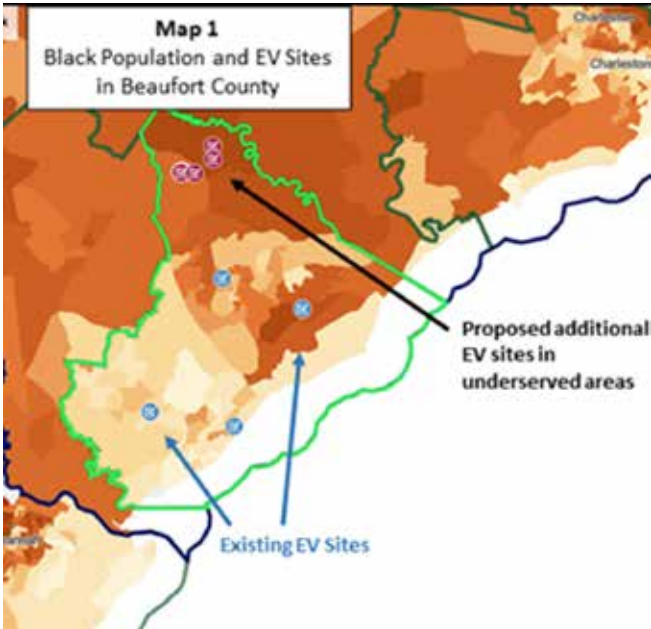
During the fall 2022 elections, the South Carolina Election Protection Coalition received numerous calls from across the state where poll workers wrongly turned away voters for wearing “Black Lives Matter” paraphernalia. As these reports accumulated, LDF worked with the ACLU of South Carolina to call local elections administrators and alert them of the First Amendment issues posed, as well as the proper definition of partisan electioneering.

Volunteer image of campaign signage right next to the voter parking lot on 11/8/2022 at the Isle of Palms Recreation Center in Charleston, SC. Photo by volunteer

EQUITY IN EARLY VOTING IMPLEMENTATION

The 2022 midterms were the first election in which South Carolina implemented early voting. After a bill enacting early voting passed during the 2022 legislative session, South Carolina voters were able to vote early without an excuse during the midterms.

According to the South Carolina State Election Commission, 560,622 people, or nearly 16.5% of all registered voters, voted early during the November 2022 Election.



The map above shows early voting locations in Beaufort County overlaying the Black population, which LDF submitted in an advocacy letter to the County Board of Voter Registration and Elections to ensure Black voters in the north were not denied equal access to early voting centers.

While the turnout numbers were extraordinary, implementation of early voting was not without its shortcomings, with voters of color facing inequitable distribution of early voting locations. South Carolina law authorizes counties to designate up to seven early voting centers for an election that maximizes accessibility for all voters to the greatest extent possible. However, several counties implemented early voting plans that fell short of their statutory obligations to voters.

LDF identified inequities in early voting locations and sent rapid response letters to five counties with significant Black populations—Florence, Marion, Beaufort, Berkeley, and Orangeburg—where LDF identified additional possible early voting locations. LDF urged the local Boards of Election to provide reasonable and fair accessibility to early voting for Black voters, and to appropriately distribute locations throughout the counties. In Florence County, this aided in the addition of an early voting site, and several other counties have expressed a desire to add more sites in response to LDF’s advocacy.

Sign indicating availability of curbside voting at polling location in South Carolina. *Photo by volunteer*





LDF staff and volunteers participating in election protection in South Carolina during November 2022 midterm elections. Photo by LDF staff

NEXT UP FOR SOUTH CAROLINA

AVOIDING ISSUES THROUGH POLL WORKER TRAINING IMPROVEMENTS

Many issues observed in South Carolina could be prevented with proper poll worker training. As the South Election Protection Coalition plans for the 2024 presidential elections, the focus will be on training and providing election workers with information to ensure safe and accessible voting for all South Carolinians.

Following the Coalition’s advocacy in 2022 and 2023 to fight misinformation, the Coalition plans to continue to advocate for more informed poll worker training that covers:

- proper signage
- precise definitions of “electioneering” and the electioneering boundary
- accessibility, particularly curbside voting requirements

LDF prepared to VOTE Non-Partisan Voter Education

SOUTH CAROLINA ARE YOU PREPARED TO VOTE?

GENERAL ELECTION DAY
Tuesday, November 8, 2022
Polls open 7 a.m. to 7 p.m.

Your Prepared-to-Vote Checklist
Note: All links are case sensitive.

- Register to vote. bit.ly/SCregister2Vote
- Confirm your registration status. bit.ly/SCRegStatus
- Find your polling place. bit.ly/SCRegStatus
- Bring your ID!

Need to Register to Vote?

- Friday, October 7 at 5 p.m.
Last day to register if you want to register in person.
- Sunday, October 9 at 11:59 p.m.
Last day to register if you want to register online, by fax, or email.
- Tuesday, October 11
Last day to register if you want to register by mail (your envelope needs to be postmarked by this date).

PICK A VOTING PLAN

PLAN 1: VOTE EARLY IN PERSON

October 24 – November 5
Early voting hours: 8:30 a.m. – 6 p.m. | Closed Sundays
Find your early voting site: www.scvotes.gov/early-voting

PLAN 2: VOTE IN PERSON ON ELECTION DAY

Tuesday, November 8
Polls open 7 a.m. to 7 p.m.

PLAN 3: VOTE BY MAIL

Friday, October 28 by 5 p.m.
Apply for an absentee ballot before this date and time. You can submit your application in person or send your application by mail. The sooner the better!

Tuesday, November 8 by 7 p.m.
Your county registrar needs to receive your absentee ballot by this date and time.

Check if you qualify to vote absentee here:

LDF prepared to VOTE Non-Partisan Voter Education

What IDs can I use?

- SC Driver’s License or ID Card
- Federal Military ID
- SC Concealed Weapons Permit
- U.S. Passport
- SC Voter Registration Card (with Photo)

What if I don’t have one of these IDs?

Get a free Photo ID from your county voter registration office or local DMV. Or bring your non-photo voter registration card to the polls and vote a provisional ballot after signing an affidavit stating you have a reasonable impediment to obtaining a Photo ID. Learn more at bit.ly/SCVOTERID22

Know Your Rights!

- Vote if you are in line when polls close.
- Vote curbside from your vehicle if you are physically unable to enter the polling place or if you are 65 or older.
- Vote free from intimidation.
- Get help voting if you need help due to blindness, disability, or you struggle to read English. Anyone can help you so long as they are not your employer or union representative.
- Vote if you are detained pre-trial or if you have been convicted of a misdemeanor that is not a violation of an election law and have completed your term of incarceration.
- Vote after serving a felony conviction if you have (1) fully completed the sentence, including any incarceration or parole, or (2) completed court-ordered probation.
- Vote by absentee ballot if you are in jail for failure to pay child support.

Have questions or issues?

Long lines? Polling location changed or not well marked? Name removed from voter roll? Voter intimidation? Misinformation? Voting machine or other technology issues?

Email vote@naacpldf.org or call Election Protection 866-OUR-VOTE (866-687-8683). Multiple language support (e.g., Spanish, Arabic, and Asian languages) is available.

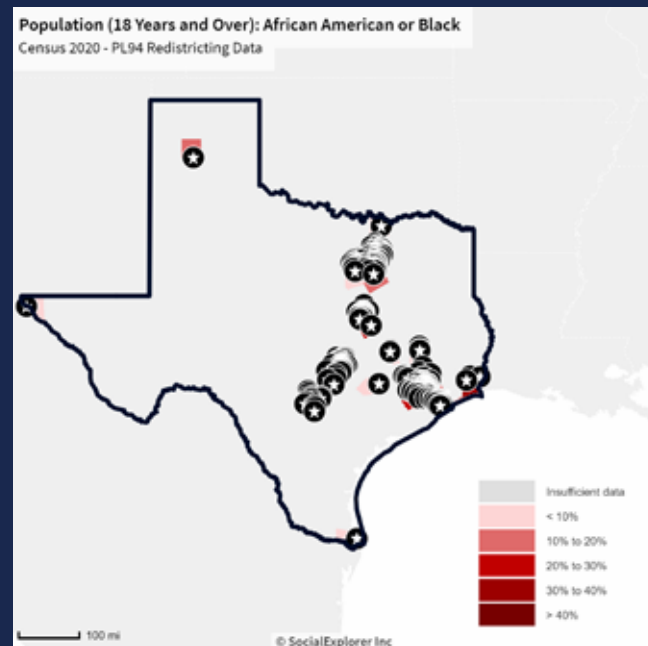
If you are experiencing accessibility issues, call Disability Rights SC at 1-866-275-7273.



Disclaimer: The information here is a resource and not legal advice. It is provided for informational purposes only and not as a substitute for or supplement to the legal advice necessary to address the specific concerns of any individual. South Carolina may revise its laws and information after this is published. It is your responsibility to determine how all

TEXAS 2022

In 2022, LDF's Texas team recorded an overwhelming number of voter incidents across the state, ranging from lack of accessibility, delayed curbside voting, long lines, machine malfunctions, and intimidation. This report captures just a snapshot of these trends.



The map depicts the poll sites visited across target counties statewide. The map overlays this data with the Black Voting Age Population. Map produced in Social Explorer.

IMPACT BY THE NUMBERS

244+ nonpartisan field volunteers

95 cities reached

324 early voting and poll sites visited

494+ poll site reports submitted

30% of reports indicating “no issues” - meaning that when the reports were submitted, the poll sites showed no barriers to voting



The image above is from the Universal City Library in Universal City, Texas (Bexar County), where a volunteer reported an 80-minute wait time and full parking lot. Photo by volunteer

HOTLINE REPORTS

During the various 2022 elections, the 866-OUR-VOTE Election Protection Hotline received over 4,000 calls from more than half of the state's counties.

Many Texans called the 866-OUR-VOTE Hotline with questions regarding their individual statuses, but a significant majority of the calls dealt with polling place accessibility issues, tech malfunctions, intimidation, and more.

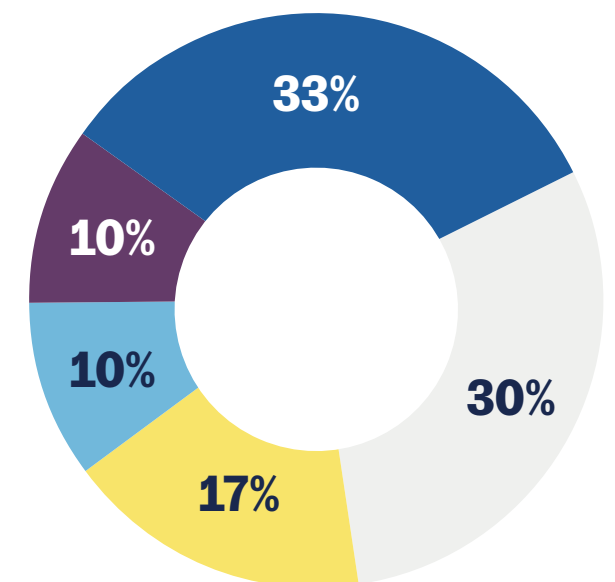
ELECTION PROTECTION

4000+
calls

50%+
counties

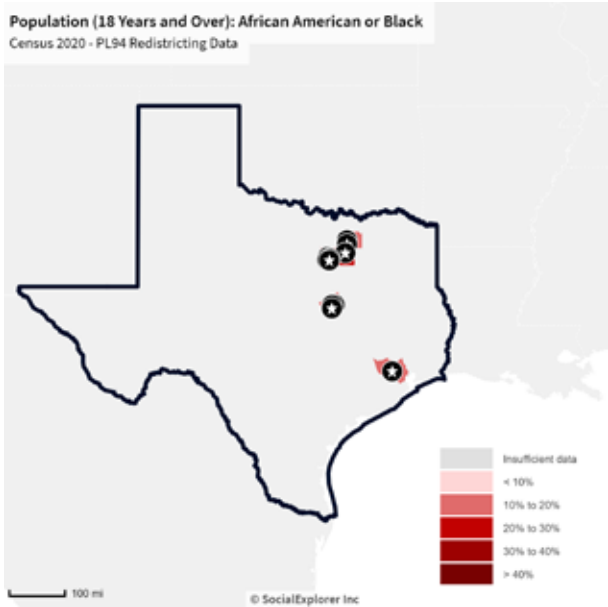
FIELD REPORTS

While most sites either had no issues or miscellaneous concerns, there were recurring reports of signage, accessibility, and law enforcement presence at polling sites in target counties monitored across Texas.



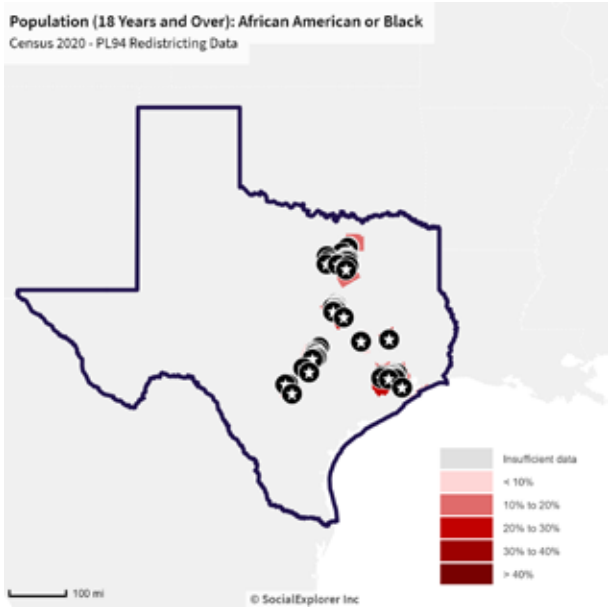
■ Parking ■ None ■ Law Enforcement ■ Signage ■ Other

TOP ISSUES ON ELECTION DAY



LAW ENFORCEMENT: Many poll sites were located next to police precincts.

Volunteers reported many instances of intimidating law enforcement presence across the state, citing multiple sites that were located adjacent to police precincts. In one report during the primaries, a volunteer documented a sheriff that set up a tent outside a polling location, forcibly grabbing voters and telling them to vote for a specific candidate. The volunteer spoke to voters who mentioned feeling intimidated and less compelled to vote because of this encounter.



SIGNAGE: Signage was the top issue reported across poll sites monitored.

The main problems with signage revolved around inadequate markings of curbside voting, which forced voters to find alternative measures. Some poll sites had confusing signage that directed voters to two separate places for curbside voting, and neither was the correct place. Volunteers also documented many sites that lacked proper directional signage into the polling location.

School Police Car at Cesar Chavez Middle School in Waco, TX
March 1, 2022. Photo by volunteer

Maps overlay issue reports on 2020 Census Black Voting Age Population data generated using Social Explorer.



ISSUE SPOTLIGHT

ELECTION TECHNOLOGY & SUPPLIES



The image above is from the Mortan Ranch High School polling site in Harris County, where a volunteer recorded lines lasting over an hour and malfunctioning curbside voting machines. *Photo by volunteer*

Problems with polling place technology caused severe delays for voters on Election Day.

Due to malfunctioning machines or confusing user interfaces, wait times reached over 2 hours at times at some poll sites.

Most machines that malfunctioned were either freezing or failing to input votes. In some cases, confusing user interfaces caused user error, forcing voters to redo their ballot until the machine accepted their choices.

Additionally, polling places began to run out of paper ballots and, in those instances, such as at Houston Community College Alief Campus, had to close the polling site down and refer voters to a nearby polling place. The Harris County election tech team was so inundated with calls that they were unable to fix issues at most polling places.

ISSUE SPOTLIGHT

VOTER INTIMIDATION

Texans faced serious instances of voter intimidation during the early voting period and on Election Day. In one case, a voter received a threatening letter regarding her party affiliation. At one poll site on Election Day, a voter was harassed and berated by another voter, causing her great distress. There were also numerous instances of poll workers incorrectly wearing party apparel or electioneers harassing voters inside the electioneering boundary. Though some harassers remained outside the 100-foot electioneering boundary, some boasted confederate flags, large political banners and/or audio expressing their political views.

Throughout early voting, there were several concerning reports of intimidation and voter suppression from a historically Black polling place in Beaumont, Jefferson County, where white poll workers repeatedly spoke in aggressive tones to Black voters and asked them to recite, out loud within the earshot of other voters, poll workers, and poll watchers, their addresses, even when the voter was already checked in by a poll worker. White poll workers and white poll watchers followed Black voters and, in some cases, their Black voter assistants, around the polling place, including standing two feet behind a Black voter and the assistant, while the voter was at the machine casting a ballot. White poll workers helped white voters scan their voted ballots into voting machines but did not help Black voters trying to do the same thing. Partner organizations ultimately had to sue to ensure similar patterns were not repeated in the future.



The image above was taken just outside a polling site in Collin County, Texas. While signs and flags were positioned beyond the 100-foot electioneering boundary, volunteers reported the intimidating effects of the display, which included a Confederate flag. *Photo by volunteer*



NEXT UP FOR TEXAS

ADDRESSING
INTIMIDATION FOR
ALL FORMS

In the face of third-party efforts to intimidate voters, excessive presence of police at poll sites, and the state-level attempts to undermine local election official’s authority in communities with large populations of voters of color, LDF and partners will continue to monitor and address efforts aimed to deter voters and threatened democratic institutions.

Looking ahead, LDF and partners will...

- Monitor issues of intimidation at individual and systemic levels
- Support voters and election officials targeted by intimidation efforts and election sabotage attempts.

LDF

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VOTE
Non-Partisan Voter Education

TEXAS ARE YOU
PREPARED TO VOTE?

GENERAL ELECTION DAY
Tuesday, November 8, 2022
Polls open 7 a.m. to 7 p.m.

- Your Prepared-to-Vote Checklist
- Note: All links are case sensitive.
- Confirm your registration status.
bit.ly/TXRegistrationStatus
 - See what ID you need to bring.
bit.ly/TXVoterID22
 - Find your polling place.
bit.ly/TXPollSites

ARE YOU REGISTERED TO VOTE?

Tuesday, October 11
Last day to register.

PICK A VOTING PLAN

PLAN 1: VOTE EARLY IN PERSON

October 24 – November 4
Hours vary by county. Find your county’s voting hours on their election administration website.

PLAN 2: VOTE IN PERSON ON ELECTION DAY

Tuesday, November 8
Polls open 7 a.m. to 7 p.m.

PLAN 3: VOTE BY MAIL

Check if you qualify to vote absentee here: bit.ly/TXAbs

Friday, October 28
Your county registrar needs to receive your request for an absentee ballot by this date. You can fill out your application with pen on paper. Then, mail it or drop it off at your county registrar’s office. The sooner the better!
Request an application here: bit.ly/TXAbs

Tuesday, November 8 by 7 p.m.*
Your county registrar needs to receive your absentee ballot by this date and time. You can mail your absentee ballot or you can drop off your absentee ballot at a drop off location.

*OR Wednesday, November 9, at 5 p.m. if anywhere is postmarked by Election Day

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What IDs can I use?

- Texas Driver’s License**
- Texas Election ID Certificate**
- Texas Personal ID Card**
- Texas Handgun License**
- U.S. Military ID Card ***
- U.S. Passport
- U.S. Citizenship Certificate***

** Issued by Texas Department of Public Safety
*** Must include photo

What if I don’t have one of these IDs?

Voters can present a supporting form of ID and make a Reasonable Impediment Declaration that they are unable to obtain an acceptable form of ID. Learn more at bit.ly/TXVoterID22

Know Your Rights!

- Vote free from intimidation.
- Vote if you are in line when polls close at 7 p.m.
- Get help voting if you need help due to blindness, disability, or you struggle to read English. Anyone can help you so long as they are not your employer or union representative.
- Vote by provisional ballot if there is uncertainty regarding your registration status.
- Vote curbside if you are physically unable to enter the polling place.
- Vote if you are detained pre-trial or if you have been sentenced to a misdemeanor.

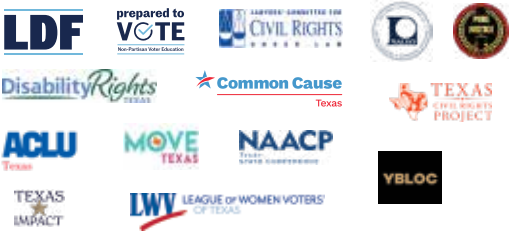
Vote after serving a felony conviction if you have (1) fully completed the sentence, including incarceration, parole, or supervision, or (2) completed any court-ordered probation.

Receive up to two more ballots if you make a mistake while marking the ballot when voting in person.

Have questions or issues?

Long lines? Polling location changed or not well marked? Name removed from voter roll? Voter intimidation? Misinformation? Voting machine or other technology issues?

Email vote@naacpldf.org or call Election Protection 866-OUR-VOTE (866-687-8683). Multiple language support (e.g., Spanish, Arabic, and Asian languages) is available.



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THE PATH AHEAD IN 2024

prepared to
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Non-Partisan Voter Education

LDF Legal
Defense
Fund



Veronica Blalock, 70, a first time poll worker, puts out a sign for voters at Worship With Wonders Church in Marietta, Ga., on Tuesday, Nov. 8, 2022. Photo by Kevin D. Liles for The Washington Post via Getty Images

Election Infrastructure Improvements

Whether to ensure timely delivery of absentee ballots, visible signage and adequate parking at poll sites, or functioning machine technology on Election Day, investment in the fundamental infrastructure of America's elections must be a critical priority in 2024. Accessibility should be prioritized at every level.

Transparency in Poll Site Changes

While standards vary across states for reporting poll site changes and making them available to the public, LDF and partners will continue to pursue efforts to promote transparency and monitor for discriminatory poll site changes and closures.

Voter Education and Mobilization

As election rules continue to evolve due to legislative actions or court interventions, it will be essential that voters are informed of the rules that apply in their states. Voter education campaigns should be catered to address the unique circumstances of first-time voters, out-of-state and college students,

formerly incarcerated and justice-impacted voters, and outreach materials should be provided in a range of languages.

Poll Worker Recruitment & Training

Poll workers serve as the frontline of America's democracy. Recruiting a rising generation of poll workers and election staff will help promote the resilience of our political process. Further improvements to poll worker training can also serve as one of the most proactive means to avoid confusion, congestion, and other issues on voting days.

Countering Election Sabotage

Strategic monitoring and messaging efforts to detect and counteract mis- and disinformation campaigns will continue to be vital to dismantle election sabotage efforts. The rise of new technology and rapid growth of artificial intelligence (AI) technologies will make these efforts increasingly vital. The strength of our democracy depends on trust in our elections.



ADDITIONAL RESOURCES

Democracy Defended: Key Findings from the 2020 Elections

AVAILABLE AT:
bit.ly/DemocracyDefended2020

Democracy Defended captures and analyzes LDF's election-related activities during the 2020 election season.

Democracy Defended: An Analysis of Barriers to Voting in the 2018 Midterm Elections

AVAILABLE AT:
bit.ly/DemocracyDefended2018

Democracy Defended captures and analyzes LDF's election-related activities during the 2018 election season.

LDF's Voting Rights Microsite

AVAILABLE AT:
voting.naacpldf.org

LDF's one-stop resource for voting rights information in target states.





The Legal Defense Fund (LDF) is America's premier legal organization fighting for racial justice. Using the power of law, narrative, research, and people, we defend and advance the full dignity and citizenship of Black people in America.

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